

## WRONG WAY GO BACK! REDISCOVERING THE PATH FOR CHARITY LAW REFORM

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### I INTRODUCTION

A little over a decade ago, England and Wales led common law countries on a journey into statutory reform of the law of charities.<sup>1</sup> A new legal framework was promised,<sup>2</sup> but what was delivered fell well short of that. Before the legislative reform, common law jurisdictions had the *common law's* three principal divisions of charitable purpose and a catch-all. After the reform process there are, in addition to the common law, variously between zero and 12 *statutory* divisions and a catch-all.<sup>3</sup> Dunn and Riley warned that the reclassification with additional statutory divisions 'will inevitably lead to a burgeoning final category and, eventually, to the same criticisms that beset the current [pre-legislation] regime'.<sup>4</sup> At best this form of legislative intervention could only postpone the need for a new legal framework.<sup>5</sup> That need is now more pressing in England and Wales. In Australia, the government has announced that a statutory definition of charitable purpose is to be introduced for Commonwealth agencies with effect from 1 July 2013, and has issued a consultation paper.<sup>6</sup> As part of the reform process, the Australian government has

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1 Beginning with Philip Woodfield, *Efficiency Scrutiny of the Supervision of Charities: Report to the Home Secretary and the Economic Secretary to the Treasury* (Her Majesty's Stationery Office, 1987). Barbados had moved to a statutory definition in 1979 but this did not trigger the widespread interest in statutory reform: *Charities Act 1979* (Barbados) c 243.

2 Secretary of State for the Home Department (UK), *Charities: A Framework for the Future* (Her Majesty's Stationery Office, 1989).

3 *Extension of Charitable Purpose Act 2004* (Cth); *Charities Act 1979* (Barbados) c 243; *Charities Act 2006* (UK) c 50; *Charities Act (Northern Ireland) 2008* (NI) c 12; *Charities and Trustee Investment (Scotland) Act 2005* (Scot) asp 10; *Charities Act 2009* (Ireland).

4 A Dunn and C A Riley, 'Supporting the Not-For-Profit Sector: The Government's Review of Charitable and Social Enterprise' (2004) 67 *Modern Law Review* 632, 644.

5 *Ibid.*

6 Bill Shorten and Tanya Plibersek, 'Making It Easier for Charities to Help Those Who Need It' (Media Release, No 077, 10 May 2011); Commonwealth Treasury, *A Definition of Charity: Consultation Paper* (2011).

also agreed to consider a Senate Economics Committee recommendation that Australia follow the precedent of England and Wales to remove certain public benefit presumptions,<sup>7</sup> despite the Charities Definition Inquiry recommending that the status quo be maintained.<sup>8</sup>

In England and Wales, where the statutory reforms appeared to remove the presumption of public benefit, problems due to inadequate drafting have materialised amid allegations the Charity Commission's function is being politicised.<sup>9</sup> In parliamentary debates on the Charities Bill, both the government and the opposition gave commitments to review the public benefit provisions three years after implementation of the legislation. Following a change of government and without waiting for the review, the Attorney-General referred two cases, on his own motion, to the First-tier Tribunal (Charity) seeking clarification.<sup>10</sup> The effect of both of those referrals has been less than satisfying for those seeking clarity. In the *Independent Schools Council Case*,<sup>11</sup> the unanimous 109 page decision concluded by noting: 'Our decision will not, we know, give the parties the clarity for which they were hoping.'<sup>12</sup> The second case, known as the *Benevolent Funds Case*,<sup>13</sup> substantially followed the principles set out in the *Independent Schools Council Case*, applying the principles to the relief of poverty head of charity law. It is not within the Tribunal's remit to resolve either the underlying problem, or re-draft poorly drafted legislation. The review of the *Charities Act 2006* (UK) c 50 was conducted by Lord Hodgson, who reported on 16 July 2012 under the curious title *Trusted and Independent: Giving Charity Back to Charities*.<sup>14</sup> Acknowledging that the law remained in a less than ideal state, he recommended, among other things, that '[i]n order to address future public concerns about "what constitutes a charity," in practical as opposed

7 Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth). See also Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Tax Laws Amendment (Public Benefit Test) Bill 2010* (2010).

8 Committee for Inquiry into the Definition of Charities and Related Organisations, Parliament of Australia, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) ('Charities Definition Inquiry'), 14; Ch 13.

9 Peter Luxton, *Making Law? Parliament v The Charity Commission* (Policy Series No 64, Politeia, 2009).

10 Her Majesty's Attorney-General, *Questions for Reference by HM Attorney-General to Tribunal under Paragraph 2(1)(a) of Schedule 1D to the Charities Act 1993*, 22 September 2010 <<http://www.charity.tribunals.gov.uk/documents/RegisterofCases/QuestRefbyHMAG.pdf>>; Her Majesty's Attorney-General, *In the Matter of a Reference Pursuant to Schedule 1D of the Charities Act 1993*, 27 January 2011

<[http://www.justice.gov.uk/downloads/tribunals/charity/NotesOfRef\\_27Jan11.pdf](http://www.justice.gov.uk/downloads/tribunals/charity/NotesOfRef_27Jan11.pdf)>. See also Stephen Cook, 'Attorney General Refers Charity Commission's Public Benefit Guidance to the Courts', *Third Sector* (online), 9 September 2010 <<http://www.thirdsector.co.uk/news/Article/1031979/Attorney-General-refers-Charity-Commissions-public-benefit-guidance-courts>>.

11 *Independent Schools Council v Charity Commission for England and Wales* [2012] Ch 214 ('*Independent Schools Council Case*').

12 *Ibid* 294 [260].

13 *Charity Commission for England and Wales v Her Majesty's Attorney General* [2012] UKUT B19 (TCC) ('*Benevolent Funds Case*').

14 Cabinet Office (UK), *Trusted and Independent: Giving Charity Back to Charities – Review of the Charities Act 2006* (Stationery Office, 2012).

to historical-legal terms, the Government should stimulate a widespread sector and public debate on the question'.<sup>15</sup>

With a public debate to commence in England and Wales 'to address future public concerns', and Australia about to embark upon a similar journey (a legislated definition of charity is planned for commencement on 1 July 2013),<sup>16</sup> we return to the original project of developing a new legal framework, one that might be taken up by a court, but more likely by a parliament committed to significant structural reform. In summary, we argue that the path taken by England and Wales under the *Charities Act 2006* (UK) c 50, now the *Charities Act 2011* (UK) c 25, is misguided. It is not the best of the available options – we argue that a better path to reform can be discovered by going back to the common law precedents and rediscovering the underlying principles. We acknowledge that some of our concepts and observations are not orthodox; nevertheless they hold value in stimulating conceptual discourse about charity reform.

We begin in Part II with a close re-reading and reappraisal of *The Commissioners for Special Purposes of the Income Tax v Pemsel*.<sup>17</sup> *Pemsel's Case*, with its categorisation of the Preamble to the *Statute of Charitable Uses 1601* 43 Eliz 1, c 4<sup>18</sup> ('Preamble'), is the foundation of the current common law understanding of charitable purpose.<sup>19</sup> Its categorisation also underpins the structure of the legislative developments. Reforming the law beyond a catch-all residuary to a new legal framework, either by case law or statute, demands reappraisal of *Pemsel's Case*.

We suggest that the ratio decidendi of *Pemsel's Case*, understood in the light of the obiter remarks, provides a path out of the problems that have led to 'report after report directed to reforming various aspects of charity law' over the last 20 years.<sup>20</sup> We argue that to resolve the problems, we must rediscover the underlying jurisprudence relied upon by all of the Law Lords including Lord Macnaghten. Returning to these underlying principles provides a basis for, and an example of, a different way of ordering the class of purposes that come within the doctrine of charitable purpose.<sup>21</sup>

We argue that the meaning of 'charitable purpose' need not be rigidly partitioned into four heads, but rather takes its colour from context. We suggest that the Australian High Court understood the underlying jurisprudence correctly when it stated in *Chesterman's Case* that the doctrine of charitable purpose 'is

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15 Ibid 42.

16 Commonwealth Treasury, Parliament of Australia, *Budget Measures 2011–12* (2011) 37; Commonwealth Treasury, *Definition of Charity*, above n 6, 1–2.

17 *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 ('*Pemsel's Case*').

18 The Act is also commonly referred to as the *Statute of Elizabeth*.

19 Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4<sup>th</sup> ed, 2010); *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 52–3 (Lord Porter).

20 Gino Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) 527.

21 This current, dominant articulation of the doctrine is from *Pemsel's Case* [1891] AC 531, 583 (Lord Macnaghten). For the status of charitable purpose as a doctrine see also *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 52 (Lord Porter).

flexible to an immeasurable degree, as can be seen by reference to the judgments of such eminent masters of law and language as the Judges who sat in *Pemsel's Case*.<sup>22</sup> When the Privy Council overruled the High Court in that case, it ossified the common law.<sup>23</sup> The result is that three well-founded principles underpinning common law development are now ignored or misapplied, which has inhibited development of the law. We contend that this body of law can continue to develop by rediscovering the underlying jurisprudence and returning to usual common law methods. When applied in an enabling or regulatory context (to define the organisations enabled or regulated), charitable purpose performs a function different in scope from when it is applied as a basis for favour, such as in an income taxing statute (to decide which enabled or regulated organisations are entitled to particular favours). As a consequence, the doctrine of charitable purpose could apply in two related, but different, spheres.<sup>24</sup>

We will then go on to consider altruism (Part III) and voluntarism (Part IV), on the basis that together they can replace reference to the 'spirit and intendment' of the Preamble. These closely related concepts are, we suggest, the contemporary articulation of the 'piety of earlier times' as that term was understood technically in *Pemsel's Case*. Consistent with the High Court's decision in the *Chesterman's Case*, continual reference to the 'extensive Elizabethan meaning' and the process of reasoning by analogy must be abandoned for common law countries to have 'a sensible meaning' – or meanings – of charitable, and to 'prevent tautology'.<sup>25</sup>

In Part V, we will argue that the broad amorphous concept of public benefit rigidly applied from within the framework of the four heads of *Pemsel's Case* is in need of theoretical development. This need is all the more pressing in a context where, following legislation in some common law countries, public benefit may no longer be presumed with respect to the first three heads. Other majority opinions in *Pemsel's Case*, particularly the often neglected judgments of Lords Watson and Herschell, provide different approaches to public benefit. In summary we theorise that, independent of public benefit being a criterion for defining charities, favour is extended to charities based on contributions to public benefit. At its simplest, the greater the contribution to public benefit the greater the entitlement to favour. We contend that just as Lord Atkin postulated remoteness as part of developing the jurisprudential landscape we now recognise as negligence, public benefit could be theorised in a similar way to limit access to the class of organisations that pursue charitable purposes. Lord Atkin found that 'there must be and is some general conception of relations ... of which the particular cases found in the books are but instances'<sup>26</sup> and held that in effect there was a continuum between immediate and direct consequences and

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22 *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362, 384 (Isaacs J) ('*Chesterman's Case*').

23 *Chesterman v Federal Commissioner of Taxation* [1926] AC 128 ('*Chesterman's Case Appeal*').

24 Peter Luxton, *The Law of Charities* (Oxford University Press, 2001) 30.

25 *Chesterman's Case* (1923) 32 CLR 362, 384 (Isaacs J).

26 *Donoghue v Stevenson* [1932] AC 562, 580.

consequences that were too remote to sum in damages at law. In a similar way we suggest that there is a continuum of public benefit where, in some cases, the benefit to the public is clear and direct and there can be no doubt of charity status, and perhaps also of entitlement to exemption and deductibility. As the evidence of public benefit becomes more remote so too might entitlement to deductibility or exemption. If public benefit is analysed as on a continuum (as the Duke of Edinburgh suggested in 1994<sup>27</sup>) then division into heads with a catch-all is unnecessary, as the critical point becomes where on the continuum between public and private benefit there is sufficient public benefit to justify first entitlement to charity status and second entitlement to favours. We will argue that these are best addressed as separate questions. A more sophisticated alternative division of public benefit for the purpose of both recognising entities as charities and also accessing favours is also offered, by developing from the four heads of *Pemsel's Case* three broader, collectively exhaustive classes which are each in turn discussed in Parts VI to VIII. They are:

- a. Dealing with Disadvantage which is for advancement of *equality*;
- b. Encouraging Edification which is for advancement of *fraternity*; and
- c. Facilitating Freedom which is for advancement of *liberty*.

The implications of this theory for the law reform discourse in both the United Kingdom and Australia are outlined in Part IX. First, the foundations for reform must begin with a recognition that 20<sup>th</sup> century cases have taken the doctrine of charitable purpose the wrong way. Second, if rigid categorisation and even adding categories of charitable purpose are inadequate measures, it suggests that the law must develop by a return to underlying principles. This offers a fresh approach to identifying and developing those principles in a reforming context. We do not deal explicitly with the associated tax reform questions, but the theory is developed with an eye to its possible application in classifying entities excluded from favours, entitled to tax exemption and entitled to deductibility. In summary then, this paper starts with *Pemsel's Case* and proceeds inductively towards an alternative, but unified, common law charity jurisprudence.

## II PEMSEL'S CASE

*Pemsel's Case* was a decision of the House of Lords on appeal from Scotland, decided by majority in 1891. The question for the Court was whether or not certain religious purposes were charitable, and thus entitled to income tax exemption. Pemsel was the treasurer of the Church of the United Brethren, commonly called Moravians.<sup>28</sup> Commissioners for Special Purposes were tax collectors.<sup>29</sup> Bates was a benefactor who had given land on trust to trustees for

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27 Prince Phillip, Duke of Edinburgh, 'Charity or Public Benefit' (Speech delivered at the 11<sup>th</sup> Arnold Goodman Charity Lecture, Charities Aid Foundation, 9 June 1994).

28 *Pemsel's Case* [1891] AC 531, 554 (Lord Watson).

29 *Ibid* 554–5 (Lord Watson).

the Moravians. The trustees had enjoyed income tax exemption on the rents and other income from that land for over seventy years when the Commissioners decided not to allow income tax exemption on part of the income.<sup>30</sup> The central question for the Court was whether the purposes set out in the trust (which was settled in England but situated in Scotland) were ‘charitable purposes’ under section 61 of the *Income Tax Act 1842* (Imp) 5 & 6 Vict, c 35, and thus exempt.<sup>31</sup> The contested wording of the trust provided:

- (1) As to two equal fourth parts thereof, for the general purposes of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of *Unitas Fratrum*, or *United Brethren*.<sup>32</sup>

The argument for the Commissioners was essentially that in Scotland, where the appeal originated, the expression ‘charitable purpose’ excluded advancement of religion and was confined to aspects of poverty relief.<sup>33</sup> The way the taxing legislation was drafted did not invite the argument that relief of poverty should be treated differently as a subcategory of charitable purpose.<sup>34</sup> The argument advanced was simply that poverty relief covered the whole class of charitable purpose. It was conceded by counsel for both parties, and accepted by all of the Law Lords, that the popular meaning of the term ‘charitable purpose’ was problematic.<sup>35</sup> The extent to which the popular and legal meanings of ‘charitable purpose’ were coterminous was strenuously argued.<sup>36</sup> There was a line of case law reaching back prior to the *Statute of Charitable Uses* by which the Courts of Chancery, and later the common law courts, had exercised jurisdiction over trusts for charitable purposes. Those trusts had been for purposes other than the relief of poverty.<sup>37</sup> Importantly, they extended to include trusts for the advancement of religion.<sup>38</sup> For the Commissioners to succeed, a majority would have to hold that a narrow, Scottish meaning applied in this case, limiting the definition of charitable purpose to the relief of poverty and excluding the religious purpose set out in the trust settled by Bates.

30 Ibid 574 (Lord Macnaghten). The year of settlement was 1813. See also Michael J Gousmett, *The Charitable Purposes Exemption from Income Tax: Pitt to Pemsel 1798–1891* (PhD Thesis, University of Canterbury, 2009); Myles McGregor-Lowndes, ‘Public/Private Accountability and the Tax Exempt Status of Charitable Organisations’ (Seminar Paper, Social Policy Research Centre, University of New South Wales, 20 February 2003); William Ewart Gladstone, *The Financial Statements of 1853* (William Clowes and Sons, 1863) 458.

31 *Pemsel’s Case* [1891] AC 531, 539, 541 (Lord Chancellor Halsbury), 554 (Lord Watson), 563–4 (Lord Bramwell), 568–70 (Lord Herschell), 575–6 (Lord Macnaghten).

32 Ibid 541 (Lord Chancellor Halsbury).

33 Ibid 550–1.

34 Thomas Kelley, ‘Rediscovering Vulgar Charity: A Historical Analysis of America’s Tangled Nonprofit Law’ (2005) 73 *Fordham Law Review* 2437. Public benevolent institutions in Australia are now provided for in the *Income Tax Assessment Act 1997* (Cth), s 30.45 item 4.1.1.

35 *Pemsel’s Case* [1891] AC 531, 542–5 (Lord Chancellor Halsbury), 556–8, 561 (Lord Watson), 566 (Lord Bramwell), 569–73 (Lord Herschell), 580–4 (Lord Macnaghten), 592 (Lord Morris).

36 Ibid 532–9.

37 Ibid 534, 543 (Lord Chancellor Halsbury), 557–9 (Lord Watson), 573 (Lord Herschell), 583 (Lord Macnaghten).

38 Ibid 534.

## A The Ratio Decidendi of the Decision and the Orthodox Reading of the Case

By a majority of four to two, the House of Lords held that the use of the words ‘charitable purpose’ in the *Income Tax Act 1842*<sup>39</sup> extended exemption to the income in question. The majority view was that income applied ‘for the general purposes of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of *Unitas Fratrum*, or *United Brethren*’ was applied for a charitable purpose.<sup>40</sup>

The following words from the judgment of Lord Macnaghten have become famous for articulating the principle of law emerging from the case, which is that the meaning of the expression ‘charitable purpose’ is not confined in a taxing statute to relief of poverty, but extends to include advancement of religion, as it did in defining the jurisdiction of the Courts of Chancery. Lord Macnaghten stated:

How far then, it may be asked, does the popular meaning of the word ‘charity’ correspond with its legal meaning? ‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. It seems to me that a person of education, at any rate, if he were speaking as the Act is speaking with reference to endowed charities, would include in the category educational and religious charities, as well as charities for the relief of the poor. Roughly speaking, I think he would exclude the fourth division. Even there it is difficult to draw the line. A layman would probably be amused if he were told that a gift to the Chancellor of the Exchequer for the benefit of the nation was a charity. Many people, I think, would consider a gift for the support of a lifeboat a charitable gift, though its object is not the advancement of religion, or the advancement of education, or the relief of the poor. And even a layman might take the same favourable view of a gratuitous supply of pure water for the benefit of a crowded neighbourhood. But after all, this is rather an academical discussion. If a gentleman of education, without legal training, were asked what is the meaning of ‘a trust for charitable purposes,’ we think he would most probably reply, ‘That sounds like a legal phrase. You had better ask a lawyer.’<sup>41</sup>

By 1947, and even though Lord Macnaghten’s opinion is quite open textured, this classification in a ‘legal sense’ into ‘four principal divisions’ had become so dominant that all legal analysis of the definition of charitable purpose was

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39 (Imp) 5 & 6 Vict, c 35, s 61.

40 As to the minority view, Lord Chancellor Halsbury in his dissent stated: ‘That there are some objects which would be charitable objects under these trusts, I do not deny; but the question here argued is whether the funds are *all* applicable *and applied* to charitable purposes. For these reasons I am of opinion that the judgment appealed from ought to be reversed’: *Pemsel’s Case* [1891] AC 531, 554 (emphasis in original). Lord Bramwell, who wrote his own dissenting opinion, concurred with the Lord Chancellor: at 563.

41 *Pemsel’s Case* [1891] AC 531, 583–4.

undertaken with reference to the classification.<sup>42</sup> The focus on these four categories has increased rather than decreased since 1947, with all of the major texts analysing charitable purpose in terms of the four heads.<sup>43</sup> Most recently, the High Court of Australia has had three opportunities to develop the law and has elected not to disturb this approach in general. In *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*, Kirby J made the point that ‘it is by no means self-evident that *Pemsel* provides the starting point for defining the word “charitable”’.<sup>44</sup> The majority considered that the Court could not reform the law to a modern paradigm without the benefit of argument.<sup>45</sup> The Supreme Court of Canada reached a similar decision in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*, holding that the taxation consequences of developing an alternative approach obliged the Court to leave the matter to Parliament.<sup>46</sup> In the United Kingdom, the Upper Tribunal has taken a similar approach in the *Independent Schools Case*.<sup>47</sup> It follows that charitable purpose, as presently understood in common law countries, is read through a particular lens that lets through only images shaped according to the ‘four principal divisions’ of *Pemsel’s Case*.<sup>48</sup> It is not beyond the courts to develop this body of law and the recent Australian High Court decision in the *Aid/Watch Case*<sup>49</sup> is an example, but the preponderance of judicial comment seems to weigh in favour of statutory amendment having regard to fiscal consequences.

We do not quibble with taking this passage from Lord Macnaghten’s opinion as a declaration of the ratio decidendi of *Pemsel’s Case*. We might not even quibble with a case that looks to the four principal divisions as proof that a purpose is charitable. Our quibble is with replacing the method of reasoning that led to the decision in *Pemsel’s Case* with a reference only to the four heads. The current orthodox reading focuses only on the four heads and excludes the jurisprudential context in which Lord Macnaghten’s judgment was placed. Put

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42 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 52–3 (Lord Porter).

43 Picarda, above n 19; Luxton, above n 24; Jean Warburton, Debra Morris and N F Riddle, *Tudor on Charities* (Sweet & Maxwell, 9<sup>th</sup> ed, 2003); John Mowbray et al, *Lewin on Trusts* (Sweet and Maxwell, 18<sup>th</sup> ed, 2008); Dal Pont, above n 20.

44 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 205 [109].

45 *Ibid* 178–9 fn 28; cf 195–7 (Kirby J). The High Court was not invited to change the categories in *Commissioner of Taxation v Word Investments Limited* (2008) 236 CLR 204, and it did not. However, in the recent decision of *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 (*‘Aid/Watch Case’*), it has opened the classes considerably, and political purposes are no longer presumed to be excluded.

46 The Canadian Supreme Court has eschewed responsibility for this development, declaring that ‘wholesale reform [as distinct from] incremental change ... is best left to Parliament. ... [and] substantial change in the definition of charity must come from the legislature rather than the courts’: *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217, 242 [44] (Rothstein J delivering the judgment of McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ).

47 [2012] Ch 214, 294 [260].

48 India and South Africa are notable exceptions. See Direct Taxes Code Bill 2009 (India) and *Income Tax Act 1962* (South Africa) ss 10(1)(cN), 30(1), 37B.

49 *Aid/Watch Case* (2010) 241 CLR 539.

simply, we say that the methodology applied across all the opinions in *Pemsel's Case* – which sought to identify whether ‘maintaining, supporting and advancing the missionary establishments among heathen nations’<sup>50</sup> was a charitable purpose – has been replaced by a process requiring all claims to charitable purpose to assert that they come within the four principal divisions referred to by Lord Macnaghten. We hasten to add that categorisation is of great utility. We will argue below for a different classification of forms of public benefit. Classification follows definition of the genus, though, and cannot replace it.

From all six opinions it is clear that each Law Lord clearly explored the essence of charitable purpose and differentiated charitable from non-charitable purpose. The court was divided, but that does not mean that they were divided on the appropriate method – only on the outcome of applying that common law method to the facts. The majority comprised Lords Watson, Herschell, Macnaghten and Morris. In dissent were the Lord Chancellor and Lord Bramwell. None of these Law Lords proceeded by analogy with purposes listed in the Preamble; it was merely observed to be a list of purposes considered charitable.<sup>51</sup> Nor did any Law Lord rely upon the ‘four principal divisions’. They all applied usual principles of legal reasoning.<sup>52</sup> The opinions focus on two things in exploring the concept of charitable purpose at law:

- a. the centrality of public benefit;<sup>53</sup> and
- b. the antecedent jurisprudence anchored in the concept of the pious use.<sup>54</sup>

None of the Law Lords considered that the Preamble did anything other than set out the context of the *Statute of Charitable Uses*. None considered that it contained the definition of anything – in particular, of charitable purpose. At most, the Preamble was affirmed as an index or chart.<sup>55</sup>

Only Lord Bramwell (who was in the minority) attempted a comprehensive definition of charitable purpose.<sup>56</sup> The majority were content to decide that religion was within the scope of the popular *and* the legal definitions. The

50 *Pemsel's Case* [1891] AC 531, 541 (Lord Chancellor Halsbury).

51 *Ibid* 581 (Lord Macnaghten).

52 *Ibid* 551–2 (Lord Chancellor Halsbury, dissenting), 561 (Lord Watson), 564 (Lord Bramwell, also dissenting), 573 (Lord Herschell), 583–4 (Lord Macnaghten), 592 (Lord Morris).

53 All agreed on the centrality to the concept of charitable purpose of benefiting others, particularly poor persons. The controversy was whether public benefit extended to evangelisation of the heathen. See *Pemsel's Case* [1891] AC 531, 541, 552 (Lord Chancellor Halsbury, dissenting), 556–7 (Lord Watson); 564–6 (Lord Bramwell, also dissenting); 571–3 (Lord Herschell, but note rejection of limitation for public good: at 572), 583–4 (Lord Macnaghten), 592 (Lord Morris).

54 *Ibid* 549 (Lord Chancellor Halsbury, agreeing with Lord Watson on application and interchange of pious and godly in charitable purpose but not as to the extent of its application), 558–9 (Lord Watson), 564 (Lord Bramwell, also dissenting but arguably, in agreeing with Lord Chancellor Halsbury, accepting Lord Watson's analysis on this point, but not the extent of its application. Note though that Lord Bramwell defined charitable purpose without any reference to motive), 572 (Lord Herschell, ‘compassion or sympathy’), 580–81 (Lord Macnaghten), 592 (Lord Morris).

55 Warburton, Morris and Riddle, above n 43, 4. See where their Lordships referred to it in those terms: *Pemsel's Case* [1891] AC 531, 542–4 (Lord Chancellor Halsbury, dissenting), 559 (Lord Watson), 566 (Lord Bramwell, also dissenting), 581 (Lord Macnaghten), 592 (Lord Morris).

56 *Pemsel's Case* [1891] AC 531, 563–8 (Lord Bramwell).

majority pointed to characteristics of charitable purpose and reasons why advancement of religion was within those particular characteristics. The ‘four principal divisions’ were not treated as a classification, but an illustration of the central issue in the case, which was that the advancement of religion is clearly within the scope of the operation of the doctrine of charitable purpose.<sup>57</sup> This is illustrated by Lord Macnaghten himself, who described the segmentation into four principal divisions as ‘rather an academical discussion’.<sup>58</sup>

So, whilst the ‘four principal divisions’ are clearly integral to the ratio decidendi of the case, they:

- a. do not vitiate or replace the underlying jurisprudence that defines the jurisdiction of courts; and
- b. do not operate as a definition of either:
  - i. the essence; or
  - ii. the differentiating features of charitable purpose; but rather,
- c. declare that certain characteristics, namely relief of poverty, advancement of education and advancement of religion, are within the legal definition of charitable purposes.

## **B Two Charitable Purposes: Defining Jurisdiction and Justifying Favour**

‘There is no necessary link between charitable status and tax relief’, declared Luxton,<sup>59</sup> and he is right. This is not a new idea. The need to distinguish the two different functions performed by what the law labels ‘charitable purpose’ was highlighted by Lord Chancellor Halsbury. The Lord Chancellor did not have difficulty with a broad interpretation of the doctrine of charitable purpose for defining the jurisdiction of the court for regulatory purposes as the Court of Chancery had done, but considered a different definition should apply to the granting of favour.<sup>60</sup> Now it might be said at this point that the Lord Chancellor was in the minority. All of the other Law Lords concurred on the point that context informs charitable purpose.<sup>61</sup>

If all six Law Lords in *Pemsel’s Case* allow for a flexible reading of the meaning of charitable purpose at common law, we contend that *Pemsel’s Case* itself is authority for freedom to develop the doctrine of charitable purpose beyond the present strictures of the ‘four principal divisions’. If it is accepted that the four principal divisions are not fixed categories determining the technical, legal definition of charitable purpose, but rather that charitable purpose ‘is used at different times in varying senses, broader or narrower’,<sup>62</sup> then there is a basis

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57 Ibid 557 (Lord Watson), 572 (Lord Herschell), 583 (Lord Macnaghten), 592 (Lord Morris).

58 Ibid 584 (Lord Macnaghten).

59 Luxton, above n 24, 30.

60 *Pemsel’s Case* [1891] AC 531, 542 (Lord Halsbury).

61 Ibid 573 (Lord Herschell), 565 (Lord Bramwell), 573 (Lord Watson), 586 (Lord Macnaghten), 592 (Lord Morris).

62 Ibid 573 (Lord Herschell).

for at least two readings of charitable purpose: one broad and one narrow. These different readings logically follow the two quite different functions being fulfilled at law by the doctrine of charitable purpose. A broad reading logically applies to the defining of a jurisdiction which regulates charities. For example, all charities that fall within this definition will be under the jurisdiction of charity commissioners, though these charities need not all be entitled to the same favours. They might or might not be, depending upon how legislation granting favours describes the organisations entitled to them. For example, only some charities in Australia enjoy deductible gift recipient status – those that are also public benevolent institutions; the remainder only enjoy tax exemption.<sup>63</sup>

A narrow reading may be appropriate in the situation where the doctrine determines entitlement to favour. For example, not all regulated charities enjoy the same favours. Some may enjoy only exemption from taxation and others, such as those providing relief of poverty, might enjoy exemption and deductibility. We contend that this division is a threshold, one that Lord Cross was willing to acknowledge in *Dingle v Turner*, in observing that the definition of charitable purpose was influenced in the late 20<sup>th</sup> century by revenue considerations.<sup>64</sup> Even if it is not a division that presently informs the doctrine of charitable purpose, it is a division which can be derived from within the methodology applied in *Pemsel's Case*, but not by focusing exclusively on Lord Macnaghten's classification. Following this approach, a gift for a purpose which is not charitable, for example a superstitious or indifferent purpose, could be recognised as a purpose gift, but entitlement to the favours available to charitable purpose trusts could be declined on the basis that the evidence of public benefit is too remote to justify access to favourable tax treatment.<sup>65</sup>

We have argued that regulating can be separated from favouring as a logical development of the common law traceable to the opinions in *Pemsel's Case*. We will shortly set out a basis for replacing reference to the spirit and intendment of the Preamble with reference to altruism and voluntarism. First, we explain why this is necessary.

Why has there been 'report after report directed to reforming various aspects of charity law' over the last 20 years?<sup>66</sup> The puzzle to be resolved is how the common law painted itself into a corner requiring statutory reform. As a matter of first principles, common law legal method should be able to develop without the need for statutory assistance. Why then have these problems arisen in the context of the doctrine of charitable purpose? The answer is that three basic, well-known principles, usually applied in casuist method in the development of the common law, have been ignored or misapplied. Had this not happened, there

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63 Compare *Income Tax Assessment Act 1997* (Cth) s 30.45 item 4.1.1 with s 30.45 item 50.5.

64 *Dingle v Turner* [1972] AC 601, 625, but note that the majority expressly rejected this. See also Warburton, Morris and Riddle, above n 43, 3. It has been explicitly acknowledged as relevant in Canada: *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217.

65 *Morice v Bishop of Durham* (1805) 10 Ves Jr 522. See also Adam J Hirsch, 'Bequests for Purposes: A Unified Theory' (1999) 56 *Washington and Lee Law Review* 33, 62.

66 Dal Pont, above n 20, 527.

might have been no need for ‘report after report’. The three legal principles, which we will discuss in the context of the doctrine of charitable purpose, are:

Principle 1: The preamble to an Act of Parliament sets out (only) background and context.<sup>67</sup>

Principle 2: In the reading of a case, there is a presumption that there is jurisprudence giving effect to a public policy in the ratio decidendi of the case.<sup>68</sup>

Principle 3: A definition defines something.<sup>69</sup>

### ***1 Principle 1: The preamble to an Act of Parliament sets out (only) background and context***

The preamble to an Act is not intended to define anything. This means it is not essential to the validity of the Act.<sup>70</sup> Unless the operative part of the Act declares otherwise, the preamble does not contain the definition (of anything).<sup>71</sup> In *Pemsel's Case*, Lord Macnaghten stated that the object of the *Statute of Charitable Uses* ‘was merely to provide new machinery for the reformation of abuses in regard to charities’.<sup>72</sup> In this section, we return to that purpose and plunge back into the history of the Preamble.<sup>73</sup>

Not all Acts declare the law. Some Acts simply enable administrative tasks to be performed.<sup>74</sup> The Preamble was part of an Act creating machinery for commissioners to investigate abuses of charitable trusts.<sup>75</sup> The fact that, contrary to tenets of statutory interpretation, it has come to be read almost as a

67 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Butterworths, 5<sup>th</sup> ed, 2001) 15.

68 Julius Stone, ‘The Ratio of the Ratio Decidendi’ (1959) 22 *Modern Law Review* 597; Kenneth J Vandavelde, *Thinking Like a Lawyer: An Introduction to Legal Reasoning* (Westview Press, 1996) 3, 20–1.

69 Leslie William Melville, *The Draftsman's Handbook* (Oyez Longman, 1979) 10, referring to the second of Sir Henry Thring’s two points about the drafting of definitions.

70 Pearce and Geddes, above n 67, 15.

71 *Prince Ernest of Hanover v Attorney-General* [1957] AC 436, 463 (Viscount Simonds); *Wacando v Commonwealth* (1981) 141 CLR 1, 23 (Mason J); *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)* [2007] 3 SCR 217, 229 [16]. This recognition of the contextual role played by The Preamble can be compared to the more conservative approach, from which the ‘no recourse rule’ stems, whereby a preamble should only be consulted if an ambiguity arises. See Anne Winckel, ‘The Contextual Role of a Preamble in Statutory Interpretation’ (1999) 23 *Melbourne University Law Review* 184, 185–6; Pearce and Geddes, above n 67, 191–2.

72 *Pemsel's Case* [1891] AC 531, 581 (Lord Macnaghten).

73 For discussion of purpose and context generally see Gareth Jones, *History of the Law of Charity 1532–1827* (WW Gaunt & Sons, 1969) 27, 107; Picarda, above n 19, 8–11; James Fishman, ‘The Political Use of Private Benevolence: The Statute of Charitable Uses’ (Pace Law Faculty Publications, Paper No 487, Pace University School of Law, 2008) 28–42 <<http://digitalcommons.pace.edu/lawfaculty/487/>>; Kerry O’Halloran, Myles McGregor-Lowndes and Karla Simon, *Charity Law and Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, 2008) 28–30.

74 See *Charities Act 2005* (NZ) s 8.

75 *Pemsel's Case* [1891] AC 531, 581 (Lord Macnaghten). See also Jones, above n 73, 27, 107; and Picarda, above n 19, 8–11.

codification of substantive law is part of the problem with defining charitable purpose by reference to the Preamble.

The process by which the Preamble becomes a definition is as follows. In 1605, a Mr Romilly (later Sir Samuel Romilly), for the purposes of arguing a case that depended upon a narrow definition of charitable purpose,<sup>76</sup> categorised the list in the Preamble into four broad groupings.<sup>77</sup> These suggested categories were not taken up in the judgment but were subsequently adopted in a leading text on the law of charities.<sup>78</sup> Lord Macnaghten substantially adopted these four categories in his reasons for judgment in *Pemsel's Case*.<sup>79</sup> From that categorisation, the orthodox understanding of the doctrine of charitable purpose has developed: for a purpose to be charitable, it must fall within one of the four heads of charitable purpose listed by Lord Macnaghten in *Pemsel's Case* and be for public benefit.<sup>80</sup>

The use of the categories in the contexts of both *Morice v Bishop of Durham*<sup>81</sup> and *Pemsel's Case* is eminently reasonable, but the categories alone were not the reasons for judgment in either case. In *Morice v Bishop of Durham*, they were not adopted into the reasons for judgment. In *Pemsel's Case*, Lord Macnaghten seems to have described his musing over the classification into 'four principal divisions' as 'academical'.<sup>82</sup> Even if the term 'academical' was a reference to the distinction between lay and legal understandings of a trust for charitable purposes, the fundamental point that the categories were not the reason for judgment remains. With the classification having now taken on the significance that it has, the divisions have become law: they are beyond 'academical'. The list itself, which, according to Fishman, recited the 'proper objects of charitable interest' solely unintentionally,<sup>83</sup> has become the rationale. This is the first underlying methodological problem.

## **2 Principle 2: The presumption of jurisprudence giving effect to public policy in the ratio decidendi of a case – the overlooked but underlying jurisprudence of *Pemsel's Case***

Typically in the reading of a case, there is a presumption that there is a jurisprudence giving effect to a public policy in the ratio decidendi of the case.<sup>84</sup> Sound jurisprudential reasoning may dissent from that reasoning and it may be

76 *Morice v Bishop of Durham* [1805] 10 Ves Jr 522.

77 Warburton, Morris and Riddle, above n 43, 12.

78 Leonard Syer Bristowe and Walter Ivimey Cook, *The Law of Charities and Mortmain: Tudor's Charitable Trusts* (Reeves and Turner, 3<sup>rd</sup> ed, 1889) 2.

79 Warburton, Morris and Riddle, above n 43, 13.

80 Luxton, above n 24, 112; Dal Pont, above n 20, 161–2, 181–3, 191–211, 212–45, 246–79; Denis Ong, *Trusts Law in Australia* (Federation Press, 3<sup>rd</sup> ed, 2007) 330; Philip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 10<sup>th</sup> ed, 2006) 251; Picarda, above n 19, 12–13; O'Halloran, McGregor-Lowndes and Simon, above n 73, 29–31.

81 *Morice v Bishop of Durham* [1805] 10 Ves Jr 522.

82 *Pemsel's Case* [1891] AC 531, 584 (Lord Macnaghten).

83 Fishman, above n 73, 33.

84 Stone, above n 68; Vandavelde, above n 68, 3, 20–1.

overruled, but it does not overlook it. Had the underlying jurisprudence not been overlooked, the current problems with the doctrine of charitable purpose might not have arisen.

If Lord Macnaghten considers that his classification is ‘academic’ and that the jurisprudence of charitable purpose rests on foundations independent of the *Statute of Charitable Uses*, how can his opinion have been read as one of classification and without reference to the underlying jurisprudence? The answer lies in the problem of defining charitable purpose. Lord Macnaghten was concerned that if the popular notion of charity was adopted, it would lead to the ‘hopeless task’<sup>85</sup> of each individual case being decided on its own facts.

As we pointed out above, the Australian High Court attempted to address this problem in the early part of the 20<sup>th</sup> century. In *Chesterman’s Case*, Isaacs J endeavoured to give jurisprudential form to the popular notion of charitable purpose and give the concept flexibility. He proposed that a non-technical interpretation be adopted, pointing out that

in the application of these rules minds easily differ. For instance, in *Pemsel’s Case* Lord Halsbury and Lord Bramwell dissented. And one of the three eminent jurists who composed the majority, Lord Herschell, in the very next year – indeed within eight months afterwards – was led to a non-technical interpretation of the words ‘charitable purpose’ in another Act.<sup>86</sup>

The other majority judges agreed in this approach, but the Court was overruled by the Privy Council.<sup>87</sup> The consequence is that one ‘hopeless task’ (each case being decided on its own facts, because of an apparent inability to give legal meaning to the popular concept of charity) has been replaced by another ‘hopeless task’ (each case being decided on its own facts because the courts are without an underlying jurisprudence to frame decision making).<sup>88</sup>

### 3 Principle 3: A definition defines something<sup>89</sup>

The definition should always be consistent with the matter defined. A good definition, at least in the classical sense, sets out the genus and differentia

85 *Pemsel’s Case* [1891] AC 531, 587 (Lord Macnaghten).

86 *Chesterman’s Case* (1923) 32 CLR 362, 381–2 (Isaacs J) referring to *Commissioners of Inland Revenue v Scott* (1892) 2 QB 152 (‘*Scott’s Case*’). In *Scott’s Case*, Lord Herschell was again applying legislation that used the words ‘charitable purpose’. The Court took time to consider its verdict and Lord Herschell, having noted that the ‘appellants naturally placed their main reliance upon the decision of the House of Lords in the *Commissioner of Income Tax v Pemsel*’, was not willing to give the words such wide application: *Scott’s Case* (1892) 2 QB 152, 165. He found that this different drafting obliged a narrower construction: at 161, 165–6.

87 *Chesterman’s Case* (1923) 32 CLR 362; *Chesterman’s Case Appeal* [1926] AC 128. The Privy Council cited *Scott’s Case* (1892) 2 QB 152 but did not accept the weight placed on it in the High Court’s reasons. The significance of this decision and the power of this argument remain. It must be noted: 1) that the decision also involved the interpretation of a taxation statute; 2) it is almost certainly the first discussion and application of the principles in *Pemsel’s Case* by an inferior court, the Court of Appeal; 3) Lord Herschell who was in the majority in *Pemsel’s Case* wrote the judgments with which Lord Lindley and Lord Kay unanimously concurred; and 4) there is not any reference to the ‘four principal divisions’. See *Scott’s Case* (1892) 2 QB 152, 164–6.

88 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305, 308–9 (Lord Simonds).

89 Melville, above n 69, 10.

ensuring that all subcategories are mutually exclusive and collectively exhaustive.<sup>90</sup> At present, there is no ‘definition’ of charitable purpose. The popular meaning of charitable purpose as concern for others was sacrificed for certainty. In lay terms, charitable purpose has a subjective element that relates to motive.<sup>91</sup> At law, by the adoption of the technical definition, the reference to motive is removed and charities are institutions that satisfy certain ‘objective’ criteria.<sup>92</sup> Motive is critical, though, to understanding why public benefits are supplied. The law avoids assessing motive in charitable purpose matters by returning consistently to the Preamble. But as the doctrine of charitable purpose has become focused on the institution (not the characteristic of altruism) it bears little, if any, link to common understanding.

If the legal class of charities does not represent social expectations of charitable purpose, what do citizens of common law countries expect to reside at the heart of this body of law? This problem was foreseen by Lord Chancellor Halsbury, who argued in his dissenting judgment in *Pemsel’s Case* for resisting the separation of the common from the technical meaning.<sup>93</sup> The problem that arises from the separation is that the notions embedded in the words ‘charitable purpose’, which might have stood as the unifying or relating concept (the essence) that brings all of these heads of charitable purpose into relationship, has been lost. The orthodox jurisprudential theory is that referable to the list in the Preamble, and if the inquiries have shown anything it is that this list is clearly inadequate.

A specific problem with identifying the genus in the Preamble is that it is merely a list.<sup>94</sup> A definition defines with reference to key characteristics – that is, the essence is elucidated.<sup>95</sup> If it is helpful, the definer may state in the definition ‘this definition includes ...’. To be a definition, a list would have to be exhaustive. With the Preamble providing the foundation for the modern legal understanding of charitable purpose, there is the worst of both:<sup>96</sup> the list is not exhaustive and there is no statement of the essential characteristics. Addressing this problem requires an exhaustive list, a clear definition, or a definition including a list.<sup>97</sup>

A second specific problem with the present approach when considering the missing essence is that spirit and intentment, with reference to the Preamble or anything else, are ephemeral, opaque and uncertain concepts<sup>98</sup> unsuited to legal analysis. As Lord Simonds noted: ‘A great body of law has thus grown up. Often

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90 See *No 20 Cannon Street Ltd v Singer & Friedlander Ltd* [1974] Ch 229, 240 (Megarry J).

91 Dal Pont, above n 20, 33–4.

92 Ibid 31–6; *Pemsel’s Case* [1891] AC 531, 583 (Lord Macnaghten).

93 *Pemsel’s Case* [1891] AC 531, 542.

94 Charitable Trusts Committee (UK), *Report of the Committee on the Law and Practice Relating to Charitable Trusts*, Cmd 8710 (1952–53) 29, 31–6.

95 R W M Dias, *Jurisprudence* (Butterworths, 5<sup>th</sup> ed, 1985) 3.

96 That is not to say that it was the worst of both in 1601. The Preamble served its purpose then. It is its current usage that creates the problems.

97 Secretary of State for the Home Department (UK), above n 2.

98 Charities Definition Inquiry, above n 8, 7.

it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and liable to be so differently interpreted in different ages.<sup>99</sup>

A spirit may have character, but that character is not manifest or subject to legal obligation until incarnate in a legally recognised body. Then, the body is subject to the law, not the spirit. In the context of charities, these bodies take organisational form.

Put at its simplest, there is a need for the law applying to these organisations to identify clearly the essence of organisations that are said to manifest charitable purposes. It is not enough, though, to identify essence. That which differentiates these organisations from others must also be delineated if the organisations are to be defined adequately. Differentiation is possible. The sector to which charities belong is but one sector – in fact, one part of a sector – of society. In disciplines other than law, charities are theorised as forming part of a third sector of society.<sup>100</sup> At this point it is enough to note that charitable purpose is not defined. In the next section we consider reasons why.

How then is the law to move beyond the Preamble? What was that overlooked jurisprudence? How should we craft a definition that does not depend upon a list or ‘spirit and intendment’? The path forward lies in the opinions in *Pemsel’s Case*. They point to an underlying jurisprudence. These ideas are developed through the next two sections.

### III ALTRUISM

Recall that Lord Macnaghten opined that the foundation of the concept of charitable use is not in the categories he listed, nor in the Preamble, per se, but in ‘the piety of early times’.<sup>101</sup> The legal significance of this ‘piety’, and its expression through pious uses or charitable purposes, was explored at some length by Lord Watson in *Pemsel’s Case*. We argue in this section that this legal conception is akin to, or has been replaced in common parlance by, the concept of altruism. The law of charities has not carried forward the foundational idea of ‘piety’ despite its being as important to the concept of charitable purpose as public benefit was in *Pemsel’s Case*. Developing the idea from the opinions of Lords Watson, Herschell and Macnaghten, altruism could be theorised to discharge the function of ‘the piety of earlier times’ in charity law. It is to that project that we turn.

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99 *Gilmour v Coats* [1949] AC 426, 443 (Lord Simonds) and later at 446 when His Lordship states: ‘Here is something which is manifestly not susceptible of proof.’

100 Australian and New Zealand Third Sector Research, Submission No 252 to Charities Definition Inquiry, *Inquiry into the Definition of Charities and Related Organisations*, 19 January 2001; Dal Pont, above n 20, 11–12; Martti Muukkonen, *The Familiar Unknown – Introduction to Third Sector Theories* (Licentiate Thesis, University of Joensuu, 2000); Mark Lyons, *Third Sector: The Contribution of Nonprofit and Cooperative Enterprises in Australia* (Allen & Unwin, 2001).

101 *Pemsel’s Case* [1891] AC 531, 580 (Lord Macnaghten).

Defining ‘pious use’ in the context of the law as it was before the passing of the *Statute of Charitable Uses* is not as simple as may be thought at first. That is not because a simple legal definition cannot be set out, but rather because the bare definition without explanation denudes the idea of its very essence. It must be remembered that the idea of charity in the Preamble was anchored in notions of civil relations which preceded the present property rights discourse. It may seem strange in the 21<sup>st</sup> century in a common law country to be focused on the use to which something is put rather than on the title or right to use. There is now a widely accepted belief that once something is ‘owned’ the owner may do as he or she pleases with it, regardless of moral constraints.<sup>102</sup> The concept of pious use belongs to a different moral frame.<sup>103</sup> The foundations for the ideas are Christian<sup>104</sup> and Augustine exemplified the expectation in a less well-known work directed to widows: ‘But in you let the love of riches grow cold ... and let a pious use of what property you possess be directed to spiritual delights, that your liberality wax warm rather in helping such as are in want than in enriching covetous persons’.<sup>105</sup>

Both words, ‘pious’ and ‘use’, are important. The ‘use’ must be directed to others who are in need. The motive must be ‘liberality’, which is contrasted with the self-interested ‘love of riches’, but this motive is known by its application of property to uses that benefit others. It is fundamentally a focus on the supply side of the transaction, but the reason for supply is manifest in the form of beneficiary to whom the transfer is made.<sup>106</sup>

In such a context it is not surprising that Lord Watson, whose reasoning was accepted by a majority on this point,<sup>107</sup> found not just public benefit but also ‘pious’ motive to be integral to the concept of charitable purpose at law. He stated:

So far as I am able to discover, ‘godly’ and ‘pious’ as applied to trusts or uses, had, in early times much the same significance in Scotland as in England. Their meaning was not limited to objects of a religious or eleemosynary character, but *embraced all objects which a well-disposed person might promote from motives of philanthropy*.<sup>108</sup>

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102 Matthew Turnour, *The Stewardship Paradigm: An Enquiry into the Ethical Obligation Associated with Being in Control of Resources* (MA Thesis, Queensland University of Technology, 1999) 48.

103 F W Maitland, ‘The Origin of Uses’ (1894) 8 *Harvard Law Review* 127.

104 Although the Islamic concept of *waqf* may have significantly informed the development of the concept into charitable trusts. See Monica M Gaudiosi, ‘The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College’ (1988) 136 *University of Pennsylvania Law Journal* 1231.

105 Saint Augustine, *Of the Good of Widowhood* (CL Cornish trans, Christian Literature Publishing Co, 1887) [trans of: *De Bono Viduitatis*] <<http://www.newadvent.org/fathers/1311.htm>>. Cf *Morice v Bishop of Durham* [1805] 10 Ves Jr 522, disqualifying ‘liberality’ from the scope of charitable.

106 See, eg, Pope John XXIII, *Sacerdotii Nostris Primordia* (1 August 1959) Papal Encyclicals Online <<http://www.papalencyclicals.net/John23/j23sacer.htm>>.

107 Lord Halsbury concurred with the reasoning of Lord Watson on the meaning of godly and pious informing the understanding of charitable purpose: ‘That “godly” and “pious” are convertible terms, and may be so treated, is true’: *Pemsel’s Case* [1891] AC 531, 549. Lord Bramwell likewise agreed with the reasoning although he came to a different decision: at 563. Lord Herschell agreed with both Lord Watson’s reasoning and conclusion: at 574.

108 *Ibid* 558 (Lord Watson) (emphasis added).

In relation to the word ‘pious’, Lord Watson gave three examples: ‘the building and repairing of bridges, repairing of churches or entertainment of the poor’.<sup>109</sup> He referred also to the case of *Lord Saltoun v Lady Pitligo*<sup>110</sup> where ‘the Court of Session held that the repair of a public harbour was a pious use’ within the meaning of the relevant legislation.<sup>111</sup> His point was clear: if a ‘well-disposed person’ was motivated by ‘philanthropy’ the courts could find charitable intent, as the traditional conception of pious use or godliness had broad application.<sup>112</sup> Lord Watson did not just point to motives of philanthropy leading to the provision of physical needs, but also to motives to make contributions to religious,<sup>113</sup> intellectual and moral culture.<sup>114</sup>

Lord Herschell, whilst agreeing with Lord Macnaghten, wrote his own opinion. He also did not categorise charitable purposes, but referenced a motive of benevolence as integral to charitable purpose: ‘I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.’<sup>115</sup>

His Lordship continued:

Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity. On the contrary, no 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 as a charitable purpose than the ministering to physical needs ... *It is a mistake to suppose that men limit their use of the word ‘charity’ to those forms of benevolent assistance which they deem to be wise, expedient, and for the public good. There is no common consent in this country as to the kind of assistance which it is to the public advantage that men should render to their fellows, or as to the relative importance of the different forms which this assistance takes.*<sup>116</sup>

Our point is that pious uses or charitable purposes are not just public benefiting purposes. They also have, as a central dimension, the motive to serve others. This is not the orthodox reading of the law as it presently stands.<sup>117</sup> Ignoring motive is justified under the doctrine of charitable purpose by focusing entirely on the side of the recipient, the demand side, not on the supplier. Looking at the supply side as well as the demand side overcomes the problems arising from a focus on public benefit alone. It is an approach that has assisted economists,<sup>118</sup> and can assist lawyers.

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109 Ibid 559 (Lord Watson).

110 Mor Dict 9948.

111 *Pemsel’s Case* [1891] AC 531, 559 (Lord Watson).

112 Ibid 558 (Lord Watson).

113 Ibid.

114 Ibid 561 (Lord Watson).

115 Ibid 572 (Lord Herschell).

116 Ibid (emphasis added).

117 Warburton, Morris and Riddle, above n 43, 7.

118 Avner Ben-Ner and Theresa van Hoomissen, ‘Nonprofit Organisations in the Mixed Economy: A Demand and Supply Analysis’ (1991) 62 *Annals of Public and Cooperative Economics* 519; Richard Steinberg, ‘Economic Theories of Nonprofit Organisations’, in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2<sup>nd</sup> ed, 2006) 117.

Pious use is an antiquated concept.<sup>119</sup> The closest contemporary equivalent is altruism. George Lewes introduced the word ‘altruism’ into the English language in 1853 with his translation of Comte’s *Philosophy of the Sciences*.<sup>120</sup> The *Oxford English Dictionary* defines altruism as: ‘Disinterested or selfless concern for the well-being of others, esp. as a principle of action. Opposed to *selfishness*, [or] *egoism*.’<sup>121</sup> In theoretical analysis, it is part of a broader class called ‘prosocial behaviour’.<sup>122</sup> If altruism is accepted as a rough equivalent of the pious use, which was central to the jurisprudence, we have a name for the uniqueness of the space without reference to the ‘spirit and intendment’ of the Preamble or the four heads of *Pemsel’s Case*. The Preamble no longer has any legislative force in Australia,<sup>123</sup> Canada and other common law countries, and the time has come to let it go.<sup>124</sup> If the quest for its ‘spirit and intendment’ is replaced in part by altruism, and if the economic and social sciences have methods of identifying and possibly even measuring altruism, then jurisprudence can draw upon those insights to shape the development of the law in this area.

Two final comments should be made before closing this section. First, charities often charge fees and frequently conduct businesses. Do these activities demonstrate a lack of altruism? The High Court recently answered this question in the negative in *Federal Commissioner of Taxation v Word Investments Ltd*.<sup>125</sup> In that case the Court reminded the Commissioner of Taxation that it is the purpose for which the activity is pursued and not the activity itself that is the focus of investigation for ‘charitable’. Altruism must be evidenced in the purpose. What though of education if it ‘goes beyond what is necessary to meet any “charitable need” for education’ and what is actually being provided is ““gold-plated” education at a cost which is unaffordable for the vast majority”?<sup>126</sup> Again the test does not change. There may need to be careful attention given to whether the school operates for private or public benefit, but as a matter of principle this is not excessively problematic.<sup>127</sup>

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119 Maitland, above n 103.

120 George Henry Lewes, *Comte’s Philosophy of the Sciences* (Bohn, 1890). Comte appears to have invented the word, possibly drawing upon a French legal phrase *alteri huic*: see Helmut K Anheier and Regina A List, *A Dictionary of Civil Society, Philanthropy and the Non-Profit Sector* (Routledge, 2005) 6.

121 ‘Definition of “Altruism”’, *The Oxford English Dictionary* (online ed) <<http://dictionary.oed.com>> (emphasis in original). When using the term, Comte intended ‘to establish the opposite reference point to the self-gratifying, utility-maximizing “economic man” of economic theory’: Anheier and List, above n 120, 6.

122 Graham M Vaughan and Michael A Hogg, *Introduction to Social Psychology* (Prentice Hall, 1998) 324; David R Shaffer, *Social and Personality Development* (Wadsworth, 2000) 306.

123 For discussion of history generally see: Dal Pont, above n 20, 79–126.

124 See also *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10, particularly Gonthier J dissenting at 40–3 [32]–[36] and *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 200–4 (Kirby J). Note however, its incorporation into statute in England and Wales: *Charities Act 2011* (UK) c 25, ss 3(1)(m)(ii)–(iii).

125 (2008) 236 CLR 204, 224–8 [35]–[45].

126 *Independent Schools Council Case* [2012] Ch 214, 232 [32].

127 *Ibid* 282 [213]–[214].

The second issue is that there is a view, traceable to Henry Hansmann's work, that the non-distribution constraint, not altruism, is the critical indicator. Our response to that is two-fold. First, Hansmann acknowledged the existence of trusts, unincorporated associations and other legal forms but made it clear that he was limiting his discussion to analysis of corporations in the United States.<sup>128</sup> A broader concept is required to apply more generally to trusts and unincorporated associations; we suggest that altruism is that concept. Second, we suggest that the non-distribution constraint is better understood as a sign of altruism. We are basing this approach on more recent American scholarship from Rob Atkinson (a student of Hansmann) who built a more comprehensive model on Hansmann's framework, stating that altruism is 'the continental divide in the nonprofit sphere'.<sup>129</sup>

We conclude this section noting that just as the 'spirit and intendment' did not stand alone but operated in collaboration with public benefit, so altruism does not stand alone, but works in conjunction with public benefit. We suggest that a third dimension, voluntarism, is also needed to complete this theory development, and we consider this next.

#### IV VOLUNTARISM

Something provided voluntarily is something that is not provided under coercion. Citizens provide funds for public benefiting purposes when they pay taxes, but that provision of funds is not in pursuit of a charitable purpose. As Lord Macnaghten famously pointed out, 'a layman would probably be amused if he were told that a gift to the Chancellor of the Exchequer for the benefit of the nation was a charity'.<sup>130</sup> However, it is not an absolute rule that a gift to government cannot be charitable. That is, in some cases a gift to government can be charitable. In *Pemsel's Case* Lord Chancellor Halsbury cited a number of authorities to that effect.<sup>131</sup> In *Re Cain*, a gift to the Victorian Department of Health was held to be for a charitable purpose.<sup>132</sup> Nevertheless, there is a clear dividing line at common law between organisations pursuing charitable purposes and governments.<sup>133</sup> Charitable purpose is characterised by voluntariness. That is not to say that all charitable work is undertaken by people voluntarily. It is to say that the public benefiting purpose is pursued separately from the coercive control of the state. People give to, and participate in pursuing charitable purposes voluntarily – that is, they are not compelled to by governments. It is the motive

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128 Henry Hansmann, 'Reforming Nonprofit Corporation Law' (1981) 129 *University of Pennsylvania Law Review* 500, 502.

129 Rob Atkinson, 'Altruism in Nonprofit Organisations' (1990) 31 *Boston College Law Review* 501, 509.

130 *Pemsel's Case* [1891] AC 531, 584 (Lord Macnaghten).

131 *Ibid* 544.

132 *Re Cain (dec'd); The National Trustees Executors Agency Co of Australasia Ltd v Jeffrey* [1950] VLR 382, 387.

133 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 185–6 [40]–[44].

for the gift or the participation, not the manner in which the public is benefited, that distinguishes charitable from government purposes. Justice Gonthier summarised the law on this point in *Vancouver Society of Immigrant and Visible Minority Women*:

Two central principles have long been embedded in the case law. Speaking of the existing *Pemsel* categories, Rand J. observed ... that 'the attributes attaching to all are their voluntariness and, directly or indirectly, their reflex on public welfare'. These two principles, namely, (1) voluntariness (or what I shall refer to as altruism, that is, giving to third parties without receiving anything in return other than the pleasure of giving); and (2) public welfare or benefit in an objectively measurable sense, underlie the existing categories of charitable purposes, and should be the touchstones guiding their further development.<sup>134</sup>

Justice Gonthier (one of three dissenting judges) effectively equated voluntariness and altruism. The majority judgment written by Iacobucci J cites the same passage from Rand J, finding that public benefit alone is insufficient, and pointing to the need for recognition of 'the "generic character" of charity'.<sup>135</sup> We suggest that this 'generic character' of charity, distinct from public benefit (in this analysis) is made up of two parts: altruism and voluntariness.<sup>136</sup> Further, we suggest that nothing is lost by referring to voluntariness and altruism as coterminous when considering the role of charitable purpose as one of determining favour. For theoretical clarity though, when defining charities for the purposes of enabling or regulating we contend it is helpful to keep them separate. Charities are distinguished from government by voluntariness, but it is altruism that distinguishes them from businesses.

If the provision of a good is coerced by government, then it is not supplied charitably. Coercion by peers, social standards and religious obligation does not disqualify a supply from being for charitable purpose. Only legally compelled coercion is actually not voluntary for the purposes of this analysis. How much government coercion is tolerable, though, for a purpose to remain charitable?<sup>137</sup> Some funding and perhaps some contributions of time flow from coercion. A most obvious example is where civil society organisations pursuing community service purposes are entirely funded by government and subject to detailed compliance requirements and directions (set out in the form of a contract or other form of arrangement).<sup>138</sup> Does this remove the requisite voluntariness? The answer we propose is that there must be a continuum and the criterion will not be fundamentally different from that applied when considering altruism. The difference is that the test will be voluntariness as identified by absence of

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134 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10, 43–4 [37].

135 *Ibid* 106 [148], citing Donovan W M Waters, *Law of Trusts in Canada* (Carswell, 2<sup>nd</sup> ed, 1984) 550.

136 Cf *Independent Schools Council Case* [2012] Ch 214, where the Upper Tribunal considered 'public benefit in the first sense' and 'public benefit in the second sense': at 235–6 [44] and subsequent discussions in sections C and D of the decision.

137 Dal Pont, above n 20; Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559, 559.

138 See *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 181.

coercion, not altruism as evidenced by absence of self-interest. At some point or points between the entirely voluntary pursuit of purposes and entirely coerced pursuit of those same purposes, a threshold will be crossed. That threshold will mark the boundary between charities and government.

There is a growing science in the measurement of altruism.<sup>139</sup> At the most basic level, it can be measured by volunteering. The United Nations sets out a method for valuing volunteer labour input in national accounts, having regard to the two presently dominant methods: opportunity cost and market or replacement cost.<sup>140</sup> There are clear indicia of coercion. We suggest that if altruism and voluntarism can be identified and measured, then theory development could progress significantly, even into quantitative measurement if the Preamble is abandoned and replaced by these concepts.<sup>141</sup> This is not to oblige theory development to move to complex measurement, but it is foreseeable under this approach that legislators determining tax law may draw upon quantitative analysis of both altruism and voluntariness.<sup>142</sup> This is because altruism could be measured in some way. Coercion could be identified by reference to such things as the capacity to oblige participation, to require allocation of funds to particular objects, or compel delivery of charitable goods.

What of the role of voluntarism in defining the gateway to favours? If altruism and voluntarism can be conceptualised as on a continuum, then jurisdictions may differ as to the evidence of altruism and voluntarism needed to access favour. Altruism and voluntarism could be utilised to assess access to favours. We suggest a simpler approach. Provided the requisite threshold of altruistic and voluntary supply is evident,<sup>143</sup> public benefit can be the gauge that allows differentiation between charitable purposes. This is a simpler approach and different levels of public benefit are evident in the cases for different charitable purposes.<sup>144</sup>

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139 See, eg, United Nations Department of Economic and Social Affairs Statistics Division, *Handbook on Non-Profit Institutions in the System of National Accounts*, UN Doc ST/ESA/STAT/SER.F/91 (2003) 69.

140 Ibid. See also Matthias Benz, 'Not for the Profit, but for the Satisfaction? Evidence on Worker Well-Being in Non-Profit Firms' (2005) 58 *Kyklos* 155.

141 For example, at the most basic level, altruism can be measured by volunteering.

142 Matthew Dwight Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* (PhD Thesis, Queensland University of Technology, 2009) 335.

143 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10, 43 [37].

144 *Inland Revenue Commissioners v Baddeley (Trustees of the Newtown Trust)* [1955] AC 572, 591 (Viscount Simonds) ('*IRC v Baddeley*').

## V PUBLIC BENEFIT

Charities are granted favours because they provide public benefits.<sup>145</sup> In common law countries there are at least two significant fiscal favours: income tax exemption,<sup>146</sup> and tax deductibility for donations.<sup>147</sup> However, there is no basis in common law countries for segmenting within charitable purposes to justify access to one form of favour but not to another. This is a problem. After the Privy Council thwarted the Australian High Court in this common law development, Parliament responded in 1927 with legislation that distinguished between classes of charity entitled only to exemption and those also able to give tax deductible receipts.<sup>148</sup> South Africa repealed reference to ‘charitable’ as a ground for exemption on 19 July 2000. It elected to reference and define ‘public benefit organisation’ and allow deductibility for specific expenditures such as environmental waste disposal.<sup>149</sup> India is expected to abandon reference to ‘charitable’ when its new *Direct Taxes Code 2010* comes into effect (this was expected to be on 1 April 2012).<sup>150</sup> In Ireland, where the most recent legislative additions have been made, the legislation defining charities is expressly stated not to have fiscal impact.<sup>151</sup> If public benefit could be theorised in ways that enabled differentiation between different charitable purposes, the concept of charitable purpose could be employed more usefully in a fiscal context, and additional categories of organisation or abandoning the reference to charitable might not be necessary.

We suggest that charitable purposes can be segmented for jurisprudential purposes according to the *extent* and *nature* of the public benefit. By *extent* we mean the extent to which a purpose is for public benefit. By *nature* we mean classification into categories of public benefit according to qualities. Both of these forms of classification seem evident in the cases and therefore we endeavour to theorise both. The simpler of the two is the *extent* to which public benefit is evident and we begin with that. When turning to classification it is

145 Picarda, above n 19, 29–30; Warburton, Morris and Riddle, above n 43, 7; Charity Commission for England and Wales, *Charities and Public Benefit: The Charity Commission’s General Guidance on Public Benefit* (2008); Charity Commission for England and Wales, *Commentary on the Descriptions of Charitable Purpose in the Charities Act 2006* (2007); P S Atiyah, ‘Public Benefit in Charities’ (1958) 21 *Modern Law Review* 138.

146 Examples of such favours are contained in: *Income Tax Assessment Act 1997* (Cth) pt 2-15 div 50; *Internal Revenue Code*, 26 USC §501(c)(3); *Income Tax Act 2007* (NZ) s CW36; *Income Tax Act 2007* (UK) c 3, ss 414–46; *Income Tax Act*, RSC 1985 (5<sup>th</sup> Supp), c 1, ss 110.1, 118.1, 149.1(f).

147 Examples of such favours are contained in: *Income Tax Assessment Act 1997* (Cth), div 30; IRC §§ 170, 501(c)(3); *Income Tax Act 2007* (NZ) ss BD 2, DV 8, DV 9; *Income Tax Act 2007* (UK) c 3, ss 521–523; *Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> Supp), ss 110.1(1)(a)(ii), 118.1(1)(b), 118.1(3), 149(1)(l).

148 Ann O’Connell, ‘Charitable Treatment? – A (Potted) History of the Taxation of Charities in Australia’ (Paper presented at the Tax History Conference 2010, Cambridge, 5–6 July 2010) 21.

149 *Income Tax Act 1962* (South Africa) ss 10(1)(cN), 30(1), 37B; see also Dal Pont, above n 20, 534.

150 Direct Taxes Code Bill 2009 (India); see also Karla W Simon, ‘International Non-Governmental Organizations and Non-Profit Organizations’ (2010) 44 *International Lawyer* 399, fn 34; Noshir H Dadrawala, ‘Difficult Times Ahead for Charities in India’ (2009) 7(4) *International Journal of Civil Society Law* 57.

151 *Charities Act 2009* (Ireland) s 7(1).

evident, though, that the extent of public benefit informs categories, so the theory regarding the *nature* of the benefit is informed by and builds from the discussion of the extent of the benefit.

### A A Continuum of Public Benefit

At its simplest, the extent of public benefit could be assessed on a continuum. The economist Burton Weisbrod has proposed a ‘collectiveness index’ as a theoretical tool for assessing public benefit as a justification for favoured treatment.<sup>152</sup> More evidence of public benefit gives greater entitlement to favour. This is a very simple, but arguably effective, framework for progressing jurisprudential development.

Progressing in this way provides a way to address problems around the concept of public benefit, which are compounded by statutorily added heads of charitable purpose.<sup>153</sup> With only four heads of charitable purpose at common law, the concept of public benefit became a deep-rooted problem.<sup>154</sup> It was not possible to state clearly what public benefit was and what it was not. The delimiters of public benefit did not work.<sup>155</sup> There were problems with the levels of public benefit.<sup>156</sup> If there are 13 heads of charitable purpose, as now in England and Wales, and each head must prove public benefit but all are different, then how is public benefit to be theorised? In response to these problems, we suggest that it is possible to maintain one concept of benefit for charitable purposes and to theorise it as a continuum between private and public benefit.

Such a continuum is a logical development from the hierarchy which is already the accepted law, set out in the charitable purpose cases. It is well established that the doctrine of charitable purpose ranked contributions to public benefit in a hierarchical way.<sup>157</sup> The oft cited authority is the House of Lords decision in *IRC v Baddeley* where Viscount Simonds flagged the so-called ‘poor relations cases’ – which have such a narrow requirement of public benefit as to

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152 Burton A Weisbrod, ‘Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy’ in Burton A Weisbrod (ed), *The Voluntary Nonprofit Sector: An Economic Analysis* (DC Heath, 1977) 51, 73.

153 See, eg, *Extension of Charitable Purpose Act 2004* (Cth); *Charities Act 1979* (Barbados) c 243; *Charities Act 2006* (UK) c 50; *Charities and Trustee Investment (Scotland) Act 2005* (Scot); *Charities Act (Northern Ireland) 2008* (NI); *Charities Act 2009* (Ireland).

154 Peter Smith, ‘Religious Charities and the *Charities Act 2006*’ (2007) 9(3) *Charity Law and Practice Review* 57.

155 *IRC v Baddeley* [1955] AC 572, 590 (Viscount Simonds); Independent Committee of Inquiry to Examine the Effect of Charity Law and Practice on Voluntary Organisations, National Council of Social Service, *Charity Law and Voluntary Organisations: Report* (1976) 2; Picarda, above n 19, 31; Wino van Veen, ‘Public Benefit from a Comparative Perspective’ in Paul Bater, Frits Hondius and Penina Kessler Lieber (eds), *The Tax Treatment of NGOs: Legal, Ethical and Fiscal Frameworks for Promoting NGOs and Their Activities* (Kluwer, 2004) 239, 248; John Colombo, ‘In Search of Private Benefit’ (2006) 58 *Florida Law Review* 1063, 1065; *Cheung Man Yu v Lau Yuen Ching* [2007] 4 HKC 314; Smith, above n 154, 70; Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) 16.

156 Smith, above n 154; Ong, above n 80, 349; Kerry O’Halloran, *Charity Law and Social Inclusion: An International Study* (Routledge, 2007) 172.

157 *Gilmour v Coats* [1949] AC 426, 449.

be ostensibly private – and noted that ‘a different degree of public benefit is requisite according to the class in which the charity is said to fall’.<sup>158</sup> He held that if a purpose was to fall within ‘the fourth class [other purposes beneficial to the community], it must be for the benefit of the whole community or at least of all the inhabitants of a sufficient area’.<sup>159</sup> He warned that failure to take such a broad view of the fourth head was to fail to recognise that ‘here is a slippery slope’.<sup>160</sup>

The idea of juxtaposing public and private benefit as antitheses on a continuum is also embedded in legislation in some common law countries. In the United States, private inurement is a disqualification from income tax exemption.<sup>161</sup> In New Zealand, private benefit is expressly listed as disqualifying an organisation from exemption.<sup>162</sup>

In summary, the common law has a long history of having one class of public benefit, but assessing it in different ways according to the charitable purpose in question. It is a logical development of the law to theorise public benefit as on a continuum and to link entitlement to favour to the degree of public benefit. It is also conceptually sound to see private benefit as its antithesis.

Once the concept of a continuum is accepted it does not matter whether there are three heads, 13 heads or any other number of heads of charitable purpose. The question is only where on the continuum between private and public benefit the threshold for entitlement to favour is satisfied for a particular expression of charitable purpose. Some purposes, such as relieving poverty, may be deemed sufficiently public to be charitable despite conferring a more private benefit than would be acceptable for other purposes such as advancement of education.

## B Categories of Public Benefit

Different expressions of charitable purpose require different levels of public benefit. Looked at another way, this means that public benefit is divisible into different levels, having regard to the expression of charitable purpose. In this section we suggest that Lord Macnaghten’s four ‘principal divisions’ of charitable purpose – categories of purposes accepted as within the spirit and intendment of the Preamble – can be simplified and expanded into three categories of public benefit. Those categories link to whether the benefit is private, quasi-public or public. A number of comments will help by way of introduction.

First, Lord Macnaghten said the classification into ‘four principal divisions’ was ‘academical’, so, in and of themselves, his reasons provide freedom to reclassify.<sup>163</sup> Second, it is often overlooked that Lord Watson and Lord Herschell, who also comprised the majority, categorised charitable purposes differently. The four principal divisions are not the only framework emanating from *Pemsel’s*

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158 *IRC v Baddeley* [1955] AC 572, 590.

159 *Ibid.*

160 *Ibid* 591.

161 IRC § 501(c)(3).

162 *Income Tax Act 2007* (NZ) s CW 42(1)(c).

163 *Pemsel’s Case* [1891] AC 531, 584 (Lord Macnaghten).

*Case* and it is appropriate to bear in mind our earlier discussion in this context. Third, as William James observed, categorising is ‘teleological’, and this is as true in law as any other discipline.<sup>164</sup> Concepts are ordered and arranged having regard to the similarities or differences chosen at the particular time for the particular purpose. It follows from these three observations that, given the level of dissatisfaction with the present law, revisiting the purpose of the arrangement is appropriate.

The 20<sup>th</sup> century French philosopher Michel Foucault used the image of things arranged on a table to conceptualise the way people bring order to things.<sup>165</sup> His point was that order is capable of alternatives. We suggest that the charitable purposes cases can be re-organised into three categories. That is, favour is extended to charities when they supply charitable goods:

1. that Deal with Disadvantage;
2. that Encourage Edification; or
3. that Facilitate Freedom.

Across the next three sections we will explain these terms and why they are collectively exhaustive, although not mutually exclusive categories. We will also explain how these ideas are developed from the underlying charity law jurisprudence and are more useful than the four heads set out in *Pemsel’s Case*.

## VI TOWARDS AN ALTERNATIVE CLASSIFICATION OF PUBLIC BENEFIT: FROM RELIEF OF POVERTY TO DEALING WITH DISADVANTAGE

Relief of poverty is the first head of charitable purpose from *Pemsel’s Case*, but conceptually poverty is just one form of disadvantage. There are many forms of disadvantage and addressing these is frequently recognised as the pursuit of a charitable purpose.<sup>166</sup> Why? We contend it is because by dealing with a disadvantage, such as poverty, the citizen helped is able to enjoy equally with other citizens the benefits and burdens of citizenship. As it is referable to the state of other citizens, it is to be expected that indicia of disadvantage will include jurisdiction. Thus the standard to be satisfied for a person to be considered at a disadvantage in a highly developed economy such as the United

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164 William James, *The Principles of Psychology* (Encyclopaedia Britannica, first published 1890, 1991 ed) 670.

165 Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Vintage, 1994) xvii [trans of: *Les Mots et les choses: Une archéologie des sciences humaines* (first published 1966)].

166 *Pemsel’s Case* [1891] AC 531, 571–2 (Lord Herschell):

Many examples may, I think, be given of endowments for the relief of human necessities, which would be as generally termed charities as hospitals or almshouses, where, nevertheless, the necessities to be relieved do not result from poverty in its limited sense of the lack of money. ... [I]t is not pecuniary destitution that creates the necessity which such a society is designed to relieve. It is the helplessness of those who are the objects of its care which evokes the assistance of the benevolent.

States might be quite different from the standard in a relatively poor developing country; the international standard of US\$1.25 might apply.<sup>167</sup>

Brooks traces the foundation of the common law's jurisprudential obligation to equality under the law to Cicero.<sup>168</sup> If the common law is taken to have a commitment to equality, then granting favours to those who voluntarily relieve and prevent poverty and thus assist the weak to join with the strong in society is to encourage that which the law itself deigns. In more recent years these ideas have found expression in language of social inclusion and social cohesion,<sup>169</sup> but they are ancient concepts deeply embedded in the common law. It becomes a function of citizens of goodwill to endeavour to lift all other citizens up so that they may enjoy that equality. This form of charitable good we call Dealing with Disadvantage.

When Dealing with Disadvantage by the supply of goods, it is enough to supply *private goods* to individual *persons* at a disadvantage. Relief of poverty is the genesis of this category, but it is not appropriate to limit it to relief of poverty because poverty is only one kind of disadvantage. The broader class of organisation recognised as Dealing with Disadvantage would include 'the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage' (added by statute in England and Wales)<sup>170</sup> and 'open and nondiscriminatory self help groups' (added by statute as recognised charitable purposes for federal laws in Australia).<sup>171</sup>

The class is similar to that recommended by Kelley, who has called for a class of charity 'whose mission and resources are devoted exclusively to serving the poor'.<sup>172</sup> Writing in a United States context, where charities 'live in fear of being ensnared by confusing and contradictory legal doctrines such as the operational test, the commerciality doctrine, the unrelated business income tax ... and the commensurate-in-scope doctrine'<sup>173</sup> the need to find ways to reform this body of law is particularly acute.<sup>174</sup> We argue, though, for a broader class on the basis that it is important to recognise that the class is confined to persons at a disadvantage. One of the problems with the purpose known as relief of poverty is that it could be invoked if someone had 'to "go short" in the ordinary acceptance

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167 Shaohua Chen and Martin Ravallion, 'More Relatively-Poor People in a Less Absolutely-Poor World' (Policy Research Working Paper No 6114, World Bank Development Research Group, July 2012) 7. For US methods to measure poverty, see United States Census Bureau, *How the Census Bureau Measures Poverty* (12 September 2012) <<http://www.census.gov/hhes/www/poverty/about/overview/measure.html>>.

168 Christopher W Brooks, *Lawyers, Litigation and English Society Since 1450* (Hambleton Press, 1998) 208.

169 Kerry O'Halloran, 'Charity Law Review as an Opportunity to Consolidate Civil Society: A Case Study of Charity Law and the Social Inclusion Agenda in the Two Jurisdictions on the Island of Ireland' (2002) 8 *Third Sector Review: Charity Law in the Pacific Rim* 133.

170 *Charities Act 2006* (UK) c 50, s 2(2).

171 *Extension of Charitable Purpose Act 2004* (Cth) ss 4–5.

172 Kelley, above n 34, 2437–9.

173 *Ibid* 2482.

174 *Ibid* 2440.

of that term, due regard being had to their status in life'.<sup>175</sup> Within this alternative jurisprudence, disadvantage must be established sufficient to invoke the law's intervention to advance equality.

Beyond advancing equality there is a second reason why Dealing with Disadvantage, even for only one person, is for public benefit in common law countries in the 21<sup>st</sup> century. It is because governments in most common law countries take responsibility for this seemingly private provision by welfare payments. At the most basic level, therefore, the public benefits when governments do not have to supply the need. It makes sense, then, that the law would favour organisations which are the vehicles for Dealing with Disadvantage – at least to the extent that this reduces the burden on government. This argument is at its clearest in the context of the supply of private goods, but it applies generally to all goods supplied by civil society organisations that would otherwise have been supplied by government. As Ware stated pithily: 'charities are an excellent instrument for making government cheaper'.<sup>176</sup>

There is then one category: Dealing with Disadvantage; but it does not cover the field of charitable purpose. At least one other category of purpose is needed, that goes beyond the supply of private goods to Deal with Disadvantage.

## VII FROM ADVANCEMENT OF EDUCATION TO ENCOURAGING EDIFICATION

Advancement of education is the second head of charitable purpose drawn from Lord Macnaghten's opinion in *Pemsel's Case*. Conceptually, however, advancement of education is just one purpose that finds expression in the supply of *quasi-public good* that 'benefit[s] the rich as well as the poor'.<sup>177</sup> We suggest that advancement of education, and many of the other purposes that are recognised as charitable under the fourth head, are recognised because they belong to a broad category of purposes that are pursued with the aim of edifying society. People work voluntarily to build up society through charities. If that is so, then a category of purposes that centre on community development by the provision of *quasi-public* goods, benefiting both rich and poor,<sup>178</sup> is required. Lord Watson identified the class with reference to 'intellectual and moral culture' and seemed to incorporate advancement of religion.<sup>179</sup> We call this category Encouraging Edification. We acknowledge the view of the House of Lords in *Gilmour v Coats* that evidence of 'edification by example' by a closed religious order was 'something too vague and intangible to satisfy the prescribed [public

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175 *Re Coulthurst; Coutts & Co v Colthurst* [1951] Ch 661, 666.

176 Alan Ware, *Between Profit and State: Intermediate Organizations in Britain and the United States* (Polity Press, 1989) 142.

177 *Pemsel's Case* [1891] AC 531, 583 (Lord Macnaghten).

178 *Ibid.*

179 *Ibid* 557–9 (Lord Watson).

benefit] test' necessary to establish charitable purpose.<sup>180</sup> We are not dealing here, however, with either the class of religion nor the evidence of public benefit. We are proposing a label for a class that is less intangible than advancement of religion, which is developed from advancement of education. It is suggested as a useful label to describe what Lord Watson referred to as 'intellectual and moral culture'.

To be Encouraging Edification, a purpose must demonstrate that its advancement leads to a greater measure of public benefit than Dealing with Disadvantage. Encouraging Edification calls for greater publicness in either the good supplied or the class of recipient. For a purpose to fit this category, the enjoyment of the benefit must be 'socialised' at least to sections of communities which are sufficiently large to be considered public.<sup>181</sup> Examples are purposes that involve the provision of social goods such as public art and other cultural activities, including public libraries, public art galleries and museums, which are recognised as charitable. We theorise that it also involves the provision of physical infrastructure that literally 'edifies' a community, such as the 'Bridges Portes Havens Causwaies ... Seabanks and Highewaies' enumerated in the Preamble.<sup>182</sup>

The socialisation of goods suggests communal sharing and so we suggest that favouring purposes that pursue this edifying role is justified because it advances *fraternity*. We suggest advancement of fraternity must at least include purposes that edify the 'intellectual and moral culture'. Advancement of religion is also justifiable on this basis, but we will discuss this purpose in more detail below.<sup>183</sup>

Fraternity is a value that may take different forms in different common law countries. Montesquieu noted, and it is worth remembering that, '[t]he laws of education will be ... different in each species of government: in monarchies they will have honour for their object; in republics, virtue; in despotic governments, fear'.<sup>184</sup> Applying this observation to the current debate over the supply of charitable goods, the point is that what a particular community will wish to encourage and consequently, how it justifies favour, will vary according to its form of government. Different nations value public goods differently. The broader principles will be consistent, though: to be entitled to favour under this head, a charity must benefit *people*, which means at least a sector of the community and not just an individual. Second, and importantly for Encouraging Edification, the charitable good supplied may be enjoyed by the rich as well as the poor (as the object is advancement of fraternity not equality).<sup>185</sup> Having regard to the economic discourse, for the charity to be entitled to favour on this basis the good supplied should be both non-rivalrous and non-excludable.

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180 *Gilmour v Coats* [1949] AC 426, 446 (Lord Simonds).

181 *Re Pinion; Westminster Bank Ltd v Pinion* [1965] Ch 85, 104; Atkinson, above n 129, 565–6.

182 *Statute of Charitable Uses*, 43 Eliz 1 c 4, Preamble.

183 *Pemsel's Case* [1891] AC 531, 557–9 (Lord Watson).

184 Baron Charles de Montesquieu, *The Spirit of Laws* (Thomas Nugent trans, Encyclopaedia Britannica, 1992) 13 [trans of: *De l'esprit des lois* (first published 1748)].

185 See *Pemsel's Case* [1891] AC 531, 583–4.

The category Encouraging Edification is the logical development of the third head, advancement of education, and an extended fourth head. Elephant rides for children have been accepted within the education category.<sup>186</sup> It will also be recalled that the fourth head is simply a grab bag overflowing with purposes that clearly benefit larger groups of people. We mentioned that advancement of religion could be subsumed in this category. However, we suggest that religion plays a broader function; and more generally, that all of the purposes recognised as charitable cannot be explained adequately as Dealing with Disadvantage or Encouraging Edification. Accordingly, we propose a third class which we call Facilitating Freedom.

## VIII FROM ADVANCEMENT OF RELIGION TO FACILITATING FREEDOM

We theorise that a third class of charitable purpose extends beyond organisations pursuing the advancement of religion, to other organisations that *similarly* contribute to the common wealth. Whilst *Pemsel's Case* was limited to the narrow religious activity of evangelism, we suggest there is a broader concept underlying the favourable treatment of religion in charity law that is developed from the role of religion in society. Our starting point is De Tocqueville's observation with reference to the role of religion in the United States: 'Thus, while the law permits the Americans to do what they please, religion prevents them from conceiving, and forbids them to commit, what is rash or unjust.'<sup>187</sup> His point was that religion operated as a moral restraint on unbridled freedom, to ensure that people in that newly democratic nation exercised their liberty as they should, that is having regard to others. Three 19<sup>th</sup> century American cases discussed by Picarda ground this broad idea in the common law's favouring advancement of religion as a charitable purpose.<sup>188</sup> The advancement of religion is quintessentially for public benefit in that it encourages concern for others and self restraint, which are the foundations of civilisation and the welfare of society. In *Holland v Peck*, the Court stated that religion was 'the surest basis on which to rest the superstructure of social order'.<sup>189</sup> In *People ex rel Seminary of Our Lady of Angels v Barber*, religion was described as necessary to the advancement of civilisation and the promotion of the welfare of society.<sup>190</sup> In *Gass and Bonta v Wilhite*, it was said that religion is a 'valuable constituent in the character of our citizens'.<sup>191</sup> In such a context, advancement of religion is recognised as a

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186 *Re Lopes; Bence-Jones v Zoological Society of London* [1931] 2 Ch 130, 136.

187 Alexis de Tocqueville, *Democracy in America* (George Lawrence trans, Encyclopaedia Britannica, 1992) [trans of: *De la démocratie en Amérique* (first published 1835)].

188 Picarda, above n 19, 92.

189 *Holland v Peck*, 37 NC 255, 258 (1842).

190 *People ex rel Seminary of Our Lady of Angels v Barber*, 3 NY St Rep 367 (1886); affirmed in *People ex rel Seminary of Our Lady of Angels v Barber*, 13 NE 936 (1887).

191 *Gass and Bonta v Wilhite*, 32 Ky 170, 180 (1834).

charitable purpose, enjoying favour because of its role in underpinning the social order and building social cohesion.<sup>192</sup>

These charitable purpose cases, read in the context of the common law history, point to advancement of religion cases forming part of a wider stream of common law jurisprudence related to the foundations of society. It is not just UK reformers, American judges and Picarda who draw this connection.<sup>193</sup> Chief Justice Gleeson of the High Court has declared that '[r]eligion is one method of bridging that gap' between individual belief and community values: it is 'the general acceptance of values that sustains the law, and social behaviour; not private conscience'.<sup>194</sup> Similar observations were made by the Charities Definition Inquiry.<sup>195</sup>

Chief Justice Barwick, in holding that the publication of law reports was a charitable purpose, explained that fortification of the foundations of society is fundamentally a public benefit:

The sustenance of the law is a benefit of a material kind which enures for the benefit of the whole community ... [I]t is true that the society cannot exist as such if it is not based upon and protected by justice under law: and nurtured by obedience to law.<sup>196</sup>

However, negative aspects of religion sometimes warrant certain religious organisations being denied access to favours.<sup>197</sup> Advancement of religion was not listed in the Preamble in 1601, and there has been debate over whether it should be retained as a charitable purpose.<sup>198</sup> There is also a growing tension between religious favours enjoyed in charity law and human rights law.<sup>199</sup> We argue below that a distinction can be drawn between freedom of religious association as a charitable purpose that justifies favour on the one hand, and simple freedom of religious association that does not warrant favour on the other. This distinction may assist in resolving some of the tensions between human rights law and religious favours, as it may be possible to limit favour to religion without limiting religious freedom by reference to principles that transcend religion. Importantly, adopting this broader approach provides a justification for denial of that favour on a basis other than religion.

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192 Dal Pont, above n 20, 235, 239–40.

193 Picarda, above n 19, 92.

194 Chief Justice Murray Gleeson, 'The Relevance of Religion' (2001) 75 *Australian Law Journal* 93, 95; see also H R Sorensen and A K Thompson, 'The Advancement of Religion is Still a Valid Charitable Object in 2001' (Paper presented at the Charity Law in the Pacific Rim Conference, Queensland University of Technology, Brisbane, 4–6 October 2001) 15.

195 Charities Definition Inquiry, above n 8, 175. See also Dal Pont, above n 20, 214–18.

196 *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 669. The references are set out in context below.

197 Senate Economics Legislation Committee, above n 7.

198 Brian Lucas and Anne Robinson, 'Religion as a Head of Charity' in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 187, 192, 198–200. See also E B Bromley and K Bromley, 'John Pemsel Goes to the Supreme Court of Canada in 2001: The Historical Context in England' (1999) 6(2) *Charity Law and Practice Review* 115.

199 O'Halloran, above n 156, 62–63.

That religion operates as a force obliging people to be good and thus underpins society is anchored in a widely accepted proposition that even though there is a great diversity of belief amongst religions, in the out-workings of behaviour all of the major religions teach the equivalent of what is known in most common law countries as the golden rule. The golden rule which is often articulated as ‘do to others as you would have them do to you’<sup>200</sup> exhorts adherents to behave altruistically. In this way, religion can be said to provide a glue that binds society together voluntarily into a community of citizens – a *polis* in the classical Greek sense or *civitas* in the Latin expression. This understanding of the basis for favour is founded upon, but goes beyond, the favour granted at common law to charitable trusts for the advancement of religion. Etymologically, religion is that which binds together. It has its root in the Latin *ligare* from which the English word ligament is derived.<sup>201</sup>

If this broad meaning is taken as the justification for favours extended to religion, then the following purposes, which are not themselves religious but are now listed as charitable purposes by sections 3(1)(e) or (h) of the *Charities Act 2011* (UK), could be said to fall within this broader definition:

1. the advancement of citizenship or community development; and
2. the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity.

These two examples illustrate that common law countries do favour organisations, other than religious organisations, that help build and sustain the infrastructure of democracy. This broad idea leads directly to the question of how political purposes might be theorised.<sup>202</sup>

The High Court has recently expanded the common law doctrine of charitable purpose to include political lobbying over the way foreign aid is applied.<sup>203</sup> Political parties, although not generally recognised as charitable, are often favoured with tax exemption and tax deductibility.<sup>204</sup> So the fiscal implications of including them in the class of organisations enjoying charitable purpose might be minimal in some jurisdictions. Given this broader classification, we contend that the simpler way to proceed is to abolish the distinction between political purposes and advancement of religion.<sup>205</sup>

We return now to negative expressions of religion and a justification for denial of favour on a basis other than religion. This has become a particularly contentious issue in Australia, where a Bill intended to deny favours to Scientology organisations because of the lack of public benefit was introduced

200 Holy Bible (New International Version), *New Testament*, Luke VI: 31.

201 ‘Definition of “Ligament”’, *The Oxford English Dictionary* (online ed) <<http://dictionary.oed.com>>.

202 Matthew Turnour, ‘Some Thoughts on the Broader Theoretical Basis for Including Political Purposes within the Scope of Charitable Purposes: The Aid/Watch Case’ (2011) 9 *International Journal of Civil Society Law* 85.

203 *Aid/Watch Case* (2010) 241 CLR 539.

204 Steinberg, above n 118, 117, 123.

205 Turnour, above n 142, 85ff, for problems with maintaining the distinction.

into the Senate in 2010.<sup>206</sup> First, following *Cocks v Manners*, it seems fundamental that organisations that are ‘adverse to the very foundation of all religion’<sup>207</sup> or ‘subversive of all morality or religion’<sup>208</sup> are not entitled to favour. This is evident in the approach taken by the Charity Commission of England and Wales which, in 1999, rejected the application by a Scientology organisation to be registered as a charity.<sup>209</sup> It is also simply repositioning theoretical understanding to say that if an organisation is pursuing purposes that are subversive of the things that warrant favour – namely morality or religion, and more broadly social order and social cohesion – that favour should be denied. However, at common law, with respect to the advancement of religion, public benefit is presumed until ‘adverse’ or ‘subversive’ purposes are evident. We suggest that the presumption of public benefit would be extended to this broader class – noting that, implicit in this suggestion, is a very broad view of facilitating freedom. Perhaps counter-intuitively, facilitating freedom in this context includes the freedom to advocate for reduced freedoms. There will be limits though, for at a certain point the exercise of that freedom may be subversive of the very society upon which it depends. Where that boundary lies is a matter for debate and not central to our argument. It is our thesis only that it is logical to extend the approach taken to the advancement of religion to this broader class of purposes that facilitate freedom, including organisations that pursue political purposes.<sup>210</sup>

Three categories have now been proposed. We suggest that all of the charitable purpose cases can be located in one or more of these categories. The categories are not mutually exclusive, and if legislation such as taxing statutes were to create different classes of benefit for different classes of charities, this may create challenges for those that span more than one class. That would be a matter for legislatures to address, but we flag it as an issue capable of easy resolution, perhaps by allowing charities to enjoy the maximum favours of any class they satisfy. We have also suggested that whilst the categories are extensions of the *Pemsel* purposes, they are actually favoured because they advance values accepted internationally, namely liberty, equality and fraternity.<sup>211</sup> Before closing this section, we explain why we have chosen advancement of liberty, equality and fraternity as bases for favour.

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206 Tax Laws Amendment (Public Benefit Test) Bill 2010 (Cth).

207 *Re Watson; Hobbs v Smith* [1973] 1 WLR 1472, 1473.

208 *Thornton v Howe* (1862) 31 Beav 14.

209 Charity Commission for England and Wales, *Decision of the Commissioners in Application by the Church of Scientology (England and Wales) for Registration as a Charity* (17 November 1999).

210 *Aid/Watch Case* (2010) 241 CLR 539.

211 Karel Vasak, ‘Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights’ (1977) 30 *United Nations Educational, Scientific and Cultural Organization Courier* 11.

## IX REASONS FOR ADOPTING LIBERTY, EQUALITY AND FRATERNITY

Why did we choose liberty, equality and fraternity? First and most importantly, when it came to rearranging the charitable purpose cases on the jurisprudential table in the manner suggested by Foucault,<sup>212</sup> the evident similarity between these values as broader classes and the existing heads in *Pemsel's Case*, stood out. The large fourth head, other purposes beneficial to the community,<sup>213</sup> seemed both to subsume all the others and demand further segmentation. These factors pointed to the possibility that the four heads from *Pemsel's Case* 'are but instances'<sup>214</sup> of these broader classes. Second, the values have broad international acceptance. The concepts of liberty, equality and fraternity are set out in the 20<sup>th</sup> century's great *Universal Declaration of Human Rights*.<sup>215</sup> Some countries, such as South Africa, have them enunciated in their Constitutions.<sup>216</sup> These three values have been adopted in the *Charter of Fundamental Rights of the European Union*<sup>217</sup> and remain in the Constitution of France today.<sup>218</sup> Most common law countries endorse the *Universal Declaration* and those which are EU members are bound by the *Charter*; so it is easy in their case to embrace these values. Of these fundamental values, Pope John Paul II declared: 'In the final analysis, these are Christian ideas'.<sup>219</sup> After almost 300 years, those values have become a (new legal) framework for discussing the foundations of society in its politico-legal expression.<sup>220</sup>

Second, returning to case law, if we wish to make a case that the *Pemsel* categories 'are but instances'<sup>221</sup> of public benefiting purposes that people will pursue voluntarily and altruistically, it follows that the values of liberty, equality and fraternity – which articulate values accepted by both secular and sacred – should be made the explicit standard bearers.

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212 Foucault, above n 165, xvii.

213 *Pemsel's Case* [1891] AC 531, 583 (Lord Macnaghten).

214 *Donoghue v Stevenson* [1932] AC 562, 580, setting out a model for legal theory development.

215 GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948). See also Vasak, above n 211.

216 *Constitution of the Republic of South Africa Act 1996* (South Africa), s 7(1) provides: 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

217 The six fundamental rights are: dignity, freedoms, equality, solidarity, citizens' rights, and justice: *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/01 (entered into force 1 December 2009).

218 *La Constitution du 4 Octobre 1958* [French Constitution of 4 October 1958] art 2.

219 Pope John Paul II, 'Homily at Le Bourget' (1 June 1980) 5, cited in Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (April 2004) Vatican, fn 793 <[http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html)>.

220 See Leo Tolstoy, *War and Peace* (Louise and Aylmer Maude trans, Encyclopaedia Britannica, 1992) 682 [trans of: *Война и миръ* (first published 1889)].

221 *Donoghue v Stevenson* [1932] AC 562, 580.

Our third reason for adopting these values is their long history in philosophy.<sup>222</sup> Adopting the phrase ‘liberty, equality, fraternity’ and bringing the ideas as individual concepts into jurisprudential discourse explicitly enriches the debate over favour with the debates over these values that found the common law heritage.

Our fourth reason is that this approach builds a bridge between the common law and civil traditions by suggesting how the common law values can be expressed in civil law language. This bridging might be particularly important for common law countries that are parties to the international instruments giving voice to these three values.<sup>223</sup>

Our final reason is that these divisions arguably could justify different classes of favour. For example, organisations with the purpose of Dealing with Disadvantage might be exempt from Unrelated Business Taxes or entitled to deductible donations where other classes of charities might not be.<sup>224</sup> Public benefit, not religion itself, provides a rationale for discriminating between religious organisations.

## X CONCLUSION

In both the northern and southern hemispheres, governments are reviewing charity law. The early stages of reform involved simply adding further heads to purposes already recognised as charitable. We have explored a more radical way of understanding the foundational elements of charity jurisprudence. We suggest the direction of recent reforms is the ‘wrong way’ to progress, and further, that 20<sup>th</sup> century cases have taken the doctrine of charitable purpose the wrong way. Categorisation is a dry gully. We have argued *Pemsel’s Case* can be read as allowing the doctrine of charitable purpose to be divided: on the one hand defining a jurisdiction for the purpose of regulation; on the other hand for the purpose of granting favour. It is also possible to read *Pemsel’s Case* as not compelling an interpretation of the Preamble through the categorisation which became the orthodox approach in the 20<sup>th</sup> century. That orthodox approach ossified common law development of the doctrine of charitable purpose because

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222 John Locke, *Two Treatises of Government* (Cambridge University Press, first published 1692, 1960 ed); John Locke, *A Letter Concerning Toleration* (Encyclopaedia Britannica, first published 1689, 1952 ed); David Hume, *Essays: Moral, Political and Literary* (Liberty Fund, first published 1742, 1987 ed); Jean-Jacques Rousseau, *Discourse on the Origin of Inequality Among Men* (G D H Cole trans, Encyclopaedia Britannica, 1992) [trans of: *Discours sur l’origine et les fondements de l’inégalité parmi les hommes* (first published 1755)]; Karl Marx and Friedrich Engels, *The Communist Manifesto* (Samuel Moore trans, Merlin Press, first translated 1888, 1998 ed) [trans of: *Das Kommunistische Manifest* (first published 1848)]; John Stuart Mill, *On Liberty* (Longmans, Green, 1892); Anita Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech* (Dartmouth, 1995); Rocco Buttiglione, *The Moral Mandate for Freedom: Reflections on Centesimus Annus* (Acton Institute for the Study of Religion and Liberty, 2001).

223 O’Halloran, above n 156, 172.

224 Kelley, above n 34, 2437–9.

it failed to follow three fundamental principles of common law methodology. In all likelihood, the courts may not feel compelled to depart from the status quo, but the common law could continue to develop the doctrine of charitable purpose by returning to the fundamentals and rediscovering the jurisprudence underpinning *Pemsel's Case*. With the courts' reluctance to engineer a radical shift, it may fall to the legislature to initiate a new jurisprudence. We have proposed a way of journeying from the Preamble to the concepts of altruism and voluntarism. We suggested that public benefit can be theorised as on a continuum or divided into three:

- a. private goods supplied to a *person* for the purposes of Dealing with Disadvantage, thereby advancing *equality*;
- b. quasi-public or public goods supplied to *people* for the purposes of Encouraging Edification, thereby advancing *fraternity*; and
- c. ligaments binding the *polis* together, which Facilitates Freedom and thus advances *liberty*.

Finally, we suggested that these three public benefit categories: advancement of equality, fraternity and liberty, can be used as bases for determining and denying entitlement to favour. In giving voice to the inherent, but suppressed, jurisprudence of the doctrine of charitable purpose, this alternative jurisprudence provides fresh direction for charity law reform on both sides of the equator.