The Charity Law & Practice Review

RELIGION, CHARITY LAW & HUMAN RIGHTS[1]

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With the Human Rights Act 1998, the specific guarantees of freedom and other rights enshrined in the European Convention on Human Rights and its Protocols will be solidly planted in domestic law. This legislation will have a profound effect in the United Kingdom on a wide range of substantive law as well as legal procedures. With its guarantee of religious freedom and prohibition against discrimination on religious grounds, the Act is sure to have no less of an effect in the administration of charity law, since religion has been an integral part of English charity law for hundreds of years. One obvious area that the Act is likely to affect is the way religion is defined.

This article will explore possible changes the Act may require in determining which systems of belief qualify as religious under English charity law. Part I will discuss charity law and practice in general, including the common law, statutory and fiscal benefits of registration as a charity, and the development of how "religion" has been defined under charity law. Part II will describe the specific religious rights guaranteed by the Act and the strict standards that must be met to justify differential treatment with respect to them as developed by the organs of the European Convention. Part III will discuss the impact the Act will have on certain definitions of religion and, recognising that no definition of religion under the Convention has ever been articulated, will survey various definitions adopted in judicial decisions from other common law countries and relevant official pronouncements of international organisations working in the field of human rights. Finally, Part IV will explore different approaches that could be taken in light of the Act and identify

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specific disadvantages or benefits of each.

Part I - The English Law Background

A. Introduction

The law of charity is a peculiarly English creation, being derived from ancient sources and developed mainly through case law and the practice of the Charity Commissioners. Far from having emerged fully-fledged, like Athene from the head of her father Zeus, it has grown incrementally, like little Topsy. What now seems obvious and self-evident, such as the concept that in a multi-cultural society all *bona fide* religions should be treated alike, provided that they do no harm to society - which is to be reinforced by the Human Rights Act 1998 - was by no means regarded as self-evident in earlier years and actually took centuries to be worked out.

The significance of the charity sector in England and Wales (Scotland has a separate legal system) is well illustrated by the fact that it is now reckoned to be larger in financial terms than the agricultural sector.

B. What Does It Mean to Be a Charity?

"Charity" has theological overtones, being the word used by St Paul to refer to Christian love, or the Greek word "a-Ga-pe". The Hebrew "tsedekah" (and a similar Arabic word) also indicate the same concept, with the secondary meaning of "justice". It has come to mean something more technical in English law. Essentially, it is a type of purpose which is recognised as desirable through being altruistic or otherwise beneficial to the public as opposed to being commercial or political or for the benefit of private individuals.

Because of that public element, the courts give special protection to property which has been dedicated to charitable purposes and a protected status to organisations which have been established for exclusively charitable purposes. The protection which charitable purposes enjoy means that those purposes will be enforced, indefinitely if necessary, whereas other purposes would be a matter of indifference to the law and strict limits are placed on the duration of private trusts.

A special Government Department - the Charity Commission - exists (it was set up originally in 1853 but has subsequently been reconstituted) to supervise the administration of charitable organisations, encourage them to become as effective as

possible, assist and advise their trustees and investigate and correct abuses. This tends to indicate that registered charities, as least, are generally regarded as genuine and deserving approval. In addition, a senior law officer - the Attorney General - has the constitutional role of protecting charity on behalf of the Crown, and represents charity in legal proceedings. The Courts are therefore accustomed to considering the needs and requirements of charity with extra sympathy. The Government, further reflecting charity's favoured position, has traditionally granted generous tax and rates reliefs both to charitable organisations themselves and to those who give to charity. As a result, charitable status is an enviable and highly-valued privilege.

C. Registration

Charitable status derives from the legal purposes of an organisation rather than registration by the Charity Commission. It is wrong to say that the Commission *confers* charitable status: it *recognises* it. The registration of charities only started under the Charities Act 1960, which has now been replaced by the Charities Act 1993. Registration means much more than the simple administrative act of placing the details of an organisation on the Charity Commission's database, however. It constitutes formal and official recognition which is binding on everyone, including the Inland Revenue, that the organisation is a charity according to English law.[4] It is not absolute in the sense that there is an appeal to the courts,[5] and the Charity Commission themselves can review their decisions and remove from the Register bodies which no longer appear to them to be charities, or which cease to exist or to operate.[6] (In fact a major review of the Register is in progress at the moment.) But for practical purposes it is the means by which most charities prove their status.

Registration is not essential or even possible for all charities. Exempt charities (such as universities) cannot be registered, and there are a number of charities (including many religious bodies such as churches, manses and church halls) which are excepted from the need to registration.[7] Excepted charities remain subject to the supervisory jurisdiction of the Charity Commission and both excepted and exempt charities can avail themselves of the benefits of charitable status, including the free

4 Charities Act 1993 s.4(1).

5 *Ibid* s.4(3).

6 *Ibid* s.3(4).

7 *Ibid* s.3(5).

advice and assistance available from the Charity Commission.

Registration itself is, however, of great importance to a body which, *if* exclusively charitable would be liable for compulsory registration, since the Commission will refuse to assist or supervise a body whose application for registration they have rejected.

D. The Benefits of Charitable Status

The following is a brief summary of the benefits which are available to charities:

1. Common Law Benefits

The potential for being established in perpetuity, since the rule against perpetual duration (which restricts the duration of private trusts) does not apply to charities.

A lesser need for certainty compared with the requirements for private trusts, since, if the purposes are exclusively charitable, no further details are required to establish validity.

Protection by the Crown: H M Attorney General will represent the beneficial interest and assist the court in many cases where a charity is involved in litigation, and may initiate an application to the court to protect the interests of the charity.

The ability, in many cases, to be the beneficiary of an existing charity with comparable objects or to receive other grants or other forms of assistance which are dependent on charitable status.

2. Statutory Benefits

Protection from failure of the charity's purposes or administrative difficulties through the scheme-making jurisdiction of the courts and the Charity Commission is one important statutory benefit.[8] A scheme is a document which modifies or replaces a governing document.

Except for exempt charities, protection from the effects of misconduct or maladministration by staff or trustees through the Charity Commission's power to

8 *Ibid* ss.13-16.

establish inquiries and take remedial action (this includes the removal and appointment of trustees, the appointment of a receiver and manager and the imposition of a scheme).[9]

Free advice (including protective advice) on particular issues concerning the duties of the trustees and the meaning of the governing document, and general guidance on charity law and good practice, from the Charity Commission.[10]

The protection of official sanction (free of charge) in the form of an order from the Commission (or the courts) for particular transactions shown to be expedient in the charity's interests.[11]

The protection to the charity's assets afforded by the requirement that no legal proceedings concerning the trusts of a charity can be commenced without the consent of the Commission or, if the Commission refuse, the leave of a High Court judge.[12]

For registered charities only, routine monitoring and review by the Commission. This is designed to provide an early warning of potential problems, as where for example excessive reserves appear to have built up, indicating a possible need for the objects of the charity to be enlarged.

3. Fiscal Benefits

Charities have enjoyed tax privileges for many years. It is often argued that, since charities are in essence established for the benefit of the public, there is no purpose to be served in taxing them. So long as an organisation remains on the Register, it is legally presumed to be a charity and must be accepted as such by the Inland Revenue.

All charities are entitled to relief from tax on their voluntary and investment income, and their capital gains, provided that the receipts are applied to charitable purposes, and where a charity engages in trading activities in actually carrying out its charitable purposes (e.g. running an old people's home) it is also relieved from tax

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9 *Ibid* ss.8,9,18,19.

10 *Ibid* ss.1(3), 29.

11 *Ibid* s.26.

12 *Ibid* s.33.

on trading profits on the same condition.[13] There are generous mandatory and discretionary reliefs from non-domestic rates for land and buildings used for charitable purposes. Although there is no general relief from VAT for charities there are some reliefs from VAT which are relevant to charities.

In addition there are generous reliefs available to those who give to charity. Gifts are exempt from income or corporation tax if they exceed £250 or are made under covenant or a payroll giving scheme. Gifts in favour of charity do not attract capital gains tax[14] and are exempt from inheritance tax.[15]

All these benefits can be seen as assisting charities to be as effective as possible by safeguarding their assets and ensuring that their funds are applied as effectively as possible for the purposes for which they were given. Such special benefits are not available to private trusts, associations or companies, who have to rely for their protection on the vigilance of their beneficiaries and members.

E. The Meaning of Charity: History

The concept of charity originally developed from Roman law via ecclesiastical law. Before the Reformation, religious purposes were exclusively Christian and Catholic, and often referred to as "pious uses" (i.e. purposes), a phrase which survived into Irish law.

Modern English charity law emerged at the time of Elizabeth I, i.e. shortly after the Reformation, when the Church of England was still in its youth. The Statute of Charitable Uses of 1601[16] was passed in order to prevent the abuse of charitable gifts, and it is apparent from the Preamble (i.e. introduction) to that statute that charity was alive and flourishing by then, and already included a variety of secular activities. The only reference to a religious purpose in the Preamble is the repair of churches, i.e. churches of the Church of England, since Roman Catholic churches were banned. This purpose, appearing next to the repair of sea-banks and highways, suggested a possibly greater concern for the provision of public utilities than for any more specifically spiritual good.

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13 Income and Corporation Taxes Act 1988 s.505.

14 Taxation of Chargeable Gains Act 1992 ss.2,8.

15 Inheritance Tax Act 1984 s.23 as amended.

16 43 Eliz. c. 4 (The Statute of Elizabeth).

Since that time the courts have looked back to the Preamble when considering whether new purposes are to be treated as charitable, and have used a sometimes subjective and often inventive form of analogy to justify development. For example, the reference in the Preamble to the maintenance of "houses of correction" led to the acceptance as charitable of the provision of a court house[17] and later to the publication of the Law Reports.[18] All attempts to codify the law relating to charitable status have been resisted and the concept of charity is still actively developing, although more often by means of decisions of the Charity Commissioners than through decisions of the Courts. The Commissioners are currently involved in a thorough review of the Register of charities, which has already caused them to consider recognising both urban and rural regeneration and the relief of unemployment as new charitable purposes. Purposes can also cease to be accepted as charitable, as in the Commissioners' decision in 1993 no longer to accept that rifle clubs were established for the charitable purpose of promoting military efficiency.[19]

Apart from the building, repair and furnishing of churches, charitable gifts were made over the years for the provision of training, support and accommodation for ministers, for sermons and lectures for the spread of the gospel and, later, for missionary work abroad and the provision and upkeep of church halls, schools and Sunday schools. Originally, only the established church was recognised: the religious practices of Protestant Dissenters, Roman Catholics and Jews were illegal and trusts to promote their purposes were void as for "superstitious uses", a doctrine introduced by Henry VIII.[20] Toleration took some centuries to mature. Non-Conformist Christian purposes (except for those of the Unitarians, who were legitimised by an Act of 1813[21]) became legal and acceptable as charitable purposes with the Toleration Act 1688.[22] This leeway was extended to Roman Catholic purposes in 1832[23] (except for their orders and societies, which in the case of

17 *Duke on Charitable Uses* at 109, 136.

18 Incorporated Council of Law Reporting v Attorney -General [1972] 1 Ch 73.

19 Decisions of the Charity Commissioners, Vol 1, para. 4.

20 23 Hen. VIII c. 10.

21 Unitarian Relief Act 1813.

22 Toleration Act 1688.

23 Roman Catholic Charities Act 1832.

monasteries remained prohibited until 1926[24]) and to the Jewish religion in 1846.[25] It was not until 1919[26] that the saying of Roman Catholic masses for the repose of the soul was held not to be a superstitious use and that doctrine expired.

F. The Advancement of Religion

The "advancement of religion" was propounded as one of the four heads, or categories, of charity, first by the Attorney General, Sir John Romilly, in argument in the case of *Morice v the Bishop of Durham* (1805)[27] and later, and most famously, by Lord McNaghten in his judgment in *Pemsel's* case in 1891.[28] The other three heads are the relief of poverty, the advancement of education and other purposes beneficial to the public.

Not every religious purpose or activity is charitable in English law. An important principle which has developed alongside the concept of charity is the idea of public benefit. For a purpose to be charitable there must be a benefit to the community, either explicit or implicit. In one case, i.e. the relief of poverty, public benefit is assumed without further argument even if the class of persons intended to receive the benefit of the gift are not a section of the public in themselves.[29] In other cases, notably those coming under the advancement of education and the fourth head, it is necessary to demonstrate that there will be a benefit to the public or a section of the public (as defined in *Oppenheim v Tobacco Securities Trust Co Ltd* in 1951[30]). The advancement of religion occupies an intermediate position: there is a presumption that a religious purpose benefits the public but this can be displaced by evidence to the contrary.

Religious purposes which have been held not to be beneficial to the public and therefore not charitable include the following:

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24 Roman Catholic Relief Act 1926.

25 Religious Disabilities Act 1846.

26 Bourne v Keane [1919] AC 815.

27 *Morice v Bishop of Durham* (1805) 9 Ves. 399.

28 *Income Tax Commissioners v Pemsel* [1891] AC 531.

29 *Dingle v Turner* [1972] AC 601.

30 *Oppenheim v Tobacco Securities Trust Co. Ltd* [1951] AC 297.

1875 - Chinese ancestor worship: this is directed to the benefit of the family of the relevant ancestors, not the public at large.[31] Contrast this with a gift for masses which it was assumed would be performed in public, held charitable - 1989.[32]

1886 - The provision of a private chapel and the support of a chaplain and choristers to serve there.[33]

1949 - The support of an enclosed order of monks or nuns whose only outreach to the rest of society is through intercessory prayer: the court held that it could not judge its efficacy.[34] Contrast this with the support of a synagogue open only to members who spent the rest of the week participating in everyday life in the world, held charitable - 1962.[35]

On the other hand, the courts have tended to look favourably on any religion regardless of its doctrines or theological merits (another area which is not susceptible to judgment by a court) so long as they are not harmful to mankind.

It matters not that its beliefs appear foolish (Joanna Southcott, "a patently demented visionary"- 1862)[36] or simplistic (tracts having little or no theological value - 1973).[37] A body providing faith healing services which were open to the public was upheld as charitable in 1996.[38]

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31 *Yeap Cheah Neo v Ong Seng Neo* (1875) LR 6 PC 381.

32 *Re Hetherington; Gibbs v McDonnell* [1990] Ch 1.

33 *Hoare v Hoare* (1886) 56 LT 147.

34 *Gilmour v Coats* [1949] AC 426.

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

36 *Thornton v Howe* (1862) 31 Beav.13.

37 *Re Watson* [1973] 1 WLR 1472.

38 *Re Le Cren Clarke* [1996] 1 WLR 288.

G. What is "Religion" for the Purposes of Charity Law?

It has been held that "any religion is better than none" (1962)[39] and that "the law does not now favour one religion to another" (1998).[40] The underlying reason is that the law is a human institution and charity law is only concerned to uphold and enforce trusts which it can be reasonably certain will benefit people in general. What the court thinks beneficial may alter from time to time. As late as 1966 the leading textbook on charity law[41] repeated the view that only monotheistic religions were recognised as charitable.

In *Re South Place Ethical Society* (1980)[42] Dillon J expressed the view (obiter) that two essential attributes of religion were faith and worship: faith in a god and worship of that god (i.e. a monotheistic concept).

This is no longer a tenable position. While the Charity Commissioners have on occasion denied registration on theistic grounds, in practice, in most cases, the Charity Commissioners have taken a broader approach, and registered religious charities regardless of whether the religion in question is theistic or non-theistic. Hinduism, Sikhism, the Ravidassian religion and Buddhism have been expressly or impliedly accepted as charitable by both the courts and the Commissioners. Charities for the promotion of less traditional religions such as Unitarianism, Spiritualism, the Exclusive Brethren, the Unification Church (Moonies), Jainism, Baha'i and (recently) the Seventh Day Adventists, besides many small and local sects, have also been registered by the Commissioners.

This later, broader approach can in fact be seen as consistent with a long established judicial definition of religion. In *Keren Kayemeth Le Jisroel v IRC* (1931),[43] a decision which went against charity both in the Court of Appeal and in the House of Lords, the Master of the Rolls (Lord Hanworth) defined religion as "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". The key to this definition is the positive acceptance of a *spiritual* dimension, coupled with a set of beliefs which in their nature are likely to be concerned with values other than the

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

40 *Varsani v Jesani* [1998] 3 All ER 273.

41 *Tudor on Charities* (6th edn) at 59, citing *Bowman v Secular Society Ltd* [1917] AC 406.

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

43 *Keren Keyemeth Le Jisroel v IRC* [1931] 2 KB 465.

material and tangible, and observances by which those beliefs are celebrated and demonstrated. This definition of religion has been relied upon in a number of cases, and is referred to in Charity Commission publications. In *Re Thackrah* (1939) Bennett J said that Lord Hanworth's definition was "what is meant by 'promotion of religion' as that phrase is understood in these courts."[44]

Such a wide definition is also consistent with the far-reaching statement by Lord Reid in *Gilmour v Coats* (1949)[45] as follows:

> "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 but where a particular belief is accepted by one religion and rejected by another the law can neither accept nor reject it."

Belief in a god is one such particular belief.

Part II - Impact of the Human Rights Act

There can be no doubt that enactment of the Human Rights Act 1998, which is expected to come into force in the year 2000, will have a profound effect on how the definition of religion evolves under charity law. It also will affect the work of the Charity Commission[46] as to the registration of religious organizations — whilst on the one hand they have registered as religious Buddhist, Jainist and other such organizations that likely do not believe in a deity, let alone worship one,[47] they have recently denied registration to a Pagan organization on the ground, *inter alia*, Pagans do not believe in and publicly worship a deity.

The most interesting question arising from enactment of the Human Rights Act is not whether the Commission is going to change its current apparently inconsistent

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44 *Re Thackrah* [1939] 2 All ER 4.

45 *Gilmour v Coats* [1949] AC 426.

46 The Charity Commission, as a statutory body exercising public law functions, meets the definition of "public authority" in section 6(3)(b) of the Act, and their acts therefore are subject to the Act.

47 A recent count showed that the Charity Commissioners have registered numerous Buddhist, Jainist and other groups whose followers neither believe in a deity nor practice any form of worship.

practice, for it clearly must consistently comply with the Act, but rather precisely what criteria the Commissioners will now apply in deciding which organizations qualify as religious under the Charities Act. As discussed below, whatever form the definition will take, it must be objective and not discriminate among religions on the ground of size, age or content of belief. Decisions on this issue by the European Court of Human Rights (the "European Court") and the European Commission of Human Rights (the "European Commission") would provide needed guidance, if there were any on point.[48] Lacking any such authoritative pronouncements under the Convention, we can look to court decisions from other countries with constitutions that guarantee religious freedom, and other international bodies working in the field of human rights.

A. Relevant Provisions of the Human Rights Act

There are three Articles of the Human Rights Act that potentially bear on decisions to register religious organizations under the Charities Act - Article 9(1), which guarantees, *inter alia*, freedom of religion, including the right to manifest one's religion in worship, teaching, practice and observance, whether alone, in community with others, in public or in private;[49] Article 14, which, *inter alia*, prohibits discrimination on the basis of religion against any of the rights and freedoms secured by the Convention;[50] and Article 1 of the First Protocol, which guarantees the right to the peaceful enjoyment of property, and which will come into play insofar as

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48 As the result of a reorganisation of the organs of the European Convention on Human Rights, the European Commission is scheduled to be dissolved in October 1999 and currently is completing its review of all cases that were assigned to it as of 1st November 1998. The European Court, which previously was composed of part-time judges who generally lived in their home countries, is now composed of 40 full-time judges, all of whom must now live in Strasbourg. This new, "permanent" European Court is deciding all cases admitted since 1st November 1998.

49 Article 9(1) provides:

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

50 Article 14 provides:

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

decisions taken under the Charities Act help determine tax status.[51]

Rights protected under Article 9 adhere to "a church body, or an association with religious and philosophical objects".[52] However, Article 9(1)'s protection "does not cover each act which is motivated or influenced by a religion or a belief." To qualify as a protected activity the action must "actually express the belief concerned" and not simply be "motivated or influenced by it".[53] (Distributing leaflets urging British soldiers posted to Northern Ireland to go AWOL by a convinced pacifist was not a "practice" protected by Article 9(1).) Under Article 9(2), a state may restrict or limit an act that manifests one's religion, even though protected by Article 9(1), if the restriction is (i) prescribed by law and (ii) "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."[54]

At least one commentator has suggested that Article 9 may not come into play in connection with the registration of religious organizations because "refusal to register a religious organization as charitable does not prevent adherents from practising that religion."[55] This argument clearly presupposes that registration is a technicality or simple formality with no substantive consequences. It also overlooks

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51 Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
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> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

52 *Chappell v United Kingdom* (1989) 10 EHRR 510, para. 1.

53 *Arrowsmith v United Kingdom* (1981) 3 EHRR 218.

54 Article 9(2) provides:

> "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."

55 D Morris, 'Know your charitable rights,' NGO Finance *Charity Law Annual Review 1998*, December 1998 at 18, 19.

the operation of Article 14, which can apply to extend the reach of other Articles, including Article 9 and Article 1 of the First Protocol, to encompass actions that otherwise would not violate their provisions.

While neither the European Court nor the European Commission has decided a case involving the precise issue raised in registrations under the Charities Act, the European Commission has stated in one case that governmental refusal to register a religious belief will not, in itself, violate Article 9 where that act is of a "pure formal character . . . without there being any particular hindrances attached to it."[56] In this case the Commission ruled that the refusal by a prison administration to enter into the prison record a prisoner's claimed affiliation with the "Wicca" religion, which the prisoner argued would allow him access to facilities where he could manifest his beliefs, did not violate Article 9. The Commission noted that the prisoner had not shown any facts to establish either that his particular religion existed, that he had ever asked to use the facilities, or that the authorities had ever interfered with his religious practices.

A decision not to register a religious organisation under the Charities Act differs in that it does result in a number of substantive "hindrances". As discussed in Part I, benefits from recognition as a charity (including registration under the Charities Act 1993 where appropriate), flow both to the charity itself, to the individuals connected to it - whether they be members, supporters, beneficiaries, or trustees - and to the public-at-large. Benefits from registration flow directly from the Commissioners as well as other governmental agencies and departments. It is often the case that these other governmental bodies automatically rule in accordance with how the Charity Commissioners decided. As stated in one of the Commissioners' official publications:

> "Registration means that while the organisation remains on the register it will be legally presumed to be a charity and *must be* accepted as a charity by other bodies such as the Inland Revenue."[57]

Charitable registration thus bestows a bundle of very powerful and valuable benefits. A religious organization forced to operate without these benefits does so at a great disadvantage compared to religious organizations that enjoy them, and its members, supporters, beneficiaries, and trustees likewise must forego significant benefits and protections accorded the members, supporters, beneficiaries, and trustees of

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56 *X v United Kingdom*, No. 7291/75, Dec. 4.10.77, DR 11, p. 55, 56.

57 Charity Commissioners, *Charities and the Charity Commission* CC2 (June 1996) at 4 (emphasis supplied).

religious organisations that have been registered. Thus, while adherents of religious organizations that have not been recognized as charities may still be able to practice their religion, they must do so burdened by a number of "hindrances" not suffered by adherents of religious organizations that have been recognized. It is these hindrances that would activate Article 9.

Such differential treatment also would violate the provisions of Article 14. Article 14 is not a wide-ranging anti-discrimination provision that applies whenever the state discriminates on the basis of religion or any of its other enumerated categories. Rather, it comes into play when the facts at issue fall "within the ambit" of one or more of the specific rights guaranteed by the Convention.[58] Article 14 is thus less encompassing than the anti-discriminatory provisions of other international human rights instruments to which the United Kingdom is a party, such as Article 26 of the International Covenant on Civil and Political Rights, which offers blanket protection for all whenever a suspect category is involved.[59] Nonetheless, the European Court has stated that Article 14 "does not necessarily presuppose a breach" of any of the other Articles, and so in this respect the Court has treated it as an "autonomous" provision.[60]

Thus, as one commentator has noted, while Article 14 "may be parasitic on other rights, its invocation may often expand their scope and render a greater range of state conduct open to human rights standards than would otherwise be the case."[61] The European Court echoed this in *Belgian Linguistics*:

> "a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature . . . . In such cases there would be a violation of a guaranteed right or freedom as it is proclaimed by the relevant Article

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58 See *Rasmussen v Denmark* (1985) 7 EHRR 371, para. 29.

59 Article 26 provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, religion, language, political or other opinion, national or social origin, property, birth, or other status."

60 *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

61 S Livingstone, 'Article 14 and the Prevention of Discrimination in the European Convention on Human Rights', 1 EHRLR 25, 27 (1997).

read in conjunction with Article 14."[62]

As the leading authorities on the European Convention have noted:

> "The Convention is concerned mainly with what broadly may be called freedom rights, which by their nature do not require a specific performance on the part of authorities, but oblige them to refrain from restrictive interference. If, however, the authorities proceed in one way or another to specific performance in a field connected with one or more of the rights in question, they are obliged to do so without discrimination. If, for instance, they proceed to subsidize a particular religious community or to promote education in a particular language, other religious communities or other linguistic communities are in principle be [sic] entitled to the same treatment. Such a right is not laid down in the Convention, but derives its protection from the operation of Article 14."[63]

This rule was illustrated in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985),[64] involving the state's obligation to respect family life under Article 8. The three applicants in *Abdulaziz*, all women from countries other than the United Kingdom, had been granted indefinite leave to live in the United Kingdom. Subsequent to receiving this leave they married non-national men who did not have indefinite leave to remain in the country. United Kingdom immigration rules at the time did not allow husbands to remain in the country under such circumstances, but would have allowed non-national wives to remain had the circumstances been reversed, that is, if the non-national husbands had initially been granted indefinite leave to stay in the country and subsequently married non-national women who had no such permission. The purpose of this disparate treatment was to bolster and protect the national economy - there was high unemployment at the time and it was believed that men were more likely to seek employment than women.

The European Court noted that the different treatment did not violate Article 8 itself because that Article does not require states to allow married couples to live wherever they may like.[65] However, the Court went on to state that once a state extends the right to non-national men to bring their wives into the country, it must also extend

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62 *Belgian Linguistics* (1979) 1 EHRR 252 (paras. 8-9).

63 P van Dijk & GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd Ed. 1990) page 547, para. 6.

64 *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

65 *Abdulaziz, supra*, at para. 68.

the same right to non-national women unless there was "objective and reasonable justification" for treating the two sexes differently.[66] Finding no such justification, the Court ruled that the applicants had been discriminated against on the basis of sex, in violation of Article 14 taken in conjunction with Article 8.[67]

Thus, to the extent a state undertakes to provide some privilege, right or benefit to one group, even though not required to do so under a particular Article of the Convention, it must treat all similar groups equally and provide them the same privileges, rights and benefits, unless there is justification to support the difference in treatment, as discussed below. This obligation to treat similarly-situated individuals and organizations equally would apply to decisions to recognize as charities religious organizations under the Charities Act. Providing privileges to some religious organizations and imposing hindrances on others would violate Article 9, whether on its own or in conjunction with Article 14, unless there is good justification for the disparate treatment, as discussed below.

As discussed in Part I, registration under the Charities Act also results in exemption from various taxes. The European Court has made it clear that if tax benefits such as exemption are not bestowed in an evenhanded way there can be a breach of Article 14 taken together with Article 1 of the First Protocol. For example, in *Van Raalte v Netherlands* (1997),[68] the applicant, a man, objected to a tax assessment against him under the Netherlands Child Benefits Act on the ground that there was an exemption for unmarried childless women aged 45 or over, but not one for similarly-situated men. The European Court found that the difference in treatment based on gender was not justified under the Convention and held that the Netherlands violated Article 14 of the Convention taken in conjunction with Article 1 of the First Protocol.[69] Again, if appropriate justification exists for differential treatment in the tax area, there will not be a violation.

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66 *Ibid* at para. 72.

67 *Ibid* at para. 83.

68 *Van Raalte v Netherlands* (1997) 24 EHRR 503.

69 See also *Darby v Sweden* (1990) 13 EHRR 774 (violation of Article 14 taken together with Article 1 of the First Protocol because no justification shown for allowing residents but not non-residents to qualify for exemption from church tax).

1. Justifying Differential Treatment - The Principle of "Proportionality"

The fact that there is disparate treatment under a particular classification does not necessarily mean there is discrimination that is prohibited by the Convention. According to the European Court, discrimination will exist wherever there is different treatment with respect to a guaranteed right and there is no "objective and reasonable justification" for the different treatment. An objective and reasonable justification for disparate action will exist only if there is a "legitimate aim" for the action and the action taken is "proportionate" to the aim sought to be accomplished.[70] As the European Court stated in the leading case on this issue, *Belgian Linguistics*:

> "A difference in treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."[71]

The European Court applied this test in connection with a claim of discrimination based on religion in *Hoffmann v Austria* (1994),[72] a case that actually resulted in a decision of a violation of Article 8, which guarantees the "right to respect for private and family life," as well as Article 14's prohibition against discrimination. This decision could have important implications for the future application of the Charities Act to religious organizations because it essentially ruled that a decision based on religious grounds alone cannot be justified under the Convention.

In *Hoffmann* the Court had to determine whether a Jehovah's Witness mother (formerly a Catholic) had to transfer custody of her two children, both Catholics, to their Catholic father, her divorced husband. The Austrian Supreme Court had ruled that she had to on the ground that the Austrian Religious Education of Children Act required children of separated parents to be educated in the religion that the parents had shared at the time of the marriage, which was Catholicism in this particular case. The European Court found that the Austrian Supreme Court had treated the two parents differently and that the difference was based on religion, so it applied the two-part proportionality test discussed above to see if there was an "objective and

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70 *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

71 *Belgian Linguistics* (1979) 1 EHRR 252, 284.

72 *Hoffmann v Austria* (1994) 17 EHRR 293.

reasonable justification" for the different treatment.

The European Court found that the first part of the test, whether the aim sought by the Supreme Court was legitimate, was easily satisfied since the goal was to protect the health and rights of the children.[73] However, the Court found that the second part of the test, "a reasonable relationship between the means employed and the aim pursued," was not met because of the Supreme Court's reliance on the mother's religion and what it believed would result from the expression of her religious beliefs.[74] The European Court made it perfectly clear that Article 14's prohibition against discrimination will be violated whenever disparate treatment is based on "religion alone".[75]

The European Court has applied a stricter standard for establishing justification in cases of discrimination involving an inherently suspect classification, such as sex, where member states have announced equality as a "major goal". The Court has articulated this standard in different ways, using terms such as "weighty reasons" in some cases and "compelling reasons" in others.[76] In *Van Raalte v Netherlands*,[77] a case involving a violation of Article 14 taken together with Article 1 of the First Protocol, the Court noted that while states enjoy a "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, "very weighty reasons" would have to be established to justify a difference in treatment "based exclusively on the ground of sex". The Court went on to note that a scheme resulting in unequal treatment based on gender could be justified only upon a showing of "compelling reasons" serving a legitimate aim that could not be achieved by less restrictive means.

In addition to cases involving sex, the European Court has applied the stricter "very weighty reasons" standard to cases involving differential treatment based on race, *Abdulaziz*, (supra), illegitimacy, *Inze v Austria* (1987),[78] and nationality, *Gaygusuz*

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73 Para 34.

74 Para 36.

75 *Ibid*.

76 See, for example, *Abdulaziz, Cabales and Balkandali*, supra, at para 78.

77 Supra.

78 *Inze v Austria* (1987) 10 EHRR 293, para 41.

v Austria (1996).[79] The Court has indicated that an even stricter standard than the "very weighty reasons" standard might apply to differential treatment based on religion, which would be the case whenever the Charity Commissioners deny registration to a religious organisation on the ground it does not meet a "traditional" definition of religion:

> "Notwithstanding *any possible* arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable."[80]

Notably, the Court in *Hoffmann* applied the "objective and reasonable justification" standard in Article 14 rather than the "necessary in a democratic society" standard in Article 8(2) in looking at the claimed Article 8 violation in conjunction with Article 14.

Part III - Towards a More Modern Definition of Religion

Application of the Human Rights Act to the Charities Act will prohibit use of the narrow theistic-based definition of "religion" based on Dillon J *dicta* in *Re South Place Ethical Society* that religion has two "essential" elements: faith in a god and worship of that god. Denying the important benefits of registration under the Charities Act to religions that do not believe in a deity or engage in worship of a deity serves no apparent "legitimate purpose." Nor is there any "reasonable relationship of proportionality" between such a rigid demarcation and any other aim that conceivably could be realised, other than religious discrimination, the very thing the Act is intended to eradicate. The question now is just what sort of definition may be used.

The terms "religion" and "religious beliefs" as used in the Convention have never been defined. The reason for this probably lies in the fact that, at least in Article 9, the Convention is not limited to freedom of religion but encompasses freedom of thought and conscience as well. It appears, however, that not just any claim of religious belief is protected by the Convention and that there must be some minimal content to the belief. For example, in *X v United Kingdom*,[81] the European Commission indicated that an applicant might have to proffer sufficient evidence to establish that the religion in question "is identifiable." In a case arising under

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79 *Gaygusuz v Austria* (1996) 23 EHRR 503, para. 42.

80 *Hoffmann v Austria* (1994) 17 EHRR 293, para. 36 (emphasis supplied).

81 *X v United Kingdom*, No. 7291/75, Dec. 4.10.77, D. 11, p. 55, 56.

Article 2 of the First Protocol, which requires states to respect the right of parents to have their children educated in conformity with their own "religious and philosophical convictions," the European Court compared the term "convictions" as used in that Article to the term "beliefs" in Article 9, stating that it "denotes views that attain a certain level of cogency, seriousness, cohesion and importance."[82] The United Kingdom has taken the position in one case before the Commission that the term "belief" in Article 9(1) means more than "mere opinions" or "deeply held feelings" and that there must be a "holding of spiritual or philosophical convictions which have an identifiable formal content".[83]

But these statements are not helpful in giving form to the test that the Charity Commissioners must apply in determining which organizations claiming religious status should be registered under the Charities Act. Since neither the European Court of Human Rights nor the European Commission of Human Rights has issued any decision that gives tangible guidance for formulating a test, it would be helpful to review what international bodies working in the field of human rights have said about how religion should be defined. Help may also be derived from relevant court decisions from other common law countries that provide constitutional protection to religions.

A. Pronouncements by International Human Rights Organizations

Pronouncements and other commentary by international organizations that work in the field of human rights also can provide helpful guidance in developing a definition of religion that comports with the requirements of the Human Rights Act.

(1) The United Nations

One of the primary aims of the United Nations, as set out in the Charter of the organization, is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion": Art. 1(3) of the Charter. The concepts of equality before the law and non-discrimination are emphasized in all three UN instruments which make up the international Bill of Human Rights: the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the International Covenant on Civil and Political Rights ("ICCPR"). The most important pronouncement by the United Nations on the

82 *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, para. 36.

83 *McFeeley v United Kingdom* (1981) 3 EHRR 161.

definition of religion is Human Rights Committee General Comment No. 22 on Article 18 of the ICCPR, which guarantees freedom of thought, conscience and religion. In that Comment the Human Rights Committee laid out a very inclusive definition of religion:

> "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community."[84]

Another broad definition of religion has been advocated by the United Nations Special Rapporteur on Religious Intolerance, Professor Abdelfattah Amor. Professor Amor is the foremost authority on religious matters in the United Nations and is responsible for religious matters "in all parts of the world which are inconsistent with the provisions of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief". The 1996 Annual Report by the Special Rapporteur to the UN Human Rights Commission sets out a broad definition of religion that includes not only theistic religions, but all movements that appeal to the sacred or transcendent:

> "All in all, the distinction between a religion and a sect is too contrived to be acceptable. A sect that goes beyond simple belief and appeals to a divinity, or at the very least, to the supernatural, the transcendent, the absolute, or the sacred, enters into the religious sphere and should enjoy the protection afforded to religions."

In 1989 the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Human Rights Commission published a report on the current problems of religious intolerance and discrimination under the direction of Special Rapporteur Elizabeth Odio Benito. This study, entitled *Elimination of all forms of intolerance and discrimination based on religion and belief*,[85] noted that "religion can be described as an explanation of the meaning of life and how to live

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84 Human Rights Committee General Comment No. 22 on Article 18 of the ICCPR, at para 2.

85 United Nations Publication Sales No. E.89.XIV.3.

accordingly" and that "every religion has a creed, a code of action, and a cult."[86] The report went on to delineate six different characteristics often found in religion:

> "There are literally thousands of religions or beliefs, and each is unique in certain respects. Each, for example, may have its own:
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> System of beliefs, such as theistic, non-theistic, or atheistic beliefs;
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> Doctrines, such as doctrines of immortality, predestination, or vesting of property in the community;
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> Basic writings, such as the Bible, the Talmud, or the Koran;
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> Forms of worship, such as masses, ceremonies or assemblies;
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> Objects of worship, such as nature, ancestors, or one or more deities; and
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> Customary practices, such as baptism, pilgrimages, celebration of feasts or festivals, or marriage or funeral ceremonies."[87]

(2) Relevant Interpretations

In the past few years various international organizations have convened groups of experts on religion and international law to address current issues confronting religious freedom throughout the world. The resulting pronouncements and interpretations provide very instructive guidance as to how the international community believes religion should be defined.

(a) OSCE Body of Religious Experts

In April 1997, the Organization of Security and Cooperation in Europe (the "OSCE") convened a body of religious experts who met at the Office of Democratic Institutions and Human Rights in Warsaw to discuss, among other things, the definition of religion. The OSCE issued a report of the meeting for distribution to OSCE member states. This report states that the experts came to the conclusion that, in arriving at a definition for purposes of determining the scope of freedom of religion claims, the broad definition adopted by the United Nations Human Rights

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86 Page 4 at para 19.

87 Page 41 at para 168.

Committee discussed in the previous section should apply:

> "As a practical matter, the approach suggested by the General Comment of the Human Rights Committee is sound and should be followed. In essence, that approach recognizes that the term religion should be broadly construed, and that it extends to nontraditional and unpopular belief systems."

(b) World Report on Freedom of Religion

In 1997 the University of Essex Human Rights Centre, in conjunction with religious human rights experts from fifty countries, released a significant human rights study entitled *Freedom of Religion and Belief: A World Report*. The study has been acclaimed by the Special Rapporteur on Religious Intolerance and religious non-governmental organizations and human rights groups as offering a detailed and impartial account of how religion is understood in all regions of the world. Two of its important findings are that new religions must be treated in the same manner as traditional religions and that new religions are a recurring target of discrimination:

> "Freedom of religion therefore is not to be interpreted narrowly by states, for example, to mean traditional world religions only. New religions or religious minorities are entitled to equal protection. This principle is of particular importance in light of the evidence reflected in the Country entries, including those of the European section, revealing that new religious movements are a recurring target for discrimination or repression."[88]

(c) World Congress on Religious Liberty

At the conclusion of the Fourth World Congress on Religious Liberty in June 1997 in Rio De Janeiro, the participants issued a Concluding Statement reaffirming certain fundamental human rights principles. Item 3 of these principles states that the participants in the Congress:

> "Accept and affirm the provisions of the United Nations Human Rights

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88 K Boyle and J Sheen, *Freedom of Religion and Belief — A Global Survey* (Routledge Press 1997). The study also notes that: "today new religious ideas, expressed through new religious movements, face a perception that their beliefs expressed are wrong or do not qualify as religious. Although the objection to new religious movements is often expressed in criticism of their methods, it is at bottom a rejection of their freedom of thought which stimulates hostility and restrictions on their organizations and activities. The challenge remains considerable to establish an ethic of tolerance towards those who differ on religious grounds."

> Committee's General Comment to Article 18 of the International Covenant on Civil and Political Rights (ICCPR). . . . In particular, the Congress participants concur with the General Comment's recognition of the broad scope of religious freedom in its determination that 'Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions'.

In its conclusions, the Congress warned that "Government and public officials should exercise caution and sensitivity when characterizing religious groups or religious beliefs, so as to avoid stigmatizing specific groups or contributing to patterns of intolerance."

(d) Council of Europe

The Human Rights Information Centre of the Directorate of Human Rights of the Council of Europe also takes an expansive definition of religion. In its study on religion under the European Convention on Human Rights[89] the Centre commented that the concept of religion is:

> "not confined to widespread and globally recognized religions but also applies to rare and virtually unknown faiths. Religion is thus understood in a broad sense."

B. Judicial Definitions

There has been a long history of judicial interest in what constitutes a religion in common law countries with constitutions that guarantee freedom of religious expression where there have been relevant decisions - the United States, Australia, New Zealand and India. Decisions from the leading courts of these countries that develop tests for religiosity certainly can be helpful in developing a definition of religion that will comport with the requirements of the Human Rights Act.

a. Decisions from the United States

The closest equivalents to the Charities Act in the United States are the provisions of the Internal Revenue Code that grant tax-exempt status to charitable, religious and educational organizations, which is administered by the United States Internal

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89 Article 9 of the European Convention on Human Rights (Strasbourg, December 1992) at page 6.

Revenue Service, and the laws adopted by most states to regulate and supervise charitable trusts, generally within the office of their Attorney General. However, there are no seminal cases in this area on important issues; most of the decisions under the Internal Revenue Code deal with questions such as whether the religious beliefs in question are a sham or whether the organization in question is operating for some purpose other than religion, such as a commercial goal. The most important cases defining religion from the United States have been rendered by the United States Supreme Court and involve Constitutional questions on issues such as exemption from military service, challenges to oaths of office, and objections to compulsory education. The Internal Revenue Service has incorporated the Supreme Court's rulings in its approach to defining religion.

The United States Constitution serves as the basis from which the United States Supreme Court defines religion. There are two Constitutional provisions that pertain to religion - the Establishment Clause and the Free Exercise Clause - and both are contained in the First Amendment of the Bill of Rights. They provide that "Congress shall make no law respecting an establishment of a religion or prohibiting the free exercise thereof . . . ."

Courts at all levels of the federal and state judiciary systems have interpreted the meaning of "religion" and "religious belief" in determining whether a set of beliefs deserved protection or other special treatment under these Constitutional provisions. Decisions by the United States Supreme Court are the most authoritative pronouncements on the meaning of these terms since it is the highest court in the country.[90]

(i) Decisions by the US Supreme Court

The Supreme Court's first decision concerning how religion should be defined involved a territorial law aimed at members of the Mormon Church that disenfranchised any individual who belonged to a group that encouraged the practice of polygamy. In upholding the law, the Court adopted a strict theistic definition of the term: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[91]

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90 There are several very excellent analyses of the concept of religion under the First Amendment. See, for example, Choper,' Defining Religion in the First Amendment', 1982 U. Ill. L. Rev. 579; note, 'Toward a Constitutional Definition of Religion', 91 Harv. L. Rev. 1056 (1978).

91 *Davis v Beason*, 133 US 333, 342 (1890).

This theistic view of religion continued for many years. It was not until 50 years later, in *United States v Ballard* (1944),[92] that the Court began to back off from this strict definition. In this case, involving the I Am religion, the Court indicated that it would extend religious recognition to views that may depart from more orthodox concepts:

> "Freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and the hereafter which are made suspect rank heresy to followers of orthodox faiths. . . . Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact they may be beyond the ken of mortals does not mean that they can be made suspect before the law."

Shortly after its decision in *Ballard* the Supreme Court had occasion to elaborate on its view of religion, holding that religious belief should be voluntary, born of free will, and not coerced.[93]

It was not until the 1960s, however, that the Supreme Court unequivocally expanded the definition of religion beyond strict notions of theism. In *Torcaso v Watkins* (1961),[94] a case addressing the legality of a state law requiring "a declaration of belief in the existence of God" as a prerequisite to holding state office, the Supreme Court held that the Establishment Clause prohibited the federal government from aiding "those religions based on a belief in the existence of God as against those religions founded on different beliefs".[95] The Court went on to note specifically that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[96] The Court did not, however, mark out an inclusive definition of religion that would pass Constitutional muster.

Several years later the Supreme Court rendered a landmark opinion concerning the limitations the federal and state governments must face whenever they act to restrict religious practice, holding that the state can interface with religious practice only if it can show a "compelling interest" to do so and that there is no "alternative means"

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92 *United States v Ballard*, 322 US 78, 86-87 (1944).

93 *Everson v Board of Education*, 330 US 1 (1947).

94 *Torcaso v Watkins*, 367 US 488 (1961).

95 367 US at 495.

96 *Ibid* at 495, n.11.

for accomplishing this interest.[97] In reaching its decision, the Court announced yet another element of religious belief that must exist before it be treated as such by the courts: that it be a "bona fide and sincere religious claim".

In the mid-1960s the Supreme Court rendered a decision that would significantly expand the concept of religion in American jurisprudence. The case involved the Universal Military Training and Service Act of 1948, which offered exemption from military duty to individuals conscientiously opposed to war on grounds of their "religious training and belief". The Act defined "religious training and belief" as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation but [not including] . . . essentially political, sociological, or philosophical views or a merely personal moral code." The beliefs of the individual involved in the case were not based on the teachings of any organized religion, nor was he a member of any organized religion during the period in question.

In that decision, *United States v Seeger* (1965),[98] the Supreme Court drew upon works by contemporary eminent theologians such as Paul Tillich's *Systematic Theology* (referring to the "God above the God of theism"), and the Bishop of Woolwich, John A T Robinson's *Honest To God* (referring to the death of a God "up there"), to adopt an expansive definition of "Supreme Being" that would encompass beliefs beyond those associated with more traditional religions:

> "Where such beliefs have parallel positions in the lives of the respective holders we cannot say that one is in a relation to a 'Supreme Being' and the other is not."[99]

The Supreme Court's most recent decision concerning the definition of religion, and perhaps its most analytical, was *Wisconsin v Yoder* (1972),[100] in which the Supreme

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97 *Shebert v Verner*, 374 US 398 (1963). The "compelling interest" doctrine has been eroded and no longer applies to certain claims brought under the Free Exercise clause of the First Amendment. *See Employment Division, Dept. Of Human Resources of Oregon v Smith*, 494 US 872 (1990).

98 *United States v Seeger*, 380 US 163 (1965).

99 *Ibid* at 166. In a subsequent decision involving almost identical facts, *Welsh v United States*, 398 US 333 (1970), a plurality of the Court went even further, holding that the statutory exemption was available to an individual who "originally characterized his beliefs as nonreligious" but subsequently stated they were religious "in the ethical sense of the word". 398 US at 341.

100 *Wisconsin v Yoder*, 406 US 205 (1972).

Court upheld the refusal by members of the Amish faith to send their children to public schools after the eighth grade on the ground that compulsory education after that year violated their First Amendment right to the free exercise of their religion. *Yoder* reined in the wide-ranging rule of *Seeger*, stating that the "parallel position" test utilized in that case could not expand the concept of religion under the First Amendment to include beliefs that were "philosophical" or "personal":

> "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the religion Clauses, the claims must be rooted in religious belief. Although the determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every individual to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."[101]

The Court went on to note that the practices of the Amish were "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[102]

(ii) Decisions by Other United States Courts

There are several well regarded lower federal and state court decisions in the United States. Two of these cases are by a federal court, the Third Circuit Court of Appeals. One, *Malnak v Yogi* (1979),[103] in holding that a form of transcendental meditation qualified as a religion, adopted a three-part test for determining whether a set of beliefs constituted a religion. The second decision, *Africa v Commonwealth of Pennsylvania* (1981),[104] developed the test in more detail:

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101 406 US at 215-16.

102 *Ibid* at 216.

103 *Malnak v Yogi*, 592 F.2d 197 (3d Cir. 1979)

104 *Africa v Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 US 908 (1982).

(1) The beliefs must address and attempt to come to terms with "fundamental and ultimate questions" concerning the human condition such as right and wrong, good and evil, life and death, and underlying theories of man's place in the universe. The beliefs should must be more than a personal or secular code, philosophy or ideology, no matter how deeply held.[105]

(2) The beliefs must be "comprehensive" and embrace an entire system rather than simply a "number of isolated, unconnected ideas" or teaching.[106]

(3) The beliefs must be manifested in a way to form "structural characteristics". There beliefs should manifest themselves in some external forms and signs such as formal services, ceremonies, a system of clergy, organization and propagation efforts.[107]

A lower court decision decided in the 1950s is relevant because it concerns facts similar to the facts in *Re South Place Ethical Society* (1980)[108] and *R v Registrar General, ex parte Segerdal* (1970).[109] *Fellowship of Humanity v County of Alameda* (1957),[110] was a decision by the California State Court of Appeal holding that facilities used by a humanist group for their weekly meetings qualified as a place of worship for purposes of property tax exemption despite the fact that the group does not believe in a Supreme Being. The court specifically rejected the state's argument, essentially the holding in *Segerdal*, that the term "religious worship" requires "reverence to, and adoration of, a Supreme Being". The court based its decision on the following definitions of "religion" and "worship":

> "If this be the correct approach, and we believe that it is, the proper interpretation of the terms 'religion' or 'religious' in tax exemption laws should not include any reference to whether the beliefs involved are theistic or nontheistic. Religion simply includes (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice

105 662 F.2d at 1033-34.

106 662 F.2d at 1035.

107 662 F.2d at 1035-36.

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

109 *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697.

110 *Fellowship of Humanity v County of Alameda,* 153 Cal. App.2d 673, 315 P.2d 394 (1957).

> directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief. The content of the belief is of no moment. Assuming this definition of religion is correct, then it necessarily follows that any lawful means of formally observing the tenets of the cult is 'worship,' within the meaning of the tax exemption provision."[111]

b. Decisions from Australia

The seminal decision in Australia on the definition of religion is *The Church of the New Faith v The Commissioner of Payroll Tax* (1983),[112] in which the High Court of Australia concluded that Scientology is a religion. Although issuing three separate judgments, all five judges rejected a theistic definition of religion, and there was specific criticism of the comments made in *South Place Ethical Society* and *Segerdal*.[113] Mason ACJ and Brennan J also expressly rejected the three-part test set forth in *Malnak v Yogi* on the ground the latter two criteria (comprehensive belief system and structural characteristics) were not characteristic of religion.[114]

According to Mason ACJ and Brennan J, religion has two essential criteria:

> "Religious belief is more than a cosmology; it is a belief in a supernatural Being, Thing or Principle. But religious belief is not by itself a religion. Religion is also concerned, at least to some extent, with a relationship between man and the supernatural order and with supernatural influence upon his life and conduct. . . . Thus religion encompasses conduct, no less than belief.
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> . . .
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> "We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, a belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right

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111 153 Cal. App.2d at 693, 315 P.2d at 406. See also *Washington Ethical Society v District of Columbia*, 249 F.2d 127 (D D C 1957).

112 *The Church of the New Faith v The Commissioner of Payroll Tax* (1983) 154 CLR 120.

113 See 154 CLR at 140.

114 *Ibid.*

conferred on the grounds of religion."[115]

c. Decisions from New Zealand

The High Court of New Zealand has adopted the same two-part test for religion articulated by the High Court of Australia. As it stated in *Centrepoint Community Growth Trust v Commissioner* (1985):[116]

> "On the evidence presented to me, oral and written, I am left in no doubt that the members of the trust who accept Mr Potter's teachings . . . have a belief in the supernatural. In some . . . this would be a supernatural being. In others it may well be rather a belief in the supernatural in the sense of reality beyond that which can be perceived by the senses. . . . Included in those beliefs are concepts that related not only to man's relationship to the supernatural in either of the senses to which I have referred."

d. Decisions from India

The leading case in India on the definition of religion is *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954),[117] where the Indian Supreme Court ruled:

> "Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a religion or a belief."[118]

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115 154 CLR at 134, 136.

116 *Centrepoint Community Growth Trust v Commissioner* [1985] 1 NZLR 678, 679.

117 *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [1954] SCR 1005, 1023.

118 See also *Ratilal Panachand Gandhi v State of Bombay* AIR 1954 SC 388, 392; *S P Mittal v Union of India* AIR 1983 SC 1, 20.

Part IV - Conclusion

The Human Rights Act 1998 has created a fresh climate, applicable throughout the courts and public authorities, in which there will be far greater sensitivity to the issues of fundamental rights and liberties, and far greater care will be taken to tread carefully in areas where they are relevant. Charity law is one very important such area, and the Charity Commission clearly will need to go beyond traditional Judeo-Christian concepts in developing a modern definition of religion in a more consistent way than they have done heretofore. Whatever position they now adopt will have to be compatible with the Human Rights Act and further the objectives of charity law.

The Commissioners could continue along the path they have followed to date and examine content in determining whether a system of beliefs and practice is religious. This approach must be free of cultural bias, however, which means that theistic-based standards cannot be permissible. The Commissioners would have to use objective standards, perhaps looking for certain factors such as an identifiable doctrine, a regular congregation or identifiable community, or recognized priests or ministers. However, this approach can suffer the same deficiency as some of their existing practices in that it is plainly susceptible to the cultural bias of the examiners.[119] In fact, it probably is not difficult to find long-established religions that do not share features commonly selected. [120] This approach also by necessity is restrictive at the outset and therefore too easily excludes religions that do not fit within the traditional mould.

Alternatively, the Commissioners could take a more "functional" approach to defining religion as exemplified by the decisions by the United States courts that put forth the "ultimate concern" and "parallel position" tests. However, this approach also has significant problems: it is highly subjective and involves very subtle concepts. Where exactly is the appropriate "position" located? Does locating it require a weighing of convictions? When is one's concern intense enough to qualify as "ultimate"? Is this not something that only the believer would know and be able to express coherently? Another problem is that this approach can encompass a wide variety of different viewpoints, possibly including humanistic and political beliefs. If this basis were adopted the decision in *South Place Ethical Society*, and its distinction between philosophy and religion, would have to be revisited.

The best approach appears to be represented by the opinion by Mason ACJ and

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119 See M Eliade, ed, 'Religion', *The Encyclopedia of Religion*, vol 12 at 282-84.

120 See Casino, 'Defining Religion in American Law', 25 Am Crim L R No. 1.

Brennan J in *Church of the New Faith*, which requires two basic factors: a belief in some transcendental reality or supernatural "being, thing or principle" and a system of conduct or practice giving effect to the belief. This test is based on the Western dichotomous view of the "sacred" and the "profane" (or "secular") as expounded by Emile Durkheim. It certainly is broad enough to include non-theistic religions such as Buddhism and Jainism, and it excludes purely secular belief systems such as ethics, philosophy and politics. This test has the distinct advantage of being relatively easy to administer - it is simply articulated, does not involve an extensive probe into beliefs, and it requires a basic organization of conduct into some form that expresses those beliefs. It is also an approach which appears to be entirely consistent with existing charity law,[121] and with the additional requirements of the Human Rights Act.

Whatever approach the Commissioners now take, the Human Rights Act 1998 will surely have a significant impact on their work. The Act is likely to engender a more objective test for religiosity that is free of cultural bias. The Act also is likely to affect the existing requirement of public benefit: for example, treating a religious group differently just because it happens to be "enclosed" rather than "open" will pass muster only if the Commissioners can show "very weighty reasons" for doing so. The full impact the Human Rights Act 1998 will have on the administration of the charity law is far from clear at this time. It is certain to be extensive.

121 See discussion on *Keren Kayemeth Le Jisroel v IRC* [1931] 2 KB 465, above.