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**Faith, Hope and Charity – a Critical Review of Charity Law's Socio-legal Reconciliation
of the Advancement of Religion as a Recognised Head of Charity**

A thesis
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of the requirements for the degree
of
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Juliet Chevalier-Watts



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Abstract

The object of my inquiry throughout the thesis was to reconcile the advancement of religion as a recognised charitable purpose, and this is undertaken through a critical socio-legal review, taking in to consideration, inter alia, historical and contemporary tensions that exist with regard to the legal recognition of religion within charity, and the fundamental need for charity in society, whereby the two principles may be critically bound, but often with competing interests and values, especially in a contemporary global climate.

The research raises questions about current issues within charity law in a socio-political landscape, such as public benefit, and is significant because of the considerable and recent changes to charity law internationally, with many more likely. For instance, in the last 60 years alone, there have been nearly 30 reviews of the law relating to charity, in a variety of jurisdictions. This illustrates the magnitude of some of the legal issues associated with charity law that will inevitably impact on the charity sector and in turn, society generally.

In addition, the research makes causal links between charity and a well-functioning society, not least because of the many and varied services that charities provide to numerous communities. Consequently, the research will assist policymakers, the judiciary, the charity sector and academics to understand trends in charity law, and assist in decision-making processes. Therefore, the overall benefit of this research will be with regard to policymaking in helping overcome challenges within charity law to benefit society generally.

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Chapter 1. Introduction

I. Introduction

This chapter has a number of introductory functions. It establishes the substantial original contribution to the research area, the purpose of the research, and introduces some key concepts pertaining to the thesis' statement, which will be explored in detail in later chapters. These include the relationship between charity and religion; religion's role and place within society; issues pertaining to state control and religion; the rule of law; a consideration of the consequences of removing religion from the fabric of society; and some discussion as to the benefits of protecting religion within society, particularly from a charity law perspective. This material will assist in contextualising religion and charity, and their legal and sociological place within society.

A few brief comments should be made here in relation to the legal theory of charity law in order to underpin the research appropriately; Chapter 2 considers these matters in further detail. Whilst there appears to be dearth of specific charity law legal theories, I have sought to ground the research in some contemporary theories.¹ These theories confirm the relevance of charity itself within society and, specifically in relation to this thesis, confirm the importance of the advancement of religion with society.

II. The Research

This thesis seeks to reconcile the advancement of religion within the charity narrative, and it does so in relation not only to some specific common-law legal systems, but also in relation to some socio-political contexts on a national and international basis.

There does not appear to be an agreed definition of what is specifically meant by a socio-political context, and indeed, it appears to be an expansive term. For the purposes of this thesis,

¹ I am grateful for the research of Professor Matthew Harding and Dr Matthew Turnour in this regard because it aided the discussions in this chapter.

it is utilised broadly, referring to systems composed of both social elements and political elements, and the interaction between them, and their relationship with religion, and thus religion within charity.

Further, for the purposes of this research, I refer to, in the majority of instances, the contexts of a democratic society, as might be understood within such common law jurisdictions as the United Kingdom, New Zealand, Australia and Canada. I acknowledge, however, that there are some instances where I refer to non-common law jurisdictions, such as Egypt and Germany, and also some non-democratic societies, including some Islamic states. I included such jurisdictions because of the relevance of the research specific to the issues being addressed at that point in the thesis.

In addition, I mainly refer to Judeo-Christian constructs of religion, which include Christianity and Islam, throughout the thesis. However, I do also make reference to other constructs of religious and spiritual belief, including Scientology, Jediism, and Druidism. Such a breadth of consideration reflects the diverse social paradigms of religion and belief on a global scale and thus embeds the notion that religion is a concept that sits within many of the societies to which this thesis refers, thus underpinning the overall object of my inquiry. That being that the advancement of religion is a legitimate paradigm and one that is reconcilable once its socio-legal contexts are understood, as this thesis demonstrates.

As a consequence, I consider a variety of jurisdictions, including Australia, New Zealand, the United Kingdom, and Hong Kong, illustrating the international relevance of the advancement of religion as a socio-political-legal construct. The majority of the jurisdictions are closely related because their jurisdictional heritage arises from English law. Consequently, it is useful to consider charity law from a comparative point of view to assess the evolution of the law, or issues arising in the law, that are specific to particular jurisdictions. As noted, the minority of the jurisdictions utilised do not have traditional historical connections with English law, for instance Germany and the United States. However, I deemed it pertinent to consider matters arising from such jurisdictions because of availability of material and because of issues raised by common law judges in relation to those specific jurisdictions that were pertinent to the assertions made in the thesis.

In addition, it is important to recognise that religion often seeks to function within an environment that is increasingly critical of religion generally.² Consequently, in order to review this head of charity within its socio-legal context, I demonstrate why the advancement of religion has a continued and fundamental place within contemporary society. Further, I argue that charity law is the appropriate vehicle to enable the advancement of religion to be upheld for the benefit of society as a whole within the context of a democratic society, generally speaking. In drawing this conclusion, as noted, I address the framing of the advancement of religion and its role in charity in relation to its public policy and socio-legal setting because to do otherwise would ignore the fact that law does not sit in isolation from its social and political environments. As a result, I look to reconcile the advancement of religion not just from a black letter law perspective, but I also look to reconcile the advancement of religion within a variety of contexts, which includes social, cultural and economic contexts. Each context was then linked back to the charity framework. I acknowledge that the principle legal regulation of the advancement of religion is through charity law, and as such, black letter law discussions form some of my arguments. For example, through public benefit, which includes critical analysis of commercialism and New Age belief systems. However, asserting that the advancement of religion is reconciled solely through black letter law regulation is to ignore other important socio-political factors associated with the advancement of religion that stem from religion as a construct. As a result of this broad scope of inquiry, therefore, I could acknowledge that law develops from, and with, its social and political influences and environments.

Consequently, the purpose of my inquiry throughout the thesis was that the advancement of religion is reconcilable through an understanding of the socio-political and legal context of religion, and what charity means within society. In other words, the multi-layered context provides for the reconciliation of the advancement of religion as a charitable purpose.

This thesis resulted from ongoing research in relation to the advancement of religion that revealed the complex relationship between religion and charity, highlighting many challenges facing the legal profession in considering and applying charity law principles in relation to the concept of religion and its advancement, which is a legally-recognised charitable purpose. Such undertakings, however, are occurring within the framework of an allegedly increasingly

² This chapter, and later chapters, set out examples of such criticism.

secular society, and conversely, within the context of newly emerging belief systems, as well as the growing shadow of extremist religious organisations. In addition, many international charity statutory reforms have occurred within the last decade.³ For instance, in 2018 in New Zealand, the Minister for the Community and Voluntary Sector announced a review of the Charities Act 2005,⁴ which is continuing at the time of writing. Such reforms illustrate the burdens on states to review the role of charity, and consequently the advancement of religion, within societies generally, and to ensure that charitable endeavours are governed and regulated appropriately.

As a result, this thesis provides a timely platform to develop previous research and debate critical legal challenges that are at the heart of, generally-speaking, the democratic societies to which I refer, not only for the legal profession, but also for governments and, importantly, for the healthy function of societies because of the relevance of charity within those democratic societies.

III. The Substantial Original Contribution to the Research Area

The research presented in this thesis is qualitatively substantial and original. This is demonstrated in a number of ways. Leading on from earlier research, I identify the fundamental connections between society, law, charity and religion, and key issues associated with the advancement of religion as a head of charity. I present methods of mitigating or assuaging such issues from a legally-defensible perspective, that of charity law, that take into consideration socio-political perspectives as might be acknowledged within, generally speaking, democratic society. I demonstrate, therefore, that the advancement of religion is reconcilable because it can be understood from its socio-legal contexts.

In undertaking this approach, I have acknowledged that charity law cannot be examined in isolation and must be considered within a broad socio-political framework; this contextualises the function and relevance of the advancement of religion in its contemporary setting.

³ For example, the Charities Acts 2006 and 2011 (UK), and the Charities Act 2013 (Australia).

⁴ “Review of the Charities Act” <https://www.dia.govt.nz/charitiesreview>. It should be noted that the author is part of the Review sector user group, although “charitable purposes”, is outside the scope of the Review at this stage.

Consequently, this holistic approach takes into consideration, inter alia, socio-legal Christian, Islamic and “new age” religious matters, thus acknowledging multi-faith and plural modern societies. It is correct that some of the societies to which I refer are not considered democratic societies as might be generally understood, however, as I have noted, it was important to include some of these findings. This was because such a comparative methodology enabled me to demonstrate a number critical aspects pertaining to the context of religion and how one may argue for its legitimacy in a variety of contexts that establish the value of religion within charity law throughout many societies, thus reflecting religious charities’ global relevance.

As a result, the findings demonstrate the continued legal and social legitimacy of the advancement of religion as evidenced for example, through the rule of law, the doctrine of public benefit, and economic and commercial enterprises. Consequently, this thesis is important in helping to understand the relevance of religion embedded within charity law as part of a democratic society as would be understood in a, generally-speaking, common law jurisdiction. Accordingly, this thesis demonstrates a comprehensive and original approach to scholarship in this field.

This chapter now considers some key introductory material, beginning with charity and religion.

IV. Charity and Religion

In endeavouring to reconcile the advancement of religion, as the object of my inquiry, it is important to understand the relevance of charity within society; I briefly make some observations on this point. The concept of charity is ancient, underpinning many aspects of societies, filling welfare gaps, reducing burdens on governments and society, and is increasingly central in today’s times. In the United States, for example, around 75 per cent of families contribute to charity, with charitable giving increasing sharply from USD 50 billion annually in 1980 to USD 325 billion in 2014. The number of charitable organisations in the United States alone in 2016 was recorded as 1.5 million.⁵ Therefore, charity’s role within

⁵ Cihan Tugal “Faiths with a Heart and Heartless Religions: Devout Alternatives to the Merciless Rationalization of Charity” 2016 *Rethinking Marxism* 28 at 422.

society should not be underestimated. Consequently, the governance of charity is a state and society concern to ensure that legally-recognised charities meet their obligations and duties, as well as ensuring that charitable governance is suitable to meet the appropriate needs of society.

Another important factor in conducting the object of my inquiry is to understand the fundamental relevance of religion to society, which I address briefly here. Religion is “of immense importance within the legal environment and the law is often deployed as an instrument for safeguarding religious interests.”⁶ A number of assumptions have been made pertaining to law’s role in underpinning religious affairs. The first relates to the profundity of religion in comparison with other human interests, suggesting any such legal acknowledgement will be of value to religious communities. This is an important point to make because in a multicultural world there may be a number of religious organisations that require protection due to their size or even due to their possible unpopularity.⁷ The second point is from: ⁸

... the standpoint of religious adherents, their religious identity and the beliefs and practices dictated by their faith often assume such a degree of importance in their lives that they are liable to suffer special harm if these are not accommodated by the law. Thirdly, it is widely ... accepted that religion generally has a beneficial impact which often permeates the wider community and that religious pursuits should thus be encouraged by the law since they promote the interests of society.

Consequently, “the international legal order has sought to guarantee religious rights and freedoms, while state legal systems have bestowed special exemptions and privileges on institutions and belief systems adjudged to be religious.”⁹ Such overarching legal recognition and governance of religion in society reflects the value that society places upon religion generally.

⁶ Andrew Iwobi “Out with the old, in with the new: religion, charitable status and the Charities Act 2006” 2009 Legal Studies Vol 29 No 4 December at 621 referring to PW Edge *Religion and Law: an Introduction* (Ashgate, Aldershot, 2006) at 6-8.

⁷ At 621.

⁸ At 621.

⁹ At 621.

In order to understand the relationship between charity and religion as a key consideration in this thesis, it is important to set out, albeit briefly in the introductory matters, their particular relationship. In doing so, the evidence points to the connection between charity and religion as being ancient and complex. Further, charity has been depicted as being desirable, and in relation to that, many religions advocate such a trait. As a result, “the law of charity favours religion not only by advantaging that virtue but also by treating as charitable the very pursuit of religion itself – hence the emergence of advancement of religion as one of the main heads of charity.”¹⁰

The connection between religion and charity remains just as strong today. Evidence of this is illustrated by the response of faith-based organisations, for example, after Hurricane Katrina struck the United States in 2005. Every major religious group provided relief, which included funds, supplies and thousands of volunteer workers. Individual churches provided assistance on their own initiative. Further, denominations and their relief agencies, including the Lutheran World Relief, the Mennonite Disaster Service and the Presbyterian Disaster Assistance, arrived in numbers, and faith-based relief organisations such as the Salvation Army, provided ample support.¹¹ Indeed, it is said that faith communities are at the forefront when responding to natural disasters. Further, such organisations are said to be “highly motivated, flexible and creative”¹² because they can provide assistance on many levels, including providing shelter, clothing, food, transportation, counselling, to name but a few methods of relief. It was further noted, in relation to Hurricane Katrina, the predominant source of help in the immediate weeks after the disaster came from religious organisations as opposed to secular bodies.¹³

However, one key issue with religion in a contemporary context is that whilst ancient history reflects the legal entrenchment of the advancement of religion as a charitable purpose, there is

¹⁰ At 622, citing A Bradney *Religions, Rights and Laws* (Leicester University Press, Leicester, 1993) at 120. See later in this chapter, and Chapter 3 for further discussions on legally recognised charitable purposes, which includes the advancement of religion.

¹¹ Stanley Clark, Giedre Gadeikyte and Erik Kasper “People Power: Natural Disasters as Catalysts for Civic Agency” in *Volunteerism and Philanthropy: Ideal or Ideology?* (LCC Liberal Arts Studies LCC International University Vol IV 2011) at 61.

¹² At 61-62, referring to Stephanie Gajewski et al “Complexity and Instability: The Response of Nongovernmental Organizations to the Recovery of Hurricane Katrina Survivors in a Host Community” (2011) *Nonprofit and Voluntary Sector Quarterly* April Vol 40 No 2 at 389ff. See Chapter 8 for an explanation as to the reason behind the success of religious charities.

¹³ At 62, referring to Richard Forgette et al “Before, Now and After: Assessing Hurricane Katrina Relief” (2009) *Population Research and Policy Review* February Vol 28 No 1 at 31ff.

evidence that religion's continued support within contemporary society is under pressure. This is particularly so in relation to its prominent position within charity law.¹⁴ For instance, actor and comedian Ricky Gervais, a critic of religion and of the privileges bestowed upon religious charities, memorably Tweeted:

Same sex marriage is not a privilege, [it's] equal rights. Privilege would be something like gay people not paying taxes, like churches don't.¹⁵

Gervais is not alone in his views. A cursory search on Twitter and Facebook, to name but two social media platforms, reveals continued criticism. Indeed, the quotes of famous critics, including Stephen Fry, Richard Dawkins and Christopher Hitchens, continue to be viewed and shared by thousands of proponents.¹⁶

However, it is not just celebrities, with their inevitable influence over the public, who are placing pressure on religion in society. Criticisms have been levelled at governments for allegedly failing to prevent discrimination in the charitable sector and for favouring religion. For example, *The New Zealand Herald* questioned the Government's stance on food giant charity Sanitarium for failing to crack down on the organisation's charitable purposes. The reporter argued that the rationale of continuing to support "archaic British law"¹⁷ is arguably "no longer relevant in a secular, 21st century democracy"¹⁸ because an organisation "should not get tax exempt status because you promote belief in a supreme being, or multiple supreme beings."¹⁹

Further evidence of negative public feeling is evidenced in relation to the New Zealand Destiny Church, "fronted by self-appointed bishop Brian Tamaki, and his wife";²⁰ it has been centre-

¹⁴ I explore the legal context of religion in charity law later in this chapter briefly, and in later chapters.

¹⁵ Twitter, Ricky Gervais (@rickygervais).

¹⁶ For example, Samuel Osborne "Stephen Fry was asked what he would say to God if they met. His answer is being investigated by police" *The Independent* (7 May 2017) <https://www.independent.co.uk/news/world/europe/stephen-fry-blasphemy-god-ireland-confronted-by-met-a7722191.html>.

¹⁷ David Farrar, Kiwiblog 23 February 2015, citing *The New Zealand Herald*, http://www.kiwiblog.co.nz/2015/02/advancement_of_religion_should_not_be_a_charitable_purpose.html.

¹⁸ Farrar; Sanitarium was established by the Seventh Day Adventist Church to promote biblical principles.

¹⁹ Farrar.

²⁰ Simon Plumb "Government moves to strip Destiny Church charities of their tax-exempt status" One News Now (3 October 2017)

stage of the media for a number of years. Much of the public attention stems from the Tamaki's own personal wealth, "which has drawn consistent public criticism for years because of the church's tax-exempt status."²¹ Further, in 2016, an online petition called for the-then Prime Minister John Key to remove from Destiny Church as a charity. This petition was in response to Mr Tamaki's public proclamation that the 2016 7.8 magnitude earthquake in Kaikoura, New Zealand was the fault of homosexuals and sinners.²²

The petition received over 100,000 signatures and whilst the Prime Minister did not strip the Church of its charitable status in relation to this petition, the negative public feeling towards the Church continued. Much of this stemmed from the announcement by the Board of the Department of Internal Affairs – Charities Services that it had "decided to remove Destiny International Trust and Te Hahi o Nga Matamua Holdings Limited from the Charities Register on 20 December 2017 ... because of the charities' persistent failure to meet their annual return obligations."²³ Destiny Church has appealed this decision, and if the appeal fails, assets belonging to the Destiny International Group could be taxed more than NZD 1.2 million.²⁴

It could be argued, therefore, that there is a contradiction between religion and charity, although this has not always necessarily been clearly expressed by denigrators of religion. The contradiction may arise because many would view charity as the material result of charitable works, such as relief for the poor. Such relief comes about through political consciousness being raised in regard to the plight of the needy. However, religion has been said to be an illusion and "merely a well-spring of moral sentiment."²⁵ As a result, it has been argued that

<https://www.tvnz.co.nz/one-news/new-zealand/government-moves-strip-destiny-church-charities-their-tax-exempt-status>.

²¹ Zac Fleming RadioNZ "Destiny Church founders move into new 'resort' home" (24 October 2017) <http://www.radionz.co.nz/national/programmes/checkpoint/audio/2018619033/destiny-church-founders-move-into-new-resort-home>.

²² <https://www.change.org/p/john-key-strip-destiny-church-from-tax-free-status> and https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11749215.

²³ Department of Internal Affairs - Charities Services Hot Topics "Update on Destiny International Trust and Te Hahi o Nga Matamua Holdings Limited from the independent Charities Registration Board (22 November 2017) <https://charities.govt.nz/news-and-events/hot-topics/update-on-destiny-international-trust-and-te-hahi-o-nga-matamua-holdings-limited-from-the-independent-charities-registration-board/>.

²⁴ Dan Satherley "Why Destiny Church might avoid a tax bill, despite charities' deregistration" NewsHub (23 November 2017) <http://www.newshub.co.nz/home/money/2017/11/why-destiny-church-might-avoid-a-tax-bill-despite-charities-deregistration.html>.

²⁵ Daniel Stevens "Rescuing Charity" in Charles Mitchell and Susan R Moody (eds) *Foundations of Charity* (Hart Publishing, Oregon, 2000) at 31.

utilising religion to try to resolve social issues is a waste of taxpayers' money. Further, money could be used more effectively by taxpayers to pursue charities that are not underpinned by allegedly self-interested moralistic and intangible principles that spring from religious beliefs.²⁶

Additionally, it could be argued that granting charitable status to a religious body “gives moral credibility to an organisation”²⁷ because an organisation that receives legally-recognised charitable status has complied with a number of legal requirements. This indicates an entity's purposes are “worthy enough to receive the support of the state”,²⁸ signalling an endorsement by society.²⁹ This may lead to the charitable sector losing credibility and public confidence if it becomes “dominated by polarising organisations”.³⁰ Indeed, there are many who view religious bodies as polarising, not least because a number of religions and their sects do not support some contemporary social views, such as same-sex marriage, abortion and LBGQTIA³¹ rights.

Further, granting religious bodies charitable status enables religions to take advantage of various financial exemptions not afforded to non-charitable bodies. This, in effect, gives economic support for having a particular belief system. In other words, a state endorses the advancement of religion through charity law, and in doing so enables religious charities to obtain a number of privileges not available to secular bodies. As Kirby J observed in the Australian High Court case *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*, “courts must recognise that this is deeply offensive to many non-believers, to people of different faiths and even to some people of different religious denominations who generally share the same faith.”³²

²⁶ At 31.

²⁷ Jane Calderwood “Controversial charities and public benefit” [2018] NZLJ March at 67.

²⁸ At 67.

²⁹ At 67, referring to Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” (2011) Melbourne Law Review 35 at 1073.

³⁰ At 67.

³¹ LGBTQIA - inclusive term for lesbian, gay, bisexual, transgender, queer and/or questioning, intersex and asexual, and/or allies.

³² *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 at [155]

Whilst there does seem to be much criticism levelled at religion and the advancement of religion, the continued relevance of religion within society and charity becomes more apparent as I consider further introductory matters. In addressing these matters, I turn now to the history of charity, and religion's place within charity.

V. A Brief History of Charity and Religion's Place within Charity

The title of this thesis takes its name, in part, from a translation of Paul's letter to the Corinthians, where he states: "And now abideth faith, hope, charity, these three; but the greatest of these is charity."³³ Research suggests that the concept of charity has "gained something of a bad name, epitomised by the [simile] 'as cold as charity.'"³⁴ It is conceivably why some of the contemporary versions of Paul's letter have replaced "charity" with "love."

However, the context of "love" is not of romance, rather it is philanthropic love - benevolence and compassion, echoing its charitable heritage. Whilst charity's reputation may have become tarnished in some regard, it is undeniable that charity, as a sociological construct, is ancient and resilient, and one that underpins society. Consequently, from its ancient history to its modern-day form, our "increasingly crowded and diverse world needs all the charitable love it can find."³⁵ Indeed, even if just viewed through an economic lens, charities constitute the most significant component of non-governmental organisations. Further, they lend themselves to promoting the growth of civil society. One way is through the diverse forms that charitable organisations may take that allows charities to be flexible in their form, and so fit in different ways within the socioeconomic fabric of society. For instance, charities can be trusts, societies, wills or corporations. In addition, charities also sustain the fabric of civil society by alleviating poverty, advocating for the vulnerable and reducing social tensions, to name but a few of their purposes.³⁶

³³ 1 Corinthians 13 *King James Bible* (Zondervan HarperCollins Christian Publishing, Nashville, 2002).

³⁴ The Hon Justice Margaret McMurdo AC "Faith Hope and Charity: the Resilience of the Charitable Trust from the Middle Ages to the 21st Century The WA Lee Lecture 2011" 2013 QUT Law Review Vol 13 No 1 at 1.

³⁵ At 1.

³⁶ Kerry O'Halloran "Charities, civil society and the charity law reviews of the island of Ireland" 2002 Policy & Politics October 32 at 265-266.

Charity is said to be an expression “of the better side of human nature”,³⁷ and is undoubtedly as “old as mankind itself.”³⁸ The word “charity” has its history in the French word “charite”, which came from the religious Latin “caritas”, meaning “love in its perfect sense”. Colloquially, this refers to “benevolence, philanthropy or goodwill.”³⁹ However, whilst a lay person’s definition of charity may be considered benevolence, philanthropy or goodwill, the legal sense has a “somewhat shadowy meaning”⁴⁰ and is different from the layperson’s meanings whereby:⁴¹

A gift simply to ‘benevolent purposes’ is objectionable: a benevolent purpose may be (but is not necessarily) charitable. The same is true of gifts to philanthropic purposes, utilitarian purposes, emigration, and public purposes: they all go further than legal charity.

It is clear, even from this brief consideration of the meaning of charity, that its framework is construed in a relatively narrow sense. The legal control of funds and activities are public for all intents and purposes and thus subject to public scrutiny and accountability. Such control measures should, in theory, provide public confidence that legally-recognised charity is therefore “fit for purpose”. However, public opinion does not always recognise such control measures.

Many democratic societies have incorporated the concept of charity into their sociological frameworks whereby charitable giving is a common personal and commercial undertaking, and indeed, many charitable constructs have now been embedded in legislation, such as the New Zealand Charities Act 2005. However, “the close relation of religion and relief of those who are in need has produced, in very diverse communities, many common notions as to what is

³⁷ Peter Luxton *The Law of Charities* (Oxford University Press, Oxford, 2011) at 3; Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Oxford, 2018) at 1. It is noted that some of this introductory material is also referred to in Juliet Chevalier-Watts “Arts and Culture – Charity Law, International Perspectives” in Marta Cenini (ed) *Trust e Patrimoni Culturali* (Publication forthcoming).

³⁸ Luxton, at 3.

³⁹ Hubert Picarda QC *The Law and Practice Relating to Charities* (4th ed, Bloomsbury Professional, Haywards Heath, 2010) at 3.

⁴⁰ Kerry O’Halloran, Myles McGregor-Lowndes, and Karla W Simon *Charity Law & Social Policy: National and International Perspectives on the Functions of Law Relating to Charities* (Springer, Netherlands, 2008) at 9.

⁴¹ At 9, citing Picarda, above n 39, at 221 (footnotes omitted). It should be noted that where later chapters may refer to the “philanthropy”, this is where research has utilised it interchangeably with “charity”.

the proper working out of moral imperatives.”⁴² For instance, the English law of charities⁴³ finds its roots in the Judaeo-Christian traditions whereby in the traditional manner of religion, charity was a key component. This is reflected in the following principles which it has its basis:⁴⁴

- i) The first commandment, to love thy God, which required self-sacrificing devotion;
- ii) The second commandment, to love thy neighbour, which obliged a person to provide mutual assistance; and
- iii) That evil lay at the root of maintaining personal wealth and goods.

As Christianity grew in popularity, philanthropic forms of charity were promoted, alongside the Church’s promise for eternal salvation for those who provided charity. For those who did not, eternal punishment would result. Consequently, the Church was significant in delivering relief to those in need, and “all charitable property was necessarily in the hands of the church”.⁴⁵ Therefore, most charitable gifts were made under the authority of alms for the poor or made for the Church itself.⁴⁶

Accordingly, the history of charity “reflects the change from the concerns of the Church and its lawyers and theologians to overtly Protestant and later liberal influences.”⁴⁷ Therefore, religion’s influence is evident in charity’s history, especially within the Western construct. Indeed, the “common law has recognized trusts for the advancement of religion as charitable

⁴² Picarda, above n 39, at 3.

⁴³ This thesis refers consistently to the English concept of charity because the majority of common law jurisdictions find their charity law heritage in the traditional English definitions and legal concepts of charity. More specific legal definitions may be considered in later chapters, where appropriate.

⁴⁴ Ann O’Connell and Joyce Chia “The Advancement (or Retreat?) of Religion as a Head of Charity: A Historical Perspective” in John Tiley (ed) *Studies in the History of Tax Law* (Vol 6, Hart Publishing, Oxford, 2013) at 370, citing Frederick Bird “A Comparative Study of the Work of Charity in Christianity and Judaism” 1982 *The Journal of Religious Ethics* 144 at 145-149; see also Juliet Chevalier-Watts *Law of Charity* (Thomson Reuters, Wellington, 2014) at 168.

⁴⁵ At 371, as cited in Patrick Adler “Historical Origin of the Exemption from Taxation of Charitable Institutions” in Patrick Adler (ed) *Tax Exemptions on Real Estate: an Increasing Menace* (Westchester Country Chamber of Commerce, New York, 1922) at 13; see also Chevalier-Watts, above n 44, at 168.

⁴⁶ Chevalier-Watts, above n 44, at 169.

⁴⁷ Picarda, above n 39, at 3, referring to, inter alia, Gareth Jones *History of the Law of Charity 1532-1827* (Cambridge University Press, Cambridge, 1969); WK Jordan *Philanthropy in England 1408-1660* (London, 1960); and Charles Stuart Loch DCL ‘Charity and Charities’ in *Encyclopaedia Britannica* (11th ed, Vol V, 1910).

for as long as it has recognized the concepts of ‘charity’ and ‘trust’⁴⁸ meaning that religious institutions have been granted a range of advantages, ranging from exemption from perpetuities to current tax exemptions.

Whilst piousness and charity have long since been associated, and certainly from medieval times, it is said that the English recognised piousness as including not only specific religious gifts and acts, but as also including donations for the poor and various activities to benefit the populace.⁴⁹ Therefore, in light of the historical correlation between religion and charity it was surprising that the Statute of Elizabeth 1601,⁵⁰ likely one of the most influential charitable legal frameworks, failed to mention religion in its Preamble. This statute, for the first time in legal history, set out a non-exhaustive legally recognised list of charitable purposes.⁵¹ These purposes⁵² were later abridged by Lord Macnaghten in the seminal case of *Commissioners for Special Purposes of Income Tax v Pemsel* as follows:⁵³

Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for purposes beneficial to the community not falling under any of the preceding heads.

This grouping became the foundation for many common law jurisdictions’ determination of legally-recognised charitable purposes, which obviously includes the advancement of religion. For example, in New Zealand, the advancement of religion is set out in s 5(1) of the Charities Act 2005, whereby “... charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.”

⁴⁸ Kathryn Chan “The Advancement of Religion as a Charity Purpose in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 115.

⁴⁹ At 115, referring to Jones, above n 47, at 4 and Kathryn Chan “Taxing Charities/Imposer les Organises de Bienfaisance: Harmonization and Dissonance in Canadian Charity Law” 2007 Canadian Tax Journal at 481.

⁵⁰ Also referred to as the Statute of Charitable Uses. This thesis utilises the “Statute of Elizabeth” throughout.

⁵¹ The statute has long been repealed, although the Preamble lives on as the foundations of charitable purposes in common law jurisdictions.

⁵² See chap 3 for the full list of charitable purposes.

⁵³ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (HL) at 583.

Returning to the issue of the absence of religion in the Preamble, the closest the Preamble came to acknowledging religion was the repair of churches as a charitable purpose. This apparent aberration might be understood by considering the non-religious standpoint of Queen Elizabeth I, which included “the desire of the Puritans to have a religion free of state interference.”⁵⁴

With the *Pemsel* case came a consensus that for a charity to be legally recognised at common law, an entity or gift must be founded entirely for charitable purposes and benefit the public.⁵⁵ The law recognised that a purpose must fall within one or more of the four *Pemsel* heads of charity, and the advancement of religion therefore became an explicitly-recognised charitable purpose.

However, the advancement of religion “as a charitable purpose is complex and increasingly variable”.⁵⁶ This is no doubt in part due to the evolution of religious beliefs within society, as well as the development of religious neutrality within constitutions. It is also in part due to “charity law’s continued failure to meaningfully address the difficult issues raised by”⁵⁷ this head of charity. Such issues have provided a greater voice to those “favouring the abolition of the religious charity”.⁵⁸ This, therefore, has inevitably led to the question of “what is the public benefit of advancing religion?”⁵⁹

This thesis will, therefore, demonstrate the adaptability and resilience of the socio-legal concept of charity, and as a result, that the advancement of religion is a defensible and “effective institution for delivering philanthropy”⁶⁰ in the 21st century. This is because this thesis embeds the advancement of religion within its social and legal contexts, and what charity means within a democratic society, generally speaking. As a result, this diverse method of reconciling the advancement of religion demonstrates that this charitable purpose is reconcilable because it can be understood from its sociolegal contexts.

⁵⁴ Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Melbourne, 2000) at 147; Chevalier-Watts, above n 44, at 168.

⁵⁵ See later chapters for more detailed observations in relation to the doctrine of public benefit.

⁵⁶ Chan, above n 48, at 115.

⁵⁷ At 113.

⁵⁸ At 113, referring to Christine R Barker “Religion and Charity Law” [1999] *Juridical Review* 30; and Peter Edge “Charitable Status for the Advancement of Religion: An Abolitionist’s View (1995/1996) 3 *Charity Law & Practice Review* at 29.

⁵⁹ At 114.

⁶⁰ McMurdo, above n 34, at 1.

I turn now to some related concepts that will provide an additional framework for this thesis' precepts, beginning with religion and society.

VI. Religion and Society

Religion has numerous definitions. Emile Durkheim⁶¹ defined religion as “the serious life”,⁶² where he pointed out that “it typically involved discipline and training, and participation in public rituals that defined life cycle and identity of the participants.” He noted that “[i]f religion generated everything that is essential in society, this is because the idea of society is the soul of religion.”⁶³

Legal systems have endeavoured to define religion in order determine which individuals or groups will receive legal benefits. For instance, legally-recognised charitable bodies will benefit from certain pecuniary advantages, inter alia, over and above other non-charitable entities. Thus, a definition of religion “as a means of inclusion and exclusion has sociological effects and is sociologically informed.”⁶⁴

However, “the very meaning of religion is contested”⁶⁵ because “[t]here is no consensus ... about what the word means.”⁶⁶ Indeed, it has been stated that the precise “definition of the concept of religion, or of what generally constitutes a ‘religion’, is difficult, if not impossible, because of the intangible and wide-ranging nature of the topic.”⁶⁷ Certainly, it has been

⁶¹ Émile Durkheim - French sociologist. Credited as being one of the principal founders of modern sociology, along with Karl Marx and Max Weber.

⁶² Bryan S Turner *The Religious and the Political: A Comparative Sociology of Religion* (Cambridge University Press, New York, 2013) at 242, referring to Emile Durkheim *The Elementary Forms of Religious Life* (Library of Alexandria, 1921).

⁶³ Durkheim, above n 61, at 314.

⁶⁴ Russell Sandberg and Rebecca Catto “Law and Sociology: Toward a Greater Understanding of Religion” in N Doe and R Sandberg (eds) *Law and Religion: New Horizons* (Peeters, Leuven 2010) at 288.

⁶⁵ Cathy Byrne *Religion in Secular Education: What, in heaven’s name, are we teaching our children?* (Leiden, Boston, 2014) at 12.

⁶⁶ At 12, citing Bron Taylor “Exploring Religion, Nature and Culture” (2007) *Journal for the Study of Religion, Nature and Culture* 1 No 1 at 9.

⁶⁷ At 12, citing the Australian Bureau of Statistics “Religious Affiliation” 2006 1301 1 Year Book Australia <http://www.abs.gov.au/ausstats/abs@.nsf/bb8db737e2af84b8ca2571780015701e/bfdda1ca506d6cfaca2570de0014496e!OpenDocument>; see later chapters regarding the charitable definition of “religion”.

recognised that “defining religion is an ‘exercise of power’ which can have serious repercussions.”⁶⁸ Nonetheless, it is acknowledged that the meaning of religion is not fixed, and has changed over time across and within societies.

Law may also operate to give an understanding of sociological constructs of religion because changes to religious definitions can be “brought about or marked by legal mechanisms.”⁶⁹ For instance, “boundary disputes may erupt formally in legislatures and courts of law.”⁷⁰ Therefore, it is evident that law’s impact on religion and its continued social relevance is paramount, and that they are inherently bound together. Consequently, the foundations of this thesis are underpinned by sociological constructs, and, as will be discussed briefly in this chapter, by political and state matters also.

With concepts of religion, regardless of its definition, comes the principle of religious freedom. This is a notion familiar in many societies today. It can be considered a freedom of conscience, where there is a “basic assumption of theories of civil liberties and tolerance.”⁷¹ The objective of civil society is to afford surety for its populace, whilst at the same time ensuring that religious beliefs remain an individual construct. This means that a specific secular state would be obligated to acknowledge religious freedoms.

As an example of this, the religiously-founded 17th century English Civil War was ended by the “Glorious Revolution”.⁷² Scotland and England had been unified, and novel ideas as to tolerance were being propounded by political theorists John Locke and Samuel von Pufendorf.⁷³ The Lockean view of secularism was that religion should be a private concern alone and must not intrude on the civic sphere. In reality, Locke, in his “A letter on tolerance” in 1667, actually desired ending the conflicts between Catholics and Protestants, particularly

⁶⁸ Sandberg and Catto, above n 64, at 288, citing J Beckford *Social Theory & Religion* (Cambridge University Press, Cambridge, 2003) at 23.

⁶⁹ At 289.

⁷⁰ At 289, citing Beckford, above n 68, at 13.

⁷¹ Turner, above n 62, at 144.

⁷² The “Glorious Revolution”, also known as the Revolution of 1688, or the Bloodless Revolution. “The Glorious Revolution of 1688-1689 replaced the reigning king, James II, with the joint monarchy of his protestant daughter Mary and her Dutch husband, William of Orange. It was the keystone of the Whig (those opposed to a Catholic succession) history of Britain.” Edward Vallance “The Glorious Revolution” http://www.bbc.co.uk/history/british/civil_war_revolution/glorious_revolution_01.shtml.

⁷³ Turner, above n 62, at 144.

amongst the puritan factions. In addition, there was growing openness in 17th century societies between states that formed long-term trade agreements, and also those that undertook colonisation. Such values of acceptance and the separation of state and religion were key to the American constitution. In effect they created free markets of religion, which do not always favour Christianity,⁷⁴ and have “opened up a cultural space for a civil religion.”⁷⁵ Thus, in a “plural, diverse and multicultural society, social diversity could perhaps be contained within the broad umbrella of a ‘civil religion’”.⁷⁶

This notion of social diversity may also be reflected in the way in which religion is a motivator for some social actions. For instance, sociological research carried out on evangelising Christian missionaries “demonstrates that religion can be a motivation for migration in a contemporary world”.⁷⁷ Further, that “religious identities still play a role within Western European borders.”⁷⁸

Nonetheless, it was asserted that the 21st century would see an increase in secularism, with a waning influence of religion and a limited presence of religion in society.⁷⁹ Indeed, in 1999 “God’s obituary” appeared in the final 20th century edition of *The Economist*, declaring religion irrelevant.⁸⁰ However, less than two years later dramatic events unfolded in New York with the destruction of the Twin Towers by Islamic fundamentalists. With this attack came the “re-entry of religion into the western psyche that would not be easily shaken”,⁸¹ and the 21st century began with a strengthening of religious and spiritual beliefs and identities, and an increase in religiously-associated conflicts. Consequently, in 2007 *The Economist* retracted religion’s death notice:⁸²

An Islamist party rules once-secular Turkey; Hindu nationalists may return to power in India’s next election; ever more children in Israel and Palestine are attending religious schools that tell

⁷⁴ At 144.

⁷⁵ At 144.

⁷⁶ At 144.

⁷⁷ Sandberg and Catto, above n 64, at 281.

⁷⁸ At 281.

⁷⁹ Byrne, above n 65, at 11, referring to Peter Berger *The Sacred Canopy* (Doubleday, New York, 1967).

⁸⁰ At 11, referring to “Obituary: God” *The Economist* (23 December 1999).

⁸¹ At 11.

⁸² At 11, citing “The New Wars of Religion” *The Economist* (1 November 2007).

them that God granted the whole Holy Land. On present trends, China will become the world's biggest Christian country ... religion is an inescapable part of politics.

Certainly, it is undeniable that the "relationship between religion, law and society ... has changed dramatically in recent years",⁸³ not least because of the "long shadow of September 11th 2001."⁸⁴ It is said that this event "both caused and ... perpetuated ... a number of moral panics concerning the wearing of religious dress, the application of discrimination laws to religious bodies and the status of religious laws."⁸⁵

Leading on from the atrocities associated with the "long shadow of September 11th 2001", and as a brief point of note here, it would be remiss to ignore the fact that religion does have a dark history. Such darkness is equally found in contemporary times and is mentioned in coming chapters. Such issues include religious extremism and violence; discrimination against women and minority groups; abuse of children; and bigotry. These issues cannot be denied. Nonetheless, mechanisms are in place that may go some way to mitigate perceived or real problems related to religion, at least in relation to charity law. For instance, the rule of law provides checks and balances to ensure that charity operates effectively within society. This can occur through charities services finding that religious bodies fail to meet certain criteria, for example, the body's activities may be illegal or oppose public policy. Public policy can include the system of government, the safety of citizens, and national security.⁸⁶ Indeed, I demonstrate that despite the negative aspects of religion, the charity law's mechanisms can ensure appropriate governance of charities through the rules of law and this provides a method of ensuring that religion operates effectively within society for the benefit of society.

Returning to matter of secularisation, it has been asserted that "[o]ur age is not an age of secularization, it is an age of exuberant religiosity",⁸⁷ reflected in a contemporary resurgence of religious and spiritual beliefs. The resurgence is said to be in response to the social crisis of

⁸³ Sandberg and Catto, above n 64, at 275.

⁸⁴ At 275.

⁸⁵ At 275.

⁸⁶ See Chapter 4 Rule of Law for discussions.

⁸⁷ Mark C Modak-Truraan "Symposium Introduction: Law, Religion, and Human Rights in Global Perspective" (2003) 22 *Miss C L Rev* 165 at 165, citing Peter L Berger "Globalization and Religion" (2002) *The Hedgehog Review* 4 at 10.

“the widespread secular materialism in both the Western industrialized countries and the Third World”.⁸⁸ Evidence of this crisis is apparent in the growth of urban poverty, failing public infrastructure, increasingly violent societies, and “feeling that problems can no longer be solved, controlled or even adequately addressed.”⁸⁹ Therefore, individuals and communities turn to, or return to, religion as a source of contemporary comfort, illustrating the continued relevance of religion. Indeed, the notions and precepts of religion invariably span the ages. Further, the foundations of religion, irrespective of specific belief systems, offer degrees of hope and comfort. This is the case regardless of the variety of stresses being suffered by populations when other tangible state provisions appear to be failing. The reality, therefore, is that there has been a worldwide religious renaissance.

It is not just a social crisis that has been occurring; a political crisis has also developed. This is evident in the “deepening fragmentation of the political culture and the flagging confidence in government, politicians and, to some extent, in the political process itself.”⁹⁰ Such crises have led to a resurgence of Christian and Islamic fundamentalism, evangelicalism, Pentecostalism, Orthodox Judaism, broader concepts of spiritualism, new age movements.

However, a contemporary concern associated with religion is the apparent rise in violence said to be connected to religion, which is often referred to as religious terrorism. Whilst religious violence dominates the media, there is nothing necessarily new, however, about this connection between religion and violence. From:⁹¹

... biblical wars to crusading ventures and great acts of martyrdom – violence has lurked as shadowy presence. It has colored religion’s darker, more mysterious symbols. Images of death have never been far from the heart of religion’s power to stir the imagination.

Although there may have been a historical connection between religion and violence, it does appear to have increased with contemporary times. Research in 2014 showed that 74 per cent

⁸⁸ Scott Thomas “Religious resurgence, postmodernism and world politics” in John L Esposito and Michael Watson (eds) *Religion and Global Order* (University of Wales Press, Cardiff, 2000) at 38.

⁸⁹ Turner, above n 62, at 144.

⁹⁰ At 144, referring to Jean Bethke Elshtain *The Trial of Democracy* (Basic Books, New York, 1995).

⁹¹ Mark Juergensmeyer *Terror in the Mind of God: The Global Rise of Religious Violence* (University of California Press, California, 2000) at 6.

of citizens endure “high levels of religious hostilities, violence, or conflict, a markedly higher percentage than just five years ago, when 45 per cent ... lived with such levels.”⁹²

Certainly, many of the distinguished intellectuals of their time, which include Durkheim, Marcel Mauss and Sigmund Freud, have questioned why religion seems to perpetuate violence, and equally, why violence perpetuates religion. Whilst it is beyond the scope of this thesis to answer such complex questions, what can be said is that whilst religion is not always the innocent party in relation to begetting violence, religion does not ordinarily lead to violence.⁹³ It occurs “with the coalescence of a peculiar set of circumstances – political, social and ideological – when religion becomes fused with violent expressions of social aspirations, personal pride, and movements for political change.”⁹⁴

Unfortunately, such circumstances are not unusual in contemporary times. This may lead to more violent expressions as communities are faced with greater challenges to, or denials of, their desired ways of life. With ever-growing global populations come issues associated with urbanisation, population density, transport issues, anonymity and alienation associated with city life, not to mention the greater presence of displaced and dislocated communities. These have produced social environments that evade state control, and such environments are exposed to greater threats of civil unrest and, indeed, terrorism. Violence can come from small militarised groups with devolved authority structures, or from lone individuals with a personal agenda, or circumstances that may progress to unstable war zones.

The threat of contemporary violence has led many governments to reduce the mobility of populations, which can be undertaken in a variety of ways. Governments have walled off, or enclaved some communities, for example, by building security measures across borders between Mexico and the United States, and between Israel and Palestine. Other examples can be found with more complex methods of social segregation, such as the wealthy communities in Cape Town, South Africa, living in secured gated communities. Such reductions in mobility

⁹² Brian J Grim, Greg Clark and Robert Edward Snyder “Is Religious Freedom Good for Business?: A Conceptual and Empirical Analysis” 2014 *Interdisciplinary Journal of Research on Religion* Vol 10 Article 4 at 3.

⁹³ Juergensmeyer, above n 91, at 6.

⁹⁴ At 10.

inevitably impact social structures leading to resentment and often violence within communities.

One might assume that such developments have little connection with religion and are perhaps merely a result of demographics, social inequalities and government policies. However, what is evident is that some of these acts of violence are “fuelled by distinctive ideologies that both explain and counter the instability, degradation and inequalities of global modernity.”⁹⁵ Further, when individual alienation and private resentments become associated with collective movements that are equipped with powerful ideologies, then what were once isolated acts of violence now become co-ordinated and cohesive.

Unfortunately, religion does appear to be a powerful motivation for violent acts, at least within the Christian-Judeo-Islamic traditions. This is because these religions divide “the world clearly in to the profane and the sacred, identifies an enemy, offers justification for resentment and aggression, and promises a future without inequality and suffering.”⁹⁶ In those circumstances, religion provides an explanation for real or perceived injustices. Further, it offers a resolution, if not necessarily in this earthly life, then in a promised afterlife.

More concerning is when “this religious imaginary is combined with a sense of national degradation, then the motivational force of religion is intensified.”⁹⁷ This is unfortunate, because one only has to view the various global news reports to witness either intentional, or unintentional, degradation of some populations in relation to religious views. For instance, some religions are referred to as cults. “Cult” is invariably regarded as a pejorative term in itself, but in addition, research has led to observations that the “coercive behaviour of cults can cause severe distress or psychological trauma, and can disrupt the lives of families.”⁹⁸ It might be argued that a cult is different from a religion. However, it has been noted that some religious organisations are “cultish, harmful to their members and yet they claim fiscal exemptions for

⁹⁵ Turner, above n 62, at 23.

⁹⁶ At 23-24.

⁹⁷ At 24.

⁹⁸ John Perkins “Charity or religion: can we advance one without the other?” 2012 Australian Humanist No 105 Autumn at 6.

activities like dissemination of their music CDs, [and] hiring stadiums for evangelical events to extract donations from their loyal adherents.”⁹⁹

Nonetheless, given the close correlation between religion, state and charity that “established their symbiotic relationship at the turn of the 16th century, it is unsurprising that from such beginnings”¹⁰⁰ it was religious principles which “thereafter identified the moral imperatives that came to inform the law”.¹⁰¹ However, this led to the social and moral battlegrounds of their day, including conflicts surrounding slavery, contraception and suffrage. Contemporary moral battlegrounds also reflect religious influences, including advocates for ‘traditional marriage’, and arguments against abortion and LGBTQIA rights. Thus, religion’s influence is being challenged by society’s desire to promote equality and human rights.¹⁰²

Further, the media is often alive with not only reports of religious-inspired violence, but also, for example, the unsavoury “activities of paedophile priests”.¹⁰³ This “indicate[s] that the activities of religious people are not always benign.”¹⁰⁴ Consequently, it has been argued that the cost to communities as a result of these criminal, or socially-unacceptable behaviours associated with religion, is not just a social cost, but also financial because of the pecuniary benefits that legally-recognised religious charities receive.¹⁰⁵ Indeed, “there appears to be a strong public sentiment that taxpayers should not be required to support others’ religious beliefs and practices through the tax system”.¹⁰⁶ Kirby J reflected such sentiment in his “strongly worded judgment”¹⁰⁷ in the Australian High Court decision *Federal Commissioner of Taxation v Word Investments Ltd*:¹⁰⁸

⁹⁹ Sofia Zudova *On the taxation of religious charities and the public benefit of charitable exemptions* (Victorian Parliamentary Internship Research Report The University of Melbourne June 2016) at 7, referring to the Church of Scientology, the Hillsong Church, and the Paradise Community Church.

¹⁰⁰ Kerry O’Halloran “Moral Jeopardy: The Challenges for the Church and for Religion Internationally” in *The Church of England – Charity Law and Human Rights* (Springer International Publishing, Switzerland, 2014) at 205-206.

¹⁰¹ At 206.

¹⁰² At 206, referring also to *McFarlane v Relate Avon Ltd* [2010] IRLR 872 at [23] and C Taylor *A Secular Age* (Belknap Press/Harvard University, Cambridge, 2007).

¹⁰³ Perkins, above n 98, at 6.

¹⁰⁴ At 6.

¹⁰⁵ At 6.

¹⁰⁶ Kathryn Chan “Religious Charitable Status and Public Benefit in Australia” 2011 Melbourne University Law Review Vol 35 at 1082.

¹⁰⁷ At 1082.

¹⁰⁸ At 1082, citing *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 at [110]; see also [112]-[116].

Charitable and religious institutions contribute to society in various ways. However, such institutions sometimes perform functions that are offensive to the beliefs, values and consciences of other taxpayers. This is especially so in the case of charitable institutions with religious purposes or religious institutions. These institutions can undertake activities that are offensive to many taxpayers who subscribe to different religious beliefs or who have no religious beliefs.

Whilst it is acknowledged that Kirby J's dictum was made in relation to statutory interpretation, it suggests that "tax exemptions in favour of religious groups should be supported by convincing public benefit rationale."¹⁰⁹

As a result, it is unsurprising that it has been observed that the "inclusion of religion as a 'head of charity' is ... quite anomalous".¹¹⁰ Not least because a "major issue is how to balance the positive contributions that religion makes to public life with the harms that are created by some religious institutions and norms."¹¹¹ I endeavour to provide some balance, at least with regard to charity law.

In light of such media attention and public opinion, it is understandable how religious motivations for defending a particular way of life may fall under greater scrutiny and, alongside that, the social consequences that arise from defending those particular belief systems and their associated ways of life, which can include violence.

Regardless of the motives of such violence, violence associated with religion inevitably leads to fear, and then anger, as communities wrestle with the notion that the ethos of religion is tranquillity and peace and should not be fear-inspiring. This leads to greater criticism being levelled at religions generally.¹¹² Thus, any religious belief is at risk of denigration and condemnation. This furthers the ever-increasing chasm that is developing between the right to freedom of belief and the deepening concerns society harbours with regard to religion

¹⁰⁹ At 1082.

¹¹⁰ Perkins, above n 98, at 6.

¹¹¹ Kathryn Chan "The Advancement of Religion as a Charitable Purpose in an Age of Religious Neutrality" 2017 *Oxford Journal of Law and Religion* 6 at 135.

¹¹² Juergensmeyer, above n 92, at 5.

generally. As result, it is evident that with contemporary times come greater state control over religious organisations and pursuits.

VII. State Control

Even though religion is playing a “more significant and ever-changing role in public life”,¹¹³ it might be believed that the relationship between religion and states is kept separate, and “the dominant way of understanding the relationship between religion and politics in the Western world is through the lens of secularism”.¹¹⁴ However, it is clear that many democratic states have much influence and control over aspects of religious life. Different religious groups have different kinds of status and are managed in distinct ways depending on the political persuasion of the government in question. One only has to consider the various public debates across Europe and the United States in relation to the wearing of the hijab, niqab, burqa and crucifixes in public spaces.

Such debates are centred around politics; the control of religion; notions of national identity and culture; and traditions and history also play a crucial role.¹¹⁵ Indeed, it has been argued that with globalisation and the blurring of traditional national and state boundaries, identity becomes a political issue. In a global society, it is religion that is increasingly defining identity. However, identity no longer sits neatly within political borders, and this becomes ever more apparent as citizens from democratic and non-democratic societies co-exist as a result of, for example, global migration as a consequence of employment, family, or conflict. This can result in modern political conflicts arising from conflicts of religion being “the primary vehicles of civilizational complexes.”¹¹⁶

This aforementioned political theory has been key to understanding the conflict that has arisen between political Islam and the West. This manifested itself in the two Gulf Wars; the invasion of Iraq; conflicts in Sudan and Somalia; the war in Afghanistan; the wars in Chechnya; and the

¹¹³ Anders Berg-Sorensen “Introduction: Contesting Secularism” in Anders Berg-Sorensen (ed) *Contesting Secularism: Comparative Perspectives* (Ashgate Publishing Limited, Farnham, 2013) at 1.

¹¹⁴ At 1.

¹¹⁵ At 1.

¹¹⁶ Turner, above n 62, at 24.

crisis in Pakistan. It has also been utilised to try to understand micro level religious conflicts, which, as mentioned earlier, includes the wearing of certain religious clothing by women and the regulations placed on minarets in Switzerland. The latter conflicts “can be read as everyday manifestations of these civilizational tensions.”¹¹⁷

The rise in conflicts relating to religion has resulted in increases in government restrictions on various sections of society. Research shows that communities subject to elevated levels of constraints imposed by governments rose from 58 per cent of the global populace in 2007 to 64 per cent in 2012.¹¹⁸ The simultaneous rise in such restrictions and religious hostilities is not a coincidence. It has been established that there is a “robust and consistent connection between the lack of government respect for religious freedom and higher levels of social hostilities involving religion.”¹¹⁹ Further, “previous theory and research go beyond drawing correlational connections to establishing a case for causation.”¹²⁰

Unfortunately, with the increasing fear in society of religion, governments, in response, continue to assert control over religious groups and activities by restricting their freedoms, and a cycle of increasing tensions and hostilities emerges. This is because variable analyses of such theories have “empirically demonstrated that government restrictions on religious freedom are the strongest predictor of religious violence and conflict”.¹²¹ Indeed, religion, particularly the fundamentalist variants of religion, often provides solace and comfort and an explanation¹²² for the perceived failures of modern times. Therefore, religion becomes particularly attractive to many who feel alienated by their state, politics, social circumstances or economics. Whilst state control may have a deleterious effect on religion within societies, a key factor in relation to religion and society that must be considered is the rule of law, and its close relationship with religion.

¹¹⁷ At 24.

¹¹⁸ Grim, Clark and Snyder, above n 92, at 3.

¹¹⁹ At 3.

¹²⁰ At 3.

¹²¹ At 3.

¹²² Jonathan Fox “The Multiple Impacts of Religion on International Relations: Perceptions and Reality” 2006 IFRI 4 Winter Edition at vi.

VIII. Rule of Law

It is said that “the rule of law [is] one of the most fundamental characteristics of liberal democratic societies”¹²³ as the “synthesis of effective and impartial judicial systems and ordinary citizens’ recognition of the law as legitimate”,¹²⁴ thus providing a legally-based civil stability.

Research suggests, overall, that the rule of law has a positive impact on the relationship between religion and society, be that political, economic or social. For example, it has been asserted that where states demonstrate an effective rule of law, there are overall fewer societal and religious conflicts. There is evidence that constitutional regimes where the rule of law is observed, by and large, have different methods of tackling religiously-based opposition, as well as differing methods of assessing regime conduct, in comparison with authoritarian regimes. For example, constitutional regimes provide impartial forums for addressing settlement of conflicts, such as courts and tribunals. In contrast, authoritarian regimes tend to prefer to contain dissent and settle conflicts through violence and coercion.¹²⁵ Evidence of this illustrated through the experiences of the Jehovah’s Witnesses during 1928 to 1945 in two opposing legal regimes: the United States and Nazi Germany.¹²⁶ This matter is discussed in detail in the Rule of Law chapter but it is worthwhile making a brief comment here to underpin the relevance of the rule of law within the context of religion. Jehovah’s Witnesses in Nazi Germany were in conflict with National Socialism. Consequently, the National Socialist State banned the movement leading to the deaths of many thousands of Witnesses at the hands of Nazis. The conflict between the two entities arose because of a gap between political ideals and religious beliefs with no opportunity to engage effectively with the rule of law to resolve the differences.

In contrast, the United States, whilst also in conflict with the religion, provided the opportunity for the movement to engage in pragmatic and legally-justifiable changes for the United States

¹²³ Seung-Whan Choi “Fighting Terrorism through the Rule of Law?” 2010 *Journal of Conflict Resolution* 54(6) at 941.

¹²⁴ At 941.

¹²⁵ Pauline Cote “The Rule of Law and Religious Minorities: A Case Study of Jehovah’s Witnesses” *The Review of Faith & International Minorities* (2007) 5 3 at 11.

¹²⁶ At 11.

and the Jehovah's Witnesses through the rule of law. The contrast between the two states' approaches reflects the relevance of the relationship between religion and the rule of law to encourage and perpetuate political and social stability.

Further, in relation to the rule of law, religion is said to be "one of the few catalysts that exists through which a private conscience can become a public conscience."¹²⁷ Consequently:¹²⁸

Institutional religion in society, and institutional religion alone, seems to reliably and consistently provide that collector function. Institutional religion has had an undefined role in mustering and shaping collective conscience and values in moral ways – and when institutional religion pluralized, so much the better for we avoid the excesses ... identified so long ago ... "the tyranny of the majority."

Indeed, it has been asserted that the societal grasp of civil liberties and duties, and the norms of freedom, are based on ethical and religious constructs:¹²⁹

... legal freedoms cannot be properly understood without appreciating the existence of corresponding duties and responsibilities. This understanding of rights-duties and freedoms-responsibilities in turn rests ultimately on moral and theological principles which informs our Western political, religious and philosophical cultures and traditions.

IX. Protecting Religion

Charity law, therefore, may offer a way of demonstrating the advantages of religion in ways that underpin the roots of societies, and thus help lessen the religious tensions that currently sit within many democratic societies, and indeed some non-democratic states that I have mentioned in the thesis. Indeed, I contend that promoting the benefits of religion should be actively pursued because "religious hostilities and restrictions create climates that can drive away local and foreign investment, undermine sustainable development, and disrupt huge

¹²⁷ Terrance S Carter "Advancement of Religion as a Head of Charity: What are the Boundaries?" 2006 October http://www.carters.ca/pub/article/church/2014/advrel_nov14.pdf at 9.

¹²⁸ At 9, citing HR Sorensen and AK Thompson *The Advancement of Religion is Still a Valid Charitable Object in 2001* (Centre for Philanthropy and Non-Profit Studies, QUT, 2000) at 3.

¹²⁹ At 9-10, citing Frank Iacobucci "The Evolution of Constitutional Rights and Corresponding Duties: The Leon Ladner Lecture" (1992) UBC Law Review 1 at 1.

sectors of economies.”¹³⁰ Consequently, charity is even more vital to restore societies that may have been damaged through the impact of religious hostilities arising from government policies. The need to promote religious freedom is further evidenced by research demonstrating that such freedom is a “key ingredient to peace and stability, as measured by the absence of violent religious persecution and conflict.”¹³¹

Beyond the scope of providing stability within communities, religious freedom also encourages socio-economic expansion. For instance, religious freedom is associated with other forms of freedom, and there is key connection between “a variety of positive social and economic outcomes ranging from better health care to higher incomes for women.”¹³² Further, it is asserted that where religiously-based organisations function in an open market place, religion is key “in the human and social development of countries.”¹³³ This is evidenced in the presence of proselytizing protestant faiths that were associated with worldwide economic growth. In the 1800s in the United States, protestant organisations operating alongside other religious organisations established academic institutions, hospitals, prisons, and churches, as well as distributing books. However, such activity does not just reside in the past. It was recognised that contemporary faith communities in a number of African regions not only deliver services within health and education, they also deliver support for orphans, those with disabilities, and the vulnerable within societies.¹³⁴

Indeed, there is evidence that religion’s “contribution to social capital and social cohesion is also manifest in the contribution that religious communities and organizations make in the public square.”¹³⁵ This occurs when followers of a faith “live out the ethics of their faith corporately and when they responsibly participate in public dialogues about the nature of truth, the meaning of justice and compassion, and our responsibilities to one another.”¹³⁶ Therefore, faith can advance within communities through corporations and promote notions of unity, compassion and support, which are some of the concepts of charity.

¹³⁰ Grim, Clark and Snyder, above n 92, at 3.

¹³¹ At 4.

¹³² At 4.

¹³³ At 5.

¹³⁴ At 5.

¹³⁵ Bruce J Clemenger “Evangelicalism and the Advancement of Religion” 2009 Church & Faith Trends January Vol 2 Issue 2 at 3.

¹³⁶ At 3.

It is evident that religion fulfils roles in society that governments are either unable to, or choose not to. Thus, when most Western democratic societies are intent on reducing religious freedoms further and risking further religious societal tension, the advancement of religion, through charity law, may be an appropriate vehicle to exhort religious freedom, because:¹³⁷

... charity law is [a] means by which the state manages its coexistence with religious groups. The state concedes privileges to those religious groups that it determines to be beneficial to society. In return, religious groups who determine the privileges worthwhile are prepared to mould their purposes, as necessary, to comply with public benefit requirements.

This type of compliance is justifiable since it corresponds with the fundamentals of charity law, “which is to facilitate activities that the state determines are beneficial to society as a whole.”¹³⁸ Indeed, “[w]ith the rule of law dominant in our societies, nothing but what is measurable in everyone’s terms can be entertained.”¹³⁹ This means charity has to be measurable to justify its benefits and this, consequently, applies to the advancement of religion.

One of the ways in which a charity is measured is through the doctrine of public benefit, as discussed fully Chapter 7. Briefly, however, this doctrine provides a useful tool by which the judiciary can assess the benefit of a religious purpose. For instance, the New Zealand case *Liberty Trust* provides some parameters whereby the presumption of public benefit¹⁴⁰ can be rebutted:¹⁴¹

¹³⁷ Chan, above n 106, at 1083.

¹³⁸ At 1083.

¹³⁹ Donovan Waters “The advancement of religion in a pluralist society (Part II): abolishing the public benefit element” 2011 *Trusts & Trustees* Vol 17 No 8 September at 730.

¹⁴⁰ For the majority of the Anglo-commonwealth jurisdictions, including New Zealand, Hong Kong and Canada, public benefit for the first three heads of charity is presumed, which includes the advancement of religion. In England and Wales, inter alia, the presumption was removed by the Charities Act 2006. There are arguments that the presumption of public benefit did not exist, although it is beyond the capacity of this thesis to address this point; see generally Mary Synge *The ‘New’ Public Benefit Requirement Making Sense of Charity Law?* (Hart Publishing, Oxford, 2017).

¹⁴¹ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [100], citing Jean Warburton, Debra Morris and NF Riddle *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at [2-052].

... if there is evidence that the purpose is subversive of all morality, or it is a new belief system, or if there has been public concern expressed about the organisation carrying out the particular purpose, or if it is focused too narrowly on its adherents.

Those parameters acknowledge that religion is generally beneficial to society, hence why the benefit should be presumed, but they are sufficient enough to ensure stringent consideration of a religious organisation. Simply put, public benefit, as part of legitimate state control, and underpinning the rule of law, ensures that religious entities operate for the public, as prescribed by law, and thus benefit the public appropriately.

The resulting social benefit is that state control of religion through charity is not as seemingly confrontational to religious groups as other types of state control may be. This reduces tensions generally from religious groups, as well as providing public confidence in relation to religious activities and enhancing public perceptions of religion within society. This may neutralise some of the perceived negative effects of violence associated with religions, which may perpetuate the notion of the real benefits of religion in society, thus reflecting the continued value of religion in contemporary times.

Consequently, some form of state control is key to religion's contemporary place in society. As a result, I will set out the reasons why the law of charity, as a state-controlled measure, enables the beneficial function of religion to be propounded for the good of society as a whole, even in the face of growing criticism and pressure for religion to be denounced. Therefore, the advancement of religion, through charity law, can deliver a positive message of religion through the benefaction of charity, thus supporting contemporary and healthily functioning societies at their very core.

X. Commercialism and the Economics of Religious Charities

I present a number of critical discussions relating to commercialism and economics, and their relationship with the advancement of religion. Prima facie, economics and religion appear curious bedfellows. Equally, the same may be levelled at commercialism and religion. Indeed, research demonstrates that in both historical and contemporary times, these relationships have been subject to criticism. However, evidence reveals that commercialism and religion are often closely aligned, and that commercialism may actually benefit religious charities, and

therefore society. In considering this issue, some key cases illustrate the sometime paradoxical issues associated with commercialism and religion. Such paradoxes include the perception that a commercial religious charity may lose its altruistic nature in the eye of the public, and that international courts may approach commercialism and religion in disparate ways. Such issues may then undermine the position of religion within charity generally.

In relation to economics and religion, it has been argued that it is distasteful to equate religion to monetary terms. This may be because a belief system could be demeaned by reducing it to mere economics. Nonetheless, as I reveal, there is a close historical and modern connection between money and religion. By way of brief historical example, the Bible refers at length to monetary matters, and it does so more times than it does to heaven, hell or prayers;¹⁴² it appears that money “occupies an important place in what we consider to be God’s inspired words.”¹⁴³

By examining the economics of religion, I demonstrate the interconnectedness of social, legal and political frameworks. This is because economics are invariably influenced by numerous socio-political factors, and charity law is no exception to this. This means that the advancement of religion is influenced by, and influences, secular political and social frameworks. I, therefore, demonstrate the secular relevance of the advancement of religion within society. It might be questioned as to why it is germane to consider the secular relationship with the advancement of religion when religion is clearly not about secular views. However, I assert that that religion and the advancement of religion should not be examined separately from secular society because the legal governance of charities, through the rule of law and state policies, is shaped by numerous influences including public advocacy, political will and international political pressures.

In addition, it may be beneficial to relate religion to the secular because this can provide a tangible narrative in relation to religion. This is relevant because society often recognises tangible evidence as having more worth than ethereal evidence; the latter is invariably prescribed to religion. Tangible evidence of the benefits of the advancement of religion can be utilised, for example, by policy makers and charitable organisations to make objective

¹⁴² John Cortines “God’s Call to Give” 2017 *The Christian Lawyer* Vol 13 No 2 Fall at 9.

¹⁴³ At 9.

decisions about charitable governance. This may in turn provide public confidence in relation to the advancement of religion.

XI. Removing the Advancement of Religion as a Head of Charity

There is no evidence yet that any Commonwealth jurisdiction is planning to remove the advancement of religion as a charitable purpose. Nonetheless, in order to consider holistically the theme of this research, that of reviewing and reconciling this head of charity within a socio-legal and political environment, it would be remiss not to address the possible consequences of such action. Indeed, it is timely to do so, not least because the public voices criticising this head grow ever louder. For example, a Bill was submitted to the Australian Victorian Parliament that would, amongst other matters, remove this head from charity law.¹⁴⁴ If a state, therefore, is to consider such an approach, it is imperative that research is made available to ensure that there is clear and full disclosure of related consequences. As a result, this research provides timely and necessitous debate of a key issue in the charity law narrative.

I reveal that there would likely be widespread societal consequences should the advancement of religion be removed as a charitable purpose, including reduction of social welfare programmes, isolation of religious groups, and overall significant economic burdens placed on states and communities. States therefore should balance carefully such costs in comparison with any perceived benefits of the removal, which may include increased civic trust in the charity sector.

One of the key ways in which I create this discourse is by critically reviewing New Zealand case studies of specific religious charities. It is commonly acknowledged that religious charities are internationally lauded for their humanitarian aid and relief work, social welfare provision and social development initiatives. However, it is perhaps not commonly understood how such charities achieve this global success.

¹⁴⁴ Peter Mulherin “Religious Organisations’ Tax Exemption Status: Mark Sneddon quoted in Victorian Parliament Debate” (22 May 2018)

<http://www.i4cs.com.au/religious-organisations-tax-exemption-status-mark-sneddon-quoted-in-victorian-parliament-debate/>.

The assessment of this research provides an insight into the global success of religious charities, which is said to be through the utilisation of a framework unique to religious charities and no other type of charity. The three aspects to this framework draw on sociological concepts: religious social capital, religious content and religious cultural power. This framework reveals a methodology available only to religious charities, and this has particular significance in providing support and aid to a variety of communities. Secular communities also benefit from the application of this specific methodology because this framework has the ability to span the gap between the religious and the secular as a result of its sophisticated narrative. This narrative includes concepts of social justice, sacrifice and morality. Consequently, it appeals to a wide audience, which is reflected in the consistently high levels of donations and support bestowed upon religious charities. Such support then equates to well-executed and successful aid campaigns. I consequently consider some theoretical issues that may arise should the advancement of religion be removed as a charitable purpose under the auspices of charity law.

I now address the methodologies and legal theories that contextualise and underpin the research.

Chapter 2. Methodology and Legal Theory

This chapter sets out the methodologies that I have utilised in this thesis, as well as outlining some relevant legal theories that underpin the research.

It has been noted that charity law “remains remarkably under-theorised despite its great age”.¹⁴⁵ Nonetheless, I have placed the research within some legal theories that demonstrate the robustness of the advancement of religion within the framework of charity law in a socio-legal and political environment.

I. Methodology

In part, I utilise traditional doctrinal research methodology, focusing on textual analysis of statute and common law, alongside articles, monographs and other pertinent materials. This methodology is concerned with the analysis of legal doctrine and how it was developed and applied.¹⁴⁶ Legal doctrines are “systematic formulations of law in particular contexts”.¹⁴⁷ Such doctrines “clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules.”¹⁴⁸ The assessment of doctrine is important for this thesis because it is “an essential part of legal activity aiming to capture the subtleness of law in words.”¹⁴⁹

The doctrinal methodology is said to fulfil an important role because “it offers insight into existing rules and previously decided cases.”¹⁵⁰ Therefore, this methodology is most appropriate for this thesis because it will enable me to gather and evaluate perspectives on

¹⁴⁵ Matthew Harding *What is the Point of Charity Law?* (Paper presented at Private and Public Law – Intersections in Law and Method Conference, the University of Queensland, 21 July 2011) at 1.

¹⁴⁶ Salim Ibrahim Ali, Zuryati Mahomed Yusoff and Zainal Amin Ayub “Legal Research of Doctrinal and Non-Doctrinal” 2017 *International Journal of Trend in Research and Development* Vol 4(1) at 493.

¹⁴⁷ Paul Chynoweth “Legal Research” in Andrew Knight and Les Ruddock (eds) *Advanced Research Methods in the Built Environment* (Blackwell Publishing Ltd, Chichester, 2008) at 29.

¹⁴⁸ At 29.

¹⁴⁹ Jan M Smits *The Mind and Method of the Legal Academic* (Edward Elgar Publishing Limited, Cheltenham, 2012) at 94.

¹⁵⁰ At 61.

charity law and religion in a broader context initially, and then focus on key issues within jurisdictions for more detailed evaluation. This will enable me to determine early relationships between religion and charity law; the relationship between religion, charity and society; and conduct critical analysis of various issues facing religion within this head of charity. Historical analysis of literature can be important because I can “draw lessons that are applicable to improving the current law”,¹⁵¹ where appropriate.

Assessing legal doctrines, such as public benefit, “explains why a rule is a valid legal rule in a given society”,¹⁵² and its context can be assessed in relation to its history, sociology and even on an economic basis.¹⁵³ This is appropriate because charity law is grounded in a variety of such contexts.

However, it has been asserted that this methodology is too limited because it “assumes that law exists in a doctrinal objective vacuum, rather than within the social framework or context.”¹⁵⁴ It is true that the law does not exist in a vacuum, rather it functions within, and impacts on, the community.¹⁵⁵ Nonetheless, I argue that this methodology still enables me to consider the social framework and context that are likely to have influenced the legal doctrines. As a result, this thesis goes beyond the descriptive, and it instead moves to a discursive model. This will be of value when being utilised by the examiners and, when published, for its readers. This is because such critical commentary is likely to raise questions which may provide a platform for further research. In addition, the gathering and assessment of contemporary and relevant information will look to provide well-reasoned answers or submissions.

Further, I can consider the implications and consequences of legal changes, or lack of change, so as to enable readers to formulate further critical thinking. Importantly, one of the key reasons to ensure that this thesis utilises a discursive methodology is because it enables the reader to engage actively in the legal debate being presented by the material. This will enable

¹⁵¹ At 24.

¹⁵² Mark Van Hoeke “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in Mark Van Hoeke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing Ltd, Oxford, 2011) at 8.

¹⁵³ At 8.

¹⁵⁴ Ali, Yusoff and Ayub, above n 146, at 493.

¹⁵⁵ At 493.

readers to reflect upon and question the submissions and issues. This will provide opportunities for further critical research, and it will undoubtedly add to the field of literature.

Due to the nature of the thesis' discussions, it is also relevant to utilise interdisciplinary methods of research. This is because whilst doctrinal research concerns itself with legal rules, these rules will not always provide an explanation for a particular ruling. Such a ruling can be interpreted by considering its social or historical context.¹⁵⁶ Charity law is a creation of social and historical contexts, therefore interdisciplinary research methods are relevant for appropriate critical analysis within this thesis.

II. Legal Theory

Ronald Dworkin noted that a “general theory of law must be normative as well as conceptual.”¹⁵⁷ In other words, there must be a “theory of legislation, of adjudication, and of compliance.”¹⁵⁸ Herbert Hart noted that legal theory, or jurisprudence, consists of the identification of principles that best “cohere with the settled law and legal practices of a legal system and also provide the best moral justification for them”.¹⁵⁹ One of the key concepts within jurisprudence is the affinity between legality and justice. In other words, the “internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration.”¹⁶⁰ Further, and specifically in relation to charity law, it has been said that law “is made for guiding conduct, or for coordinating activity for the common good, or for doing justice, or for licensing coercion.”¹⁶¹ These latter views underpin much of the ethos of charity in relation to charity's role within society.

However, it has also been asserted that “legal theory has failed to provide any significant explanation or justification of what academic lawyers do ... and thus of what academic law

¹⁵⁶ Chynoweth, above n 147, at 30.

¹⁵⁷ Ronald Dworkin *Taking Rights Seriously* (Gerald Duckworth & Co Ltd, London, 1977) at vii.

¹⁵⁸ At vii.

¹⁵⁹ HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at 241.

¹⁶⁰ Lon L Fuller *The Morality of Law* (Yale University Press, New Haven, 1969) at 157; see also Ronald Dworkin *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, Cambridge, 2011).

¹⁶¹ Leslie Green “Introduction” in HLA Hart *The Concept of Law* (3rd ed, Oxford University Press, Oxford, 2012) at xxxiv.

might be.”¹⁶² In spite of the lack of overall legal theory, I have taken inspiration from scholars who have sought to provide some theoretical frameworks, and why expounding such frameworks is important for the law of charity. This is because confirming the relevance of religious charities within society, as this thesis has sought to do, illustrates the “goals of that body of law”,¹⁶³ as well as explaining how those goals can be achieved.¹⁶⁴

Matthew Harding observed that charity law and its relevance should be framed within two of its key features. Firstly, that charity law is organised around a legal definition of charity. This principle must be met if a body is to be legally charitable.¹⁶⁵ Internationally, such principles, or criteria, are broadly similar, such as the general description of charitable purposes, which includes the advancement of religion. In addition to the requirement of charitable purpose, a purpose must have public benefit, whereby a purpose must benefit the public in some legally-recognised way.¹⁶⁶

The second key feature of charity law is that a state gives legally-recognised charitable entities preferential treatment, including some tax exemptions and providing reputational advantages.¹⁶⁷

Consequently, Harding states that any account of charity law should be sensitive to these two factors, and it explains why a state might extend such favourable treatment to those entities that fall within charity law parameters. He does so through a liberal theory perspective. In other words, charity law makes possible what would otherwise not be possible, where purposes achieve a certain legal status.¹⁶⁸ This is identified as “power-conferring rules.”¹⁶⁹

These rules enable people to bring about legal changes for themselves, as well as other people, but those rules do not levy obligations. In relation to charity law, the criteria of charity confirms

¹⁶² Chynoweth, above n 147, at 28.

¹⁶³ Harding, above n 145, at 2.

¹⁶⁴ At 2; later chapters also recognise the legal theory of law and economics, which may provide a legitimisation of charity law.

¹⁶⁵ At 3. See later chapters for this legal criterion.

¹⁶⁶ At 4.

¹⁶⁷ At 4-5.

¹⁶⁸ At 5-6.

¹⁶⁹ At 6.

whether or not entity will obtain legally-recognised charitable status, and determines those circumstances that must be met by those who ensure that those aforementioned power-conferring rules, which can vary a person's own legal standing, as well that of others. In other words, an individual may assert those power-conferring rules associated with charity law by obtaining legal charitable status. If those criteria are met, an individual can create a number of legal variations, including claiming tax exemptions; being able to register as a charity with a regulator; and generating rights, powers and duties under charity law.¹⁷⁰

It is asserted that if charity law is best underpinned by these power-conferring rubrics, then the purpose of charity law will become clear. This is because the societal purpose of such rubrics is "to provide individuals with facilities for realizing their wishes."¹⁷¹ Hart stated that this is "one of the great contributions of law to social life."¹⁷² Joseph Raz noted that the social function of power-conferring rules may be a confusing concept, but that social effects refer to intended, or foreseen consequences, of power conferring. This could include fraud reduction, or encouraging people to form particular relationships.¹⁷³

Harding asserts that utilising this liberal perspective to ground a liberal theory of charity is justifiable because "charity law entails what might be called facilitative, incentive and expressive strategies."¹⁷⁴ Such strategies are best understood as ensuring that individuals can and will pursue charitable purposes, and that this pursuit is maintained, and also augmented over time. In other words, a "central feature of charity is that the state uses it to promote charitable purpose."¹⁷⁵ Therefore, "the point of charity law is to be found in the value of individual freedom and in the range of goods the realisation of which is made more likely by the pursuit of charitable purposes."¹⁷⁶

Additionally, the relevance of charity law, within a set of power-conferring rules, "is revealed in light of the value of positive freedom ... the value of autonomy."¹⁷⁷ Engaging in autonomy

¹⁷⁰ At 6-7.

¹⁷¹ At 7, citing Hart, above n 159, at 27 (emphasis removed).

¹⁷² At 7, citing Hart, above n 159, at 28.

¹⁷³ At 7-8, referring to Joseph Raz *The Concept of a Legal System* (Clarendon Press, Oxford, 1970) at 158.

¹⁷⁴ Matthew Harding *Charity Law and the Liberal State* (Cambridge University Press, Cambridge, 2014) at 44.

¹⁷⁵ At 44.

¹⁷⁶ Harding, above n 145, at 6.

¹⁷⁷ At 9.

is an individual choice, and “depends on a willingness to cultivate and realise virtues, skills and capacities as well as a preparedness to make decisions and commitments.”¹⁷⁸ The benefit of autonomy further requires a state to bring about conditions for a person to live autonomously. This relates to charity law because charity law, as a set of power-conferring rules, “serves the value of autonomy by making a contribution to these conditions.”¹⁷⁹

Harding notes that amongst the conditions for autonomy there must be a number of choices that may be chosen, and charity law widens these numbers of choices available. For instance, charity law provides an option to create a trust to relieve poverty. Without charity law, there would be limited ways of relieving poverty. By choosing to relieve poverty through a charity, a person, *inter alia*, is given access to certain tax benefits and an enhanced reputation.¹⁸⁰ Therefore, providing these options is “its very point, because the normative function of power-conferring rules is to provide options.”¹⁸¹ Consequently, the role that these options makes to wide variety of options available for those purposes that are legally-charitable “is a contribution to the conditions of autonomy.”¹⁸²

A further key factor for Harding, which also reflects Raz’s theory, is to consider what a state aims to achieve through charity law. A purpose of charity law is to increase the likelihood of charitable purposes being carried out. It does this through the privileges and benefits that are afforded to registered charities that are not afforded to non-registered entities. A state has these aims in order to generate goods, those being contributions to human wellbeing, therefore it encourages charitable purposes to be carried out to benefit society.¹⁸³

Harding considers this matter in detail, but for the purposes of this chapter, I summarise that there are two sets of goods. The first is collective goods, which can be realised in a number of ways, and these have a public character that many, or sections of a community, can access, including education and health care. Religious charities often provide such services. For

¹⁷⁸ At 9.

¹⁷⁹ At 9.

¹⁸⁰ At 10.

¹⁸¹ At 10.

¹⁸² At 10. It should be noted that Harding does qualify the concept of power-conferring rules and charity at 10-14.

¹⁸³ At 14-15.

example, the Salvation Army provides, *inter alia*, education and employment services. Secondly, there are individual goods, which are private in character and are not available to all sections of a community.¹⁸⁴

An example of how purposes and goods are linked is to consider the doctrine of public benefit. In order for a purpose to be charitable, it must demonstrate public benefit, as prescribed by law, and a purpose will realise collective goods, for instance, by advancing religion, as the state endorses.¹⁸⁵

It might be argued that a liberal state that sanctions as well as assists in the fulfilment of goods which are autonomy-enhancing may just benefit individuals as opposed to benefitting communities as a whole. However, many goods, such as health and education, contribute to autonomous situations for the entire communities. These, therefore, have a collective value. Further, it has been argued that autonomy can only be achieved when societies offer a kind of public ethos that contains collective goods. These goods could be environmental stewardship, political stability, the rule of law, political engagement and tolerance to different ways of living. Such collective goods can be achieved through charitable purposes.¹⁸⁶

It may be argued that it would be difficult to justify the advancement of religion within this legal theory because religion might undermine the conditions for autonomy for everyone. For instance, by demanding seclusion in some instances, or by entailing discrimination in relation to gender or sexual preference.¹⁸⁷ However, Harding asserts that the advancement of religion, “from a liberal perspective, it is in light of the demands of an autonomy-enhancing public culture that the state’s promotion of goods entailed in various religious purposes may be best understood.”¹⁸⁸ It is probable, therefore, that pursuing religious purposes will ensure a diverse civic ethos of tolerance and empathy. This is because “the conditions for autonomy are substantially enhanced in circumstances where a variety of religious beliefs and practices

¹⁸⁴ At 15.

¹⁸⁵ At 20.

¹⁸⁶ At 32-33, referring to, *inter alia*, Charities Act 2006 (UK) ss 2(2)(i) and (h), for example “the advancement of environmental protection or improvement” and “the advancement of citizenship or community development.”

¹⁸⁷ At 33-34.

¹⁸⁸ At 33.

coexists peacefully.”¹⁸⁹ Consequently, charity law “is arguably one of the liberal state’s most important vehicles for sustaining public culture of the type that ... is necessary to the living of autonomous lives.”¹⁹⁰

Another way of considering the legal theory of charity law is to recognise charity’s place within civil society. Civil society is said to be a “sphere of institutions, organisations and individuals located between family, the state and the market in which people associate voluntarily to advance common interests.”¹⁹¹ According to Matthew Turnour, society can be divided as follows:¹⁹²

1. business (the first sector);
2. government (the second sector);
3. not-for-profit, non-government, voluntary, intermediary (the third sector);
4. family (the fourth sector).

Charity sits within the third sector. However, it has been asserted that there is a lack of legal theory in relation to entities within civil society, and further, as I have noted, “there is no clearly identifiable jurisprudence for the third sector.”¹⁹³

Nonetheless, it could be argued that charity law may sit within a legal theory that illustrates charity’s place within society. This is because it can be argued that the “unique essence of the laws applying to civil society ... is that this function is not coercive but rather enabling and preferring voluntary association and contribution.”¹⁹⁴ It might be argued that law is essentially coercive, but in reality, some “laws simply enable and others prefer.”¹⁹⁵

¹⁸⁹ At 34. Note that Harding, at n 71, refers to *Thornton v Howe* (1862) 31 Beav 14 whereby purposes that “are adverse to the very foundations of all religion” will not be charitable.

¹⁹⁰ At 33.

¹⁹¹ Matthew Turnour “Modernising charity law: steps to an alternative architecture for common law charity jurisprudence” in Myles McGregor-Lowndes and Kerry O’Halloran (eds) *Modernising Charity Law Recent Developments and Future Directions* (Edward Elgar Publishing, Cheltenham, 2010) at 231, citing H Anheir *Civil Society Measurement, Evaluation, Policy* (Earthscan, London, 2004) at 22.

¹⁹² At 230.

¹⁹³ At 232

¹⁹⁴ Matthew Turnour and Myles McGregor-Lowndes *From Charity to Civil Society: Sketching Steps to an Alternate Architecture for the Common Law* (Paper Presented at the ARNOVA 2007 Conference, Atlanta, 15 November, Session D10) at 7. This paper advocates for a number of legal theories that might be an appropriate framework for modern philanthropy although are beyond the scope of this thesis.

¹⁹⁵ At 7.

An example of preferring legislation is found in the United States s 501(c) of the Internal Revenue Code where organisations can satisfy exemption from paying income tax.¹⁹⁶ Consequently, placing charity law within a theory of jurisprudence relative to civil society underpins the laws that “enable and prefer voluntary association to advance non-commercial common interest”,¹⁹⁷ reflecting much of the concept of charity.

Whilst it is evident that there is a dearth of legal theories in relation to charity law, I have sought to ground my thesis within some rational concepts elucidated in recent times, which provide justification and explanation of charity law within the context of my research.

¹⁹⁶ At 7.

¹⁹⁷ At 7.

Chapter 3. Charity, Religion and Society

As established, this thesis seeks to reconcile the advancement of religion in the charity narrative, and it does so in relation to various socio-political-legal contexts. This chapter is important because it sets out the complex relationship between charity, religion, and society generally, reflecting the key interrelationship between all these constructs. In doing so, this chapter serves to illustrate the function of the advancement of religion within its socio-legal foundations. This is because I demonstrate the correlation between law, society and religion. As a result, this chapter illustrates how embedded religion, and thus religion within charity, is within our social frameworks, and consequently, this chapter begins the reconciliation of the advancement of religion assertions. It was important to begin the reconciliation of the advancement of religion within these specific contexts because, as I have already asserted, the law develops from, and within, its socio-political frameworks. Therefore, in order to understand the legal context of this charitable principle, it was important to embed it within its other contexts. As a result, the reconciliation of the advancement of religion becomes more coherent and reasoned.

In endeavouring to do so, I set out the complex relationship between charity, religion and society generally, reflecting on some of the key issues pertaining to the continuing acknowledgement of religion within society, as well as considering how the advancement of religion can promote social welfare.

The chapter begins by considering some historical markers relating to charity and charity law, which will contextualise the relevance of charity and charity law within society, even in contemporary times. Other matters to address include the relationship between religion and charity, and religion and society; defining religion; addressing secularism; and finally, placing religion within the law.

As a result, I assert that each of these matters is key in piecing together the examination of the socio-political and legitimate function of the advancement of religion, and thus fully underpin this thesis' object of reconciling the advancement of religion within the framework of charity law. I begin by considering a brief history of charity and its law to contextualise the importance

of those constructs and thus lay the foundations for later assertions in relation to reconciling the advancement of religion.

I. A Brief History of Charity and Charity Law

Charity is deep-rooted within the human psyche and human behaviour. “It aims to provide emotional, spiritual, and material comfort to those in need as taught by many religions and communities.”¹⁹⁸ Indeed, charity “is deemed an important virtue in many moral systems.”¹⁹⁹ Charity has some roots in Christianity, whereby the English term “charity” is derived from the Latin “caritas”. This was utilised by St Jerome in the Latin Bible, the Vulgate, which originally was translated as “love”. Over the centuries, however, as people became more familiar with the King James Bible, “love” became “charity”, and so charity evolved from its religious beginnings into a legal meaning.²⁰⁰

From its early times therefore, “charity” has been one of the central tenets of Christianity, encompassing a central obligation to consider others first, even if one must self-sacrifice. Some the Old Testament prophets spoke of the need to set aside the old, unjust ways, and put others first. For example, Micah was asked “What does the Lord require of you?”, and he responded “To act justly and to love mercy and to walk humbly.”²⁰¹ Even before Micah’s consideration, the Law of Moses commanded that “You shall love your neighbour as yourself.”²⁰² The love of one’s neighbour “is the basis of nearly all activity which has been traditionally described as charity.”²⁰³

Indeed, the scriptural traditions of all three Abrahamic religions oblige their followers to be generous towards others. Both the Jewish and Christian Bibles warn of the perilous

¹⁹⁸ Nuzhat Malik “Defining ‘Charity’ and ‘Charitable Purpose’ in the United Kingdom” 2008 *International Journal of Not-for-Profit Law* Vol 11 No 1 November at 37.

¹⁹⁹ J Gregory Dees “A Tale of Two Cultures: Charity, Problem Solving, and the future of Social Entrepreneurship” 2012 *Centre for the Advancement of Social Enterprise* at 321.

²⁰⁰ Gareth G Morgan *The Spirit of Charity* (Professorial Lecture Faculty of Organisation and Management Sheffield Hallam University 3 April 2008) at 3.

²⁰¹ At 4, citing Micah 6:8 *The Bible* NIV translation 700BC.

²⁰² At 4, citing Leviticus 19:8 *The Bible* NRSV translation.

²⁰³ At 4.

consequences for those too eager to hang on to their own wealth,²⁰⁴ and in Islam, the Qur'an similarly echoes such sentiments, warning:²⁰⁵

Have you met those who deny the Day of Judgment? They are the ones who turn away the orphan, and have no urge to feed the destitute and needy. Woe to those who pray but lack compassion and eschew moral duty, who make a show of false piety and disdain charity.

Therefore, numerous religions have their foundations in charity, and from Buddhism to Zoroastrianism, religions exhort their believers to be generous to those in need.

Even non-religious philosophers, including Confucius and Aristotle, recognised charitable giving as a virtue. Confucius incorporated charitable behaviour within his fundamental qualities, which regularly translated as “benevolence, charity, and humanity.”²⁰⁶ Aristotle believed charity to be a feature of benevolence, that being the ability to provide altruistically to those in need when they needed it.²⁰⁷

The Christian Parable of the Good Samaritan effectively demonstrates charity's concept of virtue. Here, a person from a reviled cultural group stopped to help a traveller who had been robbed and injured. Others had passed by without assisting, including those from esteemed groups. This tale illustrates “the intrinsic moral value of acting selflessly, out of compassion”,²⁰⁸ focusing on the person's altruistic motives, and their readiness to forgo their own concerns. Indeed, any personal gain is seen to dilute the moral value of the act, raising questions as to the purity of the motives.²⁰⁹

²⁰⁴ James William Brodman *Charity & Religion in Medieval Europe* (The Catholic University American Press, Washington DC, 2009) at 10, referring to Psalm 68:6-7; Ecclesiasticus 4:4 and 4:10; Isaiah 58:7; and James 2:17 *The Bible*; see also Michael Cook *Ancient Religions, Modern Politics: The Islamic Case in Comparative Perspective* (Princeton University Press, Princeton and Oxford, 2014) at 199-200, referring to the Matthew 6:1-4; Luke 14:13-14; 1 Timothy 6:17-18; Mark 14:7; Matthew 26:11; and John 12:8, inter alia, *The Bible*

²⁰⁵ At 10-11, citing 107:1-7 the *Qur'an*. The available literature provides a variety of spellings of Qur'an and this thesis utilises the most common spellings.

²⁰⁶ Dees, above n 199, at 322.

²⁰⁷ At 322; referring to *Nicomachean Ethics*, a series of books considered to be Aristotle's best-known work on ethics.

²⁰⁸ At 322.

²⁰⁹ At 322.

Whilst it took many centuries before a legally-recognised framework of charitable administration evolved, some religions demonstrate that even in ancient times there was a prescribed system of charitable giving. For instance, the Law of Moses set out a system of tithes, whereby the Israelites were required to reserve 10 per cent of their harvest as an offering for God, partly to support the poor and needy. Even today, many Christian and Jewish followers contribute 10 per cent of their salary to charity. Under the Islamic principle of zakat, Muslims give two and half per cent of their wealth each year for the needy.²¹⁰ Therefore, charity and religion are inherently and historically bound within many societies and remain so in today's allegedly secular times.

The formal legal system of charitable giving and administration came about, in part, because of the societal and pious revolution of the Reformation.²¹¹ "The overthrow of the papal supremacy and the decline of the authority of organised religion was paralleled by"²¹² a "change of viewpoint concerning the nature and functions of religion, both in the individual and in society."²¹³ Consequently, charitable objects became more secular in nature, as people considered more worldly needs as opposed to the fate of their souls, as had been decreed in times gone by. For example, in earlier times, a papal decree of Gregory IX urged religious followers to save their souls by bestowing some of their means for religious causes. Those who ignored this appeal might not receive the Eucharist, which would result in being buried in unconsecrated ground.²¹⁴ A person who had died without a will, and thus had failed to ensure he had undertaken important merciful endeavours before he died, might also suffer the same fate.²¹⁵ In medieval times, the ecclesiastical courts upheld gifts for pious and charitable causes wherever possible, meaning an increase in power of the religious institutions.

²¹⁰ Morgan, above n 200, at 5; see later chapters for further discussions on zakat.

²¹¹ "The Protestant Reformation was the 16th-century religious, political, intellectual and cultural upheaval that splintered Catholic Europe, setting in place the structures and beliefs that would define the continent in the modern era. In northern and central Europe, reformers like Martin Luther, John Calvin and Henry VIII challenged papal authority and questioned the Catholic Church's ability to define Christian practice. They argued for a religious and political redistribution of power into the hands of Bible- and pamphlet-reading pastors and princes. The disruption triggered wars, persecutions and the so-called Counter-Reformation, the Catholic Church's delayed but forceful response to the Protestants" <http://www.history.com/topics/reformation>.

²¹² Gareth Jones *History of the Law of Charity 1532-1827* (Cambridge University Press, Cambridge, 1969) at 10.

²¹³ At 10, citing AG Dickens *The English Reformation* (Schocken, London, 1964) at 325.

²¹⁴ At 3, referring to Letter of Authorisation for Collectors for Charitable Institutions, approved by the 4th Lateran Council (1215) and included in the decretals of Gregory IX, cited in Brian Tierney *Medieval Poor Law* (University of California Press, Berkeley and Los Angeles, 1959) at 46.

²¹⁵ At 3.

However, because of the aforementioned societal and pious disruption that came about in the 1600s, there came a need to control charitable gifts more systematically - the key legislative reform was the Statute of Elizabeth I 1601²¹⁶ providing an administrative mechanism for charities,²¹⁷ thus, inter alia, reducing burdens on the State to meet the needs of society's poor and hopeless. The Act was repealed in 1888²¹⁸ but the Preamble endured because it was recognised as being the foundation for the legal definition of charitable purposes that continues to be acknowledged within numerous jurisdictions.

The Preamble reads as follows:²¹⁹

Whereas land, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stock of money, have been heretofore given, limited, appointed, and assigned as well by the Queen's most excellent majesty, and her most noble progenitors, as by sundry other well-disposed persons: some for relief of aged, impotent, and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, seabanks and highways; some for education and preferment of orphans; some for or towards the relief, stock, or maintenance for houses of corrections; some for marriages of poor maids; some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out soldiers, and other taxes; which land, tenement, rents, annuities, profits, hereditaments, goods, chattels, money, and stock of money, nevertheless, have been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same.

²¹⁶ Malik, above n 198, at 37. This Act is also known as the Charitable Uses Act 1601; this thesis utilises the "Statute of Elizabeth" throughout. See later chapters for further discussions on this statute.

²¹⁷ Michael Chesterman *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, London, 1979) at 19.

²¹⁸ The Act was repealed by the Mortmain and Charitable Uses Act 1888; s 13(2) of that Act preserved the Preamble of the Statute of Elizabeth, noted by Malik, above n 198, at 38.

²¹⁹ Donald Poirier, *Charity Law in New Zealand* (Department of Internal Affairs, Wellington, 2013) at 79-80; see also Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 46-47; and Juliet Chevalier-Watts *Law of Charity* (Thomson Reuters, Wellington, 2013) at 7.

One of the functions of this Act was to replace the Catholic Church's role prior to the diminution of its power in assisting the needy, but with a contemporary "secular notion of philanthropy."²²⁰ In reality, the Act was a reforming act to correct the misuses resulting from the governance of charitable trusts rather than define charity generally; the Preamble merely set out a catalogue of purposes recognised as charitable.²²¹ As mentioned, the Preamble lives on, providing the "foundations for the legal definition of charitable purposes, which is still recognised today."²²²

After the enactment of this Act, courts recognised a purpose as charitable if it fell within the purposes in the Preamble or, as commonly known, falling within the spirit and intendment of the Preamble. This latter phrase is utilised by today's courts to determine the charitable nature of an object. Whilst not explicitly stated in the Preamble, it was established by the Court of Chancery that in order for an entity, or a trust, to be charitable it must be of a public character.²²³ In other words, for the benefit of the community, or an appreciably important section of the community. This invariably consists of a two-limbed test. Firstly, whether the purposes confer a benefit on the public, or on a sufficient section of the public. Secondly, whether the class of persons eligible to benefit constitutes the public, or a section of the public.²²⁴

Whilst the Preamble provided the first legal recognition of charitable purposes, the Court in *Morice v Bishop of Durham*²²⁵ took the initial steps in setting out a definition of charity, enshrining the Preamble within a simplified formula²²⁶ as follows:²²⁷

1. Relief of the indigent; in various ways: money: provisions: education: medical assistance;
&c:
2. The advancement of learning;

²²⁰ Chevalier-Watts, above n 219, at 7, referring to Poirier, above n 219, at 80.

²²¹ Jean Warburton, Debra Morris and NF Riddle *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 2-3.

²²² Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018) at 10; see also Chevalier-Watts, above n 219, at 7.

²²³ Warburton, Morris and Riddle above n 221, at 7, referring to, inter alia, *Jones v Williams* (1767) Amb 651 at 652.

²²⁴ At 7; public benefit will be addressed in more detail in Chapter 7.

²²⁵ *Morice v Bishop of Durham* (1804) 9 Ves 399.

²²⁶ Jones, above n 212, at 122.

²²⁷ *Morice*, above n 225, at 532.

3. The advancement of religion; and
4. Which is the most difficult, the advancement of objects of general public utility.

This classification became the “quintessence of legal charity”.²²⁸ Following this classification came the more well-known classification of charitable purposes as enunciated by Lord Macnaghten in *Commissioners for Special Purposes v Pemsel*.²²⁹ Evidently his Lordship was influenced by *Morice’s* classification, as the classifications strongly resemble each other.²³⁰ Lord Macnaghten’s classification reads as follows:²³¹

‘Charity’ in its legal sense comprises four principle divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

This categorisation is the foundation for contemporary charity law in many jurisdictions, and its influence can be found in a number of statutes. For instance, New Zealand’s Charities Act 2005; England and Wales’ Charities Acts 2006 and 2011; Canada’s Income Tax 1985; and Australia’s Charities Act 2013.

II. Giving to Charity and Religion

However, these laws of charity merely provide a regulatory framework to facilitate donations to an approved variety of purposes. What they do not do is “teach those who are subject to their authority to give to persons in need.”²³² In fact, the common law traditions of charity are silent on to whom one should give, and how much. Nor do they provide reasons to give; those questions are left to be answered elsewhere.²³³ Consequently, other aspects of civil communities, as might be seen in democratic societies, such as economics, psychology and morals, have endeavoured to provide those answers. As one might imagine, those answers

²²⁸ Jones, above n 212, at 126; Chevalier-Watts, above n 222, at 54.

²²⁹ *Commissioners for Special Purposes v Pemsel* [1891] AC 531.

²³⁰ Chevalier-Watts, above n 222, at 54.

²³¹ *Pemsel*, above n 229, at 583.

²³² Kathryn Chan “Advancement of Religion in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 129.

²³³ At 129, referring to David Stevens “Rescuing Charity” in Charles Mitchell and Sue Moody (eds) *Foundations of Charity* (Hart, 2001).

vary considerably, depending on the community and individuals in question. This can in turn leave many charities vulnerable to the whims and desires of humans, resulting in greater vulnerability for those in need where a state may not be in a position to assist.

Interestingly, “it is the normative universes of religion that seem to fill the gaps most completely, answering the big questions about charity in culturally specific but relatively consistent ways.”²³⁴ For instance, Islam affords a useful example as to the way in which a religion may provide answers to such societal questions. The general approach to charity can be divided into distinct Islamic concepts, “including ushr (alms of agricultural produce), nawaib (alms for extraordinary circumstances), sadaqa (‘voluntary’ alms), and zakat (‘obligatory alms’)”,²³⁵ and as noted earlier, Islamic law explicitly instructs followers in relation to property which is subject to zakat.²³⁶ Further, Islam contains much detail as to why Muslims should be charitable, and outlines the advantages for receivers and givers. This has been attributed to the Prophet, who stated: “Protect your wealth through zakat, cure your ill with sadaqa, and be ready, against misfortunes, with dua (prayer).”²³⁷

Therefore, whilst charitable regulation suggests that charity is a choice, there appears to be little to explain charity’s real benefits to society, other than that which may be surmised by general knowledge, or by influences from a number of aspects of civil communities, such as media campaigns and advertising. This therefore means that “the maintenance of the needy within the community [is left] ‘to the vagaries of human initiative and volition.’”²³⁸

On the other hand, religion provides a method by which a community is benefitted more fully by charity without being left to the whim of humans. For instance, as mentioned earlier, the Islamic construct of zakat, which is subsequent in importance only to prayer as a principle in Islam, is a compulsory and inseparable part of the faith; failure to observe it is equivalent to

²³⁴ At 129.

²³⁵ At 129, referring to Omer F Senturk *A Comprehensive Guide to Zakat: Charity in Islam* (The Light Inc, New Jersey, 2007) (originally published in Turkish as *Soru ve Cevaplarla Zekat* 2006) at 3-8.

²³⁶ At 130, referring to Farishta G de Zayas *The Law and Institution of Zakat* (Other Press, New York, 2003); instructions include how much to pay; when it should be paid; and the categories of those entitled to receive it.

²³⁷ At 129, citing Senturk, above n 235, at 35.

²³⁸ At 131, citing Jacob Neusner and Bruce Chilton (eds) *Altruism in World Religions* (Georgetown University Press, 2005) at 38.

the negation of Islam itself.²³⁹ Sikhism ensures its followers set aside 10 per cent of their earnings (dasvandh) for the needy and poor,²⁴⁰ and the New Testament requires similar of its followers.²⁴¹ Judaism offers similar exhortations to its faithful, although the act of giving is seated within the broader scope of mitzvot, or obligations, and classes various types of alms according to a particular version of economic justice.²⁴²

Whilst some would not necessarily agree with the “epistemic claims underlying these narratives”,²⁴³ it cannot be denied that charities are a fundamental requirement of likely most societies, democratic or otherwise, to protect those in need. It is also asserted that “charities constantly need more funding to sustain our civil community”,²⁴⁴ although it is beyond the scope of this thesis to determine the full scope of that claim. If, however, it is accepted that charities do fill voids in communities that are often neglected, for a variety of social and political reasons, then the religious narrative, through its various doctrines of obligations, as just one aspect of religion, can be a valuable tool in the redistribution of wealth through charity for the benefit of communities as a whole.²⁴⁵ This occurs without state coercion or pressure, which, as seen in Chapter 1, can have damaging consequences on communities.

Of course, it can be argued that religion is not the only reason to give to charity, and I do not seek to undermine any type of charitable giving. However, what is being asserted is that religion is a valuable tool in the charity armoury, even in civil societies that may seek to denigrate religion.

It might, however, be argued that obliging religious followers to give to charity actually undermines the ethos of charity, which includes altruism, good will and benevolence. Indeed, the obligations of religion are often framed in narratives associated with spiritual rewards for pious gifts. Christianity is not exempt from this, as noted earlier, and the central parables

²³⁹ At 131, referring to de Zayas, above n 236, at xxii-xxiv.

²⁴⁰ At 131, referring to Parkash Singh *Community Kitchen of the Sikhs* (Singh Brothers, Amritsar, 1994) at 60.

²⁴¹ At 131, referring to 1 Corinthians 16.2 *The Bible*, although there is some argument as to whether such a tithe can be properly characterised as an obligation.

²⁴² At 131.

²⁴³ At 131.

²⁴⁴ At 131.

²⁴⁵ At 131.

revolve around emulating Jesus in order to inherit eternal life;²⁴⁶ other religions follow suit. Hindus seek freedom from the karmic cycle if their conduct advances others' wellbeing, but it must be devoid of self-interest, which is an ironic twist.²⁴⁷ Classical Judaism encourages charitable works in return for divine redemption,²⁴⁸ and Islam encourages almsgiving for great rewards, and promises adverse consequences if it is not carried out.²⁴⁹

How, then, can it be asserted that people who are impelled to give to charity because of religious norms will do so for the public good, when such narratives are in direct contrast to the secular notion of altruism? In other words, altruism means that a person can serve others without a benefit to their own self, and indeed, it may be at a cost to oneself.²⁵⁰ It is perhaps difficult to rationalise the encouragement of such self-centred behaviour with that of charitable giving. It may be argued, however, that evaluating the motives for giving is not appropriate, not least because it is very difficult to evaluate such motives. Motives might be practical or moral. Is there a difference between being motivated to carry out a charitable act in order to assuage a guilty conscience, for instance, after seeing a homeless person when one has moderate means, and being motivated to carry out a charitable act because of a religious obligation? Many would probably argue that there is little or no difference. The end result is certainly the same: a charitable endeavour has taken place for a public good.

Further, what is evident is that these functions of religion enable redistribution of wealth for charitable purposes, making them “instrumentally valuable to the public as a whole.”²⁵¹ Certainly, recent research provides evidence that those who claim to be of a certain religion tend to make greater charitable donations than those without a belief system. Sikhs and Jews appear to be the most generous in charitable giving, just ahead of Christians, Hindus and Muslims.²⁵² It is said that this is because “faith should motivate people to acts of generosity”²⁵³

²⁴⁶ At 133.

²⁴⁷ At 132, referring to Richard Davis “Classical Hinduism” in Jacob Neusner and Bruce Chilton (eds) *Altruism in World Religions* (Georgetown University Press, Washington, 2005) at 176.

²⁴⁸ At 132, referring to Jacob Neusner and Alan J Avery-Peck “Altruism in Classical Judaism” in Neusner and Chilton (eds), above n 247, at 47.

²⁴⁹ At 132, referring to Emil Theorin “Altruism in Islam” in Neusner and Chilton, at 247.

²⁴⁹ At 132, referring to Theorin, above n 249, at 47.

²⁵⁰ At 133, referring to William Scott Green “Epilogue” in Neusner and Chilton, above n 247.

²⁵¹ At 133.

²⁵² John Bingham “Religion ‘makes people more generous’” *The Telegraph* (9 June 2014) <http://www.telegraph.co.uk/news/religion/10885180/Religion-makes-people-more-generous.html>.

²⁵³ Bingham, citing Reverend Dr Martyn Atkins General Secretary of the Methodist Church.

although it should be noted that pecuniary donations represent only a part of charitable giving. Other non-financial charitable acts were not specifically measured, and thus only religiously motivated financial gifts were measured within this research.

This research is supported by similar research carried out in Malaysia, which has a significant Muslim population. It was noted that charitable donations were often allied with religious views, whereby “religion and charity go hand in hand.”²⁵⁴ This is because religion is confirmed as having a significant effect of human conduct. Indeed, due to many religions having donation to charity as a central tenet, it is perhaps unsurprising that religion is a significant feature when considering the effect of religion on charitable giving.²⁵⁵ The conclusions drawn from this research, inter alia, determined that religious beliefs were found to be an important arbiter in the encouragement of charitable giving, which further supports previous research undertaken.²⁵⁶

What these various pieces of research illustrate, therefore, is that religion has a significant role within the constructs of charity. This consequently supports communities generally, thus improving the quality of societies overall. Without religion within charity, it is likely that many charitable endeavours would not be possible, and this would be detrimental to many societies, democratic or otherwise.

Nonetheless, it would be unfair to assert that non-religious people do not carry out numerous charitable acts. Unquestionably they do, but this does not lessen the impact of religious giving in relation to charity. Rather it merely emphasises the fundamental relevance of religion within charity in a civil society.

²⁵⁴ Min Teah and Michael Lwin “Moderating roles of religious beliefs on attitudes towards charities and motivation to donate” 2014 *Asia Pacific Journal of Marketing and Logistics* Vol 26 No 5 at 739, citing SK Ranganathan and WH Henley “Determinants of charitable donation intentions: a structural equation model” (2008) *International Journal of Nonprofit and Voluntary Sector Marketing* Vol 13 No 1 at 1.

²⁵⁵ At 744.

²⁵⁶ At 739, referring to Ranganathan and Henley above n 254, at 1-11; J Reitsma, P Scheepers and M Te Grotenhuis “Dimensions of individual religiosity and charity: cross national effect differences in European countries” (2006) *Review of Religious Research* Vol 47 No 4 at 347-362; and EF Jackson et al “Volunteering and charitable giving: do religious and associational ties promote helping behaviour?” (1995) *Nonprofit and Voluntary Sector Quarterly* Vol 36 No 2 at 218-238.

It is worthwhile now looking at religion and its influence and relevance within society to understand its impact on communities so as to underpin the assertions I make in this thesis.

III. Religion and Society

In furthering the object of my inquiry, that of reconciling the advancement of religion within its socio-legal constructs, it was also important to make some correlations between religion and society generally to understand their relationship, and thus lay the groundwork for later assertions relating to the reconciliation of the advancement of religion. I turn to this matter now.

Whilst it is outside the scope of this thesis to consider sociology beyond a few well-chosen remarks, it should be noted that law and sociology share similar principles. For instance, both are concerned with a range of significant forms of social relationships, and they require the abstract to be applied to the concrete.²⁵⁷ Thus:²⁵⁸

The relationship between religion and society cannot be understood without reference to law and the relationship between religion and law cannot be understood without reference to sociology. A sociology of law and religion is concerned with how social forces shape the legal regulation of religion and how law is used to affect religion and its social expression. It seeks to shed further light upon the complex relationship between religion, law and society.

It has been argued that the religion's distinctive position is embedded in the meaning of being human. Since the beginnings of society and human consciousness, humans have continued to question the meaning and purpose of life.²⁵⁹ Thus, religion is a universal phenomenon because humans are meaning-seeking animals.²⁶⁰ Not only do humans seek out religion to interpret meaning, but religion also influences human behaviour. For example, religion is said to be

²⁵⁷ Russell Sandberg and Rebecca Catto "Law and Sociology: Toward a Greater Understanding of Religion in N Doe and R Sandberg (eds) *Law and Religion: New Horizons* (Peeters, Leuven 2010) at 287, referring to K Patchett "The Role of Law in the Development Process" (1987) 48 Commonwealth Legal Education Association Newsletter at 36.

²⁵⁸ At 287.

²⁵⁹ Barry W Bussey "The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School" 2016 *BYU Law Review* Issue 4 January at 1136.

²⁶⁰ Jonathan Sacks *The Persistence of Faith: Religion, Morality and Society in a Secular Age* (Continuum, London, 2005) at 9.

negatively related to abortion rates; babies born to unmarried parents; marriage breakups; and late bill payments. Further, as noted, religiously-committed people are more active in charitable volunteering, and active in charitable donating.²⁶¹

Such searches for the meaning of life and influences on behaviour have had significant impact on the place of religion within society, and with that the legal framework. History implies religion was adjoined explicitly to the structures of liberal states, as opposed to being added by chance, and “[t]his design is firmly established in a history steeped in human events and philosophical inquiry as to the meaning of life.”²⁶² Consequently, religion was a “means of pinning down and managing the ideas and practices”²⁶³ for the welfare of Western societies.

Western history “is replete with the ebb and flow of the state demanding ultimate allegiance from its citizens”²⁶⁴ and religion has been used to cement loyalty to the state. Polybius, after living in Rome for many years, noted “in 150 BC ‘The quality in which the Roman commonwealth is distinctly superior ... is the nature of its religion ... is that which maintains the cohesion of the Roman state.’”²⁶⁵

Further, religion has been seen as being at the root of morality, whereby if god was not recognised then all things would be tolerated.²⁶⁶ This may be an arguable point in a contemporary democratic society, and certainly some notions of religion and morality are a cause of tension in today’s society. For example, with regard to “traditional” Christian notions of abortion, marriage and contraception, to name but three. Nonetheless, religion did, and still

²⁶¹ Niclas Berggren and Christian Bjornskov “Is the importance of religion in daily life related to social trust? Cross-country and cross-state comparisons.” (2011) *Journal of Economic Behavior & Organization* 80 at 461-462, referring to LR Iannaccone “Introduction to the economics of religion” (1998) *Journal of Economic Literature* 36 at 1465-1496; N Berggren “Rhetoric or reality? An economic analysis of the effects of religion in Sweden” (1997) *Journal of Socio-Economics* 26 at 571-596; and RD Putnam *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, New York, 2000); see Chapter 6 for discussions on the “halo effect” of religion.

²⁶² Bussey, above n 259, at 1136.

²⁶³ At 1136, citing Derek Peterson & Darren Walhof *The Invention of Religion: Rethinking Belief in Politics and History* 7 (Rutgers University Press, New Brunswick, 2002).

²⁶⁴ At 1141.

²⁶⁵ At 1141, citing Will Durant *Caesar and Christ* (Simon & Schuster, New York, 1944) at 93, citing 4 Polybius, *Histories* 56 (Loeb Classical Library ed, 1925).

²⁶⁶ Sacks, above n 260, at 36, referring to Fyodor Dostoevsky *The Brothers Karamazov* (The Russian Messenger, Moscow, 1880).

does, impact on morality. However, we do not need religion to be moral, rather we, as humans, need to be part of a community,²⁶⁷ and this subsequently informs our identity.²⁶⁸

IV. Religion and Identity

Identity is a key part of religious traditions, which makes religion a fundamental part of the human condition. For example, whilst Catholicism has cultural variances, it has been found that some nations that fall within that same religious space, such as within the Northern Lutheran rim, they “tend to cluster according to their configuration of market, state and family for the pursuit of work and welfare”.²⁶⁹

Further evidence of religious identity is to be found in the wake of the collapse of the “once proudly godless [albeit enforced] Soviet Union”.²⁷⁰ Here religion has assumed prominence again in the emerging discourse on national identity through “its teachings, rituals, vestments and symbolism ... to build and maintain communities ... in all three of the South Caucasus states of Armenia, Azerbaijan and Georgia.”²⁷¹ In addition, religion has served as a key instrument of “otherisation”. This is where one identifies with others through similarities and differences, for instance, separating Armenians from Azerbaijanis, and vice versa.²⁷² Moreover, it has been noted that “Islam is first and foremost a marker of identity”. For instance, in Kazakhstan, if a person is born into a Kazakh family, they are nearly always immediately

²⁶⁷ At 45.

²⁶⁸ Nukhet A Sandal and Jonathan Fox Religion in *International Relations Theory: Interactions and Possibilities* (Routledge, Abingdon, 2013) at 28.

²⁶⁹ Kees van Kersbergen “From charity to social justice: religion and the European welfare state traditions” in Pauli Kettunen and Klaus Petersen (eds) *Beyond Welfare State Models* (Edward Elgar Publishing, Cheltenham, 2011) at 93.

²⁷⁰ Katya Migacheva and Bryan Frederick “Religion, Conflict, and Stability in the Former Soviet Union” in Katya Migacheva and Bryan Frederick (eds) *Religion, Conflict, and Stability in the Former Soviet Union* (Rand Corporation, Santa Monica, 2018) at 14.

²⁷¹ At 13-14, referring to Daniele Hervieu-Leger *Religion as a Chain of Memory* (Rutgers University Press, New Brunswick, 2000) at 140-162 (translated by Simon Lee).

²⁷² At 14, referring to Rogers Brubaker “Language, Religion, and the Politics of Difference” 2013 *Nations and Nationalism* 19 1 at 3.

Muslim. According to a recent poll, 96.9 per cent of Kazakh respondents identified themselves as Muslim.²⁷³

Similar patterns of identify and religion emerged with settlers in Hong Kong. In this situation, the early settlers mainly comprised of refugees from mainland China, but there was little support to be gained from the colonial rule of the time. As a result, the settlers turned to their own communities and mutual help to assist with plugging the welfare gaps left by the ruling party. Key in providing support for such communities were the religious groups. Their traditions were bound in Chinese culture, and as a result, the notion of charity and giving remains “fundamentally inspired by the distinctive Chinese attitude.”²⁷⁴ It is also noticeable that the Asian charity model has many of its roots within, inter alia, Taoism, Confucianism and Buddhism.²⁷⁵ Therefore, religious traditions, which are observed as part of so many communities, are sources of morality and identity. As a result, historical religious influences continue to pervade many communities, underpinning the community functions of religion within the charity narrative. Nonetheless, whilst it is evident that identity may be a key factor in relation to religion broadly, I do not necessarily suggest that identity should influence charity law per se. This is because the construct of “identity” within religion is fluid and not every recognised religion, or spiritual belief system, has defined notions of identity. Therefore, making “identity” a key factor on the definition or influence of charity law may constrain charity law when, in reality, charity is such a fundamental aspect of many democratic societies. Rather the purpose of my addressing identity within religion was to embed the construct of identity within religion as part of this thesis’ discussions and demonstrate the importance of considering religion within its social framework.

²⁷³ Nargis Kassenova “Islamic Revival and Trajectories of State-Society Relations” in Migacheva and Frederick, above n 270, at 118, referring to B Bekturganova and M Nurgaliyeva *Ethnic and Religious Identifications of the Regional Youth Report* (Association of Sociologists and Political Scientists, 2016).

²⁷⁴ Damian Bethke “Charity Law Reform in Hong Kong: Taming the Asian Dragon?” 2016 *International Journal of Not-for-Profit Law* 18(1) May at 16; Chevalier-Watts, above n 222, at 173.

²⁷⁵ Bethke, at 18, referring to Yu Tsu *The Spirit of Chinese Philosophy: A Study in Mutual Aid* (Columbia University, New York, 1912).

V. Religion and Infrastructure

The impact on many civilizations, Western or otherwise, by religion is not just evidenced in morals or identities. Its impact on “the contribution of religious organisations, throughout history, to building the constitutional infrastructure ... of contemporary society is beyond estimation.”²⁷⁶ States such as Ireland, Australia, New Zealand and Canada owe a debt to such organisations because religious organisations provided the foundations for contemporary welfare and learning establishments.²⁷⁷ Consequently, their influence is still felt today in supporting and providing state infrastructure. It further acts as “midwife to many prominent third sector endeavours in the community services industry.”²⁷⁸ These religious bodies often have close links to charitable institutions. For instance, many hospitals and schools are registered charities, as well as being religious institutions.

There are also other beneficial impacts of religion within society that have been observed beyond the spiritual and infrastructural benefits. As has been noted, having a religious focus has the effect of lowering divorce rates; impacting negatively on the rates of abortion; as well as encouraging timely payment of bills.²⁷⁹ Health benefits are also said to spring from being religiously-minded, whereby church attendance can add up to seven years to life expectancy, in addition to lowering blood pressure; impacting positively on alcohol and drug usage; improving mental health; and developing a strong immune system.²⁸⁰

Consequently, the impact of religion and religious charities can be felt within the very infrastructures of many societies,²⁸¹ illustrating the fundamental relevance of religious charities

²⁷⁶ Kerry O’Halloran “Charity and Religion: International charity law reform outcomes and the choices for Australia” (2011) Third Sector Review Vol 17 No 2 at 30.

²⁷⁷ At 30.

²⁷⁸ At 41, citing M Lyons *Third Sector: The contribution of non-profit and cooperative enterprises in Australia* (Allen & Unwin, Sydney, 2001) at 35.

²⁷⁹ Berggren and Bjornskov, above n 261, at 461-462, referring to LR Iannaccone “Introduction to the economics of religion” (1998) *Journal of Economic Literature* 36 at 1465-1496; N Berggren “Rhetoric or reality? An economic analysis of the effects of religion in Sweden” (1997) *Journal of Socio-Economics* 26 at 571-596; and RD Putnam *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, New York, 2000).

²⁸⁰ Jeffrey Dorfman “Religion is Good for All of Us, Even Those Who Don’t Follow One” *Forbes* (22 December 2013) <https://www.forbes.com/sites/jeffreydorfman/2013/12/22/religion-is-good-for-all-of-us-even-those-who-dont-follow-one/#713abffb64d7>; it should be noted that such matters are not necessarily the views of the author.

²⁸¹ As one example, the Catholic Church operates more than 140,000 schools, 10,000 orphanages, 5,000 hospitals and some 16,000 other health clinics. Caritas, the umbrella organisation for Catholic aid agencies, estimates that spending by its affiliates totals between £2 billion and £4 billion, making it one of the biggest aid

to multiple communities, even if those communities are not consciously aware of such relevance. Therefore, any move to exclude religion as a head of charity may impact adversely on some instrumental sections of the community, including not just the infrastructure of many communities but the very fabric and connections of communities themselves.

However, whilst I have made numerous references to the concept of religion, I have, as yet, not considered the meaning of religion, to which this chapter turns now.

VI. Introduction to Religion and Defining Religion

Whilst it is important to define religion, it is beyond the scope of this thesis to provide an exhaustive exploration of religion. Rather, I will outline religion and its meaning, both generally and at charity law, so as to underpin the terms utilised throughout the thesis and to provide some context as to religion within charity law.

It is said that non-legal definitions of religion can be divided into two varieties.²⁸² Firstly, as functional, where religion is recognised as what it does for individuals or social systems. Secondly, as substantive, which refers to what religions consist of, such as narratives, symbols and institutions. Religion may also take on other functions, including making sense of a person's relationship to nature, history and society. Religion is said to be compelling because, inter alia, its stories are often told in childhood. They may be presented not just orally, but also with symbols, pictures, songs and rituals, which help form the religious imagination, and so become the foundations for religious understanding.²⁸³ Therefore religion can become embedded early within the psyche of many.

In relation to religion and charity, it has been observed that:²⁸⁴

agencies in the world; David Paton "The World's Biggest Charity" *Catholic Herald* (16 February 2017) <http://www.catholicherald.co.uk/issues/february-17th-2017/a-worldwide-force-for-good/>; New Zealand alone reportedly boasts nearly 300 religious schools throughout the country https://en.wikipedia.org/wiki/List_of_Christian_organisations_in_New_Zealand.

²⁸² David Herbert *Religion and Civil Society Rethinking Public Religion in the Contemporary World* (Ashgate Publishing Limited, Aldershot, 2003) at 30, referring to M Chaves "Secularization as a Declining Religious Authority" (1994) *Social Forces* 72(3) at 749-774.

²⁸³ At 30-31.

²⁸⁴ Kerry O'Halloran *Religion, Charity and Human Rights* (Cambridge University Press, Cambridge, 2014) at 10, citing Government White Paper *Charities: A Framework for the Future Cm 694* (HMSO, London, 1989) at 8.

The importance of religion as a fundamental spring of charity can scarcely be overestimated. It is part of the makeup of Man to want to give. It is part of the ethics of most religions to encourage that.

Religion's relevance for mankind is further demonstrated in the way in which religion can be seen as being multi-faceted –“as a belief; as an identity; and as a way of life.”²⁸⁵ Religion as a belief represents the “substantive content of a convictional position”,²⁸⁶ typically including “doctrines, theological categories and the investment of authority in figureheads such as the priesthood.”²⁸⁷ Key to religious belief are “dualisms such as truth/falsity and orthodoxy/heresy.”²⁸⁸ With regard to religion as an identity, this relates to the creation and preservation of collective association. Identity can overlap with ethnicity, nationalism, and family and cultural traditions. It is often seen as being the primary source of prejudice and oppression of the religious. With regard to religion as a way of life, this can be conveyed through clothing, food restrictions and segregation of communities in order to follow a particular belief.²⁸⁹ However religion is viewed, be it as a belief system, as an identity, or as a way of life, “it commonly functions by invoking an authority which is considered to be final ... and transcendent.”²⁹⁰

In relation to charity, whilst religion was not mentioned explicitly in the Preamble of the Statute of Elizabeth, it was evident that it came within the spirit and intendment of the Preamble. This was because the relief of poverty and distress, which appeared to underpin numerous purposes set out in the Preamble, might be said to be religious in nature.²⁹¹ Indeed:²⁹²

²⁸⁵ Celia G Kenny “Law and the Art of Defining Religion” (2014) 16 ECC LJ at 29 referring to T Gunn “The complexity of religion and the definition of ‘religion’ in international law” (2003) 16 Harvard Human Rights Journal.

²⁸⁶ At 29 referring to Gunn, above n 285.

²⁸⁷ At 30 referring to Gunn.

²⁸⁸ At 30 referring to Gunn.

²⁸⁹ At 30.

²⁹⁰ At 30.

²⁹¹ Gino Dal Pont “Charity law and religion” in Peter Radan et al (eds) *Law and Religion God, the State and the Common Law* (Routledge, Abingdon, 2005) at 204.

²⁹² At 204, citing *Commissioners for Special Purposes v Pemsel* [1891] AC 531 at 572.

[N]o insignificant portion of the community consider what are termed spiritual necessities as not less imperatively calling for relief, and regard the relief of them not less than as a charitable purpose than the ministering to physical needs.

These points, therefore, support assertions earlier in this chapter of the relevance of religion within charity, and thus society. However, ‘religion’ per se has not been “wholly amenable to legal definition.”²⁹³

Within charity law, ‘religion’ is generally construed liberally. The primary case is the Australian High Court case of *Church of the New Faith v Commissioner of Pay-roll Tax*, where Mason ACJ and Brennan J identified the following principles:²⁹⁴

... the criteria of religion are twofold: first, 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 ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.

This definition was recognised in Australasia, although English courts have utilised slightly different definitions. In *Re South Place Ethical Society*, Dillon J observed:²⁹⁵

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

Dillon J further defined ‘worship’ as:²⁹⁶

... something which must have some at least of the following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession.

²⁹³ Kerry O'Halloran *Religion, Charity and Human Rights* (Cambridge University Press, Cambridge, 2014) at 10.

²⁹⁴ *Church of the New Faith v Commissioner of Pay-roll Tax* (1983) 154 CLR 120 at 136.

²⁹⁵ *Re South Place Ethical Society* [1980] 1 WLR 1565 at 1571-1572.

²⁹⁶ At 1572, citing *R v Registrar General, Ex parte Segerdal* [1970] 2 QB 697, [1970] 3 All ER 886 (CA) at 709 and 892, which concerned the Church of Scientology.

The English charity law definition of religion, at that time, defended “a theistic concept of religion man's relation with God - and attributes it two essential attributes: faith in a god and worship of that god.”²⁹⁷

Dillon J, in *Re South Place Ethical*, did offer “a clear, though doubtful response to possible critics”:²⁹⁸

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

What the approaches of Australia and England illustrate is that the charitable model of religion is subject to varying interpretations, and England, at the time of the *South Place Ethical* decision, was most certainly restrictive.

It presents a theistic conception and a number of essential elements--faith and worship--which are characteristic of traditional Western religions and are defined in accordance with the postulates of these religions. The clearest proof of this is that Buddhism, whose religious nature cannot possibly be disputed, is treated expressly as an exception.²⁹⁹

This restrictive method of defining religion may, however, be a popular approach in the public eye. I have already observed the often negative associations in relation to religion and the benefits it receives from its recognition at charity law. Therefore, if courts are deemed as interpreting “religion” conservatively, the public may have confidence that any apparent advantages religions may obtain, at the perceived expense of other bodies, may be lessened.

²⁹⁷ Miguel Rodriguez Blanco “Religion and the law of charities” 2005 Ecclesiastical Law Journal 8(38) at 257.

²⁹⁸ At 257, citing *Re South Place Ethical Society*, above n 295, at 1573.

²⁹⁹ At 258.

England was not alone in this conservative approach. Canada appears to have “one of the narrowest understandings of religion”.³⁰⁰ The Canada Revenue Agency’s publication on the criteria for charitable status identifies three main characteristics for religion: “faith in a higher power, such as a God, Supreme Being, or Entity; worship or reverence; and a particular and comprehensive system of doctrines and observations.”³⁰¹

Consequently, in relation to the association between religion and society, such restrictive approaches may actually have gone some way towards reassuring society that religions are not being unduly advantaged through charity law at the expense of non-religious bodies. The apparently rigorous criteria that such charitable bodies must meet may enable people to recognise the benefits to society that result from religious bodies being charitable.

However, in relation to the notion of religion, the approaches of English and Canadian courts evidently contrast with those of the United States Supreme Court or the High Court of Australia, which provide broader characterisations.³⁰² As a result, such diverging judicial approaches may, unfortunately, give rise to public concerns that religions are being treated disparately. This may undermine religion’s position in society because the public might have limited confidence that courts would apply the required criteria rigorously in all circumstances. Indeed, there is no easy answer to this issue, because whilst the English courts did follow a restrictive interpretation of “religion”, it is apparent now that some changes have occurred affecting the definition of religion in charity law in England.

³⁰⁰ Kathryn Chan “Advancement of Religion in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 118.

³⁰¹ At 118, citing CRA Guidance CG-019 *How to Draft Purposes for Charitable Registration* (25 July 2013) at [34].

³⁰² Blanco, above n 297, at 258 and footnote 44, referring to *United States v Seeger* 380 US 163 (1965) at 165-166 “those beliefs that in the life of their holders have an equivalent position to that of religion in the life of the faithful are considered as being equivalent to religious beliefs: ‘belief in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption’”; and *Church of the New Faith v Commissioner of Payroll Tax* (1982-1983) 154 CLR 120, “in which charitable status is granted to the Church of Scientology and its religious nature is acknowledged”; see also W Sadurski, “On Legal Definitions of Religion” (1989) 63 Australian Law Journal at 834-843.

VII. England and Wales

The Charity Commission for England and Wales has recognised the “promotion of religious harmony” as a new charitable purpose. This is not necessarily limited to religions per se, rather it take account of “beliefs” that are recognised by the European Court of Human Rights.³⁰³ This has now been consolidated in the Charities Act 2011, where a purpose may be charitable if it promotes “religious or racial harmony”.³⁰⁴ Further, the Act also provides a description of religion, although it is only partial:³⁰⁵

... religion” includes—

- (i) a religion which involves belief in more than one god, and
- (ii) a religion which does not involve belief in a god.

Its effect has been to remove uncertainty about whether the common law construct of religion excluded faiths with more than one god, such as Buddhism. Consequently, the common law definition of religion is still operative, although it has been broadened, and this is reflected in two recent Registration Decisions of the Commission. In the first one, the Gnostic Centre,³⁰⁶ the Commission, relying on its own guidance, noted that the:³⁰⁷

... characteristics of a religion for the purposes of charity law are:

- a. the belief system involves belief in a god (or gods) or goddess (or goddesses), or supreme being, or divine or transcendental being or entity or spiritual principle, which is the object or focus of the religion (referred to in this guidance as ‘supreme being or entity’);
- b. the belief system involves a relationship between the believer and the supreme being or entity by showing worship of, reverence for or veneration of the supreme being or entity;
- c. the belief system has a degree of cogency, cohesion, seriousness and importance;
- d. the belief system promotes an identifiable positive, beneficial, moral or ethical framework.

³⁰³ Mark Hill “Religion and the State: Recognition, Regulation and Facilitation” in Russell Sandberg (ed) *Religion and Legal Pluralism* (Ashgate Publishing, Farnham, 2015) at 28, referring to Three Faiths Forum Application (14 June 2002).

³⁰⁴ At 28, referring to the Charities Act 2011, s 3(1)(h).

³⁰⁵ At 28, referring to the Charities Act 2011, s 3(2)(a).

³⁰⁶ At 28, referring to *Application for the Registration of the Gnostic Centre* (16 December 2009) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324274/gnosticdec.pdf; see Chapter 7 for further discussions on the *Gnostic Centre Decision*.

³⁰⁷ *Application for the Registration of the Gnostic Centre*, above n 306, at [23], referring to s C2 and Annexe A of the Advancement of Religion for the Public Benefit. .

In 2010, the Druid Network for England and Wales³⁰⁸ was successful in its registration application because it met the required criteria of religion that was detailed in the Gnostic Centre application; the Gnostic Centre failed to meet that criteria.

The English Supreme Court also recently interpreted “religion” in the Places of Worship Registration Act 1855 as including “a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives ...”.³⁰⁹ Thus, England, along with Australia and New Zealand,³¹⁰ reflects a significantly broader approach to religion. Although England “continues to exclude belief systems that explain the universe solely in terms of the human senses and science.”³¹¹

Such liberal developments may further undermine the status of religions within many democratic societies. This is because liberalising the definitions may be interpreted as unduly favouring religions, at a time when religions are often negatively construed in the public mind. However, such critics may be heartened to note that whilst the definition of religion may be broadening, there are checks and balances available to courts to ensure that religions seeking charitable status can be struck down, even if they advance the religion satisfactorily. For instance, the Australian High Court stated that “canons or conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the ground of religion.”³¹² In other words, the Court explicitly noted that if a “religion has such dysfunctions then it should lose all legal privileges commonly given to religions.”³¹³

³⁰⁸ Hill, above n 303, at 28-29, referring to *Application for the Registration of the Druid Network* (Charity Commission for England and Wales, 21 September 2010) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324236/druiddec.pdf; see Chapter 7 for further discussions on the *Druid Network Decision*.

³⁰⁹ Chan, above n 300, at 118, citing *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 at [51] and [57].

³¹⁰ See *Liberty Trust v Charities Commission* [2011] 3 NZLR68 (HC) and the Department of Internal Affairs – Charities Services *Registration Decision: The Jedi Society Incorporated* (JED49458) 14 September 2015.

³¹¹ Chan, above n 300, at 118, referring to *R (Hodkin)*, above n 309, at [57].

³¹² Russell Sandberg and Rebecca Catto “Law and Sociology: Toward a Greater Understanding of Religion” in N Doe and R Sandberg (eds) *Law and Religion: New Horizons* (Peeters, Leuven 2010) at 290-291 and fn 114, citing *Church of the New Faith v Commissioner for Payroll Tax* (1983) 57 ALJR 785.

³¹³ At 290-291.

Whilst England does not express such limitations so explicitly, *Thornton v Howe* confirmed that religions must not offend public morality.³¹⁴ Thus, whilst an organisation may meet the religious requirements, if it engages in illegal activities, or activities that offend a societal ethical conventions, which might include dangerous psychological techniques, or children being involved in sexual acts, it will be unlikely to meet the public benefit requirement and may be struck out.³¹⁵ Consequently, the public may have some confidence that religious charities are still subject to stringent legal criteria, regardless of the evolution of the characterisation of religion itself.

On a more general level, there may be an argument which would resolve public confidence issues in relation to religion. That being that there should be a standard legal approach to religion, where the standard definition should apply to all religions. This appears to be a logical approach, but there may be policy reasons to support fluctuating definitions of religion within democratic societies. For example, much United States case law on the denotation of religion derives from constitutional first amendment cases that are related to individual rights. As a result, the meaning of religion has merited from a broad construction,³¹⁶ which reflects the desire of a state to ensure various freedoms, including religion.

Further, there is an argument that the definition of religion should be subject to variation when considering the motive of the religious gift. For example, more leeway could be demonstrated in situations where donations for apparent pious purposes are based on the donor's intention, as opposed to trying to obtain relief on tax or rating.³¹⁷ This is justified because:³¹⁸

Legal definitions ... do not describe an objective reality but form a part of the normative language in which the legally protected values are cast. The specific purpose of any given rule is best captured by describing the special problem that the rule [is] intended to attack: if a refinement of an accepted meaning of a particular word or a phrase will help us tailor the rule

³¹⁴ At 291, referring to *Thornton v Howe* (1862) 31 Beavan 14.

³¹⁵ Gino Dal Pont "Charity law and religion" in Peter Radan et al (eds) *Law and Religion: God, the State and the Common Law* (Routledge, Abingdon, 2005) at 217, referring to *Church of the New Faith v Commissioner of Pay-roll Tax* (1983) 154 CLR 120; *Church of Scientology of California v Kaufman* [1973] RPC 635; and MP Battin *Ethics in the Sanctuary* (Yale University Press, New Haven, 1990) at chapter 2.

³¹⁶ Dal Pont, above n 315, at 207-208.

³¹⁷ At 208.

³¹⁸ At 208, citing W Sadurski "On legal definitions of 'religion'" 1989 Australian Law Journal 63 at 842-843.

better to attack this evil, then this refined meaning should be adopted [so] there is nothing odd or improper in reading the same word differently in two different [cases].

Moreover, ensuring that there is a possibility of interpreting religion which is dependent upon the particulars of a case would address the apparent problem of Western religious bias against non-Christian faiths. This stems from the idea that the denotation of religion in common law states evolved within a largely Christian Protestant context, which has strong distinctions between religion and the secular, which is not so prevalent in non-Western cultures. This means that in contemporary multi-faith, multi-cultural Western countries, charity law should recognise non-Western standards of religion to benefit all communities.³¹⁹ This would support the evolving definitions of religion. Favouring a benignant construction of religion for charitable purposes underpins Hammond J's (as he was) astute remarks in *Re Collier (deceased)* for valid policy reasons:³²⁰

Charitable bodies have always been distinctly important in socio-economic terms. Charities were a creature of Tudor/Stuart philosophy, and owed their origins to a Christian-ethic system of equity. But, the voluntary sector could go no real distance to meeting the needs of the poor, the sick, and the oppressed, and other needs, in heavily industrialised societies. Welfare systems evolved ... In contemporary circumstances, charities often tackle what a conservative bureaucracy or state will not. They are often innovative. And, in some jurisdictions, charities have even become delivery vehicles for state programmes.

As noted earlier, religious bodies can be found in a multitude of organisations, not just, for instance, in churches and mosques, but in schools, hospitals and aid agencies. Therefore, religious charities carry out a wide variety of supportive functions in many communities. Favouring broad religious definitions in a charity law framework is more likely to have constructive effects overall on communities as a result of the positive activities of the religious organisation. Therefore, there are sound policy reasons to support Hammond J's construction of charity, particularly in relation to the advancement of religion.

³¹⁹ At 207, referring to E Penalver "The Concept of Religion" 1997 Yale Law Journal 10 at 812 and 812; Western bias is reflected in *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381; see also later chapters for discussions on non-Western religions; see also generally Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018).

³²⁰ *Re Collier (deceased)* [1998] 1 NZLR 81 (HC) at 95; see also chapter 7 for further discussions on the doctrine of benignant construction.

Additional answers to questions as to the benefits to society of liberalising the definition of religion may also be found when I consider notions of secularism, to which this chapter turns shortly, and indeed, when I consider, in the section following that, the relationship between religion and the law. However, before I consider these matters, it should also be noted that in addition to a charity's religion being recognised at law, a body must also advance religion, which I now address.

VIII. Advancing Religion

This will be legally understood within the construct of common law charities if it comprises “the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines in which it rests, and the observances that serve to promote and manifest it.”³²¹ The Canadian Federal Court of Appeal noted that in relation to furthering religion, a charity's focus should be “positive” and “targeted”; it is insufficient that the charity merely enables pious beliefs to be followed.³²²

Therefore, for a body to be recognised at charity law as advancing religion, not only must the religion itself be recognised, but the body must also advance that religion in a legally-understood way. This provides courts with an opportunity to ensure that religious bodies are undertaking their religious duties appropriately such that they benefit the public, and therefore provides evidence that checks and balances are in place. Such checks and balances provide certainty for society that religions carrying out charitable acts have met a rigorous legal criterion.

However, not all case law, *prima facie*, reflects such a stringently regulated approach. For instance, in the New Zealand High Court case *Liberty Trust v Charities Commission*,³²³ the

³²¹ Kathryn Chan “Advancement of Religion in an Age of Religious Neutrality” 2017 Oxford Journal of Law and Religion 6 at 116, citing *Keren Kayemeth Le Jisroel Ltd v IRC* [1931] 2 KB 465 (CA).

³²² At 116, referring to and citing *Fuaran Foundation v Canada Customs and Revenue Agency* (2004) FCA 181 at [15].

³²³ *Liberty Trust v Charities Commission* [2011] 3 NZLR68 (HC); see also chapter 7 for additional discussion on *Liberty Trust*.

Court adopted what might be considered a liberal understanding of the advancement of religion.

One of the Trust's core activities included acting as a mortgage lending scheme. It did this by offering interest-free loans. Liberty Trust stated that this scheme advanced religion by expounding Biblical financial ideologies. It is acknowledged, that on the evidence presented, there was no issue with this type of activity advancing religion because these principles being taught "are an aspect of Christian Faith as expounded by Liberty Trust."³²⁴ It is asserted, however, that the issue that arises is in relation to public benefit. Generally speaking, it will be presumed that purposes that advance religion will afford public benefit. Therefore, whilst the presumption for a court is that a purpose will satisfy the public benefit criteria, "it remains for the court to be satisfied that the gift satisfies the public benefit requirement."³²⁵

In considering whether or not Liberty Trust's scheme did confer public benefit, the Charities Commission (as it was), relying on *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand*, submitted:³²⁶

Liberty Trust's scheme is simply "edification by example" which does not meet the public benefit test. The [Commission] submits that this is because the scheme principally confers private benefits whereas, to be a charitable purpose, any private benefit must be ancillary to the wider charitable purpose. The [Commission] submits that any wider community benefit from a mortgage scheme, not based on need, but based on religious financial principles is too remote.

Mallon J disregarded the significance of the *Grand Lodge* case, stating that "a difference between that case and the position here is that Liberty Trust's edifying example is directly

³²⁴ *Liberty Trust*, at [69].

³²⁵ At [100]; see also Juliet Chevalier-Watts "Trusts for Religious Purposes" [2010] NZLJ 55 at 56; Juliet Chevalier-Watts "Charitable Trusts and Advancement of Religion: On a Whim and a Prayer?" 2012 VUWLR Vol 43 3 September at 417-422 for alternative arguments on this case. It should be noted that the United Kingdom Charities Act 2006, s 3, has now removed the presumption of public benefit for all heads of charity, which includes the advancement of religion.

³²⁶ *Liberty Trust*, above n 323, at [117], referring to *Re the Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC).

linked to the Christian faith.”³²⁷ Further, her Honour observed that “private benefit is part and parcel of Christian living”.³²⁸

Liberty Trust desired that the beneficiaries of the loan should be able to live without financial liability in order to spread the Bible’s message. Mallon J asserted that she found it "difficult to distinguish [the scheme] from a mass in a Church which is open to the public".³²⁹ This meant that, in her Honour’s view, Liberty Trust’s scheme enabled loanees to "lead a Christian life free of the burdens of debt".³³⁰

Certainly, it might be argued, as I have done previously, that “[t]he focus ... is on the adherents first and foremost, which should theoretically rebut the presumption of public benefit because it appears too remote;”³³¹ I have not been alone in such criticism.³³² Consequently, this case may do little to reassure the public that, in some circumstances, religious activities may be subject to a generous interpretation. As a result, it could be argued that such a generous interpretation of public benefit may lead to an extension of this legal principle, which may, consequently, lead to the opening of the floodgates with future cases.

However, in answer to this, and reflecting an evolution of my earlier published propositions, what this case does do is implicitly acknowledge religion’s inherent position within society. Indeed, it respects Hammond J’s aforementioned benignant construction of charity. If Mallon J had not found public benefit in this case, this would signal a rejection of the relevance of religion in a contemporary setting, with a downstream effect of reducing the importance of religion in the charitable sector. Therefore, I contend that *Liberty Trust* is a useful case in enabling religion to operate in a contemporary climate, but still within the confines of the law.

³²⁷ At [117].

³²⁸ At [121].

³²⁹ At [122].

³³⁰ At [125].

³³¹ Juliet Chevalier-Watts “Charity Law, the Advancement of Religion and Public Benefit – Will the United Kingdom be the Answer to New Zealand’s Prayers?” (2016) 47 VUWLR at 404.

³³² Donald Poirier *Charity Law in New Zealand* (Department of Internal Affairs, Wellington, 2013) at 141; see also *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA) for discussions on the application of public benefit.

It was noted earlier that secularism may have a role to play in undermining charitable acts associated with religion. Therefore, to explore such assertions, I turn to what is meant by secularism and its possible impacts on the charity narrative. It should be noted, however, that it is only possible to consider a brief foray in to this topic because secularism is a complex concept, and it is beyond the scope of this thesis to consider it in more detail other than to provide some basic principles that provide a framework for the narrative of this thesis. However, it was still considered pertinent to address this topic within this chapter because of the assertion earlier in the thesis that many common law countries are becoming increasingly secular, and thus it may be that secularism may have an impact on the reconciliation of the advancement of religion generally.

IX. Secularism

Early leading sociologists, including Comte, Marx, Weber and Durkheim, observed a weakening significance of religion with regard to social institutions and the lives of individuals. Comte argued that history had arrived whereby empirical and scientific thinking would replace theology and metaphysics. He celebrated the death of religion as he saw sociologists as the shapers of the secular future of society.³³³ Thus, sociology was in opposition to theology. Marx, who was militantly anti-religion, called for the eradication of religion because it was the “opium of the people” which caused a massive obstruction of genuine class consciousness. Ironically, however, Marx also recognised the benefit of religion within society, observing “that religion ... is the sigh of the oppressed creature, the heart of a heartless world, just as it is the spirit of spiritless situation.”³³⁴

Marx’s generally less than sympathetic stance was recognised in the works of Weber and Durkheim. Weber believed that the transcendence of religion no longer had a role in the process of modernisation. This was because the “intensification of instrumentality and bureaucracy as

³³³ Jayeel Serrano Cornelio “Is Religion Dying? Secularization and Other Religious Trends in the World Today” in Paul Hedges (ed) *Controversies in Contemporary Religion, Education, Law, Politics, Society and Spirituality* (ABC-Clio, LLC, Santa Barbara, 2014) at 222, referring to Inger Furseth and Pal Repstad *An Introduction to Sociology of Religion* (Ashgate, Aldershot, 2007).

³³⁴ At 222, citing Karl Marx and Friedrich Engels *On Religion* (Foreign Languages Pub House, Moscow, 1957) at 42.

the guiding principle of social life could only mean that the space for aesthetics, emotions, and the subjective is shrinking.”³³⁵

Durkheim did recognise that religion underpinned societal cohesion but as society became more complex, religion’s influence over different institutions of society would be expected to wane. His focus turned to the moral force of religion, which was only found in the collective. His concern was that as religion declined, this necessitated the decline of the collective, “leaving the individual to the personal and the subjective.”³³⁶

Such views, however, appear to have been unfounded. The ascendance of secularism appeared to have been limited to only a minority of European societies, and political secularism, whereby the state and religion are separated, “was jolted with the establishment of the first modern theocracy in Khomeini’s Iran.”³³⁷ Shortly after that, other religious uprisings occurred in the public domain, in states including Egypt, Sudan, Ethiopia, Nigeria, Turkey, Afghanistan, and Pakistan. One might argue that these were generally Islamic states, thus secularism did not impact on those states with that religious bent. However, the movement against secularism was not just restricted to such states. For example, Sri Lankan Sinhalese Buddhist nationalists; Indian Hindu nationalists; and Israeli religious ultra-orthodoxy did not recognise the separation of state from religion and symptomised a crisis of secularism.³³⁸

Further, secularism is being challenged in Western democratic states, suggesting that religion is just as important now in contemporary democratic states as it may have been historically. For example, Protestant fundamentalism is increasing within the United States, and in addition,

³³⁵ At 222, referring to Max Weber *The Protestant Ethic and the Spirit of Capitalism* (Mineola, Dover, 2003) at 182.

³³⁶ At 222-223, referring to Emile Durkheim *The Elementary Forms of the Religious Life*, translated by John Ward Swain (George Allen Unwin, London, 1915) at 427.

³³⁷ Rajeev Bhargava “Multiple Secularisms and Multiple Secular States” in Anders Berg-Sorensen (ed) *Contesting Secularism: Comparative Perspectives* (Ashgate Publishing Limited, Farnham, 2013) at 20.

³³⁸ At 20, referring to J Cassanova *Public Relations in the Modern World* (University of Chicago Press, Chicago, 1994); G Kepel *The Revenge of God: The Resurgence of Islam, Christianity, and Judaism in the Modern World* (Pennsylvania State University Press, University Park, 1995); D Westerlund *Questioning the Secular State* (Hurst & Company, London, 1996); I Ahmed *The Concept of an Islamic State: An Analysis of the Ideological Controversy in Pakistan* (Frances Printer, London, 1987); and A Mohsin “National Security and the Minorities: The Bangladesh Case” in DL Sheth and G Mahajan (eds) *Minority Identities and the Nation-State* (Oxford University Press, New Delhi, 1999).

in a number of European states, migrant workers and intensified globalisation have shed the shackles of marginalised religion, creating a rich religious diversity.³³⁹

How, though, should secularism be understood? Broadly speaking,³⁴⁰

The best way to understand ... is to see it in opposition to religious hegemony, religious tyranny and religious and religion-based exclusion. The goal of secularism...is to ensure that the social and political order is free from institutionalized religious domination so that there is religious freedom, freedom to exit from religion, inter-religious equality and quality between believers and non-believers.

However, regardless of the secular movement, religion's impact can be felt in many socio-political international Western arenas. It is a multifaceted-phenomena that influences many levels of politics and society, including international relations, where for instance, religion can motivate policymakers' decisions. It has been argued that "state leaders and decision makers can ascribe meanings to reality by assessing foreign policy through their religious lenses."³⁴¹ Therefore, even though it has been asserted that secularism is a rising phenomenon, the reality is that religion can influence how contemporary policymakers "identify causes of global problems, allies, enemies",³⁴² as well as how they are able to assess national interests, thus demonstrating the profundity of religion within politics in democratic societies.

In addition, religion can also add legitimacy to governments, as well as to particular government policies. For example, a number of United States presidents have utilised religious imagery to legitimise foreign policies. Jimmy Carter used conciliatory religious discourse to bring different world views to the table in the context of Middle East peace talks. Ronald Reagan referred to the former Union of Soviet Socialist Republics as an "evil empire", and George W Bush frequently utilised religious imagery to justify the wars on Iraq and against

³³⁹ At 20, referring to BS Turner "Cosmopolitan Virtue: on Religion in a Global Age 2001" (2001) *European Journal of Social Theory* 4 at 131-152.

³⁴⁰ At 20.

³⁴¹ Nukhet A Sandal and Jonathan Fox *Religion in International Relations Theory* (Routledge, Abingdon, 2013) at 13, citing Serdar S Guner "Religion and Preferences: A Decision-theoretic Explanation of Turkey's New Foreign Policy" 2012 *Foreign Policy Analysis* 8(3) at 219.

³⁴² At 13, citing Guner, above n 341, at 219.

terror.³⁴³ It appears that the current President, Donald Trump, is also no stranger to the use of such religious weaponry to invoke fear of Islam.

Therefore, whilst secularism maybe a recognised movement, its actual influence, socially and politically, may be limited in reality. As a result, I assert that this is important to acknowledge because it adds weight to my overall argument that religion is an ever-present influence as a result of religion's fundamental influence on society and individuals. For instance, whilst a particular democratic state might be considered secular, such as Australia, in reality, religious influences may still strongly be felt in entities such as hospitals and schools. Thus, one could argue that there is no bright line separation of state from religion. This may be positive for societies generally, especially in relation to religion and charity. There is argument, in the context of religious charities, that "in essence, what makes religion 'good' from a societal point of view is that it makes us want to become better – it makes people become better members of society."³⁴⁴ A secular view may, mistakenly, diminish the influence of religion to the particular understanding of a person, as opposed to acknowledging its broad societal contributions through a variety of vehicles. Consequently, it may be that supporting a strongly secular policy may have adverse consequences for charities. This is because religious charities support a variety of communities and consequently reduce pressure on governments to undertake such social welfare. As I asserted earlier in this thesis, charity is vital within many societies, democratic or otherwise, and a key charitable principle is the advancement of religion. To disfavour the advancement of religion through the promotion of secularism risks undermining the fundamental relevance of religion within charity, and thus societies. I have demonstrated throughout this thesis that the advancement of religion is reconcilable through its socio-legal contexts and thus secularisation, whilst perhaps not a key concern for religious charities per se, may have some negative consequences for the charity sector if the position of secularism is promoted over and above religion in any particular democratic state's policies.

³⁴³ At 15, referring to, inter alia, Colleen Kelley *With God on His Side: Deconstructing the Post 9/11 Discourse of George W Bush* (Paper Presented at the Annual Meeting of the Australian and New Zealand Communication Association, Christchurch, New Zealand, 4-7 July, 2005).

³⁴⁴ Bruce J Clemenger "Evangelicalism and the Advancement of Religion" 2009 Church & Faith Trends January 22 at 3, citing Carl Juneau "Is Religion Passe as a Charity?" 1999 Church & the Law Update 2 March 22, also accessed at <https://thephilanthropist.ca/2002/07/is-religion-passe-as-a-charity/>.

As a further point, and one that I make because it may be a subset of the issue of secularisation in relation to religion and charity, secularisation may impact negatively on phenomena such as cultural defence and cultural transition. As has already been observed in this chapter, the construct of identity may be of real importance within religion within identity, and thus communities. This is particularly of relevance when a religion is attacked, or a community is facing hostile force. For example, religion was said to form part of a defensive shield against English domination in parts of Ireland, Scotland and Wales. Similarly, in Northern Ireland, Presbyterian and Catholic identities supported the separated communities in the face of historic hostilities. Such arguments can also be utilised to explain the high rates of religion in Poland and Lithuania in relation to Russian domination.³⁴⁵ Therefore, religion in communities offers defences to apparent or perceived threats from outside influences, drawing communities closer and providing comfort and belonging. It might be argued that growing secularisation may undermine religious identity and if that is so, then the ability of religious charities to operate effectively within communities may also be impacted. This is because there may be lessening numbers of donor and volunteers for such charities, as well as less government support, when in reality, those communities that feel threatened by conflict or hostilities may need to rely more substantively on the support of their religious community support during these stressful times. Secularisation, therefore, may be a deleterious construct for communities in need.

The same theory can be applied with regard to cultural transition, where religion may offer means for group mobilisation, as well as imparting some sense of belonging, especially in situations where societies may view such groups indifferently or with hostility. I already outlined the importance of religious groups for Hong Kong settlers because of the failing of the colonial government to provide support to its immigrant communities. Religious groups, with their strong Chinese cultural traditions, provided much needed assistance and resources,³⁴⁶ thus communities were supported, and flourished, as a result of the strong religious

³⁴⁵ David Herbert Religion and Civil Society: Rethinking Public Religion in the Contemporary World (Ashgate Publishing Limited, Aldershot, 2003) at 30, referring to S Bruce *Choice and Religion: A Critique of Rational Choice Theory* (Oxford University Press, Oxford, 1999); S Bruce and R Wallis “Secularization: the Orthodox Model” in S Bruce and R Wallis (eds) *Religion and Modernization: Sociologists and Historians Debate the Secularization Thesis* (Clarendon Press, Oxford, 1992) at 8-30; and R Inglehart *Modernization and Postmodernization: Cultural, Economic and Political Change in 43 Societies* (Princeton University Press, Princeton, 1997).

³⁴⁶ Damian Bethke “Charity Law Reform in Hong Kong: Taming the Asian Dragon?” 2016 International Journal of Not-for-Profit Law 18(1) May at 16.

foundations. Therefore, any growing trend of secularisation may be detrimental to many communities because this may undermine the close community networks and support provided by religion and charity. In the global communities that are evident in so many states, the mental and physical wellbeing of citizens is paramount for healthy and functioning states. Religious charities can and do continue to support such functions for the benefit of the state. Consequently, any diminishing impact of religion, and thus religious charities, may have an overall deleterious effect. However, such discussions are merely a point of note because the construct of secularism is a broad one and beyond the scope of this thesis generally. However, it was worthwhile mentioning these key points because if one discusses religion generally, then it would be disingenuous not to mention the place of secularism within society also.

I turn now to consider the relationship between law and religion, and in addressing such matters, I consider how the law and charity law may legitimise the value of the advancement of religion as part of the overall inquiry in to the reconciliation of the advancement of religion.

X. Relationship between Law and Religion

It has been asserted that “the ultimate source of law is God, or some God”³⁴⁷ analogy, and is explained as follows:³⁴⁸

Law is in every culture religious in origin. Because law governs man and society, because it establishes and declares the meaning of justice and righteousness, law is inescapably religious in that it establishes in practical fashion the ultimate concerns of a culture . . . Second, it must be recognized that in any culture the source of law is the god of that society. If law has its source in man’s reason, then reason is the god of that society. If the source is oligarchy or in a court, senate, or ruler, then that is the god of that system . . . Modern humanism the religion of the state, locates law in the state and thus makes the state, or the people, as they find expression in the state, the god of that system.

³⁴⁷ Rex J Ahdar “The inevitability of Law and Religion: An Introduction” in *Law and Religion* Rex J Ahdar (ed) (Ashgate, Aldershot, 2000) at 1, referring to Arthur A Leff “Unspeakable Ethics” (1979) *Duke Law Journal* at 1230; “God” in this context is likely to refer to a variety of beings, things or principles.

³⁴⁸ At 1, citing Rousas John Rushdoony *The Institutes of Biblical Law* (Presbyterian & Reformed Publishing, New Jersey, 1973) at 4-5 (emphasis removed).

Historically, law and religion were unified, therefore finding the religious legal source was unnecessary. In some cultures, even today, this is still evident. For instance, for Muslims, Shari'a is the "divinely ordained guide for law, religion, hygiene ... and all of life."³⁴⁹ However in Western contemporary democratic states, it has been traditional to distinguish law and religion, and church and the state, although this has not been without its critics. Lord Denning lamented that "without religion, there can be no morality, there can be no law,"³⁵⁰ although many would likely disagree with such sentiment.

Regardless, however, of the Western tendency to distinguish law and religion, it is asserted that law and religion are actually closely linked and, indeed, interdependent:³⁵¹

Every legal system shares with religion certain elements – ritual, tradition, authority, and universality – which are needed to symbolize and educate men's legal emotions. Otherwise law generates into legalism. Similarly, every religion has within it legal elements, without which it degenerates into private religiosity.

There has undoubtedly been a shift in the role of democratic governments in religion throughout the centuries. Historically, as religion played a significant role in everyday life via poor relief, education, and family life, so governments' roles were fairly limited. However, it is argued that even though religion has become increasingly a private concern, governments now play a considerable role in controlling religion. This is evidenced in the control of religious communities; what religious dress may be worn in public; restrictions on the behaviour of the ordained; and the size and design of religious buildings in particular localities. All these interferences are governed by law or policy.³⁵² Thus, what "religious organizations and adherents do is increasingly an issue of regulatory control."³⁵³

Conversely, whilst many democratic states are increasingly concerned with the control of religion, protecting international freedoms of religion and belief has had a long history. Since

³⁴⁹ At 2.

³⁵⁰ At 2, citing Rt Hon Lord Denning "The Influence of Religion on Law" (1989) Lawyer's Christian Fellowship booklet at 10.

³⁵¹ At 2, citing Harold Berman *The Interaction of Law and Religion* (Abingdon Press, Nashville, 1974) at 49.

³⁵² At 3.

³⁵³ At 3.

the 16th century, “there has been a need for international arrangements concerning religion and belief in Western Europe.”³⁵⁴ Early arrangements concentrated on the way in which authorities dealt with various Christian belief systems and regulated Church and state relations; The Peace of Augsburg 1555 and the Treaty of Westphalia 1648 are such examples. After the French Revolution, fundamental freedoms were recognised for individuals, including the freedom of religion. Later recognition of religious freedoms for individuals came about, for example, in the Universal Declaration of Human Rights 1948 and the European Convention on Human Rights, both guaranteeing religious freedom.³⁵⁵

Religious liberty, however, requires autonomy or self-governance ³⁵⁶ through self-determination and self-regulation, as well as passive non-interference from government or the courts.³⁵⁷ Such autonomy may exacerbate public concerns as to the activities of some religious groups as a result of such lack of state intervention. However, as mentioned earlier, Western government intervention in religion is evident in modern day life, and this is certainly the case with regard to legally-recognised charities in many jurisdictions. Although this “degree of control exercised by the state over religious groups through charity law will wax and wane according to the relative strengths of the two parties to this symbiotic relationship.”³⁵⁸

This is evidenced in the differing approach of the courts in relation to religion throughout the years. In *Joyce v Ashfield Municipal Council*,³⁵⁹ the question for the Court was whether the Exclusive Brethren’s religious services provided sufficient public benefit, because public access to these services was restricted. The Court took a generous view and determined that the public benefit would be derived by the later contact by the Brethren with the public after its services.

³⁵⁴ Sophie C van Bijsterveld “Religion, International Law and Policy in the Wider European Arena: New Dimensions and Developments” in Rex J Ahdar (ed) *Law and Religion* (Ashgate, Aldershot, 2000) at 164.

³⁵⁵ At 164-165.

³⁵⁶ Julian Rivers “The Secularisation of the British Constitution” (2012) 14 *Ecc LJ* at 373.

³⁵⁷ Mark Hill “Religion and the State: Recognition, Regulation and Facilitation” in Russell Sandberg (ed) *Religion and Legal Pluralism* (Ashgate Publishing Limited, Farnham, 2015) at 29.

³⁵⁸ Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” [2011] *Melbourne University Law Review* Vol 35 at 1079.

³⁵⁹ At 1079, referring to *Joyce v Ashfield Municipal Council* [1975] 1 *NSWLR* 744 at 751.

The House of Lords, however, in *Gallagher v Church of Jesus Christ of Latter-Day Saints*³⁶⁰ took a more conservative approach. Lord Scott noted that religions, whilst being beneficial, can be divisive, and that secrecy within religious practices breeds suspicions and prejudices. Conversely, openness in such practices will have the opposite effect.³⁶¹

It has been asserted that such differences in views may be a reflection of society's mood at the time. For instance, the *Gallagher* case was heard after the 2005 London bombings, when religious tensions were riding high. State security controls increased dramatically, and this included control over religious organisations, including courts' willingness to discourage private religious activities.³⁶² Further, the Charity Commission for England and Wales has adopted a more progressively counter-terrorist function, as evidenced in the Commission's role in the activities of the North London Central Mosque. The Commission had concerns that the Mosque Trust was infiltrated by Islamic fundamentalists resulting in non-adherence to the Trust's recognised charitable purposes. As a result, the Commission immobilized the Trust's bank accounts and removed Sheikh Abu Hamza Al-Masri, who was said to be a radical cleric, as well as closing the mosque for a period of time.³⁶³

Notwithstanding levels of state control being exerted, I assert that a certain level of control is actually beneficial with regard to the connection between religion and the public. In other words, the controls imposed by democratic governments on religious charities simply serve to promote the benefits of religion in communities. In turn, such control provides legitimacy for the operation of religion within charity. Therefore, I contend that charity law is a method by which a democratic common law state may manage its relationship with religion and religious entities. When a state determines that a religious group provides benefit to the public through its legal mechanisms, then the state will cede privileges to that religious group. In return, the religious group will ensure that its purposes comply with the state's legal requirements in order to deliver the public benefit.³⁶⁴

³⁶⁰ At 1079, referring to *Gallagher v Church of Jesus Christ of Latter-Day Saints* [2008] 1 WLR 1852.

³⁶¹ At 1079, referring to *Gallagher*, above n 360, at [51].

³⁶² At 1080.

³⁶³ At 1080-1081 and also footnote 58, referring to *Charity Commission for England and Wales North London Mosque Trust* (Report 1 July 233) at [33].

³⁶⁴ At 1083.

Consequently, democratic state control is “legitimate in principle because it accords with the rationale of charity law, which is to facilitate activities that the state determines are beneficial to society as a whole.”³⁶⁵ This means that rather than a state acknowledging a religion as delivering a public benefit in line with its own religious principles and *raison d’être* in accordance with a state’s provisions, instead religions might be seen as being “within the embrace of the state”.³⁶⁶ Thus they are subject to the state’s values and agendas.³⁶⁷ One interesting illustration is evidenced in the notion that Roman Catholic adoption and fostering agencies should ensure that their policies do not discriminate against same-sex couples.³⁶⁸

As a result, the advancement of religion, through charity law, can continue to benefit society and provide public confidence that the relevant checks and balances are established, which ensures that public benefit continues to flow, as the law determines.

XI. Conclusion

There is evidence “of a creeping polarisation, within and between some contemporary societies, on faith-based differences.”³⁶⁹ Religion’s political relevance has increased following on from the fateful 9/11 attacks, “drawing in more countries and ratcheting up the tension between some elements of Islam and some nations of the Judeo-Christian tradition.”³⁷⁰ Consequently, there are only a small number of Western societies do not have some form of divide between those holding conservative religious beliefs and those whose views differ fundamentally. Therefore, I observe that the ancient roots of religion have continued their stronghold even today, reflecting the longevity and fundamental importance of religion, even in contemporary society.

³⁶⁵ At 1083.

³⁶⁶ Rivers, above n 356, at 396.

³⁶⁷ At 396.

³⁶⁸ At 396, referring to Equality Act (Sexual Orientation) Regulations, SI 2007/1263; and *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] EWHC 520 (Ch).

³⁶⁹ Kerry O’Halloran *Religion, Charity and Human Rights* (Cambridge University Press, Cambridge, 2014) at 38.
³⁷⁰ At 38.

However, there is now a pressing need for dialogue between differing factions and it is possible that it is charity's deep-seated relationship with religion that may provide a much-needed olive branch. Not least because religion continues to have, as it has for millennia, a valuable role in supporting society, not only in finding one's place in the universe, but also in alleviating suffering in a myriad of ways, some ethereal, some more concrete.³⁷¹ The consequence of losing the advancement of religion as a head of charity has serious implications for societies because of the reliance on religious activities that support so many communities. The law, consequently, gives legitimacy to beneficial religious activities through charity regulations.

Clearly, charitable acts can and do occur without religious overtones. However, I have demonstrated that charity's very essence finds its history in religion, and such engrained history continues to permeate cultures and communities. Consequently, religion's continued influence within charitable acts and its role in society are still felt keenly, even in allegedly more secular societies.

Whilst religious traditions encourage the transfer of material wealth for possibly self-serving reasons, it is not for a court or a state to evaluate the truth or reality of such sentiments. Rather, it is evident that religions can and do support the public through charitable norms in a measured and regular way thus justifying the special treatment given to religion within charity law. Consequently, I argue that the advancement of religion should continue to be protected by legal frameworks, as recognised in many commonwealth states, because through the advancement of religion, charitable activities are "widely regarded as a valuable component of civil society, and such activity should be facilitated."³⁷²

This chapter, therefore, was an important one in relation to the reconciliation of the advancement of religion because it set out the complex and continuing social and legal connections between charity, law, religion and society, reflecting the key interrelationship between all these constructs. In doing so I demonstrated the function of the advancement of religion within its socio-legal foundations through the correlation between law, society and religion. As a result, I critically assessed how embedded religion, and thus religion within

³⁷¹ Barry W Bussey "The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School" 2016 *BYU Law Review* Issue 4 January at 1136.

³⁷² Nick Martin "Liberal Neutrality and Charitable Purposes" 2012 *Political Studies* Vol 60 at 936.

charity, is within our social frameworks. Consequently, this chapter began the reconciliation of the advancement of religion assertions and provided the context for discussions presented in the following chapters. The next chapter is a critical examination of the rule of law, which reflects the fundamental role of the rule of law in relation to charity law and religion.

Chapter 4. Rule of Law

No examination of charity law would be complete without attention being given to charity and religion and their relationship with the rule of law. I assert that this chapter is vital in assisting in my inquiry as to the reconciliation of the advancement of religion because it aids in reconciling this charitable purpose by embedding the construct of religion and charity within the socio-political and legal contexts of the rule of law. In order to do this, I address the relationship between the rule of law and religion and confirm that there is a nexus between a strong rule of law, as might be acknowledged in a democratic society, and political and socially stable democratic states. Therefore, I assert that the rule of law is an important facet in the reconciliation of the advancement of religion because of the strong correlation between the rule of law, charity law and thus the advancement of religion.

As a result, the concepts addressed in this chapter underpin numerous themes considered throughout the thesis, thus the fundamental significance of the rule of law within charity law, and specifically the advancement of religion, will be explored. Such themes include comparing law and religion as normative structures, and the role and importance of religion within law, including the resolving of religious conflicts. I look to determine the role of the rule of law within charity law and its impact on charity and religion. Consequently, this chapter provides a key legal framework that underpins the continued role of the advancement of religion in the charity narrative, and aids in reconciling this charitable purpose because it can be understood from this particular socio-legal perspective.

I. Introduction to the Rule of Law

To begin these discussions, it is pertinent to clarify the meaning of the rule of law and its place in democratic society generally. This provides a context for the later discussions pertaining to the rule of law, religion and thus charity.

Much has been written in relation to the doctrines of the rule of law throughout the decades. I seek not to challenge such writings, and nor to set out an exhaustive examination of the key

writings. Instead, I focus on some established principles of the rule of law and how they relate to religion and thus to charity law. Put simply, the rule of law may be seen as representing the core values of supremacy of law over arbitrary state powers, thus all are equal before the law.³⁷³

A number of socially-divergent opinions regarding the rule of law date from thousands of years ago. For instance, 2,500 years ago Greece sentenced Socrates to death for, inter alia, heresy. It is said that Socrates preferred to remain in prison because he asserted if he escaped, this would subvert the stability of state because he had broken the agreement between himself and the laws of the state. Thus, Socrates illustrated the importance of the rule of law in maintaining good social order. In contrast, at a similar time in China, Confucius denigrated the rule of law. In his view it was not justice but, “righteousness and social harmony based on role obligations [that were] the symbol for the ideal society.”³⁷⁴

In contemporary times, many democratic states have implemented institutional changes that endeavour to reduce corruption and to strengthen the rule of law. This demonstrates the innate relevance of the rule of law in relation to a politically and socially stable democratic state. Thus, the rule of law, democratic culpability, and the reduction of corruption are part of the societal models belonging to the “norms of governance.”³⁷⁵ Such norms are considered necessary methods of exercising politico-economic power.³⁷⁶ Governance is crucial in controlling socially unacceptable individual or group wielding of power. Consequently, the rule of law is one of the societal constructs of authority that prescribes proper methods of rule. The rule of law limits individual freedom to utilise authority such as the law prescribes.³⁷⁷

In relation to the object of this thesis inquiry, that of the reconciliation of the advancement of religion, as this thesis sets out, charity law has prescribed rules, and the advancement of religion, as a legitimate legal head of charity, is therefore confined within the rule of law.

³⁷³ Javaid Rehman “Islam vs the Shari’a: Minority Protection within Islamic and International Legal Traditions” in Anver M Emon, Mark S Ellis and Benjamin Glahn (eds) *Islamic Law and International Human Rights* (Oxford University Press, Oxford, 2012) at 377.

³⁷⁴ Amir N Licht, Chanon Goldschmidt and Shalom H Schwartz “Culture rules: The foundations of the rule of law and other norms of governance” (2007) *Journal of Comparative Economics* 35 at 660.

³⁷⁵ At 660.

³⁷⁶ At 660.

³⁷⁷ At 663.

With regard to the definition of the rule of law, in the Western legal philosophical viewpoint “is forever associated”³⁷⁸ with the jurist AV Dicey:³⁷⁹

... rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions. We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land ...

We mean in the second place ... not only that with us no man is above the law, but (what is a different thing) that here every man whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals ...

... There remains yet a third and different sense ... We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

Whilst the rule of law may be “forever associated” with Dicey, it is also “subject to various definitional and normative disputes”.³⁸⁰ Seung-Whan Choi asserts that there “should be present in most democratic societies with a high-quality rule of law: (1) fair, impartial, and effective judicial systems and (2) a nonarbitrary basis according to which laws and the legal system as a whole can be viewed as legitimate.”³⁸¹

Further to this, Joseph Raz argued that a “fair and impartial judicial systems require at least an independent judiciary branch with fair-minded judges, prosecutors and lawyers, as well as strong and stable law enforcement or police”.³⁸² Institutionalising such a judicial mechanism

³⁷⁸ Harry W Jones “The Rule of Law and the Welfare State” 1958 *Columbia Law Review* Vol 58 February No 2 at 149.

³⁷⁹ At 149, citing AV Dicey *Introduction to the Study of the Law of the Constitution* (9th ed, McMillan, London, 1952) at 187-196.

³⁸⁰ Seung-Whan Choi “Fighting Terrorism through the Rule of Law?” (2010) *Journal of Conflict Resolution* 54(6) at 943, citing Guillermo O’Donnell “Why the rule of law matters” (2004) *Journal of Democracy* 15(4).

³⁸¹ At 944.

³⁸² At 944, referring to Joseph Raz “The rule of law and its virtue” (1977) *Law Quarterly Review* 93.

indicates a state's acknowledgement that everyone is equal before the law, and that they should be able have their disputes heard and reconciled in court.³⁸³

Choi further asserted that only when just and autonomous judicial organisations are institutionalised will people have faith in legal standards, and legal and constitutional practices, amongst other matters. Thus, when such practices have been established, individuals will tend to follow relevant legal practice to settle disputes, as opposed to turning to violent means resolve disputes. Therefore, when people have confidence in a state's institutes of law they are more willing to bring their disputes to those institutes for resolution. Consequently, confidence in such institutes results in a recognisable stability for socio-political relationships.³⁸⁴

The rule of law, therefore “encompasses broad societal respect for and protection of legal entitlements including ownership in tangible and intangible property (contractual rights, patents, etc.) and, equally important, personal safety from crime”.³⁸⁵ Further, the rule of law safeguards the benefits and obligations of democratically-made laws for citizens, as well as state establishments.³⁸⁶ As a result, it can be said that the rule of law brings certainty and trust for citizens, and underpins a peaceful and ordered state.

In the converse, a lack of rule of law is often the hallmark of a government that is likely subject to international condemnation, where genocide, ethnic cleansing and waging of aggressive wars are all too familiar;³⁸⁷ these are not likely to be democratic states. Consequently, where the dignity of individuals is compromised, be that through arbitrary application of rules or unjust decisions – in other words, social injustices at the hands of the state³⁸⁸ – social and political norms break down. The rule of law is therefore intended to protect citizens from such injustices and is pivotal in creating and promoting social justice. As Tom Bingham noted,

³⁸³ At 944.

³⁸⁴ At 943, referring to Russell Hardin “Law and social order” (2001) *Philosophical Issues* 11 and Guillermo O'Donnell “Why the rule of law matters” (2004) *Journal of Democracy* 15(4).

³⁸⁵ Licht, Goldschmidt and Schwartz, above n 374, at 663-664.

³⁸⁶ Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 8.

³⁸⁷ At 9.

³⁸⁸ Malik Imtiaz Sarwar “Freedom of Religion and Expression: A ‘Rule of Law’ Perspective” in Anver M Emon, Mark S Ellis and Benjamin Glahn (eds) *Islamic Law and International Human Rights* (Oxford University Press, Oxford, 2012) at 3254.

rather than living “in a regime which flouts the rule of law ... [it is] “[b]etter to put up with some choleric judges and greedy lawyers.”³⁸⁹

II. Religion and Law

As part of the reconciliation of the advancement of religion, it is now relevant to consider the relationship with religion and law, and thus its connection with the rule of law, in order to embed my assertions within their socio-legal contexts.

Over the years religion has adopted a progressively more discernible position in public matters, be that positive or negative visibility, and every state has adopted some position towards religion and its citizens.³⁹⁰ Some democratic states have adopted a non-secular stance and others have adopted a more non-religious system. Within those non-religious states are variety of regimes, ranging from a strong commitment to secularism, to more accommodating regimes that commit to a state’s neutral stance whilst at the same time engaging in religious collaboration. The rule of law is an important element within the constitutional and legal norms of each regime.³⁹¹

Law and religion can be viewed as societal occurrences and because they coexist, they interact with one another.³⁹² Indeed, law and religion have enough similarities so as warrant some well-thought through comparisons. Such compatibility may explain, in part, the close links between law and religion across the ages, and their comparisons highlight “common discursive structures[s] underlying both legal and religious discourses.”³⁹³

Both law and religion are standardising constructs that regulate many societies. Law and religion interpret certain writings, and those writings may be upheld as being true and must be adhered to. Both law and religion purport to promote order and peace, but both structures carry

³⁸⁹ At 9.

³⁹⁰ Javier Martínez-Torrón & W Cole Durham, Jr (eds), *Religion and the Secular State: National Reports* (Servicio de Publicaciones de la Facultad de Derecho de la Universidad Complutense Madrid, Spain 2015) at 1.

³⁹¹ At 1.

³⁹² Peter W Edge *Religion and Law: An Introduction* (Ashgate, Farnham, 2006) at 3.

³⁹³ Joshua Neoh “Text, Doctrine and Tradition in Law and Religion” (2013) *Oxford Journal of Law and Religion* Vol 2 No 1 at 176.

with them the potential to bring violence to protect or defend each structure, and as such may result in civil or world wars, or religious wars.

The accepted constructs of law and religion function in two ways. Firstly, in society, where they provide some community mandate, and second, to the individual, where people are granted certain societal significance and standing. A religion can provide communal faith, as well as individual salvation. Constitutionalism forms a communal state, as well as defining the rights, obligations and civic identity of individuals within that state.³⁹⁴ Further, particular principles are the ruling codes and creeds of a society, and as such legal communities require legal principles much as religious communities require religious principles. Such doctrines are “elucidated systematically and presented thematically.”³⁹⁵ Thus, what is evident is “that legal and religious discourses are constituted by a circumincession of text, doctrine and tradition.”³⁹⁶ This in turn reflects a reciprocal relationship between each other.

Religion can be important for law for a number of reasons, for example, with regard to political, marital or sexual practices. Thus, a law enforcement agent can give proper consideration to the context of a particular situation, and the law is enriched and developed. However, there are also some notable issues caused to law by religion. It has been argued that “liberalism was born as a solution to the problem of religious pluralism”,³⁹⁷ therefore a liberal legal state might be confronted by a number of issues connected to religion. These can be triggered by renouncing authority over non-secular matters, alongside the requirement to maintain more authority overall.³⁹⁸ I can utilise charity law to illustrate this, which assists in embedding these assertions within the object of my inquiry, that of the reconciliation of the advancement of religion.

In early English charity law, states developed the rule that a charitable trust that supported superstitious use, in other words false religious purpose, such as Judaism or Catholicism, would be void. This was because states had categorised religion in a specific way, therefore

³⁹⁴ At 176-177.

³⁹⁵ At 188.

³⁹⁶ At 199.

³⁹⁷ Edge, above n 392, at 8.

³⁹⁸ At 8.

heathenism (as Catholicism and Judaism were deemed at the time) was not recognised as falling within a state's recognition of specific religious doctrines. As a result:³⁹⁹

When religion is equated with a particular religious faith, whose doctrines can be expounded by an authoritative organisation, or derived from an authoritative textual source, the courts can determine religious issues by making use of the discipline of that single religion. This may not only involve disputes concerning religion, but also the proper way to deal with other religious systems.

It should be made clear that the legal systems mentioned above have moved on from this position. Consequently, the English charity law position, as with Australia, New Zealand and Canada, as examples, have established that the advancement of religion is no longer restricted to the Church of England. Non-Anglican denominations have been accepted, as have, inter alia, Judaism, Buddhism, Islam, Hinduism and Druidism.⁴⁰⁰

Therefore, many democratic states now recognise multiple religions existing for charity law purposes, and courts also remain neutral as to the different religions.⁴⁰¹ However, such a stance can lead to issues when a court is faced with a religious assertion, and the veracity of that claim must be made by that Court. Such an issue is illustrated in the criminal case *R B and G*.⁴⁰² Here, the English Court of Appeal had to consider granting custody of children to a non-Scientologist parent. However, the granting of this custody would have involved removing the children from their current home. Trial judge Latey J evidently had strong opinions regarding Scientology, taking the view that being raised by Scientologists would not be in the children's interests. His Honour said that that Scientology was "immoral and socially obnoxious ... corrupt, sinister and dangerous."⁴⁰³ The Court of Appeal referred to Latey J's statements, observing that they:⁴⁰⁴

³⁹⁹ At 9.

⁴⁰⁰ At 9, referring to *Thornton v Howe* (1862) 31 Beav 14; *Re Watson* [1973] 3 All ER 678; *Re Schoales* [1930] 2 Ch 75; *Re Michael's Trust* (1860) 28 Beav 39; *Re South Place Ethical Society* [1980] 1 WLR 1565; see also *Application for the Registration of the Druid Network* (Charity Commission for England and Wales, 21 September 2010).

⁴⁰¹ *Neville Estates Ltd v Madden* [1962] 1 Ch 832 (Ch) at 853; *Hester v Commissioner of Inland Revenue* [20015] 2 NZLR 172 (CA) at [7].

⁴⁰² Edge, above n 392, at 9, referring to *R B and G* [1985] FLR 493.

⁴⁰³ At 9, citing *R B and G*, at 157.

⁴⁰⁴ At 9, citing *R B and G*, at 502-503.

Added colour to the suggestion that what the judge primarily had in mind was the exposure of [S]cientology rather than the interests of the child which was in fact and in law all he was concerned with. However, towards the end of the judgment the judge did relate the practices of [S]cientology to the circumstances of these particular children. He did carry out the balancing exercise. Although he plainly felt strongly that these children were at risk from exposure to [S]cientology, I find no reason to suppose that in carrying out that essential balancing exercise he did not do so judicially.

Therefore, it might be argued that issues can arise with regard to the objectivity of the judiciary, a fundamental principle of the rule of law, when religious values collide with a secular legal order. Although in response to this, the Court of Appeal was satisfied that whilst Latey J may have had strong opinions on a religion, he did perform his judicial functions appropriately.

Nonetheless, religion matters to law, and thus to the rule of law, in a number of ways. Firstly, religion functions to provide a context to legal discourses, for example, in relation to sexual or marital practices,⁴⁰⁵ as mentioned earlier. Secondly, religious interests have been given a distinct place in legal analysis. This is either through international or constitutional rights – “the profundity of religious interests, their centrality to the rights of the individual believer, their importance to broader cultural and communal life, or their role in society as a whole.”⁴⁰⁶ Thirdly, because religion poses unique issues to liberal legal discourses that seek to advance legal diversity as a response to the increase in religious pluralism.⁴⁰⁷ The law enables diversity by recognising and protecting minority group concerns through laws that focus on equality and tolerance. Within the context of the common law, the law has its basis in constructs of social justice and is closely aligned with democracy.

It is a context that provides opportunities for charity law to address social justice issues, and there are indications that a variety of charity law reform developments have been used strategically by governments to improve social cohesion generally. Such discussions, therefore, are pertinent in relation to the reconciliation of the advancement of religion. Thus,

⁴⁰⁵ At 11, practices might include same sex marriage, or sexual practices carried out by homosexuals.

⁴⁰⁶ At 11.

⁴⁰⁷ At 11.

for instance, in recent years England and Wales have been subject to substantial charity law changes resulting in the Charities Acts 2006 and 2011. There was significant engagement between the not-for-profit sector and the government, and bodies such as the National Council for Voluntary Organisations played a key role in sector coordination, policy development and articulating sector interests. Such engagement enabled interested parties to negotiate terms of engagement in relation to sharing public benefit provision, a key principle of charity law.⁴⁰⁸

It may be argued that charity law, through judicial interpretation, has contributed to “a profusion of quixotic charitable causes and elitist aesthetic amenities which could be perceived as socially divisive”.⁴⁰⁹ However, I argue that charity law can serve to “ameliorate hardship, demonstrate altruism, generate engagement in community life, enrich the fabric of society and generally facilitate social cohesion.”⁴¹⁰ Indeed, ever since the Statute of Elizabeth, charity law has articulated the agenda for the partnership between government and the third sector. That sector has become ever more sophisticated, and as a result, has become ever more entwined in the workings of the democratic political system. For instance, statutory regulatory charitable bodies were introduced to connect the sector and government,⁴¹¹ including the Charity Commission for England and Wales, and the now disestablished Charities Commission in New Zealand.⁴¹² Indeed, recent government moves to strengthen the policy of entering into partnerships with faith-based organisations (FBOs) have led to reports of religion returning to the public sphere or reviving public religion.⁴¹³ Thus, religious charities and their relationship with government are seen as leading the way in revitalising not only the religious sector, but also the social sector through charitable endeavours. As a result, I assert that the rule of law within its charity law context is a vital component in the reconciliation of the advancement of religion as a charitable principle because of the benefits it offers to the charity sector, and thus communities generally.

⁴⁰⁸ Kerry O’Halloran *Human Rights and Charity Law International Perspectives* (Routledge, Abingdon, 2016) at 18 and 98.

⁴⁰⁹ At 19.

⁴¹⁰ At 19.

⁴¹¹ A 70.

⁴¹² The Charities Commission for New Zealand was disestablished, and its core functions were transferred to the Department of Internal Affairs – Charities Services in 2012; see Juliet Chevalier-Watts *Law of Charity* (Thomson Reuters, Wellington, 2014) at 21 for further details.

⁴¹³ James A Beckford “Religion in Prisons and in Partnership with the State” in Jack Barbalet, Adam Possamai and Bryan S Turner (eds) *Religion and the State a Comparative Sociology* (Anthem Press, London, 2011) at 57.

Nonetheless, the core business of charity has always been public benefit through its charitable purposes, and obviously that inherent relationship with the rule of law, and public benefit continues to be fundamental to governments. For instance, in England and Wales, such purposes constituted a statement of the government's social policy objectives regarding sharing public benefit responsibilities that meant facilitating the shifting of some public benefit services from government to charity. Indeed, this was the primary trigger for the Government at the time to initiate charity law reforms.⁴¹⁴

England and Wales is not alone with regard to religious charities impacting on social policies. In the 1990s in New Zealand, the Christian social services sector, which included a number of charitable bodies, challenged government policy with regard to issues within the welfare state at the time. This included rising poverty, privatisation of state housing, and benefit reform. The reports provided by FBOs demonstrated the importance of FBOs within society at the time. Not only that, but FBOs began to reevaluate their foundational doctrinal and philosophical constructs that underpinned their *raison d'être* within contemporary New Zealand. As a result, many moved beyond traditional forms of charity, such as emergency temporary relief, and adopted methods of assistance that were influenced by norms of socially-recognised justice. For instance, they began operating within a more business-like model and encouraged people to assist themselves out of need, as opposed to encouraging continued reliance on charity.⁴¹⁵ Such organisations included The Mission and The Salvation Army, and changes to their charitable endeavours were evidenced in a number of newly-established programmes. These included “drug and alcohol rehabilitation programmes, youth work, employment training centres, supported accommodation, work with prisoners, homecare and hospice work.”⁴¹⁶

An illustration of the impact of these welfare changes on social policy within New Zealand is reflected in The Salvation Army's association with the creation of the Social Policy and Parliamentary Unit (SPPU) in 1994. The SPPU sought to tackle operational and political factors which were said to contribute to poverty in New Zealand. It provided a strong

⁴¹⁴ O'Halloran, above n 408, at 70.

⁴¹⁵ David Conradson “Expressions of Charity and Action towards Justice: Faith-based Welfare Provision in Urban New Zealand” 2008 *Urban Studies* September 45(10) at 2127-2129.

⁴¹⁶ At 2130-2131; “The Mission” is a New Zealand charity.

connection to the disadvantaged because of its geographical position in relation to a number of Salvation Army welfare facilities in South Auckland.⁴¹⁷

Consequently, I argue that the rule of law is fundamental in underpinning, and thus reconciling, not only models of charity law, but also the relationship between state and charities themselves, which inherently includes the advancement of religion. Such interconnectedness provides certainty and clarity to society, whilst ensuring care and welfare for citizens. This is because charities that participate in the societal governance of public matters can act:⁴¹⁸

... as the “buffer, transition device and regulator” between government and market, absorb[ing] the suggestions and requirements from the relevant people in the governance process of public affairs, input ... those suggestions and requirements to the government, and provide ... various social means to meet the social members’ diverse and multi-level wishes and realize own interest.

This is important socially because such a relationship can strengthen social tolerances; alleviate social conflicts; improve resource delivery; and thus improve welfare standards for society overall.⁴¹⁹ As a result, it would appear that the advancement of religion, as one facet of charity, and through religious charities’ delivery of social welfare, is therefore reconciled through the principle of the rule of law.

One specific example of social improvement as a result of religious charity is evidenced in the principle of zakat,⁴²⁰ to which I turn now. I deemed such discussions pertinent to the reconciliation of the advancement of religion because, as an Islamic construct of charity, zakat provides a useful tool by which to demonstrate the value of religious charity in a religiously-diverse world. It is also important to consider the charitable principles of Islam because the Islamic faith is not just contained within Islamic states, rather Islam is now prevalent within many non-Islamic and democratic societies, including the United Kingdom and New Zealand. Therefore, such discussions on this religion, and the principle of zakat, reflect the holistic

⁴¹⁷ At 2131-2132.

⁴¹⁸ Shilong Wang “Research on the Collaborative Governance Model in the Charity Organization under Polycentric Perspective” (2014) *Open Journal of Social Sciences* 2 at 264.

⁴¹⁹ At 264.

⁴²⁰ See later chapters for further discussions relating to zakat.

approach of this thesis, and consequently provide another avenue for the reconciliation of the advancement of religion from a rule of law perspective.

III. Zakat

As mentioned in Chapter 3 in relation to prescribed charitable giving, zakat is one of the five pillars of Islam. As a charitable donation it is mandatory for all Muslims of sound mind with resources exceeding a certain amount to transfer a certain amount of their wealth to specific categories of recipients set out in the Qu'ran.⁴²¹ Zakat is the only pillar of Islam that is concerned with financial matters, and it is the only pillar which is related specifically to Islamic governance. It is the fundamental pillar in the Islamic economic system,⁴²² thus it is an obligation to society. The Qu'ran sets out eight purposes for which zakat donations may be utilised, and the key purposes are those that provide support for those in poverty and those in need. Whilst only anecdotal evidence is available in relation to the amount of donations made through zakat, it is estimated that USD tens of billions are generated annually. Zakat is therefore central in underpinning constructs of Islamic social justice.

Zakat payments are not only a method of providing social welfare, they are also a useful device by which to try to reduce disparities in society. This is because zakat duties are founded on resources (in principle). Therefore, when zakat is paid, a portion of resources are allocated from those who may have amassed some means to those who lack means. What can be said about this type of religious charitable donation is that it encourages parity and social fairness because it operates throughout an entire range of means. Consequently, for those at the higher end of the means spectrum, zakat may be seen as reducing the surfeit of riches by directing a portion of those riches over and above that family's annual need. In contrast, at the poorer end of the means spectrum, zakat specifies the categories within which those in need should be given assistance.⁴²³

⁴²¹ Adamu Ummulkhayr, Musa Yusuf Owoyemi Rafidahbinti and Mohamad Cusairi "Zakah Administration and its Importance: A Review" 2016 Journal of Humanities and Social Science Vol 21 6 June at 115.

⁴²² At 115.

⁴²³ Jennifer Bremer *Zakat and Economic Justice: Emerging International Models and their Relevance for Egypt* (Third Annual Conference on Arab Philanthropy and Civic Engagement June 4-6 Tunis Tunisia 2013) at 51.

The correct use of zakat, therefore, is a valuable illustration of the importance of religious charity in fostering a greater degree of equality in society, not only to support those in need, but also to slow the amassing of financial means by individuals who create in excess of their own requirements. Therefore, it can be said that zakat contributes to social parity overall through state governance, and in essence, the rule of law. This then reflects the symbiotic relationship between charity and state and demonstrates the importance of the rule of law as a method of reconciliation of the advancement of religion.

I now turn other considerations in relation to the rule of law and charity, and those being some possible points of concern in relation to charity remaining independent from democratic government, and the possible impact on society as a result.

IV. Independence from Government

Whilst charities and state may have a symbiotic relationship, caution is offered because there may be hidden costs. Certainly, there are many benefits for a charity in fostering a close relationship with a government, such as social standing within the third sector and the ability to influence policies. Nonetheless, the issue remains that such a relationship may compromise a charity's capacity to represent the interests objectively of the socially disadvantaged. There are expectations that charities will be independent from governments in order to advocate effectively for those most in need, generally citizens who are neglected by government policies of the time. Further, difficulties have been highlighted in relation to the working relationship between FBOs and the state. For instance, in a report conducted by the Church of England's Commission on Urban Life and Faith, it concluded that government policy had not "provided a secure and consistent relationship between faith communities and government at all levels. There needs to be greater clarity over expectations in partnerships."⁴²⁴

Such issues arising from this relationship can have adverse impacts on the charitable sector in carrying out its endeavours. This comes alongside reports that the faith sector is not able to

⁴²⁴ James A Beckford "Religion in Prisons and in Partnership with the State" in Jack Barbalet, Adam Possamai and Bryan S Turner (eds) *Religion and the State: A Comparative Sociology* (Anthem Press, London, 2011) at 57, citing Church Urban Fund *Faithful Representation: Faith Representatives on Local Public Partnerships* (Church Urban Fund, London, 2006).

fulfil the expectations of government rhetoric, as well as there being wide gaps in the understanding and knowledge between FBOs and non-FBOs. Such criticisms are, ironically, contrasted against the reported very high levels of contributions made to various communities by FBOs and charities.⁴²⁵

Therefore, in order to protect social welfare charitable works, and to provide effectively for those in need of the services provided, it is important that charities remain independent from government, as opposed to becoming a substitute for that which a government should be providing.⁴²⁶

Nonetheless, it is sometimes difficult to disentangle the nexuses between government and charity; such nexuses have ancient roots. The Preamble to the Statute of Elizabeth,⁴²⁷ as outlined in Chapter 3, was deemed the “judicial lodestar”⁴²⁸ for legally-recognised charitable purposes. The Preamble was a “manifestation of the legislature’s ultimate authority to give legal meaning to the term ‘charity’ and to align the legal concept with a specific welfare agenda.”⁴²⁹ It is asserted that the Preamble’s charitable purposes were devised in order to “reinforce a broader Tudor policy agenda involving the construction of public works, local taxation, forced labour and the criminalization of vagrancy.”⁴³⁰ Therefore, in setting out explicit charitable purposes within the jurisdiction of the Commissioners of the Statute, the Government of the time was able to gather charitable resources to underpin their own agenda.

Whilst it is evident, therefore, that a democratic government may be inextricably allied with charity, the rule of law may ensure, to some degree, that the two sectors do have some independence. The independent courts have developed and articulated the legal meaning of charity. This has occurred, for instance, through drawing analogies to the purposes within the Preamble; developing the four-fold classification of charitable purpose, “which effectively

⁴²⁵ Beckford, above n 424, at 57-58.

⁴²⁶ O’Halloran, above n 408, at 312.

⁴²⁷ 43 Eliz I, c 4; also referred to as the Statute of Charitable Uses 1601. The statute has been repealed, but the Preamble lives on in many common law jurisdictions.

⁴²⁸ Kathryn Chan “The Co-option of Charities by Threatened Welfare States” (2015) Queen’s LJ 40 2 at 574, citing *Vancouver Society of Immigrant & Visible Minority Women v MNR* [1999] 1 SCR 10 at 144, and DWM Waters *Law of Trusts in Canada* (2nd ed, Carswell, Toronto, 1984) at 550.

⁴²⁹ At 574.

⁴³⁰ At 574, referring to Blake Bromley “1601 Preamble: the State’s Agenda for Charity” (2002) *Charity Law & Practice Review* 7 3 at 144.

replaced the Preamble as the starting point of the law”;⁴³¹ and by creating the doctrine of political purposes.⁴³²

However, it can still be argued that there is much state impact on the definition of charity; this is illustrated by considering the journey of charity law in England and Wales. Up until 1960, with the enactment of the Charities Act 1960, the Preamble was the most modern manifestation of charity and its purposes in the United Kingdom. The 1960 Act, and the 1993 version of the Act, both stated that charitable purposes were “purposes which are exclusively charitable according to the law of England and Wales”.⁴³³ However, the common law condition that such purposes must fall within the spirit and intendment of the Preamble of the Statute of Elizabeth ensures the continued influence of the Preamble still today.

In 1960, the Charity Commission for England and Wales was given responsibility for the maintenance and administration of charities; in effect, the Commission replaced the courts in determining charitable standing within its own jurisdiction. The Commission has been active in adding additional charitable purposes, including the relief of unemployment, and promoting human rights within the fourth *Pemsel* head, thus suggesting that it had the same powers as a court.⁴³⁴ However, with the enactment of the Charities Act 2011, the role of the Commission changed in relation to the development of the construct of charity law. Parliament at the time took the opportunity, politically, to reshape charity law borders, setting out a statutory definition of charity. Pursuant to s 2 of this Act, a purpose may be charitable if it falls within one of the now 13 categories of charity that are set out in s 3, which is an extension of the original four *Pemsel* heads of charity, although the additional purposes find their history in the original four heads of charity.⁴³⁵

⁴³¹ At 576, referring to *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 (HL) at 583, as per Lord MacNaghten.

⁴³² At 576-578; see also *Bowman v Secular Society* [1917] AC 406 (HL); *McGovern v Attorney-General* [1981] 3 All ER 493 (Ch); *Re Greenpeace of New Zealand Inc* [2014] NZSC 105; and Juliet Chevalier-Watts *Law of Charity* (ThomsonReuters, Wellington, 2014) at Chapter 7 generally for further discussions. The political purpose doctrine is beyond the scope of this thesis.

⁴³³ Chan, above n 428, at 578-579, referring to Charities Acts 1960 and 1993.

⁴³⁴ At 579.

⁴³⁵ At 580.

It has been argued that this classification of charitable purpose is a restatement of the “perennial power of the legislature to direct the charitable sector towards the ends of its choosing.”⁴³⁶ This is because the purposes are, in effect, a statutory list, which came about through the enactment of the democratic process. The influence of the legislature is certainly evident in relation to the advancement of religion. For example, s 3 (2) of the 2011 Act states:

- (i) a religion which involves belief in more than one god, and
- (ii) a religion which does not involve belief in a god.

This is an extension of the original common law definition of religion, which, as mentioned earlier, appeared to be prejudiced towards a Western Christian belief system. This change was not previously supported within the common law and was the focus of substantive governmental discussions. This reflects the role of the rule of law in developing charity law in a contemporary context.

Indeed, it is still not clear that the Commission is entirely independent from government influence. The 2011 Act does preserve the historical common law method of analogical reasoning to determine charitable purpose, which in theory gives the Commission discretion in exercising its functions. Nonetheless, the statutory definition of charity now reduces the scope of the Commission to interpret more freely charitable purposes. Interestingly, the 2011 Act reflects a combination of reducing the influence of government over the Commission, whilst at the same time, increasing government powers over the body.

The 2011 Act established the Commission as a non-ministerial government branch that would not be directed, nor controlled by other government departments or ministers. However, it must carry out its functions consistently with the statutory objectives of increasing public confidence in the sector. Further, its decisions may be appealed to the First-Tier Tribunal. This Tribunal is an independent judicial body, which has the authority to quash the Commission’s registration decisions; indeed, the Commission’s own policies have been subject to judicial review. This suggests that the Commission has limited discretion to administer charities and charitable purposes; that it must exercise its discretion towards specific purposes; and that there

⁴³⁶ At 580.

is limited opportunity for it to be influenced by the executive branch of government.⁴³⁷ This, therefore, reflects an interesting combination of the influence of the state, the imposition of the rule of law, and independence from government.

It is evident, therefore, that there may be contemporary influences on the charitable sector from government, which may impact adversely on the support being provided to the third sector by charities. This in turn undermines the overall beneficial effect of charities to support communities appropriately. This may become a concern for religious charities if the government of the day adopts a strongly secular approach, and it may indirectly lessen the impact of religion-based assistance within the charitable sector.

However, the rule of law can provide some inherent protection for charities through the common law. This is because judges are “stewards and beneficiaries of the common law, [and] they are foremost sworn protectors of the rule of law ... The rule of law provides the medium of civil society in which the common law may be developed and applied to resolve our civil disputes.”⁴³⁸

In recognising the rule of law like this, it is evident that the common law comprises a number of ways to guard religious charities from undue government influence, this also applies to non-religious charities. For example, trustees are required to observe a trust’s requirements, meaning that if a trustee directs funds to be utilised in a way that breaches a trust instrument, strict liability follows the breach of that trust. Indeed, the Attorney-General has the jurisdiction to be granted an injunction to prevent a trustee from performing an activity that would not be deemed within the scope of charity law.⁴³⁹ In addition, the common law protects charities from falling foul of external influences by imposing fiduciary obligations on trustees and fiduciaries. This means that such persons are obligated to act, or not, in the best interests of the charity, ensuring they act without conflict of interest and cannot make a profit from their relationship

⁴³⁷ At 582.

⁴³⁸ William N Drake Jr “The Common Law and the Rule of Law: an Uncomfortable Relationship” (2016) *Stetson Law Review* 45 at 468.

⁴³⁹ Chan, above n 428, at 596, referring to, inter alia, Jean Warburton, Debra Morris and NF Riddle *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 96; *AG v The Earl of Mansfield* (1827) 38 ER 423 (Ch); and *AG v Ross* [1985] 3 All ER 334 (Ch).

with the charity.⁴⁴⁰ Therefore the rule of law, under the auspice of judicial guardianship, may enable charity law to be applied effectively to support civil society, and as a result, is an important facet within my assertions that the advancement of religion is a reconcilable legal construct because it can be understood from the context of the rule of law.

In order to further my arguments as to the reconciliation of the advancement of religion, it is important now to consider the more general relationship between religion and the rule of law to contextualise the fundamental nexus between the two concepts, to which I turn now.

V. Religion and the Rule of Law

It has been argued “that organised religion provides a method to ‘bridge the gap’ between individual belief and the general acceptance of values that sustain the law and social behaviour.”⁴⁴¹ This is because institutionalised religion within society and institutional religion on its own appears to provide a collector function; in other words, collecting conscience and values in a moralistic sense. Whilst it might seem an outdated notion, it has been stated that “no society has yet solved the problem of how to teach morality without religion”,⁴⁴² which in turn supports the view the virtuous standards of behaviour required by religion are indispensable for the protection of liberty.

Of course, a person may have socially-acceptable morals without subscribing to a religion, and conversely, a person may be religiously-biased but may be lacking in socially-acceptable morals. However, it is not just the private conviction of a person that is important, it is the overall credence given to those constructs that underpin and thus sustain the law. Donovan Waters argues that a Christian principled construct was not just concerned with the high values

⁴⁴⁰ At 597.

⁴⁴¹ H R Sorensen & A K Thompson *The Advancement of Religion is Still a Valid Charitable Object in 2001* (Charity Law in the Pacific Rim, Queensland University of Technology, Centre of Philanthropy and Nonprofit Studies Working Paper No CPNS13, 4-6 October 2001) at 3.

⁴⁴² At 3, citing Alexis de Tocqueville *Democracy in America* (Anchor Books, New York, 1969); and P Devlin *The Enforcement of Morals* (OUP, Oxford, 1965) at 25.

in relation to personal conduct and a mindful approach as Christian individuals, rather it was concerned also with service to the society.⁴⁴³

Indeed, this code, or construct, was precisely related to loving thy neighbour, as Lord Atkin famously implied in *Donaghue v Stevenson*, in which his Lordship applied a biblical principle to a tortious legal issue.⁴⁴⁴ For a believer, this was how charity, or love, should be demonstrated. The courts took this moral code and secularised the motivation as a good neighbour not only to the faithful but also to the non-believers.⁴⁴⁵ Thus the law and religion shared borders, and the law was changed forever.

Further, there is historical evidence that religious leaders exhorted their believers to obey the rule of law. In the 18th century, preachers would acknowledge the two realms of law – the first being civil, and the second being religious. Both the civil and religious realms imposed a duty on individuals. Religious individuals were requested to give attention not just to their individual notions of religious requirements that were imposed upon them by their God, but also to take into account obedience to the law generally. The latter was required because obedience to the civil law was necessary to realise true liberty. Preachers were able to assert such matters because, generally speaking, they were well-educated and were the political and social leaders of the day.⁴⁴⁶

Consequently, “the free exercise of religion was to be pursued not in isolation, but rather in so far as may be consistent with the civil rights of society.”⁴⁴⁷ The reasons clergy gave to obey civil law were firstly that the law was God-given. Consequently, a religious follower was required to observe such law. Secondly, the rule of law was said to benefit everyone. Thirdly, true liberty would not be obtained without the rule of law because the rule of law operates by appointment of citizens.⁴⁴⁸

⁴⁴³ Donovan Waters “The Advancement of Religion in a Pluralist Society” at www.qut.edu.au at 10.

⁴⁴⁴ At 10, referring to *Donaghue v Stevenson* [1932] AC 562 at 580.

⁴⁴⁵ At 10.

⁴⁴⁶ Marci A Hamilton *God vs the Gavel: Religion and the Rule of Law* (Cambridge University Press, New York, 2005) at 264-265.

⁴⁴⁷ At 266, citing Anson P Stokes *Church and State in the United States A Declaration of Certain Fundamental Rights and Liberties of the Protestant Episcopal Church of Maryland* (Harper, New York, 1950) at 741.

⁴⁴⁸ At 267.

Even in contemporary times, the nexus connecting the rule of law and religion is still acknowledged. For instance, in recent times it was asserted that “the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government.”⁴⁴⁹ This is because without “a moral component that squares with the eternal and natural rule of God that objectively sets up a standard of righteousness, there can be no rule of law, but the tyrannical imposition of rule by law.”⁴⁵⁰

As a result, religion provides a method of collecting and shaping conscience and values. The closing of the space, whereby one moves from a belief to an action that is connected to that belief is said to be a result of religion’s teaching in relation to accountability and responsibility, leading to the afterlife or a day of judgment. The effect of this teaching is to provide a “big picture” for religious individuals, which is a concept that society is generally unable offer in the absence of religion. Further, religious believers are generally willing to delay earthly gratification for spiritual salvation at a later date. Sometimes they even suffer serious hardship and deprivation in doing so, yet their confidence and happiness in the present is not generally diminished.⁴⁵¹

Of course, it would be wrong to assert that non-religious individuals are unhappy in the present, nor that they cannot delay gratification for other reasons. Neither that they are unaccountable for their behaviours, nor that they are irresponsible. However, religious teachings have provided durable and meaningful methods of instilling such values and continue to do so in contemporary times.

Therefore, it seems reasonable to exhort the benefits of religion within society, not least because it is underpinned by the rule of law, which is fundamental to a healthy democracy. This is demonstrated further when one considers that a functioning society necessitates some notion of shared duty from the populace in order to flourish. This sense of community will not

⁴⁴⁹ Charles I Lugosi “How Secular Ideology is Marginalizing the Rule of Law and Catholic Contributions to Law and Society II: The Ten Commandments and the Rejection of Divine Law in American Jurisprudence” (2017) *Journal of Catholic Legal Studies* Vol 47 No 1 Art 9 at 152, citing *McCreary County v ACLU of Ky* 545 US 844 907 (2005), per Scalia J (dissenting).

⁴⁵⁰ At 152.

⁴⁵¹ Sorensen & Thompson, above n 441, at 13, referring, inter alia, to M Scott Peck *The Road Less Travelled* (Simon & Schuster, New York, 1978) at 15-20.

thrive if key private institutes, such as religious institutes, are not recognised nor supported by government policy. It should also be noted that where societal objectives are, for example, enforced by legal privileges,⁴⁵² the correlation between promoting religions and the rule of law is potentially important for society generally. Therefore:⁴⁵³

The preservation of a civilised society depends upon the willingness of many of its members to fulfil responsibilities they are free to ignore. It may even depend to some extent on the willingness of many to forgo the pursuit of rights they are free to enforce ... Any person who is concerned with preserving the force of law and the enforceability of individual rights should be profoundly concerned about the civic responsibilities upon which the legal order is based.

Consequently, the private conscience of religion may bridge the gap of the recognition of standards that underpin the law, as well as influencing societal behaviours. Certainly, there is much evidence to show that religions and churches operate on a large scale to counteract many of today's societal concerns. For instance, by providing soup kitchens and food banks, as well as traditional welfare assistance such as clothing and financial assistance. Further, many religious bodies are actively involved in providing humanitarian aid and welfare relief on an international scale.

As a result, it seems prudent to protect and encourage religious charities, as well as religious pluralism, because of their overall benefit in ensuring a functional society with a sound rule of law. This is because religion is fundamental in encouraging the societal standards that maintain the law and socially-acceptable conduct, which "even in a non-legal sense, is charitable."⁴⁵⁴ Indeed, there is much evidence of the major social movements in social history that have been significantly religiously motivated. The civil rights movements and the abolitionist movements are the two most prominent examples. Such movements motivated large numbers of people to suffer extreme hardships for their given cause because of a perceived duty to God; the United States would be a poorer place without the suffering that was endured.

⁴⁵² At 14.

⁴⁵³ At 14, citing D H Oaks "Rights and Responsibilities" (1995) *Mercer Law Review* 36 at 435.

⁴⁵⁴ At 15.

Martin Luther King Jr, the leader of the civil rights movement, was a preacher and an activist. He credited his faith for leading him and enabling him to persevere in the face of adversity, which ultimately led to his murder. His perceptions of faith-based good, and the need to improve morals, provided a means of motivating political opposition, which in turn led to constitutional changes.⁴⁵⁵

The abolitionist movement, another form of civil dissent, was also infused with religious zeal. Without the espoused religious duty to oppose slavery it is unclear whether the movement would have been successful. This is because in reality, the duty was espoused, consolidated and persevered through the American Civil War. This meant that it even impacted on those who were not directly affected by slave holdings. Consequently, religious zeal was a strong influence in ending slavery.

Further, there is continued recognition that religious FBOs are critics of social policy. This is the case both historically, where churches raised objections to slavery, and in contemporary times, where they highlighted issues with global debt.⁴⁵⁶ Indeed, the “prophetic vision of the divine commonwealth ... explicitly and comprehensively challenges the individualism and materialism of the commercial culture of cities.”⁴⁵⁷ This is because “religious faith that is grounded in the prophetic tradition ... inspires belief in the possibilities for real social change and thus promotes political mobilisation.”⁴⁵⁸

If a democratic state, therefore, validates the role of religion within society, there is also another benefit for society, and this comes about through the rule of law. The predictability in the development of law over the course of time serves the ideal of the rule of law in a beneficial manner. This is not least because “predictability helps to justify decision-makers adopting a cautious posture towards the recognition of new types of purpose as charitable.”⁴⁵⁹ Public

⁴⁵⁵ Christian ML Bonat “Your Reason Isn’t Reasonable: An Analysis of the Legitimacy of Faith-Based Arguments in the Public Debate” (2003) 1 *Geo JL & Pub Pol’y* 1 at 418.

⁴⁵⁶ David Conradson “Expressions of Charity and Action towards Justice: Faith-based Welfare Provision in Urban New Zealand” 2008 *Urban Studies* September 45(10) at 2120, referring to, inter alia, R Benne *The Paradoxical Vision: A Public Theology for the Twenty-First Century* (Fortress Press, Minneapolis, 1995).

⁴⁵⁷ At 2121, citing M Ramsay “Redeeming the city: exploring the relationship between church and metropolis” (1998) *Urban Affairs Review* 33(5) at 606.

⁴⁵⁸ At 2121, citing Ramsay, above n 457, at 607.

⁴⁵⁹ Matthew Harding *Charity Law and the Liberal State* (Cambridge University Press, Cambridge, 2014) at 87.

concerns about the tyranny of religion are more likely to be appeased if it is understood that religious charities are limited by the rule of law.

Further, “the soundness of reasoning by analogy in the charity law setting turns on the sorts of analogies that decision-makers draw when developing charity law.”⁴⁶⁰ This principle of analogy is suited to generating predictability in the development of the law, which underpins the ideals of the rule of law⁴⁶¹ as evidenced in *Scottish Burial Reform & Cremation Society v Glasgow Corporation*,⁴⁶² whereby the House of Lords had to determine the charitability of a crematorium. An analogy was made between a crematorium and the maintenance of a cemetery. The maintenance of a cemetery, in earlier times, had been found analogous to maintaining a burial yard attached to a church, and also to the repair of churches. Lord Wilberforce stated that the “repair of churches” was of “general public utility”. Promoting cremation was also said to be of public utility. Therefore, in his Lordship’s view, cremation was considered to be equivalent to repairing churches and therefore charitable.

This analogy is perhaps tenuous but Lord Wilberforce’s utilisation of analogy was apt to generate predictability in the development of the law. As a result, his reasoning aligned appropriately with the rule of law.⁴⁶³

Thus, society can be reassured that even though charity law may develop, as has been seen with respect to the advancement of religion, the rule of law can keep such development in reasonable check.⁴⁶⁴ Consequently, it is unlikely that the perceived threat as to the tyranny of religion in civil society will occur, as set out below.

In addition, by permitting religions to obtain legally-recognised charitable status, the state is able to enforce certain regulatory procedures imposed upon such charities. This provides a measure of checks and balances that will satisfy the public that no religion will be able to wield

⁴⁶⁰ At 87.

⁴⁶¹ At 87.

⁴⁶² At 87-88, referring to *Scottish Burial Reform & Cremation Society v Glasgow Corporation* [1968] 1 AC 138 (HL).

⁴⁶³ At 87-88, referring to *Scottish Burial Reform & Cremation Society*, above n 462, at 155; also referring to *In re Manser* [1905] 1 Ch 68; *In re Eighmie* [1935] Ch 524; *In re Vaughan* (1886) 33 ChD 187; and *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 (HC) (Aus).

⁴⁶⁴ At 87.

or exercise power or influence in a tyrannical way.⁴⁶⁵ This is because charities are subject to stringent legal doctrines and principles that ensure their purposes are for public benefit, which will be addressed in later chapters.

I contend, therefore, that because of the inherent links between the rule of law and religion, democratic states can justify religion in charity. This is because charity law provides a useful vehicle to ensure that the rule of law and religion remain bound together to ensure the continued support of communities. As such, the advancement of religion, within charity law, is reconcilable through the influence of, and impact by, the rule of law, thus supporting the overall object of my inquiry.

Indeed, history shows us that if states legally support religion, such promotion can reduce conflict and bloodshed. This is because law is a pragmatic endeavour, and in connection with the liberal approach, “it is tasked with ensuring that societal rules are making peace, order, and good government possible.”⁴⁶⁶

Evidence of such aforementioned bloodshed is found in the early Reformation period where conflicts arose between the religious minority groups and the state, resulting in the deaths of hundreds of thousands across Europe. That experience, along with the recognition that a state could not force individuals to believe in a belief system alien to their own, led to a more accepting society where religious minorities were tolerated and accommodated. This led to greater social harmony.⁴⁶⁷

Further, recent evidence of the fundamental nexus between religion and the rule of law is demonstrated in relation to the historical relationships between the religious group the Jehovah’s Witnesses, Nazi Germany and the United States.

⁴⁶⁵ Sorensen & Thompson, above n 441, at 4.

⁴⁶⁶ Barry W Bussey “The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School” (2016) *BYU Law Review* Issue 4 Article 5 at 1144.

⁴⁶⁷ At 1144-1145.

VI. Jehovah's Witnesses – A Tale of Two States

It is noted that constitutional regimes, likely democratic states, that promote an effective rule of law are likely have a variety of methods of resolving religious disputes in comparison with authoritarian regimes. For instance, those democratic states with a strong rule of law will provide impartial arenas for settling disputes, such as courts and tribunals. Disputes can be resolved in a transparent and legally-justifiable manner.⁴⁶⁸ In contrast, authoritarian non-democratic states “measure success as containment of the expression of differences, settlement of conflicts through the use of physical and symbolic coercion, and ensuring quiescence.”⁴⁶⁹

I assert that the discussions pertaining to the Jehovah's Witnesses is relevant to the object of my inquiry because it contextualises the fundamental relevance of the rule of law in relation to religion and state disputes. Thus, it provides evidence that the advancement of religion, by way of its relationship with religion generally, is reconcilable within the legal principle of the rule of law.

I will address the social and political impact of both types of regimes on Jehovah's Witnesses shortly, however, it is useful firstly to outline the central canons of political authority advocated by the Witnesses and how such doctrines, or canons, made the risk of conflict between the movement and the state seem likely.

Jehovah's Witnesses are a religious group that originated in the United States in 1879. Witnesses see themselves as set apart from society through their moral beliefs. They support political neutrality, whereby religion is separated from the state, and there is no participation in political endeavours. This is an indication of their fidelity to one true religion.⁴⁷⁰ Nonetheless, for early Witnesses, political authorities were deemed necessary to maintain order and authority, thus Witnesses were exhorted to pay their required taxes, and be respectful and obedient in all ways to authorities that did not conflict with God's laws.

⁴⁶⁸ Pauline Cote “Rule of Law and Religious Minorities: A Case Study of Jehovah's Witnesses” (2007) *The Review of Faith & International Affairs* 5 3 at 11.

⁴⁶⁹ At 11.

⁴⁷⁰ At 11, referring to *New World Translation of the Holy Scriptures* (Watch Tower Bible and Tract Society of Pennsylvania, 1995) at John 17:15-16 and Exodus 20:4.

The movement went through World War I from a pacifist standpoint, and was neutral with regard to politics and authority. However, factors in the movement, including prophetic failures and organisational stress, led to changes in the movement. Such changes included assertive evangelism and mass mobilisation. Witnesses would preach in various public places, and their message was loaded with attacks on other religions and denouncements of commercialism, capitalism and promoting political conspiracies.

Between 1928 and 1945, Witnesses were arrested en masse in the United States, Germany and Great Britain for offences such as unlicensed selling of literature, disturbing the peace and violating Sabbath laws. Consequently, the movement experienced conflict in relation to their culture, and their beliefs about politics progressively allowed adversarial attack. The treatment of the group in the United States, when one compares the group's treatment within Germany during this same period, is an illustration of the representation of an effective rule of law to foster cohesion. Consequently, the movement's doctrine lost its negative stance in the United States, and evolved in to a positive approach with the "writing of the faith into the laws of the land."⁴⁷¹ The fate of the movement in Germany was very different; we consider the German approach first.

VII. Jehovah's Witnesses in Nazi Germany

Throughout this period of time, Germany was suffering from a prolonged economic crisis as well as political uncertainty. These were proving to be difficult times for an unpopular religious minority, which was what the Jehovah's Witness represented. During the late 1920s, the movement proselytised publically, and was in conflict with National Socialism; this grew worse with Adolf Hitler's rise to power. Witnesses refused to say "Heil Hitler", as well as refusing to join in parades, sing the national anthem, or take part in military service.

The doctrinal evolution of the movement led believers to eschew all worldly concepts, including politics, because the world was deemed to be under Satan's influence. Saluting the German flag or the Fuhrer was an act of idolatry. Indeed, Hitler's Reich was said to be an

⁴⁷¹ At 13, citing Gabriel Yonan "Spiritual Resistance of Christian Conviction in Nazi Germany: The Case of the Jehovah's Witnesses" (1999) *Journal of Church and State* 41 No 2 at 307.

aspect of Jehovah's fight with the devil. As Jehovah's disciples, Witnesses were commanded to fight such influences. The movement was vocal in its opposition to Hitler, publically referring to him being the Antichrist.⁴⁷²

In 1933, the National Socialist State banned Jehovah's Witnesses. What the movement considered political neutrality, Nazi Germany characterised as dangerous and damaging to public security and order. Witnesses who failed to hide, or indeed, who did hide and were then subsequently discovered, were murdered by the Nazis. After the persecutions ended, the movement reflected on its persecution in relation to the perceived imperfect laws of Socialism and the state, and the perceived perfect laws of their God, as well as their faithful devotion to their God. Put simply, this meant that there was no gap bridged between the political ideals of the state and religious beliefs due to the authoritarian approach of the state.

VIII. Jehovah's Witnesses in the United States

In comparison, the treatment of the movement was starkly different in the United States, leading to a fundamentally different outcome. During this same period in the United States, the movement was no more popular than it was in Germany due to the movement's political alienation for the same reasons as it espoused in Germany. However, the United States provided an alternative platform for resolving this dispute through effective utilisation of the rule of law, that of the court system.

This system enabled the movement to participate fully in defending their stance and the movement's leaders systematically appealed rulings and engaged in the legal culture, although this did lead to a considerable defeat for the movement in 1940 in *Minersville School District v Gobitis*.⁴⁷³ In this case, the Supreme Court determined that a Jehovah's Witness can be required to salute the flag.

However, the State then began to consider the movement's claims. In 1943, the Supreme Court in *West Virginia State Board of Education v Barnette*⁴⁷⁴ ruled that the Free Speech Clause of

⁴⁷² At 13 - 14, referring to Yonan, above n 471, at 317 and 320.

⁴⁷³ At 14, referring to *Minersville School District v Gobitis* 310 US 586 (1940).

⁴⁷⁴ At 14, referring to *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

the First Amendment gave protection to the Jehovah's Witnesses with regard to their custom of abstention from political pledges and salutes. Therefore, the constitutional legal process that was brought by the Jehovah's Witnesses proved a major factor in expanding protections under the Bill of Rights. Additionally, as a result of the engagement with the rule of law, later leadership of the movement encouraged less aggressive actions, and protests were reduced.⁴⁷⁵ The rule of law enabled the state and the movement to engage in pragmatic and legally-justifiable changes for both entities.

The comparison of the two states' approaches reflects the relevance of the nexus between religion and the rule of law to encourage and perpetuate political and social stability. In Germany, the movement was "engulfed in helpless polarization between human law and God's law".⁴⁷⁶ Left with no suitable options, the movement was only left with clashing dangerously with their political oppressors. In the United States, however, the movement was "persuaded into the project of writing their faith into the laws of the land." Here, the movement could utilise the full weight of the law to air their disputes formally, enabling the movement to align its views with the law of the land, but without prejudicing its belief system.⁴⁷⁷

The rule of law, therefore, enabled the integration of an unpopular, socially-divisive and minority religious group into a constitutional political culture, although the law still did not protect all of the movement's desires to proselytize aggressively on the streets. Notwithstanding some of those limitations, the extent to which constitutionalism, and specifically the rule of law, impacted positively throughout the movement's discourse is a reflection of the social importance of the nexus concerning the rule of law and religion.

In essence, therefore, the comparison of these two states' approaches illustrates that:⁴⁷⁸

... the intersection of the rule of law and religion is not just about social control but also about social integration. Provided an appropriate arena to settle conflicts with the symbolic order of

⁴⁷⁵ At 15.

⁴⁷⁶ At 15.

⁴⁷⁷ At 15, referring to the biblical precedent of Paul the Apostle in Acts 24:10-22 *The Bible*, giving authority for the movement to engage with state laws.

⁴⁷⁸ At 16.

a given country, religiously dissident minorities can enter a process of negotiation that results in adjustments and moderation rather than polarization and radicalization.

This is evidence that countries with an operative the rule of law are generally less likely to see societal and religion-based conflicts.⁴⁷⁹ Consequently, it can be said that the rule of law, at least in relation to religious matters, can “[serve] as a tool for mollifying or resolving disputes.”⁴⁸⁰

It is now pertinent to consider the rule of law specifically in relation to religious charities and thus demonstrate the reconcilability of the advancement of religion specifically through the rule of law, so providing support to the overall object of my inquiry. That of reconciling the advancement of religion as a charitable purpose within its socio-legal contexts.

IX. Rule of Law and Religious Charities

How the rule of law relates to religious charities specifically is illustrated with the example of the political governance of religion in Central Asia in the later parts of the 20th century. I acknowledge that I have generally referred to Western democratic societies throughout this thesis, and this section of the thesis appears to stray from that. I was cognisant, however, of the lack of available research pertaining to the rule of law and religious charities generally in such societies, hence turning to examples outside of the general discourse to date. Nonetheless, I would assert that addressing non-Western constructs of society does not diminish the fact that the rule of law and religious charities have a close and vital connection, as will be demonstrated as follows.

When certain Central Asian republics, including Turkey and Saudi Arabia, “began to loosen restrictions on the practice of Islam in the 1990s, a range of international Muslim charities and donors eager to assist with the construction of mosques and the spread of religious

⁴⁷⁹ At 11.

⁴⁸⁰ Benjamin Schonthal et al “Is the Rule of Law an Antidote for Religious Tension? The Promise and Peril of Judicializing Religious Freedom” 2016 *American Behavioral Scientist* Vol 60(8) at 967.

education.”⁴⁸¹ With the increase in education, as well as the community support provided within mosques, the local communities began to benefit. This is because education, in a variety of guises, sustains individual and societal improvement. One of the mechanisms by which society makes economic, social and political improvements is through the education of its people,⁴⁸² thus the role of education cannot be underestimated. In addition, mosques, like other forms of religious institutions, are places where communities can gather and share views; share common interests and concerns; provide comfort to the lost and grieving; and disseminate learning and teaching. Consequently, what these discussions pertaining to non-Western social constructs demonstrate is that there is much value in such institutions for the cohesion of a community, thus lending weight to my assertions that the advancement of religion is reconcilable through the context of the rule of law.

As a point of note in relation to Western democratic states, it is evident that public policy in the West has “clearly and consistently been in favour of supporting charities”,⁴⁸³ and charities do indeed enjoy a special position in English law,⁴⁸⁴ as with many other Western jurisdictions. However, the example I provided in relation to Central Asia provides a concrete illustration as to the actual value of charity when the rule of law is exercised appropriately. In the Central Asian context for example, liberalising constitutional governance, as part of the rule of law, encouraged charity within the community, which can only be of benefit to the community and society generally. This is important to emphasise in an age where calls for religion to be removed from society are being heard and disseminated widely, thereby providing further evidence that the advancement of religion is reconcilable within its rule of law context.

⁴⁸¹ Jonah Blank “Religion and Stability in the Former Soviet Union: Policy Implications of Analysis” in Katya Migacheva and Bryan Frederick (eds) *Religion, Conflict, and Stability in the Former Soviet Union* (Rand Corporation, Santa Monica, 2018) at 195.

⁴⁸² Mimar Türkkahraman “The Role of Education in the Societal Development” 2012 *Journal of Educational and Instructional Studies in the World* November Volume 2 Issue 4 Article 04 at 38.

⁴⁸³ Debra Morris “Charities and the Modern Equality Framework” 2012 *Current Legal Problems* Vol 65 at 297.

⁴⁸⁴ At 297, referring to *Gaudiya Mission v Brahmachary* [1998] Ch 341 at 350.

X. Conclusion

This chapter demonstrates that the rule of law, religion and charity are inextricably linked. Indeed, the rule of law enables charity law to function appropriately within society. This is because a charity's purposes must be charitable. Engaging in unlawful activities, or encouraging behaviours that are against the law, or breach public policy, may disqualify a body from being charitable.⁴⁸⁵ Public policy can include the “rule of law, the constitutional system of government ... , the safety of the general public and national security. Activities are not contrary to public policy merely as a result of their being contrary to government policy”.⁴⁸⁶

I have shown that charity law, through its relationship with, and its governance by, the rule of law, is ideally positioned to fortify the needs of society in a way that is designed to promote public confidence in the sector; religious charities form a fundamental section of that relationship. In essence, this chapter illustrates that the rule of law legitimises and underpins the advancement of religion within charity, providing surety to society, and ensures charity operates effectively within society. As a result, I assert that this chapter has been key in assisting in my inquiry as to the reconciliation of the advancement of religion because it has embedded the construct of religion and charity within the socio-political and legal contexts of the rule of law. Consequently, I assert that the rule of law is an important facet in the reconciliation of the advancement of religion because of the strong correlation between the rule of law, charity law and thus the advancement of religion. As a result, the rule of law assists with the effective operation of the religious charities within democratic, and some non-democratic societies, as well as providing public and legal confidence and surety because of the inherent nature of the rule of law. Consequently, this chapter is a reflection of the social and political frameworks to which I made mention earlier in the thesis, thus reflecting the various contexts in which the advancement of religion is placed.

Now that the paramountcy of the rule of law has been demonstrated in relation to charity law and religion, Chapter 5 furthers the discussion. I do this by considering the advancement of

⁴⁸⁵ Registration Decision: *Greenpeace of New Zealand Incorporated* (GRE25219) 21 March 2018 at [85]-[86]; see also *Greenpeace of New Zealand Inc* [2014] NZSC 104.

⁴⁸⁶ Email from Murray Baird Acting Commissioner to the The Hon Phillip Ruddock “Submission to Expert Panel on Religious Freedom” (14 February 2018) at [2].

religion in the context of a number of challenging historical and contemporary black letter law constructs, which inherently are framed in their social contexts, as well as some key discussions pertaining to Islam and the advancement of religion that fit within the theme of this chapter.

*Chapter 5. Acknowledging Religion in Contemporary Society – Critical
Discussions Relating to Ancient and Contemporary Religious Issues*

I. Introduction

As will be recalled, the purpose of this research is to review critically the reconciliation of the advancement of religion within charity law through a sociopolitical-legal narrative, with the object of my inquiry being to reconcile the advancement of religion in a variety of contexts. The specific positioning of this chapter within the thesis was relevant because once I had made a number of socio-political submissions in previous chapters that were framed within their socio-political contexts, this chapter could then turn to some, *inter alia*, black letter law considerations in relation to the advancement of religion in various common law jurisdictions. I assert that it was important to set out some of the socio-political contexts first so as to gain an understanding of how the law sits within these frameworks. As a result, the justiciable nature of the common law decisions become more inherently defensible when one has a clearer understanding of the relationship between law, society, and politics, even if some of those cases are controversial.

Consequently, this chapter furthers the thesis' overall object of reconciling the advancement of religion by considering key issues relating to religion and charity in a contemporary context that may, *prima facie*, actually undermine the vital role that religion plays within the charity sector. As a result, the discussions include examining commercialism within religion; new age beliefs; and non-Western concepts of religion and charity to ascertain if such issues undermine the position of religion within charity law. It is arguable that if religion lacks credibility, it follows that there will be limited support for such bodies to be charitable in the public view. Nonetheless, what is revealed is the credibility of religion in some challenging circumstances resulting in religion, through charity, embracing many aspects of the modern world. This means that religious charities, can, and should, remain stalwarts of communities. Overall therefore, I argue that the advancement of religion can be reconciled within the contexts of this chapter because charity law is positioned to recognise the value of such circumstances in contemporary society.

However, there are disconnects whereby the gaps are not so easy to bridge. For example, with regard to the prevailing position of Judaeo-Christian religious legal principles in communities that do not necessarily focus culturally on such religions. Consequently, communities that may have benefitted from religious charities may be marginalised. Such disconnects suggest that religious charities are not as relevant in today's times. Nonetheless, I offer potential solutions to such issues that would enable the advancement of religion to sit more favourably within society through charity law, and thus benefit societies.

Even so, these matters are not easily addressed, and many judicial decisions reflect conflict in the law, which can undermine the place of religion within charity, leading to uncertainty and public lack of confidence. In addition, as courts endeavour to reconcile the ancient and modern, there is concern that religion generally may be discredited because it appears to take on the trappings of consumerism and commercialism, and I begin these discussions by assessing the relationship between religion and commercialism.

II. Commercialism in Religion

Commercialism and religion appear at first sight to be mutually exclusive concepts. This is perhaps because religion is considered to have numerous non-pecuniary benefits, including moral guidance, spiritual guidance and the redistribution of goods and services to those in need, as opposed to ensuring a profitable existence. Indeed, the public concept of religion does lead society to view commercialism and religion as distasteful. This in part may have its history in greed, which is a closely connected factor with profit. Greed, of course, is one of the seven deadly sins that are so ingrained in Western Judeo-Christian society.

Greed is also referred to as mammonism, which has religious roots, and is a word derived from Aramaic, the language spoken by Jesus. Mammonism means the pursuit of wealth as a key purpose.⁴⁸⁷ According to the Bible “ye cannot serve God and mammon.”⁴⁸⁸ Consequently, the pursuit of wealth, profit and, subsequently, commercialism, does not sit easily within the religious charitable narrative.

⁴⁸⁷ Sheila T Harty *The Sin of Greed: How 'Profit' Became a Dirty Word* (Draft Paper, July 2015,) citing Matthew 6:24b *King James Bible* (Zondervan HarperCollins Christian Publishing, Nashville, 2002).

⁴⁸⁸ Harty.

One recent example of such distaste is illustrated in China. The Chinese Government determined that was to be a ban on the selling of shares by temples to investors. This came about because it was discovered that some temple leaders had been planning on undertaking such activities as commercial undertakings. Commercialising religion in such a manner was criticised because it was seen as extending China's commercial culture too far⁴⁸⁹ in an "already unrestrained commercial culture."⁴⁹⁰

Recent criticism has also been levelled at Islam for becoming too commercial, whereby it has been said to be "slowly and steadily becom[ing] part of our onscreen lives ... [i]t is omnipresent. Ironically more so in advertising than in entertainment."⁴⁹¹

It is apparent therefore that the "faith and fortune of the religious sector is flourishing".⁴⁹² Indeed, commercialisation does appear to be ever-present in a religious context, with the growth of megachurches, drive-in confessionals and commercial pilgrimages, to name but a few commercial ventures. This results in religious markets bearing the trappings of modern society.⁴⁹³ Commercialisation, in turn, has become associated with religious charities, and this is unsurprising when one considers it within a socio-political context. For instance:⁴⁹⁴

Analyses of religion, consumerism and the state in Western societies have shown how religion has been dedifferentiated in the public sphere through market forces that are increasingly unregulated by the state. Religion has been deprivatized ... and has appeared as a social force on the same footing as other social forces ... With the rolling back of the neoliberal state from its welfare activities in several domains in public life, faith-based organizations have increased their penetration in the public sphere ... for example, the prevalence of faith-based organizations running facilities and programs targeting urban poverty. This has reached a

⁴⁸⁹ Louise Watt "Chinese government tells Buddhist temples to ease up on the commercialism" (26 October 2012) <https://skift.com/2012/10/28/chinese-government-tells-buddhist-temples-to-ease-up-on-the-commercialism/>.

⁴⁹⁰ Watt; see also Ian Johnson "China Seeks Tighter Grip in Wake of a Religious Revival" *The New York Times* (7 October 2016) <https://www.nytimes.com/2016/10/08/world/asia/china-religion-regulations.html>.

⁴⁹¹ TN Ahmed "Religion sells. And it can sell anything" (9 December 2017) <https://aurora.dawn.com/news/1142115>.

⁴⁹² Alec Spencer "Does Freedom of Religion Imply Freedom of Religious Trade?" [2017] JCULawRw 5 at 84.

⁴⁹³ Bryan S Turner, Adam Possamai and Jack Barbalet "Introduction: States, Consumption and Managing Religions" in *Religion and the State: A Comparative Sociology* (Anthem Press, London, 2011) at 8.

⁴⁹⁴ Arathi Sriprakash and Adam Possamai "Hindu Normalization, Nationalism and Consumer Mobilization" in Barbalet, Possamai and Turner, above n 493, at 210.

turning point in which we find politicians, social activists and commentators claiming that some religious organizations are better equipped for such actions than the current welfare state. With the advent of neoliberalism, faith-based organizations changed from simply offering charity work to being strong actors in the provision of welfare and social services.

Thus, with the emergence of the neoliberal state, religion was pushed into the public domain, and with that, the explicit embracing of commercialism.⁴⁹⁵ However, it appears that the mercantile nature of religion is not a novel concept. For example, there is evidence that religious entrepreneurialism has been practiced by the Catholic Church for centuries. This occurred under the canon law doctrine of “indulgences” whereby the devoted may buy their way out of purgatory and into heaven. Canon law encourages Catholics to donate money to the church for the public good; in other words, for charitable endeavours, such as supporting hospitals and schools, as well as building churches and cathedrals.⁴⁹⁶ Then there is the perhaps uncomfortable reality that in Australia alone, the Catholic Church owns indirectly, but with direct control of, AUD 100 billion in property and assets, employs circa 118,000 people, and generates AUD 15 billion from its education, health and welfare enterprises annually.⁴⁹⁷

Consequently, this section of the chapter considers how the two apparently disparate concepts, charity and the mercantile, may actually make unlikely bedfellows in an increasingly commercial world. In doing so, I demonstrate the paradoxical benefits of commercialism within religious charities, and consequently, it is inferred that religious charities are likely to benefit communities through such commercial engagement, thus justifying the presence of religious charities in a modern context. I begin by considering the Australian High Court *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*.⁴⁹⁸

III. Word Investments – A Case of Commercialism

In this case, the questions for the Court included whether or Word Investment’s (Word) objects were charitable, and whether an entity would be charitable if it did not carry out charitable

⁴⁹⁵ At 210.

⁴⁹⁶ Spencer, above n 492, at 91.

⁴⁹⁷ At 91.

⁴⁹⁸ *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55.

activities beyond activities that made profits which were then targeted at entities that carried out in charitable purposes.⁴⁹⁹

In brief, Wycliffe Bible Translators (Wycliffe) was originally a legally-recognised charity. It carried out international religious missionary work. Part of its work involved spreading the word of God through its Bible translation activities, and educating communities from the translated Bibles. Wycliffe formed Word Investments Limited (Word) as, inter alia, a means of raising funds, which passed its profits into Wycliffe. Word later expanded its operations to include financial planning services and a funeral business.

The High Court determined that commercial undertakings and achieving legally-recognised charitable status were not necessarily mutually-exclusive models. The Court came to this conclusion firstly by framing the question of charitable activities. In other words, the “activities of Word in raising funds by commercial means are not intrinsically charitable, but they are charitable in character because they were carried out in furtherance of a charitable purpose.”⁵⁰⁰ Therefore, the purposes did not have to be inherently charitable, so long as they enabled a charitable purpose to be furthered.⁵⁰¹ Whilst at first sight this may appear to be a rational approach, it has been subject to criticism.

It has been suggested that there was a fundamental issue in the majority of the Court’s approach whereby the activities should be determined in relation to their advanced in continuance of a charitable purpose, in contrast with supporting a distinct and non-charitable purpose. It suggests that it might be difficult to assess the correlation between mercantile undertakings and charitable purposes. For instance, there may be many activities, such as purchasing land, shares or public collections, but there is no one test that can ascertain whether these activities might promote a charitable object, or whether they are, in fact, incidental to its charitable objects.⁵⁰²

⁴⁹⁹ *Word Investments Limited* at [12] and [34]. This case was considered in Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018) chap 6, although within the broader context of Australian jurisprudence.

⁵⁰⁰ At [26].

⁵⁰¹ Ian Murray “Charity Means Business – Commissioner of Taxation v Word Investments Ltd Case Note” [2009] *Sydney Law Review* Vol 31 at 316.

⁵⁰² At 316-317.

Nonetheless, assistance may be found by asking if the purpose is “conducive to promoting”, “conducive to the achievement of”, or “tends to assist” with the main charitable purpose.⁵⁰³ The nexus could also be assessed on “the natural and probable consequences”⁵⁰⁴ of the undertakings. Therefore, the charitable nature of the commercial activities can be adduced through close factual analysis, instead of applying a precise test, which permits a flexible approach in determining the charitable nature.⁵⁰⁵ This is perhaps a preferred methodology, as the concept of charity evolves as society evolves; a one-size-fits-all test is not necessarily apposite to enable charity to advance religion appropriately.

The Court’s second consideration, as mentioned earlier, was whether an entity could be charitable if it did not carry out charitable activities beyond activities that made a profit which were then targeted at entities that carried out in charitable undertakings. The Court, relying on *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue*, determined that:⁵⁰⁶

[T]he charitable purpose of a trust is often, and perhaps more often than not, to be found in the natural and probable consequences of the trust rather than its immediate and expressed objects.

As a result, “the charitable purposes of a company can be found in a purpose bringing about the natural and probable consequence of its immediate and expressed purposes.”⁵⁰⁷ This means that “its charitable activities can be found in the natural and probable consequence of its immediate activities.”⁵⁰⁸

This approach, therefore, looks to “the effect of, rather than the motivation for, the activities.”⁵⁰⁹ This approach finds support in the New Zealand High Court case *Hester v*

⁵⁰³ At 317, citing *Stratton* (1970) 125 CLR 138 at 148; *Thistlethwayte* (1952) 87 CLR 375 at 442; and *Navy Health* (2007) 163 FCR 1 at [65].

⁵⁰⁴ At 317, citing *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 at [83]; see also *Vancouver Society of Immigrant & Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10 at [158]; [52]; and [56].

⁵⁰⁵ At 317.

⁵⁰⁶ *Word Investments Limited* at [38], citing *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue* (1945) 26 TC 335 at 348.

⁵⁰⁷ At [38].

⁵⁰⁸ At [38].

⁵⁰⁹ Murray, above n 501, at 318.

Commissioner of Inland Revenue, where the Court referred to the “natural and probable consequences of such provision is the advancement of religion”.⁵¹⁰ As such, the majority in *Word* concluded that *Word* was charitable.

This suggests, therefore, that where a court can determine that profits, or any private benefits, are not the end in themselves, then the commercial activities are not the actual issue. Rather it is the fruit of those activities that is key in determining the charitable nature of the commercial entity.⁵¹¹ Both the *Word* case, and in effect the *Hester* case, offer a “significant boost for charities”. This is because in an increasingly market-driven world, where funding and fund-raising becomes more competitive, self-funding,⁵¹² this may mean the difference between a charity that merely stays in existence or that is able to operate more successfully for communities overall.

Another New Zealand case also reflects the commerciality of religion, that of *Liberty Trust v Charities Commission*.⁵¹³ I have discussed this case in other chapters, but it is useful to consider it in this context because it illustrates how commercial principles are infiltrating the religious charitable sector in ways that are challenging the traditional concepts of religion and charity and aligning them with modern constructs.

IV. Liberty Trust and Commercialism

Chapter 3 sets out the facts of the *Liberty* case, so for my current purposes, I argue that at its heart, this case is an acknowledgement of the frowned-upon religious principle of usury. Consequently, I contend that this case illustrates a commercial approach to religion that is appropriate in modern circumstances. Usury, in a religious context, originally meant charging interest on loans. Historically in Christian societies, and still in many Islamic societies, charging interest was, and still is, regarded as sinful.⁵¹⁴ Leviticus states:⁵¹⁵

⁵¹⁰ *Hester*, above n 504, at [83]; see also Murray, above n 501, at 317.

⁵¹¹ Claire Russell “Taxation Law: A Word to the Wise” 2009 Keeping Good Companies Vol 61 No 3 Apr at 181.
⁵¹² At 181.

⁵¹³ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68.

⁵¹⁴ “Usury” Wikipedia <https://en.wikipedia.org/wiki/Usury>.

⁵¹⁵ Leviticus 25:35-37 *The Bible*

If your brother becomes poor and cannot maintain himself with you, you shall support him as though he were a stranger and a sojourner, and he shall live with you. Take no interest from him or profit, but fear your God, that your brother may live beside you. You shall not lend him your money at interest, nor give him your food for profit.

If the loans given by Liberty Trust had charged interest, they would likely be construed as sinful in a trade or commercial context.⁵¹⁶ However, because they are interest free, the ethos of religion is acknowledged, whilst at the same time enabling loanees to obtain a debt-free existence. According to the Trust, Christians should not be encumbered with substantial financial liabilities,⁵¹⁷ thus evidence is presented of commercial realism crossing over into the charitable sector.

Mallon J did observe that a “mortgage scheme ... is not an obvious candidate for the ‘advancement of religion’ category of charitable purposes”.⁵¹⁸ That, in itself, however, did not preclude the loan scheme from advancing religion. Rather, religion was taught through the loan scheme because it operated in accordance with scripture. Therefore, it promoted religion and took affirmative actions to maintain or augment religious beliefs.⁵¹⁹

The commercial aspect was further acknowledged explicitly by her Honour. She observed that it was undeniable that the Trust’s scheme had a commercial flavour to it, with mention of money saving, investments and tax advantages. However, Mallon J noted that commercial promotion of religion will not automatically disqualify a purpose from being charitable.⁵²⁰ This reflects the approach taken in the *Word* case, as well as implicitly recognising the reality that religion and commercialism are closely associated.

Acknowledging explicitly the relationship between religion and commerce may appear distasteful to many, and as a result could undermine the role of religion within charity. However, Mallon J emphasised that “[i]mportantly, the commercial nature of the scheme is

⁵¹⁶ Harty, above n 487.

⁵¹⁷ *Liberty Trust*, above n 513, at [94].

⁵¹⁸ At [93].

⁵¹⁹ At [94].

⁵²⁰ At [95].

limited.”⁵²¹ This means firstly that usury, as a condemned practice, is impliedly avoided. Secondly, her Honour confirmed that commercialism may only stretch so far, and beyond that, commercialism may actually negate charitable status, for instance, where the founders make a profit through the scheme.

Whilst, therefore, providing interest-free loans does not appear to reflect the ethos of charity, and certainly not religious charities, perhaps it can be argued that quite the opposite is true. This is because the loan scheme embraces religious teachings and promotes such teachings through its loan scheme, whilst ensuring that usury is avoided, which underpins key religious principles. Further, Mallon J stated that there are limits as to the extent of commercialism within a religious charitable context thus giving boundaries, which should provide some public confidence that the principles will not be overly extended.

In addition, it can be argued that this case places religious charity firmly within the context of the modern day. This is because finances and debt are key concerns to many in this day and age. Enabling people to live debt-free so as to embrace religious endeavours will reduce the burden on communities generally. Debt is a significant challenge to many. It means that some people are unable to afford amenities or pay bills; it causes homelessness and, in some circumstances, suicide. Reducing debt, therefore, is surely of public benefit, and it can be achieved through charity law, ensuring the principles of law are applied appropriately in a transparent and accountable manner, as required by charity law. Therefore, the reality of modern commercialism sits within the ancient concepts of religion and is acknowledged through charity law to support communities.

Whilst the *Word* and *Liberty Trust* cases can be utilised to justify the association between the mercantile and religion in a charitable context, this situation is not always so clear-cut, and unfortunately can lead to confusion within the charity sector, and thus may do little to aid in the reconciliation of the advancement of religion.

⁵²¹ At [95].

V. Hong Kong Sheng Kung Hui

This is illustrated in the Hong Kong decision *Hong Kong Sheng Kung Hui v Commissioner of Inland Revenue*.⁵²² In this case, Hong Kong Sheng Kung Hui, the Anglican Episcopal Church, and its ancillary entity, the Hong Kong Sheng Kung Hui Foundation, sold a number of residential units and car park spaces. From the sales, the Church received a profit of HKD 452 million, and the Foundation made a profit of HKD 667 million.⁵²³ This led to questions being raised in relation to the ensuing tax bill of HKD 180 million.

It should be noted that Hong Kong relies on the English charity law principles set out in this thesis, including the four charitable purposes expounded by Lord Macnaghten in *Income Tax Special Purposes Commissioners v Pemsel*,⁵²⁴ in other words, “for the relief of poverty, for the advancement of education, for the advancement of religion; and for other purposes beneficial to the community but not falling under any of the preceding types.”⁵²⁵ Specifically in relation to this case, s 88 of the Hong Kong Inland Revenue Ordinance states that a trade or business being carried out by a charity must set out its purposes. Thus a charity must operate to achieve those specified purposes, “which in a traditional way pertains to the promotion of charitable purposes,”⁵²⁶ which find their basis in the *Pemsel* definition.

The Court dismissed the assertion that the Church was not authorised to carry on a business or trade because of its Constitution, therefore could not have used its land as a trading asset. Instead, the Court asserted that the correct approach was the actual use of the asset, rather than the capacity of the user to carry out a specific trade or business. “In other words, whether or not an asset was used in the context of a trade or business was solely dependent on its actual use,”⁵²⁷ meaning, regardless of the purpose of the activities, which was advancing religion. This is distinguished from the High Court’s approach in the *Word* case.

⁵²² *Hong Kong Sheng Kung Hui v Commissioner of Inland Revenue* [2010] HKCFI 61.

⁵²³ *Hong Kong Sheng Kung Hui* at [4]-[16].

⁵²⁴ *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531 (HL) at 583.

⁵²⁵ See *Li Kim Sang Victor v Chen Chi Hsia* [2016] 1 HKLRD 1153 at [72], referring to *Pemsel*, above n 524, at 583.

⁵²⁶ Damian Bethke and Jdrzej Gorski “Rethinking Social Ventures in Hong Kong” [2014] Richmond Journal of Global Law & Business Vol 13 1 at 22, referring to Inland Revenue Ordinance Advance Rulings (1999) Cap 112 at 84(a) (HK).

⁵²⁷ Patrice Marceau and Patrick Cheung *National Hong Kong Report* (American Bar Association Foreign Lawyers Forum, 2010) at 17.

It was asserted that the Hong Kong Court “obscurely rejected the very legitimate argument that the criterion must pertain to whether the charity used its revenue solely for charitable purposes, which in this case was the advancement of religion.”⁵²⁸ It was further asserted that behind this rationale was the incorrect view that Sheng Kung Hui’s undertakings must qualify as an undertaking for trade or business, as opposed to advancing religion. This was wrong, allegedly, because business purposes merely relate to whether business organisations are not-for-profit or, in some instances, where surfeit is disseminated to stakeholders or to social mission.⁵²⁹

What this decision therefore illustrates is the unease that exists between commercialism, religion and charity. In particular that Hong Kong “does not welcome the combination of a make money and do good approach.”⁵³⁰ What has been further argued is that this case is simply a selective taxation to discourage charitable organisations from undertaking significant or commercial activities, which reflects the continued unease about such practices generally.⁵³¹ This is unfortunate because such a decision, in contrast with the Australasian approach, may do little to provide legal certainty in such matters, and thus may undermine, in part, my assertions that the advancement of religion is reconcilable in this particular context. However, in answer to this, I would argue that this is just one limited example of a common law jurisdiction choosing not to support commercialism as a charitable construct, and overall, the evidence does suggest that commercialism may be a justifiable construct within charity law. Thus, it is arguable that the advancement of religion is reconcilable through these cases because the law recognised the value to society of commercialism and did so in a legally-justifiable manner.

VI. Commercialism - Concluding Remarks

It is evident that the Hong Kong decision sits in contrast with the Australasian decisions, although the Hong Kong case may be welcomed by many because it may be seen as preventing businesses apparently obtaining charitable advantages. Indeed, it has been noted that should

⁵²⁸ Bethke and Gorski, above n 526, at 23.

⁵²⁹ At 23, referring to Marceau and Cheung, above n 527, at 16-17.

⁵³⁰ At 23.

⁵³¹ At 23-24.

profitable fundraising increase within the charitable sector, public support may then be reduced because of the perception that commercial enterprises somehow reduce the altruism of charities.⁵³²

However, the opposite may actually be true, and if that is correct, then Hong Kong's approach may be detrimental overall to the charitable sector. This is because such differing approaches can send mixed messages to charities, as it is not always clear how a business will be assessed by the courts. This suggests that some commercial activities, even if designed to support charitable purposes, may put at risk the charitable status of that entity. In today's commercially-driven world where charities compete for funding and support, this may not be a welcome consideration. This consequently may undermine the activities of many charities, to the overall detriment of those relying on the funds raised from commercial endeavours. Further, whilst questions have been raised as to whether commercial activities reduce the apparent altruism of charities, research suggests that there is societal support for charities that undertake some commercial and profit-driven activities.⁵³³

Therefore, where courts find that commercial activities do sit appropriately in relation to construct of advancement of religion, the public can be assured that through charity law governance, which ensures transparency and accountability, then those charities will not be unduly advantaged at the expense of non-charitable organisations as a result of their charitable status. Indeed, religious entrepreneurialism is perhaps "a reflection of the status religion plays in our society"⁵³⁴ and "a lineal and logical consequence"⁵³⁵ of the legal and constitutional recognition of religion in numerous states. As a result, such support for religion may indeed prove beneficial to the charitable sector generally as funding is likely to improve through commercial activities. Nonetheless, such charitable commercial ventures should rightly be subject to "strict scrutiny [as] they are in competition with others in the marketplace who do not enjoy any of the economic advantages"⁵³⁶ given to charities.

⁵³² Murray, above n 501, at 326.

⁵³³ At 326, fn 119.

⁵³⁴ Alec Spencer "Does Freedom of Religion Imply Freedom of Religious Trade?" [2017] JCULawRw 5 at 90.

⁵³⁵ At 90.

⁵³⁶ At 100, citing *Word Investments Ltd*, above n 498, at [117]-[120].

Whilst commercialism within religious charities may be justifiable, and indeed has some benefits for the charitable sector, other contentious charity cases have arisen that may reflect a disconnect between the public perception of religion and charities, and the actual reality of religion and charity. I argue that even where such contentious cases arise, charity law can justify the existence of such religious charities.

VII. *New Age Beliefs*

The first case I consider is the Australian High Court case of *Church of the New Faith v Commissioner of Pay-Roll Tax (Scientology case)*.⁵³⁷ I focus on Australian jurisprudence because the research sits within the Australasian context of this part of the chapter. I acknowledge that this is a much-cited, and discussed, case and it might be argued that the originality of the discussions may not, prima facie, be of such a judicious nature. However, in answer to this, I assert that I would be remiss if I were not to consider this case in the context of this thesis because of its authority and its influence in many jurisdictions. It was the first of its kind, in many ways, where a court had to grapple with a contentious religious subject matter, therefore its position within this thesis is significant.

In brief, the question throughout the appeals was whether Scientology was a religion; Scientology was originally conceived by L Ron Hubbard. “Scientology” is derived from the Latin “scio”, which means “knowing, in the fullest meaning of the word”; and the Greek “logos”, meaning the “study of”.⁵³⁸ Scientology further means “the study and handling of the spirit in relationship to itself, universes and other life.”⁵³⁹

Scientology is said to offer a path that leads to “a complete and certain understanding of one’s true spiritual nature and one’s relationship to self, family, groups, Mankind, all life forms, the material universe, the spiritual universe and the Supreme Being.”⁵⁴⁰ Its “ultimate goal ... is

⁵³⁷ *Church of the New Faith v Commissioner of Pay-Roll Tax* [1983] HCA 40.

⁵³⁸ Scientology “Frequently Asked Questions” <https://www.scientology.org/faq/background-and-basic-principles/what-does-the-word-scientology-mean.html>.

⁵³⁹ Scientology “What is Scientology” <https://www.scientology.org/faq/background-and-basic-principles/what-is-scientology.html>.

⁵⁴⁰ “What is Scientology”.

true spiritual enlightenment and freedom.”⁵⁴¹ Whilst it may consider itself a religion, the High Court had to determine this in relation to charity law. This led the Court to consider the meaning of religion. Mason ACJ and Brennan J observed:⁵⁴²

The relevant inquiry is to ascertain what is meant by religion as an area of legal freedom or immunity, and that inquiry looks to those essential indicia of religion which attract that freedom or immunity. It is in truth an inquiry into legal policy.

In taking this approach, their Honours considered the relevance of religion within society. In doing so, they contextualised its fundamental importance to individuals and to society generally, alluding to the fact that new age belief systems can sit within the ancient concepts of religion in contemporary times. The relevance of religion was placed within the context of societies and individuals trying to explain their existence within the universe. This included seeking the meanings of the cosmos, life and fate. For some individuals, acceptance of the general character of nature will satisfy these concerns, but for many, the only adequate solution could be found within discovering a supernatural order, and thus faith in the supernatural.⁵⁴³ In other words, “[f]aith in the supernatural, transcending reasoning about the natural order, is the stuff of religious belief.”⁵⁴⁴ As a result, it was argued that religious belief comes about “from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe”.⁵⁴⁵

In addition, religion is also concerned with the supernatural influence on humans and their conduct, thus in many instances religion provides “a set of ideas of how man is well-advised, even obligated, to live.”⁵⁴⁶ Consequently, the public benefit generally of religion is implied within these assertions, in other words, inter alia, certainty; comfort; codes of conduct; and a reassurance in the face of inadequacies. Such implications serve to underpin the overall relevance of religion within society generally, and provide, in part, a justification for the continued acceptance of religion within communities overall. Consequently, charity law is

⁵⁴¹ “What is Scientology”.

⁵⁴² *Church of the New Faith*, above n 537, at [12].

⁵⁴³ At [13].

⁵⁴⁴ At [13].

⁵⁴⁵ At [13], citing *United States v Kauten* (1943) 133 F (2d) 703 at 708.

⁵⁴⁶ At [14], citing Clifford Geertz “Anthropological Study of Religion” (1968) *International Encyclopaedia of the Social Sciences* Vol 3 at 406.

able to provide the vehicle by which religion can benefit communities appropriately. The Court in the *Scientology* case then considered further aspects to religion and where religion might then sit within the charity context.

It was noted that of equal importance are the canons of conduct that a person acknowledges as relevant so as to give rise to the belief in the supernatural, making those canons of conduct “no less a part of his religion than the belief itself.”⁵⁴⁷ Accordingly, the Court held that the oft-cited definition of religion is as follows:⁵⁴⁸

[F]irst, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief ... These criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.

This criteria was in contrast to the narrower English approach, where Dillon J in *South Place Ethical Society* stated that the two essential “attributes of religion are faith and worship; faith in a god and worship of that god.”⁵⁴⁹ The Court in the *Scientology* case, however, determined that such a definition was too limiting and would exclude non-theistic beliefs, which would include Buddhism, which is an acknowledged religion.⁵⁵⁰ As a result, the Court’s view was that the test of belief would be fulfilled by believing in a supernatural Thing or Principle, and would not be limited to belief in a God, or a supernatural Being.⁵⁵¹ Consequently, the broad definition reflected an evolution in the meaning of religion. This reflects the idea that religion can adapt in line with modern-day considerations, and its relevance is not limited to historical concepts.

⁵⁴⁷ At [14], referring to Max Mueller *Natural Religion (Collected Works)* (Longmans, Green & Co, London, 1899) at 135.

⁵⁴⁸ At [17].

⁵⁴⁹ At [23], citing *South Place Ethical Society* (1980) 1 WLR at 1572; a similar test was applied in *Registrar General; ex parte Segerdal* (1980) 1 WLR at 1572, where a chapel in the Church of Scientology was not a place of meeting for religious purposes, as referred to by *Church of the New Faith* at [24].

⁵⁵⁰ It should be noted that the Charities Act 2011 (UK) s 3(1)(2)(a) now states, under the head of advancement of religion, that ““religion” includes — (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god.’

⁵⁵¹ *Church of the New Faith*, above n 537, at [24].

In relation to the canons of conduct, the Court concluded that whilst the material to support their conclusion was not compelling, they could draw inferences that the adherents to Scientology, in carrying out the practices required by Hubbard, gave effect to their supernatural beliefs.⁵⁵² This may be criticised as adopting too broad an interpretation of giving effect to supernatural beliefs. However, what this does suggest is that the Court adopted a neutral stance in relation to assessing a belief system and how people ought to be able to give effect to their own belief system. This finds its authority in the concept that “the truth or falsity of religions is not the business of officials or the courts”.⁵⁵³ Thus, it is incumbent upon the courts to view religions, and how individuals give effect to their beliefs broadly, in a manner that is as inclusive as possible.

It may be argued that such a broad approach might be seen as giving religious charities pecuniary advantages over other non-charitable entities. However, it must be remembered that charity law still requires certain tests to be met. As the Court in the *Scientology* case has stated, religion is required to fall within a twofold test, and whilst public benefit is implied under the advancement of religion, this doctrine can be rebutted, as evidenced in Chapter 7. Therefore, whilst the boundaries surrounding religion within the parameters of charitable law may appear to be drawn widely, charity law still provides containment to ensure that advantages granted to such charitable bodies are granted on the basis of compliance and continued governance requirements.

An additional issue considered by the Court was in relation to accusations of Scientology being a sham religion and tainted with charlatanism. Such issues would, perhaps, be a disqualifying criterion as a charitable entity. It was asserted by trial judge Crockett J that Scientology “was no more than a sham ... and the adoption of paraphernalia and ceremonies of conventional religion was a mockery.”⁵⁵⁴ In response to this accusation, Mason ACJ and Brennan J of the High Court stated that “charlatanism is a necessary price of freedom”.⁵⁵⁵ Therefore, even if “a self-proclaimed teacher persuades others to believe in a religion which he propounds, lack of

⁵⁵² At [45].

⁵⁵³ At [7].

⁵⁵⁴ At [25], referring to the *Scientology* case (1983) 1 VR at 109.

⁵⁵⁵ At [25].

sincerity or integrity on his part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers.”⁵⁵⁶

Prima facie, such apparent criticism of a religion would appear to undermine the public benefit of religion, and thus disqualify it as a charity. However, in answer to this, what this falls back on is faith, and prescribing to the canons of conduct that are observed, which enable the followers to give effect to their belief. Murphy J, in the same case, provided the context to this. He stated that whenever “legislature prescribes what religion is, this poses a threat to religious freedom.”⁵⁵⁷ Further, bias by courts nor officials against religion is not acceptable in a today’s society.⁵⁵⁸ Indeed, in reality if “each purported religion had to show that its doctrines were true, then all might fail.”⁵⁵⁹ To impose such judgment on one religion means that all religions should also be judged equally. Therefore, just because a religious belief or practice seems “absurd, fraudulent, evil or novel”,⁵⁶⁰ or if a religion is novel, or lacking in members, this does not negate the fact that it may still be a religion.⁵⁶¹ Rather, there is no “essence of religion”;⁵⁶² it is for each body to prove, on the standards set by charity law, that they are entitled to the privileges of charity.⁵⁶³ In other words, charity law can and does state what is sufficient to bring that body within charity law benchmarks.

Murphy J was clear, nonetheless, that some religions may be hoaxes and consequently will not meet the prescribed charity law benchmarks. However, this is not a presumption, and “to reach this conclusion requires an extreme case.”⁵⁶⁴ Being sceptical of a belief system is not sufficient to reach that conclusion, and religious scepticism has abounded for hundreds of years. For instance, “religions, with their gods, their demigods, and their prophets, their messiahs and their saints, were created by the credulous fancy of men who had not attained the full development and full possession of their faculties.”⁵⁶⁵

⁵⁵⁶ At [26].

⁵⁵⁷ At [7].

⁵⁵⁸ At [7].

⁵⁵⁹ At [7].

⁵⁶⁰ At [7].

⁵⁶¹ At [7].

⁵⁶² At [8].

⁵⁶³ At [8].

⁵⁶⁴ At [8].

⁵⁶⁵ At [4], citing Michael Bakunin *God and the State* (Freedom Press, London, 1910) at 12.

Nonetheless, religion sits deep with the psyche of humans, regardless of criticism, and is protected by law in so many jurisdictions, thus all beliefs have to be treated equally, even if some belief systems appear alien or deceptive. Indeed, Murphy J highlighted the importance of protecting less popular religions. This is because, generally, “all religions commence as minority groups, often gathering around the teachings of one seemingly inspired individual. Their rise to public acceptance is normally very slow and difficult.”⁵⁶⁶ Further, as had been argued previously in the United States’ Supreme Court case of *Gillette v United States*,⁵⁶⁷ a test of public popularity might risk increasing a claimant’s chances of legal success if their belief system echoed a more familiar or salient connection with a conventional religion.

This approach echoes the discussions in Chapter 7 in relation to issues arising with popular or unpopular charitable purposes. Briefly, as I addressed it in that chapter, it was observed by Elias CJ in the New Zealand Supreme Court case of *Re Greenpeace of New Zealand Inc*:⁵⁶⁸

Just as unpopularity of causes otherwise charitable should not affect their charitable status, we do not think that lack of controversy could be determinative.

In other words, if it were only the popular or non-controversial purposes that were charitable, this would be detrimental overall for the charitable sector because:⁵⁶⁹

Such thinking would effectively exclude much promotion of change while favouring charitable status on the basis of majoritarian assessment and the status quo. Just as unpopularity of causes otherwise charitable should not affect their charitable status, we do not think that lack of controversy could be determinative.

In application to the *Scientology* case, I respectfully acknowledge that Murphy J’s encompassing methodology is likely the most appropriate approach. To find otherwise would mean that “the proliferation of religions and religious sects would present difficulties for any test based on public acceptability.”⁵⁷⁰

⁵⁶⁶ At [39].

⁵⁶⁷ At [39], referring to *Gillette v United States* [1971] USSC 45 at 185.

⁵⁶⁸ *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 at [75].

⁵⁶⁹ At [75].

⁵⁷⁰ *Church of the New Faith*, above n 537, at [40].

Therefore, whilst Scientology may be subject to criticism, this is not a reason to preclude it from being charitable. The Court confirmed that it fell within the twofold test prescribed by their Honours. As such, it is caught within the ambit of charity law, thus it is fully justified as being a creditable charity.⁵⁷¹

Whilst Scientology may find credibility as a religion within the Australian charity law framework, other contemporary religious cases appear to be testing the boundaries of modern-day believability. As such, the question remains as to whether such cases risk undermining the relevance of the charitable sector as a whole.

Over the last couple of decades countries including the United States, the United Kingdom, Australia and New Zealand, have witnessed a rise in small groups who claim to be religious. Some of the groups are said to be “jokes, parodies or straightforward offence.”⁵⁷² Examples include Jediism; The Church of the Flying Spaghetti Monster; Matrixism; and the Missionary Church of Kopimism.⁵⁷³ The religious claims made by such groups may cause publically-raised eyebrows, although there is much legal interest is being sparked as to the veracity of their claims. For our purposes, I will focus mainly on Jediism.

⁵⁷¹ It should be noted that the United Kingdom determined that the Church of Scientology was not charitable (Charity Commission Decision 17 November 1999 *Application for Registration as a Charity by the Church of Scientology (England and Wales)*). This was in relation to the core practices of Scientology, auditing and training, which were determined as not constituting worship as they do not display the essential characteristic of reverence or veneration for a supreme being, at 25 to 26. This was a different from the High Court of Australia in the *Scientology* case. The United Kingdom case disregarded the more liberal approach expounded by Mason ACJ and Brennan in the *Church of the New Faith* case, and affirmed that belief in and worship of a supreme being remained the essential characteristics under English charity law; see Andrew Iwobi “Out with the old, in with the new: religion, charitable status and the Charities Act 2006” 2009 Legal Studies Vol 29 No 4 December at 625.

⁵⁷² Teemu Taira “The Category of ‘invented religion’: A new opportunity for studying discourses on ‘religion’” [2013] Culture and Religion Vol 14 No 4 at 477.

⁵⁷³ At 477.

VIII. Jediism

It is likely of no surprise that the belief system of “Jediism” finds its history in the Star Wars films. However, elements of its doctrines find their basis in other world religions, including Taoism, Buddhism, Hinduism, Judaism, Christianity and Paganism.⁵⁷⁴

It has been stated that Jediism can be distinguished from the Jedi who are depicted in the Star Wars films. In the films, the Jedi are fictional characters, whereas the Jedi referred to by the religious groups are factual people living their lives according to Jediism. The history of Jediism is said to traverse a 5,000 year history because of its associations with the aforementioned religions,⁵⁷⁵ and it is presented as an old religion “remythologized to a contemporary public.”⁵⁷⁶

Despite its apparent history, it is still seen as an “invented religion”, and such a definition raises issues. By attributing a religion the title “invented”, this automatically serves to discredit or undermine that particular belief system. It has been asserted that such belief systems are only being invented so as to take advantage of the freedoms of religion set out by law and thus as a “resource for claiming rights, privileges and legitimacy”.⁵⁷⁷ This may in turn discredit established recognised religions. However, there are arguments that many established religious traditions “have misattributed authorship of sacred scriptures to founding figures.”⁵⁷⁸ Further, it is also asserted that religions such as Methodism, Mormonism and Adventism have developed, over some generations, a variety of methods that authenticate and naturalise their practices so as to “mask their recently invented nature in order to construct, unify, legitimise and strengthen their collective identity.”⁵⁷⁹

⁵⁷⁴ Charity Commission for England and Wales *The Temple of the Jedi Order – Application for Registration Decision* of the Commission 16 December 2016 at [22] and *Registration Decision: The Jedi Society Incorporated* (JED49459) 14 September 2015 The Charities Registration Board New Zealand at [22].

⁵⁷⁵ Adam Possamai “Gramsci, Jediism, The Standardization of Popular Religion and the State” in Jack Barbalet (ed) *Religion and the State* (Anthem Press, London, 2011) at 246.

⁵⁷⁶ At 246.

⁵⁷⁷ Taira, above n 572, at 477.

⁵⁷⁸ At 477.

⁵⁷⁹ At 477.

Therefore, it could be argued that the word “invented” begins to lose its more critical undertone. In addition, so-called “invented religions”, such as Jediism, have demonstrated how their belief system has a historical path as opposed to being invented from scratch.⁵⁸⁰ Further, it might be contended that religions generally were invented by humans, and it is said that, for example, “people rarely speak of the ‘invention’ of Islam by the prophet Muhammad.”⁵⁸¹ Regardless, Jediism, and indeed Scientology, as discussed earlier in the chapter, are invariably referred to as “invented” religions.

Nonetheless, I assert that the use of such a term in the public discourse does reveal its pejorative associations, which immediately undermines those belief systems in the public eye, thus making their transition into public acceptance all the more difficult. Irrespective, however, of the terminology utilised, Jediism has gained much attention in the public eye because of its recent judicial journeys in the United Kingdom and New Zealand. For the purposes of this chapter, I will mainly concentrate on the New Zealand *Registration Decision: The Jedi Society Incorporated*⁵⁸² because the research sits within the Australasian context of this part of the chapter. I acknowledge that this Decision is not legally-binding, however, the Board’s determination is significant in the development arguments pertaining to “sham religions”, therefore its inclusion in the thesis on that matter is significant.

The Charities Registration Board (Board) in the *Jedi Decision* referred to the question of Jediism being a sham religion; this was connected to the gravity of the religion. In addressing this matter, the Board referred to the *United States v Kuch*,⁵⁸³ noting that in *Kuch* there was evidence that the organisation was full of “goofy nonsense, contradictions, and irreverent expressions.”⁵⁸⁴

In applying this to the *Jedi Decision*, the Board affirmed that the gullibility of the believers is of no consequence, although there was sufficient evidence that the Jedi Society should be distinguished from *Kuch*. This was because whilst the Society did take its mythological content

⁵⁸⁰ At 477.

⁵⁸¹ At 478.

⁵⁸² *Registration Decision: The Jedi Society Incorporated*, above n 574. The Charity Commission for England and Wales came to the overall same conclusion as the New Zealand Board; see *The Temple of the Jedi*, above n 574.

⁵⁸³ At [35]-[36], referring to *United States v Kuch* 288 F (DC 1968).

⁵⁸⁴ At [35]-[36], referring to *Kuch*, above n 583, at 444-445.

from the Star Wars films, and allegedly not from divine inspiration nor revelation, which was similar to the Kuch entity, there was no evidence of ulterior motives in its doctrines nor any sense of insincerity.⁵⁸⁵

Indeed, and of relevance as to how religions may be viewed in a contemporary context, the Board observed that whilst the Society's doctrines were taken from a fictional source, this is a "sometimes more practical means of conveying philosophies applicable to real life."⁵⁸⁶ I contend that this suggests charity law is capable of recognising the practical realities of religion in modern day context. This might give credence to a new belief system and enable it to benefit communities in ways that are appropriate to their specific needs, which more traditional religions may be unable to provide.

My viewpoint finds authority in Adam Possamai's research into novel religions. Possamai suggests that such religions take "account of subjective needs, of emotional communication, of face to face rapport, as opposed to all the cold forms of functioning of the traditional religious institution."⁵⁸⁷ In applying this to Jediism, it can be argued that Jediism fulfils a person's needs. This can occur through expressing themselves on the internet and through forums, with emotional connections made in cyberspace without fear of discrimination or harassment. Indeed, members of Jediism, just as with other new age religions, can create cyber identities and change gender, name and age, in order to create a safe belief construction that provides comfort and support.⁵⁸⁸ This is different from the way in which traditional religions provide their religious outputs to members. It speaks to the contemporary methods of communication undertaken in so many walks of life in current societies, which includes texting, social media apps and internet forums.

Whilst it could be argued that electronic forms of communication fail to recognise the power of face-to-face communication, where, for instance, a priest might give comfort to parishioners or hear confessions, the opposite might be said to be true. Chat rooms and forums form a part of the oral conversation construct. Such liturgy is preserved online, where it can be shared and

⁵⁸⁵ At [38].

⁵⁸⁶ At [38].

⁵⁸⁷ Possamai, above n 575, at 254.

⁵⁸⁸ At 254.

form part of further conversations, adding to support networks and sharing of views and ideas. This creates a new type of face-to-face rapport in the religious environment.⁵⁸⁹ The public benefit of such networks may be undeniable because they echo traditional forms of communication albeit in extended, and generational-appropriate, formats.

Returning to the Board Decision, the Board confirmed, nonetheless, that the Society was self-professedly not sufficiently organised and non-dogmatic. It did endeavour to advance its faith through its website, but the formal structure of learning was not elaborated upon, although the Society did have future plans to establish a Jedi school and a Jedi Temple.⁵⁹⁰ Consequently, the Board concluded that the “belief system is merely a collection of interconnected ideas based on the Star Wars universe, rather than [a] structured, cogent and serious religion.”⁵⁹¹

Nevertheless, the Board did perhaps leave the door open for the Society to reapply for charitable status, observing that “in time Jediism may develop the level of seriousness and structure necessary to advance religion”.⁵⁹² This point is important because this reflects the sincerity given by judicial authority to contemporary religions in a charity context. Charity evolves to meet the societal requirements, as has been discussed in other chapters, and not all conventional religions will meet the needs of contemporary society. Whilst an “invented” religion may not be an obvious provider of charity, there is no reason, in reality, why it should not. This is because it is equally likely to be able to provide spiritual comfort to its followers, just in a different format from that traditionally recognised.

I contend that Jediism may be perfectly placed to provide a multitude of spiritual benefits because it exists at a time of the “loss of traditional security with respect to practical knowledge, faith and guiding norms.”⁵⁹³ Indeed, individuals are often increasingly uprooted or “deprived

⁵⁸⁹ At 254.

⁵⁹⁰ *The Jedi Society Incorporated*, above n 574, at [40].

⁵⁹¹ At [40].

⁵⁹² At [41]. It should be noted that the Charity Commission for England and Wales *Decision of the Temple of the Jedi Order*, above n 574, at [23]-[30], came to a similar conclusion in relation to the lack of sufficient cogency. Whilst the Order borrowed heavily from other world orders, this was not sufficient aggregate to meet the cogency requirement.

⁵⁹³ Possamai, above n 575, at 257, citing Ulrich Beck “Individualization, Institutionalization and Standardization: Life Situations and Biographical Patterns” in Ulrich Beck *Risk Society: Towards a New Modernity* (SAGE, London, 1992) at 127-138.

of the cultural signifiers of traditional culture.”⁵⁹⁴ As a result, traditional methods of finding spiritual comfort and enlightenment may be unsatisfactory or inappropriate. Consequently, finding new methods of spirituality may simply be a reaction to contemporary society and the pressures and changes it places upon its communities. Indeed, it has been observed that in religions such as Jediism, “some science fiction, horror and fantasy narratives can be understood as cultural reservoirs for the construction of religion by spiritual consumers.”⁵⁹⁵

Nonetheless, as observed in the Charity Commission for England and Wales *The Temple of the Jedi Order (TOJO)*,⁵⁹⁶ although interestingly not in the New Zealand Decision, seeking spiritual comfort through electronic means must still comply with public benefit. The Commission did confirm that while the Jedi Doctrine and its services are accessible to the public, such services were focused on the “provision of a support service for the ... members who are in need to help them seek solutions themselves.”⁵⁹⁷ This meant that the focus was too inward, as opposed to the requisite “outward focus on the general public.”⁵⁹⁸ I respectfully assert that the Commission was likely correct to conclude that the TOJO did not demonstrate sufficient public benefit in this matter as it does appear that the pastoral care is self-focused. However, it is not clear how this matter would necessarily be distinguished from pastoral care being offered to a Christian when being granted face to face spiritual counsel by a minister. This too would likely be construed as self-care. Nonetheless, it is still not clear from the evidence given by the TOJO that sufficient public benefit was demonstrated overall on this matter. This is relevant because at a time when religions are falling increasingly under the spotlight to justify their place in the world, the public may be comforted that at least with regard to controversial “new” religions, charity law governance appears stringent in its requirement to establish the overall benefit to society.

Nevertheless, the acknowledgement by the New Zealand Board of the possibility that Jediism might be recognised as a charity is significant for the charitable sector because religions could

⁵⁹⁴ At 257.

⁵⁹⁵ Russell Sandberg “Clarifying the Definition of Religion under English Law: The Need for a Universal Definition” (2018) *Ecclesiastical Law Society* 20 at 144-145, citing Adam Possamai *Religion and Popular Culture: a hyper-real testament* (Peter Lang, Brussels, 2005) at 58.

⁵⁹⁶ *The Temple of the Jedi Order*, above n 574 at [34].

⁵⁹⁷ At [34].

⁵⁹⁸ At [34].

provide benefit to new communities in ways that had not been conceived previously. Indeed, as observed earlier, taking beliefs “from a fictional source is ‘a sometimes more practical means of conveying philosophies applicable to real life.’”⁵⁹⁹ This also reflects the applicability of charity law in a contemporary context, whereby religion might no longer be seen as having a “Christocentric or monotheistic bias”.⁶⁰⁰ This means that religion is more inclusive and may be welcomed in more communities, thus underpinning the ethos of charity generally.

Nonetheless, whilst this Decision demonstrated that there is an apparent move away from the aforementioned “Christocentric or monotheistic bias”, there is evidence that this is not always the case in some jurisdictions. For instance, it has been asserted that the advancement of religion within charity law has been strongly prejudiced towards the Judaeo-Christian religions,⁶⁰¹ and indeed, still continues to be in some jurisdictions. This has led to “an inarticulate drawing upon the traditions of a subset of religious systems in order to formulate a requirement applicable to all.”⁶⁰² Indeed, it was further noted that “defining religion by reference to worship of a deity automatically create[d] a bias against Eastern religions.”⁶⁰³ As a result, such bias can lead to possible religious discrimination at the likely expense of communities, and could be seen as charity failing its communities. It is to this issue that I turn now.

IX. When Cultures Collide

This part of the chapter considers charity law issues arising within Hong Kong, which derives its charity law framework from English principles. I consider the problematic application of English charity law principles to non-Western religious beliefs. This reveals that such methodology “tends to discriminate against non-Western and non-mainstream religion.”⁶⁰⁴

⁵⁹⁹ The Jedi Society, above n 574 at [38].

⁶⁰⁰ Jonathan Benthall, “Scientology’s Winning Streak” (2014) *Anthropology Today* Vol 30 No 1 at 3.

⁶⁰¹ Andrew Iwobi “Out with the old, in with the new: religion, charitable status and the Charities Act 2006” 2009 *Legal Studies* Vol 29 No 4 December at 626.

⁶⁰² At 626, citing PW Edge and JM Loughrey “Religious charities and the juridification of the Charity Commission” (2001) 21 *LS* 36 at 46.

⁶⁰³ At 626, fn 44, citing Charity Law Association Response to the Draft Charities Bill (Main Report) at <http://charitylawassociation.org.uk/wparty040727.html>.

⁶⁰⁴ Pauline Ridge “Religious Charitable Status and Public Benefit in Australia” (2011) *Melbourne University Law Review* Vol 35 at 1075. It should be noted that the submissions made in this chapter extend considerably some

The likely reason being that “religious charity law strongly reflects its historical context and is grounded in a mainstream Protestant Christian paradigm.”⁶⁰⁵ I acknowledge that in charity terms, there are certainly limited materials available relating to this jurisdiction and the advancement of religion. However, it would be a mistake to believe that lack of materials reflects the worth of considering this state’s charity law matters. I assert that actually the opposite is true. The issues arising with regard to the application of the advancement of religion principles within Hong Kong gives rise to concerns as to the potential discriminatory role that Western religious doctrines play in a contemporary charity law narrative. This may lead to communities being undermined, and with that the social support provided by religious groups may be significantly reduced without charitable legitimacy. Consequently, it could be said that English charity law principles are “increasingly ill-fitting to the needs of contemporary society.”⁶⁰⁶ As such, I submit that it is important to highlight such matters and consider how charity law can address such difficulties, which this chapter aims to do. As a result, even though the issues pertaining to Western notions of religion being applied to non-Western notions of religion may be seen to undermine the object of my inquiry, that of reconciling the advancement of religion, this may not be the case. This is because I provide perspectives as to how charity law may be able to address these issues, and thus reconcile the advancement of religion appropriately.

X. Ancestor Worship in Hong Kong

The “law of charities in Hong Kong remains, in many respects, a classic common law affair”,⁶⁰⁷ whereby English charity law principles apply. A key issue with regard to the advancement of religion within the Hong Kong context is the construct of Traditional Chinese Religion (TCR), where ancestor worship sits at its core. This occurs in clan halls called T’ong, where plaques and steles are raised so as to honour the dead ancestors, and their spirits are said to be contained within the monuments. T’ongs are generally upheld by family clans, and membership of clans

materials in Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018) at 181-183 in relation to Ancestor Worship.

⁶⁰⁵ At 1075.

⁶⁰⁶ Rachael PS Leow “The Evolution of Charity Law in Singapore: From Pre-Independence to the 21st Century” (2012) *Trust Law International* Vol 26 No 2 at 90.

⁶⁰⁷ Stefano Mariani “Traditional Chinese Religion trusts in Hong Kong” (2015) *Trusts & Trustees* June Vol 21 No 5 at 538.

is claimed through the family name and a shared lineage from an ancestor; such membership is extensive. Importantly, “TCR can be understood to be the religious dimension of traditional Chinese social and kinship structures.”⁶⁰⁸ Further, the fundamental importance of such culture is firmly embedded within Chinese society, even from Imperial times, whereby the clan “was the basic organizational and juridical unit of society, such that the conceptual and psychological lines dividing the family sphere remain less well defined than in most European cultures.”⁶⁰⁹ This means that ancestor worship was, and remains still, of profound spiritual and cultural significance. Indeed, ancestor worship is “intrinsically tied to the Chinese identity as a communal people, bound by Confucian values to honor the family.”⁶¹⁰ Failing to observe correct deference to the deceased is said to have disastrous consequences for society generally, as well as for the person who has failed in their cultural duty. Further, ancestor worship is not limited to individuals or one family, as has been understood from a European perspective, which is the basis of English charity law principles.⁶¹¹ Consequently, ancestor worship is not without its issues in contemporary times especially when it is viewed from an English colonial law construct, which occurs in Hong Kong. Indeed, it has been said that ancestor worship “still presents one of the greatest obstacles to the progress of Christianity”,⁶¹² suggesting an inherent prejudice against TCR in an originally-colonised state such as Hong Kong.

The burden of English legal principles is certainly felt when considering TCR and the advancement of religion because the general rule is that trusts for the advancement of religion that encompass TCR will not be charitable. The origin of this is to be found in *Ip Cheung Kwok v Ip Siu Bun*.⁶¹³ The heavy weight of English charity law was apparent throughout the Court’s deliberations on the concept of ancestor worship. It was clear that the Court was not able to make a distinction between TCR and Western-based religions, noting that “it is not a common or any God which is worshipped but private ancestors ... which are more comparable to those pertaining to a gift for a private family chapel”,⁶¹⁴ thus not charitable.

⁶⁰⁸ At 539.

⁶⁰⁹ At 539.

⁶¹⁰ Clark G Fobes “Chinese Ancestor Worship and Christianity: A Historical and Contextual Evaluation” (Research paper, The Southern Baptist Theological Seminary, 31 December 2018) at 3.

⁶¹¹ Mariani, above n 607, at 539-540.

⁶¹² Fobes, above n 610, at 2.

⁶¹³ Mariani, above n 607 at 540, referring to *Ip Cheung Kwok v Ip Siu Bun* [1990] HKLR 499.

⁶¹⁴ *Ip Cheung Kwok* at [120], referring to, inter alia, *Gilmour v Coats* [1949] AC 426 and *Hoare v Hoare* (1886) 56 LT 147.

The Court did acknowledge that ancestor worship was “clearly a bulwark in the religious life and social structure of the Chinese”⁶¹⁵. However, it could not be charitable because English law prevented the requisite public benefit being ascertainable, no matter how “socially desirable ancestor worship may have been considered in China.”⁶¹⁶

In addition, the Court also considered the other part of the public benefit test, that being whether ancestor worship benefitted a section of the public. That being that a trust would be charitable if the legatees had been the community at large or a sufficient section of the community.⁶¹⁷ This led to the consideration of the rule set out in *Re Compton*, which was later approved in *Oppenheim v Tobacco Securities Trust Co Ltd*, whereby “even where a group of persons is numerous, if the nexus between their personal relationship to a single propositus or to several propositi, they are neither community nor a section of community for charitable purposes.”⁶¹⁸ In applying the principle from *Compton* and *Oppenheim*, the Court stated that it was “inescapable that a trust for the benefit of the male descendants of Ip Sze Shing ... falls squarely within the ‘single propositus’ test”,⁶¹⁹ which rendered the trust non-charitable. Consequently, it appears unlikely that such cases would meet the charitable requirements of the advancement of religion.

However, Stefano Mariani argues that the continuation of *Ip* as authority on ancestor worship in Hong Kong is “disappointing ... because ... there is much in [the] judgment militating against it being treated as the last word on the matter.”⁶²⁰ It is a convincing argument and one worth considering.

In *Ip*, the Court agreed with the Singaporean Court in *Choa Choon Neoh v Spottiswoode*⁶²¹ that ancestor worship was not charitable because of the clan relationships. The Privy Council in

⁶¹⁵ *Ip Cheung Kwok* at [123], referring to, inter alia, *Gilmour v Coats*, above n 614.

⁶¹⁶ At [123], referring to *Cocks v Manners* (1871) LR 12 Eq 574.

⁶¹⁷ At [125], referring to *IRC v Baddeley* [1955] 572 (HL).

⁶¹⁸ At [129], referring to *Re Compton* [1945] Ch 123 and *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL).

⁶¹⁹ At [134].

⁶²⁰ Mariani, above n 607 at 541.

⁶²¹ *Choa Choon Neoh v Spottiswoode* [1869] 1 Kyshe 216 at [102].

Yeap Cneah Neo v Ong Cheng Neo “approved *Choa’s* case”⁶²² on this matter and *Ip* made reference to this authority also. However, Mariani argues that *Ip* was “decided on its own convoluted facts”,⁶²³ and its reliance on *Choa* and *Yeap* was not appropriate. This was because in *Choa*, “it was common ground that the trust ... was not charitable”,⁶²⁴ and indeed, that Maxwell CJ in *Choa* was “at pains to emphasize that ... this stood on the particular facts of that case, and should not be construed as questioning the validity of a charity for the advancement of Oriental religions in general.”⁶²⁵

With regard to *Yeap*, the Court said that the trust was not charitable because of its perpetuitous nature.⁶²⁶ Consequently, it was argued that the discussions on ancestor worship “was for the public benefit may be regarded as obiter, and in any event, both predated the more generous judicial approach ... adopted in *Bourne v Keane* ... and *Re Hetherington*.”⁶²⁷ In *Bourne*, there was “some judicial consideration of the analogy between ... ancestor worship and Roman Catholic masses celebrated for the dead”,⁶²⁸ and in *Hetherington*, Catholic Masses were said to be for the public benefit.⁶²⁹ However, in *Ip*, the Court referred to *Yeap*, where a Sow Chong house (where a religious ceremony to a deceased husband and the testator) was said not to be charitable because that ceremony “can benefit or solace only the family itself”⁶³⁰ The Court in *Ip*, in reliance on *Yeap*, then noted that such ceremonies were closely analogous to “gifts to priests for [Catholic] masses for the dead”⁶³¹ and not charitable.

Mariani asserts that that determination has been “fundamentally undermined by ... *Re Hetherington* ... that a Mass for the dead was understood to have a public dimension if performed in public.”⁶³² Indeed, *Re Hetherington’s* approach appears to align more closely with *Choa’s* assertion that “[ancestor worship] is agreeable to God ... and its neglect entails disgrace on him whose duty it is to perform it ... and mankind generally.”⁶³³ Further, both

⁶²² *Ip Cheung Kwok*, above n 613 at [103], referring to *Yeap Cneah Neo v Ong Cheng Neo* (1875) LR 6 PC 381.

⁶²³ Mariani, above n 607, at 541.

⁶²⁴ At 541.

⁶²⁵ At 541, footnote 9, referring to *Choa*, above n 621, at 219.

⁶²⁶ At 541.

⁶²⁷ At 541, referring to *Bourne v Keane* [1919] AC 815 and *Re Hetherington* [1989] 2 All ER 129.

⁶²⁸ At 542.

⁶²⁹ At 542.

⁶³⁰ *Ip Cheung Kwok*, above n 613 at [103], referring to *Yeap*, above n 622, at 396.

⁶³¹ *Ip Cheung Kwok*, at [103].

⁶³² Mariani, above n 607 at 542, referring to *Re Hetherington*, above n 627, at 135.

⁶³³ Mariani, above n 607 at 542, citing *Choa*, above n 621 at 218.

types of ceremony “are believed to have spiritual implications transcending the purely personal or familial sphere.”⁶³⁴ Taking this argument one step further, it is asserted that in reality, and “specifically in a Chinese cultural context, the clan, being a fundamental and self-contained unit of social and religious organization, would constitute an important section of society.”⁶³⁵

It is clear that there are issues in applying Western traditions of charity law to Chinese belief systems, not least because it could be argued that “colonial rule ... [has] undermined the agricultural and village community bases of traditional Chinese popular religion.”⁶³⁶ This may have impacted adversely on the ability of religions to act under the umbrella of charity and thus ensure purposes are operating effectively throughout communities. However, I contend, respectfully, that New Zealand jurisprudence may provide a suitable approach in such circumstances, specifically in regard to the issue arising with blood tie nexus, which provides substance to Mariani’s observations in relation to kinship issues found in ancestor worship that it “does not follow that a clan affiliation is susceptible to analogy with an Anglo-Saxon nuclear or extended family.”⁶³⁷ For this, I rely on *Latimer v Commissioner of Inland Revenue*.⁶³⁸

XI. A New Zealand Māori Approach and Hong Kong

This case concerned certain interest payments from a Trust being made accessible to Maori so as to assist their negotiating claims before the Waitangi Tribunal, which took into consideration all of the groundwork relating to research and preparation that was required prior to such negotiations. One of the questions before the Court was whether assistance given to Māori claimants was for public benefit, in spite of the relationship of shared ancestry contained within each claimant group.

Just as Hong Kong was bound by English charity law principles, so too originally was New Zealand, specifically in relation to the test set out in *Compton and Oppenheim*, as mentioned above. However, the Court in *Latimer* approached this matter in a way that was specific to the unique perspective of New Zealand.

⁶³⁴ At 542.

⁶³⁵ At 543.

⁶³⁶ Joseph Bosco “Chinese popular religion and Hong Kong identity” (2015) 14:1 Asian Anthropology at 18.

⁶³⁷ Mariani, above n 607, at 543.

⁶³⁸ *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

Blanchard J observed that there is a shared ancestry for Māori, which would, prima facie, fail the nexus test of *Oppenheim* because public benefit would fail. Nonetheless, this was not a barrier because:⁶³⁹

... the common descent of claimant groups is a relationship poles away from the kind of connection which the House of Lords must have been thinking of in the *Oppenheim* case when it said that no class of beneficiaries could constitute a section of the public for the purpose of the law of charity if the distinguishing quality which linked them together was a relationship to a particular individual either through common descent or through common employment. There is no indication that the House of Lords had in its contemplation tribal or clan groups of ancient origin. Indeed, it is more likely that the Law Lords had in mind the paradigmatic English approach to family relations.

Whilst the test in *Oppenheim* was not undermined, it was evidently not appropriate in the New Zealand cultural context, not least because the House of Lords in *Oppenheim* could not have considered such a context. Indeed, Blanchard J confirmed that charity law “has been built up not logically but empirically”,⁶⁴⁰ suggesting that some elements of charity law are not appropriate in some circumstances; *Latimer* being one example.

Further, his Honour confirmed that the majority decision in *Oppenheim* was criticised in *Dingle v Turner*,⁶⁴¹ where the dissenting view of Lord MacDermott in *Oppenheim* was favoured. In the *Dingle* case, Lord Cross of Chelsea stated:⁶⁴²

In truth 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 the trust is a charity ... It may well be that ... a trust to promote some purpose ... will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and ... on the other hand, a trust to promote another purpose ... will not

⁶³⁹ *Latimer* at [38].

⁶⁴⁰ At [38], citing *Oppenheim*, above n 618, at 309.

⁶⁴¹ At [38], referring to *Dingle v Turner* [1972] AC 601.

⁶⁴² At [38], citing *Dingle v Turner* at 624.

constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.

In application to *Latimer*, Blanchard J confirmed that in “the New Zealand context it is ... impossible not to regard the Maori beneficiaries of this trust, both together and in their separate iwi or hapu groupings, as a section of the public”.⁶⁴³

As a result, English law was put aside to respect New Zealand cultural issues falling outside the English framework. I contend that such an approach could also be applied to the cultural perspectives specific to both Hong Kong in relation to ancestor worship. Whilst English law would still be applicable, *Latimer* shows that there is “ample scope to perfect the adaption of common law to the particular societal character of”⁶⁴⁴ different cultures.

It might be argued that *Latimer* was not an advancement of religion case, and therefore the principles would not apply to religious cases. However, Blanchard J said charity law “has been built up not logically but empirically.”⁶⁴⁵ Therefore, principles might be applied outside of their original context, where appropriate to do so. Indeed, my view finds weight in *Ip*. The Court in *Ip* confirmed that *Compton* and *Oppenheim* were concerned with trusts for the advancement of education, not religion. Nonetheless, the Court understood that the test in those cases was not to be confined to educational trusts,⁶⁴⁶ and could be applied to other circumstances. Consequently, charity law principles are not necessarily confined to specific heads of charity and may be applied to other heads of charity.

I respectfully suggest this may be applicable in circumstances pertaining to ancestor worship. This is because, just as Blanchard J in *Latimer* observed, “it is more likely that the Law Lords had in mind the paradigmatic English approach to family relations”,⁶⁴⁷ as opposed to specific Chinese family relations referred to in *Ip*.

⁶⁴³ At [38].

⁶⁴⁴ Mariani, above n 607, at 544.

⁶⁴⁵ *Latimer*, above n 638, at [38], citing *Oppenheim*, above n 618, at 309.

⁶⁴⁶ *Ip Cheung Kwok*, above n 622, at [130].

⁶⁴⁷ *Latimer*, above n 638, at [38].

If this approach was observed, this would endorse Elias CJ's statement in the Supreme Court case *Re Greenpeace of New Zealand Inc* that charity law is an "area of law which should be responsive to the way society works."⁶⁴⁸ Indeed, if charity law is not cognisant of particular societal circumstances, this "is likely to hinder the responsiveness of this area of law to the changing circumstances of society."⁶⁴⁹ Indeed, her Honour went further, noting the relevance of, inter alia, *Latimer*, observing that:⁶⁵⁰

... the circumstances of the modern ... state may throw up new need for philanthropy which is properly to be treated as charitable ... for example, charity has been found in purposes which support the machinery or harmony of civil society, such as is illustrated ... in ... *Latimer v Commissioner of Inland Revenue* ...

Utilising Elias CJ's view that charity "has been found in purposes which support the machinery or harmony of civil society", I assert, as I have in another chapter, that religion can be said to support the "harmony of civil society" because of its beneficial role within society generally. Therefore, there is authority to support my recommendation to adapt the common law in Hong Kong to take into consideration specific societal characteristics. This would have the benefit of ensuring that religion is able to assist society generally because clans are extensive, thus any personal benefit would be ancillary to the overall public benefit.

This is not the only reason, however, to perfect the adaption of the common law. It has been submitted that there are other valid reasons to do so also. For instance, "the maintenance of ancestral temples and the performance of the attendant rites remain important features of Chinese communal life, in which devout and socially engaged wealthy individuals ... continue to express interest."⁶⁵¹ Indeed, there is evidence that some ancestral trusts hold substantial wealth, and that wealth has been utilised to benefit some Hong Kong village communities. Such benefits include maintaining and upgrading village halls; cleaning a village pond; refurbishing ancestral and village temples; establishing a kindergarten; and maintaining a

⁶⁴⁸ *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 at [70].

⁶⁴⁹ At [70].

⁶⁵⁰ At [70].

⁶⁵¹ Mariani, above n 607, at 544.

sporting stadium that is utilised substantially by villagers.⁶⁵² It might be argued that some of these purposes would not necessarily be charitable, but improvement of communities has been confirmed as charitable,⁶⁵³ thus ancestor worship funds may support charitable endeavours, and as a result, the reconciliation of the advancement of religion would be apparent within this context.

Such commercial benefits echo the views expressed earlier about the relevance of commercialism within religion in a contemporary context, and provide further evidence that the application of Western-based religious charity law may not be appropriate in a number of cultures. This is because it comes at the expense of non-Judeo Christian religious beliefs and may undermine “the machinery ... of civil society” applicable to Hong Kong. Although as the law stands in Hong Kong, such charitable endeavours are left without state recognition, and thus fail to obtain any charitable benefits that may support communities further.

Therefore, I argue that the transplantation of Western laws into a different societal dynamics can cause deeply-held cultural and social observances to suffer, suggesting that the law is unfit for purpose in those circumstances. Charity law, therefore, is likely to fail in its remit to support communities where it is needed. However, options are available to assist the charity sector in such circumstances, as evidenced in New Zealand, although it may be some time before other states follow such examples.

The final matter I address in this chapter also relates to cultural differences between Western-based notions of religion and non-Western based notions of religion in a charity law context. I offer some brief considerations in relation to a specific Islamic institution, that of the waqf, which is a “perpetual charity in the Islamic ethical system”,⁶⁵⁴ and how this institution may provide another avenue for the reconciliation of the advancement of religion.

⁶⁵² Selina Ching Chan “Selling the Ancestor’s Land: A Hong Kong Lineage Adapts” (2001) *Modern China* April Vol 27 No 2 at 273-275.

⁶⁵³ “Community and economic development” Charities Services New Zealand <https://www.charities.govt.nz/ready-to-register/need-to-know-to-register/charitable-purpose/community-and-economic-development/>

⁶⁵⁴ Abdul Hasan M Sadeq “Waqf, perpetual charity and poverty alleviation” (2002) *International Journal of Social Economics* Vol 29 No 1/2 at 135.

XII. Waqf and the Advancement of Religion

Before I begin, it is important to give an overview of waqf (awqaf, plural) and its role within Islam. Islam is a “comprehensive religion that covers all aspects of human life.”⁶⁵⁵ Consequently, the Islamic faith is a complete code of life. As such, it has a successful economic system, and waqf is one of the Islamic economic instruments. It is related to pious, religious or charitable donations, and its conventional meaning is derived “from the canonical Islamic concept, which refers to a special kind of charity given for the purposes of benevolence.”⁶⁵⁶ As noted with regard to Western concepts of charities, waqf refers to charities and gifts that are in perpetuity, thus it has public benefit, which again is a familiar concept for charity in Western culture. There are, however, private awqaf, where, for example, a settlor creates a waqf for their benefit of their children.⁶⁵⁷

Awqaf are cited as underpinning significant societal development, including, inter alia, establishing mosques, educational institutions, and libraries. The benefit of awqaf also extend to non-Muslims, thus it goes beyond religious, cultural, racial and sectarian boundaries. Its overall purpose is to eliminate poverty and to make improvements to the social and economic Muslim ummah (community). Consequently, awqaf have had a fundamental role within Islamic society since the time of the Prophet to modern times.⁶⁵⁸ Indeed, it is said that from an economic view alone the waqf is a powerful mechanism in developing a state because of its underlying charitable framework.⁶⁵⁹ This is because charity underpins a functioning society.

In an earlier chapter, the five pillars of Islam were outlined, and they include zakat, which is obligatory charitable giving and can only be given to Muslim. Waqf is different from zakat

⁶⁵⁵ Masoud Ahmad “Role of Waqf in Sustainable Economic Development and Poverty Alleviation: Bangladesh Perspective” (2015) *Journal of Law, Policy and Globalization* Vol 42 at 118.

⁶⁵⁶ Zia Akhtar “Charitable Trusts and Waqfs: Their Parallels, Registration Process, and Tax Reliefs in the United Kingdom” (2002) *Statute Law Review* 34(3) at 284.

⁶⁵⁷ At 284-285.

⁶⁵⁸ Ahmad, above n 655, at 118.

⁶⁵⁹ Zulkifli Hasan and Muhammad Najib Abdullah *The Investment of Waqf Land as an Instrument of Muslims’ Economic Development in Malaysia* (Paper presented at the Dubai International Conference on Endowments’ Investments 4-6 February, Dubai, United Arab Emirates, 2008) at 1.

because waqf is voluntary charitable giving and can be given to Muslim and non-Muslim.⁶⁶⁰ Therefore, at its most simple form, waqf is a benevolent, or charitable bequest, which enables an individual to bestow goods to Allah, which has civic benefit. In other words, “[t]his call by the Qu’ran to be charitable has been viewed ... by Islamic society to require the facilitation of an institutionalised mechanism for wealth redistribution in an efficient and practical manner, which is Waqf,”⁶⁶¹ which supports the construct of the reconciliation of the advancement of religion in a non-Christian context. However, whilst the Qu’ran, which is the principal foundation of Islamic law, does not specifically refer to waqf, it does stress the importance of charitable giving. For instance, “Lo! those who believe and do good works and establish worship and pay the poor-due, their reward is with their Lord and there shall no fear come upon them neither shall they grieve.”⁶⁶²

This chapter mentioned the similarity between waqf and Western common law notions of charity, and indeed, it has been asserted that the establishment of trusts in England was based on the waqf, after British interactions with Islamic leaders in the Middle East, and adopted it into the English common law.⁶⁶³ Nonetheless, it should be noted that there are some distinctions, and one of the key ones is that Islamic theology prioritises the family. Common law charity, as would be recognised in such jurisdictions as New Zealand and the United Kingdom, on the other hand, excludes provisions for people who are related to the settlor, as propounded in the *Oppenheim* case, to which this chapter referred earlier. However, Islamic theology asserts that giving to family can be charitable because:⁶⁶⁴

A pious offering to one’s family, to provide against their getting into want, is more pious than giving alms to beggars. The most excellent of sadaka (charity) was that which a man bestowed upon his family.

⁶⁶⁰ Paul Stibbard, David Russell and Blake Bromley “Understanding the waqf in the world of the trust” (2012) *Trusts & Trustees* Vol 18, No 8, September at 786.

⁶⁶¹ Mohammed Abdullah Nadwi “Comparing the effectiveness of Waqf and English charitable trusts” (2015) *Islamic Relief Academy* at Foreword.

⁶⁶² At Foreword, citing *The Qu’ran*.

⁶⁶³ Fahad Mohammed Alabdulmenem “Waqf in Islamic Legal System and Trust System in the United Kingdom: A Comparative Study” (2017) *Journal of Law, Policy and Globalization* Vol 61 at 212.

⁶⁶⁴ Stibbard, Russell, and Bromley, above n 660, at 786-787, citing *Abu Fata Mahomed Ishak v Russomoy Dhur Chowdhry* (1894) *Law Rept* 22 Ind Ap 76 (PC), where Lord Hobhouse was citing the Prophet Mohammed but could not justify a family waqf as being charitable because it did not meet English charity law principles.

The House of Lords in *Oppenheim*, nonetheless, stated that such a relationship would negate charitable purpose because, as will be recalled:⁶⁶⁵

... even where a group of persons is numerous, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither community nor a section of community for charitable purposes.

Further differences include the basis of charitable trusts and that of awqaf. Whilst at their core both have as their intention to give up voluntarily assets or property for others, awqaf have their values and beliefs entrenched in religion. Islam places strict restrictions on waqf and connects it to religion and the financial system. Waqf has its origins within the Islamic charitable trust, and it still retains its historical holy nature. Consequently, waqf must operate appropriately within Shari'ah in relation to its construction, structure, administration, objectives, and management.⁶⁶⁶ On the other hand, common law charity is, theoretically, secular in its foundations and free from religious regulation,⁶⁶⁷ although as earlier chapters outlined, their history is found in religious concepts, and it may advance religion as a recognised purpose.

Nonetheless, both waqf and common law charity have had a profound influence on the development of societies, both Western and non-Western, in terms of providing social welfare, advancing religious education, research and providing infrastructure development.⁶⁶⁸ However, the common law does not necessarily recognise waqf as charitable. As a result, this section of the chapter considers the issues related to that, and addresses whether in multicultural democratic societies, continuing to ignore this Islamic charity institution reflects a continued favouring of Western concepts of religion at the expense of non-Judaeo Christian religions, thus perhaps undermining my assertion that the advancement of religion is a reconcilable

⁶⁶⁵ *Ip Cheung Kwok*, above n 622, at [129], referring to *Re Compton* [1945] Ch 123 and *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL).

⁶⁶⁶ Alabdulmenem, above n 663, at 220-221; "shari'ah" is spelt in a variety of ways throughout the resources utilised in this thesis and I utilise the spelling of it as utilised in the appropriate resource.

⁶⁶⁷ At 221.

⁶⁶⁸ At 208.

construct in contemporary society. Indeed, it has been asserted that “case law reveals that ... the power of colonial law and courts ... [has] ... invalidate[d] ... awaqf”⁶⁶⁹ over the years.

Whilst the common law continues to ignore awaqf specifically as being charitable, what cannot be ignored is the ancient history between Islam and England in relation to awaqf, which is only recently coming to light. It is said that the “the world’s first university, Al-Qarawiyin in Fez, Morocco ... was ... based on waqf,”⁶⁷⁰ and that waqf influenced Oxford University, and then later other eminent universities, because that University had its foundations in the Islamic model of waqf.⁶⁷¹ As a result of such historical relationships, I assert therefore that such relationships may provide the foundations for recognising awaqf within the English concept of charity in the future, which would reflect the multi-faith realities of contemporary society. If this were to occur, this would support the object of my inquiry that the advancement of religion is reconcilable in this very specific context, that of an Islamic construct in contemporary Western society, and in doing so, charity would likely be able to provide greater support to many communities as a result of more Islamic entities being able to obtain legal charitable recognition.

XIII. Oxford University and Waqf

It has been submitted that Merton College, Oxford, had waqf at the heart of its constitution and this constitution was the first of its kind.⁶⁷² Further, the constitution was typically followed by additional Oxford and Cambridge colleges.

Merton College’s founder was Walter de Merton, a minister and senior government officer. One of the key aspects of de Merton was his connection with the New Temple. He conducted

⁶⁶⁹ Hang Wu Tang “From Waqf, ancestor worship to the rise of the global trust: A history of the use of the trust as a vehicle for wealth transfer in Singapore” (2018) *Iowa Law Review* 103 (5) at 2278.

⁶⁷⁰ Daniel Rahman “Waqf can empower youths, society” 15 May 2018 *The Star* www.thestar.com.my/opinion/columnists/whats-your-status/2018/03/15/waqf-can-empower-youths-society-when-institutionalised-the-spirit-of-giving-and-caring-can-play-a-bi/#iC72Jb4XxXYRIZCC.99

⁶⁷¹ Sadeq, above n 654, at 135; see also Murat Cizakca *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present* (Bogazici University Press, Istanbul, 2000) at 50.

⁶⁷² Stibbard, Russell, and Bromley, above n 660, at 791, referring to Monica Gaudiosi “The influence of the Islamic law of Waqf on the development of the Trust in England: the case of Merton College” (1987-1988) *University of Pennsylvania Law Review* 136 1231-1261.

his business here, as well as maintaining his wealth within this institution. The New Temple was the English base for the operation of an order called the Knights Templar. This military religious organisation was established in Jerusalem in 1120. By the 13th century, the order had “evolved in to a complex multinational trading empire with major centres of operation in the Middle East and Mediterranean regions.”⁶⁷³ Further, de Merton had significant involvement in discussions with the Pope’s envoy in relation to Sicily, which aided the transference of Islamic culture from Sicily to Norman England.⁶⁷⁴

de Merton wished to educate his nephews, and from that desire, Merton College became an incorporated college; the first of its kind to be created. Of note are some of the features of the founding documentation for the College, which appear to be based on waqf principles, such as specifying the charitable purpose of the Trust; the assignment of the property in perpetuity; and reserving the benefit to his family. In other words, the Trust followed the Islamic practice of supporting his family and also long-term charitable objects. Benefiting family members is, as has been mentioned, an acceptable charitable practice within the waqf framework.⁶⁷⁵

In addition, the documentation set out requirements for student clothing, which for all intents and purposes was a school uniform, which followed similar provisions current at the time in waqf documents. It is said that this was the template for school uniforms. The documentation also set out provisions for forfeiture for bad behaviour and removal of unfit trustees, both of which had similar Islamic law principles.⁶⁷⁶

Nonetheless, it is evident that at no point did de Merton make explicit reference to waqf or that it influenced the documentation; there was good reason for this. This was because Merton College was founded at the time of the Crusades, meaning that “it would not have been wise for a prominent clergyman and government servant to announce his adoption of an Islamic institution.”⁶⁷⁷ Therefore, it is asserted that de Merton had a significant effect on not only esteemed places of learning but on trust law also. This is because “[b]y separating legal and

⁶⁷³ At 791-792.

⁶⁷⁴ At 792.

⁶⁷⁵ At 792.

⁶⁷⁶ At 792.

⁶⁷⁷ At 792, citing Monica Gaudiosi, above n 672, at 1255.

beneficial ownership for the benefit of family members, it may furthermore have had a critical role to play in the evolution of the common law trust.”⁶⁷⁸ Ironically, however, there has been little mention of this fundamental influence on Western notions of law throughout the centuries, perhaps reflecting the historical lack of recognition of non-Western religious concepts in the West which we still see today.

Whilst waqf has at its heart religious aims, education is one of its key objectives, and this is clear from its history. This is evidenced from de Merton’s utilisation of waqf principles in establishing Merton College. Other key beneficiaries of awqaf were the poor and the needy; awqaf were also utilised to provide health services and provide assistance to abandoned animals.⁶⁷⁹ The breadth of Islamic philanthropy therefore echoed the charitable purposes detailed within the Preamble of the Statute of Elizabeth, as mentioned in earlier chapters. It is said, however, that Islamic philanthropy is much broader in its scope than common law charitable trusts.⁶⁸⁰

Regardless of awqaf’s apparent charitable framework, difficulties arise in ensuring that such trusts meet common law requirements of charity, not least in relation to the public benefit test, because the *Oppenheim* nexus test rules out such recognition. The other issue is that as the law stands “English ... charitable purposes are ... incompatible with Islamic charitable purposes”⁶⁸¹ because all Western charitable purposes must be exclusively charitable. However, this has not traditionally been how Arabic “settlers drafted their awaqf.”⁶⁸² Often, awqaf would include charitable and non-charitable purposes that would benefit family.⁶⁸³ A further issue arises whereby Western courts have failed to recognise that “a purpose which is religious in the eyes of a devout Muslim is considered to be a religious purpose under charity law.”⁶⁸⁴ Instead, “the purpose must promote religion, not merely ... secure the approval of the

⁶⁷⁸ At 794.

⁶⁷⁹ At 794.

⁶⁸⁰ At 794.

⁶⁸¹ Tang, above n 669 at 2280.

⁶⁸² At 2280.

⁶⁸³ At 2280.

⁶⁸⁴ At 2280.

Almighty.”⁶⁸⁵ However, in Islamic law, seeking the approval of the Almighty is a religious purpose.⁶⁸⁶

Such systematic failure to recognise key theological differences inevitably caused by transposing inherently different legal principles is disappointing because at its theological heart, waqf is broad in its capacity and capable of assisting many communities, not just Islamic ones. Further, “there is no place in modern multicultural society for treating faiths other than Christian as non-religious.”⁶⁸⁷ Consequently, I contend that for the benefit of multiple societies, charity law should consider seriously the role of waqf within Western concepts of the advancement of religion. Of course, this may not be a popular stance to take. Sharia law appears shrouded in mystery and mistrust in the West as evidenced when, in “2008 the Archbishop of Canterbury raised a media storm by suggesting that sharia law might in some limited respects be recognised by the civil legal system ... that storm ... still blows around.”⁶⁸⁸ Nonetheless, Singapore may provide part of the answer to this issue.

XIV. Singapore and Waqf

Singapore introduced the Administration of Muslim Law Act 1968 (AMLA) to create a more inclusive approach towards the advancement of religion, which included waqf.⁶⁸⁹ The AMLA provided for the regulation of Muslim religious affairs. This included instituting a council, the Majlis Ugama Islam, Singapura (MUIS), which advised and administered matters concerning Islam, generally in relation to marriage, divorce and inheritance. Under MUIS, waqf is described as “the permanent dedication by a Muslim of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable”.⁶⁹⁰ Every waqf must be registered with the MUIS, and its Fatwa Committee then decides on the validity of it. Only Muslim may found a waqf in Singapore, but the beneficiaries need not be Muslim.⁶⁹¹

⁶⁸⁵ At 2280 referring to *Syed Shaik Alkaff v A-G* (1923) 2 MC 38 (Sing) at 44.

⁶⁸⁶ At 2280.

⁶⁸⁷ At 804, referring to Donovan Waters QC “The Advancement of Religion in a Pluralist Society” (2012) *Trusts & Trustees* 17 at 660-662.

⁶⁸⁸ Julian Rivers “The Secularisation of the British Constitution” (2012) *Ecc LJ* at 391.

⁶⁸⁹ Rachael PS Leow “The Evolution of Charity Law in Singapore: From Pre-Independence to the 21st Century” (2012) *Trust Law International* Vol 26 No 2 at 92.

⁶⁹⁰ At 92.

⁶⁹¹ Stibbard, Russell, and Bromley, above n 660 at 801.

The effect of the AMLA “was to relieve some of the strain imposed on a charity framework originating in England and forced to fit into the unique social and cultural history of Singapore.”⁶⁹² This is certainly welcome legislation because it recognises the value of waqf within the social structure of a state. However, the law of charity in Singapore is still limited in its ability to recognise certain religious purposes as being charitable, just as it does in Hong Kong, which no doubt undermines the role of religious charities within that society.⁶⁹³ Further, there is also evidence that the AMLA has had limited impact on awqaf in Singapore, perhaps because, *inter alia*, there are other forms of “Islamic philanthropic purposes aimed at Muslims”.⁶⁹⁴ Indeed, it there appears to be a “preference for settlors ‘to manage their own [aw]aqf without any interference”⁶⁹⁵ that arises from the AMLA governance.

Therefore, even with the progression of legislation in Singapore, notwithstanding its apparent limitations, the English model of charity law is constrained by its ability to recognise some waqf as charitable, especially family waqf, even though the New Zealand case of *Latimer*, as addressed earlier, provides authority for such possible recognition. As it stands, even though the principle of religious freedom is extolled in many jurisdictions, charity law can still limit some expressions of religion, and invariably these are non-Judaeo Christian models of religion. This is an unfortunate development in our multicultural societies, and it is hoped that charity law governance can evolve in a more appropriate manner to meet the needs of such societies because the charity sector is likely poorer for such limitations.

XV. Conclusion

The positioning of this chapter was significant because in order to reconcile the black letter law assertions, and the arguments made in relation to waqf, it was important to have made a number of socio-political submissions prior to this in the thesis in order to gain an understanding of

⁶⁹² Leow, above n 689, at 93.

⁶⁹³ See generally Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018) at chap 10.

⁶⁹⁴ Tang, above n 669 at 2283, referring to Shamsiah Bte Abul Karim “Contemporary Shari’a Compliance Structuring for the Development and Management of Waqf Assets in Singapore” (2010) *Kyoto Bull of Islamic Area Stud* 3-2 at 144.

⁶⁹⁵ At 2283, citing Karim, above n 694 at 144.

how the law sits within these specific frameworks. As a result, the justiciable nature of the common law decisions, and those pertaining to waqf, became more inherently defensible once one had a clearer understanding of the relationship between law, society and politics.

In considering the assertions in this chapter, I highlight some disconnects between ancient and modern concepts of charity in contemporary society. That being said, in relation to matters such as commercialism and novel belief systems, credibility can be demonstrated in instances where courts have recognised as charitable some of these challenging circumstances. Indeed, as confirmed in this chapter, charity law, through the necessity of public benefit, requires that these charities can meet stringent legal criteria and, as a result, will benefit societies as their objectives determine, thus reducing burdens overall on society. Therefore, concerns relating to, for instance, commercialism and religion may be more readily eradicated because what has been demonstrated is that modern trappings of religion are actually compatible with the commercial world, and are meeting the needs of contemporary society. For example, by assisting with reducing debt and by enabling charities to be competitive.

Whilst such approaches may not necessarily be the perceived traditions of religion, religion now embraces many aspects of modern-day society. This is evidenced, for example, in megachurches embracing sales strategies to disseminate their message to the public.⁶⁹⁶ The public generally now accept such commercial tactics, whilst charity law ensures that a church's charitable objectives must still be met so as to satisfy charity law requirements. Indeed, "[c]ommercialism is so characteristic of organized religion that it is absurd to regard it as disqualifying."⁶⁹⁷ Whilst Hong Kong appears to reject commercialism within religion, I have demonstrated that within other jurisdictions, religious commercialism may benefit the charity sector by enabling charities to operate more effectively, for example, by enabling charities to compete more effectively for funding. It is respectfully suggested that Hong Kong might wish to consider the Australasian jurisprudence in a more favourable light so as to benefit the charitable sector.

⁶⁹⁶ Jack Barbalet, Adam Possamai and Bryan S Turner "Public Religions and the State: a Comparative Perspective" in (eds) Jack Barbalet, Adam Possamai and Bryan S Turner *Religion and the State: A Comparative Sociology* (Anthem Press, London, 2011) at 282.

⁶⁹⁷ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) ("Scientology case")* [1983] HCA 40 at [45].

Nonetheless, this chapter also highlighted other disconnects, whereby the gaps are not so easy to bridge and issues remain. For instance, with regard to the dominant position of Judaeo-Christian religious legal principles in communities that do not focus traditionally or culturally on such religions, Hong Kong in relation to TCR. The other matter that was also raised in this chapter where cultural differences arose was in relation to the Islamic institution of the waqf.

What these discussions illustrate is that the predominance of Judaeo-Christian-centric notions of charity and religion could undermine significant communities that may have benefitted from the assistance provided by religion. This in turn undermines the role of religion within society itself, further marginalising it. This is unfortunate when religion faces such challenges within contemporary society.

Marginalising a religion means marginalising its religious following because religion is not just a belief system, as demonstrated in earlier chapters. For many, religion is an identity, family, community, way of life and law. Charity law should be able to support such communities, but it is apparent that it may be failing with regard to some religious aspects because of the disconnects between law and religion. I respectfully suggest that such matters are addressed on a governance and legal level, perhaps as Singapore did with the implementation of the AMLA, at least with regard to waqf. Indeed, historical relationships between English universities and waqf may provide the foundations for such future charitable recognition.

I contest that such changes are important because charity law must progress to ensure that it meets the evolving needs of societies, as pointed out by Elias CJ in the *Greenpeace* decision, whereby charity law is an “area of law which should be responsive to the way society works.”⁶⁹⁸ As the English model of charity law stands in relation to some aspects of advancement of religion, it is not easy to say that it is responding to the way in which society works, as was urged by Elias CJ. Consequently, it is more difficult to justify the rationale for religious bodies in those circumstances when they appear to be at odds with common law charitable parameters.

⁶⁹⁸ *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 at [70].

I continue the thesis' examination of the advancement of religion in the next chapter by critically reviewing the economic relevance of religious charities within a social and political context.

Chapter 6. Religion and Economics

I. Introduction

This thesis' aim is to examine critically charity law's sociopolitical-legal reconciliation of the advancement of religion. I progress this analysis in this chapter by focusing on religion and its relationship with economics, and I look to understand the economic relevance of the advancement of religion, which sits within a socio-political context. This chapter was relevant to continue the critical examination because it looks to embed religion within the socio-political framework to which I have made reference earlier in the thesis; economics being a subset of that framework. I argue that this chapter aids my object of reconciling the advancement of religion because it illustrates, objectively, the social relevance economically of religion within charity. Economics was selected as a pertinent argument because charity does not sit in isolation from the narratives that can determine state policies, which includes charity law, and thus the advancement of religion.

What I confirm in this chapter is that economics and religion have long been associated, and further that because of this association, the high economic value of religious charities to many societies, democratic or otherwise, is key in aiding a plethora of communities through the work of religious charities. Consequently, I assert that the advancement of religion can be reconciled from a secular perspective, that of being an economically-viable construct for the benefit of society generally. From a secular perspective, I argue that giving religious charities an economic value is relevant. This is because in many capitalist societies as might be recognised in, for example the United States and the United Kingdom, it may be that when something is valued, it is often given a monetary value, and that monetary value is then important to society because it is a method of measuring worth. In giving religious charities a value, their worth, apart from the arguably unmeasurable spiritual benefits, may be seen as being of "worth" to society, therefore.

It should be noted that the legal decision-making process as to whether a purpose fits within the legal rubric of advancement of religion is not subject to economic scrutiny. Nonetheless, this chapter's specific focus on economics within religion has relevance because charity law cannot be considered in isolation from social and policy narratives. Consequently, I provide, inter alia, a global overview of religion and economics; critically examine the role of Faith-

Based Organisations (FBOs); and analyse the relevance of the Islamic institution of zakat on an economic level. Overall, I provide tangible evidence as to the objective significance of religion within charity, which may have relevance also within a secular context.

Economics and charity may be considered to be equally as strange bedfellows as commercialism and charity, as discussed in an earlier chapter. Indeed, for many, equating economics and charity is distasteful. For example, at least in Christian terms, money is said to be the root of all evil. Further, it might be seen as demeaning a belief system by reducing it to mere economics. Nonetheless, and perhaps surprisingly, at least from a Christian perspective, “Jesus says more about money than heaven, hell, or prayer, and there are over 2,300 verses pertaining to money in the Bible”.⁶⁹⁹ Evidently, money “occupies an important place in what we consider to be God’s inspired words.”⁷⁰⁰

Further, generally speaking, religious participation, and particularly a conviction in the existence in hell, heaven and the hereafter, is said to have positive impact on the development of economics. This is because religious beliefs are said to increase efficiency by promoting beneficial human characteristics such as integrity, hard work and prudence. It has been argued that religious compensations, such as forgiveness of a person’s sins, and being granted salvific reward as a result of charitable endeavours, will encourage religious believers to work conscientiously and to carry out good works.⁷⁰¹ Further evidence suggests that religious beliefs are linked to an increasing levels of education and, therefore, knowledge.⁷⁰² Consequently, with higher levels of education generally come higher socio-economic levels of living.

It is important to note that in the previous chapter I did consider some matters in relation to economics. Specifically, this was set within a defined narrative relating to particular case law to assess critically the relationship between commercialism and religious charities. However, this chapter takes a broader approach. The narrative of this chapter frames religious bodies within the economics of states and communities, endorsing the fundamental importance of religious charities within communities.

⁶⁹⁹ John Cortines “God’s Call to Give” 2017 *The Christian Lawyer* Vol 13 No 2 Fall at 9.

⁷⁰⁰ At 9.

⁷⁰¹ Rachael M McCleary “Religion and Economic Development” 2008 *Policy Review* Apr/May at 49.

⁷⁰² At 48-49.

It should be noted that whilst this chapter does not take an explicit legal focus, it is implicit from the arguments presented in this chapter that the laws pertaining to charity will be influenced by the socio-political-economic frameworks that encase religion within communities.

I acknowledge that my approach is not a common one to take. However, this approach is important in order to consider the overarching socio-economic position of religious charities as part of this thesis' overall deliberation of how the law endeavours to reconcile the advancement of religion as a legally-recognised head of charity. Further, this approach fits within a sociological description of legal theory that refers to law being described in economic terms.⁷⁰³ In other words, the common law can be understood, in part, as “pursuing efficiency and have developed into systems of welfare maximization.”⁷⁰⁴ Welfare maximisation could be said to be part of the ethos of charity. Indeed, the legal rules of charity can be said to be selected, inter alia, “with respect to their effect on the wellbeing of individuals in society.”⁷⁰⁵ Therefore, this legal theory of charity law is relevant because “it is useful to know about the costs and benefits of implementing a certain rule or reaching a certain judicial decision.”⁷⁰⁶ Consequently, it contributes to the religious charity narrative by providing additional legitimacy for the advancement of religion in a socio-economic context.

One of the reasons that the approach being taken in this chapter is not a common one may be because of the general unwillingness to place an economic value on matters of morality and faith, hence the distaste mentioned earlier. Although, as also mentioned earlier, and considered in the previous chapter, religion and money have long been associated. So perhaps it is now time to consider the realities of this and provide an additional framework by which to assess a tenable value of religious charities.

⁷⁰³ Jan M Smits *The Mind and Method of the Legal Academic* (Edward Elgar Publishing Limited, Cheltenham, 2012) at 22-23.

⁷⁰⁴ At 23.

⁷⁰⁵ At 63.

⁷⁰⁶ At 66.

The limited times this type of approach has been taken may also be indicative of the fact that actually this is a relatively new area of research. Consequently, “what we do not know dwarfs what we do know about the economics of charity.”⁷⁰⁷ It is also worthwhile noting that much of the research available at the time of writing this thesis had limited specific commentary on religious charities per se, although such charities were included generally in the research. The available research often referred to FBOs; non-governmental organisations (NGOs); and religious organisations, many of which are charities or carry out charitable endeavours. Further, these terms were often used interchangeably and referred specifically to religious charities or religious not-for-profit (NFP) organisations. It should be noted that “NFPs” is also used interchangeably for charities. Consequently, in some instances, some of the arguments may be academic due to some assumptions or analogies that have had to be made in relation to religious charities generally.

One final point needs to be made in relation to the limited availability of research in relation to economics and charity. The lack of substantive research resulted in this chapter critically assessing what may be perceived as an eclectic selection of jurisdictions, which includes the United Kingdom, Germany, the United States and some Middle Eastern jurisdictions. Such an approach is merely indicative of the research available for consideration at the time of this thesis. What this does indicate, therefore, is that more research is required within this area to understand fully the real economic value of religious charities, not only within the charity sector, but more importantly, to civil society as a whole.

Nevertheless, what I demonstrate is the economic relevance of religious charities, demonstrating a key function of religious charities within many societies, democratic or otherwise, and thus providing substantive evidence that the advancement of religion can be reconciled from this specific socio-political framework. Such secular evidence is relevant because it provides tangible evidence to the non-religious communities who might suggest that intangible benefits have limited value, or are even meaningless, in an increasingly (allegedly) secular world. At a time when society becomes more vocal about the relevance of religion

⁷⁰⁷ Clive D Fraser “Faith, Hope and Christian Giving: How Religion Explains Giving when Warm Glow and Impure Altruism Do Not” (17 April 2018) <http://dx.doi.org/10.2139/ssrn.3164327>, citing JA List “The Market for Charitable Giving” 2011 J Econ Perspectives 25(2) at 177.

within charity, tangible evidence is likely to become paramount in order to counteract pressure being placed on states to assess the perceived value of this charitable purpose.

It might be argued that knowing the socio-economic value of religion does not reflect the true value of religion generally because religion's benefits are often ethereal in their construct. However, such demonstrable evidence provides an objective perspective, which might be persuasive for governments when considering policy approaches in relation to religions and their governance, which includes charitable governance. Further, such socio-economic value enables faith leaders to demonstrate quantifiable worth to communities, which then has a meaningful value, as opposed to considering religion's general ethereal worth, which for many is of limited relevance.

In order to examine the relationship between economics and religion, and to aid my assertion that the advancement of religion can be reconciled within this specific framework, I first provide an overview of religion and economics generally, in order to contextualise the overall narrative. It should be noted that focus is given to recent research emanating from the United States, although comparisons will be made to other jurisdictions where research is available to assess the international economic and religious trends. The focus is given to the United States because the available research is detailed, comprehensive and recent.

The research has also highlighted connections between religion, economics and civil society and therefore I addresses, briefly, how charity sits within civil society, because it is apparent that some of the legal principles of charity are embedded within this particular framework. This section of the chapter is relevant, therefore, because it contextualises the economic and social framework of charity within civil society, and it also echoes some of the legal theory material in relation to framing charity law within society. I refer to "civil" society generally as a society that is part of a recognised democratic society.

I then consider the relationship between economics, FBOs and social welfare from a Western society perspective. Finally, I consider the economic position of Islam within the charitable construct. I contend that this latter point is just as important as considering Western perspectives because of the relevance of Islam within modern-day multicultural societies; religious charity discussions cannot be limited to Western notions of faith. Indeed, these

discussions are judicious not only because of the challenging times for religions generally, but also specifically for Islam on an international scale.

II. Religion and Economics – An Overview

I begin the examination by providing some general background information pertaining to religion and economics that will contextualise the later assertions that religious charities can be reconciled within an economics construct.

It has been observed that decisions with regard to charitable giving, which include not just financial gifts but also gifts of time, are closely related to “orientations toward divine guidance in financial decision making.”⁷⁰⁸ Taking the United States as an example, in 2008 over 89 per cent of households gave money to charity, and religious organisations were the most common cause to which households gave. Even in the midst of an economic downturn in 2008, said to be the worst since the Great Depression, religious groups received USD 107 billion. The second most common cause to receive gifts, educational organisations, ‘only’ received USD 41 billion.⁷⁰⁹ Indeed, it is said that religious spending is generally resilient, and likely immune from such downturns. This is because places of worship, and schools and hospitals with religious affiliations continue operating, and consequently, continue to spend money. Further, despite the downturn in the economy since 2008 in the United States, faith-based spending, for example, on community social programmes, has increased by 3 times over the last 15 years.⁷¹⁰

Financial crises may actually increase religious participation and thus religious good in the community. Research conducted in Indonesia illustrated how an Asian financial crisis led to increased religious participation through Koran and Islamic school attendance and through the increase in religious social organisations thus ensuring greater assistance with social relief. This increased religious intensity was not because there was more time for religious activities,

⁷⁰⁸ Lisa A Keister *Faith and Money: How Religion Contributes to Wealth and Poverty* (Cambridge University Press, New York, 2011) at 79.

⁷⁰⁹ At 79; see also Russell N James III and Keely S Jones “Tithing and religious charitable giving in America” (2011) *Applied Economics* 43 19 at 2442.

⁷¹⁰ Gene Veith “Religion’s economic impact” (20 September 2016) <http://www.patheos.com/blogs/geneveith/2016/09/religions-economic-impact/>.

rather it was a direct response to economic distress, where people increased labour and religious beliefs.⁷¹¹

One might argue that this information is of limited value because some is dated, and therefore such economic relevance may not be of such significance in contemporary times. However, research from the United States in 2016 suggests that this data is still relevant today because little has changed with regard to the United States' economic relationship with religion.⁷¹²

In 2016, the total given by American individuals, bequests, foundations and corporations specifically to religious charities totalled USD 122.9 billion, which was a 1.8 per cent increase from 2015. By way of comparison, educational charities, which were second as recipients of donations, received a 'mere' USD 59.9 billion.⁷¹³ The United Kingdom provides similar statistics, whereby religious charities were joint first recipients of donations.⁷¹⁴ New Zealand echoes these statistics, where donations worth NZD 447.9 million were made to religious activities, which represented 32.6 per cent of the overall amount donated in 2014; this was the sector that received the highest donations. Culture and recreation, the sector that received the second highest amount of donations, received nearly 19.3 per cent of the total donations.⁷¹⁵ A 2017 Report revealed similar trends, whereby religious charities received the highest levels of donations in comparison with all other groups.⁷¹⁶

⁷¹¹ Sriya Iyer "The New Economics of Religion" (IZA Discussion Papers 9320, Institute for the Study of Labor 2015) at 30-31.

⁷¹² Brian Grim and Melissa Grim "The Socio-economic Contribution of Religion to American Society: An Empirical Analysis" [2016] *Interdisciplinary Journal of Research on Religion* 12 3; Religious Freedom and Business Foundation <https://religiousfreedomandbusiness.org/1-2-trillion-religious-economy-in-us>; Brian J Grim "Religion may be bigger business than we thought. Here's why." World Economic Forum 5 January 2017 at <https://www.weforum.org/agenda/2017/01/religion-bigger-business-than-we-thought/>; Joe Carter "How much economic value does religion provide America?" Action Institute Blog (15 September 2016) <http://blog.acton.org/archives/89009-how-much-economic-value-does-religion-provide-america.html>.

⁷¹³ Una Osili "What influences American giving?" *The Conversation* 25th July 2018 <https://theconversation.com/what-influences-american-giving-78800>. Numbers are in billions of inflation-adjusted USD.

⁷¹⁴ Fraser, above n 707, at 3.

⁷¹⁵ Mark Cox, Fiona Stokes, and Hugh Dixon "Giving New Zealand: Philanthropic Funding 2014" 2015 *Philanthropy New Zealand* December at 11.

⁷¹⁶ John McLeod "The New Zealand Cause Report - Shape of the Charity Sector" *JBWere* (March 2017) at 16 <https://www.jbwere.co.nz/assets/Uploads/JBWereNZ-CauseReport-March2017-DigitalVersion.pdf>; see also John Edens "New Zealanders give generously – almost \$3 billion a year – but rarely talk about" it (10 July 2017) <https://www.stuff.co.nz/business/94560462/new-zealanders-give-generously--almost-3-billion-a-year--but-rarely-talk-about-it>.

Returning to the United States, research indicates that religion is a substantial contributor to the United States' financial and societal power, and this research is said to be the first of its kind to frame religion within such a context.⁷¹⁷ For instance, the research shows that religion provides USD 1.2 trillion of social and pecuniary worth to the overall economy of the United States on an annual basis. This can be equated to being the global fifteenth main national economy. At the time of the research, this was “more than the global annual revenues of the world's top 10 tech companies, including Apple, Amazon and Google. And it's also more than 50% larger than the global annual revenues of America's six largest oil and gas companies.”⁷¹⁸

In terms of what this means for United States' economy alone, religious organisations such as churches, mosques and temples of every denomination employ many thousands of people, and they buy billions of dollars' worth of services in a wide variety of communities. In addition, the congregations of these organisations spend USD 84 billion on their operations, which include paying staff and purchasing goods and services. Such spending occurs within the local community, thus supporting local communities.⁷¹⁹

In addition, the economic relevance of religious organisations, religious schools and universities is significant. By way of just one example, St Benedict's Catholic Preparatory School in New Jersey prepares 530 boys for college, and then for later years. These boys are generally living in some kind of poverty, and are from minority groups. In an area prevalent with gang violence, this work enables nearly 100 per cent of its students to attend higher education establishments, including a considerable amount of students being able to attend Ivy League schools. Graduates also return to the community and make a positive impact as a result. Uriel Burwell did just this after graduating from university. Returning to his old community, he built a substantial number of reasonably priced homes; rehabilitated more than 30 houses;

⁷¹⁷ Kelsey Dallas “Economic impact of religion: New report says it's worth more than Google, Apple and Amazon combined” (14 September 2016) <https://www.deseretnews.com/article/865662454/Economic-impact-of-religion-New-report-says-its-worth-more-than-Google-Apple-and-Amazon-combined.html>.

⁷¹⁸ Grim, above n 712. Grim's methodology is discussed in Kelsey Dallas, above n 717; note the study gives an educated guess as to the economic worth of religion thus it is thought that the study has underestimated the value rather than overestimated it.

⁷¹⁹ Grim.

and obtained more than USD 3 million to construct further reasonably priced homes in the locale.⁷²⁰

One might argue that this is not related to religious charities per se, rather this may include religious organisations generally. It is not, however, easy to differentiate between the two when it is evident that religious organisations offer significant charitable services within communities, thus charity work is being undertaken all the while under the umbrella of religion. For instance, the congregations of United States religious groups deliver 130,000 alcohol assistance courses, which includes the Saddleback Church “Celebrate Recovery” programme. This programme has assisted nearly 30,000 people over 25 years. In addition, congregations also provide many thousands of programmes to help those without work, and this includes the Church of Jesus Christ of Latter-day Saints. This church provides employment assistant facilities nationally and internationally.⁷²¹ The assistance provided to such communities as a result of the charitable works is likely difficult to measure but has assisted literally thousands of people and families without impinging financially on the state.

Such assistance provided by religious organisations is also said to run counter to various stereotypes that are levelled at religions, for instance, some religions may be said to discriminate against certain sections of the community due to alleged sexual practices that may result in diseases. HIV/Aids is one such example having originally been seen as being part of the homosexual community. Those within such communities have been subject to much vilification as a result by some religious groups. Nonetheless, over 25,000 congregations provide some level of assistance to people with HIV/AIDS. This means for every 46 people with the illness, there is one HIV/AIDS ministry. Indeed, in 2017, on the weekend of 9/11, a substantial number of churches in Chicago held free testing programmes for HIV, amongst other diseases.⁷²²

Specific religious charities and organisations are said to “add another \$303 billion of socio-economic impact to the US economy each year. These includes charities such as the Knights

⁷²⁰ Grim.

⁷²¹ Grim.

⁷²² Grim; “HIV” refers to Human Immunodeficiency Virus - a virus passed through the blood stream; “AIDS” refers to Acquired Immune Deficiency Syndrome - an advanced form of HIV; see generally New Zealand AIDS Foundation <https://www.nzaf.org.nz/>.

of Columbus, whose 1.5 million members respond to disasters and other human needs.”⁷²³ In addition, religious groups are said to be responsible for operating much of the United States health care system, and the Catholic Church accounts for one in six hospital beds in that country. Such outreach by religious organisations creates the ‘halo effect’ from which communities will benefit in a variety of ways, through provision of, for example, child care services, education, employment and social events.⁷²⁴ Many such services will fall under the umbrella of charity.

The halo effect is evidenced in a number of specific ways. For instance, it has been observed that religious participation increases life expectancy by up to 7 years; and improves health through lowering blood pressure and stronger immune systems. It also has a positive impact on reducing juvenile delinquency, increasing school attendance and positively increasing the chances of graduating from high school. Such factors, therefore, provide economic benefits for communities generally. This is because burdens imposed on states to pay for court processes, subsequent incarcerations and rehabilitation programmes, are reduced. In addition, improved employment will also reduce welfare costs. Further, adults with religious leanings are not as apt to carry out crimes, and thus to rely on welfare and social support, in turn reducing the burdens on the state.⁷²⁵

This contemporary snapshot of religion within the United States economy illustrates how religion and charity are fundamentally intertwined. Without religion, and its charitable outreach, there would be significant economic cost within communities, and the country generally, thus providing evidence that the advancement of religion may be reconciled from this economic framework.

Research from some other democratic states echoes that of the United States. For example, research produced by the Australian Charities and Not-for-profits Commission (the ACNC)

⁷²³ Grim.

⁷²⁴ Marcia Segelstein “The Economic Benefits of Religion” National Catholic Register (27 September 2016) <http://www.ncregister.com/blog/segelstein/the-economic-benefits-of-religion>; see also Alex Matthews-King “Religious people live four years longer than atheists, study finds” The Independent (13 June 2018) <https://www.independent.co.uk/news/health/religion-live-longer-muslim-jewish-christian-hindu-buddhist-life-expectancy-age-a8396866.html>.

⁷²⁵ Jeffrey Dorfman “Religion is Good for All of Us, Even Those Who Don’t Follow One” Forbes (22 December 2013) <https://www.forbes.com/sites/jeffreydorfman/2013/12/22/religion-is-good-for-all-of-us-even-those-who-dont-follow-one/#713abffb64d7>.

also confirms the economic value of other charitable sectors, albeit in more general terms, and with mention of the position of religious charities within the sector.⁷²⁶ The research revealed the economic significance of sector itself, finding that Australian charities employ more than one million people and have approximately two million volunteers. Of relevance is that the research revealed that the Australian charitable sector favoured the following purposes over and above other types of charitable purposes: religion; education; research; and health.⁷²⁷ This echoes the research undertaken in the United States.

Research provided by the Charities Aid Foundation (CAF) in the United Kingdom revealed a similar picture, showing that religious entities were the recipients of the highest total donations amount in 2016, receiving 20 per cent of the total donation amount, with overseas and disaster relief receiving the second highest amount at 10 per cent.⁷²⁸ What was also interesting within the CAF data was the levels of trust associated with the charitable sector. CAF acknowledged that only 50 per cent of the population believed that charities were trustworthy. For a sector that aims to be transparent and accountable, this appears to be a low level of trust. However, what is significant is that whilst only 50 per cent of the population believed that charities were trustworthy, the highest proportion of donations were made to religious organisations.⁷²⁹ This reveals the perceived value of religion generally, such that even when the public are faced with limited trust in a sector, one part of that sector – religion – is favoured over others, suggesting that the public find religion more trustworthy than other causes.⁷³⁰

In addition, research suggests that those individuals who have a belief system are considerably more likely to make contributions to charity than secular individuals. This is because, as considered in earlier chapters, faith is said to motivate people to make acts of generosity⁷³¹

⁷²⁶ “Economic impact of charity sector revealed” Governance Institute of Australia (8 December 2015) <https://www.governanceinstitute.com.au/news-media/news/2015/dec/economic-impact-of-charity-sector-revealed/>.

⁷²⁷ “Economic impact of charity sector revealed”.

⁷²⁸ “CAF UK Giving 2017 “An overview of charitable giving in the UK” 2017 Charities Aid Foundation April at 13.

⁷²⁹ “CAF UK Giving, at 16.

⁷³⁰ The CAF research does not make any comment on this particular point.

⁷³¹ John Bingham Religion ‘makes people more generous’ *The Telegraph* (9 June 2014) <https://www.telegraph.co.uk/news/religion/10885180/Religion-makes-people-more-generous.html>.

because religious affiliation is closely affiliated to the benevolent provision of time and money.⁷³²

New Zealand research also revealed similar trends, whereby religious individuals were said to give more to charity than non-religious individuals because of experiencing subjective well-being as a result of doing so.⁷³³ Indeed, studies have revealed that tithing⁷³⁴ encourages greater variety of giving overall. This practice is determined as a pro-social behaviour and pro-social behaviour is said to be a conduit for increased pious endowments, as well as increased positive relationships with non-religious charities.⁷³⁵

Evidence of religious pro-social behaviours is illustrated through research into the Evangelical Pentecostal Charismatic Movement (EPCM). This movement is linked to the much of the global expansion of Christianity. The community aspect of the EPCM encourages and creates greater prosperity, increases upward mobility and provides a greater sense of civic responsibility. Consequently, the EPCM has been at the root of multiple initiatives including welfare institutes for vulnerable members of the community, as well as providing business loans and tackling employment issues. Such initiatives extend further than just providing assistance. They tackle directly fiscal growth and societal transformation.⁷³⁶

Therefore, it can be argued that not only do people generally value religious charities over and above other charities, having a religious belief is also likely to increase the amount given to charities, religious or otherwise, overall.

Studies such as these provide compelling evidence of the material contributions made to societies by religious belief. This evidence is important because many faiths feel marginalised by government policies in contemporary times. Therefore, this economic evidence should be

⁷³² Ida Berger “The Influence of Religion on Philanthropy in Canada” (2006) *Voluntas* 17 at 130.

⁷³³ Chris G Sibley & Joseph Bulbulia “Charity explains differences in life satisfaction between religious and secular New Zealanders” (2015) *Religion, Brain & Behaviour* 5 2 at 97.

⁷³⁴ Tithing means giving 10 per cent or more of one’s income to religious organisations, as addressed in Russell N James III and Keely S Jones “Tithing and religious charitable giving in America” (2011) *Applied Economics* 43 19 at 2441 and generally throughout the article.

⁷³⁵ James and Jones at 2445.

⁷³⁶ Peter S Heslam “The Rise of Religion and the Future of Capitalism” (2015) *De Ethica. A Journal of Philosophical, Theological and Applied Ethics* Vol 2:3 at 59-60.

valuable to policymakers in determining religious societal secular and tangible benefits, particularly within a charitable context. Charitable governance will ensure that funds raised through religious endeavours benefit communities as determined by rules of law, thus assisting with public confidence in the sector. As a result, I assert that this evidence underpins the object of my inquiry, that of reconciling the advancement of religion, and it is evidenced here with regard to the economics framework that I have been examining.

I have made much reference to some democratic societies and the beneficial economic impact of religious organisations and charities on those societies, but in order to contextualise the relevance of this economic impact within a democratic society, I need to step back and consider what underpins charity within civil society before returning to the significance of economics and charities. As I mentioned earlier, I refer to “civil” society generally as a society that is part of a recognised democratic society.

III. Charity and Civil Society

Law must connect to its contemporary place within society, and charity law is not exempt from this. Earlier chapters confirm that charity law is underpinned by the concept of public benefit, which means that legally-recognised charities address contemporary social circumstances in an appropriate and sufficient manner. Consequently, legally-recognised heads of charity, which includes the advancement of religion, are “essential to establishing and sustaining an equitable, inclusive and stable society.”⁷³⁷ In other words, “to promote a truly contemporary interpretation of the public benefit is to promote civil society.”⁷³⁸

It could be asserted that public benefit should not be found if a religion, for example, reinforces sectarian differences. This might be said to emphasise divisions and promote inequalities in communities. In the alternative, it could be asserted that, in reality, religious charities enrich “the texture, health and general good of society, promoting diversity rather than stultifying it by protecting homogeneity.”⁷³⁹ The latter view is perhaps most pertinent in contemporary

⁷³⁷ Kerry O’Halloran “Charities, civil society and the charity law reviews on the island of Ireland” 2004 Policy & Politics Vol 32 No 2 at 263.

⁷³⁸ At 263.

⁷³⁹ At 263.

multicultural and multi faith civil societies when growing voices seek to silence religions in many regards.

How then does public benefit sit within a civil society? The concept of civil society can have a variety of meanings. It can mean the behaviours produced as a result of a society, such as trust, reciprocity, tolerance and inclusion. These traits add to the economic success and social capital of civil society. A civil society can come about through the meeting of certain preconditions, such as an effective rule of law, freedoms of speech and association. Civil society can mean having a desirable state of society, where, for example there is free public education and health care. Finally, civil society can be viewed by its composition. This might include religious organisations, clubs and movements, and community-based organisations.⁷⁴⁰ However one interprets civil society, the concept seems to be based on the free association of people pursuing aims that complement the public benefit efforts of the state, and thus resulting in a more “cohesive and engaged body politic.”⁷⁴¹

I argue, therefore, that charity law is a facilitative framework that promotes civil society, and that is so even if I just focus on the economic impact of charities generally. Charity comprises the largest component of the NGO sector, and charity lends itself well to promoting civil society. This is because charity law facilitates the work of charities through the principle of public benefit. The public benefit ethos underpins charity’s mission to improve social circumstances through redistributing goods and funds. Religious charities fulfil this mission through their teachings, outreach and provision of services, to name but a few of their offerings. As a result, religious charities “address the issues of fundamental concern and facilitate the growth of civil society.”⁷⁴² In just economic terms alone, religious charities, as this research demonstrates, can help achieve some harmony in civil society through their public benefit, even in the face of increasing criticisms and societal alienation. Consequently, the growth of civil society can be promoted.⁷⁴³

⁷⁴⁰ At 264, referring to J Bothwell “Indicators of a healthy civil society” in J Burbridge (ed) *Beyond prince and merchant: Citizen participation and the rise of civil society* (International Institute of Cultural Affairs, Brussels, 1997) at 1-2.

⁷⁴¹ O’Halloran, above n 737, at 264.

⁷⁴² At 266.

⁷⁴³ At 266.

Now I have contextualised the economic and social framework of charity within civil society, I will consider the role of FBOs and their place within the fabric of a civil society; I do this specifically in relation to social welfare from 2 Western democracies, England, as part of the United Kingdom, and Germany. Such organisations support numerous communities through their delivery of social welfare, thus are important economic actors within civil society, hence their consideration within this research. The research contrasts FBOs in England with Germany to gain an understanding of the economic impact in the differing state approaches.

IV. FBOs and Social Welfare

One of the issues facing FBOs in contemporary democratic society in relation to the welfare services they provide, especially if government-funded, is ensuring that an FBO remains faithful to its religious heritage and traditions, whilst at the same time ensuring that it complies with government bureaucracy. This can include observing contractual obligations, policies and practices within the sector.⁷⁴⁴ Further, it has been noted that many governments “do not follow and measure the scope of FBO activities”,⁷⁴⁵ which in essence means it is difficult to understand the true economic value added to society by these organisations. Earlier in the chapter, the research conducted in the United States revealed some of the true economic worth of FBOs, but outside of that there has been an obvious paucity of any similar research, certainly pertaining to jurisdictions outside the United States.

Nonetheless, some recent qualitative research on a number of countries⁷⁴⁶ does shed some light on this area. It illustrates that FBOs remain of real relevance in the delivery of social welfare. As a result, it is submitted that FBOs and their charitable endeavours continue to facilitate the growth of civil society. This, as will be demonstrated, underpins the thesis’ premise that the advancement of religion is a central part of civil society, and as such I can reconcile the

⁷⁴⁴ Wilma Gallet “Confused Identity: What Makes Faith-Based Organisations Faith-Based?” Ethos EA Centre for Christianity and Society (10 April 2017) <http://www.ethos.org.au/online-resources/engage-mail/confused-identity-faith-based-organisations>.

⁷⁴⁵ Amos Zehavi “Religious Supply, Welfare State Restructuring and Faith-Based Social Activities” 2013 Political Studies Vol 61 at 568.

⁷⁴⁶ I consider England and Germany to contrast the two approaches of the states. Other countries in this research included the Netherlands and Israel. Of brief note, and in general terms, the Netherlands reflected the approach of Germany, and Israel reflected the approach of England. As a result, it was deemed pertinent to focus on the research from England, as part of the United Kingdom, and Germany because both are recognised as democratic societies

advancement of religion as a charitable purpose through an economic framework as part of a civil society. I begin by considering FBOs within England.

V. England and FBOs

The role of FBOs in providing social welfare fell significantly after the Second World War due to the post-war policies that expanded public services.⁷⁴⁷ However, the 1990s saw a resurgence of FBO welfare services under Conservative and Labour leadership. John Major's Conservative Government created the Inner City Religious Council (ICRC). The ICRC enabled discussions within faith groups that were linked to the Government, and as a result encourage faith-based contributions within urban regeneration projects. Subsequent Labour governments also supported this approach, expanding such initiatives institutionally and with further funding.⁷⁴⁸

Whilst it was evident that governments supported such initiatives, what was not measured was the level of public support of FBOs and these initiatives. Nonetheless, what can be gleaned is how much such services were worth to governments. For instance, the financial worth of the provision of FBO welfare assistance in the south-east of England by the state amounted to GDP 12.9 million.⁷⁴⁹ Consequently, it can be argued that governments endorsed FBOs to provide social welfare through this funding. This assertion is given weight by evidence provided by government reports recognising the FBOs' capacity to deliver highly effective services. This was because of "their social capital, highly motivated leadership and infrastructure".⁷⁵⁰

Further, there is evidence to show that governments have progressively depended on marginal FBOs to deliver publicly-funded services. In addition, state partnerships with faith leaders, such as Islamic leaders, have been encouraged because they are seen as a way of tackling

⁷⁴⁷ Zehavi, above n 745, at 568, referring to A Dinham *Faiths, Public Policy and Civil Society* (Palgrave Macmillan, London, 2009).

⁷⁴⁸ At 568, referring to A Zehavi "The Faith-Based Initiative in Comparative Perspective: Making Use of Religious Providers in Britain and the United States" (2008) *Comparative Policies* 40(3) 331-351.

⁷⁴⁹ At 568-569, referring to South East England Faiths Forum "Economic Impact Assessment of Faith in the South East" (WM Enterprise, London, 2010).

⁷⁵⁰ At 569; see chap 8 for discussions on the unique religious framework that enables FBOs, and similar bodies, to provide successful social work.

religious zealotry in some sections of the community.⁷⁵¹ Indeed, it has been asserted that “[f]aith communities have a new found importance as key civil players in the Government’s agenda which centres on localism, devolution of power, citizen choice, and community based service delivery.”⁷⁵² As a result, I conclude that FBOs offer a positive socio-economic impact within these communities, thus supporting the object of my thesis that the advancement of religion can be reconciled, and specifically here from an economics perspective.

Nonetheless, it has been observed that in England, governments appear reluctant to look systematically at the impact of FBOs on their local economies.⁷⁵³ This reluctance may stem from legitimate concerns about evaluating moral communities solely in economic terms. However, as I have already asserted, providing a secular and objective tool by which to measure impact is likely to benefit the religious sector, and the charitable sector also, because overall the impact appears to be positive. Another reason for the reluctance is perhaps because of the difficulty of measuring the true economic impact when one considers, *inter alia*, the number of volunteers that operate within FBOs; the thousands of hours given by volunteers; and the numerous services provided by FBOs.

However, there may well be a way to assess the economic contribution and social return on investment of FBOs, or places of worship on their communities. For instance, one could consider the direct economic upturn or downturn in a local community after the building of, for example, a mosque. This would be measurable quantitatively. Although this would not take in to consideration the power of faith and doctrine that encourages support within the community. Faith can act as a community of people, across multi-faiths, or inter faiths, or it can act as a single faith, or as a congregation. All of which assist in communities, thus providing some kind of economic output.⁷⁵⁴ However, that kind of economic output is likely to be difficult to determine. Indeed, as was noted about the 2016 United States research, those figures were said to be conservative, illustrating the difficulties of assessing true economic

⁷⁵¹ Zehavi, above n 745, at 568-569.

⁷⁵² Carl F Stychin “Pluralism, Equality and the Challenge of Faith-Based Services” (2014) *Journal of International and Comparative Law* at 142, referring to Jesse Norman, *The Big Society: The Anatomy of the New Politics* (University of Buckingham Press, 2010).

⁷⁵³ Daniel Singleton “Faith-based organisations and local economic impact. Why do we not know more about how faiths shape the world around us?” www.publicspirit.org.uk.

⁷⁵⁴ Singleton; chap 8 provides some insight as to why FBOs and religious groups are successful in this matter.

value. Certainly, the lack of effective studies appears now to be being acknowledged,⁷⁵⁵ and it is the recommendation of this thesis that such fundamental research would be opportune, and of significance to states, communities and the charitable sector.

Nonetheless, what has become evident from some of this research, and pertinent to this thesis, is that the motives for FBO initiatives that were supported by both Conservative and Labour governments stemmed from deeply religious convictions. It was asserted that the resurgence of FBOs within communities was actually a reflection of broader trends, those trends being a resurgence in religion generally. Not least because of strongly religious leaders who were influencing social policies at the time. Indeed, the “influence of the church is ... central to English constitutional history”,⁷⁵⁶ as well as to modern times. For instance, the religiously-inclined individuals Tony Blair and Gordon Brown rose high within their political hierarchies. In addition, there was a marked disassociation with radical socialism, and a move towards ethics-based socialism that led New Labour to a more religious-orientated approach.⁷⁵⁷ The Blair years were also noted as expanding state-funded religious schools. This led to an uncomfortable socio-political situation, whereby that Government increased equality to lesbian and gay communities, and that created conflict with a number of religious groups’ moral views. This approach by the government of the day had its groundings in the ethos of civil society, whereby faith was seen as having a fundamental position in public undertakings.⁷⁵⁸ In other words, this was a “distinctive view of civic religion that sees religion as contribution to the creation of a more dynamic civil society and the development of a more democratic political culture.”⁷⁵⁹

What this tells us is that religion, welfare and politics cannot be isolated from each other. Unfortunately, it is beyond the scope of this thesis to consider in any more detail these complex relationships. However, it is unlikely to be a coincidence that, in economic terms, the value of

⁷⁵⁵ Singleton.

⁷⁵⁶ Stychin, above n 752, at 142.

⁷⁵⁷ Zehavi, above n 745, at 569, referring to A Giddens *The Third Way: The Renewal of Social Democracy* (Polity Press, Oxford, 1998); P Routledge “Labour Revives Faith in Christian Socialism” *The Independent* (22 May 1994) at 4; M Bevir “New Labour: A Study in Ideology” (2000) *British Journal of Politics and International Relations* 2(3) 277-301; and A Zehavi (2008), above n 748.

⁷⁵⁸ Stychin, above n 752, at 145.

⁷⁵⁹ At 145, referring to John Annette “Faith Communities, Communitarianism, Social Capital and Youth Civic Engagement” (2011) *Ethnicities* 11 at 383-384.

FBOs in England was recognised implicitly as politics took a more religious stance, thus providing evidence that the advancement of religion can be reconciled through this economic and political framework because the value of religious charities as FBOs to English communities was recognised and endorsed by the government of the day.

VI. Germany and FBOs

In contrast to that of England, the role of FBOs providing welfare services in Germany appears to be shrinking.

Prior to the Second World War and in the subsequent years, the German welfare model was motivated by the Roman Catholic principle of subsidiarity; this created a pivotal place in society for faith groups to provide welfare services. However, as the years went on, secularisation and greater demands on welfare services presented challenging times for FBOs as economic times took a downturn. This was because of reduced church membership and a reduction of independent resources. This decrease in church membership also had a knock-on effect of reducing a particular state tax. Revenue from church tax (Kirchensteuer) dropped as church-goers reduced in numbers, and this reduced the amount of revenue collected by the churches. This tax had funded, *inter alia*, social services. Further, growing competition from non-FBO welfare providers placed considerable pressure on FBOs. This was evidenced in the number of full-time employees falling from 528,694 to 434,504 from 1998 to 2008 within the Catholic Caritas and Protestant Diakonie.⁷⁶⁰ It is said that FBOs do still play a role in providing welfare services, but increasing competition for contracts and diminishing resources present a bleak future for the role of FBOs within welfare generally within Germany.⁷⁶¹

The question then arises as to what the impact has been on German society as FBOs and their services diminish. The research conducted on Germany does not provide an answer about this point. However, what can be surmised, if one looks to the recent United States research, is that there is likely to be an overall negative economic impact on communities, not least in terms of increased unemployment and the reduction in taxes being paid to the government; these two

⁷⁶⁰ Zehavi, above n 745, at 571-572. Catholic Caritas and Protestant Diakonie were Germany's two largest faith-based social welfare providers; both are considered charitable organisations.

⁷⁶¹ At 572.

factors alone represent substantial economic losses to communities. Consequently, it appears that FBOs in Germany are not positioned or encouraged to provide support as actively in communities as FBOs are within the United States and, indeed, England.

Whilst it is not argued that secularisation as whole will be detrimental to Germany, or to states with similar approaches, such as the Netherlands and Australia, this thesis has demonstrated that, at least on an economic level, those states are likely to be poorer, thus providing evidence of the value of the advancement of religion from an economics perspective, and supporting the object of my inquiry. Further research, however, is required to consider this matter, just as has occurred in the United States. Only then can policymakers and lawmakers consider objectively the value of religious charities for their individual states.

This chapter has so far focused generally on the Western Judaeo-Christian economic religious impact, but this ignores the relevance of Islam within the charitable construct. Islam is important to consider because the charity narrative cannot just be framed in the Western construct of belief, especially in contemporary multicultural societies. Such a consideration is timely because of the challenging times for religions generally, but also with regard to Islam on an international scale. The news outlets and social media are alive with commentary on Islam, and much of it is negative. This leads to fear of religion, especially Islam; disenfranchisement of Muslim communities; and, at its most extreme, can lead to violence within communities. Thus, social changes and economic pressures are raising issues of social justice, equity and security, and I maintain that Islam is likely to be constructively influential on the social and political economics of states, thereby supporting the object of my inquiry that the advancement of religion can be reconciled from an economics perspective. As a result, I now consider the economic relevance of Islam within the charity paradigm, and I begin by introducing the relationship between Islam and charity and thus providing the foundations for my assertions in relation to Islam and the object of my inquiry later in the chapter.

VII. Islam and Charity – An Introduction

It should be noted, and in a similar fashion to earlier in the chapter, that there is a dearth of research in relation to the specific economic value of Islam within communities. Nonetheless, I endeavour to provide a snapshot of the relevance of Islam within the charity framework. By way of brief introduction, there are distinctions between Muslim and Christian civilisations

which date back to the foundations of their faiths. Christianity developed as a consequence of the expansion of the Roman Empire, and thus Roman law. The Empire had a cohesive legal code and system. Accordingly, Christianity was not required to provide an additional system of law to govern daily lives of its citizens and its believers. Christian citizens complied with Roman law, and with time, non-religious laws.⁷⁶²

Islam arose through an alternate route. Muhammad had to establish a religious and a social, partisan, and fiscal society. Islam provided, and emphasised, the obligation to its believers to comply with Shari'a, Islamic law. As a result, Islam regulates believers' beliefs; behaviour; economics; politics; and social affairs.⁷⁶³ As has been mentioned earlier in the thesis, Islam is both a religion as well as a socioeconomic system. The system is founded on the following core pillars - Shahada: faith; Salah: prayer; Zakāt: charity; Sawm: fasting; and Hajj: pilgrimage to Mecca. These 5 basic acts are considered mandatory by Muslims.⁷⁶⁴

Marx memorably referred to religion as “the opium of the people”;⁷⁶⁵ this was not meant as a compliment. He remarked that the true liberation could only be achieved through the elimination of religion, because it was “the illusory happiness of the people.”⁷⁶⁶ His view may have changed, however, if he could have observed how many, in contemporary times, are wielding “the power of faith in the service of emancipating the disenfranchised classes by combining theological beliefs with modern socialist ideas.”⁷⁶⁷ For instance, in Iran, an Islamic country, this approach was apparent in the debates of Mohammad Nakhshab, the Party of the

⁷⁶² Jean-Phillipe Platteau “Religion, politics, and development: Lessons from the lands of Islam” (2008) *Journal of Economic Behaviour & Organization* 68 at 333.

⁷⁶³ At 333, referring to Avner Greif *Institutions and the Path to Modern Economy: Lessons from Medieval Trade* (Cambridge University Press, Cambridge, 2006) at 206 and T Kuran “Why the Middle East is economically underdeveloped: historical mechanisms of institutional stagnation” (2004) *Journal of Economic Perspectives* 18(3).

⁷⁶⁴ Adam Bukowski “Social Role of Alms (zakat) in Islamic Economics” 2014 *Ethics in Economic Life* Vol 17 No 4 December 2014 at 124 and “5 Pillars of Islam” Wikipedia https://en.wikipedia.org/wiki/Five_Pillars_of_Islam accessed 23 August 2018; it should be noted that there are numerous spellings of zakat, with or without accents, throughout the variety of research available. This thesis utilises the common spelling of “zakat”.

⁷⁶⁵ Siavash Saffari “Charity or Mass Mobilization? Public Religion and the Struggle for Economic Justice” in Peyman Vahabzadeh (ed) *Iran's Struggles for Social Justice – Economics, Agency, Justice, Activism* (Palgrave MacMillan, Cham Switzerland, 2017) at 66, referring to Karl Marx *A Contribution to the Critique of Hegel's Philosophy of Right*, translated by A Jolin and J O'Malley (Cambridge University Press, London and New York, 1982) at 131.

⁷⁶⁶ At 66, referring to Marx, above n 765, at 131.

⁷⁶⁷ At 66.

Iranian People; Ali Shariati Mazinani, a revolutionary and sociologist; and Mahmoud Taleghani, a theologian, an Islamic campaigner, an democratic activist and a senior religious leader.⁷⁶⁸ This approach was additionally the main creed of organisations that included the People's Mojahedin,⁷⁶⁹ and it continues to influence the works of devout people who undertake initiatives that focus on equality and relief of poverty.⁷⁷⁰

Remaining within Iran, by way of example, it has been observed that there has been a push for economic liberalisation since the 1990s, and with that in increase in "NGOization of social services."⁷⁷¹ However, with this push has come a steady State reduction of security being provided to the indigent. This has led to the increase of the appeal of charity amongst the pious and FBOs. In a 2008, it was estimated that almost 75 per cent of all Iranian social welfare NGOs were established by religious people or organisations. One can see the importance of religion in this regard when comparing the same statistics for instance in Egypt, which amounts to 20 per cent, and the United States, which amounts to 18 per cent.

What this reflects is a broader shift within the Middle East generally to a proliferation of similar FBOs, with a focus on religious charity. This is a result of political reforms and economic liberalisation across the geographical area, and indeed, many religiously-based charities that carried out social welfare operations were established following the Islamic Republic's neoliberal change.⁷⁷²

An example of this is a student organisation in the Sharif University of Technology, Tehran, which has over 500 volunteers. They provide various welfare services to vulnerable youth;

⁷⁶⁸ At 66.

⁷⁶⁹ "The People's Mojahedin Organization of Iran (PMOI), also known as Mujahedin-e-Khalgh (MEK), is the largest and longest-standing Iranian opposition group with a five-decade history of struggling for freedom and democracy in Iran. The PMOI/MEK is also part of the National Council of Resistance of Iran (NCRI), a large coalition of dissidents and organizations that support democratic regime change in Iran." About the People's Mojahedin Organization of Iran (PMOI/MEK) <https://english.mojahedin.org/about-iranian-opposition-pmoi-mek>.

⁷⁷⁰ Saffari, above n 765, at 66.

⁷⁷¹ At 74.

⁷⁷² At 74-75, referring to Masoumeh Bagheri, Fatemah Noughani, and Housein Moltafet "Formation of Voluntary Associations in Iran" (2008) *The Indian Journal of Social Work* 69(1) at 87; and Gerard Clarke "Faith Matters: Faith-Based Organizations, Civil Society and International Development" (2006) *Journal of International Development* 18(6) at 841 and 842.

vulnerable women; and others affected by poverty. The organisation's maxim is a philosophy of the first Shi'i Iman that "all persons bare [sic] responsibility towards their society".⁷⁷³

The relevance of Islam within the charitable welfare forum is not just apparent in the Middle East. In the United Kingdom, during Ramadan alone, the Muslim Charities Forum estimated that Muslims across Britain donate approximately GDB 100 million in this one small period. This ensures a wide variety of charitable works can be delivered off the back of such generosity.⁷⁷⁴ Such charitable generosity during Ramadan has also been observed, by way of example, in Tampa, Florida where the economic impact of this religious period is two-fold. The fasting that is required does mean a possible reduction in consumer expenditure, but the breaking of the fast is financially beneficial to communities. Charities can expect to increase their donations substantially during this time, perhaps by up to a third of their yearly income,⁷⁷⁵ thus providing substantive evidence of the economic value of religion within the charity framework, thereby supporting the object of my inquiry that the advancement of religion can be reconciled, and specifically in this particular context.

I noted earlier that zakat, which is almsgiving, or charity, is one of the 5 Islamic pillars. In earlier chapters I also referred to zakat within the contexts of tithing and the rule of law. I now consider this specific form of Islamic charity and its socioeconomic place within the religious construct. This is timely because not only is zakat an important tool in the charitable narrative but zakat is also "going through a period of innovation and critical re-examination".⁷⁷⁶ My re-examination forms part of the wider discourse as to how this critical religious doctrine may be utilised more effectively, "making the transition from idealized religious and historic models into operational institutions that can meet the very real challenges of the present."⁷⁷⁷ This chapter forms part of this wider narrative and demonstrates that religion within charity is a reconcilable construct.

⁷⁷³ At 75, referring to IAPSRs Catalogue The Iman Ali Popular Students Relief Society.

⁷⁷⁴ "Give safely to charities this Ramadan" The Charity Commission for England and Wales <https://www.gov.uk/government/news/give-safely-to-charities-this-ramadan>.

⁷⁷⁵ Tierra Smith "Ramadan having an economic impact on local charities, businesses" *Tampa Bay Times* (12 May 2018) <http://www.tampabay.com/news/business/economicdevelopment/ramadan-having-an-economic-impact-on-local-charities-businesses/2328175>.

⁷⁷⁶ Jennifer Bremer *Zakat and Economic Justice: Emerging International Models and their Relevance for Egypt* (Third Annual Conference on Arab Philanthropy and Civic Engagement June 4-6 Tunis, Tunisia 2013) at 52.

⁷⁷⁷ At 52.

VIII. Zakat

Whilst it is acknowledged that Western notions of religions, such as those espoused by Christianity, are enshrined in charity, as evidence in earlier chapters, it is said that such charity is based more on a voluntary basis, whereas zakat is more rigidly prescribed. It is considered to be the duty of pious Muslims to give to those in poverty. Consequently: ⁷⁷⁸

... in some Islamic economies strongly based on Islamic principles given by Allah to Muhammad, with the prime example of Pakistan, zakāt is imposed by law and is not considered a charity but more of a duty. ‘The commandment to establish zakāt is mentioned [in the Qur’an] more than 100 times, usually in conjunction with salah (prayer), as two means of purification’.

Whilst zakat is said to purify the heart, it is also concerned with economic justice. Thus, zakat is seen as improving poverty, and fulfilling an important role in wealth redistribution from the rich to the eight classes of beneficiaries stipulated in the Qur’an.⁷⁷⁹ Its objective, therefore, is to assist the needy, the indigent, and the poor.⁷⁸⁰ This echoes the first *Pemsel* head of charity, that of the relief of poverty. Here, poverty is a broad term that can encompass the needy, the impotent, and the indigent, as well as those suffering from financial hardship. However, zakat clearly finds its ethos in religion as opposed to the general charitable public benefit found in the relief of poverty. Nonetheless, it is said that during the early days of Islam, zakat was utilised to eradicate poverty, thus suggesting that this Islamic construct supports my argument that the advancement of religion, through religious charities, is reconcilable because zakat is said to provide economic justice.

Further confirmation that this Islamic principle is reconcilable from a religious charity perspective is evidenced where it is asserted that zakat is said to relate directly to Islamic governance and the welfare of the people because it is a pillar of Islam. This in turn underpins the concept of a civil society, which was addressed earlier. Its relevance in social economics

⁷⁷⁸ Bukowski, above n 764, at 124, referring to M A Quraishi *The Institution of Zakat and its Economic Impact on Society* (Islamic Finance into the 21st Century: Proceedings of the Second Harvard Forum on Islamic Finance, Centre for Middle Eastern Studies, Harvard University, Cambridge, Massachusetts 1999).

⁷⁷⁹ Adamu Ummulkhayr; Rafidah Mohamad Cusairi; and Musa Yusuf Owoyemi “Zakah Administration and its Importance: a Review” (2016) *Journal of Humanities and Social Science* Vol 21 Issue 6 Version 8 June at 115.

⁷⁸⁰ Bukowski, above n 764, at 124.

has been recognised by many societies, so much so, a number of states have implemented measures to ensure the collective administration of zakat, either through government-backed, or voluntary organisations. This is evident in countries such as Malaysia, Pakistan, and Indonesia, and even in non-Islamic states, including the United Kingdom, the United States, and South Africa. It has been asserted that those states are faring better in terms of controlling poverty than those without such provisions.⁷⁸¹

Unfortunately, there are limited verifiable records which confirm the real dollar amount that zakat generates, but anecdotal evidence suggests that the sums are significant, ranging from several billion dollars, to tens of billions of dollars.⁷⁸² Whilst there is limited specific data on the overall specific economic value of zakat on a socioeconomic scale, there is much evidence of its general benefits within a number of communities. In addition, zakat is said to have a multiplier effect, or also referred to as halo effect, as discussed earlier. This is because it increases a society's employment rates and levels of income, and as this happens, so standards of living increase, leading to increasing amounts of zakat being collected.

Other benefits have been recorded, for example, in Brunei, where asnaf (zakat recipients) are provided with food and shelter; the shelter can also include construction, repair and rental. In addition, asnaf are provided with education up to higher degrees; medical expenses; disaster relief; and business capital. Where asnaf own their own land, or have suitable homes, they can be provided with rent, and assistance with bills.

Other states also report socioeconomic benefits of zakat. For instance, the reduction in poverty in Indonesia is said to amount to 10.79 per cent as a result of zakat.⁷⁸³ In Kano, a northern Nigerian city, the Hubshi Commission, a state-supported zakat administration, reported it spent NGN 7.3 million as zakat on 397 indigents in 2015. The recipients received debt relief;

⁷⁸¹ Ummulkhayr et al, above n 779, at 116.

⁷⁸² Bremer, above n 776, at 51.

⁷⁸³ Ummulkhayr et al, above n 779, at 117, referring to R Abdullah *Zakat management in Brune Darussalam: A case study* (The 7th International Conference The Tawhidi epistemology: zakat and waqf economy, Bangi, 2010); and EA Hasham & S El-Sha'er "Can zakat help to enhance financial inclusion? Case Study Egypt" (2015) *International Journal of Education and Research* 3(3).

established businesses; medical assistance; and travel assistance. It has been reported that its inhabitants have benefitted substantially from zakat such as this.⁷⁸⁴

It is certainly true that zakat can relieve poverty in the short term. However, focusing purely on such short-term charitable ventures can actually reduce the value of zakat. The aim being to create a society that promotes equitable living. This suggests zakat is perhaps not the panacea for all social ills. One might argue that this should be charity's overall aim regardless of the vehicle being utilised, which clearly can include zakat. Unfortunately, it is beyond the scope of this thesis to address the complex issue of how charity may encourage poverty, but I can consider how zakat can be utilised to improve long term social issues.

One example can be seen in Tafahna al-Ashraf, an Egyptian village that transformed itself from being within poverty to thriving through zakat and systematic reinvestment over 30 years. Its process of transformation could be used as a model of success for other projects. Some of its key success features involved strong local direction and leadership. This was because the project was administered mostly by the community. Secondly, there was engagement with the local population by those in charge. Thirdly, the project began with income-generating activities, and shares of the income were invested to undertake additional programmes. Fourthly, the aim was always for the future of the village. It has been reported that no villagers are now on an income low enough to receive zakat, and the zakat generation now focuses on supporting the neighbouring poor and needy students, 3000 of whom receive zakat to assist with their studies.⁷⁸⁵

However, the success of this village is not widely known, and neither has it been widely replicated,⁷⁸⁶ although the research does not elucidate on why this might be. Perhaps, like many aspects of zakat, and its administration and initiatives, zakat is still shrouded in mystery to the non-Muslim world, as much of Islamic practice remains, even in this multi-cultural

⁷⁸⁴ At 118, referring to SA Ashafa "The administration of zakah in Lagos and Ogun states" (2014) *Research on Humanities and Social sciences* 4(21); SM Ibrahim and A Shaharuddin "In search of an effective zakat institution management in Kano State, Nigeria" (2015) *1 Journal for Studies in Management and Planning* (7); and HN Wali "Utilization of zakat and Islamic endowment funds for poverty reduction: A case study of Zakat and Hubshi commission, Kano State – Nigeria" (2013) *Journal of Economics and Sustainable Development* 4 (18).

⁷⁸⁵ Bremer, above n 776, at 67-68.

⁷⁸⁶ At 67-68.

world. This is unfortunate because zakat, as a charitable tool, offers a bridge to join the apparently ever-growing social chasm between the Christian West and the Islamic East.

Nonetheless, there are some other zakat success stories. There is evidence that some states are achieving long term social successes by implementing novel approaches in the utilisation of zakat. For instance, in Indonesia zakat institutions are blending zakat funds with funds from other sources. One such combination has occurred by adding waqf funds. Waqf has been discussed in a previous chapter, but for the present purposes, waqf is a unique institution within Islam, and is a “voluntary charity which is strongly encouraged within Islam”.⁷⁸⁷ Further, it is said to be “endowed for a charitable purpose to be held in perpetuity and stands out as one of the greatest achievements along the history of Islamic civilization.”⁷⁸⁸ It is relevant to note, as has been mentioned earlier, waqf is different from zakat in that waqf is voluntary charitable giving, and further, it can be given to Muslim and non-Muslim.⁷⁸⁹ This reflects its value within society and thus may provide further evidence of the Islamic charitable constructs supporting my assertion that the advancement of religion is reconcilable within an economic framework.

Returning then to the matter of blending zakat and waqf funds, there is a benefit in such a process because the investment part of waqf administration can be important in increasing socially-equitable and financial opportunities, as the numerous charitable undertakings are subsidised. For instance, a waqf-established land bequest might be utilised to facilitate local businesses, with subsequent revenue being reinvested in to healthcare and education for those families, as well as training workers, and other purposes that may support the equity and development of those communities. Interestingly, such models were common in medieval awqaf (plural of waqf). For example, a mosque or a hospital would often be bordered by businesses that were established with waqf assets on waqf property. The businesses would provide income to support the mosque or hospital. Contemporary financial management schemes would offer wider and more creative types of funding and financing to leverage off the asset base of waqf through zakat institutions,⁷⁹⁰ thus, in theory, would be of great value to

⁷⁸⁷ Mochammad Arif Budiman “The Significance of Waqf for Economic Development” 2014 *Equilibrium* Vol 2 No 1 June at 20.

⁷⁸⁸ At 21.

⁷⁸⁹ Paul Stibbard, David Russell and Blake Bromley “Understanding the waqf in the world of the trust” (2012) *Trusts & Trustees* Vol 18, No 8, September at 786.

⁷⁹⁰ Bremer, above n 776, at 57.

many communities and supports the object of my inquiry that religious charities can be reconciled through socio-legal frameworks, and specifically here, through an economic framework, that being a subset of a social framework.

IX. Management of Zakat

The key to zakat, therefore, is effective management to ensure a positive socioeconomic impact, although this is not always so easy to achieve. States do play a significant part in the operation of zakat in many Islamic-majority countries, and indeed, in “contrast to the other pillars of the Islamic faith ... zakat is established by law in sixteen of the world’s forty Muslim-majority countries.”⁷⁹¹ However, this does not mean that such legislation makes zakat legally-mandatory. For example, Egypt collects zakat through a number of state-owned entities. However, zakat is said to be voluntary. That means that individual methods of collecting zakat are commonly utilised, especially through mosques.

In circumstances where zakat is obligatory, a state will gather it; this occurs in Pakistan and Saudi Arabia. However, even if states do collect zakat, other mechanisms are also invariably utilised to collect it, and despite there being formal collection systems available, individuals may make direct donations as part of ensuring their religious obligations.⁷⁹² Such variety in the means of collection means that accurate economic figures relating to zakat are going to be difficult to assess.

Regardless of the issues with its collection, there is evidence that there are greater innovative forms of zakat administration through non-state channels than through state channels. This is especially so in Islamic-minority states, including the United Kingdom and the United States. Whilst it is difficult to build an accurate picture of such processes, research from the Islamic-American Zakat Foundation in the United States showed that by 2010, there were 11 organisations with a total of USD 46.7 million in assets, and those funds had annual growth rates of 10-59 per cent.⁷⁹³

⁷⁹¹ At 58, referring to Russell Powell “Zakat: Drawing Insights for Legal Theory and Economic Policy from Islamic Jurisprudence” (2009) University of Pittsburgh Tax Review 7 at 59.

⁷⁹² At 59.

⁷⁹³ At 59.

The Middle East is also seeing new models of zakat emerging; Egypt has two such models. The first being Lafakr.com, which translates as “no poverty”. Its purpose is to stimulate bequests; encourage people to volunteer; and encourage partnership with other charities. Lafakr.com makes no specific reference to zakat, but its processes suggest it is zakat in origin. Its fund distribution is linked to organisations which are concerned with collecting and distributing zakat. These are “AlOrman; the Food Bank; and Resala”.⁷⁹⁴

The second is the National Bank for Development charitable accounts, and these accounts are utilised for charitable purposes, and include the Children’s Cancer Hospital; Resala Institute; and Dar Al Orman. Accounts are opened in cooperation with the Abu Dhabi Islamic Bank, and the United Arab Emirates bank allows customers to pay zakat via cell phone and provide zakat assistance via cell phone also.⁷⁹⁵

Some of the greatest zakat innovations, however, have been taking place in South East Asia, such as Indonesia and Malaysia. Collecting Indonesian zakat is undertaken in a number of ways, including public and private collectors, Muslims organisations and mosque committees. Many of the Indonesian programmes focus on fiscal growth; supporting of small commercial enterprises; and providing employment preparation. Such programmes ease immediate burdens, as well as empowering the poor long term, which fulfils the ethos of zakat, as well as charity generally. A number of calls have also been made to utilise broader hybrid zakat institutions to assist with poverty relief, such as combining the aforementioned zakat and waqf. Such novel arrangements might operate as inspiration for other Arabic zakat institutions.⁷⁹⁶

Zakat clearly has an important place in improving the socioeconomic position of communities through its charitable endeavours, and it is suggested that there should be greater recognition of its benefits, as well as its potential, to operate even more effectively. It is evident that the management of zakat does require attention, on a global scale, to ensure that its real effectiveness is captured. As well as more effective management, it is further suggested that there should be greater systematic measures being undertaken to consider novel models of

⁷⁹⁴ At 61.

⁷⁹⁵ At 61.

⁷⁹⁶ At 63-64.

zakat, such as combining waqf funds, to mobilise resources over the long term.⁷⁹⁷ Such measures are likely to ensure that zakat's socioeconomic impact is more effective and widespread on a long-term basis although even without such measures, its benefit from a socioeconomic perspective does provide evidence that the advancement of religion, through this religious charitable endeavour, is reconcilable from an economics perspective.

X. Conclusion

This chapter undertook an uncommon approach in relation to the examination of religion and charity. It did so by, *inter alia*, considering religion and economics globally; critically examining the role of FBOs; and analysing the significance of zakat on an economic level.

This chapter revealed that religion, charity and economics have been bedfellows for generations, and their relationship is still as close today as it was in centuries past. Research suggests that a religious upbringing and religious participation increases levels of trust in governmental institutes and underpins the rule of law. Further, economic and political institutes of high quality reduce state costs and encourage economic growth. Consequently, politics, economics and religion appear to have a symbiotic relationship. Within an effective civil society, which is invariably based on strong economic and political institutions, religious charities and FBOs appear to be the bedrock of communities. This is because of their intrinsic socioeconomic value within communities, be that through Islamic or Western-based models of charity, thus supporting my assertions that the advancement of religion is a reconcilable construct in economic terms.

It is true that I did not explicitly refer to traditional legal frameworks and models, as previous chapters have undertaken, but there is sound reason for this. This thesis looks to understand the social, political, and economic relevance of the advancement of religion. This charitable purpose is underpinned by the rules of law, but to understand its place within society on a broader level, I considered a number of key factors, including economic relevance. Economics are intrinsically bound to numerous social and political pressures and factors. Consequently, I provided a snapshot of the secular relevance of religious charities, which is often missing from much literature.

⁷⁹⁷ At 71; Ummulkhayr et al, above n 779, at 119.

This evidence is important because it is tangible, and oftentimes, society will see tangible evidence as being of more value than the general ethereal benefits that are usually associated with religion. Such evidence can be utilised by policy makers; charities; and law makers, for example, to advocate for the retention of the advancement of religion because of its fundamental tangible place within civil society. I demonstrate how the economic outcomes of religious charities provide an objective measurement of its value, placing religion's relevance within a secular narrative that can be quantified by policy makers and the public alike. As a result, this chapter was key in embedding religion within an economics framework and then demonstrating that the advancement of religion can be reconciled as an economically-viable construct because of its benefit to a variety of societies, democratic or otherwise.

Nonetheless, I am mindful of the dearth of research in this area because unless governments understand the real, and likely currently underestimated, economic value of religious bodies in many states, policies and laws will not sufficiently support welfare models that endeavour to underpin civil societies. I contend that further research would be valuable to evaluate public policies and support decision-making so as to ensure charity law operates effectively within society. Indeed, it may be that such economic evidence would ensure that the requisite public benefit requirement is confirmed even in situations where religious public benefit has historically proven difficult to measure. The next chapter indeed turns now to the issue of public benefit.

I. Introduction

In order to reconcile the advancement of religion, the key object of my thesis, I could not ignore the doctrine of public benefit, a charity law construct, which subsequently is the fundamental concern of this chapter. As a result, I critically assess public benefit as part of the continuing narrative of the reconciliation of the advancement of religion. This is because this doctrine is key in determining whether or not a purpose advances religion, either as a rebuttable presumption, or to be established explicitly, depending on the jurisdiction, as I will explain later in the chapter.

In order to undertake this examination, I critically consider existing law and theories and bed some of my assertions about the reconciliation of the advancement of religion within those constructs. I do acknowledge that much has been written about public benefit throughout the years, however, I assert that it would have been remiss of me to ignore this fundamental principle when I am endeavouring to demonstrate that the advancement of religion is reconcilable from a legal perspective. I argue that even through the doctrine of public benefit has been criticised over the years, it is a defensible principle that provides another avenue of reconciling the advancement of religion. Further, it is important to critically review black letter law constructs as part of the object of my inquiry because the advancement of religion is a legal principle, and whilst, as my thesis has demonstrated, it is embedded in various socio-political frameworks, its legal basis cannot be ignored. This is because at the heart of public benefit, at least in regard to its presumption, it acknowledges the spiritual element of religion, which is an intrinsic element of religion itself. Therefore, this chapter is fundamental for developing the

⁷⁹⁸ Some of the research presented in this chapter refers to some of the author's earlier published articles to underpin submissions. Further, it should be noted that some of the research utilised in this chapter refers to acknowledged principles and explanatory materials that do have to be replicated in order to contextualise the discussions. However, this chapter reflects an evolution of some of the previously expressed views as a result of extensive research and additional available material. Consequently, this chapter provides additional materials to support the author's substantive and evolving arguments. Some of the material that appeared in a draft version of this chapter has been subsequently published in Juliet Chevalier-Watts "Have a Little Faith: The Advancement of Religion and Public Benefit" in Barry Bussey (ed) *The Status of Religion and the Public Benefit in Charity Law* (Anthem Press, New York, 2020).

argument that the advancement of religion is reconcilable and specifically within its legal framework.

I do acknowledge that earlier chapters have discussed some aspects of public benefit with regard to other matters. However, this chapter focuses specifically on the principle of public benefit and its function within the advancement of religion. In doing so, I consider significant cases that demonstrate how public benefit can provide a check and balance for the advancement of religion, illustrating that public benefit has a key function in underpinning the legitimacy of the advancement of religion. However, issues arise with regard to the evolving jurisprudence with regard to the presumption of public benefit, which may have undermined the position of religion within charity. Indeed, the doctrine has “generated lively parliamentary, legal and journalistic debate in recent years, not least in relation to ... the merits ... of religious organisations”.⁷⁹⁹

Nonetheless, I conclude that the advancement of religion can be reconciled with the utilisation of the presumption of public benefit⁸⁰⁰ because it is authorised and controlled appropriately by the rules of law. Further, public benefit provides a measurable safeguard to ensure that charities benefit the community through distributing their charitable resources appropriately. Consequently, its function legitimises the advancement of religion and ensures accountability for religious purposes within society, thus demonstrating the reconcilability of the advancement of religion. I begin this journey by outlining the doctrine of public benefit in order to embed it within later discussions that form part of my submissions that it is a reconcilable construct.

⁷⁹⁹ Mary Syngé “A State of Flux in Public Benefit Across the UK, Ireland and Europe” (2013) 16 CL & PR 163 at 164.

⁸⁰⁰ It should be noted that not all common law jurisdictions presume public benefit. For example, the United Kingdom has removed the presumption of public benefit for all heads of charity. New Zealand and Canada, inter alia, however, presume public benefit for all heads of charity except the fourth. This is discussed later in the chapter.

II. Introduction to Public Benefit

To appreciate the requirement of public benefit, one must consider the English⁸⁰¹ common law model of charity, which is generally traced to the Statute of Elizabeth. As referred to in Chapter 3,⁸⁰² the Act's Preamble set out a comprehensive, albeit incomplete, listing of legally-acknowledged charitable purposes. This listing was later abridged to just four in *Commissioners for Special Purposes of Income Tax v Pemsel*, as follows:⁸⁰³

Trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for purposes beneficial to the community not falling under any of the preceding heads.

Many common law jurisdictions have continued to acknowledge these four heads of charity. For example, s 5(1) of the New Zealand Charities Act 2005 states:

In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

Section 3 of the United Kingdom Charities Act 2011 sets out a list of charitable purposes that includes the above four heads, as well as additional purposes that are explicitly legally-recognised as charitable.

Courts tended to view the collective feature that adjoined the variety of charitable purposes was that of public benefit,⁸⁰⁴ although interestingly, the Statute of Elizabeth did not make any explicit reference to any notion of public benefit. Nonetheless, the Preamble was said to promote purposes that effected public benefit. For instance, it was observed that “if there is any thread linking these crude judicial attempts to define charity, it is in the conception of charity as a *public use*.”⁸⁰⁵ Therefore, for an object to be recognised as charitable, it must

⁸⁰¹ This always includes Wales.

⁸⁰² See chap 3 for the full Preamble.

⁸⁰³ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (HL) at 583

⁸⁰⁴ Jonathan Garton *Public Benefit in Charity Law* (Oxford University Press, Oxford, 2013) at 1-3.

⁸⁰⁵ At 18, citing Gareth Jones *History of the Law of Charity 1532-1827* (Cambridge University Press, Cambridge, 1969) at 121 (emphasis retained).

firstly be a legally-acknowledged charitable purpose, and secondly, there must be a public benefit.

In relation to that second element, which is the focus of this chapter, generally speaking, those charities whose purposes were to relieve poverty, to advance education, or to advance religion, were said to be presumed for the public benefit.⁸⁰⁶ For those purposes that fall under the fourth head, that of any other purposes beneficial to the community, public benefit must be determined explicitly. As will be discussed later in the chapter, England and Wales has made significant changes with regard to presuming public benefit.⁸⁰⁷ However, for jurisdictions such as New Zealand, Australia (generally speaking), Canada, and Hong Kong, the presumption of public benefit is still thought to exist with regard to the first three heads of charity.

In general, “there are two essential elements of the public benefit requirement: first, the pursuit of an organization’s purposes must be capable of producing a benefit which can be demonstrated and which is recognised by law as beneficial.”⁸⁰⁸ Secondly, “that benefit is provided for, or available to, the public or a sufficient section of the public.”⁸⁰⁹ This is expressed in the New Zealand High Court case of *Liberty Trust v Charities Commission*:⁸¹⁰

It is accepted that in order to have a charitable purpose, the entity must be carrying out its purposes for the benefit of the public. This means that the entity must confer a “benefit” and that it does so in respect of the public or a sufficient section of it.

Further, Mallon J, in that case, noted that with regard to the advancement of religion public benefit is presumed. This is because it is “well settled”⁸¹¹ that “a gift for religious purposes is prima facie charitable, the necessary element of public benefit being presumed unless and until

⁸⁰⁶ There is an argument that this presumption may be a fallacy, but it is beyond the scope of this thesis to address this issue further. See Mary Synge *The ‘New’ Public Benefit Requirement Making Sense of Charity Law?* (Hart Publishing, Oxford, 2015); Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018) at 81; and *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) for further discussions.

⁸⁰⁷ Charities Act 2011, s 4(2) (UK).

⁸⁰⁸ Debra Morris “Charities and the Modern Equality Framework – Heading for Collision?” (2012) *Current Legal Problems* Vol 65 at 298; see also *Gilmour v Coats* [1949] AC 426 (HL).

⁸⁰⁹ At 298; see also *Verge v Somerville* [1924] AC 496 (PC).

⁸¹⁰ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 at [99], referring to *Re New Zealand Computer Society Inc* HC Wellington CIV-2010-485-924, 28 February 2011 at [14].

⁸¹¹ *Liberty Trust* at [99].

the contrary is shown”.⁸¹² As a result, where “purposes are found to be religious in nature the court ‘will generally assume a public benefit unless the contrary is shown’”.⁸¹³ This assumption “reflects the court’s reluctance to enter into questions concerning the comparative worth of different religions, and also the view that religion itself commonly generates benefit to the public”.⁸¹⁴ “In addition, there should be no undue private benefit.”⁸¹⁵

Whilst the initial consideration for public benefit will be the presumption of its existence, at least in the majority of common law jurisdictions, a court must be satisfied that the purpose does satisfy this requirement, and it can be rebutted. Consequently:⁸¹⁶

... the presumption will be rebutted ... if there is evidence that the purpose is subversive of all morality, or it is a new belief system, or if there has been public concern expressed about the organisation carrying out the particular purpose, or if it is focused too narrowly on its adherents.

It has been observed that where a religion “promotes conduct inconsistent with the prevailing public policy then there are grounds for denying charitable status”.⁸¹⁷ An example of this may be a religion that encourages dangerous risk-taking behaviour.⁸¹⁸

It is asserted that public benefit is utilised to rationalise charities’ preferential legal treatment and the advantages granted to entities that obtain registered charitable status, such as tax benefits that are afforded to the entities themselves, and their donors.⁸¹⁹ It is also the doctrine

⁸¹² At [99], referring to Jean Warburton, Debra Morris and NF Riddle *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at [2-048]; and included in the footnotes: In the United Kingdom in 2006, legislation was passed requiring charities to be demonstrably for the public benefit. (Refer to s 3 and s 4 of the Charities Acts 2006 and 2011 respectively (UK); also see Charity Commission for England and Wales *Analysis of the Law Underpinning the Advancement of Religion for the Public Benefit* (December 2008) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358534/lawrel1208.pdf. It should further be noted that since the decision of the Upper Tribunal Tax and Chancery Chamber in *Independent Schools Council v Charity Commission* [2011] UKUT 421 (TCC), some elements of the Charity Commission for England and Wales Guidance on Public Benefit has been rewritten.

⁸¹³ *Liberty Trust* above n 810, at [99], citing Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford, 2000) at 166.

⁸¹⁴ *Liberty Trust* at [99], citing Dal Pont, above n 813, at 166.

⁸¹⁵ Morris, above n 812, at 298-299; see also *Royal College of Nursing v St Marylebone Corporation* [1959] 1 WLR 1077 (CA).

⁸¹⁶ *Liberty Trust* at [100], citing Warburton, Morris and Riddle, above n 812, at [2-052].

⁸¹⁷ At [100], citing Dal Pont above n 813, at 167.

⁸¹⁸ At [100], citing Dal Pont, at 167.

⁸¹⁹ Morris, above n 808, at 299.

that is used to justify charities receiving “exemption from the ‘beneficiary principle’ and the ‘certainty of objects’ rule ... [and] not [being] subject to the ‘perpetuity rule.’”⁸²⁰

Courts have historically found the public benefit requirement of this head of charity to be challenging, and the doctrine has been subject to much criticism. For instance, some have “alluded to the difficulties inherent in the modern day operation of the public benefit requirement”.⁸²¹ Further, “few would regard the formulation of the requirement and the manner in which it has been applied as wholly coherent and satisfactory.”⁸²² Indeed, “[t]he concept of public benefit is intangible and nebulous; its effects can only be represented as variable and unpredictable. Imprecision has resulted in illogical and capricious decisions, sometimes impossible to reconcile.”⁸²³

Consequently, some religious purposes have been found not to demonstrate the requisite public benefit, for instance, when performing rites in a private situation;⁸²⁴ and when observing that intercessory prayers are “manifestly not susceptible of proof”.⁸²⁵ Notwithstanding these limited observations, the common law has said “little about when and on what basis a purpose that advances religion will meet the public benefit test.”⁸²⁶ Further, and of note is “that Anglo-Commonwealth courts have managed to avoid articulating how the public benefits from the advancement of religion.”⁸²⁷ Case law does occasionally refer to “the edifying effects of the collective participation in religious celebrations, and the manner in which religion may ‘take a man outside his own petty cares’”.⁸²⁸ However, more often than not, courts merely assume religion “is good for man to have and to practice religion.”⁸²⁹ So the courts have shied away from asserting such claims, and instead favour standing neutral as to different religions as the

⁸²⁰ At 299, referring to inter alia, *Morice v Bishop of Durham* (1805) 10 Ves 522; *Re Koeppler’s Will Trusts* [1986] Ch 423; and *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531 at 581.

⁸²¹ Andrew Iwobi “Out with the old, in with new: religion, charitable status and the Charities Act 2006” (2009) *Legal Studies* 29 4 at 630.

⁸²² At 630, referring to M Freeland “Charity law and the public/private distinction” in C Mitchell and S Moody (eds) *Foundations of Charity* (Hart, Oxford, 2000) at 111 and 121.

⁸²³ At 630-631, citing GHL Fridman “Charities and public benefit” (1953) *Can B Rev* 31 at 539; see also *Gilmour v Coats* [1949] AC 426 (HL) at 443.

⁸²⁴ Kathryn Chan “The Advancement of Religion as a Charitable Purpose in an Age of Religious Neutrality” (2017) *Oxford Journal of Law and Religion* 6 at 118, referring to *Re Hetherington* [1990] Ch 1 (Ch).

⁸²⁵ At 118, citing *Gilmour v Coats* [1949] AC 426 (HL) at 446.

⁸²⁶ At 118.

⁸²⁷ At 119.

⁸²⁸ At 119, citing *Re Hetherington*, above n 824, at 12.

⁸²⁹ At 119, citing *Gilmour v Coats*, above n 825, at 459.

general assumption is that “any religion is at least likely to be better than none.”⁸³⁰ It is perhaps this reluctance to address explicitly the notion of public benefit within the advancement of religion that has led to concerns as to this doctrine’s validity, and consequently inherently leads to criticisms of religion remaining as a charitable purpose.

Nonetheless, I will demonstrate that whilst the public benefit doctrine may be accused of being intrinsically vague, or that it is allegedly applied inconsistently, or even results in capricious decisions, this doctrine can provide a justifiable legal safeguard. It is a check and balance in the process of ensuring that a purpose is charitable. Such a safeguard ensures that the advancement of religion, within charity law, benefits communities through distribution of charitable resources, as well as the state generally, notwithstanding some evidence of controversy in the construal of public benefit as regards to religion.

What is evident is that the principle of public benefit is complex, and its complexity has led to perceived inconsistencies and anomalies that have likely done little to placate the public as to the contemporary significance of religion. I illustrate this point by considering two cases that may be construed as controversial: *Holmes v Attorney-General*⁸³¹ and *Liberty Trust v Charities Commission*.⁸³² These cases demonstrate that whilst, prima facie, the public benefit test might be thought to cause mischief because of its alleged inconsistent application, in reality what they demonstrate is that public benefit, and its presumption, is a valuable tool. Its value is found in ensuring that religious entities operate for the public, as prescribed by law, and thus benefit the public appropriately where evidence cannot be produced to the contrary. Such an approach reflects the rules of natural justice. Further, I provide evidence that the presumption of public benefit supports the doctrine of benignant construction, as well as ensuring that charity law remains as relevant in contemporary times as it did in bygone eras, even when some charitable purposes may be unpopular or controversial. I begin with the case of *Holmes*.

⁸³⁰ *Neville Estates Ltd v Madden* [1962] Ch 832 at 853.

⁸³¹ *Holmes v Attorney-General* The Times, Feb 11, 1981; see also *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744.

⁸³² *Liberty Trust*, above n 810; please refer to chap 3 for additional consideration of *Liberty Trust*.

III. Holmes v Attorney-General

This case related to a religious body known as “the Brethren”, or the “the Exclusive Brethren”, and in earlier times, “the Plymouth Brethren.” The question for Walton J in this case was whether the purposes of the deed were charitable.

In this case, The Brethren claimed to be an “ultra-puritan sect,”⁸³³ and evidence was provided that it was a Christian sect. Consequently, Walton J noted that “the trust deed is one for religious purposes ... because it has long been settled that the law presumes that it is better for a man to have a religion ... rather than to have no religion at all.”⁸³⁴ Nevertheless, “that is only the first step. That presumption is capable of being rebutted.”⁸³⁵ On that point, even though the sect called themselves the “the Exclusive Brethren”, his Honour concluded that there was no lack of benefit on that matter because there was elements of public proselytising, and that outsiders were allowed to attend meetings. This meant that the Brethren fell outside the concept of an enclosed order, as determined in *Cocks v Manners*, and *Gilmour v Coats*.⁸³⁶ In those 2 cases, the Courts held that enclosed orders did not satisfy the public benefit test. In addition, Walton J noted that *Thornton v Howe* provided evidence that the law does not “make any distinction between one sect and another.”⁸³⁷ His Honour did confirm that where particular tenets are “adverse to the very foundations of all religion, and that they are subversive of all morality”,⁸³⁸ then this would likely rebut the presumption of public benefit. However, his Honour concluded that when one was considering “what is basically a fundamental puritan sect ... there is not the slightest reason to suppose ... there is anything which remotely falls within that kind of exception.”⁸³⁹

⁸³³ *Holmes v Attorney-General*, above n 831, at 2.

⁸³⁴ At 3.

⁸³⁵ At 3.

⁸³⁶ At 4, referring to *Cocks v Manners* [1871] 12 Equity at 574, and *Gilmour v Coats* [1949] AC 426.

⁸³⁷ At 4, referring to *Thornton v Howe* [1862] 31 Beav at 19.

⁸³⁸ At 4, referring *Thornton v Howe*, at 19.

⁸³⁹ At 4.

Consequently, here is evidence that the presumption of public benefit is likely to be viewed as operating appropriately in the circumstances without need for a Court to pursue any lengthy debate about the merits of a particular religious sect, because clearly a Judge is simply “a mere man of the world”⁸⁴⁰ and not capable of making a determination on spiritual matters.

Nonetheless, that was not the end of the story for the Brethren. There was a question as to whether the disciplinary practices of the Brethren may be contrary to public interest. If so, the public benefit would be rebutted. These practices concerned what were referred to as “shutting up” and “withdrawal.” Briefly, “shutting up” is based on Biblical principles of protecting the assembly from a transgressor’s evil, and to give the transgressor the opportunity “to perceive that evil and to put it away from himself.”⁸⁴¹ A transgressor, therefore, will be required to stay from meetings until his transgressions are absolved. He is permitted, generally, to remain with his family, and to associate with members although not in relation to fellowship. “Withdrawal” is generally final and “involves complete separation from the transgressor and the evil which he represents.”⁸⁴² This does mean severing the transgressor from his family, but that is apparently a rare occurrence.⁸⁴³

These punishments certainly appear to be severe, and indeed, as Walton J noted, there have been “very serious allegations ... made against the Brethren in connection with these matters.”⁸⁴⁴ Nonetheless, it was evident that rebutting the presumption of public benefit might be difficult even though his Honour stated that these allegations had been made. It might be argued that reservations about rebutting the presumption would likely cause public concern. This is because it could be asserted that it should not be difficult to rebut the presumption of public benefit in circumstances where it has been alleged that members of a sect are suffering through the sect’s practices of punishment. In response to this, I argue that these are merely allegations, and evidence must be made available to confirm or deny such allegations. I respectfully acknowledge that his Honour was correct to avoid rebutting the public benefit because although the Brethren were likely to have described the disciplinary practices “in a

⁸⁴⁰ At 5.

⁸⁴¹ At 5.

⁸⁴² At 5.

⁸⁴³ At 5.

⁸⁴⁴ At 5.

much more favourable light than it wears in reality”,⁸⁴⁵ the reality was that there was no evidence put before him by the allegers as to the merits of their claims. That meant that Walton J could not give them any credence.⁸⁴⁶ Consequently, the trust was charitable. I submit that this is exactly as it should be because his Honour’s approach is underpinned by the rules of natural justice. Therefore, I assert that this case provides evidence of the importance of the presumption of public benefit in situations which, although might be deemed controversial when viewed in the cold light of day, illustrate that presuming the benefit ensures that procedural fairness is observed.

What this case does is reflect some of the challenging circumstances in which courts are expected to grapple with the doctrine of public benefit. It may be seen as reflecting a liberal determination of public benefit, and as a result it could be asserted that the presumption of public benefit is a challenging tool for the judiciary to exercise. This is because the resulting judicial decisions can appear to liberalise the advancement of religion. Such liberalisation of religion may cause consternation to the public because, *prima facie*, the benefit may not necessarily be apparent.

However, what *Holmes* does is illustrate that when one is considering the advancement of religion as a head of charity, it is inescapable that “no advances in technology or information-gathering will ever enable the meaningful evaluation of something fundamentally incapable of evaluation.”⁸⁴⁷ Therefore, it is appropriate that the presumption of public benefit be acknowledged broadly because to do otherwise would risk undermining the rules of natural justice.

I now turn to the case of *Liberty Trust*. I acknowledge that much has been published concerning this decision. However, I assert that I would be remiss to ignore the issues of public benefit contained within this case because the decision heralded a liberal religious discourse within New Zealand that had not necessarily been witnessed previously. Therefore, its principles

⁸⁴⁵ At 5.

⁸⁴⁶ At 5.

⁸⁴⁷ Jonathan Garton *Public Benefit in Charity Law* (Oxford University Press, Oxford, 2013) at 110; see also Juliet Chevalier-Watts “Charity Law, the Advancement of Religion and Public Benefit – Will the United Kingdom Be the Answers to New Zealand’s Prayers?” (2016) VUWLR 47 at 408.

make a valuable contribution to this chapter. Further, in previous research I have argued that this case “extended the doctrine of public benefit in relation to the advancement of religion, ‘beyond the realms envisioned’”.⁸⁴⁸ This earlier approach suggested that public benefit may not be such an appropriate tool by which to administer the advancement of religion within charity law. However, I now assert that perhaps a more appropriate argument is that *Liberty Trust* exemplifies the benefits of assessing public benefit through a presumption. This is because not only does it reflect the doctrine of benignant construction,⁸⁴⁹ but it also reflects the idea that charity law ought to, and does, evolve with the times, and to do otherwise would stultify the law.

I acknowledge that I have utilised this case in earlier chapters. However, I argue that there is value in considering this case in this chapter because of its contribution to the public benefit doctrine and the advancement of religion. Therefore, the approach of this chapter differs in the context and assessment of *Liberty Trust* from previous chapters.

IV. Liberty Trust

Chapter 3 sets out the facts of *Liberty Trust*. In this case, Mallon J affirmed the presumption of public benefit with respect to the advancement of religion.⁸⁵⁰ Her Honour noted that this presumption would be rebutted, or would have to be explicit, where:⁸⁵¹

... there is evidence that the purpose is subversive of all morality, or it is a new belief system, or if there has been public concern expressed about the organisation carrying out the particular purpose, or if it is focused too narrowly on its adherents.

⁸⁴⁸ Juliet Chevalier-Watts “The Operation of Public Benefit in New Zealand – Meeting Contemporary Challenges?” (2015) CL&PR at 188 citing Juliet Chevalier-Watts “Charitable Trusts and the Advancement of Religion: On a Whim and a Prayer?” (2012) VUWLR 403 43 at 419.

⁸⁴⁹ As considered in chap 3.

⁸⁵⁰ *Liberty Trust*, above n 810, at [99], citing Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Oxford) at 166.

⁸⁵¹ *Liberty Trust* at [100].

This implicitly acknowledged the approaches taken in *Thornton v Howe* where the court stated that the presumption would be denied in circumstances where particular doctrines might be “adverse to the very foundations of all religion, and that they are subversive of all morality.”⁸⁵²

Therefore, the question for Mallon J was whether the loan scheme bestowed a public benefit. In answer to this, the public benefit could be presumed because it was not demonstrated that the loans were in breach of public policy or that such money lending was in breach of Christian principles.⁸⁵³ Prima facie, therefore, the benefit could be presumed. However, one cause for concern was that such a lending scheme enabled the receivers to live debt free, which could be said to be “focused too narrowly on its adherents”.⁸⁵⁴ In other words, it had an extensive private benefit, which would outweigh the public benefit. Nonetheless, her Honour confirmed that such a benefit was merely part and parcel of living a Christian life, therefore the public benefit was not too remote.⁸⁵⁵

I have argued in previous research that this was too “generous an interpretation of the ethos of public benefit”.⁸⁵⁶ Further, it was conflicting with the view that public benefit must be “more than a hopeful outcome”.⁸⁵⁷ In fact, Mallon J herself indicated that public benefit will be denied if “it is focused too narrowly on its adherents.”⁸⁵⁸ Nonetheless, the lending scheme did advance religion, and according to established law, the presumption of public benefit must be presumed in those situations. This is regardless of whether or not a court “may have a different view as to the social utility of the Liberty Trust scheme and whether it is an activity deserving of the fiscal advantages that charitable status brings.”⁸⁵⁹ In fact, even if a court has an opposing standpoint, this does not authorise that court to disprove the presumption of public benefit.⁸⁶⁰

⁸⁵² *Thornton v Howe* above n 837, at 20.

⁸⁵³ *Liberty Trust*, above n 810, at [101]-[102].

⁸⁵⁴ At [100].

⁸⁵⁵ At [113]; see *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR (HC) where the benefit was held to be too remote, albeit not related to advancement of religion.

⁸⁵⁶ Juliet Chevalier-Watts “The Operation of Public Benefit in New Zealand – Meeting Contemporary Challenges?” (2015) CL&PR at 191 and Juliet Chevalier-Watts “Charity law, the Advancement of Religion and Public Benefit – Will the United Kingdom be the Answer to New Zealand’s Prayers?” (2016) VUWLR 47 at 403-404.

⁸⁵⁷ *Canterbury Development Corporation*, above n 855, at [67] and Chevalier-Watts “The Operation of Public Benefit in New Zealand – Meeting Contemporary Challenges?” (2015) CL&PR at 191.

⁸⁵⁸ *Liberty Trust*, above n 810, at [99] citing *Dal Pont*, above n 810, at 166.

⁸⁵⁹ At [101].

⁸⁶⁰ At [101].

Further, Mallon J confirmed that “[g]iven the assumption of public benefit, and that the Court does not intrude into matters of faith except where they are contrary to public policy, it is not for the Court to say that teaching biblical financial principles is not a public ‘benefit’.”⁸⁶¹

Just as Hammond J in *Re Collier (Deceased)* confirmed there is good social policy in finding the public benefit where it is possible to do so, it could also be argued that Mallon J’s liberal approach to public benefit also finds its roots in good social policy. This is even though:⁸⁶²

Arguably there is a line to be drawn between the outworkings of a religious faith that, being ancillary and incidental in nature, can be seen to manifest an organisation’s religious beliefs, and those that are disproportionate and unrelated to such an organisation and its beliefs.

Certainly, it might be problematic to distinguish between the private benefits of such a loan scheme and any perceived public benefits that may arise from them. So there may still be weight in the assertion that this may be sufficient to rebut the public benefit. Nonetheless, what Mallon J’s approach does do is speak to the fact that while “a mass in a church may have more ready acceptance as being of a religious nature and for religious purposes”⁸⁶³ than would the scheme in question, the judgment is persuasive as to why such loans demonstrates public benefit. Just because a purpose is not popular or a purpose is controversial does not mean that it should not be charitable, and this lies in good social policy. To consider otherwise would be deleterious for the charitable sector, as set out in Chapter 5 when considering the dictum of Chief Justice Sian Elias in the New Zealand Supreme Court case *Re Greenpeace of New Zealand Inc.*⁸⁶⁴

Liberty Trust, therefore, illustrates two important principles. Firstly, the implicit recognition of benignant construction. In other words, whilst a trust instrument may not expressly convey the way in which a religion may be disseminated, one should look to their overall purposes. Thus, Mallon J looked benevolently at the Trust’s underlying purpose and recognised the charitable purpose. Consequently, even though, at first sight, it might have been difficult to

⁸⁶¹ At [102].

⁸⁶² Kerry O’Halloran *Religion, Charity and Human Rights* (Cambridge University Press, Cambridge, 2014) at 447.

⁸⁶³ *Liberty Trust* at [122].

⁸⁶⁴ *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169 at [75].

find the balance between both public and private advantages being afforded by the scheme, Mallon J acknowledged the intention of dominant public benefit. As a result, the Trust's objects were charitable.⁸⁶⁵ Secondly, that charities should operate on a basis of benefit to the public without their purposes being limited to being popular or being non-controversial. If the requirement of being publically popular or non-controversial was enforced, this would represent a barrier within the charitable sector. This is because such a requirement would stultify not only the law, but also likely be detrimental to the third sector generally because charitable assistance is not always popular for some sections of the community. Sometimes, a pragmatic approach has to be undertaken for the benefit of a community overall.

This is illustrated in the New Zealand High Court case of *Re Centrepoint Community Growth Trust*. In this case, Cartwright J noted that:⁸⁶⁶

In present-day society, many who are not "worthy" are none the less the objects of charitable assistance ... Consequently the outrage ... although inevitable, cannot be the defining reason for refusing to assist with a payment ...

It is acknowledged that the *Centrepoint* case revolved mainly around the relief of poverty, but I contend that notions of unpopularity or unworthiness extend to the advancement of religion also. Therefore, Cartwright J's view that unworthy objects cannot be the reason to invalidate a charitable purpose is the same reason that unpopular objects cannot be the reason to invalidate charitable purposes. This is because:⁸⁶⁷

It would be unfortunate if charities law were to stand still: this body of law must keep abreast of changing institutions and societal values. And, it is to New Zealand institutions and values that regard should be had.

Charity law has a duty to ensure that charities meet the needs of contemporary societies, and such societies will undoubtedly be very different from those purposes first envisioned by the legislators of the Elizabethan period. If the law did not progress, then charity would fail its

⁸⁶⁵ *Liberty Trust*, above n 810, at [124]-[125].

⁸⁶⁶ *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325 at [57].

⁸⁶⁷ At [56], citing *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 348.

beneficiaries, to the ultimate detriment of society generally. For instance, promoting the ending of slavery was an unpopular purpose of its time,⁸⁶⁸ yet it was held to be charitable because it benefited societies globally.

Therefore, I argue that public benefit should be interpreted liberally, where appropriate to do so, and it is defensible with regards to the modern advancement of religion. Indeed, as asserted in the *Greenpeace* case, “a strict exclusion risks rigidity in an area of law which should be responsive to the way society works.”⁸⁶⁹ This is because:

Just as the law of charities recognised the public benefit of philanthropy in easing the burden on parishes of alleviating poverty, keeping utilities in repair, and educating the poor in post-Reformation Elizabethan England, the circumstances of the modern outsourced and perhaps contracting state may throw up new need for philanthropy which is properly to be treated as charitable.

Certainly, religion may not be thought of as being a modern part of society; it is ancient in origin. However, the current varied social and political pressures on religion *are* new, even though there is much evidence of the benefits of religion generally within society. What can be said, therefore, in favour of religion within charity, as supported by case law, is that “charity has been found in purposes which support the machinery or harmony of civil society”.⁸⁷⁰ Religion can be said to “support the machinery or harmony of civil society” because of the variety of benefits it offers to society generally, for instance, through providing emergency assistance, succour and general living assistance.

V. Concern about Public Benefit

Even though I have presented evidence that the decisions in *Liberty Trust* and *Holmes* were appropriate, and thus support my assertions that the advancement of religion is reconcilable through public benefit, it might still be argued that such liberal interpretations of public benefit would be of concern to society. This is because religious entities might be given the advantages

⁸⁶⁸ *Re Greenpeace of New Zealand Inc*, above n 864, at [71], referring to *Jackson v Philips* (1867) 96 Mass 539 14 Allen 539 (Mass SC).

⁸⁶⁹ At [70].

⁸⁷⁰ At [70].

of charitable status at the expense of secular non-charitable organisations whilst being seen as having too limited public governance. In response to this concern, I assert that public benefit serves as a limitation on purposes that would not meet public requirements. For instance, public benefit can fall foul of illegal purposes or be in opposition to public policy. If such circumstances arose, the presumption of public benefit would be denied⁸⁷¹ as the consequential benefits to the public would not be in evidence.⁸⁷² Although as illustrated in *Holmes*, it is likely that the rules of natural justice should be considered appropriately when considering such evidence.

An additional consideration in relation to the concept of harm, morality, or illegality, all of which would likely be contrary to public policy, as observed in *Thornton v Howe*,⁸⁷³ is that there is no guidance on what is meant by “harm”.⁸⁷⁴ Indeed, many would argue that some religious practices do amount to harm:⁸⁷⁵

Cults split up families and take children away from their parents – in the Roman Catholic Church they call it vocation. Irrational beliefs, such as that God spoke in Korean – was that less plausible than his being monolingual in Hebrew, Latin, or Arabic? And would any dispassionate observer accept without faith, the doctrines of resurrection, or the Athanasian Creed.

Consequently, it is perhaps wise to ensure the applicability of the presumption of public benefit when it would be difficult to determine whether a purpose did really breach public policy, or whether it would appear to be a perceived harm because a person did not follow a prescribed, and already accepted, religious practice.

I further submit that the public should actually be reassured by the decisions of *Holmes* and *Liberty Trust*. This is because they reflect the underlying rationale of charity - that of providing

⁸⁷¹ In the United Kingdom, the presumption of public benefit has been removed, and all purposes must expressly confirm their public benefit, and I consider that matter later in the chapter. In many common law jurisdictions, such as New Zealand and Canada, the presumption of public benefit is still said to exist.

⁸⁷² Registration Decision: *The Jedi Society Incorporated* (JED494458) 14 September 2015 at [45]-[46].

⁸⁷³ *Thornton v Howe*, above n 837 at 19.

⁸⁷⁴ Robert Meakin (2017) “Taking the Queen’s Shilling: the Implications for Religious Freedom for Religions Being Registered as Charities” 178 *Law & Justice Christian Law Review* at 70.

⁸⁷⁵ At 70, citing Ian Williams *The Alms Trade* (1st ed, HarperCollins Publishers Ltd, 1989), at 124.

succour to the needy, which is what religion is presumed to do, regardless of the era. Charity has existed since time immemorial, and these cases reflect the fact that charity law can evolve alongside the evolution of societal needs.

This is surely the tenet of charity - to avail itself to society as determined through the rule of law. Therefore, charity law must be able to evolve as society evolves. Certainly, a mortgage scheme and disciplinary practices may not have been envisioned by the legislators of 1601, but the same can be said of many contemporary charitable objects, including human rights and protection of the environment.⁸⁷⁶ Such purposes would likely not have been considered charitable in bygone days. Yet charity law permits such purposes today and few would question their beneficial effects within society. *Liberty Trust* and *Holmes* merely reflect a tolerant and progressive approach within the laws of charity to meet societal requirements as they evolve.

The advancement of religion within the confines of charity law continues to have imposed upon it stringent legal principles, even in the unusual contexts of *Liberty Trust* and *Holmes*, including the principle of public benefit, as evidenced in this chapter. On these occasions, the Courts found that the purposes provided succour to the needy – an underlying principle of religion. The law achieved its purpose, and a purpose merely being controversial should not negate its charity⁸⁷⁷ as that would undermine the role of charity within society, supporting the vulnerable and those in need, regardless of judgment. I contend, therefore, that these arguments rebut the suggestion that public benefit may not be an appropriate tool to administer the advancement of religion. This is because the Courts in *Liberty Trust* and *Holmes* demonstrated solid legal reasoning in relation to public benefit to substantiate their assertions, thus affirming the processes of the rule of law, and demonstrating that the advancement of religion is reconcilable from a legal perspective.

In all the cases to which this chapter has referred the public benefit has been presumed. However, as has been mentioned, the United Kingdom has now removed the presumption of public benefit from all its legally-recognised charitable purposes, which includes the

⁸⁷⁶ *Re Greenpeace of New Zealand Inc*, above n 864, at [71].

⁸⁷⁷ At [75].

advancement of religion.⁸⁷⁸ I now turn my attention to some issues relating to the removal of that presumption and its impact on charity, and thus whether its removal undermines my assertions that the advancement of religion is a reconcilable construct from a legal perspective.

VI. Proving the Public Benefit – The Effects

The rationale for removing the presumption of public benefit appeared to have been to “ensure a level playing field for all potentially charitable organisations.”⁸⁷⁹ As this is a relatively recent legal change, there have been limited cases to test this new public benefit test. Nonetheless, there are two Decisions of the Charity Commission for England and Wales that highlight some issues relating to the removal of this presumption, and suggest that retaining a presumption may be more beneficial, overall, for the charity sector.⁸⁸⁰ The Decisions are the *Application for Registration of the Gnostic Centre*⁸⁸¹ and the *Application for Registration of the Druid Network*.⁸⁸² These Decisions were mentioned briefly in Chapter 3 in relation to defining religion. This chapter considers the Decisions in further detail specifically in the context of public benefit.

I assert that it is essential to include these Decisions because they were the Charity Commission for England and Wales’ first Decisions with regards to the advancement of religion subsequent to the relevant provisions of the Charities Acts 2006 and 2011. In other words, s 4(2) states “it is not to be presumed that a purpose of a particular description is for the public benefit.”⁸⁸³ Consequently, these two Decisions play a key role in this thesis in emphasising the issues pertaining to the removal of the presumption of public benefit. As a result, they lay the foundations for submissions following their discussion relating to ethical frameworks and the ‘benefits’ of public benefit.

⁸⁷⁸ Charities Act 2011, s 4.

⁸⁷⁹ Synge, above n 806, at 9.

⁸⁸⁰ It should be noted that I have considered these Decisions in previous published research because of the fundamental importance of these Decisions. However, this thesis provides additional critical consideration of the issues relating to these Decisions and their place within the continuing role of public benefit advancement of religion in charity law, for which I advocate.

⁸⁸¹ *Application for Registration of the Gnostic Centre* (Charity Commission for England and Wales, 16 December 2009).

⁸⁸² *Application for Registration of the Druid Network* (Charity Commission for England and Wales, 21 September 2010).

⁸⁸³ Charities Act 2011, s 4(2) (UK).

I consider the *Gnostic Centre Decision* first. Prior to this Decision, it is worthwhile noting that historically, and even in contemporary times, “[a]s between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none”.⁸⁸⁴ Further:⁸⁸⁵

The liberal acceptance of trusts for the advancement of religion as being for the public benefit is consistent with the attitude and views of the court that would extend toleration to the need to support religion as a ‘valuable constituent in the character of our citizens’.

With regard to the Decision of the Gnostic Centre, it appears that the new public benefit requirements remove such liberal acknowledgement for the advancement of religion. As such, this is perhaps what the future holds for religious organisations when applying for charitable status and this may cause concern for the charitable sector.

VII. *The Gnostic Centre*

The Gnostic Centre was established to “promote and advance and research on Gnosticism, both ancient and modern,”⁸⁸⁶ which fell within the advancement of religion, and the Commission addressed the characteristics of a religion for charitable purposes.⁸⁸⁷ For the purposes of this chapter of interest is criteria 4 which I set out in Chapter 3, which is that of a ‘belief system that promotes an identifiable positive, beneficial, moral or ethical framework.’ This is because the Commission stated that this framework would demonstrate how a belief system is able to impact beneficially within society.⁸⁸⁸ In other words, it will establish the requisite public benefit.

⁸⁸⁴ *Hester v Commissioner of Inland Revenue* [2005] 2 NZLR 172 (CA), [6], citing *Neville Estates Ltd v Madden* [1962] Ch 832 at 853; Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018) at 102-103.

⁸⁸⁵ Hubert Picarda “Charities Act 2011: a dog’s breakfast or dream come true? A case for further reform” in Matthew Harding, Ann O’Connell and Miranda Stewart (eds) *Not-for-Profit Law Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) at 143, citing *Gass v White* 32 Ky 170 (Ct App 1834).

⁸⁸⁶ *Gnostic Centre*, above n 881, at [19].

⁸⁸⁷ At [22], referring to The Advancement of Religion for the Public Benefit, s C2 and Annex A, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358531/advancement-of-religion-for-the-public-benefit.pdf; the four criteria are set out fully in Chapter 3.

⁸⁸⁸ *Gnostic Centre*, above n 881, at [60].

Curiously, there is no evidence to support this particular criteria in statute or case law.⁸⁸⁹ Further, neither does the Commission set out its authority for relying upon this benchmark, except in relation to the case of *Gilmour v Coats*.⁸⁹⁰ Confusingly, the Commission actually referred to the Court of Appeal *Gilmour* decision and not to the House of Lords decision. In referring to the Court of Appeal case, the Commission stated that the Judges observed public benefit as being “a benefit to the community in light of evidence of a kind cognisable by the court.”⁸⁹¹

Nonetheless, in the House of Lords case, it was noted that public benefit, inter alia, is merely “a condition of legal charity.”⁸⁹² Further, neither the Court of Appeal nor the House of Lords made reference to the criteria that the Commission set out, and certainly not the fourth criteria that I set out, on which the Commission relies. The House of Lords case does refer to public benefit being “too remote” in relation to edification by example,⁸⁹³ but the Commission does not refer to the public benefit of the Gnostic Centre being too remote.

Therefore, it has been argued that the initial approach of the Commission in relation to public benefit is at best confusing, and it certainly appears to have limited authority. At worst, it has been argued that the Commission’s standpoint was incorrect.⁸⁹⁴ I contend that either approach is concerning for charity law because, as I noted earlier, the law has already been observed as being “illogical and even capricious”.⁸⁹⁵ By utilising authority in such a manner, the Commission has done little to reassure the public that charity law is any less illogical or capricious in this particular instance, and indeed, this may undermine my assertion that the advancement of religion is reconcilable through the doctrine of public benefit.

⁸⁸⁹ Peter Luxton and Nicola Evans “Cogent and cohesive? Two recent Charity Commission decisions on the advancement of religion” 2011 Conveyancer and Property Lawyer at 146.

⁸⁹⁰ *Gnostic Centre*, above n 881, at [46], referring to *Gilmour v Coats* [1948] Ch 340 (CA).

⁸⁹¹ At [46], citing *Gilmour v Coats*, above n 890.

⁸⁹² *Gilmour v Coats*, above n 890, at 446.

⁸⁹³ *Gilmour v Coats*, at 454.

⁸⁹⁴ Luxton and Evans, above n 889, at 147, referring to, inter alia, Hubert Picarda QC *Written Evidence to the Joint Committee on the Draft Charities Bill* (HL Paper No 167-2; HC Paper No 662 DCH 297 2004); Jeffrey Hackney “Charities and public benefit” (2008) LQR 124 34; and Anne Sanders “The mystery of public benefit” (2007) CL & PR 10 (2) at 3.

⁸⁹⁵ *Gilmour v Coats*, above n 890, at 443.

An additional problem also arose with this Gnostic Centre Decision, and it is pertinent to the advancement of religion specifically. That being that a court, or its equivalent, is not the proper forum to decide religious doctrine issues, or indeed decide upon such “moral or ethical frameworks.”⁸⁹⁶ Removing the presumption of public benefit required the Commission to ascertain positive effect emanating from the Gnostic Centre’s core beliefs to the public. This was because to advance the ethical or divine well-being, or community enhancement in a way that has public benefit, there has to be a promotion of a principled or moralistic tenet that will be evidentially of public benefit. Yet, due to the very nature of religions, it is not clear how such things can be proven substantively. This is because “no advances in technology or information-gathering will ever enable the meaningful evaluation of something fundamentally incapable of evaluation.”⁸⁹⁷ In spite of that, the Commission asserted the Gnostic Centre failed on this matter.⁸⁹⁸

Overall, therefore this decision certainly raises issues in relation to the rejection of the presumption of public benefit, and unfortunately for the Gnostic Centre, it did not seek to appeal, citing pecuniary limitations, and the Decision remains unchallenged.⁸⁹⁹ This is regrettable for the charity sector because it suggests that religions may indeed struggle to demonstrate the requisite public benefit when their very nature may preclude them from doing so. As a result, the downward consequences for beneficiaries that may have been supported by such registered charities may be negative. Interestingly, this may suggest that removing the presumption of public benefit, in reality, provides evidence that my assertion that the presumption of this doctrine *is* in fact reconcilable from a charity law perspective. This is because the presumption has provided historical, and indeed current, legal certainty, whereas its removal suggests now that there may be some lack of legal clarity, which will do little to ensure public confidence in the charity sector.

⁸⁹⁶ Luxton and Evans, above n 889, at 147.

⁸⁹⁷ Jonathan Garton *Public Benefit in Charity Law* (Oxford University Press, Oxford, 2001) at 110.

⁸⁹⁸ *Gnostic Centre*, above n 881, at [59].

⁸⁹⁹ Luxton and Evans, above n 889, at 149; Juliet Chevalier-Watts *Charity Law International Perspectives* (Routledge, Abingdon, 2018) at 105.

VIII. *The Druid Network*

In comparison, the Commission decided the opposite in the *Application for the Registration of the Druid Network*,⁹⁰⁰ even though, prima facie, the two applications may have been construed as similar. However, in a similar vein to the *Gnostic Centre Decision*, the *Druid Decision* has also provoked negative commentary, not least because whilst established Christian religions may have to prove their public benefit, this Network that “seems predominantly to afford outreach via the Internet and has only two solstice rituals a year to witness any ... edification.”⁹⁰¹ Further, the Decision also supports my assertion that the advancement of religion is reconcilable through the presumption of public benefit because this Decision actually reflects yet further inconsistencies within this new legal framework.

The purposes of the Network include providing information in relation to philosophies and traditions of Druidry and to enable the undertaking of Druidry.⁹⁰² As with the *Gnostic Centre Decision*, the Commission relied on the four criteria, as set out earlier, and I will again focus on these specific criteria.

In a change from the *Gnostic Centre Decision*, the Commission found that the Network promoted its ethical codes in ways that were vital and core to their creed. The Network achieved this through providing details about living ethically; through caring for the environment; and encouraging access to historical places of interest and to ancient relics, amongst other methods.⁹⁰³ This led the Commission stating that the Network had demonstrated adequate verification of “an identifiable positive beneficial ethical framework ... that is capable of having a beneficial impact on the community at large.”⁹⁰⁴

⁹⁰⁰ *Application for the Registration of the Druid Network* (Charity Commission for England and Wales, 21 September 2010).

⁹⁰¹ Hubert Picarda “Charities Act 2011: a dog’s breakfast or dream come true? A case for further reform” in Matthew Harding, Ann O’Connell and Miranda Stewart (eds) *Not-for-Profit Law Theoretical and Comparative Perspectives* (Cambridge University Press, Cambridge, 2014) at 146; see Luxton and Evans, above n 889, at 150; Chevalier-Watts, above n 899, at 105-107.

⁹⁰² *Druid Network*, above n 900, at [5].

⁹⁰³ At [51]-[52].

⁹⁰⁴ At [53].

The Commission did not make reference to *Gilmour v Coats*, as it did with in the *Gnostic Centre Decision*, rather it relied on one other authority, *Cocks v Manners*.⁹⁰⁵ It is not clear to which principle in *Cocks* the Commission is making reference. However, it is thought to be as follows:⁹⁰⁶

It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable.

Nonetheless, it has been asserted that this statement does not provide support for the Commission's fourth characteristic, because "identifiable", "beneficial", "moral", "ethical", or "framework" are not referred to in *Cocks*. Further, the Court in *Cocks* determined that the gift failed for charity.⁹⁰⁷

Therefore, it is unclear as to the relevance of *Cocks* as authority in the *Druid Network Decision*. Whilst it is certainly beneficial to the charitable sector that the Druid Network was found to be charitable, one might argue that the Commission's standpoint, since the removal of the presumption of the public benefit, causes concern. This is because its approach can be said to be comparatively limited, as well as being rigid in its approach.⁹⁰⁸ This approach differs from the Commission's earlier approaches, as is evidenced in the Decision of *Church of Scientology (England and Wales)*.⁹⁰⁹ In that Decision, the Commission relied substantially on recognised case law, and it provided thorough evaluation of pertinent issues and relevant law.

In summary with regard to the *Druid Network* and *Gnostic Centre Decisions*, I find myself in agreement with Russell Sandberg that:⁹¹⁰

⁹⁰⁵ *Cocks v Manners* (1871) LR 12 Eq 574.

⁹⁰⁶ Luxton and Evans, above n 889, at 149, citing *Cocks v Manners*, above n 905, at 585.

⁹⁰⁷ At 150. This approach was approved in *Gilmour v Coats*, above n 890.

⁹⁰⁸ At 150.

⁹⁰⁹ At 150-151, referring to *Church of Scientology (England and Wales)*, Charity Commission Decision for England and Wales (November 17, 1999).

⁹¹⁰ Russell Sandberg "Clarifying the Definition of Religion under English Law: The Need for a Universal Definition" (2018) *Ecclesiastical Law Society* 20 at 144-145.

It is difficult to disagree with Luxton and Evans that the reasoning of the Commission in both the Gnostic Society and Druid Network applications was reached ‘in reliance on the Commission’s own guidance with virtually no mention, let alone analysis, of the underlying case law and its application to the case in hand.’

I respectfully concur that these two Decisions demonstrate “the Commission’s lack of awareness of the need for legal rigour when making a legal decision.”⁹¹¹ If this is correct, this is a concerning development because such Decisions are contrary to the intentions of the legislative reform with regard to public benefit wherein it was undertaken, inter alia, to provide clarity and to garner public confidence. In reality, the very opposite appears to have occurred, at the expense of legal clarity and of great concern no doubt to religious communities and the outreach that they provide through their charitable endeavours. This then supports my submissions that the advancement of religion can be reconciled through the presumption of public benefit, not least because of the certainty and clarity provided by that doctrine.

IX. Preston Down Trust

Of interest also is the Charity Commission case involving the Plymouth Brethren, that of the Preston Down Trust, which also reflected the problematic issue with proving public benefit with religious groups.

Originally, in 2012, the Charity Commission rejected the Trust’s application for registration because the Commission concluded that it did not advance religion due to lack of public benefit.⁹¹² The Trust owned a meeting hall that was used by the Plymouth Brethren Christian Church. The Preston Down Trust was particularly interesting not least because “there was legal precedent ruling that the Plymouth Brethren were charitable”,⁹¹³ as discussed earlier in

⁹¹¹ At 145, citing Luxton and Evans, above n 889 at 150.

⁹¹² Debra Morris “Elasticity of the Boundaries in England and Wales: What is (and isn’t) Charitable? An Opportunity Lost (or Not Yet Fully Embraced)?” (2015) at 23 (Conference Proceedings National Centre on Philanthropy and the Law), referring to Letter by the Charity Commission Legal Advisor to the Trust, 7th April 2012.

⁹¹³ Robert Meakin “Taking the Queen’s Shilling: the Implications for Religious Freedom for Religions Being Registered as Charities” (2017) *Law & Just Christian L Rev* 57 at 64-65, referring to *Holmes v Attorney-General* *The Times* 11th February 1981.

the chapter in relation to the *Holmes* case. Just as in *Holmes*, these Brethren were the same fundamental Christian group.

In 2012 the Commission stated that neither the Preston Down Trust nor the Church demonstrated sufficient public benefit either in its services, nor in its doctrines or practices,⁹¹⁴ which was in direct contrast to the decision in *Holmes* although obviously the Preston Down decision came about after the statutory change to remove the presumption of public benefit. However, the *Holmes* decision had already concluded that the public benefit was established, therefore it might be asserted that this latest decision was an unusual approach for the Commission in the face of previous determined evidence. Nonetheless, it was asserted that the *Holmes* decision turned on the presumption, or had “at least been largely influenced by the existence of a presumption ... of public benefit.”⁹¹⁵ Certainly, in my discussions, I utilised the *Holmes* case as supporting the presumption of public benefit. However, this new decision might cause concern about the justiciability of such a conclusion by the Commission because an identical group had previously been found to be charitable and on the same basis. Nevertheless, the Commission distinguished *Holmes* because “there was real doubt that the decision in *Holmes* could be relied upon”⁹¹⁶ because it was determined in reliance on the presumption of public benefit. This creates an interesting dichotomy whereby two identical groups’ charitability can be decided in opposition to each other because of a statutory change, which in turn creates discord within a charity law context.

The Commission also had heard allegations in relation to the Brethren’s practices that might deem them harmful, echoing the decision in *Holmes*. Just as in *Holmes*, the Commission could not give any weight to such allegations because there was no substantive evidence of the perceived harms, therefore it played no part in the overall decision-making process.

The Trust appealed to the Charity Tribunal, but events took an interesting turn. Shortly after a hearing in 2012, the Trust was granted a stay in proceedings in order to negotiate on matters outside of the Tribunal in a cost saving exercise. Talks between the Trust and the Commission

⁹¹⁴ Morris, above n 912, at 23.

⁹¹⁵ At 23, footnote 114.

⁹¹⁶ Application for Registration of the Preston Down Trust Charity Commission for England and Wales 3 January 2014 at [43].

took place, and evidence was shared from independent experts, particularly in respect to the “allegations of detriment, harm or disbenefit which could outweigh or militate against public benefit.”⁹¹⁷ What the Commission observed was that the Trust “had demonstrated a willingness to do what it could as a Christian organisation to ensure ... it would act with Christian compassion ... in carrying out its disciplinary practices and its relations with former members of the Brethren.”⁹¹⁸

Consequently, the Commission concluded that the Trust demonstrated sufficient evidence that the Trust did fulfil the public benefit test and it revised its original decision pertaining to the Trust’s charitability. Debra Morris opined that actually this revision of the decision indicated that the Commission “upheld the main elements of the public benefit test from the pre-Charities Act case law.”⁹¹⁹ If that is correct, this suggests that the Preston Trust case has done little to assuage concerns about the removal of the presumption of public benefit, and instead, has merely added to concerns that its removal has created inconsistencies in the determination of public benefit, at least for religious bodies. Consequently, I assert that this then does tend to support the object of my inquiry that the advancement of religion is reconcilable, and specifically through the legal construct of public benefit.

Of course, it must be acknowledged that this decision by the Commission “does not have the same precedential status as that of a case decided in the Upper Tribunal”.⁹²⁰ However, its very existence casts doubt as to whether the desire of the Government at the time to create certainty and clarity on public benefit by removing the presumption of public benefit has actually been achieved in reality. Indeed, following this decision, “the House of Commons Public Administration Select Committee subsequently recommended that ‘the removal of the presumption of public benefit ... be repealed ...’”.⁹²¹ Whilst it is apparent that no such recommendation has been adopted at the time of writing, this type of pronouncement is

⁹¹⁷ At 24.

⁹¹⁸ At 24; it should also be noted that the disciplinary practices referred to in *Holmes* of “shutting up” and “withdrawal” are now known as “shrinking” and “excommunication”, respectively, as per Morris, above n 912, footnote 115.

⁹¹⁹ At 25.

⁹²⁰ At 25.

⁹²¹ Pauline Ridge “Not for profit law and freedom of religion” in Matthew Harding (ed) *Research Handbook on Not-for-profit Law* (Edward Elgar Publishing Limited, Cheltenham, 2018) at 302, citing House of Commons Public Administration Select Committee “The Role of the Charity Commission and Public Benefit: Post-Legislative Scrutiny of the Charities Act 2006 (HC 76, 21 May 2013) at [91]-[93].

indicative of overall concerns relating to public benefit in the United Kingdom. In addition, such pronouncements add weight to my assertions that the presumption of public benefit is actually valuable in cases relating to the advancement of religion so as to try to reduce concerns relating to inconsistencies about the determination of public benefit. Further, if this statutory amendment were to be repealed, as recommended, this would avoid the Commission, and courts, having to make “judgments about the value of religious doctrine and practice.”⁹²² This seems an impossible task for a legal body to undertake meaningfully when it has already been determined that many religious doctrines and practices are outside of such value-making judgments. The Preston Down decision reflects this lack of meaningful judgment if indeed it is correct that the Commission “upheld the main elements of the public benefit test from the pre-Charities Act case law.”⁹²³

Returning to matters arising from the Gnostic Centre and Druid Network Decisions, there is a further concern regarding those Decisions, and that is in relation to the assertion that the ethical framework criteria, which was criterion 4, discussed above, has been conflated with the public benefit requirement. In other words, the question should really be whether the activities of an entity are beneficial for the public, not whether it has an identifiable ethical framework. The Commission has chosen to identify an ethical framework as a means of assessing public benefit, and it is argued that this confuses two entirely different issues,⁹²⁴ and in doing so, provides further evidence that the advancement of religion can be reconciled from this legal perspective. I turn to this matter now.

X. Public Benefit and Ethical Framework

It is stated that whilst “benefit” itself is unspecified legally, it has been described in a variety of ways, which includes “edification and improving effects, instruction of the public, or moral uplifting and spiritual comfort.”⁹²⁵ Further, it is said that there are three main levels of public

⁹²² Meakin, above n 913, at 64.

⁹²³ Morris, above n 912, at 25.

⁹²⁴ Suzanne Owen and Teemu Taira “The Category of ‘Religion’ in Public Classifications: Charity Registration of the Druid Network in England and Wales” in Trevor Stack, Naomi Goldenberg and Timothy Fitzgerald (eds) *Religion as a Category of Governance and Sovereignty* (Brill, Leiden, 2015) at 99.

⁹²⁵ At 99, citing Peter W Edge and Joan M Loughrey “Religious charities and the Juridification of the Charity Commission” (2006) *Legal Studies* 21 1 36-64.

benefit. Firstly, there should be material and spiritual benefits gained from performing activities. Second, these should edify and inspire the public. Third, religious charities should have secular activities that provide various civic benefits.⁹²⁶

The Gnostic Centre was unable to persuade the Commission that its teachings met with an identifiable ethical or moral framework. The Centre asserted that individuals would become spiritually aware and exhibit positive behaviour, and as a result would then benefit society. It could be argued that much the same could be said of traditional church services – individuals receive spiritual enlightenment and there is a downstream positive impact on communities as a result. However, the Commission stated that the Centre’s teachings were not sufficient and too anecdotal to determine the benefit. It could be asserted that the benefits provided by traditional church services as mentioned are also too anecdotal to determine benefit. Interestingly, the Druid Network had no issue convincing the Commission of its beneficial ethical framework because they advanced religion through promoting their beliefs, providing public rituals, and promoting interfaith activities and religious harmony.⁹²⁷ This is perhaps because they echoed traditional church activities, although the rationale was not explained.

Nonetheless, it has been asserted that the conflation of the ethical framework and public benefit can be understood in two ways. Firstly, it is a practical way of evaluating whether a group should be given the benefits of charity in cases where the entity’s beliefs and practices might be regarded as deviant from the standard society moral framework. Secondly, because an ethical framework is connected to the category of religion, it can tell us about this religion in a contemporary context.⁹²⁸ For example, in the *Druid Network* Decision, mention was made of “sacrifice”.⁹²⁹ “Sacrifice”, in religious terms, suggests animal or indeed human sacrifices, which would be an unusual, and certainly frowned-upon practice, in contemporary Western societies.

Consequently, the Druid Network had to reiterate that its sacrifices involved no bloodshed, but rather referred to sacrifice of time within the community. This rhetoric is important because it

⁹²⁶ At 99, referring to Peter W Edge *Religion and Law: An Introduction* (Ashgate, Aldershot, 2006).

⁹²⁷ At 100.

⁹²⁸ At 100.

⁹²⁹ *Druid Network*, above n 900, at [49].

meant that the Network was able to provide evidence of its public benefit, whilst at the same time eschewing its ancient practices, which today would be deemed immoral and uncivilised. Unfortunately, what this suggests is that religions are having to ensure that their rhetoric reflects a taming of their principles to become socially acceptable in today's times.

Indeed, much time was given by the Commission in exploring this reinvented determination of sacrifice,⁹³⁰ illustrating the importance of language in ensuring that a religion complies with modern day public benefit requirements. Further, much of what the Network outlined as being part of the sacrifice required related to secular activities, such as promoting animal and human rights, and highlighting social issues.⁹³¹ This focus on secular activities moves away from what would generally be seen as core religious activities usually associated with religious groups, such as prayers, edification and church services. It might be asserted, therefore, that conflating the public benefit and ethical frameworks undermines the ethos of the religious undertakings of the entity by packaging them in a secular, modern context. This may not be appropriate to do merely in order to meet charity law requirements.

An additional point of note, and one that pertains implicitly to the power of the new public benefit condition, is that there is evidence that the Network refashioned its objects in order to meet this new public benefit obligation. The Network's purposes are "[t]o provide information on the principles and practice of Druidry for the benefit of all and to inspire and facilitate that practice for those who have committed themselves to the spiritual path."⁹³² However, its original constitution declared:⁹³³

As is true of any mystical religious tradition, the deeper mysteries and practices that would be confusing or detrimental to the novice are retained in the privacy of personal practice and close relationship.

⁹³⁰ At [49]-[53].

⁹³¹ At [52].

⁹³² Pauline Ridge "Religious Charitable Status and Public Benefit in Australia" (2011) *Melb U L Rev* Vol 35 at 1079, citing *Druid Network*, above n 900, at [5] and fn 45, whereby it states "the Network provided detailed evidence to the Commission to show how it benefited the community ... also provided evidence to why it did not cause any detriment or harm."

⁹³³ At 1079, citing *Druid Network*, above n 900, at [74].

The Commission was concerned that this inferred that a number of the Network's undertakings were restricted to selected groups. This would then fall outside of the limits of the public benefit doctrine. Accordingly, the Network changed its constitution. The constitution then stated: "There are no occult, secret or hidden practices within Druidry; teachings are open to all."⁹³⁴

It is clear that these new objects differ fundamentally from the old ones. This is an illustration of "the power of the public benefit requirement as a means for the state to mould religious purposes to its own ends."⁹³⁵ However, the Network was not alone in its constitutional changes to gain charitable status. In the Preston Down Trust case, I noted that the Trust entered negotiations with the Charity Commission in order to come to an acceptable compromise whereby the Trust could be construed as meeting public benefit. To do this, the Trust demonstrated that it had made changes to its religious practices to make them more palatable in the eyes of the public. In doing so, the Trust obtained charitable status and the Commission therefore "obtained regulatory power over the group."⁹³⁶

This is surely a concerning development within charity law and certainly for religions and this is because here is evidence of religions having to conform to secular, and perhaps populace, notions of religion, which may be contrary to their original teachings. Indeed, what this suggests is that the public benefit has been evaluated "in secular charitable activity with an erosion of the spiritual element of advancing religion."⁹³⁷

As a result, one has to ask how much of its actual "religion" has been abandoned by the Network, and indeed the Brethren, in order to demonstrate their public benefit to ensure it is now compatible with English law. Perhaps this does mean that "the removal of the presumption of public benefit has triggered a view that religion itself is not publicly beneficial unless it satisfies some further, non-religious, criterion."⁹³⁸ This is evidentially not correct, as

⁹³⁴ At 1079, citing *Druid Network* at [75].

⁹³⁵ At 1079, referring to Julian Rivers *The Law of Organized Religions – Between Establishment and Secularism* (Oxford University Press, Oxford, 2016) at 165.

⁹³⁶ Pauline Ridge "Not for profit law and freedom of religion" in Matthew Harding (ed) *Research Handbook on Not-for-profit Law* (Edward Elgar Publishing Limited, Cheltenham, 2018) at 302.

⁹³⁷ Meakin, above n 913 at 64.

⁹³⁸ Julian Rivers "The Secularisation of the British Constitution" (2012) *Ecc LJ* at 395.

this thesis alone has demonstrated that religion has countless non-secular benefits, and further it is concerning because this undermines the notion that religion is generally “a positive ethical task and publicly beneficial activity”.⁹³⁹ As a result, that in itself should be sufficient as a criterion for the privileged status of charity.

Removing the presumption of public benefit is perhaps a step too far for some religions because it is likely some will not be able to show the requisite proof, no matter how clever the rhetoric, even though there is likely much presumed public benefit. For those such as the Druid Network and the Brethren, who could demonstrate the explicit public benefit, there is a question about how much of their actual religion might have been abandoned in order to obtain that privileged status as charity.

Indeed, it has been asserted that removing the presumption of public benefit has pressed religion into the “service of a secular conception of ‘public interest’.”⁹⁴⁰ In other words, rather than a government viewing religions as delivering distinct community welfare services in conjunction with government services, religions are now contained by “the embrace of the state ... at the same time made subject to its agenda and values.”⁹⁴¹ Certainly, I have argued in a previous chapter that secular evidence regarding the benefits of religion may help support the advancement of religion in a social sense. However, as I also acknowledge, religion is not just about secular benefits. Religion has many non-secular benefits that cannot necessarily be quantified.

Nonetheless, such state intervention may well reassure the populace that religions will not necessarily be unduly advantaged by having charitable status. Nevertheless, this fear is perhaps unfounded because the real damage is likely to occur to religions themselves as they have to illustrate their secular activities to meet the expectations of the public. Whereas in reality, it is oftentimes their spiritual benefits that are of such importance to those in need. Those spiritual benefits maybe seen as having limited public value, which undermines the ethos of many religious bodies, and so their potential charitable works.

⁹³⁹ Owen and Taira, above n 924, at 101.

⁹⁴⁰ Rivers, above n 938, at 396.

⁹⁴¹ At 396.

Consequently, I respectfully assert that the Commission's approach has simply added uncertainty to an already difficult legal area. This is because the reality is that the public benefit doctrine needs clarifying, especially with the recent removal of its presumption by England and Wales legislators. Therefore, I contend that the advancement of religion is reconciled through the presumption of public benefit, which adds to the overall object of my inquiry that the advancement of religion is reconcilable from a number of differing contexts, and a legal framework is just one.

XI. The "Benefit" of the Presumption of Public Benefit

This section of the chapter provides further evidence of the reconcilability of the advancement of religion through this specific legal framework by considering, *inter alia*, some of the underlying characteristics of public benefit and its role in religious charities.

It was asserted earlier that the removal of the presumption was to create certainty and consistency; the discussions pertaining to the *Gnostic Centre*, *The Druid Network*, and the Preston Down Trust provide evidence that the opposite may have occurred. This is concerning for charities generally because it is not clear how religious organisations should present their public benefit so to reflect their underlying purposes accurately, and in a way to ensure that the public benefit fits within a framework that appears to have little legal authority.

I contend that the presumption of public benefit is actually a useful jurisdictional instrument in assessing whether or not a purpose meets society's and charity's measure of benefit. For instance, *Liberty Trust* has already provided the parameters whereby the presumption can be rebutted:⁹⁴²

... if there is evidence that the purpose is subversive of all morality, or it is a new belief system, or if there has been public concern expressed about the organisation carrying out the particular purpose, or if it is focused too narrowly on its adherents.

⁹⁴² *Liberty Trust*, above n 810, at [100], citing Warburton, Morris and Riddle, above n 812, at [2-052].

Those parameters take into consideration the acknowledgment that religion is generally beneficial to society, hence why the benefit should be presumed. However, they are sufficient enough to ensure stringent consideration of a religious organisation. Focusing on ethical frameworks, and with that, essentially secular activities, reflects a judicial “rejection of spiritual benefit”.⁹⁴³ As a result, such a rejection “both undermines the very nature of what it means to be religious and flies in the face of the importance ... attributed to spiritual matters”,⁹⁴⁴ which is a key aspect of religion, and one of the key attractions for many seeking religious undertakings.

However, one might ask, as perhaps many non-believers may, why legally there should be a presumption in favour of advancing religion. One response may be found by looking to the history of religion in England and Wales. That common law jurisdiction, and its overseas territories, adopted the presumption of public benefit when Christianity was the key religion, and prior to modern times it would have been unlikely that any person would have challenged the presumption that Christianity was inherently beneficial to society.

In current times, just as it could be said for historical times, it is said that the benefits of religion and forms of spiritual belief can be seen most clearly in the direct effect on their adherents. For instance, “in the peace and equanimity instilled by the prospect of eternal salvation or other forms of redemption; and on communities of the like-minded, by being part of a collective bound by the same values and modes of worship.”⁹⁴⁵ This does not necessarily answer the question as to how this will benefit the public generally, but it has been argued that the wider community will benefit, albeit more indirectly. For instance, from the exposure to the modelling of good civic conduct; dissemination of relevant teachings; through leading good lives; and doing good works that will enhance secular welfare more widely.⁹⁴⁶

There are, of course, other benefits to the community that are derived from religion. These include the presence of churches and places of worship in communities. These represent places

⁹⁴³ Jonathan Garton *Public Benefit in Charity Law* (Oxford University Press, Oxford, 2013) at 193.

⁹⁴⁴ At 193.

⁹⁴⁵ Kerry O’Halloran *Religion, Charity and Human Rights* (Cambridge University Press, Cambridge, 2014) at 479.

⁹⁴⁶ At 479.

of solace, community and pastoral care. Further, such buildings provide significant teaching and learning, as well as offering culturally-enriching experiences such as music, architecture, sculptures and other art, and public ceremonies. In addition, whilst it might be trite to say, religions still remain centres of generosity, altruism, high moral standing and education. These elements can and do counteract the stresses of everyday life. Indeed, “religion ... continues to uphold and represent virtuous and decent behaviour and serves as a reminder ... that ‘good works’ are needed if society is to be a better place.”⁹⁴⁷ Thus, the presumption of the public benefit of religion makes much sense legally and socially, and evidentially supports my assertions that it ensures that the advancement of religion can be reconciled for the benefit of society.

Nonetheless, the United Kingdom did remove that presumption in the Charities Act 2006, along with s 8(1) of the Charities and Trustee Investment (Scotland) Act 2005, and s 3(1) of the Charities (Northern Ireland) Act 2008.⁹⁴⁸ This is likely to have been a welcome change for many, not least because of the repeated and determined calls, as highlighted in Chapter 1, for the advancement of religion to be removed as a charitable head, or at least to be apparently more stringently controlled.

However, it has been argued that the Charity Commission for England and Wales did recognise that the advancement of religion satisfied the public benefit test in ways that differed from the other heads of charity. It is therefore not entirely clear how Parliament intended religious entities to meet the new public benefit condition. This concern is raised because the 2006 and 2011 Acts are silent as to how this should be achieved, as is Parliament.⁹⁴⁹

Certainly, the Commission’s 2008 draft supplementary guidance on public benefit did remind the public that religious bodies would have to set out the effect of their belief systems, doctrines and undertakings, and demonstrate community benefit. In addition, the Commission

⁹⁴⁷ At 479.

⁹⁴⁸ Donovan Waters QC “The advancement of religion in a pluralist society (Part II): abolishing the public benefit element” 2011 *Trusts & Trustees* Vol 17 No 8 at 732.

⁹⁴⁹ At 732.

acknowledged that some organisations would find this difficult, and it set out to provide some guidance on the matter:⁹⁵⁰

The benefits to the public should be capable of being recognised, identified, defined or described but that does not mean that they also have to be capable of being quantified. Benefits that can be quantified and measured may be easier to identify but we also take non-quantifiable benefits into consideration, provided it is clear what the benefits are. The benefits may or may not be physically experienced. We realise that often in the case of charities whose aims include advancing religion some of the benefits are not tangible and could be potentially difficult to identify. However, this is not to say that a public benefit assessment would only take account of tangible, practical benefits.

This suggests that spiritual benefits may be taken into consideration. However, the Commission only included spiritual benefits contributing “to the spiritual and moral education of children”.⁹⁵¹ Adults have been excluded from the guidance, and it would appear to be quite deliberate. This means that benefiting from spiritual matters will not be sufficient to meet the public benefit test, which is a large section of the community deliberately excluded from the test.

Indeed, it has been suggested that the Commission’s carefully-worded guidance means that it is not possible to speak of spiritual benefits being beneficial to any persons other than children being educated.⁹⁵² On the other hand, it is acknowledged that the Commission has provided some information pertaining to assessing the public benefit:⁹⁵³

⁹⁵⁰ At 733-734; “Public benefit - Principle 1: There must be an identifiable benefit or benefits” Charity Commission for England and Wales 2008 at D2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358531/advancement-of-religion-for-the-public-benefit.pdf. It should be noted that the Commission states: “This guidance is currently under review. It no longer forms part of our public benefit guidance and should now be read together with our set of 3 public benefit guides. It will remain available to read until we publish replacement guidance.” “The Advancement of Religion for the Public Benefit” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/358531/advancement-of-religion-for-the-public-benefit.pdf.

⁹⁵¹ “Public benefit - Principle 1: There must be an identifiable benefit or benefits” at D2.

⁹⁵² Waters, above n 948, at 734-735.

⁹⁵³ “Public benefit - Principle 1: There must be an identifiable benefit or benefits”, above n 950, at D2.

... whether a religious organisation's aims are for the public benefit is a question of judgement. We have to decide ... whether there is public benefit in the light of the evidence and facts before us.

Nonetheless, the “absence of any measuring yardstick in those words is striking”,⁹⁵⁴ and does little to acknowledge the very real difference in the benefits to be found in religion in comparison with the other heads of charity. Consequently, I submit that this may undermine the role of religion within the charitable sector at the expense of the sector itself. One only has to review the evidence provided throughout this thesis to recognise the value of religion within charity to understand the real threat to the sector if the advancement of religion is undermined in this manner. In addition, the requirement to confirm that a purpose provides explicit evidence of its public benefit is seen as a fundamental devaluation of religion. This is because the “flat rate public benefit test”⁹⁵⁵ imposed across all charitable purposes, reinforced by the activities test is viewed as secularising religion. Further, a “flat rate public benefit test”⁹⁵⁶ is unlikely to be applicable to religion in the same way as it is to the other secular charitable purposes.⁹⁵⁷

Indeed, this new proof of public benefit ignores the fact that religions offer more than secular conceptions of benefit. Religious belief offers “spiritual, emotional and intellectual resources ... to people who are searching for answers to ethical and existential questions.”⁹⁵⁸ Such resources enable people to develop emotionally, and “constitute options for autonomous choices.”⁹⁵⁹ Such spiritual resources also provide other benefits. For example, in the spiritual requirement of tithing, which comes from charitable obligations that a religious belief places upon individuals. It is argued that tithing creates a wellspring of charitable activity, and communities feel benefited, emotionally and physically, from such provision of tithes. It appears that perhaps only the physical effects will now be acknowledged under United

⁹⁵⁴ Waters, above n 948, at 735.

⁹⁵⁵ Kerry O'Halloran *Religion, Charity and Human Rights* (Cambridge University Press, Cambridge, 2014) at 481.

⁹⁵⁶ At 481.

⁹⁵⁷ At 481.

⁹⁵⁸ Kathryn Chan “The Advancement of Religion as a Charitable Purpose in an Age of Religious Neutrality” (2017) *Oxford Journal of Law and Religion* 6 at 124, referring to Matthew Harding *Charity Law and the Liberal State* (Cambridge University Press, Cambridge, 2014).

⁹⁵⁹ At 124, referring to Matthew Harding *Charity Law and the Liberal State* (Cambridge University Press, Cambridge, 2014).

Kingdom law. However, the ethereal public benefit that arises “from the existence of the normative universe that caused”⁹⁶⁰ a person to give, because of unquantifiable religious spiritual obligations, may no longer be a relevant benefit.

XII. Conclusion

This chapter was important to support my assertions that the advancement of religion is a reconcilable construct, and specifically from the evidence provided in this chapter, from the legal context of public benefit. This is because public benefit and religion are inherently and intrinsically linked. Not least because religion may fill voids that exist between personal morality and the overall recognition of societal principles which uphold the law and societal behaviours. For instance, public benefit is implied in religion because religion can offer certainty, comfort, codes of conduct and reassurance in the face of inadequacies of humans’ place within the universe. These inferences emphasise the continued function of religion within society. This provides a justification for the continued acceptance of religion within society generally. Consequently, I contend that charity law can provide the vehicle by which religion can benefit communities appropriately, not least because of public benefit, ensuring that the advancement of religion is reconcilable.

Certainly, there is abundant evidence that churches, which are invariably charitable, continue to exert a fundamental influence in endeavouring to reduce contemporary societal issues. Examples of this are seen whereby governments subcontract services to religious groups, for example, in the provision of traditional welfare services such as clothes, money and education. Further, religious group involvement in large-scale humanitarian aid is legendary, and includes groups such as the Salvation Army and Catholic Relief Agencies.⁹⁶¹

In addition, public benefit may be inherently inferred from the general redistributive process of transferring property from a religious person to the community through acts of altruism and tithes, which are obligations on the adherents of many religions. This occurs without direct coercion from the state, yet benefits the state intrinsically because of the communities that are

⁹⁶⁰ At 127.

⁹⁶¹ HR Sorensen and AK Thompson *The Advancement of Religion is Still a Valid Charitable Object in 2001* (Working Paper No CPNS13 for Charity Law in the Pacific Rim 4-6 October QUT Brisbane 2001) at 12.

then supported; the pressure is thus reduced on the state.⁹⁶² What can be asserted is that “maintenance of the normative universes that promote these narratives is instrumentally valuable to the public as a whole.”⁹⁶³

In judicial terms, case law has revealed that the presumption of public benefit has generally assisted courts when considering with the advancement of religion. In cases such as *Liberty Trust* and *Holmes*, where there was an accepted relationship between religion and charity, a court could uphold an object as charitable to the full extent of the law. The presumption acted as a check and balance where there was both findings of public benefit and no public benefit. Overall, the presumption weighed in favour of charity, therefore the value of the presumption of public benefit is illustrated.

Similarly in *Re Watson*,⁹⁶⁴ there was evidence for and against finding the charitable purpose. The evidence against was that the works of HG Hobbs had nil worth in relation to the Christian faith. However, Hobbs’ writings were not contrary to fundamental religious beliefs or morals, thus the presumption of public benefit was not rebutted. Therefore, Plowman J was able to weigh up the evidence, and sufficient evidence was presented not to rebut the presumption, leading to a finding of the purposes being charitable.⁹⁶⁵ I contend that assessing the public benefit in this manner illustrates its effectiveness as a check and balance for the advancement of religion. Further, it gives credence to the doctrine of benignant construction, which is clearly a benefit to society overall.

I maintain that evaluating religion’s explicit public benefit in many instances is not merely impractical, it is effectively impossible, because religion’s spiritual components are fundamentally incapable of being evaluated.⁹⁶⁶ In other words, the “indemonstrable nature of any supernatural belief places endeavours undertaken to give effect to that belief beyond effective evaluation”.⁹⁶⁷ Nonetheless, I argue that having an indemonstrable public benefit should not negate charitable status, rather the presumption of public benefit should be applied.

⁹⁶² Chan, above n 958, at 133.

⁹⁶³ At 133.

⁹⁶⁴ At 165, referring to *Re Watson (deceased), Hobbs v Smith* [1973] 3 All ER 678.

⁹⁶⁵ At 165, referring to *Re Watson* at 682; 683; and 688.

⁹⁶⁶ Garton, above n 943, at 110.

⁹⁶⁷ At 192.

If there is sufficient evidence to rebut that presumption, such as a purpose being contrary to public policy or an illegal purpose, then this can be a sufficient regulatory mechanism by which to deny charitability.

Consequently, I contend that the role of the public benefit in this context is valuable because it acknowledges that spirituality is at the heart of religion. It is disingenuous, at the very least, for states to recognise that religion can be charitable without acknowledging, explicitly, that very concept. With respect, the United Kingdom's rejection of the presumption of public benefit rejects the heart of religion, that of spiritual benefits, and I assert that this may undermine the absolute construct of religion, thus undermining religion as a whole within society. As I have demonstrated throughout this thesis, religious charities provide numerous benefits to a wide variety of societies, and undermining the overall construct of religion through the removal of public benefit may in turn undermine the charity sector, which may then undermine its social welfare endeavours. I submit, therefore, that the presumption of public benefit ensures provides not only a method of reconciling the advancement of religion, but also may go some way to preserving the charitable endeavours of religious charities to benefit society as a whole.

The presumption of public benefit within the advancement of religion has, generally speaking, tended towards some clarity and predictability – two basic requirements of the rule of law.⁹⁶⁸ Consequently, I view the public benefit doctrine, in conjunction with its presumption, as a valuable instrument in a court's arsenal to assess the overall value to a community, not just the secular benefits of religion. The utilisation of the doctrine in this context ensures that distribution of charitable resources is authorised and controlled by the rules of law,⁹⁶⁹ which provides surety to the public. It is certainly unlikely that the United Kingdom will reinstate the presumption of public benefit, but I would respectfully suggest that other jurisdictions consider very carefully the potential issues pertaining to any possible changes to the presumption of the doctrine.

⁹⁶⁸ Kathryn Chan *The Public-Private Nature of Charity Law Divide* (Bloomsbury, London, 2016) at 6.

⁹⁶⁹ At 11.

I therefore submit that this chapter has demonstrated that removing religion's presumption of public benefit risks charity law being uncertain, biased or unstable, and "threatens the law's ability to provide people with definite expectations ... [s]uch is the rule of law and its virtue."

⁹⁷⁰ Such factors are key to consider within charity law because where disincentive and inconvenience occur, the betterment of society will flounder.⁹⁷¹

Public benefit is an organic principle, and I have presented evidence to support the object of my inquiry whereby its value may be recognised where courts have to determine modern day charity law challenges, which arise particularly in regard to issues associated with the advancement of religion. I cannot deny that the doctrine of public benefit is not without issue, but its value is clear when it comes to the very specific requirements of assessing the benefit of religion within charity law because of the inherent complexities of assessing such benefits.

It is possible, as I mentioned in the previous chapter, that assessing the economic value of a religion may satisfy the public benefit requirement. However, as stated, research relating to the economics of religion is limited and invariably it will be difficult currently to assess such values accurately. Further, merely equating a pecuniary value to religion may actually undermine some of the complex benefits afforded by religions to society through their charitable endeavours. Consequently, I contend that the advancement of religion, and the advantages that are granted through being a recognised charitable purpose, can be justified, and therefore reconciled, through the appropriate recognition and application of the presumption of public benefit because it is legitimised through the rules of law whilst continuing to acknowledge the very nature of religion. Indeed, the case of *Holmes* provided one method of determining how the public benefit may be rebutted, and those in in circumstances where the purposes "adverse to the very foundations of all religion, and that they are subversive of all morality".⁹⁷² This may seem like a high threshold but such a parameter implicitly recognises that matters of faith and spirituality benefit humankind overall, and yet it explicitly acknowledges that some religions may not, and in those circumstances it will not be appropriate

⁹⁷⁰ Emma Dowse "Political Purpose and Charity Law in New Zealand. The public benefit requirement: opportunities, issues and solutions in response to *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105" (LLB Dissertation University of Otago 9 October 2015) at 11.

⁹⁷¹ At 11.

⁹⁷² *Holmes v Attorney-General* The Times, at 4, referring *Thornton v Howe*, above n 837, at 19.

to acknowledge any charitable nature. One should not be naïve to the fact that not all religions will have the best interests of humans at their core. However, this is unlikely to be a common situation, especially because many religions, even the controversial ones such as Scientology and Jediism “are remarkably similar to established religions in terms of doctrine.”⁹⁷³ This was acknowledged in the United States in *Founding Church of Scientology v United States*,⁹⁷⁴ whereby the Court noted that Scientology “had many of the characteristics of other recognised religions.”⁹⁷⁵

As a result, I assert that the presumption of public benefit avoids the problem of forcing courts or charitable bodies to evaluate “religious doctrines and practices of a religion.”⁹⁷⁶ Due to the very nature of religions, the truth of many practices and claims cannot be verified by a court, therefore it is difficult to imagine how these matters will be addressed adequately in the future. Indeed, as Murphy J in *Church of the New Faith v Commissioner for Payroll Tax* observed that many of the “established religions ... would not satisfy such criteria”⁹⁷⁷ and:⁹⁷⁸

Christianity claims to have begun with a founder and twelve adherents. It had no written constitution, and no permanent meeting place. It borrowed heavily from the teachings of the Jewish religion, but had no complete and absolute moral code. Its founder exhorted people to love one another and taught by example. Outsiders regarded his teachings, especially about the nature of divinity, as ambiguous, obscure and contradictory, as well as blasphemous and illegal.

Consequently, it is likely that early Christianity would have fallen outside the constructs of religion, at least for charitable purposes. This suggests that new or controversial religions being determined in today’s climate might also be subject to such scrutiny that determines they fail as a religion at charity because their public benefit cannot be explicitly proven, yet they may share many doctrines of established religions who are charitable. This seems an inequitable situation. I demonstrate in this chapter, therefore, that the presumption of public benefit is likely

⁹⁷³ Robert Meakin “Taking the Queen’s Shilling: the Implications for Religious Freedom for Religions Being Registered as Charities” (2017) *Law & Just Christian L Rev* 57 at 67.

⁹⁷⁴ At 67, referring to *Founding Church of Scientology v United States* 409 F2d 1146 (1969).

⁹⁷⁵ At 67.

⁹⁷⁶ At 67.

⁹⁷⁷ At 68, citing *Church of the New Faith v Commissioner for Payroll Tax* (1983) 154 CLR 120 at [46].

⁹⁷⁸ At 69, citing *Church of the New Faith v Commissioner for Payroll Tax*, at [46].

still a useful method of determining the charitability of religious bodies because of the complex and spiritual nature of religion itself which invariably render their explicit public benefit incapable of determination by a court whereas their intrinsic benefit is already established. As a result, it supports my assertions that the advancement of religion is reconcilable through the legal framework of the presumption of public benefit.

In the following penultimate chapter, I turn my attention to potential risks in removing the advancement of religion as a legally-recognised charitable purpose, and how such a removal may provide evidence as to further the object of my inquiry, that of reconciling the advancement of religion.

Chapter 8. Removing the Advancement of Religion as a Head of Charity

I. Introduction

As established in Chapter 1, the overarching aim of this thesis is to review critically the reconciliation of the advancement of religion as a legally-recognised head of charity in the context of the legal and socio-political environment. As the research was undertaken, and as I have demonstrated throughout this thesis, I have established that the advancement of religion within charity law, underpinned by the rule of law, is reconcilable within a number of contexts,⁹⁷⁹ including legal, social, and political. Nonetheless, in providing a thorough and complete examination of this head of charity, I deemed it important to consider some of the possible implications if this charitable purpose were to be removed as a head of charity. This is because if it can be shown that removing this particular charitable purpose would likely have a detrimental effect on democratic society, then this would provide another method by which to reconcile the advancement of religion for the benefit of society. Therefore, this is the focus of this chapter.

I acknowledge that there is no evidence in any reported decisions from the Commonwealth jurisdictions that this head of charity is to be removed. Nevertheless, I maintain it is pertinent to address this specific point within this thesis, not only because it ensures a comprehensive examination of the advancement of religion, but also because "... the voices favouring abolition of the religious charity appear to be growing in strength".⁹⁸⁰ For example, as mentioned, in 2018 a Bill was introduced to the Australian Victorian Parliament which would, inter alia, "remove the advancement of religion as a charitable purpose for charity law".⁹⁸¹ In

⁹⁷⁹ For example, HR Sorensen & AK Thompson *The Advancement of Religion is Still a Valid Charitable Object in 2001*" (Working Paper No CPNS13, Charity Law in the Pacific Rim, Centre of Philanthropy and Nonprofit Studies, QUT, Brisbane, Australia, August 2002) at 10.

⁹⁸⁰ Kathryn Chan "The Advancement of Religion as a Charitable Purpose in an Age of Religious Neutrality" (2017) *Oxford Journal of Law and Religion* 6 at 113; see also Barry W Bussey "The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School" 2016 *BYU Law Review* Issue 4 January at 1213.

⁹⁸¹ Peter Mulherin "Religious Organisations' Tax Exemption Status: Mark Sneddon quoted in Victorian Parliament Debate" (22 May 2018)

addition, and as observed in Chapter 1, the rationale to continue to support “archaic British law”⁹⁸² with respect to the advancement of religion is arguably “no longer relevant in a secular, 21st century democracy”.⁹⁸³ This is because an organisation “should not get tax exempt status because you promote belief in a supreme being, or multiple supreme beings.”⁹⁸⁴ Consequently, any reconciliation of the advancement of religion is implicitly shadowed with public calls for its removal.

In reflecting on the removal of the advancement of religion, I consider some key factors of religion that are unique to religious charities that are not necessarily part of the construct of other secular charitable groups. These unique properties contribute significantly to the support given to, and provided by, religious charities and groups, thus providing evidence to support my assertion that the advancement of religion is a reconcilable principle.

I conclude that any removal of this charitable purpose would have wider implications for society generally, because implicitly charity, and charity law, are influenced by society and social contexts. Therefore, if religion were to be removed from charity law, then society may also lose the influence of religion, for example, through significant reductions in social welfare programmes and activities that are provided by religious groups.

Consequently, this chapter forms part of this wider discourse of the role of religion within charity. As part of these discussions, it will become implicitly evident as to what consequences

<http://www.i4cs.com.au/religious-organisations-tax-exemption-status-mark-sneddon-quoted-in-victorian-parliament-debate/>.

⁹⁸² David Farrar, Kiwiblog 23 February 2015, citing *The Herald*

http://www.kiwiblog.co.nz/2015/02/advancement_of_religion_should_not_be_a_charitable_purpose.html

⁹⁸³ Farrar.

⁹⁸⁴ Farrar; see also Bryce Edwards “[who runs New Zealand?] Religious charities” *Liberation* (27 January 2008) https://liberation.typepad.com/liberation/who_runs_new_zealand/; Dann Flynn “An unprecedented attack on faith and freedom defeated” *The Spectator* (25 May 2018) <https://www.spectator.com.au/author/dan-flynn/>; Rationalist Society of Australia “Petition: remove “advancement of religion” as a charitable purpose” (19 November 2015) <https://www.rationalist.com.au/petition-remove-advancement-of-religion-as-a-charitable-purpose/>; Wendy Williams (ed) “Advancement of Religion as Charitable Purpose Question” *ProbonoAustralia* (15 December 2017) <https://probonoaustralia.com.au/news/2017/12/advancement-religion-charitable-purpose-question/>; Meredith Doig “Religion’s tax break is a cross we shouldn’t have to bear” *The Sydney Morning Herald* (24 March 2016) <https://www.smh.com.au/opinion/easter-is-a-good-time-to-revisit-taxexempt-status-of-religious-organisations-20160324-gnpzjj.html>; Luke Appleby “‘Comprehensive’ review of Charities Act now underway, minister Peeni Henare, as calls to change tax treatment of religious charities grows” *1News TVNZ* (7 March 2018) https://www.tvnz.co.nz/one-news/new-zealand/comprehensive-review-charities-act-now-underway-minister-peeni-henare-says-calls-change-tax-treatment-religious-grow?variant=tb_v_1; see Chapter 1 for additional discussions.

may arise for societies with the removal of the advancement of religion as a head of charity. I begin by considering the nexus between religion, society, and charity, which has been considered in previous chapters. However, I address this matter with regards to the consequences to society if the advancement of religion were to vanish from legal charitable purposes. Therefore, this section contextualises religious charities as part of the broader discussions within this chapter.

II. Religion, Society and Charity – an Overview

As I observed in some earlier chapters in relation to the lack of available research, or up-to-date research in those specific areas, the research in the particular context of this chapter is also limited. Certainly, there is extensive research about the influence of religious charities, both positive and negative, however, there is limited information available about what would happen if religion were to be removed from charity law. Obviously, because it is a theoretical question at the time of writing, all of the information available is academic in nature, and it means that I may have to make some assumptions or assertions based on the research available.

Nonetheless, what these lack of enquiries highlight is the need for more research to understand the real consequences should governments determine that removing the advancement of religion as a charitable purpose is the correct approach to take.

As I established in earlier chapters:⁹⁸⁵

The relationship between religion and society cannot be understood without reference to law, and the relationship between religion and law cannot be understood without reference to sociology. A sociology of law and religion is concerned with how social forces shape the legal regulation of religion and how law is used to affect religion and its social expression. It seeks to shed further light upon the complex relationship between religion, law and society.

I established in Chapter 6, from an economics perspective, that generally speaking, law, and thus charity law, must fit within a modern social context to operate appropriately and

⁹⁸⁵ Russell Sandberg and Rebecca Catto “Law and Sociology: Toward a Greater Understanding of Religion” in N Doe and R Sandberg (eds) *Law and Religion: New Horizons* (Peeters, Leuven 2010) at 28.

effectively. This means that the advancement of religion, alongside other the charitable purposes, is “essential to establishing and sustaining an equitable, inclusive and stable society,”⁹⁸⁶ or, in other words, “to promote a truly contemporary interpretation of the public benefit is to promote civil society.”⁹⁸⁷ Indeed, it has been asserted that religion is a “valuable constituent in the character of our citizens”.⁹⁸⁸ This latter point was made specifically in reference to United States’ citizens, although no doubt it would also apply to many jurisdictions. Further, it has been said that religion is “necessary to the advancement of civilisation and the production of the welfare of society”.⁹⁸⁹

Consequently, I contend that religion, society and law have a symbiotic relationship where one influences the other, and in this context, I refer generally to democratic societies, as has been referenced throughout this thesis. Politics equally influences the law, and vice versa, and obviously charity law forms part of the legal framework that is influenced by politics. Therefore, religion and politics are also closely associated. As a result, it is argued that “religion is a normal part of the political discussion.”⁹⁹⁰ For instance:⁹⁹¹

All sorts of values feed into a political position, and most are accepted as a legitimate part of political debate. Different economic schools of thought, for example, contribute to different kinds of economic policy. Different beliefs about the nature, causes and consequences of climate change contribute ... to different stances on emissions reduction. Different ideological orientations nurture different approaches to international relations.

Therefore, accepting religion in the political arena enables religious contribution to policies, education and civic discourses, which in turn leads to the promotion of democratic principles.⁹⁹² “Far from ushering in theocracy, this openness to faith enhances pluralism and diversity.”⁹⁹³ For example, the United States Supreme Court, whilst acknowledging the

⁹⁸⁶ Kerry O’Halloran “Charities, civil society and the charity law reviews on the island of Ireland” 2004 Policy & Politics Vol 32 No 2 at 263.

⁹⁸⁷ At 263.

⁹⁸⁸ Sorenson & Thompson, above n 979, at 10, citing Hubert Picarda *Law and Practice Relating to Charities* (3rd ed, Butterworths, London, 1999) at 84.

⁹⁸⁹ Sorenson & Thompson, above n 979, at 10, citing Picarda, above n 988, at 84.

⁹⁹⁰ Marian Maddox “An Argument for More, not Less, Religion in Australian Politics” (2009) ARSR 22.3 at 361.
⁹⁹¹ At 361.

⁹⁹² Antony Barone Kolenc “Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court” 2017 Pace International Law Review Vol 30 Issue 1 Winter at 54.

⁹⁹³ At 54.

religious basis of the country, also acknowledged the United States' "respect for freedom of religious practice that extended to other faiths as well."⁹⁹⁴ Therefore, religion can be recognised as having a "vital political role."⁹⁹⁵ This is because not only is religion an "important source of viewpoints in the process of democratic self-government, but also a powerful political motivator behind some of the [United States'] greatest crusades."⁹⁹⁶ Such views apply equally to Europe where many would "prefer to live in a country of pluralism that grants a more complete freedom of public behaviour even if [they] belong to a minority and have to support the predominance of an established religion."⁹⁹⁷

Nonetheless, politically, the advancement of religion is a challenging principle because religious charities may be seen as being advantaged at the expense of other social necessities. For example:⁹⁹⁸

... in present society, while health services are suffering from underfunding and other public goods like education and welfare are increasingly strained, the prospering pursuit of advancement of religion with its intangible and questionably 'public' benefits is problematic.

Therefore, it becomes clearer as to why this head of charity may be regarded as having an untenable future. However, removing the advancement of religion from charity law would have consequences, and it is likely these would be detrimental for society in a number of regards, demonstrating, therefore, why it is a reconcilable principle, as I assert.

In order to illustrate some likely consequences for societies generally, which would include the democratic societies to which I've made reference throughout this thesis, this chapter provides a comprehensive review of a case study of two New Zealand religious charities that operate on

⁹⁹⁴ At 55, citing Thomas C Berg "Can State-Sponsored Religious Symbols Promote Religious Liberty?" (2013) *Cath Legal Study* at 34, citing *Holy Trinity Church v United States* 143 US 457 (1892) at 458-459.

⁹⁹⁵ Patrick M Garry "Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion" (2005) *Florida Law Review* Vol 57 January No 1 at 34.

⁹⁹⁶ At 34, referring to some political movements that were inspired by the Social Gospel movement, such as the demand for the freer immigration of refugees; the abolitionist movement of the 19th century; and the civil rights movement of the 20th century.

⁹⁹⁷ Kolenc, above n 992, at 55, citing Pierre-Henri Prelota "The Lautsi Decision as Seen from (Christian) Europe" (2013) *ME L Rev* 65 at 786.

⁹⁹⁸ Sofia Zudova On the taxation of religious charities and the public benefit of charitable exemptions (Victorian Parliamentary Internship Research Report June 2016) at 6.

an international scale to fight global poverty. Consequently, the next part of this chapter concentrates primarily on this specific research, and then moves to providing some general conclusions in relation to the possible removal of the advancement of religion as a head of charity.

The New Zealand case study in question demonstrate religion's ability to address global poverty through the utilisation of a skills framework peculiar only to religious charities and bodies. As a result, the following discussions demonstrate how such groups utilise techniques and principles within this framework that are not available to other charitable groups to carry out charitable works. By implication, therefore, if the advancement of religion were removed as a head of charity, those methods utilised specifically by religious charities will vanish because they are not available to secular charitable organisations to utilise.

Of course, it could be argued that if faith groups were no longer available to carry out charity work, people will donate to secular causes instead. As the research indicates, however, this may not be the case because of the methodology of the faith groups. As a result, if such organisations were to lose their charitable status as a result of the advancement of religion being removed as a head of charity, the detrimental consequences for society become self-evident because the welfare provided by such charities would likely be eliminated due to lost support and funding. Consequently, the burden on societies would increase in direct proportion to the lost charitable welfare. In economic terms alone, as established in Chapter 6, this is likely to have serious financial implications for many communities. Other consequences may include alienation of minority or religious groups.

It should be noted, by way of explanation, and as echoed in previous chapters, that much of the research referred to in this thesis uses terms such as “charity”, “non-governmental organisation (NGO)”, and “not-for-profit organisations”, interchangeably. It is not always easy to determine if such bodies are legally-recognised charities, however, the aid work that they undertake is of a religiously philanthropic,⁹⁹⁹ or charitable, nature. Thus, similarities may have to be drawn

⁹⁹⁹ “Philanthropy” is not a legally-recognised form of charity thus a body may have philanthropic purposes but is not legally charitable. Nonetheless, in some research “philanthropy” and “charity” are used interchangeably, which this chapter acknowledges; see Juliet Chevalier-Watts *Law of Charity* (ThomsonReuters, Wellington, 2014) at chap 1.

between those organisations and legally-recognised charitable organisations because their work is invariably identical.

It should also be noted that whilst the New Zealand case studies to which this chapter refers focus on the relief of global poverty specifically, the principles and methodologies of the religious charities that have been referred to in relation to relieving poverty are also utilised in other forms of charitable works undertaken by religious groups, not just relief of global poverty. Consequently, these two case studies merely provide an example of the religious framework in which religious charities operate generally.

III. A New Zealand Case Study – Relief of Global Poverty

A. Introduction

It is evident from previous chapters, and indeed from common awareness generally about religious charities, that religious charities are renowned for providing humanitarian aid on community and global scales. Of course, one cannot ignore the historical darker side of religious charities and religious NGOs, with assistance oftentimes exchanged for religious transformation. Certainly, religion has been notorious for the oppression of certain groups or minorities. Nonetheless, religious groups and charities have had significant positive global impact in relation to social welfare, international humanitarian relief and social development efforts.¹⁰⁰⁰

However, it has been observed that in reality, religion has long been ignored by the social sciences as a result of social sciences being profoundly influenced by secularisation theory. This is because it is thought that religious institutions have lost their social significance in contemporary society.¹⁰⁰¹ Nonetheless, recent civil studies have explored the not-for-profit

¹⁰⁰⁰ I Mylek and P Nel “Religion and relief: the role of religion in mobilizing civil society against global poverty” (2010) *Kotuitui: New Zealand Journal of Social Sciences Online* 5:2 at 82-83, referring to, inter alia, J Berger “Religious nongovernmental organizations: an exploratory analysis” (2003) *Voluntas* 14 (1) 15-39; and MR Kroessin and AS Mohamed “Saudi Arabian NGOs in Somalia: ‘Wahabi’ Da’wah or humanitarian aid? In G Clarke and M Jennings (eds) *Development, civil society and faith-based organizations: bridging the sacred and the secular* (Palgrave Macmillan, Basingstoke, 2008) 187-213.

¹⁰⁰¹ Mylek and Nel, above n 1000, at 81, referring to, inter alia, B Wilson *Religion in Sociological Perspective* (Oxford University Press, Oxford, 1982) at 149.

area and the nexus between philanthropy¹⁰⁰² and religion. The studies have found that religious organisations are viewed as more important than other organisations by poor people, and that recipients of aid trust religious organisations more than non-religious aid entities.¹⁰⁰³

Indeed, the role of religious NGOs and charities cannot be underestimated in relation to aid. It is said that “few other charity sectors exhibit the continuing presence of so many religiously based organizations as does overseas development, with anything up to one-quarter of Northern and international NGOs being ‘Christian’”.¹⁰⁰⁴ In addition, such groups generally command considerable fiscal resources. For instance:¹⁰⁰⁵

... the [largest] four faith-based development agencies had a combined annual income of approximately \$2.5 billion at the beginning of the new millennium ... almost two-thirds of the annual budget of the UK Department for International Development.

The question, therefore, arises: what is it specifically about religious charities that enables them to gather such resources and mobilise in such a way so as to relieve global poverty in comparison with other charitable models? So, prior to addressing the two New Zealand case studies specifically, it is necessary to set out the framework employed by religious charities, which is then demonstrated in a practical context through the works of the two depicted religious charities.

¹⁰⁰² “Philanthropy” used in this context is a general term relating to ensuring the welfare of others, and may be related to charitable work, but is not recognised as a legal term within charity law.

¹⁰⁰³ Mylek and Nel, above n 1000, at 81-82, referring to, inter alia, F Kniss and DT Campbell “The effect of religious orientation on international relief and development organizations” (1997) *Journal for the Scientific Study of Religion* 36(1) 93-103; R Wuthnow and W Cadge “Religion and the nonprofit sector” in W Powell and R Steinberg (eds) *The nonprofit sector: a research handbook* (Yale University Press, New Haven, 2006) 485-505; KA Ver Beek “Spirituality: a development taboo” (2000) *Development in Practice* 10(1) 31-43; and SM Thomas *The Global Resurgence of Religion and the Transformation of International Relations: the Struggle for the Soul of the Twenty-First Century* (Palgrave Macmillan, New York, 2005).

¹⁰⁰⁴ Mylek and Nel, above n 1000, at 83, citing A Whaites “Pursuing partnership: World Vision and the ideology of development – a case study” (1999) *Development in Practice* 9(4) at 410.

¹⁰⁰⁵ At 83, citing G Clarke “Faith-based organizations and international development: an overview” in G Clarke and M Jennings (eds) *Development, civil society and faith-based organizations: bridging the sacred and the secular* (Palgrave Macmillan, Basingstoke, 2008) at 26-27; see also John Edens “New Zealanders give generously – almost \$3 billion a year – but rarely talk about it” *Stuff* (10 July 2017) <https://www.stuff.co.nz/business/94560462/new-zealanders-give-generously--almost-3-billion-a-year--but-rarely-talk-about-it>, whereby World Vision NZ received the largest overall cumulative donations from the public (\$71.7 m).

B. The Model/Framework of Religious Charities

This part of the chapter refers to a theoretical framework that draws on sociological explanations, which underpin and provide a narrative of religion's role in charitable endeavours, and provides evidence to support my assertions that the advancement of religion is reconcilable, and evidently through this framework. There are three key aspects to this framework.

1. Religious social capital

The first aspect is religious “social capital”.¹⁰⁰⁶ This reveals the needs of others to communities and individuals and provides recruitment opportunities through its networks. By exposing people to the needs of others, this provides opportunities for recruitment and promoting trust, in turn leading to the promotion of charitable activity. Research indicates that “the most important predictor of charitable giving is ... a donor's ‘network-based social capital’ the degree to which the donor is embedded socially, or involved and engaged in society.”¹⁰⁰⁷ Of particular importance is the notion that “faith communities ... are arguably the single most important repository of social capital in America.”¹⁰⁰⁸ This is likely to be the case in other jurisdictions if the research presented in previous chapters relating to religion and its social context is also considered.

As has been observed in earlier chapters, it is well documented that religious persons undertake greater levels of charitable activities than secular persons. It is thought that this is because of the connectedness between religious individuals within religious networks and communities.

¹⁰⁰⁶ “Social capital broadly refers to those factors of effectively functioning social groups that include such things as interpersonal relationships, a shared sense of identity, a shared understanding, shared norms, shared values, trust, cooperation, and reciprocity. However, the many views of this complex subject make a single definition difficult.” https://en.wikipedia.org/wiki/Social_capital; see also generally Arthur C Brooks “Does Social Capital Make You Generous?” (2005) *Social Science Quarterly* Vol 86 No 1 March; and Arthur C Brooks “Faith, Secularism, and Charity” (2004) *Faith & Economics* No 43 Spring at 7.

¹⁰⁰⁷ Mylek and Nel, above n 1000, at 84, citing JJ Havens et al “Charitable giving: how much, by whom, to what, and how? In W Powell and R Steinberg (eds) *The nonprofit sector: a research handbook* (Yale University Press, New Haven, 2006) at 545.

¹⁰⁰⁸ At 84, citing RD Putnam *Bowling alone: the collapse and revival of American Community* (Simon & Schuster, New York, 2000) at 66.

Such communities and networks enable easy mobilisation when required. In addition, and as earlier observed in the thesis, religious people have higher levels of donating to charity and volunteering than non-religious persons.¹⁰⁰⁹ One key point to make about social capital is that it is “not only the types of social connections that matter ... but the ideas, virtues and social practices that make up [their] *content*.”¹⁰¹⁰ This particular point leads on to the second key aspect of this framework that enables it to fight global poverty so effectively, that of religious content.

2. *Religious content*

Religious content includes belief and education, and the standards and observances which support them. It is said that a combination of these elements specific to religious charities creates such a potent tool out of religion in the war against international deprivation. This is because religious content connects belief with activity, making it a dynamic mobilising power. In other words, religious content directs behaviour towards activities; it motivates its religious followers in to positive action; and it encourages commitments to charitable objectives. This makes religion suitable for tackling such global political-social issues such as poverty. Therefore, it is seen as a practical aspect to religious teaching, and the United Nations noted its value in charity:¹⁰¹¹

... most religions incorporate a social dimension in their teachings that focuses on improving conditions for [those] suffering from poverty, hunger, and other forms of injustice.

Even though religious content is said to have an important impact in the delivery of charity, it is “surprisingly understudied.”¹⁰¹² Nevertheless, some research does illustrate its influence. For example, in the United States, reports of the “content of sermons, discussions, and other group activities ... influences parishioners’ likelihood of engaging in giving and volunteering”.¹⁰¹³ Thus, both religious social capital and religious content are part of the

¹⁰⁰⁹ At 84, referring to, inter alia, SM Monsma “Religion and philanthropic giving and volunteering: building blocks for civic responsibility” (2007) *Interdisciplinary Journal of Research on Religion* 3 at 7.

¹⁰¹⁰ At 84, citing SM Thomas *The Global Resurgence of Religion and the Transformation of International Relations: the Struggle for the Soul of the Twenty-First Century* (Palgrave Macmillan, New York, 2005) at 236 (emphasis retained).

¹⁰¹¹ At 85, citing “Religion and public policy at the UN” (Park Ridge Centre, Chicago, 2002) at 15.

¹⁰¹² At 85.

¹⁰¹³ At 85, citing Monsma, above n 1009, at 8.

mechanism that enables religious charities to mobilise against poverty. However, it is argued that those two elements alone are not sufficient to explain the “extent of religion’s role in this area; something else helps it to mobilize religious and secular alike in fighting global poverty.”¹⁰¹⁴ That additional factor is found in “religious cultural power”, which is the third element in the theoretical framework that underpins religion’s role in charitable endeavours.

3. *Religious cultural power*

Religious cultural power is a force unique to religion that enables it to mobilise civil society in its mission to end global poverty, amongst other welfare assistance. Religious cultural power offers means by which society can be inspired to, and be stimulated to, assist in relieving poverty. It has the ability to influence political processes through its appeal to cultural resources, which include symbols, moral authority and ideologies. This enables the religious message to be spread more widely through communities, including secular communities. As it does so, it garners more support and more power through generation of political support, funding and social connections.¹⁰¹⁵

The social theory movement has long-recognised the relevance of resources within a cultural context and acknowledges “philanthropic activity is mobilized by the medium of moral or cultural capital in the form of symbolic expressions of need.”¹⁰¹⁶ Indeed, it is said that religion is “perhaps one of the most important repositories of cultural resources, with world religions ‘offer[ing] especially revealing instances of ... cultural power.’”¹⁰¹⁷ Certainly, the “relationship between religious cultural symbols, morality and wider worldviews, and the inspirational power this entails”¹⁰¹⁸ has been widely observed. The United Nations confirms such views:¹⁰¹⁹

¹⁰¹⁴ At 85.

¹⁰¹⁵ At 86, referring to, inter alia, RH Williams and NJ Demerath III “Cultural power: how underdog religious and nonreligious movements triumph against structural odds” in NJ Demerath III, PD Hall and T Schmitt (eds) *Sacred companies: organizational aspects of religion and religious aspects of organizations* (Oxford University Press, New York, 1998) at 367-368.

¹⁰¹⁶ At 86, citing PG Schervish “Philanthropy” in R Wuthnow (ed) *The Encyclopedia of Politics and Religion* Vol ii (Congressional Quarterly, Washington DC, 1998) at 601.

¹⁰¹⁷ At 86, citing Williams and Demerath, above n 1015, at 364.

¹⁰¹⁸ At 86, and referring to R Falk *Religion and Human Global Governance* (Palgrave, New York, 2001); SM Thomas, above n 1001, and I Linden “The language of development: what are international development agencies talking about?” In G Clarke and M Jennings (eds) *Development, Civil Society and Faith-based Organizations: Briding the Sacred and the Secular* (Palgrave Macmillan, Hampshire and New York, 2008).

¹⁰¹⁹ At 86-87, citing “Religion and public policy at the UN” above n 1011, at 15.

Religions express themselves through symbols, rituals, doctrines, holy places, devotional and other types of sacred literature, and structures. These carry great meaning and emotional investment for religious people since they embody their understandings of sacred realities. Religious people may ‘sacrifice’ themselves – a potent, ancient religious concept – wholly devoting themselves to the holy, unto death.

These religious notions of morality and sacrifice are especially powerful in mobilising the alleviation of global poverty because even against the odds, commitment and motivation inspire people to make sacrifices. Religious moral language also has the ability to motivate indignation or moral outrage, or inspire a moral duty. This is because “whereas secular transformative thought tends to appeal mainly to alienated intellectuals, religious revolutionary language and aspirations have deep roots in popular culture and possess great mobilising potential.”¹⁰²⁰ Indeed, “religious promises of victory and justice offer hope in struggles for social and economic justice.”¹⁰²¹

Such cultural resources are important weapons in the armoury of poverty elimination to mobilise, and further, these resources bridge the gap between the secular and religious. This is because:¹⁰²²

[While] secular NGOs also rely to a degree on appeals to morality as a means of mobilising public opinion ... religious NGOs are more directly able to raise moral issues and tap into religious discourse, thereby fuelling a sense of moral duty, indignation, or outrage, which makes change possible ... Theirs is a distinctly moral tone, charged with notions of ‘Right’ and ‘Wrong’ – culturally resonant with large portions of the world’s population.

Consequently, religious cultural power enables religious individuals to recruit support and action from a number of sources, including from secular sources.

¹⁰²⁰ At 87, citing R Falk, above n 1018, at 30.

¹⁰²¹ At 87, referring to, inter alia, EO Hanson *Religion and politics in the international system today* (Cambridge University Press, Cambridge, 2006).

¹⁰²² At 87, citing J Berger “Religious nongovernmental organizations: an exploratory analysis” (2003) *Voluntas* 14 (1) at 35.

In summary, the outlined framework of religious social capital, religious content and religious cultural power is unique to religious charities and religious NGOs, and “ultimately gives religion such a powerful potential to mobilize civil society in the fight against global poverty.”¹⁰²³ Now it is important to demonstrate the realities of such a framework, and this can be achieved by considering the two New Zealand case studies of World Vision New Zealand (WVNZ) and Tearfund. Both organisations are registered charities in New Zealand.¹⁰²⁴ I consider both specifically in the context of the religious social capital, religious content and religious cultural power framework.

IV. New Zealand Case Studies: WVNZ, Tearfund and Social Capital

As has been established, religious social capital enables mobilisation of religious organisations through its networks, and through the “norms of trust and reciprocity these engender”;¹⁰²⁵ this is demonstrated by both WVNZ and Tearfund. WVNZ is part of an international network that is categorised by the norms of trust, reciprocity and organisation that are representative of social capital norms. This leads to members becoming aware of global poverty issues and mobilises staff through its social capital. The social capital mobilisation is especially active through WVNZ’s network of churches and partnership with churches, thus mobilising the public to engage with, inter alia, sponsorship, fundraising and volunteering.¹⁰²⁶

Tearfund also utilises such social capital strategies. Its Christian network is part of its core constituency, and many churches identify with the evangelical component of its programmes, ensuring substantial support for Tearfund.¹⁰²⁷

Turning aside for a moment from the examples of WVNZ and Tearfund, there is further evidence of the important role of religious social capital as a charitable tool, and this comes in

¹⁰²³ At 87-88.

¹⁰²⁴ Tearfund’s charity registration number is CC21725, and World Vision’s charity registration number is CC25984. WVNZ is the New Zealand body of World Vision International. WVNZ advocates and raises funds for World Vision field offices in developing countries. It is New Zealand’s largest relief and development charity. Tearfund is the New Zealand equivalent to The Evangelical Alliance Relief Fund. It carries out its operations through Christian partnership organisations. Both are Christian organisations.

¹⁰²⁵ Mylek and Nel, above n 1000, at 89.

¹⁰²⁶ At 89-90.

¹⁰²⁷ At 90.

the form of faith-based organisations (FBOs), as discussed in earlier chapters. In the context of social capital in this chapter, it has been observed that the role of FBOs and increasing social capital has been growing in relevance. For instance, within the various communities, agencies and organisations that FBOs operate, relationships develop, and reinforce community and religious identities. This reduces constructs of isolation and exclusion, especially within marginalised communities.¹⁰²⁸ As such, FBOs are a “crucial site not only for bonding capital but also of a bridging capital within and beyond the city.”¹⁰²⁹ Consequently, the relevance of religious social capital is evidenced as a valuable tool in the religious charity’s tool box.

Nonetheless, whilst social capital is important for religious organisations, which includes WVNZ and Tearfund, religious content is also of great significance in ensuring the success of the organisations.

1. WVNZ, Tearfund and religious content

In organisational terms, WVNZ is underpinned by Christian teachings, beliefs, values and practices, with trustworthiness and accountability as key elements of its operational principles. Such norms reflect the organisation’s commitment to ensuring it complies with various NGO codes of conduct; this mobilises staff to commit to working for WVNZ. Such values motivate the staff even though remuneration may be lower than in other organisations.¹⁰³⁰ Similarly, the public are also mobilised through such motivation because of the manner in which WVNZ practices its public engagement. Consequently, its networks embrace and promote WVNZ’s practices and principles of Christianity, underpinned by trustworthiness, accountability and transparency. These are considered key motivators to mobilise the public.¹⁰³¹

It is said that religious content plays an even more important role in mobilisation in Tearfund than with WVNZ. This is because Tearfund’s literature is explicitly full of biblical references, and it signifies the compassion of Jesus Christ. Its central values include prayer, justice, faith, integrity and culpability, all underpinned by its explicit reference to the scriptures throughout

¹⁰²⁸ Lily Kong “Global Shifts, theoretical shifts: Changing geographies of religion” (2010) *Progress in Human Geography* 34(6) at 766.

¹⁰²⁹ At 766, citing J Beaumont “Faith action on urban social issues” (2008) *Urban Studies* 45 at 2021.

¹⁰³⁰ Mylek and Nel, above n 1000, at 90-91, referring to, inter alia, L Tripp “Gender and development from a Christian perspective: experience from World Vision” (2000) *Gender and Development* 7(1) at 62-63.

¹⁰³¹ At 91.

its literature. Such motives are advocated by its staff, and indeed, draw employees to the organisation. Such factors also mobilise the public, even the secular public, because of the levels of trust and accountability associated with the organisation.¹⁰³²

2. *WVNZ, Tearfund and religious cultural power*

It is said that religious cultural power is even more effective in mobilising poverty relief than the religious social capital and religious content.¹⁰³³ The use of cultural religious language is widespread within WVNZ, as evidenced in their frequent use of biblical concepts such as “justice” and “service” in fighting for the poor and oppressed. The official WVNZ literature reflects such language, noting, *inter alia*, that they seek to change unjust structures that impact on the poor and that they serve the poor.

Religious symbols are valuable in relation to the cultural power wielded by WVNZ. Its own logo is that of a cross-shaped star, which implies hope, sacrifice and light. The use of the word “hope” is scattered liberally throughout their literature, which in turn explicitly provides motivation.¹⁰³⁴ Indeed, such “shared religious understandings form powerful motivational forces for staff who may not accept purely secular development discourse.”¹⁰³⁵ It is not only staff, however, who are motivated by such cultural power; the public are also motivated by it. WVNZ’s use of religious language and religious symbols resonates with both religious and non-religious groups because of words such as “injustice” and “social justice.” Even though such language is associated with Judeo-Christian notions of morality and justice, the language crosses over into the secular realms of morality and justice. Consequently, WVNZ’s message is accessible by a wide range of communities, including secular communities, in a positive way.¹⁰³⁶

Tearfund is also no stranger to utilising religious cultural power to assist in mobilising poverty relief. For this organisation, Christian notions of sacrifice and service, as demonstrated by Christ, are of value in mobilising secular support, and this is because “everybody can engage

¹⁰³² At 91.

¹⁰³³ At 91.

¹⁰³⁴ At 92.

¹⁰³⁵ At 92.

¹⁰³⁶ At 92.

with ideas of service and sacrifice.”¹⁰³⁷ These concepts of doing good; making a difference; providing justice; and offering morality, are concepts understood just as clearly by secular communities as they are by religious communities. Consequently, cultural understandings are shared, and mobilisation across communities is ensured.

3. WVNZ and Tearfund: a conclusion

What these case studies demonstrate is the power that religious charities can wield through this specific religious framework in order to mobilise staff and the public to fight against world poverty which is not necessarily available to secular charities. Religion can therefore be said to have particular significance for relief and aid programmes because of its inherent narrative that appeals to religious and secular communities alike. This narrative includes concepts of justice, service, sacrifice and morality, which broadens the appeal of these religious charities to wider audiences, as opposed to relying solely on religious messages, which would risk alienating some religious organisations in largely secular communities.¹⁰³⁸ This religious narrative is sophisticated and proven to be successful. If such a narrative is lost, the consequences for societies will likely be grave because these narratives are unique to religious groups, as demonstrated by WVNZ and Tearfund. The consequences to society are likely to include increased levels of global poverty, which has serious significance in terms of increased humanitarian disasters and suffering. Such disaster and suffering is something that global politics should be endeavouring to reduce, not risk increasing through the removal of religious benefactors.

V. Conclusion

There may be many questions as to why religion remains such a prominent focus of so many communities. One answer may be because religion “is one of the few catalysts that exists through which a private conscience becomes a public conscience”,¹⁰³⁹ which generally occurs through religious charities and bodies. Nonetheless, calls for the removal of the advancement of religion become ever louder, although there is yet reluctance to consider such a move, and

¹⁰³⁷ At 92.

¹⁰³⁸ At 93.

¹⁰³⁹ Terrance Carter “Advancing Religion as a Head of Charity: What are the Boundaries?” (2007) *The Philanthropist* at 261.

perhaps wisely. This may be because it is said that religion is “necessary to the advancement of civilisation and the production of the welfare of society”,¹⁰⁴⁰ which supports my assertions that the advancement of religion is reconcilable within a variety of contexts. Perhaps more controversially it is because:¹⁰⁴¹

The duties enjoined by religious bodies ... furnish a sure basis on which the fabric of civil society can rest without which it would not endure. Take from it those supports and it would tremble in to chaos and ruin. Anarchy would follow order and liberty, freed from its restraining influence, would soon degenerate in to the wildest licence, which would convert the beautiful earth into a howling pandemonium, fit only for the habitation of savage beasts and more savage men.

Such consequences would likely raise a cynical eyebrow in contemporary times, but what can be said is that:¹⁰⁴²

[I]nstitutional religion alone seems to reliably and consistently provide that collector function. Institutional religion has had an undefined role in ... shaping collective conscience and values in moral ways – and when [it] is pluralized, so much the better for we avoid ... ‘the tyranny of the majority.’

Religious charities are legitimised through the rules of charity law, and amongst those rules is the doctrine of public benefit. As I determined in Chapter 7, as a general principle, the advancement of religion is validated through the application of the presumption of public benefit. Public benefit is measured through appropriate constructs of charity law. Such benefit is discernible tangibly through such religious traditions as creating and fostering “distinctively normative commitments, which tend to encourage the transfer of material resources from person to charitable purposes.”¹⁰⁴³

¹⁰⁴⁰ Sorensen & Thompson, above n 979, at 10, citing Hubert Picarda *The Law and Practice Relating to Charities* 3rd ed (Butterworths, London, 1999) at 84.

¹⁰⁴¹ At 10, citing Picarda, above n 1040, at 84. Sorensen & Thompson note Picarda does not provide a citation for the quotation although it is said to be from *Trustees of the First Methodist Episcopal Church South v City of Atlanta* 76 Ga 181 at 192 (1886).

¹⁰⁴² Carter, above n 1039, at 261, citing Sorensen & Thompson, above n 979, at 3.

¹⁰⁴³ Kathryn Chan “The Advancement of Religion as a Charitable Purpose in an Age of Religious Neutrality” (2017) *Oxford Journal of Law and Religion* 6 at 133.

I have demonstrated throughout this thesis how religious charities are celebrated for their ability to inspire the transference of means for charitable use that appear, in many ways, to be outside the scope of other charities. This is apparent from the substantial support they receive on an international scale, and their extraordinary ability to relieve human suffering on so many levels. The impact of religious exhortations and teachings within the charitable sector cannot be underestimated. Research is only recently beginning to demonstrate, at least in economic terms, how valuable religious charities and bodies are to the overall health of society generally.

If the advancement of religion were to be removed as a head of charity, I contend that the impact would certainly likely be felt quickly in terms of economic losses. However, other trickle-down consequences would also be felt. For instance, minority communities may become more isolated, and religious communities may feel threatened as religion might become seen as lacking legal legitimacy. Further, no doubt increasing burdens would be placed on families, communities, and indeed governments, as religious bodies would not be able to undertake social welfare roles, or would only be able to play a more limited role in such welfare.

However, the advancement of religion is reconcilable, and not least because it has legal legitimacy, and part of this legitimacy is granted through the doctrine of public benefit. This doctrine is a “primary public policy concern.”¹⁰⁴⁴ It ensures that the purposes of a charity “demonstrably serve and [are] in harmony with the public interest”,¹⁰⁴⁵ ensuring that purposes are a “beneficial and stabilizing influence in community life.”¹⁰⁴⁶ Indeed, it “is enough for rule of law purposes if the courts make the measurable determination of whether the particular religious purpose violates the law or public policy”.¹⁰⁴⁷ If, however, the advancement of religion were removed as a head of charity, this could be “injurious to those organisations that are overwhelmingly small community based groups”, as many religions are,¹⁰⁴⁸ which surely cannot be warranted in a multicultural and pluralistic society.

¹⁰⁴⁴ Carter, above n 1039, at 266.

¹⁰⁴⁵ At 266.

¹⁰⁴⁶ At 266.

¹⁰⁴⁷ Donovan Waters “The Advancement of Religion in a Pluralist Society” (2011) *Trusts & Trustees* Vol 17 7 1 August.

¹⁰⁴⁸ Zudova, above n 998, at 12.

Certainly, generally speaking, governments are committed to diversity and accommodating faith, as evidenced, for example through the New Zealand Bill of Rights Act 1990,¹⁰⁴⁹ and the United Kingdom's Human Rights Act 1998.¹⁰⁵⁰ Further, it is said that in the United States, that the exercise of religion "is 'the nation's first freedom', occupying a place of 'preferential treatment' in the Constitution's Bill of Rights."¹⁰⁵¹

Such religious freedom perhaps comes about because of the nature of humans themselves. Aristotle observed that humans are political creatures because they are reasoning creatures.¹⁰⁵² Thus, the "crux of the cognitive-science or anthropological case for religious freedom is that man is by nature a religious animal for much the same reason."¹⁰⁵³ As a result, human animals are believing animals, and as rational beings, humans seek to understand the "ultimate cause that supplies explanations and guidance for their lives."¹⁰⁵⁴ If religion were repressed, it would not be to repress an odd quirk of human nature, rather, it would be to "repress the variable yet inevitable religious choices and experiences of actual human beings."¹⁰⁵⁵ It has been argued that to repress religion is to "deny the very essence of what it means to be human."¹⁰⁵⁶ In fact, repressing religion would occur at the "price of undermining individuality and disrupting society."¹⁰⁵⁷ Accordingly, it could be argued that religion has "earned the right to be treated with respect and protected by the state."¹⁰⁵⁸

One way in which commitment to diversity and accommodation of faith can be achieved, and has been successfully achieved, is through charity law and its observation of specific rules of law. Consequently, its removal as a head of charity might be, at the very least, nonjusticiable,

¹⁰⁴⁹ Bill of Rights Act 1990, s 15.

¹⁰⁵⁰ Human Rights Act 1998, sch 1, art 9.

¹⁰⁵¹ Kolenc, above n 997, at 51, referring to *Lamb's Chapel v Ctr Moriches Union Free Sch Dist* 508 US 384, 400 (1993), per Scalia J.

¹⁰⁵² Timothy Shah and Matthew J Franck "What is Religion? The Anthropological Basis of Religious Freedom" in *Religious Freedom: Why Now? Defending an Embattled Human Right* (The Witherspoon Institute, New Jersey, 2012) at 15.

¹⁰⁵³ At 15.

¹⁰⁵⁴ At 15.

¹⁰⁵⁵ At 15.

¹⁰⁵⁶ At 15.

¹⁰⁵⁷ At 15.

¹⁰⁵⁸ Kolenc, above n 997, at 51.

because “[i]t surely cannot be challenged even in a liberal and democratic environment, that the rule of law must prevail”.¹⁰⁵⁹

I contend that religious charities play a unique and valuable role within societies making them indispensable partners for strong democratic governments.¹⁰⁶⁰ Religion is woven into everyday spaces of life, and societies and communities are infused and shaped by religious values, consciously or otherwise. The way in which religion is experienced on a charitable and non-charitable basis is “multifaceted and multiscaled”,¹⁰⁶¹ leading to a variety of partnerships and relationships throughout communities and sectors, therefore providing evidence of the multifaceted contexts in which the advancement of religion may be reconciled, and thus justified.

There is evidence that religion “can and does have a significant role in identifying and promoting values that advocate and encourage personal attitudes towards others and conduct between citizens which, even in a non-legal sense, is charitable.”¹⁰⁶² Further, there is acknowledgment that religion continues “to have relevance in bridging the gap between private conscience and the general acceptance of values that sustain the law and social behaviour.”¹⁰⁶³ Indeed, religious involvement, as this thesis has demonstrated, “in large-scale humanitarian projects and welfare relief is legend.”¹⁰⁶⁴

Thus, for religion to operate effectively, “those who believe must be allowed to engage in practical manifestations of their faith.”¹⁰⁶⁵ This means that “it is ... appropriate for the state to provide broad support for religious organizations by granting them charitable status. In doing so, the state acknowledges the benefit that comes from advancing religion within a pluralistic society.”¹⁰⁶⁶ There is already evidence in New Zealand that dramatic decline in church numbers is impacting on levels of support for some religious charities, and resultant fundraising is

¹⁰⁵⁹ Waters, above n 1047.

¹⁰⁶⁰ Kolenc, above n 997, at 55.

¹⁰⁶¹ Kong, above n 1028, at 769.

¹⁰⁶² Carter, above n 1039, at 285-286, citing Sorensen & Thompson, above n 970, at 15.

¹⁰⁶³ Sorensen & Thompson, above n 979, at 12.

¹⁰⁶⁴ At 12, referring to, inter alia, the Salvation Army; City Missions; Catholic Relief Agencies; SDA Melanesian programs; and LDS charities.

¹⁰⁶⁵ Carter, above n 1039, at 285-286.

¹⁰⁶⁶ At 286.

becoming increasingly difficult. As a result, this is increasing pressure on other forms of social welfare to fund alternative social welfare providers.¹⁰⁶⁷

Consequently, I claim that removing the advancement of religion as a charitable purpose without more research to assess the likely and real impacts on society would be to damage any such social and civil partnerships and relationships that exist as a result of religious charities. It risks alienating vulnerable groups, as well as disestablishing some communities. Such failures would likely have lasting and damaging economic and emotional consequences for societies as a result. Accordingly, I do not support the removal of the advancement of religion as a head of charity at the current time because of the likely widespread and long-term negative consequences on an economic and social basis for society generally. Rather, the evidence provided in this chapter supports the object of my inquiry further that the advancement of religion is a reconcilable construct and from a variety of contexts.

In the final chapter, I conclude this thesis' overall findings.

¹⁰⁶⁷ Paul Morris "The 2013 Census and Religion" The Royal Society at 4
<https://royalsociety.org.nz/assets/Uploads/Our-futures-submissionPaul-Morris.pdf>.

Chapter 9. Conclusion

I. Overview

The purpose of this research has been to review critically the advancement of religion as a legally-recognised head of charity through a socio-legal narrative, and I have provided substantive evidence that it is reconcilable through a variety of sociolegal contexts. This is because I set out the socio-political and legal frameworks of religion, and the place of religion within charity, and thus charity within society. In other words, I presented multi-layered contexts in which the advancement of religion can be reconciled as a charitable purpose. As a result, I assert that the advancement of religion could remain as a charitable purpose because it can be understood from its sociolegal contexts.

Consequently, this chapter overall concludes the thesis by providing an overview of the research and a summary of the findings of each chapter. Its concluding remarks consider, *inter alia*, the value of this research.

I submit that this thesis is timely because it has become evident from my research conducted over the years that the advancement of religion has presented various legal and social challenges. Consequently, I have sought to evaluate some of these issues within a sociolegal framework. One of the first issues relates to the numerous international inquiries into charity law and regulation within the last 60 years. For instance, the United Kingdom, New Zealand and Australia have all passed legislation that reconsiders or extends the meaning of charitable purpose, which inherently includes the advancement of religion. Such changes have ramifications for a wide variety of charity law stakeholders, not least in terms of interpretation and application of the law. Other issues have arisen, including removing the presumption of public benefit, as well as applying Judeo-Christian models of religion in circumstances that do not relate to such religious constructs.

This research is significant because whilst much has been written over the years about this charitable purpose in a legal construct, including by myself, there has been more limited combined research undertaken on this head of charity's significant social, political and economic role within society, which is what this thesis does. The timeliness of such research is evident not only because of the variety of international legal changes in recent years, but also

because of increasing political and social discussions as to the position of religion generally within society, as well as within charity law.

The legal theories presented to underpin the research, as well as evidence presented in the chapters, demonstrate the fundamental place of charity law within a healthy-functioning civil society. Religion, as part of charity law, plays its role in supporting such civil societies, and as such, furthers the well-being and harmony of society, even in spite of the growing criticism of religion. Consequently, this thesis demonstrates that charity law is an appropriate vehicle to uphold the virtues of the advancement of religion in a legally-appropriate manner, thus providing legitimacy and public confidence in the charitable sector.

I acknowledge that there still remain issues associated with this head of charity, such as concerns regarding the doctrine of public benefit. Nonetheless, I have provided evidence that the advancement of religion plays a fundamental role within society, and, as such, I contend that governments should continue to validate its position within the rules of law because it can be understood from its sociolegal contexts, and thus is reconcilable as a charitable purpose.

As a result, this research provides much substantive evidence for states, policymakers and charity law stakeholders to consider charity law governance and law in line with current the socio-legal climate.

In order to carry out this critical review of the advancement of religion, this research traversed a range of socio-political and legal matters.

II. Chapter 1

Chapter 1 introduced many of these themes to underpin and contextualise the arguments and assertions that have been made throughout the thesis. I began with outlining the ancient and interrelated concepts of charity and religion, noting that charity has underpinned, and continues to, fill a variety of welfare gaps within societies. As is established early on from this chapter, religion has been closely associated with charity for millennia and remains a fundamental part of the charitable sector.

Nonetheless, in the interests of balance, I do set out some of the public criticisms that have been levelled at religion generally, and at the advancement of religion. Criticisms include religion being granted charitable privileges even as societies allegedly become more secular. It is asserted that due to an increase in secularism, this has served to limit the value of religion more generally within an allegedly more secular contemporary society, hence the assertions that is inappropriate to grant religious charities legal benefits of being a charity. Another criticism is the condemnation of apparently wealthy religious bodies maintaining their charitable status, which appears to fly in the face of the generally-accepted doctrines of religion, such as humility, generosity and eschewing of wealth. The purpose of setting out some of these issues is to illustrate the pressures facing religious charities and to contextualise some of the foundations for the assertions within the thesis.

Other themes introduced in Chapter 1 included the relationship between religion and society; state control and religion; the rule of law; the economics of religion; and issues associated with the removal of the advancement of religion as a charitable purpose. Each of these matters were addressed more fully in later chapters.

III. Chapter 2

Chapter 2 set out the methodologies utilised in the thesis and the legal theories that underpin the research. I utilised, generally, traditional doctrinal methodologies to assess critically legal principles within primary and secondary legal materials. In doing so, the methodology enabled me to offer insights into current doctrines and jurisprudence and place the legal discussions within their social and political contexts.

In relation to legal theories, it was evident that there is generally a dearth of charity law legal theory. Nonetheless, Matthew Harding, *inter alia*, provides useful consideration of such legal theories. These theories speak to the societal relevance of charity law, specifically in relation to the advancement of religion to illustrate the goals of such charitable bodies, and how they may be achieved. The theories, therefore, grounded my research within a number of justifiable concepts.

IV. Chapter 3

Chapter 3 was important because it set out the complex relationship charity, law, religion and society, reflecting the nexus between these constructs, and in doing so, this chapter embedded the function of the advancement of religion within its sociolegal foundations, thus the discussions in this chapter began the reconciliation of the advancement of religion assertions that were subsequently developed throughout the later chapters.

Some of the key concepts included the history of charity and charity law, which provide some historical markers for continued discussions. The history of charity and charity law is relevant because much of contemporary law and principles are framed within the historical background. No discussion would be complete without the historical markers to underpin the dialogue.

The research speaks to religion generally, the definition of the advancement of religion, and the meaning of secularism. Consequently, Chapter 3 provided evaluation of each of these concepts in order consolidate the critical discussions throughout later chapters.

It was also important to contextualise the relationship between law and religion. This is especially pertinent in current times when there are many public discussions of the need to separate government and religion. The research demonstrated that whilst many would see government and religion as being separate entities, and that they should remain that way, the reality is that law and religion are closely aligned. As a result, it is inevitable that the advancement of religion will be impacted by, and will impact upon, policies and politics of the day. This, therefore, is of relevance for the narrative of this thesis because it provided evidence of the reconciliation of the advancement of religion within these sociolegal contexts.

Consequently, the themes in Chapter 3 are significant. They provide observations in relation to religion and the advancement of religion that reflect the stronghold of such principles in contemporary societies that are influenced by, and influence law and society generally, and thus begin the narrative in relation to the reconciliation of the advancement of religion.

V. Chapter 4

Chapter 4 was an important chapter in order to further the object of my inquiry, that of reconciling the advancement of religion. This was because it provided evidence of the correlation between the rule of law, charity law and the advancement of religion, thus demonstrating that this charitable principle was reconcilable under the sociolegal context of the rule of law.

In carrying out this critical assessment, I considered the doctrine of the rule of law in relation to the advancement of religion. The rule of law is relevant to many discussions posited in the thesis because charity law would not exist without this doctrine. Consequently, this chapter set out some introductory matters pertaining to this doctrine, including Dicey's key commentary; the relationship between religion and the law and the rule of law; and a pertinent case study of a religious organisation and the rule of law. I note that Tom Bingham's discussions of Dicey were beneficial in adding to this thesis' consideration of the rule of law because Bingham's observations appear to support the role and function of charity law. Bingham notes that acknowledging the rule of law does not require "us to swoon in adulation of the law",¹⁰⁶⁸ and certainly charity law is not without issue, as has been evidenced in this thesis. Rather, the rule of law enables charity to operate as effectively as possible in a world that is "divided by differences of nationality, race, colour, religion and wealth...".¹⁰⁶⁹ Bingham concludes that the rule of law "remains an ideal",¹⁰⁷⁰ just as charity law does. Therefore, charity, as an ideal concept, through the rule of law, aims to unify and draw together the differences in our society for the benefit of society.

This chapter, therefore, provides evidence of the continued and inherent links between the rule of law and of religion. As such, the rule of law could be said to provide validation of religion within charity. This is because charity law provides an appropriate vessel in which to ensure that the advancement of religion provides public benefit to communities through the recognition of the rule of law. As a result, this chapter demonstrated that the rule of law

¹⁰⁶⁸ Tom Bingham *The Rule of Law* (Penguin Group, London, 2010) at 9.

¹⁰⁶⁹ At 174.

¹⁰⁷⁰ At 174.

underpins and legitimises the advancement of religion, which then assists with the effective operation of religious charities within society, and further provides public and legal confidence and certainty.

VI. Chapter 5

Once I had made a number of socio-political submissions that were framed within their own socio-political context in the preceding chapters, Chapter 5 turned to the black letter law in relation to the reconciliation of the advancement of religion. I argue that it was important to set out some of the socio-political contexts first in order to gain an understanding of how the law sat within those frameworks. The justiciable nature of the black letter law decisions then became innately justifiable because there was a clear explanation as to the relationship between the law, society, and politics.

As a result, this chapter furthered the thesis' research by considering key issues relation to religion and charity within a contemporary context. In doing so, this chapter set out methods of providing credibility to the advancement of religion even when the circumstances surrounding some of these issues may be deemed controversial or legally challenging.

The chapter began by critically evaluating the relationship between commercialism and religion and how that might relate to the advancement of religion. It is said that commercialism within religion is distasteful, not least due to perceived concepts of religion not abiding greed. However, this research revealed that religion and commercialism have a long history. Further, some commercial activities can sit appropriately within the advancement of religion and may not discredit the charity sector. Commercialism within religion in a contemporary context reflects the evolutionary nature of religion and how it can operate effectively and appropriately to continue to support communities. I respectfully suggest that courts should continue to approach such legal issues in this benignant manner so as to support the charitable sector because the advancement of religion can be reconciled through commercialism.

This chapter also considered issues relating to religion, new age beliefs and alleged charlatanism. Such issues may undermine religion generally, and also undermine the charity

sector. Therefore, it was important to review such matters within this thesis' narrative. In carrying out these discussions, I considered Scientology and Jediism and the roles of such religions in a modern-day charity law context. The research revealed how these belief systems, whilst undoubtedly contentious, can be justified within the parameters of charity law. Such contemporary approaches speak to charity law's ability to adapt to different paradigms that exist in modern society when "traditional" religions may no longer offer new generations the benefits they once did to different populations. Thus, religion may be viewed as being generationally-appropriate, and it may benefit communities in ways that have not been determined previously. Consequently, I support these courts' approaches and support a continued liberal approach to such cases.

Other matters addressed in this chapter included the problematic application of the English charity law religious paradigm, that of Judaeo-Christian concepts of religion, within primarily non-Judeo-Christian states, which includes Hong Kong, which still utilise the English concepts of charity law. In continuing this discussion, I also referred to the key Islamic charity concept of waqf.

This research revealed the disconnect in the charity law narrative in matters outside of the Western concepts of Judaeo-Christian-centric religious charity law paradigms. This may lead to marginalisation of some religious communities that are currently not granted the support or benefits offered by charity law. It may also lead to the undermining of the charitable sector because it could be argued that Judeo-Christian concepts of the advancement of religion discriminate against some non-Western concepts of religion. In today's difficult political and social climate, such discord is unwelcome because it is imperative that religion is viewed in a more positive light more generally. Decades of hostility towards religion generally has led to societal discord as societies become more multi-ethnic and multi-religious. This then speaks to the necessity of viewing religion more favourably for harmony within society. Nonetheless, this chapter does seek to provide some consideration as to how, legally, such matters may be resolved. For example, if courts were to recognise that some religious purposes do "support the machinery and harmony of civil society" that were discussed in this chapter, as propounded in New Zealand case law or by Singapore's Administration of Muslim Law Act, even when historically those purposes failed for public benefit. Such acknowledgement would be culturally appropriate in many circumstances.

Consequently, I assert that Chapter 5 was an important part of the thesis because it demonstrated that the advancement of religion can respond to some of the needs of society, for example, by acknowledging society's desire to embrace new belief systems, or indeed, continue to embrace culturally important belief systems. In this manner, the advancement of religion is reconciled within these legal contexts.

VII. Chapter 6

Whilst Chapter 5 provided some consideration of commercialism and religion, Chapter 6 extended this discussion by examining the relationship between religion and economics. This chapter was important within the framework of my research because, in recalling the object of my research was to reconcile the advancement of religion, this chapter embedded religion within the socio-political context of economics. I argue that this is relevant to the reconciliation of the advancement of religion because I demonstrate, objectively, the social relevance economically of religion within charity. This was an important argument to make because charity law does not sit in isolation from the narratives that can determine state policies, which include charity law, and thus the advancement of religion. Consequently, what I confirmed in this chapter was that religion, charity, and economics have long been associated, and as a result of that close nexus, the advancement of religion can be reconciled from the secular economics perspective generally.

In undertaking this approach, I looked to evaluate the economic relevance of the advancement of religion within a social and political environment. This research is key because it provides tangible and objective evidence of the importance of religious charities that can be understood in a secular context. The transitioning from the religious to the secular is germane because the research demonstrates that there are public voices declaring the irrelevance of religious charities within secular societies. This secular evidence provides a political and social commentary that can assist in the continued validation of the advancement of religion but from a rarely-taken perspective.

As part of the discussions, the chapter critically reviewed actual dollar-value figures associated with religious charities; the “halo effect” of religious charities on society; the social welfare importance of FBOs; and the principle of zakat within the charity law paradigm.

This chapter, therefore, provided demonstrable evidence of the benefits of religion within charity, and thus provided another context for the reconciliation of the advancement of religion. For some secular states and bodies, this may be of more value than trying to comprehend the generally-espoused ethereal benefits of religion that are said to arise from, for example, praying and church attendance. Consequently, I contend that this research may provide an objective method of measuring religion’s value in a contemporary context, placing religion within a secular, and thus contemporary, narrative. I do acknowledge, however, that further research is required in this area to obtain accurate figures on a national and international scale as to the real economic benefits of religious charities.

VIII. Chapter 7

In order to reconcile the advancement of religion, the key objective of my thesis, I could not ignore the doctrine of public benefit, which was therefore the key focus for this chapter. As a result, Chapter 7 returned to the type of traditional black letter law discussions normally associated with the advancement of religion - that of the doctrine of public benefit. In providing evidence to support my object, I critically analysed existing law and theories, and bedded my assertions pertaining to the advancement of religion within those constructs.

The doctrine of public benefit is steeped in history, and sometimes controversy. Its associated controversies may be thought to undermine the charity sector. Nonetheless, this chapter revealed that the judicious application of public benefit can enable validation of advancement of religion, and thus benefit the requisite communities appropriately.

The chapter considered religious charity law cases that have been deemed controversial. Whilst the cases may be controversial, the research demonstrated that public benefit can serve as an effective tool in the judicial armoury ensuring that charity law remains within the confines of public policy, and that the purposes continue to support the harmony of civil society.

Other matters for consideration included the removal of the presumption of public benefit in the United Kingdom and the possible legal challenges associated with such a statutory change. The research provided evidence that removing this presumption may do little to reflect the true overall value of religion with communities. This is an unfortunate stance in today's climate, which is already placing much negative pressure on religions generally. I acknowledge that the United Kingdom is unlikely to amend this legislative development, even in light of the criticisms it is facing. However, I respectfully advocate that other common law jurisdictions might hesitate to make similar changes because of the potential costs to the charity sector in denying religious organisations their ability to operate as charities.

Overall, therefore, I argued that the presumption of public benefit, which is confirmed in states such as New Zealand and Canada, provides a useful tool by which religious benefits can be construed to take into consideration religion's multi-faceted benefits. Previous chapters asserted that religion has commercial and economic benefits for communities, and this is not denied. However, they are not the only benefits for communities. Religion still invariably embraces various forms of spirituality and prayer. These cannot be measured in mere monetary terms, and the presumption of public benefit inherently recognises this. This ensures that the benefits of religious charities are felt widely within communities without being limited to mere secular constructs, as decisions such as the Druid Network and Preston Down Trust suggest might be the future for some religious trusts. Consequently, I support the retention of the presumption of public benefit because it appears to acknowledge the underlying and unmeasurable ethos of religion - that of spirituality and belief, which are still fundamental even in contemporary society. As a result, this chapter supports the object of my inquiry, that the advancement of religion is reconcilable through the presumption of public benefit because at this doctrine's heart, it acknowledges the spiritual element of religion, which is a key component of religion. Even though spirituality may not be inherently measurable, the public benefit doctrine provides a safeguard against religions operating to the detriment of the public. As a result, public benefit, and its presumption, does provide some certainty and predictability, thus the benefits of the religious charities can be reconciled within this legal doctrine.

IX. Chapter 8

As part of my inquiry in to the reconciliation of the advancement of religion, this chapter was important because if I could show that removing this charitable purpose from the charity law framework would likely have a detrimental impact on society, then this would provide another avenue to reconcile the advancement of religion, but from a perspective that has little been critically assessed.

Consequently, Chapter 8's discussions arose as a result of the ever-growing dissent as to the relevance of religion generally, and consequently, the advancement of religion in contemporary society. As a result, I assessed some of the consequences of the removal of the advancement of religion as a charitable purpose.

I note that no state has confirmed that it is considering removing this purpose from charity law, although a Bill was presented to the Australian Victorian Parliament in 2018 that would, *inter alia*, do just that. Therefore, any discussions pertaining to the advancement of religion are inherently shadowed by calls for its removal. Previous chapters have provided evidence for the continued support of this charitable purpose, but this chapter specifically focused on issues that may be associated with its subsequent removal.

As part of the discussion, I returned to the relationship between religion, society and charity. However, I looked to frame the concepts within the repercussions for society if the advancement of religion were to be removed. Leading on from this discussion, I considered a case study of New Zealand charities that revealed a religious framework, based on sociological principles, which is specific to religious charities alone.

It is said that it is this framework that leads to the renowned successes of religious charities within the social welfare environment. Consequently, if the advancement of religion were to vanish as a head of charity, this framework would not be available to other non-religious charities. Previous chapters demonstrated that religious charities receive, overall, more donations and support globally than secular charities, and it is likely due to this specific framework. The impact of religious charities globally in social welfare is also legendary in comparison with secular charities. By implication, therefore, it might be presumed that if the

advancement of religion is removed as a head of charity, this framework will also become unavailable in the charity sector. Consequently, I contend that the impact will be detrimental on a local and global scale for communities. As a result, this chapter was valuable in presenting a socioreligious reconciliation of the advancement of religion that crosses from the religious to the secular, and as such, it aids in providing a sociological understanding of religion that builds upon the doctrinal analysis that had been undertaken in previous chapters. This helps in understanding the relevance of religion within society generally, and then, as it is embedded in charity law. As a result, this research from this chapter may assist in providing the public with confidence as to religious charities' fundamental relevance within democratic societies, and overall, it provides evidence that the advancement of religion is reconcilable from this sociological context.

Nonetheless, it is important to note that there is limited research available in regard to this issue, and some assumptions have had to be made. Therefore, I recognise that it is important for this lack of research to be addressed before any state could consider seriously the position of the advancement of religion within charity law. I recommend that further research is undertaken in this area to ensure that future policies and laws are enacted to take into consideration the full impact of religious charities on society.

X. Overall Findings

Overall, this thesis' deliberation as to how the advancement of religion may be reconciled through a variety of sociolegal contexts has revealed numerous issues facing charity law and religion. Nonetheless, I demonstrate not only the resilience of religion within charity law throughout the millennia, but also that the advancement of religion is a defensible and effective institution for delivering charitable objectives. Such objects include redistribution of goods and funds through teachings, outreach and provision social welfare. As a result, religious charities address many issues within civil society and enable the healthy function of civil society as may be recognised in democratic societies through the rule of law and the public benefit doctrine. Consequently, I contend that the advancement of religion is reconcilable overall because it can be understood from its sociolegal contexts.

It might be argued that charity law is an organic law, and within that sits the advancement of religion, and consequently, I contend that religion still has a place within charity as part of a healthy and functioning civil society that requires an organic law to function appropriately. As such, the advantages granted to religious charities through the rule of law are, overall, justified and reconciled because they are grounded within charity law. Of course, it cannot be denied that the advancement of religion is subject to criticism, and still *should* be subject to criticism, as is appropriate in a democratic society. However, in answer to such current criticisms, I have provided evidence that charity law infrastructures facilitate the social benefits of religion, which are achieved because of religion's ability to "ameliorate hardship, demonstrate altruism, generate engagement in community life, enrich the fabric of society and generally facilitate social cohesion."¹⁰⁷¹ The research suggests that such facilitation may not be available through secular charities, which serves to underpin my assertions that the advancement of religion is reconcilable because it serves to support society through its charitable purposes.

Therefore, this holistic socio-political and legal commentary means that this research extends the charity law narrative in comprehensive detail. As such it will be of interest to the charity sector, policymakers, practitioners, the judiciary and academics alike.

I assert that this substantive research may go some way to balance the negative pressures being placed upon religion in society and may help reduce marginalisation and polarisation of religious communities. Protecting and encouraging religion in communities encourages philanthropy, volunteerism, and promotes civil cohesion,¹⁰⁷² perhaps in ways that are not demonstrated so effectively through other secular organisations. Further, this research recognises that religion has been, and still is, "a natural and necessary source and dimension of any regime of law, democracy and human rights."¹⁰⁷³ Indeed, "[d]espite the best wishes of those who desire religion to be at an end ... it is inconceivable that religion will ever cease to

¹⁰⁷¹ Kerry O'Halloran *Human Rights and Charity Law International Perspectives* (Routledge, Abingdon, 2016) at 19.

¹⁰⁷² H R Sorensen & A K Thompson *The Advancement of Religion is Still a Valid Charitable Object in 2001* (Working Paper No CPNS13 for Charity Law in the Pacific Rim, Queensland University of Technology, Centre of Philanthropy and Nonprofit Studies, 4-6 October 2001) at 14.

¹⁰⁷³ John Witte Jr "Law, Religion, and Human Rights" (1996) *Columbia Human Rights Law Review* Vol 28 1 at 30.

be a force to be reckoned with.”¹⁰⁷⁴ Given that religion is likely to remain a constant in society, not least because it still “remains a strong independent source of motivation in modernity,”¹⁰⁷⁵ any “legal revolution that eliminates or severely curbs religious accommodation ... will place significant pressure on the democratic project.”¹⁰⁷⁶

Therefore, I concur that losing the traditional, or indeed, new models of religion, “will cause significant negative consequences to society’s efficacy.”¹⁰⁷⁷ Certainly, history has demonstrated that “we are best able to maintain civil peace when religious accommodation is a high priority in public policy.”¹⁰⁷⁸ Accordingly, I advocate that the advancement of religion should remain a “high priority in public policy.” This is, not least, because “the strong normative universes of religion tend to encourage the transfer of charitable resources ... to charitable objects in ways that the weaker normative universe of the civic community does not.”¹⁰⁷⁹ The “price of [such a] revolution”,¹⁰⁸⁰ in other words, removing the advancement of religion as a head of charity, is as yet unquantified, thus any move to have it removed may not be “worth it in the end.”¹⁰⁸¹ Consequently, I contend that in a time of global political and religious upheaval, demonstrating the benefits of religion through the charity law lens can only serve to benefit civil society.

Overall, therefore, I conclude that the advancement of religion should remain as a charitable purpose at law. This is because it is reconcilable through the socio-political and legal contexts of religion, and what charity means within society. In other words, this multi-layered context provides a diverse method of reconciling the advancement of religion. Further, I contend that I could not have reconciled this charitable purpose by considering just one context in isolation from others. This is because charity law, and thus the advancement of religion, is influenced by, and with its socio-political contexts. As a result, the advancement of religion is a valid

¹⁰⁷⁴ Barry W Bussey “The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School” 2016 *BYU Law Review* Issue 4 January at 1213.

¹⁰⁷⁵ At 1213, citing Charles Taylor *A Secular Age* (Harvard University Press, Massachusetts, 2007) at 530.

¹⁰⁷⁶ At 1213.

¹⁰⁷⁷ At 1213.

¹⁰⁷⁸ At 1213.

¹⁰⁷⁹ Kathryn Chan “Advancement of Religion in an Age of Religious Neutrality” (2017) *Oxford Journal of Law and Religion* at 124.

¹⁰⁸⁰ Bussey, above n 1074, at 1127.

¹⁰⁸¹ At 1127.

charitable purpose as it can be objectively reconciled from its sociolegal contexts and is thus justifiable.

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