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## **1601 PREAMBLE:**

### **The State's Agenda for Charity**

BY

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Presented At

**CHARITY LAW IN THE PACIFIC RIM CONFERENCE**

**QUEENSLAND UNIVERSITY OF TECHNOLOGY**

Brisbane, Australia

October 4-6, 2001

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# 1601 Preamble: The State's Agenda for Charity

## Introduction

We have gathered together today from around the world at Queensland University of Technology in Brisbane, Australia, to discuss the legal meaning of charity on the occasion of the 400<sup>th</sup> anniversary of *An Acte to Redress the Misemployment of Landes, Goodes and Stockes of Money heretofore Given to Charitable Uses*<sup>1</sup>, also commonly (and hereafter) referred to as the *Statute of Charitable Uses, 1601*<sup>2</sup>, which has been acknowledged as the starting point of charity law. Four centuries later, many countries are considering whether they should legislate a statutory definition of charity. This issue is frequently framed around the question whether the Preamble to the *Statute of Charitable Uses, 1601* (“*Preamble*”) is still relevant to the legal meaning of charity. One doubts whether the *Preamble* should continue to dominate the legal concept of charity to the extent described by Lord Simonds in 1949, when the following was held to be “settled and familiar law”:

"From the beginning it was the practice of the Court to refer to the preamble of the Statute in order to determine whether or not a purpose was charitable. The objects there enumerated and all other objects which by analogy ‘are deemed within its spirit and intendment’ and no other objects are in law charitable."<sup>3</sup>

There is a great deal of academic literature and case law analysing the objects enumerated in the *Preamble*. A number of countries seem to be moving inevitably towards a statutory definition of charity. However, I chose not to add to the literature on how the words of the *Preamble* define charity. Rather, this paper examines the historical environment of the *Preamble* to see what it may teach us about Parliament’s view of the charitable sector. This shift in inquiry led to some extremely unsettling conclusions that may affect the charitable sector’s current enthusiasm to pursue Parliament’s intervention in the defining of the sector’s purposes and priorities.

Having studied the *Preamble* in the context of Tudor England, I now believe that “the spirit and intendment” of the *Preamble* is quite simply the expression of the State’s agenda for the charitable sector. The *Preamble* is a remarkable and troubling example of the State seeking to co-opt the agenda and resources of the charitable sector. It is disturbing to realize that the enumerated objects are almost solely a reflection of Elizabeth I’s political and economic policies and programs. Worse still, the object most important to the ordinary citizens, namely religion, was audaciously excluded. The citizens of Elizabethan England viewed religion as a matter of spirituality and a charitable object. However, Elizabeth I wanted her subjects to abide by the religion of their monarch. She considered it an issue of political allegiance if they did not conform to her religious views and legislated penal sanctions for citizens who did not respond with “due obedience”. Holding contrary religious views was repeatedly legislated to be seditious or treasonous, being political crimes, rather than blasphemous, which was a religious crime.

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1. 43 Elizabeth I, c. 4

2. This statute is also frequently referred to in the cases as the *Statute of Elizabeth*

3. *Gilmour v. Coats* [1949] A.C. 426, at p. 443

Understood against its historical background, the *Preamble* has much to teach the charitable sector about why it should be wary of compromising its independence from the State. The charitable sector has a remarkable willingness to believe that only good can come from being embraced by the State. However, an examination of the reign of Elizabeth I suggests that this belief is both flawed and dangerous. Elizabeth I politicised religion and then co-opted the church to both fund and deliver her social programs. It was the State's view of the poor that informed the *Preamble*, not that of the Church. It is doubtful that the Elizabethan charitable sector would have recognized the significance of the *Statute of Charitable Uses, 1601* being enacted almost immediately after the *Poor Law of 1601*<sup>4</sup>. On the other hand, I have no doubt that Elizabeth I did. The *Poor Law of 1601* was the most important social legislation of the era, and shaped the development of social service delivery for more than the next three centuries.<sup>5</sup> By referring throughout its provisions to "the charitable uses comprised in this Act", the *Poor Law of 1601* affirmed that its programs were charitable.<sup>6</sup> Therefore, the Parliament of the *Preamble* had already passed its effective definition of charity in the provisions of 43 Elizabeth I, c. 2 prior to enacting the *Preamble* to 43 Elizabeth I, c. 4.

The functional importance of the *Statute of Charitable Uses, 1601* was its provisions setting out regulatory and accountability measures to ensure that assets given for charitable purposes were applied to the "Charitable Uses" intended by the donor. However, I believe Elizabeth I set up her first "Charitable Uses" provisions much earlier, in a 1572 Poor Law well described by its title, *An Act for the Punishment of Vagabonds and for the Relief of the Poor and Impotent*. This "Charitable Uses" statute opens with the words "and for the better performance of this charitable Act"<sup>7</sup>. The opening proviso makes it quite clear that the Elizabethan view of "charity" involved punishing the poor as much as relieving their poverty.

It is not insignificant that the object of punishing vagabonds preceded "the relief of the poor" in the title of this legislation. As W.K. Jordan points out in his historical study, *Philanthropy in England 1480-1660*<sup>8</sup>, relieving the poor was inextricably linked with maintaining public order in Elizabethan England:

"Even the great Elizabethan poor laws, opening up as they did a new and vastly important additional area of responsibility, sprang at least in part from the intense Tudor preoccupation with the maintenance of order and were set upon sound bases of responsibility only after the Tudor society had struggled valiantly for three generations to deny that there was even a problem with which government could or need be concerned."<sup>9</sup>

The charitable sector was less a partner of the State than its dupe in implementing and funding

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<sup>4</sup> 43 Elizabeth I, c. 2, *An Act for the Relief of the Poor*

<sup>5</sup> An example supporting this assertion is the *Minutes of Evidence* dated 14 June 2000 of the Social Security Committee of the House of Commons in London that begins its KEY POINTS IN HISTORY OF HOUSING BENEFIT with: "1598 and 1601—Poor Laws provide, through local parishes, for the so-called deserving poor to be maintained and cared for in almshouses."

<sup>6</sup> 43 Eliz I, c. 2, *An Act for the Relief of the Poor* cite ¶

<sup>7</sup> 14 Elizabeth I, c. 5, ¶ XXXV

<sup>8</sup> George Allen & Unwin, London, 1959 (hereafter cited as "Jordan")

<sup>9</sup> Jordan, p. 46

the programs promoted by the draconian Poor Laws. The first object enumerated in the *Preamble* is “the relief of aged, impotent, and poor people”. These are the code words for the Poor Laws policy of helping only old, blind and lame poor people while whipping and coercing into labour and stigmatising as criminals the able-bodied poor and “sturdy beggars”. Elizabeth I saw these two objectives as equally charitable, as indicated by the language of the 1572 Act:

And forasmuch as Charity would that poor, aged and impotent Persons, should as necessarily be provided for as the said Rogues, Vagabonds and sturdy Beggars repressed...<sup>10</sup>.

For the charitable sector, the unfortunate result of studying the *Preamble* without reference to its historical context is that it sees only objects that might be modernized through analogy rather than the Elizabethan agenda for charity. It is by studying the legislative agenda surrounding the *Statute of Charitable Uses, 1601* that one recognizes that its ostensible benefits extended only as far as the State’s agenda. The *Preamble* was part of the legislative package necessary to make the charitable sector the vehicle to carry out a harsh and repressive system of social service delivery. Worse, Elizabeth I, like modern Parliaments, was downloading the delivery of social services to local institutions without any funding from the central government. The *Poor Law of 1601* set the course by saying that the poor were the exclusive responsibility of the local parish, and that the local people must find all of the funds to support them. The local church parish was made the administrative arm of the State’s social delivery system and Parliament extended taxation powers to the parish in order to fund state-mandated programs for the poor. Consequently, *Preamble* charities (other than the parish) were unwittingly co-opted into the State’s social programs but not given the mandate and financing provided to the parish by the *Poor Law of 1601*.

It is not possible to understand the evolution of the charitable sector from an historical perspective without looking at the relationship between the church and State. This paper will contrast the State’s view of the poor as a source of cheap labour and a threat to social order with the church’s view of the poor as simply people in need. It examines Henry VIII’s appropriation of the church’s capital assets and endowments that funded the church’s delivery of social services. It then points out that the State exempted itself from the “charitable uses” statutes that would otherwise have allowed the courts to redress the misemployment of charitable funds by the State.

Four hundred years after the *Preamble*, the charitable sector in many countries in the common law world, such as Australia, New Zealand, Canada, and England, are clamouring for a statutory definition of charity. These pressure groups make a study of the historical context of the *Preamble* relevant today. Although not articulated in Elizabethan terms, the State today has a view of the “worthy poor” that frequently differs from the view of the charitable sector. It is important for the charitable sector to reflect on the political and social significance of moving the definition from the courts to Parliament. Is redefining charity by legislation an Elizabethan exercise in Parliament downloading financial responsibility for charitable uses on to local organizations? The priority of pressure groups lobbying for a statutory definition is to have advocacy legislated as a charitable object. This paper will touch on the relevance of Elizabeth Legislation to the judicial determination that political purposes are not charitable.

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<sup>10</sup> 14 Elizabeth I, c. 5, ¶ XIV

Modern Parliaments are no more bound to limit charitable purposes to objects that have previously been considered charitable than were the Parliaments of Elizabeth I. They are just as capable of including “non-charitable” objects that advance their political agenda and programmes. However one judges the merits of this power, it must be kept in mind that the courts must act in accordance with the words enacted by Parliament and that legislation will overrule the common law.

It is also certain that when Parliament restricts the independence of the charitable sector, it will do so under the guise of saving the sector from itself. Elizabeth I did not call her statute “*An Act to Define Certain State Purposes and Public Programs and Policies As Being Charitable*”. Instead, she called it *An Act to Redress the Misemployment of Lands, Goods and Stocks of Money heretofore Given to Charitable Uses*. Further, one can confidently predict that once Parliament starts to legislate with regard to charities, it will expand its level of interference with and regulation of the charitable sector. The sector will lose much of its independence when it must comply with the principles of “good governance”, “transparency” and “accountability” as defined by the politically correct.

## **The Vision of Piers Plowman and the *Preamble***

The *Preamble* listed the following purposes as charitable:

"The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens,<sup>11</sup> setting out of soldiers and other taxes."

The most commonly cited source of these enumerated purposes<sup>12</sup> is William Langland’s poem, *The Vision of Piers Plowman*. Written in 1362, the *Vision of Piers Plowman* is over 2,600 lines, with the following 9 lines appearing about 200 lines from the end of the poem in *Passus VII*:

And therewith repair hospitals  
help sick people  
mend bad roads  
build up bridges that had broken down  
help maidens to marry or to make them nuns  
find food for prisoners and poor people  
put scholars to school or to some other craft,

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<sup>11</sup> A tax of one fifteenth formerly imposed upon personal property.

<sup>12</sup> Hubert Picarda, Q.C. in *The Law and Practice Relating to Charities*, 3rd edition, Butterworth 1999 at p. 9 refers to the following sources: (1894-95) 8 Harvard Law Review 69; Jordan *Philanthropy in England 1480-1660* (1959) 112; and Keeton and Sheridan *Modern Law of Charities* (4th edn) 58.

put religious orders and  
ameliorate rents or taxes.

The wording of Langford's poem is very similar to that of the *Preamble*, and the notion that an epic religious poem inspired the *Preamble*'s creation has a romantic appeal. However, I believe that the true sources of the *Preamble* are to be found amongst the titles and provisions of the public statutes of the Tudor monarchs. These statutes provide a compelling explanation for the inclusion in the *Preamble* of several objects that ordinary persons would not otherwise consider to be charitable. In addition to the public statutes, many of these objects can also be found in the titles of the private acts passed by the Elizabethan Parliaments.

While the objects set out in the *Preamble* have their source in the statutes of Elizabethan England, many of these objects also appeared in the Bills and Answers heard in the Chancery Courts.<sup>13</sup> The officials hearing these pleas in Chancery were some of the highest officials in Elizabeth I's court who were very close to her. They included Lord Keepers of the Great Seal of England, such as Sir Nicholas Bacon and Sir Thomas Edgerton, as well as various Lord Chancellors, such as Sir Thomas Bromley and Sir Christopher Hatton. I originally relied on these pleas to fill in the blanks for objects not found in statute titles, on the assumption that the causes and purposes set out in these Bills and Answers would likely be known to the drafters of the *Statute of Charitable Uses, 1601*. I subsequently found the missing objects in the texts of Elizabethan statutes so consider the significance of Jones' List of Bills and Answers ("Jones' List") to be evidence that the people of England were giving to these charitable objects in response to the social agenda set by the Tudor Parliaments.

Examining the objects in the *Preamble* in the light of both public and private Elizabethan statutes as well as the pleas in Chancery provides the following analysis:

### **"The relief of aged, impotent and poor people"**

The first object enumerated in the *Preamble* is "the relief of aged, impotent, and poor people". The *Preamble*'s opening words are the code words for the Poor Laws' perception of the "worthy poor". The *Preamble* came only two statutes after the *Poor Law of 1601*, the provisions of which refer specifically to "poor persons, not able to work". When the charitable sector is attempting to understand the agenda of Parliament it is important to look for what Parliament chooses not to put out in plain view. "The relief of aged, impotent, and poor people" is only one half of the Elizabethan view of the poor. Parliament set out its program ("in Manner and Form following") for "the charitable relieving of the aged and impotent poor People" in *An Act for the Punishment of Vagabonds and for the Relief of the Poor and Impotent*<sup>14</sup>. The same Act referred to "Rogues, Vagabonds and sturdy Beggars" when it stated its purpose being "as well for the utter suppressing of the said outrageous Enemies to the common Weal".<sup>15</sup>

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<sup>13</sup> See Gareth Jones, *History of the Law of Charity 1532-1837, in which "Appendix A" sets out a list of "Bills and Answers in Chancery Relating to Charity, 1350 – 1601" ("Jones' List")* Cambridge University Press, 1969 ("Jones")

<sup>14</sup> 14 Elizabeth I, c. 5, § II

<sup>15</sup> *ibid*

There are approximately 220 references to poverty objects in Jones' List. About 28 refer to "charitable uses" and the "poor" generally, with additional references to the "lame and blind"<sup>16</sup>, "almshouses"<sup>17</sup> and "provision of coals for the poor forever"<sup>18</sup>.

### **"The maintenance of sick and maimed soldiers and mariners"**

The name of the statute immediately preceding the *Statute of Charitable Uses, 1601* is *An Act for the Necessary Relief of Soldiers and Mariners*<sup>19</sup>. The provisions of this statute refer specifically to "sick, hurt and maimed soldiers and mariners that have lost their limbs and disabled their bodies in the defence and service of her Majesty and the State". Elizabeth I had no standing army. Consequently, she depended upon soldiers and mariners recruited for conflicts in Scotland and Europe as well as defeating the Spanish Armada. Towards the end of her reign, Elizabeth I had insufficient funds to adequately recruit, equip and provide for soldiers and mariners who fought against those who thought to restore a Roman Catholic monarch. Her first such statute, *An Act for the necessary Relief of Soldiers and Mariners*<sup>20</sup>, was passed in 1593. However, shipmen and soldiers were licensed to beg as early as 1572.<sup>21</sup>

Just as Elizabeth I did not want to have charities supporting the able-bodied poor, she did not want poor beggars passing themselves off as soldiers or mariners. In 1597, therefore, Parliament enacted *An Act against Lewd and Wandering Persons, Pretending Themselves to be Soldiers or Mariners*<sup>22</sup>. There are no references fitting this *Preamble* object on Jones' List.

### **"Schools of learning, free schools and scholars of universities"**

There are few Elizabethan public statutes dealing with these objects, although Oxford and Cambridge were the subject of two statutes<sup>23</sup>. More amusing is the statutory provision that "all Scholars of the Universities of Oxford or Cambridge, that go about begging, not being authorized under the Seal of the said Universities, by the Commissary, Chancellor or Vice Chancellor of the same" were to be declared Vagabonds.<sup>24</sup> There are many more references to "schools of learning, free schools and scholars of universities" in the private acts<sup>25</sup> passed in Elizabethan England. Jones'

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<sup>16</sup> Jones *supra*, p. 177

<sup>17</sup> *ibid.*, pp. 180, 189, 193, 199 & 201

<sup>18</sup> *ibid.*, p. 198

<sup>19</sup> 43 Elizabeth I, c. 3

<sup>20</sup> 35 Elizabeth I, c. 4. This legislation was extended in 1597 by 39 Elizabeth I, c. 21, *An Act for the further Continuance and Explanation of an act for the necessary relief of Soldiers and Mariners made in the 35th year of the Queen's Majestys reign that now is*

<sup>21</sup> 14 Elizabeth I, c. 5, ¶ IX

<sup>22</sup> 39 Elizabeth I, c. 17

<sup>23</sup> 13 Elizabeth I, c. 29, *An Act concerning the several Incorporations of the Universities of Oxford and Cambridge, and the Confirmation of the Charters, Liberties and Privileges granted to either of them*; 18 Elizabeth I, c. 6, *An Act for the Maintenance of the Colleges in both Universities, and also in Winchester and Eaton*

<sup>24</sup> 14 Elizabeth I, c. 5, ¶ V

<sup>25</sup> Some examples include 1 Elizabeth I, c. 10, *An Act for the Incorporation of Trinity-Hall in Cambridge*; 5 Elizabeth I, c. 7, *An Act touching one Annuity granted for the founding of a School at Guilford*; 14 Elizabeth I, c. 2, *An Act for the better and further Assurance of Lands given to the Maintenance of the Free Grammar School in*

List includes references to “fellows and scholars”<sup>26</sup>, Oxford<sup>27</sup>, grammar schools<sup>28</sup>, “poor scholars at a university”<sup>29</sup>, “founding a school”<sup>30</sup>, and “establishing a free school”<sup>31</sup>.

While Elizabeth I did support “the advancement of education”, she was very concerned that the education system serve her view of religion and political conformity. If a schoolmaster was convicted of failing to attend the Church of England at least once a month, the law mandated that he “be disabled to be a Teacher of Youth, and... suffer Imprisonment without Bail or Mainprise for one Year”.<sup>32</sup> Reading this and other statutory provisions, it seems highly implausible that “the spirit and intendment of the *Preamble*” required that education present both sides of an issue, as is so stringently required by registration authorities today.

### “Repair of Bridges, Havens, Causeways, Churches, Sea Banks and Highways”

The fourth object of the *Preamble* dates back to the reign of Henry VIII, and the enactment of *The Maintenance and Repair of Bridges and Highways Act*<sup>33</sup>. In 1563, Philip and Mary enacted *An Act for the Mending of Highways*<sup>34</sup>, which required parishioners to provide for or put in four days labour for the maintenance of highways. However, most of the statutes related to this object were enacted during the reign of Elizabeth I. Elizabeth I repealed and reversed the statutes of Philip and Mary dealing with theology and the church. However, she was happy to revive her predecessors’ public work statutes and increase the “contributions” required from the poor.<sup>35</sup> She then passed a prolific amount of her own statutes relating to repairing and maintaining highways and bridges.<sup>36</sup> The “havens, causeways, and sea banks” referred to in the *Preamble* appear in the titles of several Elizabethan statutes regarding naval matters<sup>37</sup>. Numerous private

*Tunbridge in the County of Kent*; 27 Elizabeth I, c. 1, *An Act for Confirmation of her Majesty’s Letters Patents to Queen’s College in Oxford*.

<sup>26</sup> Jones *supra* pp. 181 & 182

<sup>27</sup> *ibid* pp. 171 and 175

<sup>28</sup> *ibid* pp. 182 and 193

<sup>29</sup> *ibid* p. 186

<sup>30</sup> *ibid* p. 187

<sup>31</sup> *ibid* p. 189

<sup>32</sup> 23 Elizabeth I, c. 1, ¶ VII

<sup>33</sup> 22 Henry VIII, c. 5.

<sup>34</sup> 2 & 3 Philip and Mary, c. 8.

<sup>35</sup> 5 Elizabeth I, c. 13, *An Act for the reviving of a statute made the 2nd and 3rd of Philip and Mary for the Amending of Highways* which increased the number of labour days from four to six.

<sup>36</sup> 13 Elizabeth I, c. 9, *An Act for the Commission of Sewers*; 18 Elizabeth I, c. 10, *An Act of Addition unto the former Acts, for the Mending and Repairing of Highways*; 18 Elizabeth I, c. 17, *An Act for the perpetual Maintenance of Rochester Bridge*; 13 Elizabeth I, c. 23, *An Act for Paving of a Street without Aldgate*; 18 Elizabeth I, c. 18, *An Act for the Repairing of Chepstowe Bridge*; 18 Elizabeth I, c. 19, *An Act for the Paving for the City of Chichester*; 18 Elizabeth I, c. 20, *An Act for the Repairing and Amending of the Bridges and Highways near unto the City of Oxford*; 39 Elizabeth I, c. 23, *An Act for the Repairing of the Bridges of Newport and Carlyon in the County of Monmouth*; 39 Elizabeth I, c. 24, *An Act for the Erecting and Building of a Bridge over the River of Wye, at Wilton upon Wye, near the Town of Rosse, in the County of Hereford*

<sup>37</sup> 8 Elizabeth I, c.13, *An Act concerning Sea-marks and Mariners*; 13 Elizabeth I, c. 11, *An Act for the Maintenance of Navigation*; 23 Elizabeth I, c. 6, *An Act for the Repair of Dover Haven*; 23 Elizabeth I, c. 7, *An Act*

acts passed by the Elizabethan Parliaments also dealt with these objects.

“The repairing or mending of highways or bridges” is also named as a charitable use in the provisions of the *Poor Law of 1572*.<sup>38</sup>

I examined more specifically one public works statute<sup>39</sup> passed in 1601, in the same legislative session as the *Preamble*. The *Act for the Re-edifying, Repairing and Maintaining of two Bridges over the River of Edon* displays a remarkable legislative continuity with Henry VIII’s act for the *Maintenance and Repair of Bridges and Highways*.<sup>40</sup> The “public works” set out in the statute included maintaining and repairing, as well as building new bridges. Parliament or the Crown did not provide the funding for these public works. Instead, the statute authorized the assessment, rating, and collection of money from residents of the local county for such work. The intriguing provision “But the Inhabitants of the Lordship of Milham shall not be chargeable with any Contribution thereunto” suggests that the powerful were able to exempt their economic bases from such a tax.<sup>41</sup>

It is interesting that Jones’ List includes a significant number of bequests for highways<sup>42</sup>, “high roads”<sup>43</sup>, repair of harbours, bridges, causeways and sea walls<sup>44</sup>, as well as “cisterns”<sup>45</sup> and “a conduit in Cambridge Market Square”<sup>46</sup>.

### “Education and Preferment of Orphans”

While there are no references fitting this object in the titles of Elizabethan statutes, orphans were covered by many provisions of the Poor Laws. Nor was the queen’s dedication to the “education and preferment of orphans” as benevolent and charitable as it appears on its face. Just as the *Preamble*’s reference to the “aged, impotent and poor” was exclusionary, so the term “orphans” excluded those who were poor but had families. This aspect of the *Preamble* is consistent with the *Poor Law of 1597*, which provided:

“That the parents or children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charge, relieve and maintain every such poor person in that manner, and according to the Rate...upon

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*for the Increase of Mariners, and for Maintenance of Navigation*, which was repealed and re-enacted by 39 Elizabeth I, c. 10

<sup>38</sup> 14 Elizabeth I, c. 5, ¶ XXXV

<sup>39</sup> 43 Elizabeth I, c. 16

<sup>40</sup> 22 Henry VIII, c. 5

<sup>41</sup> At least one public statute title suggests that the Queen was the primary beneficiary of some of the public works. See 23 Elizabeth I, 12, *An Act or an Addition to a former Act made Anno 13 of her Majesty’s Reign, for the Paving of a Street without Aldgate, leading to her Highness’ Storehouses at the Minories, and other Places*

<sup>42</sup> Jones *supra* pp. 174, 187, 188, 192, 193 & 200

<sup>43</sup> *ibid* p. 176

<sup>44</sup> *ibid* pp. 186, 188, 191, 199, & 200

<sup>45</sup> *ibid* p. 180

<sup>46</sup> *ibid* p. 176

pain that they shall forfeit twenty shillings for every month for which they shall fail therein.”

The *Poor Law of 1601* extended this family responsibility by a generation to make grandparents responsible for grandchildren and *visa versa*. Giving to poor children who were not orphans was actually illegal, according to the legislation enacted in conjunction with the *Preamble*. This exclusionary character of Elizabeth I’s benevolence adds a certain poignancy to the one reference to “certain paupers”<sup>47</sup> on Jones’ List.

The “worthy poor” clearly did not include the “immoral poor” in Elizabethan England. Giving birth out of lawful matrimony was described as “an Offence against God’s law and Man’s law”.<sup>48</sup> The cost of supporting “said Bastards” was described as “defrauding the relief of the impotent and aged *true poor* of the same parish”. To address the financial costs and discourage the “encouragement of lewd life” the parents were assessed a weekly charge for the support of their bastards.

### “Relief, Stock or Maintenance of Houses of Correction”

Elizabeth I’s first statute related to this object was a revival of one of her father’s laws<sup>49</sup>. In the *Poor Law of 1572*, however, Elizabeth realized that “by reason of this Act, the Common Goals of every Shire within this Realm are like to be greatly pestered with a more Number of Prisoners than heretofore”.<sup>50</sup>

The *Poor Law of 1576*<sup>51</sup> authorized counties to establish houses of correction for vagrants, as did the *Act for the Punishment of Rogues, Vagabonds and Sturdy Beggars*<sup>52</sup> and *An Act for Erecting of Hospitals, or Abiding and Working-houses for the Poor* in 1597<sup>53</sup>. The latter statute was enacted immediately prior to the *Statute of Charitable Uses, 1597*<sup>54</sup>. The Poor Laws aimed to criminalize any refusal to work by the able bodied poor. The *Poor Law of 1601*, which ordered that those who “shall not employ themselves to work” be sent to “the House of Correction”, provides a good example of this policy. Consequently, houses of correction figured very prominently in Elizabeth I’s social agenda. However, Jones’ List has no reference to houses of correction.

### “Marriages of Poor Maids”

No study of the *Preamble* is complete without dealing with the “Marriages of Poor Maids”. This object does not appear in the titles of Elizabethan statutes. However, Jones’ List includes bills

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<sup>47</sup> *ibid.*, p. 190

<sup>48</sup> 18 Elizabeth I, c. 3, *An Act for the setting of the Poor on Work, and for the avoiding of Idleness*

<sup>49</sup> 5 Elizabeth I, c. 24, *An Act for the Reviving of a Statute made 23 Henry VIII touching the Repairing of*

*Goals*

<sup>50</sup> 14 Elizabeth I, c. 5, ¶ XXXVI

<sup>51</sup> 18 Elizabeth I, c.3

<sup>52</sup> 39 Elizabeth I, c. 4, ¶ XII

<sup>53</sup> 39 Elizabeth I, c. 5, *An Act for Erecting of Hospitals, or Abiding and Working-houses for the Poor*

<sup>54</sup> 39 Elizabeth I, c. 6, *An Act to Reform Deceits of Breaches of Trust Touching Lands Given to Charitable*

*Uses*

relating to “poor maidens of good name on their marriage”<sup>55</sup>, and the “marriage of fifty poor maids in Tideswell”<sup>56</sup>.

Statutes such as *An Act Touching Divers Orders for Artificers, Labourers, Servants of Husbandry and Apprentices*<sup>57</sup> provide a good indication of why the marriage of poor maids was included in the *Preamble*’s list of charitable objects. This statute, enacted in 1563, authorized “the appointed officials” to compel any unmarried woman between the age of 12 and 40 to work as a servant “for such wages and in such reasonable sort and manner as the appointed officials shall think meet”. Any unmarried woman who refused to comply was to be committed to ward “until she be bounden to serve as aforesaid”. None of these punitive provisions applied to women who were married. The *Poor Law of 1601* also authorized officials to bind any poor “woman child” to be an apprentice until she reached the age of twenty-one years, or until “the time of her marriage”. Consequently, it was charitable to facilitate the marriage of a poor maid to relieve her of this onerous condition.

It is ironic that the “marriages of poor maids” is the object most often cited with derision by activists rejecting the *Preamble*’s relevance to a contemporary definition of charity<sup>58</sup>. The priority of these activists is a statutory definition that will include and authorize advocacy. Understood in its historic context, the “marriages of poor maids” is the best argument for advocacy in the *Preamble*. A change in the laws that discriminated against unmarried women would have removed the need for this to be a charitable object. No other *Preamble* object supports the case for advocacy being an important function of the charitable sector as much as the “marriages of poor maids”.

### **“Supportation, Aid and Help of Young Tradesmen, Handicraftsmen and Persons Decayed”**

The statutes relating to tradesmen and handicraftsmen are too numerous to list. They include such intriguing titles as *An Act Touching Shoemakers and Curriers*<sup>59</sup> and *An Act for the True Making of Hats and Caps*<sup>60</sup>. These are primarily commercial rather than supportation statutes. However, Henry VIII did pass a law restricting the exploitative fees that apprentices had to pay to begin their trade.<sup>61</sup>

This object of supporting tradesmen may have more roots in Medieval England. As G.K. Chesterton describes, one of the purposes of the charities of the guilds was to take care of their

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<sup>55</sup> Jones *supra* p. 177

<sup>56</sup> *ibid* p. 188

<sup>57</sup> 5 Elizabeth I, c.4

<sup>58</sup> Broadbent Report, at p. 52. Formally called *The Panel on Accountability and Governance in the Voluntary Sector* released its final report “Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector” on February 8, 1999

<sup>59</sup> 1 Elizabeth I, c. 8

<sup>60</sup> 8 Elizabeth I, c. 11

<sup>61</sup> 22 Henry VIII, c. 4, *An Act concerning the avoiding of Extractions levied upon Apprentices*

own apprentices and their ageing members<sup>62</sup>. Elizabeth I's understanding of this object was likely somewhat different than that of the medieval Guilds as the *Poor Law of 1601* authorized the binding out of poor children as apprentices. Jones' List includes the "benefit of apprentices"<sup>63</sup>.

### **"Relief or Redemption of Prisoners or Captives"**

There are no references fitting this object in the titles of Elizabeth I's statutes. However, the whole thrust of the Elizabethan Poor Laws was to penalize the able-bodied poor whom the authorities could not coerce into the labour force. The *Poor Law of 1572*<sup>64</sup> had a special taxation regime for the relief of prisoners. Jones' List includes a reference to "prisoners in Newgate, Ludgate and The Counters"<sup>65</sup>.

### **"Aid or Ease of Any Poor Inhabitants Concerning Payment of Fifteens, Setting Out of Soldiers and Other Taxes"**

It is somewhat ironic that the least understood of all of the *Preamble*'s objects was the subject of more Elizabethan legislation than any other. In every single legislative session of the reign of Elizabeth I, Parliament passed a statute relating to "the payment of fifteens".<sup>66</sup> This suggests that Elizabeth I not only sought through the *Preamble* to co-opt private sector funds for the State's social agenda, she wanted charitable funds to be paid directly to her by assisting those who were too poor to pay her taxes. Interestingly, Jones' List indicates that people did give to these objects. The list refers to gifts for "payment of fifteens"<sup>67</sup>, "two fifteenths of the said town"<sup>68</sup>, to "recover dues"<sup>69</sup> and to "relieve payment of subsidies"<sup>70</sup>.

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<sup>62</sup> *Short history of England*, G.K. Chesterton, Chatto and Windus London, 1917 page 98. These guilds not only protected the welfare of their members but also made sure they had the necessary tools, equipment and clothing to carry on their crafts.

<sup>63</sup> Jones *supra* p. 191

<sup>64</sup> 14 Elizabeth I, c.5, ¶ XXXVII

<sup>65</sup> *ibid* p. 198

<sup>66</sup> 1 Elizabeth I, c. 21, *An Act of a Subsidy, and two Fifteens and Tenth, granted by the Temporalty*; 5 Elizabeth I, c. 30, *An Act of a Subsidy, and two Fifteens and Tenths, granted by the Temporalty*; 8 Elizabeth I, c. 18, *An Act of a Fifteen and Tenth, and Subsidy, granted by the Temporalty*; 13 Elizabeth I, c. 27, *An Act of a Subsidy, and two Fifteens and Tenths, granted by the Temporalty*; 14 Elizabeth I, c. 7, *An Act against the Deceipts of Under-Collectors of the Tenths and Subsidies of the Clergy*; 18 Elizabeth I, c. 23, *An Act of two Fifteens and Tenth, and one Subsidy, granted by the Temporalty*; 23 Elizabeth I, c. 15, *An Act for a Subsidy and two Fifteens granted by the Temporalty*; 27 Elizabeth I, c. 29, *An Act of One Subsidy, and Two Fifteens and Tenths granted by the Temporalty*; 29 Elizabeth I, c. 8, *An Act for the Grant of One entire Subsidy, and Two Fifteens and Tenths, granted by the Temporalty*; 31 Elizabeth I, c. 15, *An Act for the granting of Four Fifteens and Tenths, and Two entire Subsidies, to our most Gracious Sovereign Lady the Queen's most excellent Majesty*; 35 Elizabeth I, c. 13, *An Act for the Grant of Three entire Subsidies, and Six Fifteens and Tenths granted by the Temporalty*; 39 Elizabeth I, c. 27, *An Act for the Grant of three entire Subsidies, and Six Fifteens and Tenths, granted by the Temporalty*; 43 Elizabeth I, c. 18, *An Act for the Grant of Four entire Subsidies, and Eight Fifteens and Tenths, granted by the Temporalty*.

<sup>67</sup> Jones *supra* p. 187

<sup>68</sup> *ibid* p. 195

<sup>69</sup> *ibid* p. 193

<sup>70</sup> *ibid* p. 182

## “Hospitals” and “Religion”: notable omissions

In my opinion, the absence of any reference to hospitals in the *Preamble* is evidence that the *Vision of Piers Plowman* is not the *Preamble*'s source. While the famous passage in Langland's poem begins with the lines “and therewith repair hospitals/help sick people”, the *Preamble* makes no mention of these objects. Jones' List contains one reference to hospitals<sup>71</sup>.

There are many references to hospitals in the titles of Elizabethan statutes, particularly in private acts. In my opinion, hospitals were not included in the *Preamble* because Elizabeth I considered them to be religious institutions. Hospitals, along with Archbishoprics, abbeys, monasteries, priories and vicarages, were required by law to pay First-fruits to the Crown.<sup>72</sup> Only in the final provision of the relevant statute does one find an exemption for hospitals founded and employing their assets for the relief of the poor.<sup>73</sup> The Bishop of each Diocese was to “visit” all hospitals at which the Founder had appointed no Visitor.<sup>74</sup> Interestingly, hospitals were also exempt from the prohibitions against helping the unworthy poor.<sup>75</sup>

Many people take the position that Elizabeth I's first statute of charitable uses was *An Act to Reform Deceits of Breaches of Trust Touching Lands Given to Charitable Uses*, enacted in 1597<sup>76</sup>. The statute immediately prior to that provided for the “erecting of hospitals, or Abiding and Working-houses for the Poor”<sup>77</sup>. In my opinion, however, Elizabeth I's first statute of charitable uses was in the *Poor Law of 1572*.<sup>78</sup> Later in the same legislative session, Parliament passed additional “charitable uses” provisions that dealt specifically with hospitals.<sup>79</sup> As in the 1597 Act, hospitals were described as “Maison Dieu”, or “houses of God”.

The most significant omission from the *Preamble* is religion, although the repair of churches is included as an object.<sup>80</sup> According to my count, there were 37 public statutes of Elizabeth I that dealt with religious, theological and clergy issues. Religion was a very high legislative priority for Elizabeth I, and she made religion a litmus test for political allegiance. Religion in Elizabethan England was defined very strictly, to force conformity with the Monarch's view of various doctrines. Religion was not a charitable use she wanted to emancipate and energize through private sector funding. Religion was to be funded by the tithe and controlled through the parish.

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<sup>71</sup> *ibid* p. 196

<sup>72</sup> 1 Elizabeth I, c. 4, *An Act for the Restitution of the First-Fruits and Tenths, and Rents reserved nomine decimae, and of Parsonages impropriate, to the Imperial Crown of this Realm*, ¶I

<sup>73</sup> *ibid* ¶ XL

<sup>74</sup> 14 Elizabeth I, c. 5, ¶ XXX, Although London was exempted from this provision by ¶ XLI

<sup>75</sup> 14 Elizabeth I, c. 5, ¶ VIII and 39 Elizabeth I, c. 4, ¶ IX

<sup>76</sup> 39 Elizabeth I, c. 6, *An Act to Reform Deceits of Breaches of Trust Touching Lands Given to Charitable Uses*

<sup>77</sup> 39 Elizabeth I, c. 5, *An Act for Erecting of Hospitals, or Abiding and Working-houses for the Poor*

<sup>78</sup> 14 Elizabeth I, c. 5, ¶ XXXV

<sup>79</sup> 14 Elizabeth I, c.14, *An Act for the better Assurance of Gifts, Grants etc Made and to be made to and for the Relief of the Poor in the Hospitals in and near the City of London, of Christ, Bridewell and St. Thomas the Apostle*

<sup>80</sup> There are approximately 43 references to church repairs and church ornaments etc. in Jones List

Jones' List contains few references to religion in general, although the list does include pious uses<sup>81</sup> religious uses<sup>82</sup>, "maintenance of a preacher or other charitable uses"<sup>83</sup> and "divers verye good and godlie uses"<sup>84</sup>. Jones' List also has examples of Chancery having to determine whether a bequest was "forfeit to the Crown being given for superstitious uses"<sup>85</sup>, or was for "charitable or superstitious uses"<sup>86</sup>. These religion issues can be traced back to 1532, when Henry VIII introduced the concept of "superstitious uses"<sup>87</sup> that were unlawful and void because they supported false religious purposes.

## Relationships Between Church and State and the Poor

The very term "charity" carries a connotation that the beneficiaries are the poor. The word charity derives from a religious context, and in England that religious context was Christianity.

Christianity's social imperative was expressed in the wisdom of the Proverbs and was more generous than the "charity" of the Poor Laws:

"Do not withhold good from those to whom it is due, when it is in the power of your hand to do so. Do not say to your neighbour, 'Go, and come back, and tomorrow I will give it,' when you have it with you."<sup>88</sup>

The church ran most of the charitable institutions in Tudor England, including almshouses, leprosy houses and hospitals. However, Henry VIII removed from the church the asset base that it needed to finance its social services. In 1532, a statute was passed that was designed to prevent donors from perpetually endowing new chantries<sup>89</sup>. A 1536 statute authorized the dissolution of smaller monasteries and appropriated the property to the Crown. The larger monasteries were not taken by legislation but abbots were persuaded to yield up their abbeys to the King. By the end of 1540, all but three abbeys and priories had been surrendered to the King, and those three abbots were put to death and their abbeys forfeited to the Crown.<sup>90</sup> In 1545, Henry VIII had a statute<sup>91</sup> enacted that appropriated existing chantry foundations to the Crown.

Henry VIII's appropriation of the monasteries removed the economic base for the Pope's temporal power in England. It is interesting that neither the preamble nor the body of the 1545 statute suggest that chantries were objectionable on the theological ground that they nurtured false religion. As always when the State curtails the activities and assets of the charitable sector, the *Preamble* of 1601 cited abuses and maladministration as the justification for this royal act of appropriation. Consequently, with this series of statutes, the State removed from the church the asset base that

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81 Jones *supra* p. 185

82 *ibid* p. 189

83 *ibid* p. 194

84 *ibid* p. 190

85 *ibid* p. 195

86 *ibid* p. 196

87. 23 Henry VIII, c. 10

88 Proverb 3:27-28, King James Version

89. 23 Henry VIII, c. 10

90. Southgate, G.W., *A Text Book of Modern English History* (J.M. Dent & Sons Ltd., London, 1929) p. 56

91. 37 Henry VIII, c. 4

allowed it to fulfil its Biblical obligation provide the poor with alms and social and medical assistance. Given this history of appropriation of charities' assets by the State, there was good reason that Elizabeth I's first statute dealing with the regulation of charitable uses exempted from its jurisdiction property previously stolen from charities by the Crown with the words "not being taken away otherwise by Act of Parliament"<sup>92</sup>.

The Biblical command to give was not confined to alms for beggars. The Bible taught that Christians should give of their "first-fruits"<sup>93</sup> to the church, as well as paying tithe. The tithe was not simply a voluntary offering, but a mandatory religious tax of ten percent of income. The Bible charged people:

"When you have finished setting aside a tenth of all your produce in the third year, the year of the tithe, you shall give it to the Levite, the alien, the fatherless and the widow, so that they may eat in your towns and be satisfied."<sup>94</sup>

In Tudor England, the payment of tenths and first-fruits was intertwined with the financing of the monarchy. After Henry VIII broke with the Church of Rome, he passed legislation<sup>95</sup> stating that these tenths and first-fruits should be paid to the English Crown.<sup>96</sup> The statutes were repealed the following year by Mary, who stopped the payment of first-fruits to the Crown and legislated that the tenths should henceforth "shall be employed to other godly uses".<sup>97</sup> Mary's generous support for the charitable sector in redirecting the tenths to public good was characterized by Elizabeth I as being "zealous" but not "politically sensitive" to the financial need of the Crown.<sup>98</sup> Elizabeth I restored both of these payments to the Crown during the first year of her reign.

First-fruits may have been a Biblical term originally designed for payment to the church, but it did not retain its Biblical meaning in Elizabethan statutes. Elizabeth I required every person appointed to any religious post, such as an Archbishopric, abbacy, monastery, priory, college, hospital, parsonage, vicarage or chantry, "to pay to the King's Use, upon reasonable days, upon good Sureties, the said First-fruits and Profits for one year"<sup>99</sup> of such appointment. These first-fruits were to be paid "before any real or actual Possession, or meddling with the Profits" of such appointment. Later in her reign, Elizabeth I would begin moving people around in such appointments specifically so she could collect the first-fruits of a new appointment. Having collected the first-fruits, Elizabeth then made it law that tithe should flow from God to the Crown, rather than from the people to God, as the Bible dictated. One tenth of the value of all "revenues, rents, fermes, tithes, offerings, emoluments, and all other profits" belonging to such appointment was required to be paid to the

<sup>92</sup> 14 Elizabeth I, c. 5, ¶ XXXV

<sup>93</sup> Deuteronomy 26:1-11

<sup>94</sup> Deuteronomy 26:12, New International Version

<sup>95</sup> Parliament passed unpublished statutes in the 21<sup>st</sup> and 27<sup>th</sup> years of Henry VIII's reign restraining the payment of first-fruits to the Church of Rome as well as the published 25 Henry VIII, c. 21. These three statutes were repealed by Mary in her efforts to return the religion of England to Roman Catholicism with the enactment of *An Act Repealing all Articles and Provisions made against the See Apostolic of Rome*, 1 & 2 Philip and Mary, c. 8

<sup>96</sup> 32 Henry VIII, c. 45 established *The Court of First-fruits and Tenths*

<sup>97</sup> 2 & 3 Philip and Mary, c. 4

<sup>98</sup> 1 Elizabeth I, c. 4, *An Act for the Restitution of the First-Fruits and Tenths, and Rents reserved nomine decimae, and of Parsonages impropriate, to the Imperial Crown of this Realm*, ¶ XVII

<sup>99</sup> 1 Elizabeth I, c. 4, ¶ I

Crown.<sup>100</sup>

The Bible does not teach that the poor are poor as a result of moral turpitude or failing. However, the government of Elizabeth I placed heavy emphasis on Biblical warnings against indolence, in an effort to justify forcing the able-bodied poor who were not part of the work force to work, no matter how poor the wages and working conditions were. Officials pointed to Old Testament passages such as Proverbs 6:9-11 to emphasize the message that people should not be indolent:

“Go to the ant, you sluggard! Consider her ways and be wise...How long will you slumber, O sluggard? When will you arise from your sleep? A little sleep, a little slumber, a little folding od the hands in sleep – So shall your poverty come on you like a prowler.”<sup>101</sup>

It is important to point out that the disproportionate emphasis on these passages ran counter to the general tenor of the Christian scriptures, which taught a substantially benevolent attitude towards the poor. In fact, Parliaments’ legislative program to penalize and exploit the able-bodied poor was itself contrary to the Biblical warning:

“Woe to the legislators of infamous laws, to those who issue tyrannical decrees, refuse justice to the unfortunate and cheat the poor among my people of their rights, who makes widows their prey and rob the orphan.”<sup>102</sup>

The origin of the English Poor Laws goes all the way back to feudal times, and the enactment of the *Statute of Labourers* in 1349<sup>103</sup>. This legislation was enacted as a consequence of the Black Plague of 1348-1349, which killed almost one third of England’s population. The Plague created a severe shortage of labour, which pushed up the wages that the poor were able to demand for their work. The *Statute of Labourers* sought to prohibit “idleness”, in order to increase the pool of manpower in a society that was ravaged by illness. Its provisions simultaneously restricted the payment of high wages, and prevented the working poor from quitting their jobs if high wages were not paid.

The Poor Laws maintained these dual objectives of increasing the size of the workforce and keeping wages down. The State sought to protect the economic position of the powerful by regulating the activities of the poor. The State emphasized selective Biblical teachings to provide religious sanction for criminalizing “indolence and vice”. Poor persons who chose to beg rather than fulfil their legislated work requirements could be convicted as felons, and sentenced to prison or even death.<sup>104</sup>

The State was so keen to increase its labour pool that it also legislated against the Christian teaching

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<sup>100</sup> 1 Elizabeth I, c. 4, ¶ III

<sup>101</sup> Proverbs 6:9-11, King James Version. Also consider “He who has a slack hand becomes poor, but the hand of the diligent man makes rich.” Proverbs 10:4 King James Version. Officials seeking to emphasize the indolence of the able-bodied poor also referred frequently to select passages of the New Testament, such as St. Paul’s statement that “neither did we eat any man’s bread for nought; but wrought with labour and travail night and day, that we might not be chargeable to any of you.” 2 Thessalonians 3:8, King James Version

<sup>102</sup> Isaiah 10:1-2

<sup>103</sup> 23 Edward III, which was expanded the following year in 25 Edward III

<sup>104</sup> The punishment for employers and sellers who did not comply with the Poor Laws was fines not prison.

of giving alms to the poor by forbidding the able bodied poor to beg. However, it was still permissible, and “charitable” to give to the worthy poor who were unable to work because of age or infirmity. The State’s agenda for charity in Tudor England was to subordinate God’s law on alms-giving to Parliament’s law on forced labour, relying upon selective Christian doctrines to provide cheap labour to the establishment. There were derivative benefits as well; the general populace got to see the public spectacle of beggars in stocks, while the powerful were comforted with the knowledge that these poor laws were protecting them from vagrants and beggars and preserving public order.

It was in the reign of Henry VIII that the State refined its differentiation between the worthy and unworthy poor. The worthy “aged impotent and poor persons” could be licensed to beg; but:

“If any do beg without such Licence, or without his Precinct, he shall be whipped, or else be set in Stocks three days and three nights with bread and water only. And a Vagabond taken begging shall be whipped, and then sworn to return to the place where he was born, or last dwelt by the space of three years, and there to put himself to Labour.”<sup>105</sup>

Henry VIII’s Poor Law of 1535<sup>106</sup> made local officials responsible both for aiding the worthy poor, by way of voluntary and charitable alms, and for compelling every sturdy Vagabond to be kept in continual labour. It also empowered officials to force children between the ages of 5 and 13 “that live in idleness” into apprenticeships. In 1547, Edward VI had The *Statute of Legal Settlement*<sup>107</sup> enacted. It imposed branding and slavery as the punishment for persistent vagrancy, and condemned shows of “foolish pity and mercy” for vagrants. In 1552, Parliament ordered parishes to register their poor<sup>108</sup>, and instructed parsons to exhort parishioners to show charity to their neighbours. Each parish, Parliament suggested, should appoint two collectors of alms to assist the churchwardens after service on Trinity Sunday, to “gently ask and demand of every man or woman what they of their charity will be contented to give weekly towards the relief of the poor”.

In 1562, Elizabeth I’s first Poor Law<sup>109</sup> introduced compulsory charitable giving for the relief of the poor, and authorized justices of the peace to tax those who refused to give voluntarily. A continued refusal to pay made one subject to imprisonment. The monarch’s next Poor Law, enacted in 1572<sup>110</sup>, made each parish responsible to provide for its own aged, impotent and sick poor. The statute introduced a compulsory poor rate, which appointed “overseers” of the poor could assess each parish. In keeping with the program of criminalizing poverty, refusing to work for lawful wages and refusing work provided by the overseer were both made punishable offences.

The economy became much worse in the last decade of the sixteenth century, with a severe economic depression in 1594 and five years of consecutive poor harvests. The government could

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<sup>105</sup> 22 Henry VIII, c. 12, *An Act Directing how Aged, Poor and Impotent Persons, compelled to live by Alms, shall be ordered, and how Vagabonds and Beggars shall be punished*

<sup>106</sup> 27 Henry VIII, c.25

<sup>107</sup> I Edward VI, c.3

<sup>108</sup> 5&6 Edward VI, c.2

<sup>109</sup> 5 Elizabeth I, c.3

<sup>110</sup> 14 Elizabeth I, c.5

not control the skyrocketing price of bread; there were bread riots in London in 1595, and the threat of famine loomed in 1596. In both rural and urban areas, able men who were desperate to work were totally unable to find employment. Elizabeth I responded to the dismal state of the economy by enacting the *Poor Law of 1597*<sup>111</sup> that consolidated and extended previous acts, and provided the first complete code of poor relief. It re-enacted the requirements for raising local poor rates, and replaced voluntary giving with tax levies determined by the overseers. The *Poor Law of 1597* required local justices of the peace to appoint and supervise “Overseers of the Poor”, for the purpose of setting to work those in need, apprenticing children, and providing “the necessary relief of the lame, impotent, old, blind and such other being poor and not able to work”. The scheme was centrally supervised by the Privy Council, to whom the justices had to report and send returns. The act also affirmed the mutual responsibility of parents and children to support each other.

The *Poor Law of 1601* consolidated and replaced all of the earlier Poor Laws. It extended family responsibility by one generation, making every parent, grandparent and child of every poor person who was not able to work, responsible for that person’s taxes and assessments. The 1601 legislation maintained the dual themes of criminalizing unworthy poverty, and of making the poor the responsibility of the local community rather than the central government.

## Religion in Elizabethan England

The reason that religion was not included in the *Preamble* is that Elizabeth I viewed religion as a political issue, rather than a charitable object. Religion was used as a litmus test of her subjects’ loyalty to herself and to England. If religious offences had been merely theological, the offence would have been heresy, as in the religious statutes enacted during the reign of her predecessor.<sup>112</sup> However, Elizabethan legislation referred to religion in terms of a subject’s “obedience”<sup>113</sup> or “disobedience”<sup>114</sup> In her very first statute, Elizabeth I made religion part of the Oath of Allegiance that every religious and temporal leader had to swear in her favour.<sup>115</sup> Any person refusing to swear this oath lost his office and all benefits attached to it. The oath was also a prerequisite to taking religious orders or receiving a Degree of Learning from any university.<sup>116</sup>

Under Elizabeth I, the holding of contrary religious beliefs became a major criminal offence. A first offence invoked the penalty of forfeiting to the Queen all personal goods and chattels, both real and personal.<sup>117</sup> Upon a third offence, the guilty party was charged with High Treason and sentenced to death.<sup>118</sup> Rather than leave the resolution of religious

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<sup>111</sup> 39 Elizabeth I, c.3

<sup>112</sup> 1&2 Philip & Mary, c. 6, *An Act for the Reviving of three statutes Made for the Punishment of Heresies*

<sup>113</sup> 23 Elizabeth I, c. 1, *An Act to retain the Queen’s Majesty’s Subjects in their due Obedience*

<sup>114</sup> 27 Elizabeth I, c. 2, *An Act against Jesuits, seminary priests, and other such like disobedient persons*

<sup>115</sup> 1 Elizabeth I, c. 1, *An Act to restore to the Crown the Ancient Jurisdictions over the Estate Ecclesiastical and Spiritual, and abolishing all foreign Powers repugnant to the same*, XIX

<sup>116</sup> *ibid*, XXV

<sup>117</sup> *ibid*, XXVII

<sup>118</sup> *ibid*, XXX

disputes to theologians, Elizabeth I made the Imperial Crown the adjudicator of all doctrinal issues rather than the ecclesiastical courts.<sup>119</sup> To guarantee the political control of religion, she further legislated that Parliament could not be adjudged to have made “any Error, Heresy, Schism or Schismatic Opinion” in the determination of any religious matters or ecclesiastical causes.<sup>120</sup> In 1571, the charge of High Treason was extended to the act of accusing the Queen of heresy.<sup>121</sup>

Elizabeth I’s close association of religious belief and political allegiance was not without cause. Her claim to the throne depended upon Henry VIII’s dissolution of prior marriages, and the legality of his marriage to her mother.<sup>122</sup> Elizabeth I was, justifiably, concerned about those who sought to have her killed so that a Roman Catholic could be returned to the throne of England. She responded to this threat with *An Act Against the bringing in and putting in Execution of Bulls and other Instruments from the See of Rome*.<sup>123</sup> Her attitude towards Roman Catholics is also evident in the preamble to “*An Act for restraining Popish Recusants to some certain places of abode*”<sup>124</sup>, which reads:

“For the better discovering and avoiding of such traitorous and most dangerous conspiracies and attempts as are daily devised and practised against our most gracious Sovereign ladie the Queen’s majesty and the happy estate of this common weal, by sundry wicked and seditious persons, who terming themselves catholicks, and being indeed spies and intelligencers, not only for her Majesty’s foreign enemies, but also for rebellious and traitorous subjects born within her Highness realms and dominions, and hiding their most detestable and devilish purposes under a false pretext of religion and conscience, do secretly wander and shift from place to place within this realm, to corrupt and seduce her Majesty’s subjects, and to stir them to sedition and rebellion”.

The Queen took a very personal interest in religious doctrines and legislated adherence to the Book of Common Prayer.<sup>125</sup> It became law that persons over the age of 16 attend church at least once a month, or be fined 20 pounds.<sup>126</sup> In 1571, legislation was passed requiring allegiance to the “39 Articles of Religion”.<sup>127</sup> Elizabeth I was pushed by the radical Puritans at court to defend aggressively against Catholicism and to outlaw any aspect of religion, including the vestments worn by the clergy, which might be a link back to the Church in Rome. While the Puritans recommended that legislation restrict what vestments could be worn by the clergy, the queen’s political instincts recognized the

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<sup>119</sup> *ibid*, XVII

<sup>120</sup> *ibid*, XXXV

<sup>121</sup> 13 Elizabeth I, c. 1, *An Act whereby certain Offences be made Treason*, I

<sup>122</sup> 1 Elizabeth I, c. 3, *An Act for Recognition of the Queen’s Highness to the Imperial Crown of the Realm*

<sup>123</sup> 13 Elizabeth I, c. 2

<sup>124</sup> (1592) 35 Elizabeth I, c. 2

<sup>125</sup> 1 Elizabeth I, c. 2, *An Act for the Uniformity of Common Prayer and Service in the Church and Administration of the Sacraments*

<sup>126</sup> 23 Elizabeth I, c. 1, *An Act to retain the Queen’s Majesty’s Subjects in their due Obedience*

<sup>127</sup> 13 Elizabeth I, c. 12, *An Act to reform certain Disorders touching Ministers of the Church*

comfort that the common person took from the familiarity of religious customs, and she allowed priests to keep wearing their surplices. She also thought that certain Puritan sermons and religious meetings were too political in their content and conduct, and legislated against them. In 1592 Elizabeth I passed her third “due obedience” statute, referring to the Puritans at whom it was aimed as the “Queen's Subjects in Obedience”.<sup>128</sup>

The politicization of religion did not begin with Elizabeth I. Henry VIII had passed statutes such as the *Ecclesiastical Licenses Act*<sup>129</sup> much earlier in the century, regulating the ownership and use of religious property. However, Elizabeth I was the first monarch to make conformity with her beliefs a matter of “due obedience” to the Crown, and the first to create penal sanctions for those who believed otherwise. She even refused members of the House of Commons the right to discuss religion under their traditional rights of freedom of speech in Parliament.<sup>130</sup> In doing so, she brought the politicization of religion to an unprecedented level in English history. It is difficult to escape the conclusion that religion was a political object in the mind and legislation of Elizabeth I.

### **Advocacy and the *Preamble***

It is now a well-established principle that political objects are not charitable. Since the House of Lords decision in *Income Tax Special Purposes Commissioners v. Pemsel* (“*Pemsel*”)<sup>131</sup>, it has been equally axiomatic that religion is a charitable object. It is difficult to reconcile these two principles with the *Preamble* view of religion as a political object. In fact, reviewing the legal history of the jurisprudence, one wonders whether the common law position that political objects are not charitable is rooted in the view that religion was a political object.

The legal proposition that charities are prohibited from engaging in political activities is based upon Lord Parker's statement in *Bowman v. Secular Society Limited*<sup>132</sup> in 1917:

"A trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."

Earlier in the same paragraph Lord Parker identified the “purely political objects” under consideration in the case as the “abolition of religious tests, the dis-establishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath”. This paper does not have the scope to revisit the history of the political objects issue from an advocacy perspective in the way it has re-examined the *Preamble*. However, there is little doubt that Lord Parker’s judgment was informed by the history of religious legislation. He wrote:

<sup>128</sup> 35 Elizabeth I, c. 1, *An Act to retain the Queen’s Majesty’s Subjects in their due Obedience*; the second statute was 29 Elizabeth I, c. 6

<sup>129</sup> 25 Henry VIII, c. 21, passed in 1533 as well as the *Suppression of Religious Houses Act, 1539*, 31 Henry VIII, c. 13

<sup>130</sup> *Elizabeth I*, Anne Somerset, Phoenix, London, 1997, p. 493

<sup>131</sup> [1891] A.C. 531 (H.L.)

<sup>132</sup> [1917] A.C. 406 (H.L.) (hereafter cited as “Bowman”) at p. 442

“Trusts for the purposes of religion have always been recognized in equity as good charitable trusts, but so far as I am aware there is no express authority dealing with the question what constitutes religion for the purpose of this rule. Prior to the Reformation that form of Christianity now called Roman Catholic was undoubtedly within the rule, but the same cannot be said with equal certainty of other forms of Christianity or of the Jewish religion... After the Reformation Anglican Christianity was undoubtedly within the rule, but this cannot be said with equal certainty of Roman Catholicism or of any form of Protestant dissent or of the religion of the Jews. The question is complicated by the fact that the Reformation was followed by a number of penal statutes enforcing conformity with the Established Church and imposing penalties on the exercise of any other form of religion, whether Christian or otherwise. As long as these statutes remained in force no trust for the purposes of any other religion than the Christian religion, or of any form of Christianity other than the Anglican, were enforceable, because it was clearly against public policy to promote a religion or form of religion the exercise of which was penalized by statute.”<sup>133</sup>

The other leading case from the House of Lords on political objects is *National Anti-vivisection Society v. IRC*<sup>134</sup>. Writing in dissent, Lord Porter expressed concern about the paucity of legal authority for Lord Parker’s judgment in *Bowman*:

"As my noble and learned friend Lord Simonds points out, it is curious how scanty the authority is for the proposition that political objects are not charitable, and the only case quoted by Lord Parker in *Bowman's* case, viz.: *De Themmines v. De Bonneval*, turned upon public policy not upon what, apart from that question, is or is not a charity."<sup>135</sup>

*De Themmines v. De Bonneval*<sup>136</sup> was also a religion case, decided upon the basis that:

"It is against the policy of the country to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the pope in ecclesiastical matters over the sovereignty of the State...this charitable trust is to be deemed a superstitious use and against public policy."

In Elizabethan England, such a publication would have been treasonous, rather than simply against public policy. *De Themmines* was decided before *Pemsel*, and may have reflected the law at that time.<sup>137</sup> However, because religious objects are now charitable rather than political, it is problematic to rely on this case as authority for the proposition that political objects are not charitable. Activists arguing for the inclusion of advocacy in the definition of charity would do well to read Lord Parker’s judgment in its entirety, rather than accept the famous passage on political objects at face value. Could his Lordship have meant that it is only political to alter the law with regard to religion?

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133. *ibid* at p. 448

134. [1947] A.C. 31 (H.L.)

135. *ibid* at p. 54

136. (1828) 38 ER 1035 at p. 1037

137. In my opinion, such a publication is not a “superstitious use” as that term applies primarily to chantries

It was likely a feeling of professional courtesy that caused Lord Simonds to omit mention of the other “authority” cited by Lord Parker in *Bowman, Thornton v. Howe*<sup>138</sup>. *Thornton* is almost certainly the most ridiculed case in the jurisprudence on the legal definition of religion. In his ruling the Master of the Rolls declared that the propagation of opinions he considered “foolish or even devoid of foundation” was nonetheless a valid religious purpose. This case can only be understood in light of the “*Mortmain Act, 1736*”<sup>139</sup>. This legislation had the perverse result that the most common way of denying a gift to charity was to have that gift declared charitable.<sup>140</sup> A close examination of *Bowman* in the light of *Preamble* suggests that the jurisprudential foundation of the doctrine that political objects are not charitable is weak.<sup>141</sup> However, this doctrine is now entrenched in legislation in Canada.<sup>142</sup>

### **Current Initiatives for Statutory Definition and the *Preamble***

As a result of Globalization in the charitable world, every country is currently considering whether it should move to a statutory definition of charity. In England, it was not a government body that initiated study of the definition question. Instead, the National Council of Voluntary Organisations initiated a consultation process that culminated in a published position paper.<sup>143</sup> The paper does not call for a statutory definition, but recommends that the presumption of public benefit be removed from the first three heads of charity set out by Lord Macnaghten in *Pemsel*.<sup>144</sup> However, England now has the Performance and Information Unit in the Prime Minister’s office reviewing the definition of charity.

In May 2001, the Scottish Law Review Commission issued a report entitled *Charity Scotland*<sup>145</sup>, which calls for substantial change to the definition of charity by way of statutory reform.

In June 2001, New Zealand’s Minister of Revenue issued a government discussion document on taxation issues related to charities and non-profit bodies called “Tax and Charities”<sup>146</sup>. This document reviews the definition of “charitable purposes”, but New Zealand is not yet at the

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<sup>138</sup> (1862) 31 Beav. 14, 1042

<sup>139</sup> (1736) 9 George II c. 36

<sup>140</sup> The impact of mortmain legislation on the definition of charity is dealt with in a paper written by Blake Bromley and Kathryn Bromley published under the title *John Pemsel Goes to the Supreme Court of Canada in 2001: The Historical Context in England*, *Charity Law and Practice Review*, Vol. 6, 1999, Issue 2, p. 115

<sup>141</sup> Lord Parker’s decision could also be challenged for his view of the authority of the *Preamble*. Having found that the Secular Society’s object “is certainly not within the preamble”, he went on to say: “This is not conclusive, though the Courts have taken such preamble as their guide in determining what is or is not charitable.” *Bowman supra* at pp. 444-445

<sup>142</sup> *Income Tax Act*, section 149.1

<sup>143</sup> National Council of Voluntary Organisations, 2001 *For the Public Benefit?: A consultation document on charity law reform*, London

<sup>144</sup> This is already the law in Canada since the Supreme Court of Canada’s decision in *Re Cox* [1953] 1 D.L.R. 577 in which Kerwin J. stated at p. 579: “It has now been settled that the element of public benefit is essential for all charities no matter in which of Lord MacNaghten’s classifications in *Com’rs of Income Tax v. Pemsel* [1981] A.C. 531, they fall.”

<sup>145</sup> This can be found on the web at [www.charityreview.com/csmr/cssd](http://www.charityreview.com/csmr/cssd)

<sup>146</sup> This can be found on the web at [www.taxpolicy.ird.govt.nz](http://www.taxpolicy.ird.govt.nz)

decision-making stage with regard to determining its definition.

Last year, the Prime Minister of Australia commissioned an independent Inquiry into definitional issues relating to charitable, religious and community service not-for-profit organizations. The inquiry recently issued the *Report of the Inquiry into the Definition of Charities and Related Organisations*<sup>147</sup> (“*Inquiry Report*”), which calls on the Australian Parliament to legislate a statutory definition of charity. Recommendation 11 of the *Inquiry Report* challenges the current position of the Australian Tax Office by stating that there should be no requirement that charitable purposes either fall within the ‘spirit and intendment’ of the *Preamble* or be analogous to one of its purposes.<sup>148</sup> While the *Inquiry Report* is a very erudite and thoughtful publication, the Inquiry may have reached a different recommendation on this point if it had considered the jurisprudence of its own country more closely.

The *Inquiry Report* is incorrect to state that the *Chester*<sup>149</sup> case was the High Court’s “most recent consideration of charitable purposes”<sup>150</sup>. In *Bathurst City Council v. PWC Properties Pty Ltd*<sup>151</sup>, the High Court of Australia cited a Privy Council decision<sup>152</sup> as authority for the principle that “the spirit and intendment of the Preamble to the statute of Elizabeth should be given no narrow or archaic construction”. It went on to say:

“The Preamble refers to "Bridges, Ports, Havens, Causeways ... and Highways". Freely accessible car parks on one view might be regarded as "Havens" from the "Highways" or as so necessarily incidental to the latter in modern times as to be almost indistinguishable in public purpose and utility from them: there is an analogy between a highway and a car park affording a haven from, and a secure place of resort near and accessible to, a highway.”<sup>153</sup>

My interpretation of the ‘spirit and intendment’ of the *Preamble* seems to conflict with the current ATO position that “the purposes of government in carrying out its functions are not charitable”.<sup>154</sup> The *Inquiry Report* recommends maintaining this approach of denying charitable status to government bodies. (“Recommendation 19”) The Committee agrees with the test set out in the *Fire Brigades*<sup>155</sup> and *Mines Rescue*<sup>156</sup> cases for determining whether an entity is a government body, namely that the entity be constituted, funded and controlled by government. It

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<sup>147</sup> This can be found on the web at [www.cid.gov.au](http://www.cid.gov.au)

<sup>148</sup> Australian Taxation Office (ATO) 1999, *Draft Taxation Ruling, Income tax and fringe benefits tax: charities*, TR 1999/D21, ¶ 10

<sup>149</sup> *Royal National Agricultural and Industrial Association v Chester* [1974] 48 ALJR 304

<sup>150</sup> p. 26 in Chapter 2

<sup>151</sup> [1998] HCA 59 at ¶ 34

<sup>152</sup> *Brisbane City Council v Attorney-General for Queensland*, [1979] AC 411

<sup>153</sup> [1998] HCA 59 at ¶ 35

<sup>154</sup> Australian Taxation Office (ATO) 1999, *Draft Taxation Ruling, Income tax and fringe benefits tax: charities*, TR 1999/D21, ¶ 16

<sup>155</sup> *Metropolitan Fire Brigades Board v. FC of T 91 ATC 4052* per Wilcox, Spender and Pincus JJ.

<sup>156</sup> *Mines Rescue Board of New South Wales v Commissioner of Taxation* 2000 ATC 4580 ¶ 26

remains to be seen whether the emphasis on the State's agenda in the *Preamble* will have any impact on Recommendation 19.

It is regrettable that the *Inquiry Report* did not consider the *Bathurst City Council* case. It is not only a *Preamble* case, but is a case about the "misemployment of land and money heretofore given to charitable uses". The plaintiff to the action sought a "remedy for unconscientious conduct" by a government body, Bathurst City Council<sup>157</sup>. One of the reasons that the court did not hold the money given to Bathurst City Council by the plaintiff to be a charitable trust is because litigation involving a charitable trust would have required leave of the Attorney-General pursuant to the provisions of the *Charitable Trusts Act*<sup>158</sup> of New South Wales. Consequently, the High Court would not have jurisdiction because there had been no compliance with the requirement for leave.

There is an Elizabethan result to the recommendation that government bodies be denied charitable status. It is inconsistent with the Privy Council decision allowing the Brisbane City Council to be a trustee of a charitable trust.<sup>159</sup> Further, the High Court indicated no objection to the Bathurst City Council being trustee of a charitable trust if it had decided the case that way. Are the actions of *Bathurst City Council* "analogous" to the appropriation of the chantry endowments and monasteries by Parliament in Tudor England? One wonders whether the reason government bodies are excluded from being charitable is this policy results in excluding the inherent jurisdiction of the Attorney-General to redress the "misemployment of land and money heretofore given to charitable uses" and other "unconscientious conduct" of government bodies.

The high quality of the Australian Inquiry's work stands in stark contrast to the work of the Voluntary Sector Initiative (VSI) in Canada. Australia put the definitional issue at the centre of its Inquiry and appointed commissioners with the legal competence to address the issue. The mandate given to VSI did not include the definition of charity. In this it differs from the work initiated in Australia, New Zealand and the United Kingdom. Canada gave the VSI project a budget of \$94.6 million; but made certain that all this money was allocated to process rather than obtaining substantive results on real issues. Consequently, \$94.6 million tax dollars and countless volunteer hours are being spent on an exercise designed to avoid the most important issues facing the sector.<sup>160</sup> Not only does VSI's mandate exclude the definition of charity, VSI has no consultative role in advising on the legislation proposed by the Canadian Parliament to combat the alleged activities of charities in funding terrorist activities. Elizabeth I's skill in manipulating her Parliaments has nothing to teach the manipulators of the charitable sector in Canada.

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<sup>157</sup> [1998] HCA 59 at ¶ 41

<sup>158</sup> Add cite

<sup>159</sup> *Brisbane City Council v. Attorney-General for Queensland*, [1979] AC 411 at 421-422

<sup>160</sup> VSI was not involved in taking a position on Bill C-16 that was introduced into Parliament on March 15, 2001 with draconian provisions to revoke the registration of charities alleged to be raising funds, directly or indirectly, for terrorism. This legislation was abandoned and replaced by the even more draconian Bill C-36 in response to the events of September 11, 2001. Bill C-36 is a more general anti-terrorism bill that has even more draconian provisions regarding charities. Again, VSI has been silent in the public debate and representations to Parliament on this legislation.

What makes the VSI in Canada such an intellectually fraudulent exercise is that the government of Canada is consulting with professionals to advise it on a statutory definition of charity. The fact is that this work is taking outside of the public process of VSI. I have personal knowledge of this as I have been consulted in this regard. It appears that VSI is a massive and expensive consultative process restricted to fringe issues. The reason the federal government wants to keep the definition issue away from the consultation process is that Canada Customs and Revenue Agency (“CCRA”) wants to maintain its policy of systematically rejecting the role of Québec civil law in Canada’s bijural legal system. The Canadian *Income Tax Act* does not define the terms “gift” or “charity”. In a bijural legal system, this means that donors and organizations in Québec are entitled to the application of civil law principles in determining whether or not a contribution is a gift at law. More importantly, it means that the definition of charity should be informed by civil law principles as well as the common law.

Given that Canada has been a bijural country since its inception, it is a disturbing fact that there is not a single *Interpretation Bulletin*, *Information Circular*, *CCRA Pamphlet*, *Information Guide or Registered Charity Newsletter* or other publication issued by the federal tax authorities which even mentions Québec law with regard to gifts or the definition of charity. This may change, although inadvertently, due to the enactment of the *Federal Law – Civil Law Harmonization Act, No. 1*<sup>161</sup> (“*Harmonization Act*”), which was brought into effect on June 1, 2001. What no one in the federal government of Canada seems to have realized is that the *Harmonization Act* has put an end to the well-entrenched Canadian practice of relying exclusively upon the common law definition of charity. Pursuant to section 8.1 of the new legislation, the following “rules of construction” have been added to the federal *Interpretation Act*:

“8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.”<sup>162</sup>

This legislation seems to be an unequivocal rejoinder to the Supreme Court of Canada’s decision on the meaning of charity in *Vancouver Society of Immigrant & Visible Minority Women v. MNR*.<sup>163</sup> The majority of the Court held that “the ITA does not define what is or is not a charitable activity. Rather, it implicitly relies upon the common law for guidance”.<sup>164</sup> Writing for the minority, Gonthier J. provided a more descriptive account of the law:

“It is well known that the ITA does not define ‘charity’ ... Instead, the Act appears clearly to envisage a resort to the common law for a definition of ‘charity’ in its legal sense as well as for the principles that should guide us in applying that definition.”<sup>165</sup>

<sup>161</sup> S.C. 2001, c. 4, given Assent on May 10, 2001.

<sup>162</sup> R.S., c. I-23. This provision was enacted as part of S.C. 2001, c. 4

<sup>163</sup> 1999 CarswellNat 19, 99 D.T.C. 5034, 234 N.R. 249, 169 D.L.R. (4th) 34, 59 C.R.R. (2d) 1, [1999] 2 C.T.C. 1, [1999] 1 S.C.R. 10

<sup>164</sup> *ibid* 143

<sup>165</sup> *ibid* 28 in the minority judgment

Our concept of democracy envisages a constant dialogue of sorts between Parliament and the courts. With the enactment of the *Harmonization Act*, Parliament has explicitly stated that the courts must not resort solely to the common law in reaching a definition of charity. The Preamble to the *Harmonization Act* claims that the Civil Code of Québec “is the law which completes federal legislation when applied in” Québec. The “rules of construction” for the term “charity” as used in the *Income Tax Act* will clearly have to be redefined with reference to the rules, principles and concepts of the civil law. The responsible execution of this task will entail giving expression to the civil law concepts of charity, rather than subverting the intent of the *Harmonization Act* by legislating an exclusively common law definition of charity in the *Income Tax Act*. It is interesting that VSI has made no indication in its published materials that the noble sounding principles articulated in the *Harmonization Act* apply to the VSI exercise. My conversations with the most senior VSI officials indicate that the \$94.6 million consultation process was designed without any mandate for VSI to be involved in the harmonization program.

In my opinion, the incorporation of this bijural concept of charity into the *Income Tax Act* provisions can only be accomplished by means of a statutory definition. The extent to which this definition is influenced by the *Preamble* is much less significant than the extent to which the definition of charity in Canada reflects civil law concepts. The political mandarins in Ottawa understand this. They just hope that the sector will get so caught up in the VSI consultation on extraneous issues that it will not realize until it is too late that the work on the definition of charity is being done behind closed doors in Canada outside the VSI process. The work being done on the definition of charity in this 400<sup>th</sup> anniversary of the *Preamble* is a much more honest and forthright process in all of the other countries than in Canada.

## Conclusion

There is little doubt that the age of determining what is charitable according to the objects listed in the *Preamble* has past. Many countries are moving towards enacting a statutory definition of charity. The question is what may be learned by examining the *Preamble* in its historical context.

The primary lesson is that the charitable sector needs to look at the legislative context in which its statutory definition is being enacted. It is doubtful that politicians are drafting legislation without giving predominant consideration to political concerns and the State’s agenda. While that agenda may not be as draconian as the Elizabethan poor laws, it is almost certainly is not as progressive and liberating as the agenda of the charitable sector. True empowerment of the disadvantaged and unruly poor is as troubling to many of the political elites in the modern world as it was to Elizabethan England.

However, at least in Canada, many of the leaders of the charitable sector are as committed to the State’s agenda as the political mandarins. The “new approach” to determining charity proposed by those leaders to the Supreme Court of Canada implicitly adopts the State’s agenda for charity. In *Vancouver Immigrant Women*, Iacobucci J. described this “new approach” as follows:

“There would be no fixed definition or categories of public benefit. Instead, the court would consider a series of questions in making the determination, including whether the activities of the organization are consistent with constitutional and Charter values, whether the activities complement the legislative goals enunciated by elected representatives, and whether they are of a type in respect of which government spending

is typically allocated.”<sup>166</sup>

The charitable sector must be mindful that the State will make economic decisions as well as public policy decisions when it defines charity. The objects ultimately legislated as being charitable may not be as baldly linked to the State’s legislative agenda as the *Preamble*’s objects were. However, there is no doubt that the tax benefits provided to fund those objects will be rationalized on the basis that they will reduce the State’s costs of providing similar services. Also, the economic rationalization will include the economic leverage of the cost to the national treasury being matched by the donors’ after-tax contributions. Indeed, the cost to the national treasury was a major reason why the majority of the Supreme Court of Canada chose not to expand the definition of charity.<sup>167</sup>

It is also important to remember that when Parliament legislates regarding the charitable sector, it will do so under the pretext of saving the sector from itself. Elizabeth I did not call her statute “*An Act to Define Certain State Purposes and Public Programs and Policies As Being Charitable*”. Instead, she called it *An Act to Redress the Misemployment of Lands, Goods and Stocks of Money heretofore Given to Charitable Uses*. It is certain that the principles of “transparency” and “accountability” will apply only to the charitable sector and not to the State’s “misemployment of land and money heretofore given to charitable uses”. Elizabeth I’s first “charitable uses” provisions in 1572 exempted from its jurisdiction property “not being taken away otherwise by Act of Parliament”<sup>168</sup>. Presumably, the memory of her father’s appropriation of church assets was so recent that she did not want the statute to apply to property previously stolen from charities by the Crown. The *Statute of Charitable Uses, 1601* excluded application to property previously appropriated by Henry VIII both by the omission of religion from the objects listed in the *Preamble* and by explicit provisions excluding religious institutions. It seems that the State today is no more interested in subjecting its bodies to charitable uses scrutiny than it was in Elizabethan times.

The sector should take comfort in the capacity and willingness of the courts to overcome the stultifying effect of a legislated definition. Four hundred years after the *Preamble*, the definition of charity is clearly not restricted to its objects and does not exclude religion. This is because of jurists like Lord Macnaghten who had the courage to resist the boundaries of the *Preamble* and to engage with the concept of charity as it would be understood by the educated layperson. On the facts of *Pemsel*, this approach led to a finding that religion was charitable in and of itself, independent of the services that religious institutions provided to the poor. Fortunately, Lord Macnaghten did stop there. He went beyond religion and opened up the fourth head of charity. In doing so, he welcomed to the charitable world William Shakespeare and all of the other great Elizabethan authors, artists and actors whose work had no place on the *Preamble*. Lord Macnaghten also recognized that he was moving away from the comfortable and conventional opinion of the majority on the scope of the legal concept of charity. After articulating his four-

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<sup>166</sup> *ibid* 197

<sup>167</sup> *ibid* 197

<sup>167</sup> *ibid* 200

<sup>168</sup> 14 Elizabeth I, c. 5, XXXV

part classification of charity, his Lordship reflected that:

“It seems to me that a person of education, at any rate, if he were 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.”<sup>169</sup>

This paper has only looked substantially at the *Preamble* and its context until 1601. The real story and glory of the law of charity took place in the four hundred years subsequent to 1601. During this time, activists in the religious sector through great courage and sacrifice brought pluralism to overcome the intolerance of the Elizabethan religious legislation. Working through the courts, activists in all parts of the sector have expanded the definition of charity using skilful arguments of analogy and incremental change. It is this heritage that is being rejected in Canada by modern activists who prefer the homogenized, lowest common denominator definition of charity<sup>170</sup> that can be expected from Parliament. The VSI exercise had its origins in the Broadbent Report, which recommended handing over the definition to the economists in the Department of Finance. In the view of the Broadbent Report:

“The determination of which organizations get the full benefits of the federal tax system should signal to all Canadians what we most value in civil society when it comes to providing a tax based incentive for giving.”<sup>171</sup>

It may be inevitable that the definition of charity will be articulated by the legislature. The concern is not with the creation of a legislated definition *per se*, but that Parliament will seize the opportunity to confine the charitable sector to the pursuance of its political agenda. It is somewhat naive to expect it to do otherwise, as Parliament’s duty is to exercise its powers to give statutory force to its collective perception of an issue. The duty of the sector will then be to go back to the courts, in order to refine and analogise the new “Preamble” of the modern world.

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<sup>169</sup> *Pemsel*, at p. 583

<sup>170</sup> There is further discussion on these issues in the author’s paper, *Table Talk: Dumbing Down the Law of Charity in Canada*, Pacific Business & Law Institute, Vancouver, May, 1999

<sup>171</sup> Broadbent Report at p. 53