

Articles

The advancement of religion in a pluralist society (Part II): abolishing the public benefit element

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Abstract

If legislatures are not prepared to treat religion separately from charity, this article argues that much of the intended gain could be had by abolishing the requirement in the case of religion that there be public benefit in religious purpose. The law's long-standing and alleviating presumption of the existence of public benefit has been abolished in the UK's three jurisdictions to the concern of the faithful, while the Irish Republic has made the presumption conclusive. Other jurisdictions remain silent. At the same time 'spiritual benefit' is something that, unlike material or tangible benefit, secular courts say they cannot assess. The result is confused thought and elusiveness rather than explanation. The only way forward, it is argued, is to recognise religion for what it is, belief and doctrine. The law has remedies to counter the unlawful and the harmful.

religious organization claims that its purposes are wholly charitable.¹ The first asks whether the organization's purposes, be it a corporation or a trust, furthers—or 'advances'—religion in the sense that religion is understood by the law. If it does so, and particular activity of the organization is in issue, the second test is whether the activity, though compliant with the organization's supporting purpose or purposes, is directly linked with the furtherance of the religion as such.² The third test is whether the carrying out of the purposes of the organization provides a benefit to the public at large or a significant section of that public.

In the previous paper the first two tests were examined, and in particular the first. The conclusion reached was that with the possible exception of a High Court of Australia decision now almost 30 years ago the law of the Commonwealth jurisdictions has not undertaken the move from yesteryear's position of the unquestioned acceptance of Christianity as being religious expression. Such a move allows it to accommodate the multi-cultural and pluralistic world of today. Existing common law societies, such as those of the British Isles, Canada, Australia and

Introduction

There are three tests that courts of Commonwealth common law jurisdictions apply when a purportedly

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1. Or a gift is made *inter vivos* or by will to an organization, or without reference to an organization, for purposes that are claimed to be for the advancement of religion.

2. For instance, can the charitable organization own, or own and itself operate, an entirely profit making corporation whose profits are applied solely to the furtherance of the owner's purposes? *West v Shuttleworth* (1835), 2 Myl K 684, designation of a purpose object as charitable does not imply that all the means directed to secure the purpose are charitable. See further on 'advancing' religion, *Liberty Trust v. Charity Commission* (HC New Zealand), CIV 2010-485-000831 [2 June, 2011], esp. at para. 93.

New Zealand, traditionally homogeneous and Christian, now include a significant number of adherents of Asian religions as well as all three Abrahamic religions. Islam in particular has become a presence in several common law jurisdictions. What constitutes religion for charity law purposes, and what relationship religion itself has with charity, are questions more hesitatingly answered in one jurisdiction than in another. While economic forces encourage the growth of immigration into the West and the majority of the residents of the contemporary multi-cultural, common law societies are increasingly secular, what is charitable can only be perceived in a society without homogeneity with a yardstick that is utilitarian. With the rule of law dominant in our societies, nothing but what is measurable in everyone's terms can be entertained.

Consequently, beyond the issue of what is a qualifying religion for charity law purposes, it is asked what measurable benefit religion as a head of charity confers upon society. The previous paper was of the view that, whatever the evident utilitarian nature of much activity undertaken by religious believers, to describe religion itself in today's societies as a charitable purpose is a misdescription that both confounds the law, and misrepresents the nature of religion. This situation is sufficiently evident that it is surprising no common law jurisdiction has even canvassed the consideration that a separate approach needs to be taken to religion. Charitable status aside, policy in a particular jurisdiction may well favour state assistance for religion *per se*. There are persuasive arguments for such a policy, as the releases of both the Charities Commission of England and Wales, and the Canadian Revenue Agency, reveal. But whatever the policy decided upon, the paper argued that religion and charitable purposes should be distinct legal concepts.

The third test is that benefit is conferred upon the public at large by the purpose that claims to be charitable. This test is examined in relation to the advancement of religion. If legislatures are not

willing to take the advancement of religion out of the *Pemsel* heads of charity, or of the charity legislation in the four jurisdictions of the British Isles, the paper asks whether much of the same effect could not be had by abolishing for the advancement of religion the requirement of demonstrated public benefit.

The third test—a requirement of public benefit

Suppose it is accepted that the purposes of the applicant organization constitute a religion, and that any specific acts of the organization, which are in issue are sufficiently directly linked to the advancement of religion. Does the carrying out of the purposes of the organization, justifying the activities of the organization within the contemplation of those purposes, constitute purposes that are for the benefit of the public? As the law phrases the question, it is a matter of whether the purposes, and the activities thereto, satisfy the test of being for the benefit of the members of the public at large, as well indeed as the adherents of the religion. The courts have traditionally taken the understandable position that they cannot simply accept the assessment of the faithful that benefit stemming from spiritual beliefs accrue beyond themselves to the general public. The secular courts must themselves determine whether there is public benefit. Moreover, as they can readily do with the relief of poverty and the education of the young, the courts must be able to say that the alleged benefit has been proved, or not proved, in legal terms. State courts can determine whether there ensues from the organization's acts material benefit, but spiritual benefit is not susceptible to a secular, or as the courts say, neutral assessment. The members of the organization may firmly believe that spiritual benefit ensues not only to the faithful, but to the general public. But that belief must be irrelevant. The result is that at law the acts, though further to a purpose or purposes, are non-charitable.³

3. The same outcome would occur when a gift is made by a will maker or *inter vivos* donor who wishes to further a purpose or purposes.

The courts have traditionally taken the understandable position that they cannot simply accept the assessment of the faithful that benefit stemming from spiritual beliefs accrue beyond themselves to the general public. The secular courts must themselves determine whether there is public benefit

The three extended House of Lords judgments in *Gilmour v Coats*⁴ in 1949 explained the situation in which the secular courts are placed, and confirmed previous judicial decisions of lower English courts that had held the benefits alleged to arise from the performance of purely religious acts to be non-measurable and therefore non-charitable. It left the matter there. Rather surprisingly, since the particular litigation was brought to have the charity status of spiritual benefit determined at the highest court level, no member of the House addressed for the assistance of future courts where the line should, or might, be drawn between material benefit and spiritual benefit.⁵ The silence, in what is still the leading case authority on the subject, has been noted by later courts.⁶

This then is the problem. Even if the state's courts were to determine whether there is public benefit in the existence or the practice of any religious doctrine, which they will not do, the state's courts have no means whereby to measure spiritual benefit. Awareness of such benefit presupposes the existence of belief in a supernatural fulfillment of some kind. Nor do the courts understand it to be for them to abdicate their judgmental role to the particular

religious group as to what is of benefit to the public at large.

The presumption that public benefit exists

The 1601 Charitable Uses statute has nothing on the subject. It was later in that century that the courts began to speak of the requirement that a charitable purpose must be for the public benefit. Advantage must be conferred by charitable gifts not on relatives or friends, but on the 'public' and that means people at large, or a significant section of the public, without the *nexus* between them of family relationship or employment. In short, private benefit cannot be passed off as public advantage because of the charitable nature of the head of charity itself. However, where the relief of poverty, the advancement of education, and the advancement of religion are concerned, purposes are presumed by the charity case law to be for the public benefit.⁷ Why the presumption does not exist when the question of whether a purpose is charitable falls under 'the spirit and intentment of the Statute of Elizabeth' – the fourth head of the *Pemsel* classification—is not clear, and since the fourth head includes the care of the sick and provision for the disabled it seems altogether anomalous.

Moreover, so far as the advancement of religion is concerned, unlike the other two charity heads of poverty relief and education, it is also not readily evident what evidence will rebut that presumption. But that belief in the supernatural and purposes stemming

4. [1949] AC 426, [1949] 1 All ER 848 (HL).

5. Lord Simonds LC was content to say that apparent illogicalities are a feature of the legal notion of charity. He considered fine judicially-drawn lines between one set of facts and another to be an inevitable product of the empirical development of charity in the courts throughout the various epochs of opinion and circumstances since 1601, and he drew attention to the fact that the quantum of public benefit required is in any event different as between each of the four *Pemsel* heads of charity. Earlier in *National Anti-Vivisection Society v IRC*, [1948] AC 31, 65; [1948] 2 All ER 217 (HL), Lord Simonds did describe the presumption and its effect.

6. The Republic of Ireland legislated in 1961 to give charity status to closed or contemplative religious orders, and in 2004 the Commonwealth of Australia did likewise for the states and territory of that country: *Extension of Charitable Purpose Act 2004 (Cth)*, No 107. This legislation simply set aside the House of Lords' decision concerning closed religious communities; it did not tackle the question whether religion as such should be recognized by charity law. What constitutes 'private' as opposed to 'public' benefit is another problem with *Gilmour v Coats*. Had the cloistered nuns invited the public to attend the convent's main Sunday mass, that, it seems, would have made things 'public', even if no one from the public in fact attended. Would instead the offering of prayers by the nuns for the public have produced the same result? These are very nice distinctions. Indeed, it is difficult to see what long-term direction the House had in mind in *Gilmour v Coats* in connection with the advancement of religion.

7. *Neville Estates v Madden*, [1962] Ch 832; *Re Coats Trusts*, [1948] Ch 340 (CA), *sub nom Gilmour v Coats*, (n 3) above in the House of Lords.

from that belief are charitable has never been questioned by common law courts. Provided an organization has beliefs, and those beliefs are held and the practice of the particular faith is followed in a manner that is comparable with that of long established religions, the court is satisfied. It then turns to whether there is also a benefit to the public in the furtherance of the religion.

The non-believer might ask why the law should raise a presumption of public benefit in favour of advancing religion. The answer may well be that the common law of England and Wales, and its one-time overseas territories, adopted this presumption when Christianity represented in its various sects and persuasions the faith of all its peoples. Prior to the nineteenth century few would seriously have challenged that Christian ethics, however interpreted in those robust centuries, fundamentally underlay the laws of England and Wales. For the same reasons that religion was recognized as early as 1639 as a charitable purpose, no one would have questioned the presumption that the furtherance of the Christian religion results in the benefit of the public. It was no doubt widely felt that the onus of proof that the particular religious purpose or activity is not charitable should be upon the aberrant person who alleges such a thing.

It was the Charities Act, 2006, of England and Wales, which for the first time gave statutory formulation to the scope of what is charitable,⁸ and in that Act a striking innovation was made so far as the advancement of religion is concerned.⁹ It followed a similar provision that had earlier been introduced in section 8(1) of the Charities and Trustee Investment (Scotland) Act, 2005. The same provision was also to appear in section 3(1) of the Charities (Northern Ireland) Act, 2008. Section 3(2) of the 2006 Charities Act in England and Wales reads:

In determining whether [the] requirement [of public benefit] is satisfied in relation to any... [charitable] purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.

The presumption that a purpose, characterized as qualitatively advancing religion, is for the public benefit was thus abolished in that jurisdiction. It was the apparent opinion behind each of the English and Welsh, the Scottish and Northern Ireland Charities Acts that all charities should be on the same footing; none as plaintiff should have to shoulder an onus of proof that another does not. Those appearing before the tribunals of the Charity Commission of England and Wales to commend or defend their registration as charities must now prove their case that purpose(s) claimed to be for the advancement of religion, whether of an existing faith or a new one, are indeed for the benefit of the public, or a sufficient section of the public.

As can be seen from the published releases of the Charity Commission, among registered religious organizations in England and Wales this abolition of the presumption has raised concerns as to the degree of certainty that now exists touching the charitable status of their existing purposes. The Commission, acting as a tribunal in charity registration applications, like the courts on an appeal, must of course ensure that the onus of proof of public benefit emanating from religious purposes is properly discharged, and the Act has given rise to apprehensions that in future there will be fewer religious purposes that satisfy the public benefit test. The organization may have reflected that when Parliament was seeking, as the Commission describes the process, a 'level playing field', it must have realized that the advancement of religion satisfies the public benefit test in a different way from that employed by all other charities. *Gilmour v Coats* from its perspective of over 60

8. S 2. It is in open list form. The first statutory open list of charitable purposes was in fact introduced by the Charities and Trustee Investment (Scotland) Act, 2005, s 7. This Act and the 2006 Act in England were emulated in the open list of the Charities Act (Northern Ireland), 2008, s 2. Barbados (Charities Act, c 243, s 3, also open lists authorized charitable purposes.

9. The other innovation was the apparent reversal of the decision in *Re South Place Ethical Society*, [1980] 1 WLR 1565, [1980] 3 All ER 918, by providing that a religion's beliefs need not include a belief in a god or supreme being.

years ago continues to govern.¹⁰ How did Parliament at Westminster intend religious organizations to meet what is now required of them?

It is interesting for a foreign observer to note that how 'public benefit' is to be established is not addressed by the 2006 Act.¹¹ So far as the advancement of religion is concerned, the Act is silent, and the Commission has been at pains to alleviate the concerns to which that silence has given rise. Westminster's silence is doubly puzzling because, much earlier, in section 45(1) of the Charities Act, 1961, replaced in 2009, the Irish Republic had expressly retained the presumption of public benefit in the case of religious charities and purposes.¹² While the 1961 subsection made the presumption irrebuttable, thereby effectively doing away with the presumption, the 2009 provision then reverted to a rebuttable presumption.¹³ The 2009 Act also requires the Charities Regulatory Authority, in registering charities, not to find absence of public benefit in the case of religion 'without the consent of the Attorney General'.¹⁴ And the Charity Definition Inquiry Report of 2001 in Australia¹⁵ expressly recommended the retention of the presumption. The Westminster Parliament would have been aware of all of this.¹⁶ The contrast of thinking is striking. What is being implicitly said here by the two camps as to the significance of the presumption?

The Australian *Explanatory Material*¹⁷ that accompanied the Commonwealth's later withdrawn Charities Bill, 2003,¹⁸ required that the public benefit of a charitable purpose must have 'a practical utility'.

The *Explanatory Material* stated, apparently intending to describe the current case law in Australia, that 'benefits are not restricted to material benefits, but include social, mental and spiritual benefits'. That reference to 'spiritual benefits', despite its being a central concern in the *Gilmour v Coats* judgments, surprisingly was not included in the Bill of 2003. Also, unless it was intended thereby to confirm the conclusion in *Gilmour v Coats* that 'spiritual benefits' cannot be proved or measured, the Charities Act, 2006, in England and Wales is silent on this Australian conception of benefit. That in the 2006 Act, as in Scotland and Northern Ireland, the occasion was not taken to explain what was intended by the abolition of the presumption vis-à-vis religion is therefore one puzzle, and the absence of legislative language or commentary on the Australian *Explanatory Material*, then so recent, opining that the word, 'benefits', refers to 'social, mental and spiritual benefits' is another puzzle. What was meant by a 'level playing field' with regard to religion might then have become apparent, and explanation would have prevented the view being subsequently taken by many that what public benefit means for the Charities Act, 2006, is 'material' or 'tangible' benefit.¹⁹

In a 2008 draft supplementary guidance document for the public entitled, 'Public Benefit and the Advancement of Religion',²⁰ the Charity Commission in England and Wales reminded its readers in its Foreword that there is now a 'new level playing field', and continued, 'All [religious charities] will have to describe the impact of their beliefs,

10. See n 7, above. It has been legislated out of effect only in the Republic of Ireland, and in Australia.

11. It is understood that the Charity Commission asked that the Act not define 'public benefit'. The reason for the request, if the information is correct, is not known.

12. The 1961 Act read: 'In determining whether or not a gift for the purpose of the advancement of education is a valid charitable gift it shall be conclusively presumed that the purpose includes and will occasion public benefit.'

13. S 3(4) of the Charities Act, 2009, reads: 'It shall be presumed, unless the contrary is proved, that a gift for the advancement of religion is of public benefit.'

14. *ibid* s 3(5). There is no appeal from the Authority's decision concerning public benefit in the case of the advancement of religion (s 3(9)).

15. The CDI Report can be found on <http://www.cdi.gov.au>.

16. Westminster would also have been aware that the Charities Bill, 2003, in Australia statutorily described charity, but that, presumably adopting the CDI Report, made no reference to the presumption in its s 7 on 'Public Benefit'. The presumption remained.

17. At para 1.36.

18. In s 7(1)(b).

19. The 2003 Bill in Australia had earlier statutorily recognized the distinct character of the advancement of religion. S 12(1) placed prime emphasis on the significance of 'ideas and practices [that] involve belief in the supernatural'.

20. The Charities Act, 2006, at the wish of the Commission, does not define 'public benefit'. See further, n 11 above. Instead, the Commission published in early 2008 a report offering guidance on the meaning of public benefit and how charities might meet the requirement. The final guidance documents, 'The Advancement of Religion for the Public Benefit' and 'Analysis of the law underpinning' the previous document, appeared on the Commission's website in December, 2008. Guidance is provided in separate form for each of poverty relief, religion and education. 'Public school' fee-charging is also the subject of guidance.

doctrines and practices and show that they are beneficial and available to the wider community.²¹ The Commission 'appreciate[s] that some trustees of charities advancing religion may find it difficult to put into words what their charity does that is for the benefit of the public',²² and offers this final guidance in its December, 2008, release:

... we also take non-quantifiable benefits into consideration, provided it is clear what the benefits are. The benefits may or may not be physically experienced. We realise that often in the case of charities whose aims include advancing religion some of the benefits are not tangible and could be potentially difficult to identify. However, this is not to say that a public benefit assessment would only take account of tangible, practical benefits.²³

The *Gilmore v Coats* decision and its reasoning have not been set aside or modified by the 2006 Charities Act, and presumably, from the way in which it writes, the Commission was well aware of this when it composed its draft guidance release.

The responses of the religious charities to the draft 'guidance' were summarized by the Commission,²⁴ and the first two observations on public benefit express exactly the difficulty public benefit creates for purposes that are religious. Whether we are speaking of England and Wales, the Scottish or Northern Ireland legislation, that difficulty is present. The evident fear of the Commission's respondents is that religion itself will be seen as an interloper in the modern multi-cultural state's conception of charity. Many respondents, says the Commission, wished to see 'more positive statements in our draft guidance about the inherently beneficial nature of religion' and 'were concerned about the distinction made [by the Commission] between the religious and the pastoral-secular work of charities advancing religion.

Many commented that it is difficult to make such a distinction'. The Commission continued, 'Some also expressed concerns that charities advancing religion might be required to undertake secular work in order to meet the public benefit requirement, or that only the benefits of secular work might be taken into account in any assessment of public benefit.'

Unfortunately, but perhaps inevitably, the Commission's guidelines do not include any comment on how a purpose activity put forward as providing public benefit will be assessed if an alleged 'spiritual benefit' is not measurable (or 'quantifiable') by the tribunal, or by a court of law on appeal from the Commission. That is, spiritual benefit, though it is central to a religion's beliefs that such a benefit accrues to society, remains an enigmatic factor. The Commission, like the 2006 Charities Act, makes no reference to the statement by the Australian *Explanatory Material* that public benefit may be 'social, mental or spiritual'.

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One must assume from the Commission's carefully chosen words that in England and Wales it is not possible to speak of spiritual benefit, i.e. benefit stemming from belief in, and doctrine based upon, the supernatural. The inference is that, even had the Australian phrase been worded with a conjunctive, i.e., 'social, mental *and* spiritual', that description of the jurisdiction of the Commission or the courts is more extensive than the law in fact permits. This is not for one moment to criticize the Charity

21. The December version, a trifle more emphatic but perhaps less helpful, states that 'all [religious charities] will have to demonstrate that the way in which they carry out their aims is for the public benefit, as do all other charities'.

22. See further in this supplementary guidance, s E 'Public Benefit – Principle 1: There must be an identifiable benefit or benefits', in particular sub-s E1 and E2.

23. Ss D1 and D2, here quoting from D2.

24. 'Public Benefit and the Advancement of Religion: Summary of Consultation Responses'.

Commission of England and Wales.²⁵ Legislation requires that it accept the advancement of religion as being charitable, and at the same time the Commission is left by the case law to reiterate the well-established response that ‘whether a religious organisation’s aims are for the public benefit is a question of judgment based on factual evidence. . . . there must be an assessment of whether the aim is for public benefit.’²⁶ The absence of any measuring yardstick in those words is striking.

The Charity Law Association of England and Wales, in its Working Party ‘Response’ to the Charity Commission’s Consultation paper, *Public Benefit and the Advancement of Religion*, made the unchallengeable observation that ‘if a charity carries out the [case law instances in which religion is recognized as being “advanced”] in a way that can demonstrate that it is for the public benefit, then it is charitable’.²⁷ The Working Party considered that, ‘because of the inherent diversity and intangible nature of much religious belief and practice, it was not easy [for the Commission] to be as clear about public benefit as in other charitable areas’. It added ‘that some religious activity needs to be manifestly harmful before it can be said to be incapable of delivering public benefit’. What was meant by ‘some’ and ‘manifestly harmful’ is not explained.

The conclusion one draws from all the ‘guidelines’ and ‘responses’ is that, the presumption having been abolished, public benefit is not going to include ‘intangible’ benefit that the believer regards as emanating from the practice of his or her belief and faith. The law will continue to look for ‘material, tangible benefit’ in the believer’s activities, benefit inspired by the believer’s belief and faith. All that can be said

further is that, should spiritual benefit be asserted by the claimant to charity status, that may assist the tribunal or court in some way not yet explained to see in a more positive light, shall we say, whatever accompanying measurable benefit may be present.²⁸

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Retaining the presumption of public benefit

Except for the four jurisdictions of the British Isles, the presumption of public benefit remains in force in all the Commonwealth jurisdictions,²⁹ and, where the presumption remains, the question that will now be raised is whether they should retain the presumption. Whatever the current persuasiveness of egalitarian treatment as between charitable purposes, the case for doing nothing is not inconsiderable. So far as the advancement of religion is concerned, the intention behind the abandonment of the presumption in the United Kingdom and Northern Ireland is not apparent and at this stage the long-term effects of that statutory move are unknown.

It has been suggested that a test of public benefit for the furtherance of religion is inappropriate when the leading case authority has underlined that there is no way in which a ‘neutral’ court of the state can determine the existence, or measure the degree, of any spiritual benefit that it is claimed to be conferred upon society. It follows, if the furtherance of

25. The reader of the Commission’s releases will observe that the Commission is always ready to go the extra mile. It says and reiterates that it will give every assistance to charities that do not know how to make their public benefit case.

26. Draft guidance, s E2, 23.

27. Comment on E2, 11–12.

28. M Harding, ‘Trusts for Religious Purposes and the Question of Public Benefit’ (2008) 71 MLR 159, suggests that English and Welsh courts might now be prepared to accept the belief of the testator or *inter vivos* donor that spiritual benefit constitutes public benefit, as have Irish courts, when considering the issue of whether public benefit arises from priests saying masses for the dead. In the opinion of the author of the article, with whom the present writer must agree, that outcome, however, is highly unlikely.

29. New Zealand adopted in 2005 a new Charities Act, but the presumption was untouched. See further, D Brown, ‘The Charities Act 2005 and the Definition of Charitable Purposes’, (2005) 21 NZ Universities L Rev 598. Like the Canadian common law jurisdictions, Singapore and Hong Kong also retain the presumption. See further TY Lin, ‘Equity and Trusts’ in *Halsbury’s Laws of Singapore*, vol 9(2) (National University of Singapore, Butterworth Asia 2003); and L Yan-Kwok Ma, *Equity and Trusts Law in Hong Kong* (LexisNexis 2006) ch 16 ‘Charitable Trusts’.

religion is to remain a head of charity, that a presumption of public benefit at least operates in mitigation of the impact of the public benefit test upon religious organizations. In order to bypass the assertion of the faithful that spiritual benefit be assessed, the courts are not necessarily driven to look for material benefit that the allegedly religious body confers upon the public. It can find that those opposing the existence of charity status have simply failed to persuade the court that the religious body does not qualify.

When there is a balance of evidence supporting a finding of public benefit and also supporting no public benefit in the particular religious purposes, English courts have demonstrated that they can find for the charitable status of the purpose without saying more than that the purpose or purposes are found to be charitable. The opponent of that position is left to conclude that his onus of proof was not discharged. Indeed, the presumption of public benefit may not even be mentioned by the court.³⁰

In *Re Watson*,³¹ a frequently discussed decision in the context of the advancement of religion, reference to the presumption was expressly made by the court in a case where the purpose the testatrix expressed was to publish and disseminate the manuscripts and pamphlets of a certain religious group leader. Expert evidence of a qualified authority on religious matters was to the effect that these writings might confirm the religious opinions of the group of persons with whom the testatrix associated, but otherwise they were of no value. They were unlikely to extend knowledge of the Christian religion. However, the court took notice in effect that there was nothing unlawful, against public policy or harmful to the public in the writings put before the court, and inferred that evaluation of their

worth was essentially a matter of individual perception and inclination.³²

Except for the United Kingdom the presumption is retained everywhere. What then are the merits of the presumption? The present writer would argue that it is better than nothing, as in England and Wales, Scotland and Northern Ireland, but its retention can play the limited role of merely lessening the impact of a continuing problem as to what is meant in the advancement of religion by the conferment upon society of benefit. As long as public benefit is said to mean 'practical utility',³³ and this is interpreted to mean the *Gilmour v Coats* 'material or tangible benefit' to the public, the conundrum remains.

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Abolishing the public benefit requirement for the advancement of religion

Direct abolition is certainly not a new idea. In the case of religion it was advocated as long ago as 1946,³⁴ three years before *Gilmour v Coats*, and a decade or more before Asian immanent or 'realised' religions were being introduced by immigrants into common law jurisdictions. The argument made by Professor Newark is that 'the advancement of religion may be charitable notwithstanding that it is neither of public character nor produces any apparent public benefit'.³⁵ And he sees *Re Caus*³⁶ as the pre-eminent authority for the proposition that the advancement of religion is charitable in itself, that is, 'without seeking how far

30. For further discussion of this case law, see Harding (n 28) 159.

31. [1973] 1 WLR 1472; [1973] 3 All ER 678. The Canada Revenue Agency cites this case: *Notes and Questions for a Discussion on Advancement of Religion as a Charitable Purpose*, 10 October 2008. It was followed in a faith healing and group private prayer case, *Funnell v Stewart*, [1990] 1 WLR 288.

32. See eg *Re Pinion*, [1965] Ch 85; [1964] 1 All ER 890 (Eng CA), where a different position was taken as to the court's ability to consider the worth of furniture, intended to be shown to the public in a museum setting.

33. The draft Charities Bill, 2003, s 7(1)(b), in Australia carried the term, 'practical utility'.

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

35. *ibid* 234.

36. [1934] Ch 162. Not surprisingly, this first instance case had a distinctly lukewarm reception in the later decision of *Gilmour v Coats*.

the advancement of any particular religion [is] for the public benefit'. Religion, he suggests, is at heart concerned with responding to a perceived supernatural existence; its meaning should not be cast wider as, for example, a way of life. The drift of the courts into applying additionally the public benefit test in the case of religion was not appropriate. Recognition of this would have saved the courts all the contortions of thought required for the purpose of finding public benefit, when the benefit essentially asserted is neither provable nor measurable in a court of law.³⁷

With this thought in mind, one reflects on the presumption, both its retention and its rejection. Across the Commonwealth today there is an evident state of contradiction as between jurisdictions, and the case law too suggests that little is gained by its retention. Indeed, the House of Lords in *Gilmore v Coats*, though finding the purpose in issue non-charitable, did not even mention the presumption's existence.

However, this article would argue that the public benefit test with regard to religion should be explicitly abolished. Belief and 'spiritual benefit' are not assessable by the courts, and the essence of this head of charity is spirituality. With abolition every religion that is accepted by the law will be accepted as to its total belief-system. At the same time the courts will retain a necessary measure of control. It is enough for the maintenance of the rule of law if the courts are able to withhold charity status where a religious or spiritual purpose violates the law or public policy, including encouraging hatred of others, or otherwise brings to bear a harmful influence upon society.

In a liberal and democratic environment no one could reasonably challenge that the rule of law must prevail, but the determination as to whether unlawfulness and public policy are in issue would be the manner in which the law would prevent belief systems injuring the state. For this regulation the courts would apply the commonly accepted standards of conduct among society's members. The central question is

what controls the rule of law must have in order that equality before the law is maintained. Independent courts in a democratic society are ideally positioned to balance freedom of religion with the measurable welfare of the citizenry at large. Indeed, the *Re Watson* approach is exactly what this article has in mind as the approach the courts would take.

The Charities Act, 2009,³⁸ of the Republic of Ireland, requires the courts to defer to religion in the following manner, '[a] charitable gift for the purpose of the advancement of religion shall have effect, and the terms upon which it is given shall be construed, in accordance with the laws, canons, ordinances and tenets of the religion concerned'.

This language certainly affords to believers the sense that the state holds in respect the benefits that they believe their faith confers, and in particular their understanding of the inseparable union of faith and 'good works'. Other jurisdictions, minded to recognize spiritual benefit, may also be persuaded to adopt this language. On the other hand, in multi-faith jurisdictions this approach may be thought to bind the courts to accept any religious body's internal rulings, sight unseen until controversy occurs. The response may be that under the Republic's legislation the Irish courts remain enabled to refuse to take note, despite 'laws, canons, ordinances and tenets', of that which is lawful but contrary to public policy; they may accordingly refuse charity status to the gift. However, the 2009 legislative language has yet to be interpreted in that regard.

For a legislature that wishes similarly to recognize religion itself, but do so without the Irish positive, 'shall have effect', expression, it may be a preferable course simply to enact the abolition of the requirement of proving benefit to the public at large.

For a legislature that wishes similarly to recognize religion itself, but do so without the Irish positive, 'shall have effect', expression, it may

37. On the issue of whether a particular purpose or activity within the scope of religion is or is not for the public benefit, being apparently private in character, an interesting point is made. Is the test the courts apply concerned with whether the public or the private element predominates, or is it that, whichever predominates, does the purpose substantially advance religion?

38. S 3(5).

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The possible risk in this abolition approach, as the Irish Republic may have seen, is that the courts may read the legislation as conflating the results produced by the then former quantitative test (public benefit) with the qualitative test (is it a recognizable spiritual purpose?). For instance, the funding of the cloistered nuns of *Gilmour v Coats*, or of a group of totally contemplative ascetics of Buddhist belief, is held to be not a religious activity within the concept of charity because of the deliberate search of the nuns and the ascetics for privacy. That is, privacy is switched from being part of the public benefit test to the qualitative test. The activity just is not 'public'. A charitable purpose is by conception public. One way in which to meet this problem might be to canvass the 'religion' case law throughout the Commonwealth and the United States for those instances where particular facets of spirituality caused decisions to be made, or questions to arise, as to whether the purpose or purposes in issue prevented the alleged 'religion'

from qualifying for 'the advancement of religion'. The proposed legislation would specifically confirm the spiritual and charitable nature of those activities while abolishing public benefit.

Events on the ground in the coming about of increasingly multi-cultural societies are moving fast. The conclusion reached by this article and its predecessor is that an examination is already overdue of whether 'religion' should now be forthrightly approached and understood as being an integrated system in each case of thought and spirituality, a structure primarily rooted in belief in the supernatural and a faith built on that belief. Though taking religion out of the scope of charity is to the writer's mind preferable, abolition of the requirement of public benefit is another way in which recognition of the distinctness of religion can be achieved.³⁹

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39. In DWM Waters, MR Gillen and LD Smith (eds), *Waters' Law of Trusts in Canada*, 3rd edn (Thomson: Carswell 2005) 716, (ch 14 'Charitable trusts'), we suggest that whether public benefit should be abolished is 'questionable'. In this article it is argued that that questionability no longer exists.