

## Articles

# The advancement of religion in a pluralist society (Part I): distinguishing religion from giving to ‘charity’

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### Abstract

This article argues that in today’s multi-cultural and pluralistic common law societies, where all the world’s religions are practiced and enjoy equal status, the advancement of religion should be treated by the law as a matter solely of belief. Faith is a phenomenon distinct from charitable giving, though the motivation of the Christian for giving may spring from belief. The concept of ‘charity’ evolved in mediaeval common law England from Christian faith and ethics. In Tudor and later centuries no one questioned the implicit synonymous character of charity and Christianity, and therefore the nature of religion itself only came under examination, to the extent it has occurred at all, in courts of the later 20th century. Given the make-up of modern common law societies, the time has come, the article contends, to recognize the universal character of religion, and for policy planning by the state *vis-à-vis* religion to be based on this recognition.

### Introduction

The common law and its law of charity had their origin in England and Wales. It was from there that in the 16th and 17th centuries each travelled to the American colonies, and later to Canada, Australia and New Zealand. Later also they would be introduced into numerous other locations around the world of the one-time Empire, many of those locations being what we now know as the offshore jurisdictions. The vehicle for charity law’s creation was the mediaeval and Tudor ‘use’ (fiduciary feoffment), and thereafter the trust.

Christianity and charity were regarded in Western European culture, at least by the 12th century, as two sides of the same coin. The Christian ethic of having compassion for one’s neighbour, and the importance of giving to ‘the Church’ in the hope of obtaining thereby eternal salvation, were widely understood. That was certainly true in England in the Middle Ages. And it was in the 12th century that there became familiar the legal idea of *charité*, a Norman

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French word meaning to give to 'the Church' for 'pious causes'. Already by that century Benedictine abbeys and priories were revered religious houses, which as part of the religious life cared for the sick among lay people and, as havens of learning, sometimes taught their young. As to religious persuasion, Christianity was the undisputed spiritual and temporal presence in a deeply religious society. Cathedrals, minsters, and humble parish churches were being built throughout England, and 'the Church' under the aegis of the Papacy in Rome was the unchallenged religious authority in Western Europe.

With the Reformation in the 16th century in England came Protestantism, and the scene changed. Though the Christian religion continued to be the dominant constituent of everyday life throughout the country, as it would be until the 19th century, sectarianism replaced the 'universal church'. With the statutory unlawfulness of the practice of Roman Catholicism and the harassment of those Protestants who dissented from the theology of the 'Established Church', inter-sectarian Christian dispute in England and Wales, as throughout Europe, was an ongoing occurrence during this period.

On the basis of a late Tudor statute,<sup>1</sup> the courts' understanding of what purposes 'charity' includes was being developed during this sectarian period, and so far as religion and its dissemination were concerned a consequence was the meticulous and overall successful effort of the courts to retain a non-judgmental posture as to beliefs and differing theological doctrine. Sectarianism was carried to the newly forming American colonies, settlers often fleeing religious persecution in Europe, and, though in a more muted form because settlement there took place later, it travelled to Canada, Australia, and New Zealand in the late 18th and the 19th centuries.

The third stage of the connection between law and religion was the age of toleration. In England, this came during the first half of the 19th century, first

as between Christian sects, in particular in the legal 'emancipation' of Roman Catholicism, and then between Judaism and Christianity. During the second half of the 20th century, encouraged perhaps by the cathartic effect of the two World Wars, toleration quietly and naturally evolved throughout the common law world into acceptance of established religions *per se*.

Australian governments with reports and draft legislation have had the scope of charity under active consideration since 2001, and in Canada in 2008 the Revenue Agency released a paper seeking input from religious charities on the appropriate character of the CRA's intended future application of the existing law. Meanwhile, during the present century the four jurisdictions making up the UK and the Republic of Ireland have legislated extensively on the subject of charity.

In the Western European culture, the law of the common law jurisdictions, like that of the civil law jurisdictions, regards the furtherance of religion as a charitable object or purpose. Religion as the law sees it is concerned with belief of some kind in the power and influence of the supernatural; a set of such beliefs will make up a faith and that faith relates humanity and the individual's destiny to a conceived spiritual essence which in one way or another is understood to bring succour to human kind.

However, whereas for centuries Christian belief and a personal deity ('God') were at the base of Western civilization, in the present century there is no longer an implicit recognition throughout the West that Christianity underpins lives.<sup>2</sup> At the same time, an approach possibly facilitated by the 20th century growth of a secular majority in all Western societies, any established religion possessing tenets of belief, and a conception of man's relationship with a supernatural element, today qualifies for charity concessions. Among all these religions, Christianity in the 21st century is now but one among many. Since the

1. Statute of Charitable Uses 1601 (43 Eliz I c 4).

2. The decline in Canada of the number of religiously active Christians to a distinct minority of the total population has been said to have commenced in the 1970s; MH Olgivie, *Religious Institutions and the Law in Canada* (2nd edn, Irwin Law 2005) 55.

Second World War immigration into the West has brought with it in particular Islam, Buddhism, and Sikhism.

Multi-culturalism and pluralism suggest two inquiries; whether the practice and furtherance of religion is today properly classifiable as a purpose that is charitable, and, if it is so classifiable, whether public benefit is a meaningful assessment to make of the practice of religion. The first issue will be examined in this article, and the second in a following article. The perspective, though concerning the law of the Commonwealth, will be that of a Canadian.<sup>3</sup>

### The insignia of spirituality

The common law courts today apply three tests in deciding whether the purpose set out in the donor's gift, or in the founding documentation of an alleged religious organization, 'advances religion'. First, does the 'religion' qualify as a religion when its elements are compared with established and accepted religions? This is an analogy test. If so, secondly, is the purpose of the donor or organization in issue sufficiently closely linked to the furtherance of the religion under consideration, or is it primarily aimed at achieving some other possibly related, but different, goal? This is also in large part an analogy test; in determining whether this link exists the court has in mind the characteristics and practices of already established religions. Thirdly, if there is an adequate link, does the purpose render benefit to the public at large?

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In all common law jurisdictions, there has traditionally been a non-definitive list of purposes that are charitable. The list is four centuries old. It is contained within the Statute of Charitable Uses, 1601, or the Statute of Elizabeth, as it is popularly called, of the English and Welsh Parliament, and that is where all our common law textbooks start. The list is located in the Statute's preamble,<sup>4</sup> and constitutes a number of workaday activities for the benefit of the public that the Elizabethan legislature recognized were in some measure funded by individuals and associations. These donating persons frequently provided assets by way of the 'use'. They appointed *feoffees to uses*<sup>5</sup> to see that the required activities were discharged, and the repair of churches is included in the preamble as one of the purposes for which 'charitable use' gifts might be made. This inclusion is explained by the fact that at the time of the enactment the maintenance of the structure of the parish church was a charge on the local community which the church served. Otherwise, the preamble and the 1601 Act make no reference to religion.

Scott records<sup>6</sup> that Sir Francis Moore, a 17th century commentator on the subject of the Act,<sup>7</sup> was of the view that religion was deliberately omitted. Parliament was apprehensive, Moore thought, that a faith that is legally followed at one time may be declared illegal a few years hence, and the assets held for that faith's adherents be seized and confiscated by the state. Moore says there was concern in 1601 that the state's Treasury be not the ultimate

3. It should be noted that in Canada, constitutional authority to legislate on the law of charity, as a branch of private law, is in the provinces. Provincial authority also includes taxation, but within the province only. It is arguable that jurisdiction over charity law concerning national (or inter-provincial) charities, such as the United Church, the Anglican Church, and the Roman Catholic Church, is in the federal domain, but this has never been asserted. Nationally levied taxation is within the sole governance of the federal authority, and therefore in terms of taxes levied nationally the scope and character of concessions extended to charitable organizations and to donors are federally governed.

4. In England and Wales, the Mortmain and Charitable Uses Act 1880, repealed the 1601 Act, (n 1), but the 1601 preamble survived as s 13(2) of the 1880 Act and was repealed ultimately only in the Charities Act 1960. However, by 1960 the preamble case law had long since had a legal authority of its own, and as case law simply continued.

5. That is, property transferees charged to hold title for another's benefit.

6. *Scott on Trusts*, 4th ed., AW Scott, WF Fratcher, 1987, Little Brown and Company, vol. IVA, para. 371. See also *Scott and Ascher on Trusts*, 5th ed., AW Scott, WF Fratcher, ML Ascher, 2009, Aspen Publishers, Wolters Kluwer, vol. 6, para. 38.4.

7. That Sir Francis Moore was also a draftsman of the Act is challenged by an authoritative work on the period, *History of the Law of Charity 1532-1827*, GH Jones, 1969, CUP (n 2) 24.

recipient of lands and funds given philanthropically to the public for the benefit of the public. The struggle between the Established Church and other Christian sects was certainly in full flood in 1601, theologically, politically, and socially, and this makes it difficult to accept that there was at that time such Parliamentary detachment and objectivity. Another view is that religion as such was not a concern of the Act. The Act was directed to activities that were in receipt of state subventions, or were the fiscal responsibility of local communities, such as the maintenance of roads and poor relief.<sup>8</sup> By way of the Act, Parliament was introducing commissions to enforce the law that it was hoped would root out the misapplication of donated funds, or sheer negligence in their expenditure, and thereby relieve the demand on local rates and taxes.

Despite it being but a listing of objects for the betterment of local government, this statutory preamble became at once for the courts a gathering, as it were, of what were to be regarded as the 'charitable purposes' the law would accept. Proceeding by analogy to the items listed in that preamble, the courts have since built up four centuries of case law enumerating the purposes that qualify for 'charity' concessions, and there is no doubt that such conclusions in each century have reflected the concerns and the community mindedness of the period. The 1601 preamble was received in the American states, where it played the same measuring role, and was ultimately accepted in all the states of the Union, some by force of local statute. It was also received by the common law provinces of Canada, by New Zealand and Australia in the 18th and 19th centuries, and by numerous territories that became subject to the common law, including Hong Kong and Singapore. And in all these territories, save now in England and Wales, Scotland, Northern Ireland, and the Irish Republic, the text of the preamble survives to this day. So the body of case law survives.

The preamble making no reference to 'religion', it was in 1639, just a short number of years after the

Charitable Uses Act was passed, that an English court held that a trust with the purpose of maintaining a preaching minister was a valid charitable trust,<sup>9</sup> and thereafter the case law grew. No one challenged the 1639 conclusion then, or has done so since.

The case law in English courts concerning the advancement of religion illustrates a progression. It commences in the 16th century when there was an intolerance in England towards any religious activity other than that of the Established Church, and culminates with the liberalism that at the end of the 19th century accepted all sectarian forms of the Christian faith and Judaism. It was logical for liberal democracy in the 20th century, though the recognition was sometimes hesitant, that the Muslim religion would be added to the list, and the yet older religions of Buddhism, Hinduism, and Taoism. Mysticism, spiritualism, and Freemasonry were issues for the 19th century; in the second half of that century, the cults drew attention, together with other such groups that sometimes merged codes of behaviour for adherents with a spiritual belief element. Because the history of religion as a charitable activity is practically as old in the USA as in England, the same progression from tolerance to contemporary acceptance is a feature of the law in the States. Nevertheless, due to the fact that the USA was settled by so many from Europe who were seeking religious freedom of expression, tolerance of more radical Protestant sects, Roman Catholicism, and Judaism was ahead of the older European societies. Australia and New Zealand received English law much later than the USA, as we have seen, but there too for not dissimilar reasons tolerance was the greater interest of society.

The building and repair of churches and chapels, and now of synagogues, temples, and mosques, has proved to be the most readily accepted outcome of the charitable status of religion. And that extends to the services and rituals, ceremony and personal contemplative conduct carried out in these buildings. The robes of the ministers who conduct ritualistic

8. FH Newark, 'Public Benefit and Religious Trusts' (1946) 62 LQR 234, 234.

9. *Pember v Inhabitants of Knighton* [1639], 1 Eq Cas 95. See also EB Bromley, 'Contemporary Philanthropy', *Equity, Fiduciaries and Trusts* 1993, in DWM Waters (ed) (Carswell 1993), 69–71.

occasions, the costumes of those who assist in the religious activity, such as singers and public readers of sacred texts, and the provision of 'accoutrements' such as musical instruments, sheet music, bells, sacred vessels, candles, seating for ministers, choirs, and the faithful attending services and rituals, are quite easily recognizable as support objects to the charitable activity. Buildings not themselves used for services and ritualistic meetings, but associated with the activities within the church, synagogue, mosque or temple, have called for a closer inquiry. Community gathering places are not accepted within the penumbra of advancing religion, but, if the usage of such buildings, like a church hall, is principally concerned with activities that complement the worship and the dissemination of the faith in the principal religiously engaged building, those buildings will be included.

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Burial grounds are charitable as long as they are physically associated with the religiously engaged building,<sup>10</sup> traditionally in England the churchyard and burial extensions of the churchyard. This will make a gift charitable that is for the maintenance of the entire such burial ground including specific grave sites, but the maintenance of particular grave sites only has not been regarded as charitable. It follows that, however involved the deceased may have been with a religious faith, the upkeep and repair of a grave site in a public or municipal cemetery would not be charitable. But here Commonwealth courts seem to be of divided opinions.<sup>11</sup>

Gifts are frequently made, *inter vivos* or by will, to ministers or leaders of religious communities. If the gift is made to the holder of office for expenditure

upon a purpose that furthers the religious activity, that will render the gift charitable, but if the donation is personal to the minister or leader, so that it may be expended upon anything that the minister or leader chooses, that will not be regarded as a charitable gift. Ministers and leaders are frequently engaged in social work in their respective local communities. But, whatever the motivation of such a minister or leader, in the eyes of the law this activity does not 'advance' faith and worship. It is evident that much will turn on the language used by the donor as to whether the gift falls into one category or the other.<sup>12</sup>

Support of ministers or leaders is another potentially borderline trust purpose. Illness or old age after many years of service to a religious community may encourage provision of housing, furnishing, and consumables by the faithful to maintain those so stricken. Little difficulty has been experienced by the courts in enclosing these kinds of gift within the ringed fence of charity. But a religious organization may introduce more complex considerations. For example, the court may be faced with a church that has created for its many clergy a pension plan. The cost of this to the church is not insignificant, and moreover the management has been put into the hands of a pension administration company that operates for profit, and manages plans for a number of employers. Doubtful also are the situations when ministers or leaders receive from the faithful competitive salaries, or gifts that are substantial in size in order to provide vacations, expensive cars, or luxury homes for the leader and his or her family.

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10. Historically interment within a church, or the instalment of plaques and memorials in the church structure, has been regarded as unquestionably charitable.

11. *Re Oldfield* [1949] 2 DLR 175 (Manitoba), followed in *Re Robinson* [1976], 75 DLR (3d) 532 (Ontario).

12. A gift 'to Monsignor O'Sullivan for expenditure as he shall choose' will be personal; 'to the priest of St Mary's for expenditure as the then priest shall choose' might be charitable because of the donee being identified as an office holder expending such funds on church purposes.

Other than ministers, an infrastructure of staff receiving salaries and benefits may be appropriate given the number of the faithful engaged in the religious community, and facilities provided for staff raise another type of problem but again these are borderline cases. The question for the court is whether advancement of the particular creed is the major object of what is provided.

Though not all religions encourage, or even favour, proselytizing of their faith, 'spreading the word' is a well-known feature of religious life among Christian sects. Missionary work, in Canada and overseas, was the subject matter of a good many cases before the 19th century Canadian courts, and this activity seemed invariably to receive the acceptance of the courts. Today education in religion, religious summer camps for children, and group travel to foreign religious sites, such as Lourdes, are the activities that are the vehicles for dissemination of faith and doctrine. But the element of furtherance of the particular religion is vital in all these activities, and it must be the sole or otherwise dominant purpose of the activity. For this reason, religiously funded radio and television stations, and 'religious centres' based on the concept of shopping mall marketing, are contemporary question marks.

The second test of charitable status of a gift or organization—is the particular activity sufficiently directly linked to the charitable purpose—will always called into play when the charitable organization is seeking to fund its operations by conducting a profit-making enterprise. Businesses operated by religious organizations are subject to the same test as is applied to businesses conducted by other charitable bodies. Though the profits flow back to the charity,

and emoluments and benefits made available to staff are reasonable and appropriate, the question in the case of religion is whether belief in the supernatural, and instruction in that belief, can be said to be directly 'advanced' by the conduct of businesses.<sup>13</sup>

## A Retrospect

Looking back over the centuries, it is clear that the common law courts of previous generations have accepted organized religion as being indigenous to society. Religion has been accorded the status of being the most familiar of all the forces that bond society, and give it cohesion. In the age of Christian faith, the charitable character of the Church was a fundamental understanding.

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For all Commonwealth common law jurisdictions, the *Pemsel* four-part categorization<sup>14</sup> reflected a past, and endorsed for the future, an approach to religion that, on the basis of that understanding, consequently concerned itself, as we have seen, solely with 'the trappings and the suits'<sup>15</sup> of religion. The difficulty, however, is that these are but the insignia, the badges, of something else. The nature of religion itself was ignored, and no one questioned why belief in the supernatural was classified by the courts with the *Statute of Elizabeth's* relief of the poor and the elderly, provision of education for the young, and the repair of bridges and causeways.<sup>16</sup>

13. The Canada Revenue Agency provides instances of what it considers 'advances' religion in its 'Notes and Questions for a Discussion on Advancement of Religion as a Charitable Purpose', 10 October 2008.

14. *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 583. Though he did not acknowledge it, Lord Macnaghten, as a member of the Court, picked up in his judgment the divisional description of Sir Samuel Romilly, counsel in *Morice v Bishop of Durham* (1805) 10 Ves Jun 522, 532. Macnaghten famously described charitable purposes as being divided into four heads, of which 'the advancement of religion' was one. The others are the relief of poverty, the advancement of education, and other public purposes beneficial to the community. The jurisdiction of England and Wales made statutory in 2006 the first three of those four heads of the *Pemsel* categorization, and thus included 'the advancement of religion'.

15. William Shakespeare's *Hamlet, Prince of Denmark* (Act 1, Scene 2). Hamlet, suspecting murder, is gently chided by his mother for his exceptional level of grief over his father's death, and replies:

But I have that within that passes show; These but the trappings and the suits of woe.

16. Case law on the advancement of religion largely arose in the centuries prior to the second half of the 20th century from disputes involving individuals' gifts by will, and less frequently *inter vivos* donations. Charity was a matter of property law. However, much law of that epoch—the impact of the perpetuity rule on

## The relationship of charity with religion; Christian ethics and social conduct

There is no definition of charity in the common law jurisdictions, and there never has been. Parliament at Westminster in 2006 made charity the subject of some clarification for England and Wales by 'listing a large number of purposes that are seen as charitable',<sup>17</sup> but the list is not definitive and no one can say the 2006 Act 'defines' charity. 'Charity' is a technical legal term referring to the purposes of organizations, or of the gifts of individuals, that are approved by case precedent, or statute, as falling within that term, and are for the public benefit. 'Benevolence' or 'philanthropy' is something else, with no legal meaning. Non-profit organizations for public benefit, but whose purposes are not so listed, are not charitable.

What has been taking place since the 19th century is the enactment of legislation and regulation on particular matters, such as income tax and local real property taxation, where each enactment carries its own provision for charitable organizations. Separate statutes that provide concessions for 'charities' may well state or infer in each case what 'charity' means for the particular statute's object. Sometimes the case law understanding of charity is adopted, but more likely there is a list of charities that will be recognized. Provincial legislation releasing real property occupied by charitable institutions from property taxation may provide that charities, like hospitals, educational institutions, and places of worship, shall not have to share in such costs as street lighting, road repair, and garbage collection. If, however, something more than an enumeration for a single purpose is required, statute may include the entire list of poverty relief,

education, and religion plus doubtfully valid purposes under the case law. The ready example in Canada is federal legislation on the tax relief of charitable organizations and donors. This covers the entire area of charitable purposes in the private law, and goes further to confirm the charity status for tax purposes of some doubtful purposes.

Kirby J of the High Court of Australia in an otherwise dissenting judgment<sup>18</sup> alluding to 'charitable purposes', noted concerning the meaning of these words that:

... absent any statutory modification or definition, the word 'charitable' in this context takes on a 'technical meaning'. It is a meaning that can be traced to the law of trusts and, ultimately, to the preamble to the Statute of Elizabeth.

That was all that could be said.

Then how has 'charity' been understood by the courts in their putting together a body of case law, a judicial understanding broadly categorized for today in the 1891 *Pemsel* case? It seems that in the fourth head of *Pemsel*, we have the closest approach to what the late Elizabethans had in mind when they spoke of 'charity'. The *use* or purpose on which the *feoffee to uses* holds must be something that seeks to enhance the well-being of society.<sup>19</sup>

Charity was a word familiar to the drafters of the Statute of 1601. The first translation of the Bible into English had been made by John Wycliffe in the mid-14th century, and Bishop Coverdale—when he translated the Psalms—had already in the first half of the 16th century joined in another English translation. 'Charity' had a clear usage for each translator. It was not until 1610 that the King James Bible appeared, but already in 1601 'charity' would have been

charitable trusts, and the inherent remedial jurisdiction of the courts concerning the certainty and updating of such purposes—has largely become less important. Its case law is correspondingly less often invoked. Gifts are today made to charitable organizations enjoying tax relief on their income and capital gain, and in Canada the donor looks for a formal receipt from the organization in order to secure to the donor a legislatively granted income tax credit. Tax legislation and policy view the charity sector as the subsidization by the state of private organizational activities that meet public need. In current practice in Canada, such legislation, regulation, and policy and technical guidance from the Revenue Agency occupy practically the whole of the charity scene. The 'advancement of religion' is one of those tax-relieved purposes.

17. The Charities Act 2006, s 2(2), and s 2(4). See HAJ Ford and WA Lee, *Principles of the Law of Trusts*, para 19.510., commenting on s 2 of the Act.

18. *Commissioner of Taxation of the Commonwealth of Australia v Word Investment Ltd.* [2008] HCA 55, para 162.

19. And that benefit must be intended for society at large or an appreciable section of the public making up society.

the familiar translation of Paul of Tarsus' conception of the 'love' of the Christian for his fellow men.<sup>20</sup> In the Vulgate, the Latin translation of the Bible used from the fourth century by the Roman 'universal church', the translation of the word from the original Greek, also meaning love, was *caritas*. The old French that came to England with William of Normandy in 1066, as we have observed, translated *caritas* as *charité*. Paul teaches that this 'love' is at the centre of Christian belief; in the English translation of his letter to the Corinthians, he speaks of faith, hope, and charity, and reflects that the greatest of these is charity.<sup>21</sup>

In Western civilization,<sup>22</sup> where at its inception religion in the Judeo-Christian expression was woven with the philosophy of ancient Greece and the legal and administrative expression of classical Rome, it is not difficult to understand the historical relationship of religion and charity in the UK and Ireland. Religion itself dictated for all a code of concern for the sick, the aged, the unlettered, and the poor. That code, drawing its authority from supernatural revelation, is today referred to as Christian ethics or moral theology. The 'highest good' in a scale of ethical principles is found beyond the rational in the realm of belief.<sup>23</sup> This was the background to the 1601 statute. No one in Tudor society would have thought of drawing a line between belief in Jesus and concern for those in need. It was the closing and destruction in the mid-16th century of the English religious houses, great and small, that removed from the daily scene the extensive assistance that for centuries these houses had provided to those in society who were in need. Thereafter, at a time also of the enclosures and consequent unemployment, the role of the private donor

became crucial to the state. The 1601 Act reflects Parliamentary understanding of this.

Charitable giving did not come into existence in 1601. From Saxon times those with means gave of their wealth, and in a dichotomy of church and state as the two authorities in the realm, the church being concerned not only for the souls but the integrity of the lifetime conduct of the faithful, it is not surprising that considerable gifting was made to the church. In the mediaeval or pre-Reformation period, the wealthy would be much concerned with the Church's call that they give of their wealth for 'pious causes'. Cathedrals, abbeys, and significant churches would be the donees of land and of treasure. The particular 'uses' chosen by the donors would reflect the work and dedicatory purposes of the donee religious organizations.<sup>24</sup>

So, in the minds of the Elizabethan faithful, Christian ethics and 'charity' were synonymous. Religious belief and charity were one. At the time, it would not have struck any observer as odd that, without mention of religion in the Act, the early 17th century courts implicitly regarded the furtherance of the Christian faith as being charitable. In the post-1601 case law, the courts as the secular institution would simply make no reference to the religious motivation for ethical behaviour; the contents of the existing ethical code would be adopted and developed without reference to the supernatural. Whatever the actual reason for the omission of religion in the Act, it is certainly true that it was theological doctrine that provided the spark for sectarian controversy and violence. The present-day concept of freedom of religion could only be born in an environment such as the 19th century acceptance of others. And then it took

20. An instance of modern usage is love for one's country or patriotism. 'Love' was seen by Paul as a secular expression of the Christian's sense of 'love' for the revealed personal Supreme Being.

21. The First Epistle to the Corinthians, ch 13, as it appears in the 1610 Bible, is the celebrated lyrical 'song' of this meaning and the significance of 'charity'.

22. More accurately the civilization of western and southern Europe, from where it later spread across the world. Though there was schism in 1054 when the Roman and Orthodox churches split, that civilization includes the Christian Orthodox tradition of Greece, eastern and south-eastern Europe, and Russia. The Byzantine scholarly compilation in the sixth century AD of Roman law provided the wherewithal, after the 10th century in Western Europe, for the Reception of that legacy of ancient Rome to civilization.

23. The comparison of Christian ethics is with philosophical ethics where authority is based on reason. A supernatural or 'revealed' element has no counterpart in philosophy, which is entirely rational.

24. The mediaeval state in its continuous power struggle with the church made periodic statutory efforts to prevent land and treasure being left in incorporated hands, which never died and therefore deprived the state of feudal dues. The familiar condition of the donor's giving is that masses be said by priests of the institutional recipient for the deceased donor and his family members. But among donors, mediaeval and Tudor, trade guilds also created dispositions on *use* for assistance towards health, education, and poverty relief needs.

100 years to reach today's human rights legislation. In the courts, it was fortunate that the Christian ethical or moral code was concerned not merely with the rigorous standards of personal conduct and attitude of mind expected of Christians as individuals, but with service to the community. That code of ethics was specifically concerned, as Lord Atkin in *Donoghue v Stevenson*<sup>25</sup> was later to point out, with assisting the 'neighbour' in need. In law, this took the minimal form of taking care not to injure one's neighbour, but for the faithful how 'charity' (or 'love') was to be demonstrated was by coming to the aid of others in need, as did the Good Samaritan.

The courts would take the contents of such a code, secularize the good neighbour concept for believers and non-believers alike, and church and state could co-exist with ease.

### What does the law today recognize as a 'religion'?

This was not a question that anyone in England would have asked in 1601. Indeed, the sectarian struggle between factions of Christianity for freedom of expression only began to come to a close 230 years later. It was shortly after the Roman Catholic emancipation, in 1837, that a court decision accepted Judaism as a religion that might publicly be practiced,<sup>26</sup> and so commenced in England—slowly at first—the modern epoch of the state's willingness to accept the various faiths that the world knows. Judaism and Christianity, in fact, shared so much history, and some would say belief, that it was only in the 20th century that the real impact of the state's neutrality as between religions was recognized.

The acceptance of all 'religions' seems also to have had a 19th century beginning in the USA. In Australia and New Zealand, though as in the USA tolerance came more easily than in the old European societies, the acceptance of all major faiths would have been

more a 20th century occurrence. It is interesting that it was those with a Christian inheritance who opened up each of these countries.

In the context of charity, the acceptability of pre-Christian 'realized' religions, practiced by millions of people from India to Indonesia, China and Japan, does not appear to have come before the Commonwealth courts. This is strange, and it is equally surprising that no jurisdiction at any point denies that established Asian religions would be recognized by its courts. Canada is a case in point. Had the question arisen as to whether the immanent or 'realized' religions of Asia qualify as religions, this would have raised an immediate difficulty for courts culturally accustomed to the three Abrahamic 'revealed' religions of Judaism, Christianity, and Islam. The question is how the courts would have rationalized the acceptance as 'religion' of the older tradition of immanence or 'realization' of self, in which in most forms of religious expression a god or entity, and worship of the same, is wholly absent. This older tradition is the hallmark of Theravāda Buddhism. Though gods are present in the belief system, immanence is also a central element of Hinduism and of Taoism. Japanese Buddhists will also embrace Shintoism if they desire religious ritual and group ceremony. Such adoption of two faiths is something branches of Christianity, where the notion of 'the one true faith' is well known, would never accept. And Confucianism, one would argue, is more a philosophy of how life on this earth should be lived than a concern with the supernatural.

Deity and worship are not only irrelevant elements in this older belief system, the release of 'the spirit' from mortality by a process of personal meditation and critical introspection is the sole aim of the believer.<sup>27</sup> Belief carries no necessary constituent of 'love' for community; it charts for the believer's life a very personal struggle. Yet, no Western common law court could surely today withhold the charity

25. [1932] AC 562, 580, [1932] All ER Rep 1.

26. *Straus v Goldsmid* (1837) 8 Sim 614, 59 ER 243, a legacy wherewith to purchase meat and wine for Passover.

27. The believer's failure to achieve this release means that 'the spirit' is reincarnated in human form. The belief element is that the achieved release is to an eternal supernatural existence (for Buddhists to *nirvana*).

classification from any of these ancient religions that long pre-date the religions of the Middle East.

Instead, common law courts have been asked to consider relatively small associations of Western located persons whose terms of association are vague as to the supernatural, and whose activities further to their purposes appear often to be derived from, or clearly cognizant of, one Christian form or another. The issue in these instances has been whether it is enough that the association members possess a belief of some kind in the existence of a supernatural element. The members may not accept that there is any personal or identifiable deity, but nevertheless speak of a supernatural stimulus, sometimes called a personified 'god' but more often a 'force' or 'verity' that is beyond the reach of reasoning.<sup>28</sup> Alternatively, the issue may be whether, though it ignores supernaturalism, the purposeful activity can be recognized as a religion when, by way of a wholly reasoned philosophy of life and death, the conclusion reached by its members is strongly avowed as a persuasive response to the basic questions concerning human life. The impetus the members experience is as if they were religiously inspired. It is this driving conviction that leads its followers to seek further disciples from society at large, disseminating that philosophical approach.

It is in tackling these issues that the courts attempt to be neutral in whatever context the question is raised. For instance, it is well understood that the court cannot evaluate the validity or invalidity of religious beliefs or spiritual persuasions.<sup>29</sup> It can only judge whether purposes are of a religious nature, and it does this by comparing observable characteristics among accepted religions. The context may be whether an association's beliefs or philosophy should be recognized as falling within the constitutional right of freedom of religion, or whether, to take the main specific concern, the particular association should benefit, necessarily at others' expense, by being

exempt as a religion from taxation of one sort or another. Those contexts in practice are different, and as a consequence views differ. While some judgments claim that neutrality requires the evaluation of the spirituality in issue to be precisely the same, whatever context has brought the matter to court, others imply that the criteria should be more demanding in the case of state subventions. Across the common law world, some court judgments have therefore seen neutrality as non-commitment as between religions.

As between jurisdictions, there are also differences of emphasis as to what constitutes 'religion' when, as occurs today, the courts regard religion as a phenomenon, as opposed to being the cultural basis that once was Christianity. When the supernatural has only a vague, indefinite part in an association's aims, or there is merely an enthusiasm of the members for a philosophy as if supernaturally inspired, judicial attitudes have differed. For the purpose of classification as a religion, Commonwealth courts continue to hold to the need of a supernatural element; others would include the purposes of associations that are not spiritual in character but for which there is a not dissimilar inspiration. It is interesting to note that those who look for a supernatural element in purposes, and find it absent, will likely observe that the objection is of no significance because the association is charitable under another head of charity. This occurred in *Re South Place Ethical Society*.<sup>30</sup> The overlap of the applicable heads of charitable status thus ameliorates the overtones of taking the position that the institutional purpose in question does not lead the organization to qualify as a religion.

### Case law

The case law concerning organizations that seem to be on the borders of religion and philosophy, and their claim to be as religiously based as the major religions, is varied. The three latest cases that deal with this

28. It is assumed the court has found no want of integrity in the references to the spiritual.

29. For example, *Bentley v Anglican Synod of the Diocese of New Westminster* (2011), 62 ETR (3d) 1 (BCCA).

30. [1980] 1 WLR 1565 (*sub. nom. Barralet v A.G.*) [1980] 3 All ER 918 (English Chancery Division).

issue, as opposed to reviewing the insignia of spirituality and determining whether any such insignia exist in the instant litigation, are *Re South Place Ethical Society*<sup>31</sup> in England, *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic.)*<sup>32</sup> in Australia, and *Centrepont Community Growth Trust v Commissioner of Inland Revenue*<sup>33</sup> in New Zealand.

A USA case, *Malnak v Yogi*,<sup>34</sup> and the conclusions there reached by Adams J, after considering a number of USA decisions, have received marked attention in both Australia and New Zealand. As to the three Commonwealth cases, it was held in *Re South Place*, a first instance decision, that an association whose members advocated a humanistic philosophical concept concerning the excellence of trust, love, and beauty, to the exclusion of anything supernatural, was not a religion for *Pemsel* purposes. Religion, the court said, requires faith, and worship of a Supreme Being. The members were agnostics, cultivating a 'rational religious sentiment'.<sup>35</sup> In *Centrepont Community*, an incorporated community of like-minded persons had as its purpose to advance the spiritual education and humanitarian teachings 'of all the messengers of god'. These were 'the founders' of the world's revealed (or Abrahamic) religions, a term which included the community's own named 'spiritual leader'. In addition to its intimate, mutually assisting life style, the community was engaged with the public in counselling and psycho-therapy plus some commercial activities, the latter of which supplied funding to the corporate community.

The court, again at first instance, found that, while some members of the community believed in a supernatural being, others held:

a belief in the supernatural in the sense of reality beyond that which can be perceived by the senses.

An exemplification [in the witnesses' evidence] of that type of belief is in the expression that frequently recurs of creative energy.

Included in these beliefs of the community members were concepts that related not only to man's relationship to man but also to his relationship to the supernatural in the sense of a Being or a reality beyond sensory perception.<sup>36</sup> The court held that in terms of their formal association, and in their beliefs and practices, the members were engaged in the advancement of religion, and it expressly followed the earlier *Church of the New Faith* decision in the High Court of Australia.

Of all the Commonwealth common law jurisdictions whose courts have reached conclusions on the subject of the law's understanding of what is 'religion', the judgments given in the *Church of the New Faith* decision in the High Court of Australia are the most extensive on the subject.<sup>37</sup> They agree on the outcome of the case, namely, that Scientology which is modelled on Buddhism is a religion, but each subtly differs from the others in its application of the various criteria drawn upon in reaching that conclusion. And this is entirely understandable. The High Court was contending with a modern, unchartered area of law—the conspectus of spirituality across the world. Religion is a phenomenon which is recognized and respected everywhere the constitutional or human rights principle of freedom of religion is honoured. But how wide can be this embrace by the state?

That the courts cannot assess the validity or invalidity of the doctrines or tenets of any religion the *Church of the New Faith* confirms, and the Court's members appear to be in agreement that, whether the issue is a constitutional right to freedom of

31. *ibid.*

32. [1983] HCA 40 (1983) 154 CLR 120, 49 ALR 65.

33. [1985] 1 NZLR 673. For a case comment on AW Lockhart, *Centrepont Community Growth Trust*, see (1984–87), 5 Auckland University Law Review 244.

34. (1979), 592 F (2d) 197.

35. However, the association was held to be a charity under the education and 'other public benefit' heads of *Pemsel's* categorization.

36. (n 33) 698.

37. In the *Centrepont Community* decision in New Zealand, Justice Tompkins noted that a professor of theology, giving evidence to the *Centrepont* court a year after the *Church of the New Faith* judgments, described the *New Faith* decision as 'a first class theological essay'. (n 33) 697.

religion or exemption from a fiscal burden shared by taxpayers, the definition of religion cannot be narrowed when the issue is fiscal exemption.<sup>38</sup>

Mason ACJ and Brennan J in their judgment examine the criteria as to what constitutes a religion, and they note that these are drawn from the courts' observation of 'acknowledged religions' and the 'beliefs, practices and observances' of those religions.<sup>39</sup> Beliefs go to make up faith. In the inquiry into the nature of man, his relationship to, and place or purpose within, the material world, the first criterion involves a going beyond empirical reasoning to faith in the supernatural. The belief will be in 'a supernatural Being, Thing or Principle'.<sup>40</sup> A supernatural principle may take the form of a belief in the struggle of the spirit located within the human frame to reach an ultimate state of purity when it is released forever from an otherwise recurring human existence into the spiritual environment. The second criterion is an acceptance of canons of conduct, which may concern the individual's moral or ethical behaviour, as well as his or her duties of ritual observance. For the purposes of evidence in a court, participation in rites and ceremonies will be enough to show an adherence to these duties. These canons grow out of and reflect beliefs. However, conduct that is permitted or mandated by either beliefs or canons must meet the laws of the jurisdiction, and on this basis polygamy, pacifism in wartime, and other specific types of conduct, are subject to the prohibitions or non-recognition that affect society's religious and non-religious members alike.<sup>41</sup>

Murphy J in his judgment traces the history of the religions of the world and the manifestations of religiosity, the achievements of religion, the ruinous wars and the partisan-driven misery brought about

in its name. He then moves to make the important observation for the first time from the Bench that, while some religions may claim to be the one true religion, others permit their adherents to belong to other religions as well as follow the beliefs and practices of the one religion.<sup>42</sup> And in the immediate context of Scientology, he draws attention to the fact that all the 'traditional religions'<sup>43</sup> had small beginnings, when it would have been tempting to argue that the few adherents were dreamers or were mesmerized by a local inspiring leader. It is not public acceptance that is the test of what is religion, Murphy J explains.

Wilson and Deane JJ in their judgment are especially concerned with the Asian 'realized' religions. Their Honours reiterate that 'religion' is not exclusive to faith in and worship of a single god. Christianity is only one form of religion; revealed godhead and a revered, obeyed, and worshipped deity is at the historic heart of the Judeo-Christian beliefs. But in law, belief in the supernatural has been accepted, though the faith in question has no conception of a personalized god or gods and does not follow a practice of reverence and worship. No one would suggest that Buddhism, Hinduism, Jainism, or Taoism, being historic religions of the Asian continent, are not religions. Yet each perceives of the spirit within the individual striving on its own for perfect purity and consequent acceptance in the supernatural.

As to the criteria for determining what is a religion, their Honours remark that not one is indispensable; they are merely rough measuring devices that suggest in concert whether the facts constitute a religion. However, the central criterion is belief in the supernatural, and this constitutes 'belief that reality extends beyond that which is capable of perception by the

38. The judgments therefore assert for the first time that religion is one and the same for whatever reason the question is asked. In the High Court's view, religion does not have a different character for each particular matter under consideration.

39. (n 32) para 11. It is pointed out that it is irrelevant whether the leaders of a cult or group are cynics or sham artists; the state of mind of these persons is irrelevant. If the followers are found to be sincere believers with regard to the doctrines taught to them and in their practice of the required conduct, their beliefs and practices constitute a religion.

40. *ibid*, para 14 (Mason and Brennan).

41. There is currently under trial in British Columbia a legal action brought by the Crown against a religious commune in the province practicing polygamy. The Fundamentalist Church of Latter Day Saints, unlike the mainstream Mormon church, holds to polygamy as a tenet of the faith, and has pleaded the defence that it is guaranteed freedom of religion under the constitution, namely, the Charter of Rights and Freedoms.

42. (n 32) para 41 *et seq.* (Murphy).

43. *ibid*, para 33.

senses'. Then comes a telling statement. 'If that be absent, it is unlikely that one has a "religion".'<sup>44</sup>

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*The central criterion is belief in the supernatural, and this constitutes "belief that reality extends beyond that which is capable of perception by the senses." Then comes a telling statement. 'If that be absent, it is unlikely that one has a "religion"'*

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USA courts have gone further in their recognition of what is a religion, as Wilson and Deane JJ note.<sup>45</sup> In *Malnak v Yogi*,<sup>46</sup> Circuit Judge Adams described the criteria developed by American courts as three in number. First, a set of ideas that deal with the ultimate concerns of man. Secondly, ideas that *in toto* constitute an integrated belief system. And, thirdly, forms and ceremonies that are found in accepted religions. Wilson and Deane JJ said their view of 'religion' 'accords broadly with the newer, more expansive, reading of that term' as set out by Judge Adams,<sup>47</sup> while Mason ACJ and Brennan J said their view, while embracing the supernatural element of Buddhism and other Asian religions, did not extend to Judge Adams' position.<sup>48</sup>

This difference in attitude towards Judge Adams' opinion is interesting because it highlights the question of where reasoning stops and the supernatural begins. In Judge Adams' opinion, an 'integrated belief-system' exists when reasoning produces the system, but those so persuaded share with adherents of an accepted religion an inspired conviction. That is, impelled by the force of the reasoning, the enthusiasm of the rationalizers in understanding the 'ultimate concerns' of mankind causes a non-rational conviction to arise that the propositions reached are correct. *South Place Ethical Society* in England rejected such a conclusion. There philosophic reasoning, however inspiring to the thinkers, was not accepted as being 'religion'. On

the other hand, the trial judge in *South Place* did not find it necessary to undertake the in-depth consideration of 'religion'—of reasoning and of faith—that characterized the Australian High Court decision.<sup>49</sup>

Though it appears to be the case, contrary to the position of Deane and Wilson JJ, that Commonwealth jurisdictions accept the position that belief in a supernatural element is a necessary constituent of a 'religion', the relationship between reason and faith, a quarter of a century after the illuminating *Church of the New Faith* judgments, continues to remain enigmatic.

Provision of a solution has now been attempted by the legislative process. Possibly influenced by that decision, the Charities Act, 2006,<sup>50</sup> in England statutorily enlarged English law as to religion. Section 2(3)(a) provides that 'religion' includes:

- (i) a religion which involves belief in more than one god, and
- (ii) a religion which does not involve belief in a god.

Polytheism under paragraph (i) would include the guardian deities of Hinduism and the revered, on occasion worshipped, 'enlightened being', the various buddhas, and the saints of some Mahāyāna Buddhism. However, it also appears to include religions like those of ancient times in Greece and Rome where, each representing a concern of mankind, such as War and Fertility, a multitude of 'guardian' gods exists in a world of passions that are human in character. The meaning under paragraph (ii) of 'a religion which does not involve belief in a god' surely refers to 'realized' religions like Theravāda Buddhism where the spirit within each human being without the involvement of a deity is striving for release into the supernatural. But, though it clearly includes Buddhism and likely Confucianism, does section

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44. *ibid*, para 18 (Wilson and Deane).

45. *ibid*, para 20.

46. (n 34).

47. *ibid*.

48. (n 32), para 23 (Mason and Brennan). Justice Murphy described the American courts' position (para 23), but did not take a position for himself.

49. There is a light, passing reference in *South Place* to the possible nature of Buddhist belief, but no more.

50. (n 16).

2(3)(a)(ii) also include the 'faithless' ethical association whose members possess an apparently inspired conviction that by a process of reasoning alone they have answers to the fundamental questions, such as the meaning of human life?<sup>51</sup>

The 2006 statute is at heart, it would seem, concerned with what this article has described as the insignia of religion. 'Religion' itself appears to remain conviction derived from a sense of supernatural liberation, and the drills that supernatural element imposes.<sup>52</sup> But the issue remains open. It is likely also that belief and faith will continue to be received as concepts that bespeak tenets and in-depth doctrines. These too are beyond reasoning. While the thought, indeed the philosophy, may be as real to believers as if rational, they are not based upon empirical evidence.

### Separating religion from the law's concept of 'charity'

In today's multi-cultural, pluralistic societies, religion for its faithful can induce a form of solitude within society. Religions introduced by immigrants tend to emphasize the cultural values, language, and traditional expression brought from elsewhere, and this inhibits the integration of these people into the societies to which they have come to make their future lives. Rather than assist the immigrant and his family members to participate as members of a new found community, religious doctrine and practice are capable of ignoring the whole idea of 'charity', which is to benefit the entirety of the modern multi-faith and secular community with one's efforts and ultimately one's resources.

*In today's multi-cultural, pluralistic societies, religion for its faithful can induce a form of solitude within society*

Religion today is seen by the secular majority in most common law societies as a mixture of reasoned philosophy and unknowable belief. The term, spirituality, is used to describe this mixture. And many are of the view that tax relief of non-governmental activities that benefit society must be demonstrably based on the utility of the subsidized purpose to the general public. Utility alone is a transparent test. Poverty relief and the provision of education for young and old, like care for the sick and disadvantaged, meet that test. Critics consequently consider that the claimed qualitative benefit to the public emanating from belief in the supernatural cannot be judged by any applicable 'charity' criterion.<sup>53</sup>

Taking into account the solitude religion can generate for the immigrant,<sup>54</sup> the self-absorption it may induce in the individual's quest for supernatural acceptance, and the fact that the courts cannot weigh the validity or value of beliefs,<sup>55</sup> the argument made is that the case for rethinking the place of religion within the penumbra of 'charity' is established. Religion may provide the greatest number of organizations and trusts on the CRA's charity listings, but that is irrelevant. The byproducts of belief such as care for the sick and the provision of education, provided by religious organizations, may be accepted as charitable by the CRA, but that is not on the basis of the religious motivation. Those activities are charitable in themselves. Charity and spirituality, each *per se*, are as alike as chalk and cheese.

51. Unfortunately, the statutory paragraph includes 'religion' in its two descriptions of what 'religion' will include.

52. A similar interpretation will probably be given to the Charities Act (Northern Ireland) 2008, c 12, s 2(3)(a)(ii)—'religion' includes: any analogous philosophical belief (whether or not involving belief in a god).

53. Though the process of seeking an analogy between the belief organization before the court and the established religions has produced elements, such as codes of conduct, that are common to each established religion, the analogy technique does seem to leave a good deal to the perception of the particular court as to manner in which the interests of the public at large are enhanced by religion.

54. In the 2001 Religious Census in Canada, just over 500,000 persons were recorded as Muslim, and well over 750,000 persons described themselves as members of Asian religions, notably Buddhists, Hindus and Sikhs. The numbers increased markedly between 1991 and 2001, and the increase has in fact gathered pace since 2001.

55. See further AW Lockhart (1984–87) 5 Auckland University Law Review 244. In PW Edge, *Religion and Law: An Introduction* [2006] Ashgate 107–11, the author also reaches an abolition conclusion.

Yet there are other arguments that lead to another conclusion.

Belief and faith constitute one characteristic of religion. Another characteristic is the familiar code of conduct that orders the believer's life and may well call upon the believer to recognize the needs of others. Moreover, the religious organization is likely to possess an in-depth and broad set of doctrines of some kind. Believers will underline that belief and faith have been a traditional inspiration for centuries in the visual arts and the performing arts, as in morality plays and musically in oratorios.<sup>56</sup> Codes of conduct imposed upon the individual, it is said, create a climate that is also essential to an ordered society, and by their existence they provide an inspiration for those without faith who value civilized society.<sup>57</sup> As to doctrine, scholarship in theology and religious philosophy provide an intellectual stimulation for society; they give depth to religious belief, and for centuries have constituted a discipline in Western universities.

Members of religious groups tend to emphasize that 'faith and good works', ie belief and the discharge of charitable activities, go hand in hand. One is not separable from the other; the motivation of religiously persuaded persons to express their faith in the relief of the poor, the care of the sick, and support of the vulnerable in society, is as much part of their overall religious conviction as is the relief, care or support itself. The faithful note that the Charity Commission in England and Wales evidently feels there is force in this argument, and is prepared in its releases to state that religion tends to be a force for good in society, setting values and holding believers to a level of conduct in life that redounds to the benefit of society as a

whole. The faithful in Canada are also buoyed to read in a 2008 CRA release words expressing a similar sensitive understanding of religion.<sup>58</sup>

Attempting to assess the relative merits of these two schools of thought, one is left with the sense that the debate is unlikely to reach any finality. Nor is the existence of the debate of any service within society. It is harmful to the search for harmony on the subject of what is charitable, and wounding for those who feel that their religious belief has to be defended in terms solely of material benefit.

The argument, one would suggest, is compelling that in today's globalized societies religion should not be considered as a 'charity' simply because, though the world has changed and produced different criteria of benefit, in the Christian countries of the West it has always been so. The test of what purposes are charitable in nature has to be acceptable to the members of society as a whole, and it is surely undeniable that that test has to be utilitarian. Religion should be a separate consideration from what satisfies that utilitarian measure. In the 21st century, we should respect belief for what it is, and it is enough that the law already has the means to deal with purposes or activities that are unlawful, against public policy, or harmful in any way. We should extend to religious groups, or to gifts for the furtherance of religion, those tax or other concessions that policy suggests religious practice, considered on its own, should enjoy. This is another realm of thinking about religion in society; something that common law societies have never previously entertained. The question would remain as to what for legal purposes is a religion, but, unlawfulness and public policy concerns apart, that is the sole question that would be asked.<sup>59</sup>

56. Robert Bolt's *A Man for All Seasons*, an interplay of ethics and personal integrity, is frequently mentioned in this regard.

57. Michael King, 'Charitable Status for the Advancement of Religion – the Proponent's View' (1995–96) 3 *The Charity Law and Practice Review* 179.

58. (n 13).

[A]dvancing religion is a benefit because it helps to provide people with a moral and ethical framework for living and because it can play an important role in building social capital and social cohesion. Religious organizations provide the majority of rites of passage ceremonies (marriages, funerals) and many services to the needy, marginalized and vulnerable. They also encourage volunteering time and money to help others.

59. Wilson and Deane JJ in *Church of the New Faith* suggested that even belief and faith are possibly dispensable if other characteristics are persuasive that a 'religion' exists. They said no more. One is driven to observe that the question of what is a religion is question enough, as in fact civil law jurisdictions have found, for whom the public benefit issue does not arise.

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*The test of what purposes are charitable in nature has to be acceptable to the members of society as a whole, and it is surely undeniable that that test has to be utilitarian. Religion should be a separate consideration from what satisfies that utilitarian measure*

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The temptation for our legislatures, presented with this proposal, will be to ask whether it is necessary that the introduction should be entertained of such an 'upheaval', as the above argument put into effect may be described. For almost 400 years in Western common law societies, the furtherance of religion has been charitable, and religion was the *fons et origo* of charity. For reasons of their own, religious organizations do in fact carry out an important amount of otherwise charitable activity. It, therefore, makes limited policy sense to create a groundswell by withdrawing charity status from what are in fact minorities. It is a move that may well be understood,

by non-believers and believers alike, as isolating the religious organizations, and prove to have created divisions in society. The contention will simply switch to what concessions, if any, the state is justified in extending to those in society who entertain a religious persuasion. Moreover, if, as charity law stands, the doctrine or practices of a religion are contrary to public policy, or are unlawful, the law has remedy available. The purpose is declared void.<sup>60</sup> *Re Watson*<sup>61</sup> drew upon this fact. So in all, governments may reflect, why 'rock the boat'?

The response this article makes is that the constituent elements of today's societies have changed and are still changing, in recent years rapidly. In doing so, they are consigning to history the homogeneous, and often one faith, communities of yesterday. With active Christianity a minority interest, and the increasing presence of many faiths a current fact, the time has come for all of us to rethink the policies that were once enough.

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60. It goes without saying that, should a religion with charity status indulge in conduct that is unlawful, contrary to public policy, or otherwise harmful to society, it will lose its charity status, among various outcomes.

61. [1973] 1 WLR 1472, [1973] 3 All ER 678.