RELIGIOUS CHARITIES AND THE CHARITIES ACT 2006

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Religion has always been at the heart of charity. Many of the early forms of charity were administered through the Church or religious bodies such as monastic houses or religious guilds. It is no coincidence that the ecclesiastical mechanisms of the parish and its officials were adopted as the basis of the poor law relief by the Elizabethan Poor Law legislation.[2]

The Charitable Uses Act of 1601[3] was passed to deal with the misappropriation of property and money that had been given for charitable purposes. The scope of those charitable purposes was elaborated in the well-known Preamble that was to become the touchstone by which future charitable purposes came to be determined. With respect to religion, the Preamble itself makes reference only to the repair of churches. It would appear that the omission of any direct reference to the practice of religion as a charitable purpose was done deliberately because of the religious vagaries of the times and a fear that support of a chaplain to celebrate divine service could in an uncertain future be construed as including 'massing priests'.[4] In 1639 an appeal was made in the case of *Pember v. Inhabitants of Kington* from a decision of the Commissioners appointed under the Statute to recognise a trust to maintain a preacher as charitable. The court held that such a purpose was not within the meaning of the Statute and reversed the Commissioners' decision.[5] The

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2 5 Eliz. 1, c. 3 (1562); 18 Eliz. 1, c. 3 (1576); 39 Eliz. 1, c. 3 (1597); consolidated in 43 Eliz. I, c. 2 (1601).

3 43 Eliz. 1, c. 4.

4 Francis Moore, *Reading* (1607), quoted Gareth Jones, *History of the Law of Charity 1532-1827* (Cambridge U.P., 1969), p. 32, and n. 1.

5 Court of Chancery: *Entry Books of Decrees and Orders*, NA C 33/176/62, 281, 433, 453, 623; C 33/178/63, 177, 207: Jones, *op. cit*,, pp. 34-5, n. 6.

case, however, was reported very differently to the effect that though it was not a purpose named in the Statute, it was still valid as a charitable gift.[6] It did in time come to be recognised that other religious purposes beyond the repair or rebuilding of churches might be construed as being charitable.[7]

Charitable status was, however, confined to the Established Church until the legal disabilities on Protestant dissenters were removed by the Toleration Act of 1688.[8] Other faiths, however, remained outside the definition of what was charitable. Gifts of money for training Roman Catholic priests[9] or to maintain them[10] were held to be invalid. As late as 1802 a bequest for the education of children in the Roman Catholic faith was held to be void.[11] Similarly, Jewish places of worship[12] and education in the Jewish faith[13] were held not to be charitable. It was not until the nineteenth century that the legal constraints imposed on Unitarians, Roman Catholics and Jews were removed[14] so as to allow funds to for the furtherance of their faiths to attract charitable status.[15] Thereafter, trusts to support and encourage a wide range of religious activities and faiths became accepted as charitable: indeed it came to be established that the law would make no distinction between one religion and another.

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6 John Herne, *The Law of Charitable Uses …*, 2nd ed., London, 1663, case 35, p. 175; George Duke, *The Law of Charitable Uses …*, London, 1676, case 35, p. 83 and ch. 7, sec. ii, p. 112.

7 *Turner v. Ogden* (1787), 1 Cox 316: to preach a sermon on Ascension Day, keeping the chimes of the church in repair and payment to singers in the gallery.

8 1 Will. & Mary, sess. 1, c. 18. See *Att.-Gen. v. Baxter* on appeal in 1689, (1684), 1 Vern. 248.

9 *Croft v. Evetts* (1605), Moore K.B. 784, *sub nom. Croft v. Evet*, *Cases Concerning Equity*, vol. I, Selden Society, 117 (2000), p. 342.

10 *Gates v. Jones* (1690), at [1893] 2 Ch. 49, n. 3.

11 *Cary v. Abbott* (1802), 7 Ves. Jun. 490.

12 *Isaac v. Gompertz* (1786), cited in 7 Ves. Jun. at 61.

13 *Da Costa v. De Paz* (1754), 2 Swans. 487, n. 2 (36 E.R. at p. 715).

14 Unitarian Relief Act, 1813 (53 Geo. 2, c. 160); Roman Catholic Charities Act,1832 (2 & 3 Will. 4, c. 115); Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59).

15 *Shore v. Wilson* (1842), 9 Cl. & Fin. 355 (see esp. Tindal C.J. at 578 – *obiter* that Unitarians were capable of benefiting from charitable gifts); *Shrewsbury v. Hornby* (1846), 5 Hare 406 (gift to a Unitarian chapel). *Bradshaw v. Tasker* (1834), 2 My. & K. 221 (Catholic schools); *West v. Shuttleworth* (1835), 2 My. & K. 684 (to promote knowledge of the Catholic faith); *Att.-Gen. v. Gladstone* (1842), 13 Sim. 7 (legacy for use of Roman Catholic priests). *Straus v. Goldsmid* (1837), 8 Sim. 614 (meat and wine for the Passover); *Re Michel's Trust* (1860), 28 Beav. 39 (a Hebrew prayer to be said on the anniversary of the testator's death); *Re Braham, Daw v. Samuel* (1892), 36 Sol. Jo. 712 (maintenance of a lecturer and reader in a synagogue).

> "*I am of opinion that the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the Court, in this respect, make any distinction between one sect and another*."[16]

The range of charitable purposes expressed in the Preamble was distilled by Lord Macnaghton in *Commissioners for Special Purposes of Income Tax v. Pemsel*[17] into his famous classification of charity under the four heads of the relief of poverty, the advancement of education, the advancement of religion and any other purposes beneficial to the community.

The most obvious of the changes brought about by the new Charities Act has been the substitution of thirteen heads of charitable purpose[18] for the four heads enumerated by Lord Macnaghten. The advancement of religion remains one of the new thirteen heads of charity.[19]

A belief in a God and the worship of that God has generally been regarded as a pre-requisite to a gift to be seen as advancing religion. In *Re South Place Ethical Society*[20] Dillon J. said:

> "*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 made the same by sincere inquiry into the question: what is God?*"

He went on to conclude:

> "*It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god*."[21]

16 *Thornton v. Howe* (1862), 31 Beav. 14, *per* Sir John Romilly at 19-20.

17 [1891] A.C. 531 at p. 583.

18 Section 2 (2) (a)-(m).

19 Section 2 (2)(c).

20 [1980] 1 W.L.R. 1565 at 1571.

21 *Ibid.* at 1571.

He drew on the earlier case of *Reg. v. Registrar General, Ex parte Segerdal*[22] that concerned a claim by the Church of Scientology to exempt a chapel used by the Church from rates as a place of worship. In rejecting the claim to be a religion, Buckley L.J. had said:

> "*Worship I take to be something that must have some at least of the following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession*."[23]

Such an interpretation of religion, however, might now be subject to some qualification. Section 2 (3) of the Act includes in its definition of 'religion': '(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god.' At first sight this subsection, particularly subparagraph (ii), appears to make significant inroads into what has traditionally been regarded as a 'religion'. Nevertheless, it is suggested that this section is only clarifying and putting into statutory form what in fact had already been accepted by the courts. The nineteenth century case of *Yeap Cheah Neo v. Ong Chen Neo*[24] involving ancestor worship that came to the Privy Council from the Straits Settlement seems to have given rise to a misconception that only a monotheistic religion would suffice. Yet the real stumbling block in the case was not the lack of a single deity but that there was no public benefit to be derived from a family performing ceremonies to gratify the spirits of their deceased relatives: 'the observance of it can lead to no public advantage, and can benefit or solace only the family itself.'[25] Indeed, the courts have already accepted a sect of Hinduism, a multi-deity faith, as charitable.[26] However, judges had from time to time talked in terms of only a monotheistic religion being charitable,[27] and the section is designed to remove any such uncertainty. Sub-paragraph (ii) refers to non-deity faiths such as Buddhism.[28] Despite the inherently philosophical nature of Buddhist beliefs and practices and the absence of a supreme deity as such, it had been generally

22 [1970] 2 Q.B. 697.

23 *Ibid*. at 709.

24 (1875) L.R. 6 P.C. 381.

25 *Per* Sir Montague E. Smith at 396.

26 *Varsani v. Jesani, Jesani v. Varsani* [1999] Ch 212: a cy-près scheme to be applied to a fund to promote the beliefs of a Hindu religious sect.

27 *Bowman v. Secular Society* [1917] A.C. 406, *per* Lord Parker at 449; *per* Arden L.J. in *Reg. (Williamson) v. Sec. of State for Education and Employment* [2003] 1300 at 1370 § 254. *Tudor on Charities*, 6th ed., 1967, p. 59 applied Lord Parker's *dictum* in *Bowman* to the same effect, but corrected, 9th ed., 2003, pp. 76-7.

28 See *Private Action, Public Benefit: A Review of Charities and the Wider Not-For Profit Sector*, Strategy Unit Report, September 2002, p. 42, § 4.34.

recognised by the courts over the years as undoubtedly a religion for the purpose of charitable status.[29] Again, this clause is therefore merely repeating what is already a position accepted by the common law.[30]

Beyond this, the Act does not attempt a statutory definition of a religion. It is right that it does not, and that the case-law is left intact. A degree of flexibility is thereby retained that will allow the concept of what might constitute a religion to develop by means of decisions of the courts or the Charity Commission as society, and indeed public perception of religion, changes over time.[31] It should, however, be borne in mind that the Act still talks in terms of 'the advancement of religion',[32] and it is suggested that a clear distinction should continue to be drawn between that which is a 'religion' and other activities or organisations that are designed to inculcate moral values or engage in a philosophical discourse. The latter, it is submitted, may still enjoy charitable status, but under some other head such as that of education, as in *Re South Place Ethical Society*.[33] Cases such as *R v. Registrar-General, Ex parte Segerdal*[34] that held that a building of the Church of Scientology was not a place of religious worship and *United Grand Lodge of Ancient Free and Accepted Masons of England and Wales v. Holborn B.C.*[35] that determined that the objects of Freemasonry were not for the advancement of religion, will therefore still hold good.

29 See Lord Denning in *R v. Registrar-General, Ex parte Segerdal* [1970] 2 QB 697 at 707; *per* Dillon J. in *Re South Place Ethical Society* [1980] 1 W.L.R. 1565 at 1573.

30 See *The Government Reply to the Report from the Joint Committee on the Draft Charities Bill Session 2003-04: HL Paper 167/HC 660* (December 2004), p. 5, § 3, that states that since 1960 over two hundred charities for the purpose of advancing the Buddhist faith have been registered, and a similar number concerning the Hindu faith.

31 There may also be a need to take into account the implications of the Human Rights Act 1998 that may require a wider definition of religion: see F. Quint and T. Spring, 'Religion, Charity Law and Human Rights', (1999) 5 C.L. & P.R. 153-186.

32 Section 2 (2)(c).

33 [1980] 1 W.L.R. 1565; [1980] 3 All E.R. 918.

34 [1970] 2 QB 697.

35 [1957] 1 W.L.R. 1080, [1957] 3 All ER 281.

Public benefit

One of the most significant changes brought about by the new Charities Act is the abolition of the presumption of public benefit that formerly had applied to the first three of the old heads of charity: the relief of poverty, advancement of education and advancement of religion.[36] As a result, each potential religious charity will have to establish on its own particular merits that its purpose does actually confer a benefit on the public: a simple assertion that the advancement of religion in a general sense is inherently beneficial because English law 'assumes that it is good for man to have and to practise a religion'[37] will no longer do.

In the run-up to the Act, much of the publicity surrounding the proposed reforms to charity law focussed on the effect that the abolition of the presumption would have with respect to public schools and to a lesser extent on private hospitals. Indeed, the requirement that the private education sector should be required to show that it does actually exhibit a benefit to the public in order to attract charitable status (and with it therefore, public money through tax reliefs, etc.) has been something of a political driving force behind this change. Yet the effect that this might have on religious charities has been little explored.

It is clear from all the discussions that took place prior to the passing of the Act that is was not the intention of the legislation to depart radically from the underlying principles of charity law established by the common law over many years. Much of the pre-Act law will therefore continue to be applicable but the changes in the public benefit requirement may have subtle but significant consequences for religious charities.

It must be borne in mind that there was no one common public benefit test that applied to all the four former heads of charitable purpose. Most obvious was the head for the relief of poverty where once it was established that a gift fell under that head a public benefit could be wholly inferred and no further specific public benefit needed to be demonstrated, so that the line between a public and a private gift could be a very fine one indeed.[38] At the other extreme was the fourth head that by definition required that any gift purporting to fall within it to be for a purpose beneficial to the public. Under this head, therefore, the existence of a public benefit had to be established before such a gift could be regarded as charitable. Falling between these two extremes were gifts for the advancement of education and the advancement of religion where a public benefit might be presumed, though was capable of rebuttal by contrary evidence. Even here the

36 Sec. 3 (2).

37 *Per* Lord Reid in *Gilmour v. Coats* [1949] A.C. 426 at 459.

38 See Jenkins L.J. in *In re Scarisbrick, Cockshott v. Public Trustee* [1951] Ch. 622 at 651.

standard might differ. As Lord Simonds explained in *Gilmour v. Coats*,[39] charity law has not developed logically but empirically. Each head might therefore have its own distinctive measure of public benefit:

> *It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty*.[40]

It must also be recognised that the public benefit requirement contains two elements that have to be satisfied. First, there must be a benefit to be derived from the application of the funds, i.e. there must be a value or utility derived from the gift, and second, that this benefit must be extended to the public at large or a sufficiently wide section thereof so as to constitute what might be seen as a "public" benefit.

Utility or value

With respect to the advancement of religion, any religion has hitherto been presumed to be inherently beneficial on the assumption "that any religion is at least likely to be better than none."[41] Accordingly, the law remained neutral[42] and no distinction was made between different religions or faiths.[43] Nor was any qualitative assessment made of the faith or the beliefs of a particular religion seeking charitable status. Thus in *Thornton v. Howe*[44] no cognisance was taken of the fact that the beliefs to be propagated were somewhat eccentric in that the donor sought to advance the writings of Joanna Southcote whose beliefs included the miraculous birth by her of a second Messiah. Though her works were seen by the

Master of the Rolls, Sir John Romilly, as "in a great measure incoherent and confused", he held the gift to be charitable as the beliefs to be propagated were neither immoral nor contrary to religion generally. In more recent times, *Re*

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39 [1949] A.C. 426 at 449.

40 [1949] A.C. 426 at 449.

41 *Neville Estates Ltd. v. Madden* [1962] Ch. 832, *per* Cross J. at 853.

42 *Gilmour v. Coats* [1949] A.C. 426, per Lord Reid at 457; *Neville Estates Ltd. v. Madden* above *per* Cross J. at 853.

43 *Thornton v. Howe* (1862), 31 Beav. 14, per *Sir John* Romilly, at 19; *Gilmour v. Coats* above, *per* Lord Reid at 459; *Re Watson* [1973] 1 W.L.R. 1472, at 1482; per Morritt L.J. in *Varsani v. Jesani, Jesani v. Varsani* [1999] Ch 212 at 235 § 30.

44 (1862), 31 Beav. 14.

Watson[45] concerned a trust to publish and distribute the works of a Mr. H.G. Hobbs who in his lifetime had produced quantities of religious tracts and pamphlets. Although in the opinion of an expert the intrinsic value of these works was "nil", it was similarly held to be a charitable since, following the decision in *Thornton v. Howe*, the views expressed there were not likely to corrupt the morals or make the readers irreligious.[46]

With respect to trusts for the advancement of religion, therefore, the presumption of public benefit might hitherto have been rebutted only in the extreme situation where the beliefs and doctrines of an alleged religion were considered to be actually "adverse to the very foundations of all religion, and that they are subversive of all morality."[47]

This was to be contrasted with gifts for the advancement of education where the presumption of a public benefit might be relatively easily rebutted by evidence that the proposed use of the funds was not of sufficient value or utility. This is graphically illustrated by the case of *Re Pinion*[48] where a testator sought to establish a museum in his studio that comprised a few pieces of furniture, china, glass, bric-à-brac and pictures painted by himself. The Court of Appeal, having heard expert opinion, considered that the quality of the items was so poor that an exhibition of them would not have had any educational merit. As Harman L.J. put it:

> "*I can conceive of no useful object to be served in foisting upon the public this mass of junk. It has neither public utility nor educative value*."[49]

A Benefit to the Public

The criteria with respect to what might constitute the public at large or a sufficiently wide section of it, also differed from head to head. As Lord Somervell said:

> "*I cannot accept the principle submitted by the respondents that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust in any other category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are in my opinion, interdependent*."[50]

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45 [1973] 1 W.L.R. 1472.

46 At 1479.

47 *Thornton v. Howe* (1862), 31 Beav. 14 at 20, approved. *Re Watson* [1973] 1 W.L.R. 1472 at 1478-79.

48 [1965] Ch. 85.

49 At 107.

50 *I.R.C. v. Baddeley* [1955] A.C. 572 at 615. See also *simile per* Viscount Simonds at 590.

The unique position formerly occupied by funds for the relief of poverty has already been noted, and it is clear that the very small class that might satisfy the test for this head would not have been nearly sufficient to constitute the public or section thereof under the old fourth head.

A test of what would not constitute the public or a section of the public under the head of the advancement of education was formulated in the cases of *Re Compton*[51] and *Oppenheim v. Tobacco Securities Trust Ltd.*[52] The former concerned a gift for the education of the descendants of three named individuals. Lord Greene M.R. held that where beneficiaries were 'defined by reference to a purely personal relationship to a named propositus' the gift lacked the essential public character and so could not be a valid charitable trust.[53] In *Oppenheim* the settlement was to assist in providing for the education of the children of employees or former employees of the British-American Tobacco Co. Ltd. Here, by a majority, the House of Lords confirmed the *Compton* test and held that there was a "common and distinguishing quality",[54] namely the employment by a particular employer, that designated those who were to benefit so that they could not be said to have constituted a section of the public for the purposes of satisfying the requirements of a charity. These cases have come to be seen as establishing that the test of public benefit will not be satisfied where the beneficiaries are determined by reference to a single propositus such as a common employer or individual or where they are linked by a nexus of contract or blood. Clearly under these circumstances the benefit is a private one directed not at members of the public but at individuals defined by a personal relationship with some common individual or each other. Although this test was formulated in the context of educational gifts, the reasoning, it is suggested, it may also be usefully applied to the former fourth head and now

51 [1945] Ch. 123.

52 [1951] A.C. 297.

53 At 131.

54 *Per* Lord Simonds at 306.

its derivatives under the new Act, for example a gift to establish a health insurance scheme for the benefit of the employees of a company.[55]

Nevertheless, this test does not sit entirely comfortably with the way in which the public element is determined in order to satisfy a gift purporting to be for the advancement of religion. At least conceptually, and perhaps in practice also, it is possible to argue that the formulation of the public benefit test in *Re Compton* and *Oppenheim* is not wholly appropriate with respect to adherents of a particular sect, faith, or religious congregation. There may in a very real sense be a common and distinguishing quality in so far that they may be linked to each other by a common belief and membership of a body determined by prescribed rules and possibly ceremonies of admission. The members may even be in a direct financial relationship with the organisation through some form of contract or 'covenant'. If this were anything other than a religious body, it might well be difficult to find the requisite public benefit.

The approach of the courts with respect to the finding of a public benefit with respect to funds or organisations for religious purposes, however, has hitherto been a rather different one. Even under the former law when public benefit could be presumed, the religion to be benefited could not just exist in a vacuum, but had to be seen to give some tangible benefit to the public. Thus, in order to be charitable, any religious organisation must reach out in some way to the public.[56] A religious organisation, church or community, etc., that opens its doors to all so that nobody is excluded from the benefit of the funds, may be regarded as conferring a sufficient benefit on the public, even though in fact very few may wish to avail themselves of it.[57] Viscount Simonds in *I.R.C. v. Baddeley*[58], drawing an analogy with the maintenance of sea walls, concluded that the validity of a trust was not 'affected by the fact that by its very nature only a limited number of people are likely to avail themselves, or are perhaps even capable of availing themselves, of its benefits.' What is crucial is that the benefit is open to all, not how many will actually take advantage of it.[59]

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55 See *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* [1946] Ch. 194 that held a fund to compensate employees of a company for any damage to their property sustained in air raids not to be charitable. For an example of the use of this test, see McVeigh L.J. in *Northern Ireland Housing Trust v. Commissioner of Valuation* [1970] N.I. 208 at 224.

56 See Goff J. in *Re Banfield, decd.*,[1967] 1 W.L.R. 846 at 852.

57 *Re Hetherington, decd.* [1990] Ch. 1. See Lord Reid in *Gilmour v. Coats* [1949] A.C. 426 at 459.

58 [1955] A.C. 572 at 590.

59 *Ibid*. at 592.

Problems have therefore been caused by gifts to enclosed orders or communities. The classic case that illustrates this is *Gilmour v. Coats*[60] that involved a gift to an order of contemplative nuns who never left the convent to go out into the surrounding community. The House of Lords could not accept that the power of prayer on its own was capable of furnishing any demonstrable public benefit, and concluded that the religion practiced by this closed community conferred what was essentially a private benefit on its members that in no way advanced religion or conferred any benefit on the public.[61] A sufficient element of public benefit was, however, found where an enclosed order did have some contact with the public. In 1989 the Commissioners registered an enclosed contemplative community of Anglican nuns from Burnham Abbey, 'The Society of the Precious Blood'. The distinguishing feature here appears to have been that the nuns did give spiritual support, education and counselling within the local community and to visitors, and they conducted public religious services.[62] Likewise the endowment of a priest to say masses for the soul of the testatrix in *Re Hetherington*[63] was held to be charitable as it was possible to construe the gift as being for public masses and a public benefit might also be found in the stipend paid to the priest that to that extent relieved the diocese of having to pay him.

The exclusive character of the Jewish faith and the attendance at the worship in its synagogues clearly exercised the court in *Neville Estates Ltd. v. Madden.*[64] The plaintiffs sought to show that Catford synagogue was not a charitable trust so as not to be subject to the Charity Commissioners' consent that had been refused for the sale by the synagogue of parts of its land to them. The question was therefore raised whether as an unincorporated association there was a sufficient public benefit to make it a charity. The court distinguished this situation from that of the enclosed order of nuns in *Gilmour v. Coats* on the grounds that the Jewish members of the synagogue lived in the community and therefore some benefit might accrue to the public from the example of their regular attendance at the synagogue.[65] Such an indirect benefit might therefore be distinguished from the

60 [1949] A.C. 426.

61 See also *Cocks v. Manners* (1871), L.R. 12 Eq. 574.

62 *Report of the Charity Commissioners for England and Wales for1989*, paras. 56-62, pp. 16-18.

63 [1990] Ch. 1.

64 [1962] Ch. 832.

65 At 853.

notion of "edification by example" that had been rejected by the House of Lords in *Gilmour v. Coats.*[66]

It may also be questioned to what extent the "class within a class" test may impact on the test of public benefit for religious charities. This test appears to have originated from *dicta* of Viscount Simonds in *I.R.C. v. Baddeley* that

> "*the intended beneficiaries are a class within a class; they are those of the inhabitants of a particular area who are members of a particular church…*"[67]

In *I.R.C. v. Baddeley*[68] a gift for purposes that included the provision of religious, social and recreational facilities for Methodists or likely Methodists resident in West Ham and Leighton was held not to be charitable on the short ground that the social and recreational activities rendered the trusts not exclusively for charitable purposes. Viscount Simonds, however, went on to discuss the public benefit issues raised by the case. He concluded that where a class of people to benefit are selected out of the community, however important that class may be, there is not a sufficient section of the public from which to conclude that there was a public benefit. There was, he suggested, an important distinction to be observed between "relief extended to the whole community yet by its nature advantageous only to the few and a form of relief accorded to a select few out of a larger number equally willing to take advantage of it"[69] and he gave the example of bridge that was available only to selected members of the public.[70] It followed therefore that "if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed" it cannot qualify as a charity.[71] In effect, the restriction to a limited class defined by their religious beliefs out of the whole community willing and able to take, turned an impersonal class of beneficiaries into a personal class defined by reference to a personal characteristic, namely their adherence to a particular religious denomination or faith.

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66 [1949] A.C. 426, at 446, 453. See also *In re Hetherington, decd.* [1990] 1 Ch. 1 at 11.

67 [1955] A.C. 572 at 591. It is perhaps also implicit in *Williams v. I.R.C.* [1947] A.C. 447, where Lord Simonds expressed doubts as to whether 'Welsh people' were capable in law of constituting a community (at 458).

68 [1955] A.C. 572.

69 At 592.

70 At 592.

71 *Ibid.*

However, Viscount Simonds evidently proceeded on the basis that the trusts in *Baddeley* could be charitable only if they fell within the fourth head[72] and it is clear that his comments were specifically directed towards gifts falling within that head that required by its "nominal classification" a proof of general public utility.[73]

It is arguable that the "class within a class" test of public benefit is applicable only to gifts falling under the old fourth head of charity and may have limited application (if at all) to gifts for the advancement of religion. It is surely inconceivable that a gift to provide educational facilities or scholarships to young people from a particular locality would be regarded as failing to provide sufficient public benefit because it was limited to young people from the area. Likewise, it would be hard to deny as charitable a fund to provide Bibles or Prayer Books to Catholics from a particular locality on the event of their Confirmation. Whereas the use of a bridge only by Methodists[74] or entry to gardens restricted to young people from a particular town or locality might well be seen as providing a personal benefit only to those of the restricted class and therefore lacking in any public benefit.

The rationale behind such a distinction in the application of the test may at least in part rest on the appropriateness of the restriction to the purpose of the gift, so that where beneficiaries from a locality are further identified by reference to some quality or characteristic that is entirely appropriate to the purpose of the gift, then the further restriction is not personal to the recipient and will therefore not have the effect of a creating a private class from among the public of a locality equally willing and able to take. Who else for example may more appropriately benefit from a gift to advance education than children or young people from town or village, etc. or with respect to the advancement of religion, those within a local community who were adherents of a particular faith? Even if the class of direct beneficiaries might be thought too restricted, it is suggested that the gift might be saved because of the indirect benefit that "would extend far beyond its direct beneficiaries". As Viscount Simonds suggested in *Baddeley*:

> "*It is easy, for instance, to imagine a charity which has for its object some form of child welfare, of which the immediate beneficiaries could only be persons of tender age*."[75]

72 At 585 and 589.

73 At 590, 591, 592.

74 The example used by Viscount Simonds in *I.R.C. v. Baddeley* at 592.

75 At 590.

The Effect of the Act

It is clear, therefore, that prior to the Act each of the old heads merited its own distinctive approach to the determination of whether there was a public benefit or not. But now that we are faced with thirteen heads rather than four, it may be difficult to correlate a particular test of public benefit with one of the new heads. Nevertheless, with respect to those new heads derived from the old fourth head that had always required proof of a public benefit, it would seem reasonable to suppose that the test of pubic benefit will remain largely unaffected by the Act. However, if the abolition of the presumption is interpreted as meaning that one uniform test of public benefit based on that applicable to the former fourth head will in future be imposed across the whole range of purposes enshrined in the new statutory list of charitable purposes,[76] this would, I suggest, cause grave problems and inequities in its application and could create a fundamental distortion and reappraisal of what might or might not be charitable in the future. Gifts for religious purposes, I would suggest, may be particularly susceptible to any such realignment of the public benefit criteria.

Doubtless in the future applications for first registration involving funds designated as being for the advancement of religion, as with all the purposes designated by the Act, will continue to be dealt with on a case by case basis. In a concordat between the Charity Commission and the Home Office as to how this should be done, the Charity Commission stated that it will continue to follow the approach formerly adopted by the courts to have regard to the different charitable purposes and activities of the proposed charity when setting the standard of public benefit required in any particular case.[77] Yet undoubtedly the law has been changed by section 3 (2) of the Act and the removal of the presumption of public benefit from the advancement of religion head is bound to introduce an element uncertainty as to what may be required of a fund or organisation that seeks to establish itself as a charity for the advancement of religion where it is required to prove that it does confer a public benefit.

Existing case law may, of course, give us a base from which to start. A religion, church or religious organisation that opens its doors to the public at large is likely to be able to demonstrate a *prima facie* benefit to the public within the existing

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76 This was indeed proposed in the NCVO's consultation document 'For the Public Benefit', Jan. 2001, § 3.5, p. 23.

77 *Joint Committee on the Draft Charities Bill -First Report* (15 September 2004), Sec. 3, 'Public Benefit', § 78 (statement).

principles discussed earlier.[78] It is not material that the congregations might be small or that the public at large might not want to attend or become members as long as the opportunity is available to them to do so should they so wish.[79] In other words, so long as membership is not restricted so as to exclude members of the public who would like to avail themselves of the benefits of the gift or fund, that religion might be seen to confer a benefit on the public at large. Even those religions that are exclusive, but whose members live and work in the community so that members of the public receive an indirect benefit from their example, may still be able to establish sufficient public benefit in accordance with the decision in *Neville Estates Ltd. v. Madden*. Where, on the other hand, a religious community is so self-contained that it does nothing for or within the community then it will be impossible to establish any public benefit, as in *Gilmour v. Coats*. Much of the former law will therefore continue to apply. Where the religion that is to be supported is essentially private in character or the benefit limited to a private class of individuals, it will not be possible to demonstrate the necessary element of public benefit.

Likewise, it will not be possible to show any public benefit where the purpose of the gift is "subversive of all morality or religion."[80] Similarly, a place of worship that encourages racism, violence, or terrorism would it seems also come within this category.

It should be noted, however, that in so far as we are applying existing case law we are still approaching public benefit in negative terms, i.e. what will not amount to a public benefit. In so doing we are applying principles formulated to determine the circumstances when the presumption of public benefit might be rebutted. Yet the Act requires a positive proof of public benefit. The Act has therefore had the effect of shifting the burden of proof onto the claimant positively to demonstrate a public benefit and it is no longer enough simply to deny the presumption of a public benefit on negative grounds.

It may therefore be postulated that the levels of public benefit may now have to be of a different character and of a higher standard to satisfy the requirement of positive proof: it is always harder to prove a positive than to negate a presumption. Indeed, why else was the presumption removed? This therefore raises a distinct possibility that a limited level of public benefit that before the Act would have been sustained by the presumption and which could have been rebutted only under

78 The Strategy Unit Report *Private Action, Public Benefit: A Review of Charities and the Wider Not-For Profit Sector*, September 2002, p. 42, § 4.33 confirmed that there was no intention to change this principle in the proposed reforms.

79 See *I.R.C. v. Baddeley*, *per* Viscount Simonds, at 592, quoted above.

80 *Thornton v. Howe*, above.

relatively extreme circumstances, might not now be sufficient to prove a sufficient public benefit.[81] I would suggest that this may impact on the public benefit requirements for gifts to promote religion in two ways.

First, the abolition of the presumption of public benefit would suggest that religious gifts will in future have to pass a qualitative test to show that their objects and activities are inherently beneficial and of value in much the same way as for gifts for the advancement of education.[82]

If so, then this raises the important questions of who is to make these decisions and in accordance with what criteria. Are the criteria for public benefit in such cases to be objective or is it to be left to the individual judge, the Commissioner, or the appellate tribunal introduced by the Act, to determine in accordance with some subjective standard? It would certainly seem that in applying any sort of objective test, *Thornton v. Howe* and *Re Watson* would now be decided differently since in both cases it would appear that on the evidence neither had much merit and their intrinsic value was minimal. The danger is, of course, that any objective criteria may be very difficult to establish so that these may become essentially subjective decisions taken about a particular belief structure with the result that one religion, sect, or faith may be preferred to others when according charitable status.

As has been observed, in the past the courts have taken the view that it was not their function to examine the beliefs of any one religion to determine whether those beliefs were of a sufficient quality to justify charitable status. This is therefore moving away very significantly from the "fundamental" position adopted by the common law that all religious charities are to be treated alike and that "*the law of charity does not now favour one religion to another*."[83] Yet if value judgments do have to be made, this will inevitably involve a degree of subjectivity and give rise to a grey area of uncertainty. We are treading a very fine line here.

It would also appear to follow that with such an emphasis on the proof of public benefit, it might be reasonable to suppose that even where some of the religious activities and beliefs were unexceptional, something less than the extreme position enumerated in *Thornton v. Howe* might be enough to tip the balance against being able to establish a sufficiency of public benefit to furnish the requisite proof. I am thinking here of activities that may be on balance harmful to the public or not in

the wider public interest. This appears to some extent already to have permeated the thinking of the Charity Commissioners. In their decision concerning the application for registration by the Church of Scientology in 1999, the Commissioners decided

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81 This was made abundantly clear in the discussion leading up to the Bill concerning public schools.

82 See *Re Pinion*, above.

83 *Per* Morritt L.J. in *Varsani v. Jesani, Jesani v. Varsani* [1999] Ch 212 at 285 § 30.

that because judicial and public concerns had been expressed concerning the Church of Scientology, it should not be entitled to rely on the presumption of public benefit, but had to prove it, which it failed to do.[84]

The onus will therefore now be very much on the claimant to demonstrate a public benefit and the balance may be difficult to establish in some situations. It might now, for example, not be easy to show the public benefit in a gift to spread one religion in countries that espouse other faiths where such activities might be illegal and could have serious political repercussions, e.g. a gift to promote the smuggling of Bibles to a Muslim country might well be regarded by the government as politically sensitive and not in the wider public interest so as to render proof of a public benefit difficult. Indeed, it might now be more problematical to prove a positive public benefit to be derived from a religious mission whose sole avowed aim is the conversion of the members of another faith. Furthermore, with the necessity to prove a public benefit, it is at least conceivable that the current charitable status of Christian Scientists and Jehovah's Witnesses might similarly be compromised by their absolute refusal to allow blood transfusions even for a child in a life-threatening situation. The extreme form of the Exclusive Brethren, unable to rely on the presumption, might also have some difficulty proving a public benefit when its doctrine of non-association with those outside the sect has been seen by some to have had the effect of dividing families and causing children to be separated from a parent. Let us take this argument a step further. Could it not also be argued that in the light of third world poverty, AIDS, etc., a religion whose tenets of faith are fundamentally opposed to birth control and any form of artificial contraception might be lacking in public benefit in this wider sense? Now it seems very unlikely that such an argument would succeed insofar as it might apply to one of great religions of the world where the overall public benefit would be incontrovertible, but the point I am making is that balances may have to be struck and that there may be a point somewhere along the line where a particular religion may be unable to prove an overall benefit to the public because of some of its activities or beliefs. These are all issues that in time will have to be addressed.

Human Rights

There may also be human rights implications.[85]

The Charity Commission as a public authority within section 6 of the Human Rights Act 1998 is bound in its decision making process to comply with the principles enshrined in the European Convention on Human Rights. This may not directly

84 *Decision of the Charity Commissioners: The Church of Scientology*, § (3).

85 See also F. Quint and T. Spring, '*Religion, Charity Law and Human Rights*', CL&PR 5/3 [1999] 153-186.

affect the freedom of thought, conscience and religion protected by Article 9[86]since arguably the religion might still be carried on without charitable status. Nevertheless, it might be contended that since loss of charitable status would lead to the withdrawal of tax concessions from religious bodies that hitherto had been regarded as charitable, this would have the effect of diminishing the ability of the religious organisation concerned to teach and give proper facilities for worship and practical observance of their faith to its adherents thereby affecting their rights under the Article. Likewise, the loss of tax relief may impact on Article 1 of the First Protocol that is designed to ensure peaceful enjoyment of property.[87] Perhaps more significant, however, is Article 14 that prohibits discrimination in the enjoyment of the freedoms and rights under the Convention.[88] It should be noted that this Article against discrimination permeates the whole of the Convention.

An example of the application of the principle of equal treatment of different religions and denominations may be seen in the case of *Canea Catholic Church v. Greece – 25528/94*.[89] Here the Greek courts refused to recognise the Roman Catholic Church of the Virgin Mary in Canea as having any legal personality to permit it to bring an action in the courts against the owners of a neighbouring property who had demolished one of its surrounding walls and opened up a window in their own building overlooked the church because the church had not complied with certain requirements of registration in order to acquire legal personality under the Greek Civil Code. The Court found, *inter alia*, that there had been a breach of Article 14 taken together with Article 6 § 1[90] because the

Greek Orthodox Church and Jewish community were able to bring proceedings to protect their own property without the need to satisfy such formalities of registration and there was no justification for the difference of treatment.[91]

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86 "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."

87 "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

88 "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

89 [1997] E.C.H.R. 100 (16th December 1997).

90 The right to a fair trial.

91 Para. 47.

If fiscal benefits are to be conferred on some religions as a result of registration as a charity but not on others where a value judgment has been made that they are not of sufficient merit to justify charitable status, then it is arguable that in so far that this may amount to an unequal treatment of one religion as against another, it could potentially constitute a breach of a combination of Articles 1 and 14 of the Convention.[92]

Conclusion

The changes brought about by the new act with respect to religious charities may therefore be subtle rather than immediately dramatic. Nevertheless, the abolition of the presumption of public benefit in particular is likely to have repercussions for religious charities. How extensive these will be is not yet clear. Until a body of jurisprudence has been accumulated based on the decisions of the courts and the Charity Tribunal established by the Act,[93] much will turn on the interpretation of the Charity Commission of what might constitute a public benefit in any particular case. The present Commissioners would I think argue that in operating the 'gateway' principle over a number of years they have already adopted a holistic approach to the registration of any charity that has included the element of public benefit. The Act itself requires the Charity Commission to issue guidance as to how it will apply the public benefit requirement after appropriate consultation,[94] and it is to be hoped that the Commission will continue to maintain its light touch with respect to religious funds and organisations.

92 See Quint & Spring, abov*e*, p. 169.

93 Section 8.

94 Section 4.