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RELIGION AS CHARITY: SOME REFLECTIONS

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Introduction

Neither the 1992 Charities Act (enacted on the day of the dissolution of the last Parliament - See *Editorial* and *Charities Act 1992: An Overview* by the Managing Editor in the CL & PR, Volume 1, 1992/93, Issue 1), nor its immediate precursors, notably Sir Philip Woodfield's 1987 *Efficiency Scrutiny of the Supervision of Charities* and the 1989 Government White Paper, *Charities: A Framework for the Future*, are directly concerned with the nature of charitable purposes. 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. As Lord Hailsham pointed out in *IRC v McMullen* [1981] AC 1, HL, "the legal conception of charity (is) not static but moving and changing": at 15D.

Nevertheless, echoing public anxieties about the alleged anti-social behaviour of various ostensibly religious organisations, the 1989 White Paper devoted 19 of its introductory paragraphs to considering `the advancement of religion' - the third of Lord Macnaghten's celebrated four heads of charity in *Special Commrs of Income Tax v Pemsel* [1891] AC 531, HL - as a legally charitable object; and with certain of those introductory paragraphs in mind (particularly 2.30 - 2.32) the Charities Bill, introduced into the House of Lords in November 1991, contained a Clause 2 designed to clarify the extent to which, when determining whether an organisation is or is not a charity, the Court or the Charity Commissioners might legitimately take into account that organisation's actual activities. This clause was eventually removed - Lord Allen of Abbeydale's comment during the initial debate that "there were moments when I thought I understood what is said, but the meaning slipped away" being eloquent testimony to its convoluted, and therefore potentially dangerous, character. However, the fact that the clause was thought necessary in the first place indicates the existence of a problem in this area. A reminder of the basic legal principles combined with some reflections on the implications of current social and other trends for the development of the law governing religious charities may therefore be of relevance and interest.

Theism, Atheism and Rationalism

Provided there is belief in a Supreme Being or Intelligence exercising control over the destiny of mankind, no creed will be disqualified merely by reason of its adherents' origins or unconventional attitude. The notion that some special

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wisdom is contained in Joanna Southcott's writings (described judicially as those of a patently demented woman) may not be widely shared. But the judicial decision of *Thornton v Howe* (1862) 31 Beav 14 is authority for the charitable status of the gift. "As between religions the law stands neutral, but it assumes that any religion is at least likely to be better than none" - Cross J, as he then was, in *Neville Estates Ltd v Madden* [1961] 3 All ER 769. It follows that in the eyes of the law, religion is not confined to Christianity, still less, as was the case for centuries, to the Established Church. It embraces, for example, Judaism, Islam, Hinduism, Buddhism. But spiritualism, freemasonry, and all groups not founded on a belief in a deity are excluded. The study and dissemination of purely ethical or rational principles are not concerned with the advancement of religion (though they may, in appropriate circumstances, come within the advancement of education). "Religion," said Dillon J, as he then was, in *Re South Place Ethical Society, Barralet v A-G* [1980] 3 All ER 918 "is concerned with man's relations with God, and ethics are concerned with man's relations with man. The two are not the same."

Contemplation and Action

At the same time, the courts have shown a marked distaste for evidence not strictly of this world. "Pious contemplation and prayer," said Harman J in *Re Warre's Will Trusts, Wort v Salisbury Diocesan Board of Finance* [1953] 2 All ER 99, "are no doubt good for the soul and may be of benefit by some intercessory process of which the law takes no notice, but they are not charitable activities." On the same reasoning a trust for nuns was disallowed in 1949 because the order was enclosed. Against the evidence of impeccable ecclesiastical witnesses (including the then Cardinal-Archbishop of Westminster) the House of Lords decided that benefit to the public - or "an appreciably important class of the community" (*Verge v Somerville* [1924] AC 496) - an essential ingredient in all cases save only where the object is to relieve poverty - through continuous prayer was not susceptible of proof (*Gilmour v Coats* [1949] 1 All ER 848). On the other hand, a community house whose expressed purpose was to donate everything to God and do His will in practical Christian ways has been held charitable. The social side (leading a pious life together) was merely incidental; the house looked after people who required help for a variety of reasons - drug addicts, alcoholics, lonely persons and those generally unable to stand the stress of life; the members also went out to offer help where it was needed (*Re Banfield, Lloyds Bank Ltd v Smith* [1968] 2 All ER 276).

Some very fine distinctions have been drawn. A gift to the vicar and churchwardens of a parish "to be applied by them in such manner as they shall in their sole discretion think fit" is charitable (*Re Garrard* [1907] 1 Ch 32) but a gift to the vicar "for parish work" is not (*Farley v Westminster Bank Ltd* [1939] 3 All ER 492). To erect and maintain a particular tomb in a churchyard fails the test of public benefit; as the 17th Century poet Andrew Marvell wrote, "the grave's a fine and *private* place".[2] But if the tomb is part of the fabric of the building or the entire churchyard is to be maintained, the trust can qualify. In short, a key word in this context is "advancement". As Lord Denning succinctly pointed out in *National Deposit Friendly Society (Trustees) v Skegness UDC* [1958] 2 All ER 601, when a man says his prayers in the privacy of his own bedroom, he may truly be said to be concerned with religion, but not with the advancement of religion; or, as Donovan J put it - less colloquially - in the 1957 case which decided that the main objects of freemasonry were not the advancement of religion, "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 or missionary" (*United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 3 All ER 281).

Should Religion be a Charitable Object?

If, then, in the words of Sheridan and Keeton, the authors of *The Modern Law of Charities* (3rd edition, 1983), "the law as to religious charities is now tolerant, but in an unholy mess",[3] ought religion of any sort to continue to be legally charitable today? Should its promoters continue to be part of a uniquely tax-privileged section of the community? At the very least, should not the current presumption - reflecting the courts' reluctance to engage in debate on the comparative worth of different religions - that a trust for the advancement of religion is, by definition, for the public benefit, be removed? Before the Reformation the answers to those questions - if asked at all - could never be in doubt. Significantly, religion is conspicuous by its absence from the activities listed in the preamble to the Tudor Statute of 1601 - still, as mentioned above, the acknowledged point of reference for the legal meaning of charity. For centuries it had been regarded as self-evident that the promotion of religion - or more precisely the Christian faith - was of benefit to the community and therefore charitable. However, although the basic principles have suffered little or no change since medieval times, their application and extension by the courts have, on occasion, been not only lenient but bizarre. How else, it may be asked, could Joanna Southcott's writings - not to mention her panacean box to be opened in the presence of 24 bishops - have passed the test? The contents of the box were - and indeed still are - as closed as the activities dismissed in *Gilmour v Coats* as of no *proven* public benefit. The fundamental problem today, as the 1989 White Paper itself pointed out, is not so much the nature of an organisation's declared objects, but "whether, if the natural *conduct* of the movement causes harm, a trust which is set up to advance its beliefs should be deprived of charitable status on the grounds that they are not of public benefit". As Lord Ferrers summarised the position during the House of Lords debate on the White Paper in November 1989, "the public disquiet arises not so much from the

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2 "To his coy mistress", line 31; author's italics.

3 Chapter III, Introduction, page 66.

professed objects of cults, which in many cases are quite unexceptional, as from their activities. Their beliefs are in themselves frequently harmless. It is the way in which they are pursued which becomes objectionable".[4]

Thus, in a number of their Reports over the past 10 - 15 years the Charity Commissioners have criticised the ways in which some fringe religious groups are run, naming several areas of concern - treatment of converts, methods of fund-raising, expenses of administration and operations of an unacceptably political character.[5] During the early 1980s the alleged anti-social practices of the Unification Church (and similarly conducted bodies) induced Lord Denning (amongst others) to demand an investigation into religious cults (with state registration of religions as the ultimate object). In the words of *the Times* leading article of 14th August 1984, it was (the leader writer asserted) intolerable that "movements employing a degree of deception and psychological imprisonment should automatically be granted the privilege of charitable status because they exist for the advancement of religion". However, neither such criticism nor pleas for the Commissioners' intervention necessarily implies ineligibility to charitable status. The cause of trouble may well lie in a misunderstanding of the law or in sincerely held conflicting views or - not infrequently - in clashes of personality.

The Approach Adopted by the White Paper

Against that background the White Paper carefully considered whether the problem would be solved by denying charitable status to all organisations established to advance religion - "of whatever type and without exception". Such a solution would have "at least the merit of simplicity. It would also avoid the need to make invidious comparisons between different religions. While the advancement of religion might cease to be a charitable object, religious organisations would still remain free to propagate their doctrines and, if they so wished, to promote and to administer trusts for such purposes as the relief of poverty which would remain charitable as before". Simple and attractive though it might seem to be, this solution was dismissed on grounds of both practicality and sentiment. For example, many existing trusts, some of considerable antiquity, might "be left in an impossible legal limbo"; and, in any event, implementation would be likely to be resisted "by the great majority of the people". These arguments are persuasive and cannot lightly be rejected. Put into historical perspective, it is no more logical to condemn the whole of Islam for violence and hostage-taking by fundamentalist sects in the Middle East today than it would have been to reject Christianity in Western Europe as worthless at the beginning of the 13th Century on account of the Papal Legate's solution, at the siege of Béziers in July 1209 during the Albigensian Crusade, to the dilemma of distinguishing heretics from true believers: "Kill them all, God will recognise his

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4 Hansard - HL - Vol 513, No 7 30 November 1989 - 584.

5 [1976] Ch Com Rep 28, para 103.
[1981] Ch Com Rep 25-27, paras 71-73.
[1982] Ch Com Rep 14, paras 36-38.
[1984] Ch Com Rep 18, para 48.
[1985] Ch Com Rep 28 & paras 86-89.

own".[6]

The Charities Bill and the 1992 Act

There remains, however, the question of how best to deal with allegations of anti-social behaviour on the part of promoters and followers of recognised (and, where necessary, registered) religious charities. The difficulties of defining - and limiting - such conduct by statute, without at the same time inadvertently proscribing genuinely acceptable activity, have so far proved insurmountable; while, as already mentioned, Clause 2 of the 1991 Charities Bill, in its original form, which purported to state in general terms the circumstances where an organisation's activities might be taken into account by the court or the Charity Commissioners in determining charitable status was eventually - and rightly - removed. Is the law, therefore, wholly without teeth in this somewhat sensitive area? In fact, it is already open to the Charity Commissioners to determine whether a particular religious purpose is, contrary to the general presumption, subversive of morality or otherwise against the public interest, though in practice the Commissioners have tended not to act in individual cases. This may have been partly due to difficulties over obtaining essential evidence - `the determined pursuit' of which was advocated by the White Paper - rather than the introduction of any new principle into the law. Under the 1992 Act, the Commissioners' powers of invigilation, investigation and control - and notably in this context their powers to obtain information and documents relevant to any inquiry - have been considerably strengthened (sections 6 - 12). These widened powers, coupled with the additional material resources made available without legislation as a result of Sir Philip Woodfield's recommendations, ought to provide the necessary impetus whenever it is called for.

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6 Jonathan Sumption *The Albigensian Crusade* (1978) Chapter VI p.93, Faber and Faber Ltd. The motto was one which "has passed into history as the epitome of the spirit which had brought the Crusaders to the South:" ibid.

Developments in the Substantive Law

Given then that the advancement of religion should continue to be legally charitable, the promoters' *modus operandi* being more robustly monitored and controlled by the Charity Commissioners, any development of the substantive law in the area would appear, at least at first sight, to be largely ruled out. This, however, is not necessarily the case. In its Report published in 1976, the Goodman Committee (established in 1974 by the National Council of Social Service, now the National Council for Voluntary Organisations, to examine the effect of charity law and practice on voluntary organisations) while concluding that religion should remain legally charitable (groups considered detrimental to the community's moral welfare being excluded) recommended that ethical and moral movements not founded upon a belief in a deity but setting out to "promote the moral improvement of mankind which is for the benefit of the community" should be brought within the ambit of legal charity in their own right (and not merely, where appropriate - and often by recourse to convoluted draftsmanship - within some other head, for example, the advancement of education).[7] Subsequent developments have reinforced these views. Thus, of those seeking in recent years to establish new charities whose objects are religious in one form or another, many have tended to be fundamentalists pursuing simple - not infrequently simplistic - messages based on their founder's teaching and eschewing abstruse theology. At the same time, as the Charity Commissioners themselves expressly recognised in their Report for 1976, many organisations, established primarily for the benefit of immigrants, though "basically religious, also have social, cultural and educational functions which have a greater importance than is the case with comparable Christian communities".[8]

The Future

Just as the Free Church movement in the 18th Century supplied an outlet for suppressed religious fervour and thereby helped to prevent a revolution in this country of the kind experienced across the Channel, so in our own time the existence of a variety of not only religious (in the traditional sense) but also ethical and moral groups, each equally encouraged by the tangible advantages of charitable status, could prove to be a stabilising element - and thus of unquestionable public benefit - in an increasingly polarised society. It must not be overlooked that in the 1990s the community of the United Kingdom, with its strong ethnic representation (there are over 4 million Moslems alone) is vastly different in composition and outlook from the relatively homogeneous element which has until now shaped the development of the law since 1601 and even earlier. In recent years the Charity Commissioners have shown themselves disposed to extend the frontiers of legal charity. Thus, by analogy with purposes already sanctioned by the courts, the promotion of good race relations within the realm has since the early 1980s been recognised by the Commissioners, in appropriate circumstances, as charitable.[9] By the same token, the "rationalisation" of religion (in more senses than one) could well be another useful step towards the

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7 Chapter III, page 23, para 53.

8 [1976] Ch Com Rep 29, para 109.

9 [1983] Ch Com Rep 9-11, paras 15-20.

creation of a truly harmonious multi-cultural community.

The Roman Catholic Alexander Pope's gloss[10] on the famous passage in St. Paul's First Letter to the Corinthians is often quoted (Lord Renton quoted it at the end of the debate in the House of Lords in February this year):

"In Faith and Hope the world will disagree
But all Mankind's concern is Charity".

No less apt in today's ecumenical climate is the *rational* defence of his calling by a late 17th Century Anglican Archbishop largely on the ground that he had been struck with "the wisdom of being religious".[11]

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10 "An Essay on Man", (iii), 1733, 1743 (*Oxford Book of 18th Century Verse*, 1926, reprint of 1966, at 123).

11 John Robert Tillotson (1630-94) Archbishop of Canterbury, 1691-4, preached a sermon entitled "On the Wisdom of being Religious": see *Concise Dictionary of National Biography* Vol III OUP 1992.