THE MYSTERY OF PUBLIC BENEFIT

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One of the most difficult questions of the whole reform process leading to the Charities Act 2006 is whether and how the public benefit test was changed by the abolition of the presumption. This article argues, that the abolition of the presumption did alter the law but only in relation to the question whether a charity will "do good", but not in relation to the question whether a sufficient number of people benefit from a certain charity (I). It is argued that the abolition of the presumption will cause difficulties, especially if charities promoting religion should be asked to present proof of the public benefit provided (II,1).

Even after the enactment of the Charities Act 2006, cases such as *Oppenheim v Tobacco Securities Trust Co. Ltd*[2] and *Dingle v. Turner*[3] will remain good law (II,2). However, it is argued that the new Charities Act provides an opportunity to challenge the case law and to inquire whether poor relation charities should be abolished and a unitary public benefit test should be established. The different approaches taken by courts are extracted from the cases and challenged from a principled point of view (III). The article comes to the conclusion that the test applied in *Oppenheim v Tobacco Securities Trust Co. Ltd*[4] offers the most promising approach (IV). As regards the problem of charities that charge fees, it is argued that the approach of the Charity Commission requiring independent schools to provide scholarships and share their facilities is probably not workable (V).

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2 [1951] AC 297 (HL).

3 [1972] AC 601 (HL).

4 [1951] AC 297 (HL).

I. The Presumption of Public Benefit and its Abolition

Before the Charities Act 2006 three classes of charity - the relief of poverty, the advancement of religion and the advancement of education - were presumed to be *beneficial* for the public. Charities under the 'fourth head' had to prove their benefit. Following the 2002 Strategy Unit Report 'Private Action, Public Benefit', a core aim of the reform was to emphasise the public benefit requirement.[5] The 'presumption of public benefit' of the first three 'heads' was abolished in section 3(2),[6] so that all charities now have to demonstrate public benefit.[7] The Charity Commission approved the adoption of a 'single public benefit' test without presumptions.[8]

To understand to what effect the law was changed, it is necessary to ascertain the scope of the presumption prior to its abolition. The word 'presumption' is used in different ways. The correct meaning of 'presumption' in this context is that if one fact is proved by evidence, the court will presume another fact.[9] Such a presumption can be rebutted if actual proof is available. However, the term 'presumption' is also used to indicate a distribution of the burden of proof (e.g. the so called 'presumption of innocence'). There are also 'irrebuttable presumptions', which are not presumptions, but rules of law.[10]

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5 Cabinet Office Number 10 Strategy Unit Report, *Private Action, Public benefit A review of Charities and the Wider Not for Profit Sector* 4.11-4.18, 4.26, http://www.strategy.gov.uk/work_areas/voluntary_sector/index.asp.

6 Section 3 Charities Act 2006 reads:
"(1) This section applies in connection with the requirement in section 2 (1) (b) that a purpose falling within section 2(2) must be for the public benefit is to be a charitable purpose.
(2) In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.
(3) In this Part any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.
(4) Subsection (3) applies subject to subsection (2)."

7 As to whether the Bill should introduce a defintion of public benefit, see: F Quint, 'Schools and the Reform of Charity Law: The Draft Charities Act' [2004] ELJ 151, 153; N Saunders, 'The Charities Act: Implication for further and higher education institutions' [2005] ELJ 139, 140.

8 The Charity Commission, *The Charity Commission's Response to the Strategy Unit Review*, http://www.charity-commission.gov.uk/spr/corresp.asp#3.

9 A Zuckerman, *Civil Procedure* (Butterworth, London 2003) 21.49.

10 ibid, 21.54.

If evidence showed that a trust pursued a purpose that is charitable under one of the first three 'heads', for example religion, the court presumed that the advancement of this purpose was beneficial without demanding evidence of its actual effects. But this 'presumption' of public benefit was rebuttable, for example, if evidence showed that a charity's actual conduct contradicted public policy.[11] Thus the 'presumption of public benefit' might be described as distributing the burden of proof.

But was this presumption also applied to the number and quality of a charity's 'beneficiaries' in view of the requirement that the benefit should be 'public'? If there was such a 'presumption', the courts should have denied charitable status when evidence was brought that the only persons able to benefit were relatives or a few lucky individuals rather than the public. That was not the case, however. In the cases of the famous 'poor relation trusts', the number of 'beneficiaries' was known without the courts denying charitable status.[12] Thus the acceptance of such poor relation charities was not based on a 'presumption' but on a different public benefit test.

This means that the abolition of the presumption of public benefit in section 3(2) merely requires a charity to establish that the purpose pursued is *beneficial* but does not concern the number of people benefiting or, to put it differently, the definition of the *public*. Section 3(3) Charities Act 2006 declares that the term 'public benefit' within the Act is a reference to the way 'the term is understood for the purposes of the law relating to charities in England and Wales'. This can only mean that – apart from the abolition of the mysterious 'presumption' - the common law developed in regard to the public benefit test continues to apply. Nevertheless, some writers and politicians seem to understand the Act to operate in a different way.[13]

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11 *Archbishop Torkom Manoogian v Yolande Sonsino* [2002] EWHC 1304; *Funnel v Stewart* [1996] 1 WLR 288, 296 (Ch); *National Antivivisection Society v IRC National Antivivisection Society v IRC* [1948] AC 31 42, 65 (HL).

12 *Isaac v Defriez* (1754) Amb 595, 27 ER 387; *Spiller v Maude* (1886) 32 ChD 158n (Ch); *Re Compton* [1945] Ch 123 (CA); *Gibson v South American Stores* [1950] Ch 177 (CA); *Re Coulthourst* [1951] Ch 661 (CA); *Dingle v Turner* [1972] AC 601 (HL).

13 F Quint, 'Schools and the Reform of Charitiy Law: The Draft Charities Bill' [2004] ELJ 151, 153; J Winfield, 'The New Public Benefit Test – An Unexploded Bomb*?'* [2005] CL&PR 51; A Frean, 'Fee-paying schools face challenge to charity tax break' *Times* (London 2 May 2006) 4; D Hayton and C Mitchell, *The Law of Trusts and Equitable Remedies* (Sweet & Maxwell London 2005) 424, 438.

II. Two Aspects of Public Benefit

It follows that with regard to the public benefit test two aspects need to be differentiated, the question of the *benefit* of a charity on the one side and the issue of whether the people having access to the benefit can be taken to represent the *public* on the other side.

1. Will the Charity do Good?

The purpose a charity pursues and the way it is done must be *beneficial*. The problem can be condensed into the simple question "Will it do good?" This question has been asked and answered by courts and the Charity Commission when they inquired whether the charitable purpose of education has to be denied because money was given to conduct research on a useless subject or in a political way,[14] or for the training of pickpockets and prostitutes.[15] In this context, the abolition of the presumption matters. In the future it seems it will not be enough to show that the purpose pursued by a charity is on the list in Section 2 (2) Charities Act 2006, but it will also be necessary that such a purpose is actually pursued in a beneficial way.

It is not the purpose of this paper to discuss the consequences of this change of the law at length. It should be noted, however, that it might lead to problems, especially if it is difficult to decide what beneficial effect a charity provides. It would have been much easier, especially for small charities, to leave the burden of proof that a charitable purpose is pursued in a non-beneficial way with the Charity Commission. It should be enough that charities provide evidence that the purpose pursued is on the list of charitable purposes. The abolition of the presumption could have the lamentable effect of discouraging charities from trying new approaches, which may or may not bring the hoped for results in order to promote their charitable purposes.

Another problem can be identified with regard to the charitable purpose of religion. As long as a charity promoting religion was presumed as beneficial to the public, the courts were not obliged to give a thorough explanation of the positive public effects of a mass. After *Gilmour v Coats*[16] they only required that religious

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14 *Re Shaw* [1957] 1 WLR 729; *Re Hopkin's Will Trust* [1965] Ch 669; *McGovern v. A.G* [1982] Ch 321, 352; *Re Hopkinson* [1949] I All ER 346.

15 An example Harman J used in *Re Pinion* [1965] Ch 85; the detrimental character of a purpose pursued was discussed at length in *National Anti-Vivisection Society v. IRC* [1948] AC 31.

16 [1949] AC 426 (HL).

activities were executed in public.[17] But now, after the abolition of the presumption, the benefit of praying in public will have to be discussed. With secularisation and tolerance – illustrated in the acceptance of different religions as charitable[18] - and the modern welfare state, the public benefit of religion became questionable.[19] The benefit cannot be found in a religion's ability to communicate moral values, since the courts have denied the charitable status under the head of religion of societies whose primary concern was the teaching of such moral guidelines.[20]

Moreover, the abolition of the presumption is questionable from the perspective of human rights. To decide on the beneficial effect of a charity requires a judgement. However, Articles 9 and 14 of the European Convention on Human rights (ECHR), reinforced by section 13 Human Rights Act 1998, forbid the state to prefer one religion over others.[21] Thus differentiations between religious organisations seeking charitable status must have a legitimate aim necessary in a democratic society and not be discriminatory.[22] Such a legitimate aim would probably only be to prevent detrimental effects on the rights of third parties, e.g. if a religion required human sacrifices, to choose a rather extreme example. Therefore it is submitted that, even after the abolition of the presumption, the Charity Commission and the courts should question whether a religious community can be proven to be dangerous to the public, rather than demanding identifiable benefits.

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17 *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 1 WLR 1080,1090 (QB); *Re Hetherington* [1990] Ch 1 (Ch); *Hoare v Hoare* (1887) 56 LT 147 (Ch); see also: *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381, 396 (PC); *West v Shuttleworth* (1835) 2 My & K 684, 39 ER 1106; H Picarda, 'Religious Observances and the Element of Public Benefit' (1993/94) CL&PR 155.

18 *Thornton v Howe* (1862) 31 Beav. 14, 54 ER 1042; *Re Watson* [1973] 1 WLR 1472 (Ch); *Funnel v Stewart* [1996] 1 WLR 288, 296 (Ch); *Varsani v Jesani* [1999] Ch 219 (Ch).

19 CE Crowther, *Religious Trusts* (George Ronald, Oxford 1954)19.

20 *Berry v Marylebone Borough Council* [1958] Ch 406 (CA); *Re South Place Ethical Society* [1980] 1 WLR 1565 (Ch).

21 *Hoffmann v Austria,* (1994) 17 EHRR 293 (App. 12875/87); Spring and F Quint, 'Religion, Charity Law and Human Rights' [1999] CL&PR 154.

22 J Wartburton, *Tudor on Charities* (9th edn Sweet & Maxwell, London 2003) 1-009; T Spring and F Quint, 'Religion, Charity Law and Human Rights' [1999] CL&PR 154, 164; this made section 2(3)(a)(ii) of the Charities Act necessary.

2. For whom is the Charity Good?

Another problem of the public benefit test, which is the main topic of this article, is to define under what requirements a charity's 'beneficiaries' can be said to represent the public or a sufficient section of it. This problem can be condensed into the simple question "For whom is the charity good?" This is the question addressed in cases such as *Re Compton,*[23] *Oppenheim v Tobacco Securities Trust Co. Ltd*[24] (hereafter *Oppenheim*) and *Dingle v. Turner*.[25] Since, as shown above, the abolition of the 'presumption' does not affect this aspect of the public benefit test, these cases will remain good law. Insofar as the first 'three' of the traditional 'four heads' – relief of poverty, religion and education - were laid down in the Charities Act, the public benefit test established by the courts must still be applied.

The Charity Commission stated, however, that the public benefit test should be applied according to the new statute and might be the subject of subsequent reform. It is submitted that this is convincing. The 2006 Act introduced new charitable purposes and the courts and the Charity Commission is required to issue guidance on how the public benefit test should be applied. Moreover, the enactment of the Charities Act provides a reason for examining the case law and the possibility of a unitary public benefit test for English charity law in general. This article's purpose is to examine the different approaches taken by the courts and to analyse if a unitary test would be possible and desirable.

III. The Public Benefit Tests of the Courts

Before the possibility of a unitary approach can be scrutinised, the different approaches developed by the courts will be depicted. In order to compare and evaluate the different approaches of the courts they will be given names.

1. Education

With respect to the charitable purpose of education, two lines of cases were established. On the one hand, cases like *Re Compton* and *Oppenheim v. Tobacco Securities Co*. discussed the requirement that a charity should benefit beneficiaries of a certain quality and number. On the one hand, charities for the founder's kin show more similarities with poor relation charities.

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23 [1945] Ch 123 (CA).

24 [1951] AC 297 (HL).

25 [1972] AC 601 (HL).

(a) *Re Compton* and *Oppenheim v. Tobacco Securities Trust Co.*

The most important test in respect of charities promoting 'education' was developed in *Re Compton*,[26] and applied in *Oppenheim v. Tobacco Securities Trust Co*.[27] This approach requires that there is no personal relationship between the 'beneficiaries' and the donor.

In *Re Compton,* the Court of Appeal held that a trust for the education of the children of three families only was not charitable. Lord Greene MR came to the conclusion that:

> "*a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift*".[28]

In *Oppenheim* a major stockholder left money in trust to support the education of children of employees or former employees of British-American Tobacco. The majority in the House of Lords decided that the trust was not charitable. Lord Simonds stated two principles for the understanding of 'public':

> "*These words 'section of the community' (...) conveniently indicate first, that the possible (...) beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they themselves form a section of it, must be a quality which does not depend on their relationship to a particular individual (...) A group of persons may be numerous but if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.*" [29]

This approach will be called the '**impersonal nexus test**'. According to this test a charity's potential 'beneficiaries' have to be ascertainable because of attributes other than a personal relationship with the donor (for example the membership of a family or being an employee of a certain

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26 [1945] Ch 123 (CA); *Re Hobourn Aero Components Ltd* [1946] Ch 86, 194 (CA).

27 [1951] AC 297 (HL).

28 *Re Compton* [1945] Ch 123, 131 (CA).

29 *Oppenheim* [1951] AC 297, 306 (HL).

enterprise). Rather they have to be ascertained by common, not by personal qualities. In reverse, this approach requires that theoretically everybody (who fulfils common criteria) has access, even if only one actually benefits. The access to the benefit provided can be restricted by defining the benefit and by the means of the charity. This approach may be understood as a requirement of a charity's potential to have an integrative effect on society.

Lord MacDermott, in his dissenting opinion in *Oppenheim,* argued that the criteria by which members of a 'section of the public' are to be ascertained as 'beneficiaries' (for example poverty) would also be personal attributes. It was not convincing that a trust for miners working for a nationalised mining company should not be regarded as charitable, but would be charitable if set up for miners in general, even if the two groups were identical. The distinction between private and public trusts should rather be made according to the individual circumstances, mainly the number of the potential 'beneficiaries'. The 110,000 employees of the tobacco enterprise should at all events be regarded as sufficient. Lord Denning MR later agreed with this critique [30]

This approach will be described as the '**sheer number approach'**. According to this view, a trust is beneficial to the public if its possible 'beneficiaries' are sufficiently numerous.

(b) Founder's Kin

An exception to the requirements of public benefit in charities for the promotion of education was established in relation to charities for founder's kin. Even after *Re Compton,* such trusts were accepted, as long as only a preference had to be given to founder's kin.[31] A critical case was *Re Koettgen's WT,*[32] where a charitable trust was accepted which gave 75% of its funds to support the education of the employees of a single enterprise. The case was criticised in *Caffoor v Commissioner of Income Tax*.[33]

30 *IRC v Educational Grants Association Ltd.* [1967] Ch 993, 1009 (CA).

31 *Spencer v All Souls College* (1762) Wilm 163, 97 ER 64; *Re Christ´s Hospital* (1890) 15 App. Cas. 172 (PC).

32 [1954] Ch 252 (Ch).

33 [1961] AC 584 (PC).

The importance of these cases diminished in the 19th century, when various statutes abolished most founder's kin charities at the universities of Oxford and Cambridge. Decisions like *Oppenheim*[34] and *IRC v Educational Grants Association Ltd*[35] indicate that these cases might be decided differently today. In the latter case the spending of 85% of the association's income on scholarships for children whose parents were employed by the founder prevented the association from being charitable even though its statutes would theoretically have enabled it to sponsor other children.

2. Relief of Poverty

The charitable purpose of relief of poverty, codified under section2 (2) (a) Charities Act 2006 has a long history in the law of charities.[36] From the 18th century onwards, a line of cases established the charitable character of trusts for the relief of poor relatives,[37] employees[38] and members of associations.[39] The difference between the principles applied in *Oppenheim* and poor relation trusts is obvious. *Oppenheim* demands that there is no personal relationship between the donor and the 'beneficiaries', whereas poor relation charities do not regard such a relationship as a barrier. Different explanations are advanced in favour of poor relation charities.

Lord Greene MR in *Re Compton* contemplated that the relief of poverty could be regarded as in itself so beneficial to the community that even the fact that the gift was confined to a certain family could be disregarded.[40]

Likewise, in *Re Scarisbrick,* Evershed MR held:

> *"The 'poor relations' cases may be justified on the basis that the relief of poverty is of so altruistic a character that the public element may*

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34 [1951] AC 297 (HL).

35 [1967] Ch 993, 1009 (CA).

36 See for a historic views on charities law: GH Jones, *History of the Law of Charities 1532-1827* (CUP, Cambridge, 1969).

37 *Isaac v Defriez* (1754) Amb 595, 27 ER 387.

38 *Gibson v South American Stores* [1950] Ch 177 (CA); *Re Coulthourst* [1951] Ch 661 (CA); *Dingle v Turner* [1972] AC 601 (HL).

39 *Spiller v Maude* (1886) 32 ChD 158n (Ch).

40 *Re Compton* [1945] Ch 123, 129, 139.

> *necessarily be inferred thereby; or they may be accepted as a hallowed, if illogical, exception.*"[41]

The majority in *Oppenheim* referred to these cases as an 'anomalous group'.[42] In *Dingle v Turner,*[43] the House of Lords recognised the 'poor relation trusts' as anomalous, too, but refrained from overruling them because their Lordships considered them as too well established. Consequently the House held a trust for the relief of poor employees to be charitable despite the personal nexus between the benefiting employees and the donor. Lord Cross of Chelsea, delivering the leading opinion, expressed sympathy with Lord MacDermott's dissenting opinion in *Oppenheim*. He reasoned:

> *"The question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether a trust is a charity. Much must depend on the purpose of the trust".*[44]

According to this view, the question of the *benefit* a charity offers and the question whether a sufficient section of the *public* has access to this benefit are intermingled and have to be decided with regard to the circumstances of the individual case. According to this view, the public benefit test should concentrate on tax benefits granted to charities and question whether the alleged charity intended to use tax-benefits to provide a fringe benefit for the employees of a company. Such fringe benefits were probable in relation to the education of employees' children, but not in connection with the relief of poverty.[45] However, only Lord Simon of Glaisdale agreed completely with Lord Cross, whereas Lord Hodson, Lord MacDermott and Viscount Dilhorne doubted the relevance of fiscal considerations.

Hence, two lines of argument were developed to justify poor relation charities.

The explanation given in *Re Scarisbrick* was that since the relief of poverty was 'so altruistic a purpose', it did not really matter who was helped in poverty. An

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41 [1951] Ch 622, 639 (CA).

42 Per Lord Simonds, *Oppenheim* [1951] AC 297, 305; see also: J Martin, *Hanbury & Martin, Modern Equity* (17th edn Sweet and Maxwell London 2005) 435; H Picarda 'Redefining 'Charity' in England and Wales, Eire and Australia' [2002] CL& PR 1, 3.

43 [1972] AC 601 (HL).

44 *Dingle v Turner* [1972] AC 601,889; see also J Martin, *Hanbury & Martin, Modern Equity* (17th edn Sweet and Maxwell London 2005) 435, 442.

45 *Dingle v Turner* [1972] AC 601, 625.

analogous approach was discussed *Re Compton*[46] for educational trusts. Lord Cross of Chelsea argued in a similar direction in *Dingle v Turner,*[47] claiming that the question whether a charity benefited a sufficient section of the public depended on the purpose of the charity. The main idea of this approach is that if the action done is especially altruistic a smaller number of 'beneficiaries', even the relatives of the donor, may suffice to represent the public. If the benefit provided is especially important for the 'beneficiary', according to this approach there is no additional requirement that the public has to have access. If this approach was right, even the saving of one life was beneficial to the public. Alluding to a saying from the Talmud, this approach will be called the '**save a life - save the whole world**' approach.

The second explanation given by their Lordships in *Dingle v Turner* and by Evershed MR in *Re Scarisbrick* obviously takes a different approach. It was argued that though 'anomalous', this long established case law could not be overruled because people relied on it. This approach will be called the 'historic anomaly approach'.

As shown above, the Charities Act will not change the *public* benefit test in respect of the definition of the public. Thus probably poor relation trusts will be accepted in the future.[48] Another question is, however, whether the Act should be taken by the courts as an occasion to challenge this 'anomalous' line of cases.

3. Religion

In *Gilmour v Coats*[49] a donation to a priory of cloistered, constantly praying, nuns was in question. The priory argued that, according to Catholic belief the nuns' prayers benefited all the world - a sufficient number of 'beneficiaries' indeed! The problem is, however, that the link between the priory's conduct and the public benefit requires Catholic belief as an intermediate step. The House of Lords denied the charitable status because the services were not held in public and therefore could not benefit the community. To prove spiritual benefits, Lord Simonds reasoned, would be beyond the means of acceptable evidence.[50]

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46 [1945] Ch 123 (CA).

47 [1972] AC 601,889

48 Hayton and Mitchell, though structuring charitable purposes according to the Charities Act, cite *Dingle v Turner* for the public benefit test for poverty: D Hayton and C Mitchell, *The Law of Trusts and Equitable Remedies* (Sweet & Maxwell London 2005) 457.

49 [1949] AC 426 (HL).

50 ibid. 446.

Some decisions held that religious ceremonies executed for the commemoration of late relatives[51] were not charitable, since they benefited and comforted only the family. In *Re Hetherington*[52] donations for reading masses for the soul of the testatrix were held charitable if the masses where read in public.[53] In *Neville Estate v Madden*[54] the mixing of the believing with other people in the world was assumed to be beneficial. This differs considerably from other decisions. In *Re Warre's WT*[55] and *Re Banfield,*[56] the moral improvement and subsequent mixture of residents of Anglican retreat houses with their fellow citizens was held not sufficient.

The Charity Commission refused the registration of the Church of Scientology because of its lack of *public* benefit. The main occupation of Scientology is the so-called 'auditing' and 'counselling' of members in private. The Commission argued that these actions were not directed at the public.[57]

According to these decisions, especially *Gilmour v Coats,* the actual spiritual purpose of the religious ceremony in the context of its belief system – the saving of a single testatrix' soul, or grace for the world – is considered negligible.[58] The possibility of the presence of the public was sufficient,[59] as long as the religious community in question convincingly claimed to pursue some form of spirituality.[60] In respect of 'religion', an 'impersonal nexus test' was applied.

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51 *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381, 396 (PC); *West v Shuttleworth* (1835) 2 My & K 684, 39 ER 1106.

52 [1990] Ch 1 (Ch); *Hoare v Hoare* (1887) 56 LT 147 (Ch).

53 H Picarda, 'Religious Observances and the Element of Public Benefit' (1993/94) CL&PR 155.

54 [1962] Ch 832 (Ch).

55 [1953] 1 WLR 725 (Ch), see P Luxton, *The Law of Charities*, (OUP 2001) 517.

56 [1968] 1 WLR 846 (Ch).

57 Decision of the Charity Commissioners, 17 November 1999, http://www.charity-commission.gov.uk/Library/registration/pdfs/cosfulldoc.pdf.

58 See P Edge and J Loughrey, 'Religious charities and the juridification of the Charity Commission'(2000) 21 LS 36, 43.

59 *Funnel v Stewart* [1996] 1 WLR 288.

60 The much debated question whether a religion requires the worshipping of one God or many Gods and non God at all, now decided in S. 2 (3) (a) Charities Act 2006 will not be discussed in this context since it concerns the definition of "Religion" and not the question of access to the benefits religion provides.

4. Charities under the Fourth Head

Viscount Simonds in *IRC v Baddeley* pointed out that the considerations in *Oppenheim* were even more important when deciding about charities under the 'fourth head'. In this context, the approach I have named 'impersonal nexus test' was developed. Trying to establish criteria to define the 'appreciably important class of the community' Lord Wrenbury had required in *Verge v Somerville*,[61] Viscount Simonds also alluded to objective criteria by which 'beneficiaries' are chosen other than by their sheer number. He distinguished between

> *"a form of relief extended to the whole community, yet by its very nature, advantageous only to the few, and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it".*[62]

A benefit could thereby be restricted to a certain class of the public, for example the people who live in a neighbourhood and thus use a bridge built there, but not 'a class within a class', for example if only people of a certain creed may cross the bridge. This reasoning uses the 'impersonal nexus test'. Objective criteria to define the nature of the benefit are accepted, but those excluding potential 'beneficiaries' because of subjective criteria are not.

Another example of an approach to define the public benefit under the 'fourth head' can be found in *Re Resch*[63] where Lord Wilberforce explained the charitable character of a private hospital with indirect benefits as 'the relief to beds and medical staff of general hospitals'. This explanation is also used by German scholars and refers to the relieving effects that charities might have on the state's expenses.[64] If the state saves money, it could be argued, this benefits the public. This will be named the '**substitutive approach**'. It is close to the 'save a life – save the world approach', but takes a more utilitarian view.

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61 [1924] AC 496, 499 (PC).

62 *IRC v Baddeley* [1955] AC 572, 592 (HL).

63 [1969] 1 AC 514 (PC).

64 J Isensee 'Gemeinwohl und Bürgersinn im Steuerstaat des Grundgesetzes' in H Maurer (ed) *Festschrift für Günter Dürig* (CH Beck, München 1990) 35, 61; J Hey 'Die Steuerbegünstigung der gemeinnützigen Tätigkeit der öffentlichen Hand' (2000) StuW 467; K Tiedtke and P Möllmann, Spenden und Stiften soll attraktiver werden (2007) DStR 509, M Chesterman, 'Foundations of Charity Law in the New Welfare State' [1999] MLR 333.

IV. A Unitary Public Benefit Test?

After the different approaches to the public benefit test have been depicted, I will evaluate them and assess the question of whether a unitary approach is possible and desirable.

1. Direct or Indirect Benefits?

It should be noted that the 'sheer number' and the 'impersonal nexus' approaches consider the number and quality of the recipients of direct benefits, whereas the 'save a life – save the world' and 'substitutive' approaches not only accept, but emphasise *indirect* benefits. The 'historic anomaly' argues from a factual, not a normative, point of view.

A problem which both the 'save a life' and the 'substitutive' approaches face is whether indirect benefits can widen the group of 'beneficiaries' to satisfy the *public* benefit test. An example is *Re Resch*[65] where Lord Wilberforce explained the charitable character of a private hospital with indirect benefits – the disburdening of public expenses. The Charity Commission accepts indirect benefits.[66] Indeed it is the idea of every charitable purpose on the list in Section 2 (2) Charities Act 2006, that society will be changed by their promotion. For example, if racial harmony is promoted, society as a whole might become more peaceful, and thus receive a considerable indirect benefit. But this does not answer the question how a charity's direct 'beneficiaries' have to be chosen. TG Watkin argues, that the question turns on whether the direct 'beneficiaries' form a sufficient section of the community, not whether the community benefits indirectly.[67] This last point is based on the assumption that charities have to benefit a sufficient group of individuals directly and must not benefit relatives and employees. But for now the acceptance of poor relation trusts is the law. Good arguments are needed to explain why an indirect benefit is not sufficient as a matter of principle.

2. Indirect Benefits – the End of Poor Relation Charities?

This article tries to establish a *public* benefit test from a principled point of view. This means that long established case law of relation charities has to be justified not by the authority of the courts but by the quality of the argument brought

65 [1969] 1 AC 514 (PC).

66 The Charity Commission, 'Public Benefit: The Legal Principles' (January 2005 http://www.charity-commission.gov.uk/spr/pblp.asp#2) n.10-12.

67 TG Watkin 'Charity: The Purport of 'Purpose'' [1978] Conv. 277, 286.

forward in these cases.

(a) The 'Save a Life – Save the World' approach

Lord Cross in *Dingle v Turner* argued that the question whether a sufficient section of the public had access to a benefit depended on the charitable purpose pursued.[68] Thus a more exclusive circle of beneficiaries could be accepted when the especially charitable purpose of relief of poverty was pursued. The Charity Commission[69] and Hayton and Mitchell[70] indicated this view as well. If this position was correct, every charitable purpose in the catalogue had its own test. This could lead to an even more complex and patchy common law.

Moreover, if certain especially altruistic purposes, e.g. the relief of poverty, were more charitable than others, this would require criteria for the importance and dealing with different purposes. However, the Charities Act 2006 does not provide such a hierarchy of purposes. If such a hierarchy was to be developed by the courts, they would require good reasons to establish that on principle one charitable purpose was more charitable than another. It is not self evident, that 'relief of poverty' is of greater importance than e.g. education, which helps people to help themselves out of financial needs, or medical care, which might even safe their lives. This means, that there is no reason in principle, why poor relation charities should be accepted under the head of 'relief of poverty'. The reason why relief of poverty is seen as especially altruistic might be that the earliest interventions of the state were made through 'Poor Law' at a time when other issues like education were as yet completely private.[71]

Another position could be to accept relation charities for all purposes in the Act. But this would have strange consequences. For example a gift of parents to their child to buy schoolbooks would be charitable. Firstly, the gift would be of public *benefit* since education is a recognised charitable purpose. Secondly, according to the 'save a life – save the world approach' education is important and consequently the gift even to only one child is beneficial for the *public*. The approach would imply a mere repetition of

68 *Dingle v Turner* [1972] AC 601, 889.

69 Charity Commission 'Public Benefit: The Legal Principles' (January 2005 http://www.charity-commission.gov.uk/spr/pblp.asp#2) n 5,12.

70 D Hayton and C Mitchell, *The Law of Trusts and Equitable Remedies* (Sweet & Maxwell London 2005) 424, 439.

71 TG Watkin 'Charity: The Purport of 'Purpose'' [1978] Conv. 277, n 27.

the statutory purposes in the *public* benefit test and thus mean the abolition of a separate *public* benefit test. Hence, the 'save a life - save the world approach' cannot justify poor relation charities.

(b) The 'Historic Anomaly' and 'Substitutive' Approaches

Another approach to justify 'poor relation charities' is to accept them as an anomaly too well established to be abolished . This 'historic anomaly approach' takes the expectations of the public into account but does not offer a principled explanation. Charity law has a long history, but it is questionable whether all historic developments should be preserved. An advantage of abolition of poor relation trusts would be a more coherent, unitary public benefit test for all charitable purposes without 'anomalous' exceptions.[72]

An approach reconciling the exceptions of poor relation charities would be to accept another public benefit test for charitable purposes which provide benefits that the state would otherwise provide, the 'substitutive approach'. The most striking example would be the relief of poverty. If people who would receive benefits through the social welfare system received the same benefits from a charity, the social welfare system saves money and the burden on the state is relieved. If money is saved, this could be considered beneficial for the public. Consequently, this would mean that independent schools would remain charitable. If parents spend money on the education of their children in an independent school, the state saves money on state schools. If the expenses of independent education are higher than the public's savings, at least a percentage of savings could be regarded as beneficial.

The substitution of public expenses could be considered beneficial to the public, irrespective of how many people benefit and what connection there is between the 'beneficiaries' and the settlor, as long as the settlor himself has no legal duty to provide the benefits. An advantage of such a view could be to give incentives for the relief of public expenses. However, the existence of a saving has to be established. People save money if they are relieved of expenses that they would otherwise have incurred. For example, if someone buys a woman dinner, she saves only the money that she would have spent on dinner for herself, and no more. She does not save the price of an expensive three course meal, even though her admirer treats her to it. The state saves money where a responsibility on the part of the state to make a particular payment can be established. To ascertain

72 See: C Mitchell, 'Redefining Charity in English Law' [1999] TLI 13, 21, 38.

such responsibilities in abstract requires a convincing distinction between desirable and necessary expenses. Does the state have a duty to care for the poor and to educate its citizens? Why not then a duty to improve them through art and religion? What expenses does the state have to incur at all? What belongs to the public and what to the private sector is a difficult question.[73] The idea of a state having certain responsibilities developed with the modern welfare state. Only then were charities, which are much older, understood as a rather suspect, private counterpart of the public welfare system, fulfilling responsibilities now understood as public ones.[74] Today, the responsibilities of the state are still a matter of political debate. Consequently, the abstract reasoning that some purposes might be useful or desirable cannot provide a reliable *public* benefit test.

A possible way to ascertain savings would be to look at individual benefits that a 'beneficiary' would receive from the state if he did not receive the same amount from a charity. But such benefits would have to be ascertained first and they would vary from person to person. The individual saving to the state would be difficult to detect. The majority in *Dingle v Turner*[75] rejected Lord Cross' proposal to take the probability of abuse of tax benefits into account when deciding on charitable status. Viscount Dilhorne, with whom Lord Hodson agreed, reasoned that changes of tax law should not affect a trust's charitable character. If the law were to look at expenditure actually incurred by the state, charities would not only be subject to statutory changes, a connection rejected in *Dingle v Turner*, but charitable status would also change with every national budget. It might be objected that the law of charities may also change. With the 'substitutive approach' however, every legal change affecting the state's responsibilities would, automatically affect the charitable status. Moreover, the loss of charitable status could lead to a trust's invalidity. Finally, charities for the benefit of relations would be difficult to distinguish from private trusts. These difficulties show in cases like *Re Scarisbrick*[76] and *Re Segelman*.[77]

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73 M Chesterman discussed this question in 'Foundations of Charity Law in the New Welfare State' [1999] MLR 333.

74 M Freedland, 'Charity and the Public/Private Distinction' in: C Mitchel and S Moody (eds) *Foundations of Charity* (Hart, Oxford 2000) 111, 117.

75 [1972] AC 601.

76 [1951] Ch 622 (CA).

77 [1996] Ch 171 (Ch).

3. Direct Benefits

It was shown above that there is no convincing approach to developing a public benefit test only with regard to indirect benefits. This is not to say that a charity's indirect benefits are negligible. Indeed some of the new charitable purposes require charities which only or mainly provide indirect benefits, for example charities for the welfare of animals. Charities are to improve society and thus all of them should have an indirect benefit. However, if a charity hands out benefits to an identifiable group of people, this group cannot be a private one. Private good deeds are not charitable, laudable as they are. Thus the recipients of 'direct benefits' have to represent the public as well.

(a) Sheer Number

The 'sheer number approach' of Lord MacDermott would provide a workable solution if the border between a 'sufficient' and an 'insufficient number' could be ascertained. This problem resembles the difficulties of the question: when is a hill high enough to be a mountain? But even if a number, for example 50, could be fixed, this would exclude entities which can only provide the means to benefit a smaller number of 'beneficiaries'.

Another way would be to expand the number to include potential 'beneficiaries'. For example a foundation awards a scholarship to a young student every year, the number of possible student applicants, not the number of scholarships could be decisive. But then a group of 'potential beneficiaries' would have to be large enough. This could bar scholarships for the students of subjects rarely studied or charities for the healing of rare diseases. On the other hand, it would be difficult to deny charitable status if people benefited their particularly large families. This shows that a test is needed which provides a guideline about the quality, not the quantity of potential 'beneficiaries'.

(b) Impersonal Nexus

If an 'impersonal nexus test' is applied, according to the case law, theoretically everybody who is qualified by common criteria should have access to the benefit provided. The donor may define the benefit by objective criteria but not the group of 'beneficiaries' by their 'subjective' relation to a certain family or employer. This distinction between 'common' and 'subjective' criteria raises a number of questions which will be tackled later. However, it is clear that this approach allows adjustment of the number of 'beneficiaries' to the means of the charity and ensures that charitable gifts are given altruistically and not with the aim to benefit

employees, friends and family.

Charities stand on the borderline between the private and public sectors, and therefore between private and public law.[78] Even if the understanding of public responsibilities changes with time, charitable purposes concern fields in which the state is active. By regulating these purposes, the legislation shows its conviction that they benefit the public. This is the reason why fiscal benefits are provided. The public benefit test thus functions as a necessary link between the private action and its effect in public.[79]

This idea leads to another justification for the application of the impersonal nexus test. If the state offers benefits, it must comply with legal rules. It is useful to examine these rules for guidance in the question of how a charity might define its 'beneficiaries'. The law of public procurement requires the state to put out to tender work orders in order to allow different suppliers to offer their services. Two central elements of the European law of public procurement are the duty not to discriminate between different offerors on the ground of non-objective criteria, and the duty to provide a transparent procedure. This includes the duty to tender with common, not subjective criteria.[80] Though they are different areas, the similarities between the law of procurement and the 'impersonal nexus test' are noticeable. It shows that the impersonal nexus test aims in the right direction.

V. Problems of the Impersonal Nexus Test

The 'impersonal nexus test' offers the best solution for a unitary approach to the question of a charity's *public* benefit. However, its weaknesses shall not be denied. The test raises numerous questions: Which criteria are common and which are subjective? Do high fees exclude the public? Are certain groups, such as millionaires, excluded?

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78 M Freedland, 'Charity and the Public/Private Distinction' in: C Mitchel and S Moody (eds) *Foundations of Charity* (Hart, Oxford 2000) 111, 117; J Hey 'Die Steuerbegünstigung der gemeinnützigen Tätigkeit der öffentlichen Hand' (2000) StuW 467.

79 M Freedland, ibid. 117-120.

80 *Luck T/A G Luck Arboricultural & Horticultural v London Borough of Tower Hamlets* [2003] 2 CMLR 12 (CA); *Telaustria Verlags GmbH v Telekom Austria* [2000] ECR I-1075 (ECJ C-324/98) [60-62]; A Brown, 'The Application of the EC-Treaty to a Service Concession Awarded by a Public Authority to a Wholly Owned Subsidiary CASE C-458/03 Parkig Brixen' [2006] PPLR 2; C Koenig and J Kühling, 'Diskriminierungsfreiheit, Transparenz und Wettbewerbsoffenheit des Ausschreibungsverfahrens' [2003] NVwZ 779.

1. What Criteria Will Preclude Public Benefit?

A major argument against the 'impersonal nexus test' was put forward already by Lord MacDermott in *Oppenheim*.[81] He questioned the use of distinguishing between 'common' and 'subjective' criteria. He argued that the poverty of prospective beneficiaries could be interpreted as a 'subjective' criterion as well. Hayton and Mitchell[82], following the critique of Lord MacDermott, point out that this test gives rise to artificial manipulation if a trust for the children of a certain city is actually for the children of employees of an enterprise in that city.

It is true that the line between 'subjective' and 'objective' criteria is difficult to draw. To ask if a donor wants to benefit a group of people because of a personal preference or because their support indirectly supports himself, for example by providing fringe benefits to employees, does not always help. A donor who gives money on his deathbed to support his family will not receive a personal advantage in return. A donor's reasons for giving to a charity might be motivated by feelings of personal sympathy or hunger for fame in a familiar environment, for example by supporting his old school. But such motives should not necessarily bar the charitable character of the gift. The criterion that a charity has to offer a benefit to which theoretically everybody who is suitably qualified to benefit has access can be questionable. A benefit provided only for employees of a certain enterprise, a certain family or followers of a certain creed could be said to be open to the public since theoretically everybody could apply to the company, marry a member of the respective family or become a follower of the creed and thus become a beneficiary.

Probably a workable solution would be to follow the words of Lord Simonds in *Oppenheim*[83] quoted above and to exclude criteria which require a potential beneficiary to enter into a specific relationship (like marriage, employment, or a certain creed), which has nothing to do with the benefit provided and the charitable purpose pursued. For example, if money is given to a religious community to promote their belief by building a new room for community meetings, the benefit can reasonably be restricted to the religion's followers, since their belief has a direct connection with the charitable purpose pursued. The use of a bridge,[84] however, where the crossing of the bridge has no connection to the promotion of a belief, may not be restricted to the followers of a certain creed. If money is given

81 [1951] AC 297, 327.

82 D Hayton and C Mitchell, *The Law of Trusts and Equitable Remedies* (Sweet & Maxwell London 2005) 424, 439.

83 *Oppenheim* [1951] AC 297, 306 (HL).

84 See fort he example: Lord Simonds in *IRC v Baddeley* [1955] AC 572, 592.

by an employer to his employees to support the education of their children, their belonging to a certain enterprise has nothing to do with the charitable purpose of education. It could be argued that this approach would exclude giving money to narrowly defined groups, for example for the support of poor newly married couples, since the personal attribute of 'being married' had nothing to do with the relief of poverty or need. However, if the support of this respective group is motivated by a certain need (e.g. furniture or children's clothing which newly weds in particular might need) which connects this group of people, it should not be problematic to define a class of potential beneficiaries in this way.

The donor is allowed to define the benefit to be provided of his charitable gift. The 'beneficiaries' may be defined indirectly by defining the purpose and the institution to which money is given , but not in a way that the public is excluded by demanding criteria which have no connection with the purpose pursued and the intended effect of the benefit provided. This reasoning is reflected in section 1(2)(b)(i) Recreational Charities Act 1958, which requires free access for the public or a certain needy class.[85]

If this approach would be applied consequently, defining a class of beneficiaries by their origin in a certain area could be problematic as well. However, as long as such a restriction is motivated by a charity's limited means and/or a need in a certain area, it should be acceptable. It might be seen as artificial, but if a charity is for the benefit for children in a certain area and not for the children of certain employees, this opens the charity to the public even if both groups are practically identical.[86] The donor may hide individual 'beneficiaries' (like his employees) behind the definition of potential 'beneficiaries'. But if any other potential 'beneficiaries' are excluded this way, the *public* does not benefit.

2. Fees

The most difficult question of charities nowadays is whether fees affect the public benefit because they will practically exclude those who cannot afford them. The charging of fees does not generally preclude charitable status. The leading case is *Re Resch.*[87] Here the Privy Council held in relation to a private hospital that the charging of fees would not exclude charitable status as long as no profit was sought.

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85 See W Swadling 'Property' in P Birks (ed) *English Private Law Vol. I* (OUP, Oxford 2000) 4.512.

86 The Charity Commission, 'Public Benefit: The Legal Principles' (January 2005 http://www.charity-commission.gov.uk/spr/pblp.asp#2) n 20-23.

87 [1969] 1 AC 514 (PC) see also *Brighton College v Marriot* [1926] AC 192 (HL); *The Abbey Malvern Wells v Ministry of Local Government and Planning* [1951] Ch 728 (Ch).

However, cases when fees are high without profits being distributed are problematic. One could argue that even a group of millionaires who can afford the fees could represent a sufficient section of the public. However, a section of society that represents the public must not be defined by wealth. Lindley L.J. held in *Re Macduff:*

> *"I am quite aware that a trust may be charitable though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor."*[88]

Moreover, it seems difficult to imagine a need which people have because of being millionaires.

The discussion concentrates on independent schools and private hospitals. After the introduction of amateur sport as a charitable purpose, the same problem will have to be discussed with respect to sport clubs charging member fees e.g. polo, golf and sailing clubs. In the Strategy Unit Reform Report *Private Action, Public Benefit,*[89] indeed in the whole reform process,[90] large fees of independent schools[91] were and still are an important political issue. To retain charitable status, such schools, as the Report stated, would have to 'make significant provision for those who cannot pay full fees'.[92] The Charity Commission stated in its response to the Strategy Unit Review that free access should be the decisive criterion for determining charitable character. The charging of fees was considered an important factor, but did not necessarily affect charitable status, because even high fees would not prevent those 'of ordinary financial means from gaining access to the services or benefits the charity offers'.[93]

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88 (1869) 2 Ch 451 (CA).

89 Cabinet Office Number 10 Strategy Unit Report, *Private Action, Public benefit A review of Charities and the Wider Not for Profit Sector* http://www.strategy.gov.uk/work_areas/voluntary_sector/index.asp.

90 J Winfield, 'The New Public Benefit Test – An Unexploded Bomb*?'* [2005] CL&PR 51.

91 M Chesterman, 'Foundations of Charity Law in the New Welfare State' [1999] MLR 333, 336.

92 Cabinet Office Number 10 Strategy Unit Report, *Private Action, Public benefit A review of Charities and the Wider Not for Profit Sector* http://www.strategy.gov.uk/work_areas/voluntary_sector/index.asp. 4.26.

93 The Charity Commission, *The Charity Commission's response to the Strategy Unit Review*, http://www.charity-commission.gov.uk/spr/corresp.asp#3.

It is difficult to decipher the implication of these statements. Since the Charities Act does not change the *public* benefit test, it is questionable how a change in the charitable status of existing independent schools could be justified. The abolition of the presumption will make it necessary to show that the education a school offers is *beneficial* to its students, not that the students benefiting should be chosen according to different criteria in the future. The Report's statements however indicate that it understands the charging of high fees without offering scholarships as not *beneficial*.

The Charity Commission proposed that fee charging charities, especially independent school should make provisions such as offering scholarships for pupils from a poorer background, sharing their facilities such as sports grounds with local schools, inviting pupils of local schools for joint lessons, or the publication of educational materials to retain their charitable status.[94] Such projects are indeed very meritorious, but the assumption of the Charity Commission that independent school have a duty to undertake them, raise a couple of problems. Firstly, the percentage of scholarships/facility-sharing required by the Charity Commission is unclear. Secondly, even scholarships would only give admission to some particularly gifted students but would not grant admission to the average pupil. Moreover, such scholarships will necessarily be financed by the fees of paying students which consequently will need to be raised for every scholarship awarded, whereas the more donations such a school receives because of being a charity, the lower their fees may be.

But also from a principled perspective it is unclear whether the approach of the Charity Commission seems workable. According to the view of the Charity Commission, an independent school which does not offer scholarships or share its facilities is not for the public benefit. But the offering of education to paying students would remain the schools main occupation, irrespective of how much effort it would put into scholarships and the sharing of facilities. If the Charity Commission's approach was right, such a school could never be exclusively charitable. But being exclusively charitable is a major requirement since *Morice v. Bishop of Durham*[95] reflected in Section 1 (1) (a) Charities Act 2006.

It seems as if the Report wrongly believed that the Charities Act would change the *public* benefit test. If the Charity Commission and the new Charity Tribunal base their decisions and guidelines under Section 4 of the Charities Act on this understanding, it might have a considerable effect on the practice of law,[96] since

94 F Quint, 'Schools and the Reform of Charitiy Law: The Draft Charities Bill' [2004] ELJ 151,153.

95 (1804) 9 Vers Jr 399.

very few cases come before the courts.[97] How the public benefit test will be changed after the reform is a difficult question. On the one hand – as depicted above – Section 3(2) of the Charities Act does not change the *public* benefit test. On the other hand the Charity Commission seems, along with the Government, determined to apply a more rigid approach to independent schools.

But from a principled point of view, it is doubtful whether the charging of high fees should exclude charitable status. This understanding easily confuses the two issues of the *benefit* per se and the *public* access to a benefit provided. The fees charged concern the access of the *public* to the benefit provided. A school's *benefit* does not lie in providing education for the poor, but in providing education.

Schools, like certain sports clubs, have high running costs which are covered by fees. The only way to challenge high fees would be for the Charity Commission to inquire into the expenses of independent schools and sports club. If schools charge high fees because they employ excellent teachers, it is difficult to argue, why this should ban charitable status. This would raise the question whether a school should offer classes with a smaller number of pupils, lessons in Greek or build new a swimming pool at all. If independent schools and sports clubs are generally accepted as being of public *benefit*, this is not convincing. It cannot be the courts' and the Charity Commission's task to decide what activities a school may undertake as long as no profits are distributed. If it had been this what legislation wanted, it should be expressed clearly in the Charities Act. After all, a state school system does not end the influence of parental background on a child's opportunities. Even if the children of better off families attend state schools, such families will tend to live in more affluent areas. Thereby only some state schools would benefit from richer parents. This is the case in Germany, but apparently also in England, where people move to better areas to send their children to better state schools.

Since the law and also the Charity Commission accept the charging of fees in general as long as no profit is sought, it would be extremely difficult to ascertain what fees are too high. What a person can afford depends on priorities and not only income. Moreover, what is affordable for someone with an average income might always exclude the poor. But such an approach would prohibit any fee-charging and thus go too far. The only possible approach can be to challenge fees which are deliberately kept high to exclude people with lower incomes. This means, however, that, contrary to Chesterman's definition, charities have to be

96 P Edge and J Loughrey, 'Religious charities and the juridification of the Charity Commission'(2000) 21 LS 36, 44.

97 H Picarda 'Redefining 'Charity' in England and Wales, Eire and Australia' [2002] CL& PR 1, 11.

accepted which do not aim at narrowing the gap between the rich and poor.[98]

VI. Conclusion

It has been argued that the abolition of the mysterious presumption of public benefit only affects the question whether the benefit that a charity provides is *beneficial* as such. The presumption does not affect the question whether the group of people which has access to the benefit represents the *public*. With respect to the latter question, the common law including cases such as *Oppenheim* and *Dingle v. Turner* will remain good law. However, the enactment of the Charities Act 2006 should be taken as an opportunity to challenge the case law and to come to a unitary *public* benefit test for all charitable purposes on the list in section 2 (2) Charities Act.

In this article, the different approaches to the definition of the public have been extracted from the case law and given names. After the 'sheer number approach', 'impersonal nexus test', 'save a life – save the world approach', 'historic anomaly approach' and 'substitutive approach' have been introduced, it is submitted that the 'impersonal nexus test' discussed in *Oppenheim* and *Re Compten* offers the best approach to the problem. However, it is submitted that rather than differentiating between common and subjective criteria, a court should ask whether the prospective beneficiaries have to fulfil a criterion which has nothing to do with the benefit provided but rather requires them to enter into a special relationship such as employment with a certain firm that has no connection with the charitable purpose pursued.

With respect to the fiercely discussed topic of fees it is argued that, as long as no profits are distributed, such fees should preclude charitable status only if they are deliberately kept so high as to exclude people with lower incomes. The approach of the Charity Commission in demanding scholarships and the sharing of facilities in order to ensure that schools are working for the public benefit is not convincing from a principled point of view, laudable as such activities are.

98 M Chesterman, 'Foundations of Charity Law in the New Welfare State' [1999] MLR 333, 334.