n last year’s July/August issue of Offshore Investment magazine I wrote about how the Beichuan earthquake in Sichuan in 2008 triggered an earthquake in charitable giving in China. The Chinese people donated RMB100 billion (USD20 billion) during 2008 alone. Most of these donations were from small donors. The question I asked was the extent to which these millions of acts of giving would evolve into a continued culture of “philanthropy.”

On Thursday, 22 April 2010 I was back in Beijing for another national day of mourning. This time it was for the Qinghai earthquake and the front page of China Daily News was entirely devoted to black and grey funereal coverage of the tragedy. However, the “good news” part of the story was that the Chinese people donated a record amount of RMB2.2 billion (USD325 million) to a CCTV telethon the previous day. Clearly, the trendline in China is that increased charitable giving is becoming part of the popular culture.

What was even more encouraging was the headline in the following day’s China Daily, that Shenzhen hotel and real estate tycoon, 88 year old Yu Pengnian, had donated his entire fortune of USD1.2 billion to his private foundation. China Daily gave extensive coverage to the 2010 Hurun Philanthropy List which disclosed that the 100 top Chinese philanthropists had donated USD3.3 billion to charity since 2005. While the draft Charity Law has not been enacted, philanthropists are able to fund foundations under the existing Regulations for Management of Foundations dating from 2004.

While China has experienced a watershed in giving both at the small donor and tycoon levels, the legal regime for philanthropy has not evolved. In 2005, China announced that it would give priority to passing a law which would promote charitable giving and provide the legal infrastructure to better enable civil society organisations to operate. The Ministry of Civil Affairs was charged with drafting this law and a draft was completed last year. I have been the primary foreign consultant to the drafting committee and have met with them over 20 times. The draft is now in the hands of Legislative Affairs Office of the State Council for review and consideration at a more political level.

My informal conversations with officials at the State Council indicate that the draft is not satisfactory. In my opinion, this is good news because the draft does not provide bold enough changes. Many of the provisions deliver less than one expects when analysed closely. For example, very generous sounding language gives a civil society organisation all of the privileges and exemptions provided under China’s tax laws. When the relevant tax laws are examined, there have been no changes enhancing charitable giving.

China continues to be suspicious of foreign funds coming in to non-government organisations. A new law controlling the receipts and payments of foreign exchange states that donations “shall not go against social morality or damage public interests…” came into effect in March 2010.

The biggest challenge is that China is primarily looking to foreign laws to inform the principles and precepts it intends to imbue its own law. The reality is that the legal, social, political, cultural and economic environment in the United States is so different from China that the American law is not an appropriate model. However, China’s law will inevitably be judged by the extent to which it adopts or avoids legal privileges and protections accorded to non-profit
organisations in the United States. It is a
troubling Catch-22 that if the law is to
win international approval it must look
something like the US law; but if it does,
the law is significantly deficient in
addressing the concrete realities in
China.

In the future, China is going to want
to channel much more of its massive
charitable endowments to scientific
rather than visceral charitable purposes.
Disaster relief is the easiest object for
which to raise charitable funds — but is
the most difficult to spend money wisely
and without inefficiency, ineffectiveness
and corruption. Horror stories will come
out which will drive the law in very
counter-productive directions. Anecdotes,
especially if told to high government
officials by philanthropic tycoons, can
easily have more influence on the law
than rational intellectual debate of
problem and policy issues.

This is part of the rationale for my
contention that the regulator is more
important than the law at this time.
Without courts completely independent
from political influence and corruption,
the law is less important. On the other
hand, without a modern law which
changes to reflect current concrete
realities, paradoxically corruption and
political influence are the forces which
forge progress as well as problems.
Consequently, China needs to develop a
charity czar with enough political power
and protection to allow progressive
experimentation in identifying causes and
purposes which China will accord the
special status given to charities in Canada
and England. This person can help to
identify and shape the purposes which are
truly rooted in Chinese soil and interpret
them to the political masters.
China needs to remember the extent to
which non-government organisations
opposed by the party were decades
ahead of the party in identifying the
centrality of the environment to the
future of China’s quality of life. A powerful
and progressive regulator can green light
and protect some of these purposes long
before the National People’s Congress is
willing to bless them with formal
legislation.

China is considering the European
Union’s legal concepts of subsidiarity and
complementarity as the legal mechanisms
to identify grass roots problems and
solutions. Subsidiarity runs into problems
when local and provincial laws conflict
with Beijing’s laws. My recommendation
to China is to deal with these problems
by adapting and integrating this new
theory with President Hu Jintao’s notion of
“harmonisation”. The word “harmony”
is a much better, and more Chinese, name
for the sector than “charity” or “civil
society” etc.

China could pioneer a new direction
for charity if it defined it by developing a
culture of innovation and problem solving
rather than amelioration of poverty and
disaster relief. The grass roots in rural
areas could help identify the problems of
greatest concern and be encouraged to
find solutions which they are free to
implement if they can be brought under
the subsidiarity principle. If they produce
solutions worthy of national attention,
the government can take them up to the
national level by invoking harmony
principles. If this approach was taken,
China would have to consciously reject
the many restrictive rules of charity law
which block innovation, creativity and
sustainability.

Officials at the State Council have
stated that the charity law “should be
rooted in Chinese soil”. Past consultations
have focused on Chinese concepts of
altruism and charity rooted in China’s
religious and cultural history. Everyone
agrees that people from all cultures and
countries have a visceral or innate
understanding of charity. What they
freely frequent to recognise is that this
universal impulse is limited to “charity”
and the sophisticated donors and tycoons
are eager to move beyond “charity” to
“philanthropy” which they want to be
more scientific, professional and pro-
active. The problem is that while visceral
charity kicks in to fuel donations to the
Wenchuan or Qinghai earthquakes there
is no universal visceral urge to support
Peking opera or even universities.
Healthcare is a universal priority; but
many believe it should be funded by the
state so that it is universally available as a
matter of entitlement rather than funded
by voluntary donations as a matter of
charity.

The co-mingling of religion and
precepts of charity also presents a
challenge for Chinese law makers.
Religion emphasises compassion and
the need to help others but is not the only
source of such sentiments given the
innate humanitarianism of all people. The
significance of religion is that it teaches
a discipline of donating a percentage of
income or wealth such as the tithe or
zakat. Visceral charity does not teach
citizens to set aside 10% of their income
in the eventuality that there will be an
earthquake in Sichuan. What China is
missing more than an indigenous sense of
charity is the disciplined philosophy which
 teaches that charitable giving is a
mandatory obligation of the faithful as
does Christianity, Judaism or Islam etc. If a
person has already notionally or
conceptually set aside 10% for charity, it
is not a new expense or reduction in
disposable income to give out of those
funds to the needy or other philanthropic
purposes.

It is likely that this is why there is so
much emphasis on natural disasters and
emergencies in the stated giving priorities
of the new foundations being created by
the wealthy in China. My experience in
working with the drafting committee is
that the government also shares this
priority and wants to promote it. While I
am not opposed to this at one level, it is
important for China to recognise that
money dictates the ethos and “enabling
evironment” of charity much more than
the law. These powerful tycoons have the
ears of the most powerful political
masters and their giving is put up as a
model for others to follow. The China
Daily article on the top ten foundations
in China disclosed that nine of them had
disaster relief as a mandate. This is a good
thing; but China needs to worry about
billionaires with little history of charity
donating massive sums, sometimes with
questionable motives, becoming the
paragons of philanthropy whom the
nation is asked to copy. This is a very
different class of donor than Puritan
merchants in England or the Carnegies
and Rockefeller who had consistently
practiced a disciplined programme of
philanthropy throughout their lives before
creating their testamentary charitable
trusts or foundations. If China primarily
follows these tycoons as the model of
philanthropy a decade from now China
will have a charitable sector which might
be too heavily weighted to disaster relief
without enough money for scientific
development, culture or the environment
etc. There was no such legal entity as a
charitable foundation for unspecified
general charitable purposes until
Carnegie and Rockefeller created them.

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China is considering the European Union’s legal concepts of subsidiarity and complementarity as the legal mechanisms to identify grass roots problems and solutions. Subsidiarity runs into problems when local and provincial laws conflict with Beijing’s laws. My recommendation to China is to deal with these problems by adapting and integrating this new theory with President Hu Jintao’s notion of “harmonisation”. The word “harmony” is much better, and more Chinese, name for the sector than “charity” or “civil society” etc.

China could pioneer a new direction for charity if it defined it by developing a culture of innovation and problem solving rather than amelioration of poverty and disaster relief. The grass roots in rural areas could help identify the problems of greatest concern and be encouraged to find solutions which they are free to implement if they can be brought under the subsidiarity principle. If they produce solutions worthy of national attention, the government can take them up to the national level by invoking harmony principles. If this approach was taken, China would have to consciously reject the many restrictive rules of charity law which block innovation, creativity and sustainability.

The drafting of the law of charity has been approached exclusively from the perspective of understanding the legal definition of charity in foreign countries and how the sector is regulated and promoted. A radical approach is actually more consistent with the history of the evolution of charity in England. That would be to use subsidiarity principles to identify and develop innovative causes and methodologies rooted in Chinese soil. Domestic legal scholars could then seek to find Chinese legal principles which would empower and protect the purposes and lessons learned from the people applying subsidiarity principles. In doing so China would be following common law charity law in the truest sense of history. The courts of equity devised legal principles to empower and protect the charitable programmes and impulses of the altruists and social activists of Tudor England and later monarchies. China should not focus on importing the legal theory and definition of English charity law. Instead it should learn from how charity law evolved in England and adapt that methodology to build a Chinese legal response to enabling and protecting indigenous social innovation. China will have the best of international learning and creating something indigenous if China can develop a legal enabling and empowering infrastructure to support the social innovation that it learns from Chinese reality in ways which parallel the English courts of equity giving a legal framework to promote and protect charitable purposes. Unfortunately, this is much easier to do in a common law jurisdiction than it is in a civil law jurisdiction.