RELIGION AND THE LAW OF CHARITIES

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This article attempts an overview of the application of the law of charities to religion. Charity law is currently subject to revision. The advancement of religion has been one of the traditional charitable purposes defined as such in the common law. In this area of law both the courts and the Charity Commission have applied a neutral approach toward all religious denominations. This approach is in principle consistent with the content of the Human Rights Act 1998. Nevertheless the growth of religious pluralism in society and the appearance of new religions and groups generate many doubts about the definition of religion as charity. On the one hand, the courts have offered a theistic definition of religion, which is not applicable to all religious groups. On the other, in every charitable purpose some element of public benefit must be present. For religious purposes the courts assume the presence of a public benefit unless the contrary is shown, but it is not clear that all religious practices are beneficial to the community. The aim of this article is to promote a discussion about the definition of religion as a charitable purpose, to identify the problems connected with the growth of religious pluralism, and to offer some remarks about the impact of the Human Rights Act 1998 on the law of charities.

INTRODUCTION

The advancement of religion is one of the charitable purposes traditionally included within the characteristic sphere of charity law. The present-day configuration of charity law originates from the Statute of Charitable Uses 1601, also known as The Statute of Elizabeth 1601, a regulation that is considered as 'the starting-point of the modern law of charities'.[1] From this regulation onwards, both the courts of justice as well as Parliament have gradually developed this sector of the legal system until endowing it with the characteristics that it currently presents. Its basic regulation is included in the Charities Act 1993, by means of which the Charities Act 1960 was very largely repealed. The Charities Act 1960 had repealed and unified the majority of the legislation from the nineteenth century on charities; one of its most noteworthy novelties was the creation of the Register of Charities, the keeping of which rests with the Charity Commission.

The contents and structure of charity law cannot be easily assimilated to the regulations concerning the voluntary sector or not-for-profit entities

[1] LA Sheridan, GW Keeton, *The Modern Law of Charities*, (3rd edn Cardiff: University College, Cardiff, Press 1983), p 9.

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existing in other countries of the European Union.[2] The terminology (charity law) employed to identify this area of law sounds anachronistic from the continental perspective. Diverse spheres (legal, business and the voluntary sector itself) defend its modification with the aim of not only accommodating charity law to the current circumstances of the welfare state, but also of assimilating it to the rest of the European systems with respect to the voluntary sector and not-for-profit entities that pursue purposes of general (public) interest or benefit to the community.

In fact, after several studies into the need to modernise English law relating to not-for-profit entities and to adapt it to the new social and economic context in which the third sector is developing,[3] a draft Charities Bill was presented to Parliament by the Secretary of State for the Home Department on 20 May 2004. Its scope of application, once passed, will be confined to England and Wales.[4] The two parliamentary houses—the House of Commons and the House of Lords—created a joint committee—the Joint Committee on the Draft Charities Bill—with the aim of subjecting its contents to 'pre-legislative scrutiny' before its introduction to Parliament.[5] The Charities Bill, which differs from the draft Bill in various respects, was introduced into the House of Lords on 20 December 2004. The Charities Bill did not receive Royal Assent before the general election on 5 May 2005. It was reintroduced in the House of Lords on 18 May and published on 19 May, including all the government amendments tabled for Report Stage, which was not reached before the election was called.[6]

The purpose of this article is not to analyse the contents of charity law, or its lines of reform. Its aim is much more specific: to study the inclusion of religion or, more precisely, of the advancement of religion in the categories

[2] A synthesis of the main differences between the British system and continental systems can be found in P Luxton, *The Law of Charities* (Oxford: Oxford University Press 2001), pp 21–22.

[3] Among other documents, see *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (1952) Cmd 8710 (Nathan Report); *Charity Law and Voluntary Organisations* (London: National Council of Social Service, 1976) (Goodman Report); *Efficiency Scrutiny of the Supervision of Charities* (London: HMSO, 1987) (Woodfield Report); *White Paper Charities: A Framework for the Future* CM 694 (London: HMSO, 1989); *Meeting the Challenge of Change: Voluntary Action into the 21st Century. Report of the Commission on the Future of the Voluntary Sector* (London: NCVO, 1996) (Deakin Commission); *For the Public Benefit? A Consultation Document on Charity Law Reform* (London: NCVO, 2001); to *Charity Law: The Case for Reform* (London: Law Society's Law Reform Committee, 2002); and *Charities and Non-for-Profits: A Modern Legal Framework* (London: Home Office, 2003).

[4] Likewise, on 2 June 2004, the Government of Scotland published the Draft Charities and Trustee Investment (Scotland) Bill. The project was subject to public and private consultation until 25 August 2004 with the aim of elaborating a final version of the Bill to be introduced to the Scottish Parliament. The Bill was introduced to Parliament on 15 November 2004, was passed on 20 June 2005, and received the Royal Assent on 14 July 2005.

[5] The Joint Committee published the Report of its Recommendations on 30 September 2004: see http://www.homeoffice.gov.uk/comrace/active/charitylaw/.

[6] See the web site http://www.homeoffice.gov.uk/comrace/active/charitylaw/ (15 September 2005).

of charitable purposes and the problems that this gives rise to. It is not even the aim of this article to offer a panorama of the consideration of religious entities as not-for-profit entities. To do so would require an exhaustive study of the voluntary sector, which is not possible in this article. Moreover, as also occurs in some legal systems in continental Europe, certain types of religious charity boast a special regime under charity law, being excepted from fulfilling certain requisites provided for in the general legislation.[7]

RELIGION AS CHARITY

The term 'charity' is an imprecise term that is used to refer to actions and programmes of a highly diverse kind. Within the sphere of charity law, the courts have stressed that the expression is not used in its popular sense, but rather that it refers to a technical concept – a word of art, of precise and technical meaning – that must be necessarily made precise even though with a meaning or scope that is different to its general or popular use. In this respect, in *National Anti-Vivisection Society v Inland Revenue Commissioners*, the House of Lords has stated:

> The question whether a gift or fund is charitable is a matter for the decision of the court on all the materials before it. 'Charitable' in this context has reference to charitable in the legal sense. Charity indeed is here a word of art, of precise and technical meaning ... not every object which is beneficial to the community can be regarded as charitable. The legal significance is narrower than the popular.[8]

In the current legislation concerning charities, perfect identification of charitable purposes or activities does not exist. Section 96 of the Charities Act 1993 offers a definition of charity that is somewhat tautological and which does not serve to specify precisely the aims of general interests as regards this area of law: 'In this Act, except in so far as the context otherwise requires—'charity' means any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities'. Subsequently, section 97(1) clarifies the scope of the expression 'charitable purposes': 'charitable purposes means purposes which are exclusively charitable according to the law of England and Wales'. This is one of the key respects in which the Charities Bill, if passed, will change the position of current legislation. It offers a precise account of the charitable purposes in Part 1, section 2(2): the prevention or relief of poverty; the advancement of education; the advancement of religion; the advancement of health or the saving of lives; the advancement of citizenship or community development; the advancement of the arts, culture, heritage or science; the advancement of amateur sport; the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony

[7] See CR Barker, 'Religion and Charity Law' (1999) *Juridical Review*, pp 310–313.
[8] *National Anti-Vivisection Society v Inland Revenue Commrs* [1948] AC 31 at 41, [1947] 2 All ER 217 at 219, 220, HL, per Lord Wright.

or equality and diversity; the advancement of environmental protection or improvement; the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage; the advancement of animal welfare; any other purposes within subsection (4).[9]

At present the precise specification of the concept of 'charitable purposes' is not found in statute law; it must therefore be extracted from the common law. The courts have created and developed the technical concept of charity on the basis of the preamble of the Statute of Charitable Uses 1601. This preamble includes a list of activities and purposes of a charitable nature,[10] which has been used by the courts to determine whether a particular institution ought to be included or not in the notion of charity.[11] Specifically, and without precluding the relevance of the preamble,[12] the current classification of charitable purposes is due to the House of Lords in the case of *Commissioners for Special Purposes of the Income Tax v Pemsel*, which is considered the leading case in the specification of the meaning of charity. There, Lord Macnaghten made the following statement:

[9] This is the text of the Charities Bill, as amended in Committee in the House of Lords on 12 July 2005.

[10] The content of the preamble relative to charitable purposes was the following: 'The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes:' see the Statute of Charitable Uses 1601 (43 Eliz 1, c 4). This Act was repealed by the Mortmain and Charitable Uses Act 1888 (51 & 52 Vict, c 42), but the preamble was expressly maintained in force. With the repeal of this Act of 1888 by the Charities Act 1960 (c 58), it is implicit that the preamble is no longer in force, though the fact of the matter is that it never had legal force in its own right: see *Halsbury's Laws of England*, vol 5(2), *Charities*, (4th edn, London: Butterworths 1975), p 9.

[11] Thus, for example, in *Gilmour v Coats*, the House of Lords stated that, from the beginning, the courts have followed the practice of referring to the Charitable Uses Act 1601 to determine the purposes susceptible to being defined as charitable: 'When I speak of the law of charity, I mean that law which the Court of Chancery and its successor, the High Court of Justice, has evolved from a consideration of the Statute 43 Eliz, c 4. It is a commonplace that that statute, as its title implied, was directed not so much to the definition of charity as to the correction of abuses which had grown up in the administration of certain trusts of a charitable nature. But from the beginning it was the practice of the court to refer to the preamble of the statute in order to determine whether or not a purpose was charitable. The objects there enumerated and all other objects which by analogy "are deemed within its spirit" and "intendment" and no other objects are in law charitable. That is settled and familiar law'; *Gilmour v Coats* [1949] AC 426 at 442–443, [1949] 1 All ER 848 at 852, HL, per Lord Simonds.

[12] 'The existing practice of developing the legal meaning of charity by reference to a list of activities considered charitable in Tudor times (the notorious preamble to the Statute of Charitable Uses 1601) is, with reservations, widely accepted as still capable of meeting the needs of the last decade of the 20th Century – not least on account of its flexibility': A Longley, 'Religion as Charity: Some Reflections' in (1992/93) 1, Issue 2, *Charity Law and Practice Review*, p 87.

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.[13]

As regards the advancement of religion as a charitable purpose, the first thing that is striking is that it does not appear as such in the preamble of the Statute of Charitable Uses 1601. The only purpose related to religion included in the preamble is the repair of churches, which is included together with the repair of property such as bridges, havens, causeways, sea banks and highways. This systematic location leads to the conclusion that the repair of places of religious worship was not inserted in the preamble so much due to their nature as holy buildings or buildings devoted to a religious purpose, as to their condition as public buildings open to the public and to the service of the community.

This lack of correspondence between the pronouncement of the House of Lords and the preamble of the Statute of Elizabeth 1601 is merely apparent for a number of reasons. First, the enumeration of general purposes offered in the preamble has never been considered exhaustive by the courts; secondly, the aim of the Statute of Charitable Uses was not that of offering a definition of 'charity', but rather of ending the frequent abuses and fraud committed in this sector of the legal system;[14] and, thirdly, because it would appear that religion was deliberately excluded from the preamble for political reasons: the turbulent situation of the times as regards religious questions advised leaving it outside of legal enumeration. Sir Francis Moore, a Member of Parliament when the law was elaborated, explained it thus in 1601:

> lest the gifts intended to be imployed upon purposes grounded upon charity, might, in change of times (contrary to the mind of the Givers) be confiscated into the King's Treasury. For Religion being variable, according to the pleasure of succeding Princes, that which at one time is held for Orthodox, may at another, be accounted Superstitious and then such lands are confiscate.[15]

[13] *Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] AC 531 at 583, HL, per Lord Macnaghten. Prior to this classification, Sir Samuel Romilly had formulated a practically identical definition in *Morice v Bishop of Durham* (1805) 10 Ves 522 at 531. Specifically, he had identified charity with the following four ends: relief of the indigent; advancement of learning; advancement of religion; advancement of objects of general public utility. On the evident parallelism between the two definitions, see SG Maurice and DB Parker, *Tudor on Charities* (7th edn, London: Sweet & Maxwell 1984), pp 6–7.

[14] As the House of Lords has indicated in the case of *Pemsel*, 'the object of that Statute was merely to provide new machinery for the reformation of abuses in regard to charities': *Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] AC 531 at 581, per Lord Macnaghten.

[15] The quotation is taken from M Blakeney, 'Sequestered Piety and Charity—A Comparative Analysis' in (1981) 2 *Journal of Legal History*, p 210. This same paragraph can also be found in CE Crowther, *Religious Trusts, their Development, Scope and Meaning* (Oxford: George Ronald 1954), p 9; and H Picarda, *The*

However, the lack of a mention of religion in the preamble of the Statute of Charitable Uses 1601 did not have a negative impact on the consideration of religion as a charitable purpose. In 1639, when the Act had been in force for just over a third of a century, the courts understood that a donation destined to sustaining a minister of religion possessed charitable status; despite its not being a charitable use mentioned in the statute, the court understood that it fitted within the equity of the Act.[16] This case, in essence, sums up the historical tradition and shows that the aim of the Statute of Elizabeth was not to offer a concept of charity nor did it radically alter the existing notion in the common law: the configuration of charity law in the period prior to the Reformation was closely linked to Canon Law by means of the category of pious causes, which were the main instrument for making gifts for beneficial or charitable purposes.[17]

Throughout the entire historical development of charity law, the advancement of religion has always been one of the purposes of general (public) interest contemplated in that law. Lord Reid states it in the following way in *Gilmour v Coats*: 'The law of England has always shown favour to gifts for religious purposes'.[18] When in 1891 Lord Macnaghten, in the *Pemsel* case, included religion among the four purposes characteristic of charity law, he was doing no more than stating a fully consolidated fact in the principles of common law. Likewise, the advancement of religion had already been included in the list of charitable purposes in the definition of 'charity' offered by Sir Samuel Romilly in 1805 in the case of *Morice v Bishop of Durham*.

The consideration of religion as a charitable purpose presupposes or entails a positive evaluation of the religious phenomenon. When an institution receives charitable status as a result of being devoted to the advancement of religion, not only is the fact that religious denominations carry out beneficial or charitable activities evaluated; their dedication to typically religious acts—worship, proselytism or religious education—is also taken into account.

This positive evaluation of religion appears, in fact, clearly included in the case law. In *Bowman v Secular Society Ltd*, it is stated 'trusts for

Law and Practice Relating to Charities (London: Butterworths 1977), p 54. The three authors reject the position of FH Newark, according to which religion was excluded from the preamble due to the actions mentioned therein being of a different nature: see FH Newark, 'Public Benefit and Religious Trusts' in (1946) 62 LQR 234. However, JC Brady, 'Some Problems Touching the Nature of Bequests for Masses in Northern Ireland' in (1968) 19 *Northern Ireland Legal Quarterly*, p 365, is found to be in agreement with Newark's thesis.

[16] 'Though this is no Charitable Use mentioned in the Statute; yet ... it is within the Equity of the Act': *Pember v Kington Inhabitants* (1639) Toth 34. See also G Jones, *History of the Law of Charity, 1532–1827* (London: Cambridge University Press 1969), pp 34–35.

[17] See B Tierney, *Medieval Poor Law: A Sketch of Canonical Theory and its Application in England* (Berkeley: California University Press 1959).

[18] *Gilmour v Coats* [1949] AC 426 at 458–459, [1949] 1 All ER 848 at 862, HL, per Lord Reid.

the purposes of religion have always been recognised in equity as good charitable trusts'.[19] In *Gilmour v Coats*, Lord Reid points out that, within the framework of charity law, the law shows no preference for any particular religion, but presupposes that it is good for man to have and to practise a religion.[20] Finally, although the relation might be expanded on, in *Neville Estates Ltd v Madden* it is pointed out that the law remains neutral with respect to the different religions, but it takes for granted that it is better to have any religious belief than to have none.[21]

The positive evaluation of religion makes complete sense when the religious phenomenon exercises a decisive influence over all spheres of society and there exists an indisputable predominance of a particular religious belief (as occurred in the Middle Ages with the Catholic Church) or when there exists a national church or a church established by law, along with the rejection or prohibition of the remaining religious denominations (as was the case of the Church of England in the period subsequent to the rupture with Rome). In any of these situations, in which entanglement tends to arise between the secular sphere of the state and the religious sphere, and the state is openly committed to a particular belief to the detriment of the rest, it is perfectly logical for the advancement of religion to be defined as a purpose of public interest and for a positive conception of the religious phenomenon to exist.

However, when a separation exists between the religious sphere and the state or secular sphere and the law does not show preference for any religion in particular, there exist many doubts as to whether the advancement of religion, in itself, constitutes a purpose of public utility or general interest. This is the present-day situation of English law, in which the principle of neutrality of public authorities with respect to the different religious faiths is fully consolidated and where, apart from the special regime of the Church of England as a product of the establishment, there exists a clear-cut distinction between so-called ecclesiastical jurisdiction and state jurisdiction.[22]

Within this specific context, some authors have openly advocated depriving the advancement of religion of the characteristic benefits of charity law,

[19] *Bowman v Secular Society Ltd* [1917] AC 406 at 448, HL, per Lord Parker of Waddington.

[20] His exact words are: 'the law of England has always shown favour to gifts for religious purposes. It does not now in this matter prefer one religion to another. It assumes that it is good for man to have and to practise a religion': *Gilmour v Coats* [1949] AC 426 at 458–459, [1949] 1 All ER 848 at 862.

[21] The context of this statement and its exact content is the following: 'The Court is, I think, entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens. *As between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none*': *Neville Estates Ltd v Madden* [1962] Ch 832 at 853, [1961] 3 All ER 769 at 781, per Cross J (emphasis added).

[22] See M Hill, 'Church Autonomy in the United Kingdom' in G Robbers (ed), *Church Autonomy* (Frankfurt am Main: Peter Lang 2001), pp 267–283.

either because they understand that the law lacks the means to evaluate the benefits that religion affords society, or because they consider that the principle of neutrality prevents the state from carrying out an evaluation of the different religious faiths and practices.[23] Other academic scholars recognise the difficulties that the inclusion of the advancement of religion causes in the sphere of charity law, but they uphold that religion produces indisputable benefits for society as a whole. For these authors, it would suffice to create a special regulation for the religious social factor that takes into account its peculiarities while maintaining the current advantages.[24]

The truth of the matter is that the advancement of religion is maintained in the list of charitable purposes in the draft Charities Bill presented to Parliament on 20 May 2004, and in neither of the study documents that preceded the draft Bill (*Private Action, Public Benefit*, elaborated at the request of the government, and *Charities and Not-for-Profit: A Modern Legal Framework*, which presents the government's response to the previous document), in contrast to what had happened with previous documents, was there any debate as regards the exclusion of religion from the list of purposes characteristic of charity law.[25] Also, the Charities Bill introduced into the House of Lords on 20 December 2004, and reintroduced in Parliament on 18 May after the general election, maintains the advancement of religion in the concept of charity offered in Part 1, section 2.[26]

THE DEFINITION OF 'RELIGION' IN THE LAW OF CHARITIES

The fact that the advancement of religion is considered a charitable purpose obliges the Administration (the Charity Commission) and the courts to specify what is understood by 'religion'. It is neither the task of the courts nor the Charity Commission to define the term 'religion' in the general sense or from a theological, philosophical or sociological point of view. Their function is to specify the concept in exclusively legal terms and, more precisely, in terms of a specific sector of the legal system, that of charity law.[27]

[23] See PW Edge, 'Charitable Status for the Advancement of Religion: an Abolitionist's View' in (1995/96) 3, Issue 1, *Charity Law and Practice Review*, pp 29–35. His stance has been criticised by M King, an author in favour of the inclusion of religion in the legal framework of charities: see 'Charitable Status for the Advancement of Religion—The Proponent's View' in (1995/96) 3, Issue 3, *Charity Law and Practice Review*, pp 179–182.

[24] See CR Barker, 'Religion and Charity Law', (1999) *Juridical Review*, pp 303–315.

[25] See A Dunn and CA Riley, 'Supporting the Not-for-Profit Sector: The Government's Review of Charitable and Social Enterprise' (2004) 67 (4) *Modern Law Review*, pp 642–643. However, in a prior document of 1989, the Government White Paper 'Charities: A Framework for the Future', whether to maintain religion among the characteristic purposes of charity law or not was expressly considered, an affirmative conclusion being reached: see A Longley, 'Religion as Charity: Some Reflections', in (1992/93) 1, Issue 2, *Charity Law and Practice Review,* pp 87–93.

[26] See http://www.homeoffice.gov.uk/comrace/active/charitylaw/.

[27] An example of the definition of 'religion' on the part of the Charity Commission may be found in the Decision of the Charity Commissioners for England and

The legal definition of 'religion' constitutes one of the topics of Church-State relations. From the moment in which state legislation takes into account the religious phenomenon so as to award it a particular regulation, it is necessary to specify what is understood in legal terms by 'religion'.[28] This precise specification cannot be made in an abstract way, with a general character for the whole legal system, but must be effected case by case on the basis of the legal context within which religion operates. This context determines, in a decisive way, the legal meaning of the term 'religion'.

The above statement is perfectly reflected in English charity law. Thus, in the period immediately following the Statute of Charitable Uses 1601, the definition of 'religion' is found to be tremendously simple, since religion is understood solely as the official Church, established by law: the Church of England. In a legal situation in which there exists one single religion that is recognised and tolerated by the state, the legal specification of the concept arouses no problem. Within the framework of charity law, advancement of religion is understood as the advancement of the Church of England, of its purposes and activities. The remaining religious denominations were excluded from charity law. The legal acts by means of which possessions and goods were endowed for the advancement of their purposes were not only prohibited, but occasionally produced a perverse effect: that possessions and goods were assigned to promoting the activities and purposes of the Church of England by the application of the *cy-près* doctrine, by virtue of which the charitable purposes established by the settlor are fixed or substituted by other, distinct purposes. It is in this period that the category of 'superstitious uses' arises and develops, which referred to those donations or endowments whose purpose was to propagate the practices of a religion that was not legally tolerated.[29] The legal acts by means of which possessions were assigned to practices considered superstitious were considered illegal and criminal penalties existed against their authors.

This situation changes slightly with the Toleration Act 1688, by virtue of which dissident Protestants are exempted from the penal regulations

Wales made on 17 November 1999: Application for Registration as a Charity by the Church of Scientology (England and Wales: see http://www.charity-commission.gov.uk).

[28] For English law, see A Bradney, *Religious, Rights and Laws* (Leicester: Leicester University Press 1993), pp 124–126; CG Hall, 'Aggiornamento: Reflections Upon the Contemporary Legal Concept of Religion' in (1996) 27 *Cambrian Law Review*, pp 7–32; PW Edge, *Legal Responses to Religious Difference* (Hague/London: Kluwer Law International 2001), pp 5–16.

[29] The institution or act by means of which possessions, properties or goods were assigned to 'superstitious uses' used to be defined by scholars, according to Boyle, as 'one which has for its object the propagation of the rites of a religion not tolerated by the law'. The definition, as scholars point out, is not exhaustive but serves as a working definition: see CE Crowther, *Religious Trusts, their Development, Scope and Meaning* (Oxford: George Ronald 1954), p 40; H Picarda, *The Law and Practice Relating to Charities* (London: Butterworths 1977), p 76. On this legal category, see CE Crowther *op cit* pp 40–52; T Bourchier-Chilcott, 'Superstitious Uses' in (1920) 36 LQR 152–157; JE Hogg, 'Roman Catholic Bequests for Masses: The House of Lords' Decision' in (1920) 36 LQR 53–57.

that sanctioned the assignment of goods to purposes characteristic of different denominations to the Church of England and charitable status is granted to the entities that pursue the characteristic purposes of religious denominations that benefit from the Toleration Act. This situation of tolerance undergoes a considerable advance in the nineteenth century with diverse regulations, among which may be highlighted the Unitarian Relief Act 1813 (the Doctrine of the Trinity Act 1813), the Roman Catholic Relief Act 1829, the Roman Catholic Charities Act 1832 and the Religious Disabilities Act 1846 (applicable to the Jewish religion).[30] Midway through the nineteenth century, restrictions only existed in the case of Catholic religious orders. With the case of *Bourne v Keane*, settled in 1919,[31] in which a legacy in favour of a Catholic religious order was admitted as valid and granted charitable status, and with the Roman Catholic Relief Act 1926, subsequent to which male Catholic religious orders stopped being illegal, an end was put to such restrictions and the category of 'superstitious uses' passed into the annals of history, definitively disappearing from the English legal panorama.

These legislative changes, by means of which the concept of religion managed by charity law was progressively expanded, were immediately reflected in the common law. In the second half of the nineteenth century, the principle of the neutrality of the state with respect to the different religious denominations was finally established in the case law. The key case is *Thornton v Howe*, decided by the Court of Chancery in 1862.[32] In this decision, a trust whose aim was the publication and dissemination of the works of Joanna Southcott was considered to possess charitable status. Sir John Romilly MR refers to her as a foolish, ignorant woman, of an enthusiastic turn of mind, who had long wished to become an instrument in the hands of God to promote great good in the earth. Nevertheless, he considers that the trust devoted to propagating her writings favours the advancement of religion. He categorically states:

> the Court of Chancery makes no distinction between one sort of religion and another sort of religion .... Neither does the Court in this respect make any distinction between one sect and another.[33]

The principle of neutrality of the courts in religious matters was consolidated by reason of this decision.[34] The impartiality of the state

[30] For a description of this historical evolution, see the decision in *Bowman v Secular Society Ltd* [1917] AC 406 at 448–450, HL, per Lord Parker of Waddington. A much more in-depth and detailed analysis can be found in G Jones, *History of the Law of Charity 1532–1827* (London: Cambridge University Press 1969), *passim*.
[31] *Bourne v Keane* [1919] AC 815, HL.
[32] *Thornton v Howe* (1862), 31 Beav 14.
[33] *Thornton v Howe* (1862), 31 Beav 14.
[34] See, among others, *Gilmour v Coats* [1949] AC 426 at 459, [1949] 1 All ER 848 at 862, HL, per Lord Reid; *Neville Estates Ltd. v Madden*, [1962] Ch 832 at 853, [1961] 3 All ER 769 at 781, per Cross J; *Re Watson, decd* [1973] 3 All ER 678 at 688, [1973] 1 WLR 1472 at 1482, per Plowman J; *Varsani v Jesani*, [1999] Ch 219 at 235, [1998] 3 All ER 273 at 285, CA, per Morritt LJ. The above statements refer to charity law;

with respect to the diverse religious denominations meant—and presently means—a radical change in the approach of charity law with respect to the approaches of the period immediately following the Reformation. At that time, as already mentioned, the definition of 'religion' created no problem whatsoever: advancement of religion was understood as the promotion of the Church of England. Nowadays, advancement of religion is understood, in principle, as the promotion of any religion without exception. The only limit, which is to be found in *Thornton v Howe*, is that the institution devoted to religious purposes does not embrace practices or activities adverse to the very foundations of all religion, or subversive of all morality.[35] The limit combines the respect for public order with the purpose of the charity law for religious purposes: not only is religion positively evaluated in English law, but the advancement of religion is not possible by means of practices that are adverse to all kinds or manifestations of religion.

The principle of neutrality means that what is understood by religion must be precisely defined with the aim of delimiting the institutions devoted to religious purposes and activities that may benefit from charitable status. This need made itself felt early on in jurisprudence. In *Bowman v Secular Society Ltd* Lord Parker of Waddington states:

> Trusts for the purposes of religion have always been recognised in equity as good charitable trusts, but so far as I am aware there is no express authority dealing with the question what constitutes religion for the purposes of this rule.[36]

Essentially, what this statement highlights is something that has already been discussed reiteratively in the preceding paragraphs: in situations of intolerance – one single religion is accepted with the exclusion of any other – it is not necessary to define what is understood by 'religion', but once the impartiality of the public authorities with respect to religion has been established, the concept must be made precise. Nonetheless, more than half a century was to pass from *Bowman v Secular Society Ltd* until the courts directly addressed the definition of 'religion' within the framework of charity law.

The leading case on this question is *Re South Place Ethical Society*.[37] An association called South Place Ethical Society applied for recognition as having charitable status due to being devoted to the advancement of religion. Its aims appeared listed in item 2 of its statutes in these terms: 'The objects of the society are the study and dissemination of ethical principles and the cultivation of a rational religious sentiment'. Dillon J maintains

in other sectors of the legal system, such as family law, the neutrality of the courts with respect to the different religions took much more time to become consolidated: see C Hamilton, *Family, Law and Religion* (London: Sweet & Maxwell 1995), pp 178–214.

[35] *Thornton v Howe* (1862), 31 Beav 14, per Sir John Romilly MR.

[36] *Bowman v Secular Society Ltd* [1917] AC 406 at 448, HL, per Lord Parker of Waddington.

[37] *Re South Place Ethical Society* [1980] 1 WLR 1565.

that the said association lacks a religious nature and denies it charitable status due to not being devoted to the advancement of religion:

> Religion, as I see it, is concerned with man's relations with God, and ethics are concerned with man's relations with man ... It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god.[38]

As may be appreciated, the court defends a theistic concept of religion – man's relation with God – and attributes it two essential attributes: faith in a god and worship of that god. Dillon J offers a clear, though doubtful response to possible critics:

> It is said that religion cannot be necessarily theist or dependent on belief in a god, a supernatural or supreme being, because Buddhism does not have any such belief ... It may be that the answer in respect of Buddhism is to treat it as an exception, as Lord Denning MR did in his judgment in *R v Registrar General, Ex parte Segerdal* [1970] 2 QB 697, 707.[39]

As is well known, the case of *R v Registrar General, Ex parte Segerdal*,[40] quoted by Dillon J, constitutes one of the key pronouncements with respect to the legal concept of religion in English law. Although *Segerdal* does not deal with charity law, its authority with respect to the legal concept of religion is recognised in this area of law.[41] In this decision, the Court of Appeal deals with the application formulated by the Church of Scientology to register a chapel as a place of worship in accordance with the provisions of the Places of Worship Registration Act 1855. The court concludes that premises devoted to holding meetings on the part of followers of the Church of Scientology cannot be considered a place of religious worship and, consequently, denies the application for registration on the register. Winn J bases his judgment on the absence of practices of worship in that denomination and expressly refuses to address the definition of 'religion', recognising the difficulty of the task:

[38] *Re South Place Ethical Society* [1980] 1 WLR 1565 at 1571–1572. For the definition of 'worship', Dillon J cites *R v Registrar General, Ex parte Segerdal* [1970] 2 QB 697, [1970] 3 All ER 886, CA: 'In *R. v Registrar General, Ex parte Segerdal* ... which was concerned with the so-called Church of Scientology, Buckley LJ said, at p 709 [and at p 892]: "Worship I take to be something which must have some at least of the following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession"'.

[39] *Re South Place Ethical Society* [1980] 1 WLR 1565 at 1573.

[40] *R v Registrar General, Ex parte Segerdal* [1970] 2 QB 697, [1970] 3 All ER 886, CA.

[41] See the reference made to this case by the High Court in *Re South Place Ethical Society*; it is also used by the Charity Commission in its decisions: see the Decision of the Charity Commissioners for England and Wales made on 17 November 1999: Application for Registration as a Charity by the Church of Scientology (England and Wales) (see note 27 above).

> I am not concerned to dwell on the question which necessarily was discussed in the course of this appeal, whether Scientology is or is not a religion. The answer to that specific question must depend so directly on the meaning that one gives, for the particular purpose and in the particular context, to the chameleon word 'religion' or 'religious'.[42]

Lord Denning MR, however, directly addresses the theme of the legal meaning of 'religion':

> We have had much discussion on the meaning of the word 'religion' and of the word 'worship', taken separately, but I think that we should take the combined phrase, 'place of meeting for religious worship' as used in the Act of 1855. It connotes to my mind a place of which the principal use is as a place where people come together as a congregation or assembly to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship. But, apart from exceptional cases of that kind, it seems to me the governing idea behind the words 'place of meeting for religious worship' is that it should be a place for the worship of God ... Turning to the creed of the Church of Scientology, I must say that it seems to me to be more a *philosophy* of the existence of man or of life, rather than a *religion*. Religious worship means reverence or veneration of God or of a supreme being. I do not find any such reverence or veneration in the creed of this church.[43]

The concept of religion elaborated in the common law must be qualified, without any doubt, as restrictive. It presents a theistic conception and a number of essential elements—faith and worship—which are characteristic of traditional Western religions and are defined in accordance with the postulates of these religions. The clearest proof of this is that Buddhism, whose religious nature cannot possibly be disputed, is treated expressly as an exception. This approach to the notion of religion clearly contrasts with that followed by the United States Supreme Court or by the High Court of Australia, who manage much wider-ranging definitions.[44]

[42] *R v Registrar General, Ex parte Segerdal* [1970] 2 QB 697 at 708, [1970] 3 All ER 886 at 890, CA.

[43] *R v Registrar General, Ex parte Segerdal* [1970] 2 QB 697 at 707, [1970] 3 All ER 886 at 889–890, CA.

[44] In one of the main cases of the United States Supreme Court on the definition of 'religion', *United States v Seeger* 380 US 163 (1965), those beliefs that in the life of their holders have an equivalent position to that of religion in the life of the faithful are considered as being equivalent to religious beliefs: 'belief in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption': 380 US 163 at 165–166 (1965). In the case of the High Court of Australia, the leading case in this matter is *Church of the New Faith v Commissioner of Payroll Tax* (1982-1983) 154 CLR 120, in which charitable status is granted to the Church of Scientology and its religious nature is acknowledged. For a brief summary of the doctrine of both tribunals on this

The critics of the restrictive notion of religion elaborated in the common law,[45] whose *raison d'être* is beyond dispute, must be relativised in order to avoid creating an erroneous conclusion: its real effects have, in fact, been very small. Here appears, with the utmost rigour, the maxim by virtue of which it is not possible to appreciate the scope and significance of a particular legal regulation outside of its practical application. Institutions and entities linked to religious denominations such as Unitarianism, Spiritualism, Buddhism, Hinduism, Islamic entities, the Exclusive Brethren, the Unification Church (Moonies), Jainism or Baha'í have been entered on the Register of Charities and benefit from charitable status.[46] On this question, the Charity Commission has adopted a constructive stance, which has taken the principle of neutrality of the public authorities with respect to the different religious faiths to its ultimate consequences. This principle has modulated the impact of the notion of religion elaborated in the common law to extremes that have made it practically inoperative or irrelevant.

One of the few cases in which the Charity Commissioners have rigorously applied the theistic notion of religion is the application for charitable status on the part of the Church of Scientology.[47] In the decision of the Charity Commissioners for England and Wales made on 17 November 1999, the Charity Commission denied the application for registration on the Register of Charities made by the Church. Throughout the decision, the Charity Commission makes a rigorous and complete exposition of the common law concerning charities devoted to the advancement of religion. Moreover, the Commission analyses this area of law in the light of the principles of religious freedom and of non-discrimination included in Articles 9 and 14 of the European Convention on Human Rights of 1950. The conclusion that it reaches is that the Church of Scientology does not have the character of a religion in English charity law, since its practices do not satisfy the requisites to be defined as practices of worship in the light of the principles consolidated in the common law; and worship – according to the courts – constitutes an essential element of all religions. The degree of detail and depth with which the Commission expounds the principles of common law and analyses the characteristics and contents of the practices of the Church of Scientology highlight the difficulty of the case and make one suspect that the will exists to deny it the status of an entity whose purposes are of general interest or beneficial to the community because of

theme, see W Sadurski, 'On Legal Definitions of Religion' in (1989) 63 *Australian Law Journal*, pp 834–843.

[45] See A Bradney, *Religious, Rights and Laws* (Leicester: Leicester University Press 1993), pp 124–126; F Quint and T Spring, 'Religion, Charity Law and Human Rights' in (1999) 5, Issue 3, *Charity Law and Practice Review*, pp 172–186; K Bromley, 'The Definition of Religion in Charity Law in the Age of Fundamental Human Rights' in (2000) 3, Issue 1, p 1 and following; PW Edge and JM Loughrey, 'Religious Charities and the Juridification of the Charity Commission' in (2001) 21 *Legal Studies*, pp 43–47, 51–64.

[46] See F Quint and T Spring, 'Religion, Charity Law and Human Rights', *op cit* p 162.

[47] Another case is that relative to paganism, which the Charity Commission has denied charitable status: see PW Edge, *Legal Responses to Religious Difference* (Hague/London: Kluwer Law International 2001), pp 147, 351.

its problematic track record in the English legal system.[48] The application of these principles to some of the denominations cited in the previous paragraph would lead to their exclusion from the Register of Charities. This fact suggests the conclusion that the key element in this particular case has not been the restrictive nature of the definition of religion, but rather the conflictive background of the Church of Scientology. In other words, and no matter how paradoxical it might seem, the general definition of religion has served to justify a singular practice (decision) without the backing of precedent administrative praxis.[49]

The Charities Bill introduced into the House of Lords on 20 December 2004 (and reintroduced in Parliament on 18 May 2005) explains the meaning of 'religion' in the context of charitable purposes. According to section 2(3), Part 1, 'religion' includes: 'a religion which involves belief in more than one god', and 'religion which does not involve belief in a god'. The Bill adopts a broad definition of 'religion' which includes theistic, polytheistic, and non-theistic religions.

PUBLIC BENEFIT IN THE ADVANCEMENT OF RELIGION

Advancement of Religion

As mentioned above, a positive evaluation of religion exists in charity law. But it should be noted that this is not an evaluation of religion in itself. The courts have specified that institutions and legal acts of a religious nature will be considered charities only if their purpose is that of the *advancement of religion*. The determination of the scope of this expression is to be found in diverse cases decided by courts.[50]

The first case in which a precise notion of 'advancement of religion' is offered is *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Commissioners.*[51] In his pronouncement, Lord Hanworth MR points out:

> The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it.[52]

[48] The following statements formulated in 1993 are highly significant: 'Examples of religions which might fail to meet the morality test are rare. However, one possible instance is Scientology. Academic commentators are all agreed in thinking that Scientology could not attain a charitable status': A Bradney, *Religious, Rights and Laws*, *op cit* p 122. On cases of jurisprudence relative to the Church of Scientology in England, see PW Edge, *Legal Responses to Religious Difference*, *op cit* pp 405–422.

[49] In a similar sense, see PW Edge and JM Loughrey, 'Religious Charities and the Juridification of the Charity Commission', *op cit* pp 44–47.

[50] Our exposition of the relevant case law is limited to the basic cases on this theme, identified as such by academic scholars: see H Picarda, *The Law and Practice Relating to Charities* (London: Butterworths 1977), pp 57–58; PW Edge, *Legal Responses to Religious Difference*, *op cit* pp 151–152; P Luxton, *The Law of Charities* (Oxford: Oxford University Press 2001), pp 129–130.

[51] *Keren Kayemeth Le Jisroel Ltd v Inland Revenue Comrs* [1931] 2 KB 465, CA.

[52] [1931] 2 KB 465 at 477, CA.

A more detailed concept is to be found in *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council*:

> To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.[53]

Finally, a third specification of the meaning of 'advancement of religion' can be found in *National Deposit Friendly Society Trustees v Skegness Urban District Council*, in which Lord Denning makes the following considerations:

> The one thing that distinguishes charitable objects from all others is that they are for the good of the community, that is, for public rather than for private benefit ... The 'advancement of religion' connotes the promotion of religion by spiritual teaching or by pastoral or missionary work among others outside one's circle. When a man says his prayers in the privacy of his bedroom, he may truly be said to be concerned with religion but not with the 'advancement of religion'.[54]

These statements by Lord Denning lead us directly to the requirement of 'public benefit', which constitutes an essential requisite that must be fulfilled by any institution that pursues charitable purposes and aims to benefit from the advantages of charitable status.

Public Benefit

In order for a legal entity or institution to obtain charitable status, it must fulfil two basic requisites: (1) its purposes and activities should fall within one of the four 'heads' of charity enunciated in the *Pemsel* case; (2) its purposes and activities should afford public benefit for the community. Both requisites must jointly arise. The latter requisite acts as a determinant adjective of the former, in the sense that not every institution that pursues potentially charitable purposes – the relief of poverty; the advancement of education; trusts for the advancement of religion; and other purposes beneficial to the community not falling under any of the preceding heads – has the right to the characteristic advantages of charities. To have this right, its activities and purposes must necessarily result in public benefit.[55] This is clearly reflected thus in *Re Compton*:

[53] *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 3 All ER 281 at 285, [1957] 1 WLR 1080 at 1090, DC, per Donovan J.

[54] *National Deposit Friendly Society Trustees v Skegness Urban District Council* [1959] AC 293 at 321–322, [1958] 2 All ER 601 at 613–614, HL.

[55] The statements of academic scholars in this respect are clear; see H Picarda, *The Law and Practice Relating to Charities*, *op cit* p 16; LA Sheridan and GW Keeton, *The Modern Law of Charities* (3rd edn Cardiff: University College Cardiff Press 1983), p 32; SG Maurice and DB Parker, *Tudor on Charities* (7th edn London: Sweet & Maxwell 1984), p 4.

> The fundamental requirement of a charitable gift is, in my opinion, correctly stated in the following passage in *Tudor on Charities*, 5th edition, p 11: 'In the first place it may be laid down as a universal rule that the law recognizes no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community'. Authority for this proposition is to be found in numerous cases .... The proposition is true of all charitable gifts and is not confined to the fourth class in Lord Macnaghten's well-known statement in *Pemsel's* case. It does not, of course, mean that every gift that tends to the public benefit is necessarily charitable. What it does mean is that no gift can be charitable in the legal sense unless it is of the necessary public character.[56]

The requirement of benefit for the community is problematic, as is that of the identification of charitable purposes. The expression 'public benefit' refers to an indeterminate legal concept: it lacks definition in statute law and its determination corresponds to the courts on the basis of the circumstances of the particular case in point. For this reason, its application does not follow the same parameters or guidelines in the four charitable heads enunciated in the *Pemsel* case.[57] In the case of advancement of religion – and the same occurs with the relief of poverty and the advancement of education – it is assumed that religion is beneficial for the community unless the contrary is shown.[58] However, it must be the case – capable of proof in the juridical sense – that this benefit for the community does effectively exist in each particular case in point.[59] The case law in relation to this point is enormous and the courts have, on occasions, acted on the basis of not very coherent criteria.[60] Although it is not easy to establish general principles in this matter, it may be said that the existence

[56] *Re Compton* [1945] Ch 123 at 128–129, [1945] 1 All ER 198 at 200–201, CA , per Lord Greene, MR.

[57] 'It is a trite saying that the law is life, not logic. But it is, I think, conspicuously true of the law of charity that it has been built up not logically but empirically. It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, *the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty*': *Gilmour v Coats* [1949] AC 426 at 448–449, [1949] 1 All ER 848 at 856, HL, per Lord Simonds (emphasis added).

[58] 'Where the purposes in question are of a religious nature – and, in my opinion, they clearly are here – then the court assumes a public benefit unless the contrary is shown': *Re Watson decd* [1973] 3 All ER 678 at 688, [1973] 1 WLR 1472 at 1482, per Plowman J.

[59] *Gilmour v Coats* [1949] AC 426, [1949] 1 All ER 848, HL; *Re Hetherington decd* [1990] Ch 1, [1989] 2 All ER 129. See CH Sherrin, 'Public Benefit in Trusts for the Advancement of Religion' in (1990) 32 *Malaya Law Review*, pp 114–125.

[60] See H Picarda, *The Law and Practice Relating to Charities*, *op cit* pp 64–76; LA Sheridan and GW Keeton, *The Modern Law of Charities*, *op cit* pp 72–90; PW Edge, *Legal Responses to Religious Difference* (Hague/London: Kluwer Law International 2001), pp 154–158; P Luxton, *The Law of Charities, op cit* pp 130–132.

of public benefit is appreciated when the community has the possibility of participating, either directly or indirectly, in the religious activities or undertakings that are characteristic of the charitable institution. How much of this participation is real does not matter, nor the concrete impact of the religious undertaking on society: what is determinant is the faculty of the members of the community to take part in the functions or acts of a religious character.[61]

In the Charities Bill introduced into the House of Lords on 20 December 2004, and reintroduced in Parliament on 18 May 2005, the presumption that certain purposes – including the advancement of religion – produce a public benefit for the community was excluded: '(1) This section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose. (2) In determining whether that requirement is satisfied in relation to any such purpose, *it is not to be presumed that a purpose of a particular description is for the public benefit*' (Part 1, section 3). Should this draft Bill be passed, it will have to be demonstrated in each particular case that a certain trust or institution produces a public benefit.[62]

THE HUMAN RIGHTS ACT 1998

The passing of the Human Rights Act 1998 has meant the review of different areas of law. Since its entry into force, the domestic courts, in deciding cases before them, must take into account decisions made by the European Court of Human Rights (section 2). Legislation, in turn, has to be interpreted and applied in a way which is compatible with the rights contained in the European Convention on Human Rights (section 3). The impact of the Human Rights Act 1998 on the system of Church-State relations has been analysed by several authors;[63] the same has occurred

[61] 'For purposes falling within the advancement of religion head, the issue of public benefit looks at a cross-section of society in terms of access to participation. Here public benefit is served where public access is permitted (irrespective of whether that access is used in practice) or where the charity provides for or maintains premises or services to which there is public admission, even if only a handful of the public takes advantage of the admission': A Dunn and CA Riley, 'Supporting the Not-for-Profit Sector: The Government's Review of Charitable and Social Enterprise' in (2004) 67(4) *Modern Law Review*, p 640 (notes omitted).

[62] For the Draft Charities Bill presented to Parliament on 20 May 2004, see A Dunn and CA Riley, 'Supporting the Not-for-Profit Sector: The Government's Review of Charitable and Social Enterprise', *op cit* pp 639-643.

[63] See, among others, P Cumper, 'Religious Organisations and the Human Rights Act 1998' in PW Edge and G Harvey, *Law and Religion in Contemporary Society* (Aldershot: Ashgate 2000), pp 69–90; M Hill, 'The Impact for the Church of England of the Human Rights Act 1998' in (2000) 5 Ecc LJ 432–433; J Rivers, 'From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act' in RJ Ahdar, *Law and Religion* (Aldershot: Ashgate 2000), pp 133–161; I Leigh, 'Freedom of Religion: Public/Private, Rights/Wrongs' in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff: University of Wales Press 2002), pp 128–158.

with charity law, and in particular with the inclusion of religion in the list of charitable purposes.[64]

Undoubtedly, the Charity Commissioners have the character of public authority for the purposes of section 6 of the Human Rights Act 1998.[65] Therefore, in their decisions relative to applications for registration on the Register of Charities, they must act with full respect for the rights included in the European Convention on Human Rights and the decisions made at Strasbourg. The Charity Commissioners themselves assumed this as being so before the entry into force of the Human Rights Act 1998 in the Decision made on 17 November 1999, on the application for registration by the Church of Scientology (England and Wales):

> The Commissioners concluded that as a matter of prudence, good practice and indirect legal obligation any discretion which the Commissioners may have in applying the existing law should be exercised in accordance with and not contrary to the principles of the European Convention on Human Rights where those principles might be relevant to the registration of charities.

The human rights included in the European Convention on Human Rights that have a major impact on the consideration of the advancement of religion as a charitable purpose are religious freedom (Article 9 of the Convention) and non-discrimination (Article 14 of the Convention).

The impact of the right to religious freedom in the sphere of charity law, taking this right alone, is minimal. The religious freedom of the members of a religious group, and of the actual group itself, is not affected by the fact that the denomination to which they belong is recognised or not as possessing charitable status. The carrying out of religious practices and manifestations is not subordinate to an entity enjoying the benefits of charity law.

[64] See CR Barker, 'Religion and Charity Law' in (1999) *Juridical Review*, pp 309–310; F Quint and T Spring, 'Religion, Charity Law and Human Rights' in (1999) 5, Issue 3, *Charity Law and Practice Review*, pp 163–186; P Luxton, *The Law of Charities* (Oxford: Oxford University Press 2001), pp 44–49; PW Edge and JM Loughrey, 'Religious Charities and the Juridification of the Charity Commission' in (2001) 21 *Legal Studies*, pp 51–64.

[65] Human Rights Act 1998, s 6(1): 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. As has been stated, 'The Charity Commissioners are without doubt a "public authority", and the Act will have some impact on the way they operate': P Luxton, *The Law of Charities*, *op cit* p 39. A different, more debatable question is whether charities have the characteristic of public authorities or carry out functions of a public nature under section 6. What is certain is that it is not possible to establish general criteria on this point which are valid for all types of charities; the answer depends on their functions and characteristics. About this point, see P Luxton, *The Law of Charities*, pp 39–41; D Oliver, 'Functions of a Public Nature under the Human Rights Act' in (2004) *Public Law*, pp 329–351; M Sunkin, 'Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority under the Human Rights Act' in (2004) *Public Law*, pp 643–658.

The right to religious freedom is relevant, however, in conjunction with the principle of non-discrimination. This principle affords protection against different treatment, without objective and reasonable justification, of persons in similar situations. Also, Article 14 of the Convention plays an important role in protecting persons and groups from discretionary powers of public authorities. The decisions of the Charity Commissioners, and the decisions of the domestic courts, on the applications for recognition of charitable status formulated by religious groups must respect this principle of non-discrimination. The denial of charitable status to a religious entity or institution must be justified on legal grounds: valid and legally consistent reasons must be provided. Although access to the benefits of charity law must be open to all religious groups, the restrictive definition of 'religion' found in the common law is not, in itself, contrary to the European Convention on Human Rights, since multiple exceptions to this definition (Spiritualism, Buddhism, Hinduism or Jainism) are admitted by the courts and especially by the Charity Commissioners. However, in order fully to respect the Convention, justification must be given as to why some religious denominations receive charitable status despite not fitting within the legal concept of religion elaborated in the common law (ie they are contemplated as an exception), while others are excluded from the sphere of charity law. On this point, the discretionary powers of the Charity Commission and of the courts are reduced to the minimum to avoid their acting in an arbitrary way and, hence, in a discriminatory way.

In relation to this last statement, note should be taken of the regulation of the limits to religious freedom included in Article 9 of the European Convention on Human Rights: '2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. In charity law, the domestic courts do not draw a distinction between one religion and another; the only way of disproving a public benefit is to show that the doctrines inculcated by the religious group *are adverse to the very foundations of all religion, and that they are subversive of all morality*.[66] The application of this limitation on the part of the courts and of the Charity Commission must be made respecting the guarantees included in Article 9(2) of the Convention.[67]

[66] *Re Watson decd* [1973] 3 All ER 678 at 688, [1973] 1 WLR 1472 at 1482–1483, per Plowman J. Of course, without detriment to this assertion the existence of a public benefit must be demonstrated in each particular case: see *Gilmour v Coats* [1949] AC 426, [1949] 1 All ER 848, HL.

[67] On this question, see C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press 2001), pp 133–167.