

Relevance of England's Charity Trust Law to China's Charity Law

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My assignment is to speak about charitable trusts. The legal concept of the trust is England's greatest contribution to the legal systems of the world. Explaining what a trust is and how it operates is a difficult enough assignment in a common law country such as England. Even in England many lawyers and officials do not properly understand the trust. It is even a more difficult assignment here in Suzhou because China is a civil law country and the charitable trust is a unique feature of the common law.

Those of you who are legal experts in China will suggest that I am wrong in saying the trust is a unique feature of common law countries because the Ninth National People's Congress passed the Trust Law of People's Republic of China in 2001. Further, Chapter 6 deals with Public Trusts and Article 60 says:

A trust established for any of the following purposes of public interest is a public trust:

- 1) Helping poor people;
- 2) Helping disaster victims;
- 3) Assisting the disabled;
- 4) Developing education, technology, culture, art and physical education undertakings;
- 5) Developing medical and sanitation undertakings;
- 6) Developing environment protection undertakings and maintaining the environment; and
- 7) Developing other public undertakings of the society.

We all agree on the importance for China to settle upon an appropriate definition of charity. China's Trust Law has a better definition of charitable purposes than does any draft of the Charities Law that I have seen. However, this trust law is not currently available to charities seeking registration in China. Further, there is a chapter on Public Trusts in the draft Charities Law and it is not clear how these two pieces of legislation will interact.

One of the reasons I like this definition is purpose #3 which is "assisting the disabled". I am not aware of any statutory definition of charity which, back in 2001, specifically referred to the disabled. As a foreigner, I ascribe its inclusion in this Chinese definition of charity to the Communist Party's determination to focus on the needs of disabled persons as a consequence of

the tragedy suffered by Deng Pufang during the Cultural Revolution.¹ If my speculation is correct, this is concrete example of a charitable purpose which is “rooted in Chinese soil”. Legislators mindful of a specific incident in Chinese history remedy it in part by giving priority to the needs of disabled persons in this definition of charitable purposes. You could even argue that China lead the British in this regard because five years later, in the Charities Act, 2006, England legislated “the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage” as its tenth charitable purpose.

China certainly moved ahead of England and Canada in 2008 when President Hu Jintao signed the Law on the Protection of Persons With Disabilities. This law causes the government’s intent to help disabled persons to move beyond merely characterizing it as a charitable purpose to which people can make voluntary donations. China gives disabled persons legal rights to specified benefits and protections. China is more progressive than Canada in that Canada does not have such a law. Passing a law to support and protect persons with disabilities does not mean that all disabled persons will immediately experience the benefits and protections extended to them any more than passing a charity law will automatically mean that the charitable sector will spring to life in a mature form in China. It will take years to determine the extent to which legislation can produce the desired change in social values and activities. However, I wanted to point out an area of social endeavor in which China is displaying international leadership with legislation that can be a model not only for the developing world but indeed for countries like Canada.

I consider the listing of disabled persons in the Trust Law as an example of the definition of charity becoming rooted in Chinese soil. This concept does not mean that the purpose has to be uniquely Chinese or originate in China. In different, and much less respectful, language “the relief of impotent people” and the “support, aid and help of persons decayed” was a purpose listed in the preamble to England’s Statute of Charitable Uses in 1601. However, a charitable purpose takes on the DNA of Chinese society when Chinese people identify it as a priority of importance in the national consciousness of the people. It is not enough for it to be just words written in Article 60 of a Trust Law which no one knows about and has never been given force and effect in the legal experience of China. I believe China has done this through the leadership demonstrated by Deng Pufang who has spearheaded this important social reform in a way which has parallels with the economic reforms brought forward by his father, Deng Xiao Ping, in 1978, 30 years before the Law on the Protection of Persons with Disabilities.

When discussing the origins of charity it is repeatedly said that people from all cultures and countries have a visceral or innate understanding of charity. This is true; but it is only true to a limited extent. What people frequently fail to recognize is that this universal impulse is limited to “charity” in the sense of helping the poor, the needy and victims of natural disasters. Visceral charitable impulses undoubtedly moved people to make donations to the Wenchuan

¹ *Deng Pufang was tortured during the Cultural Revolution and thrown out of the window of a three-story building at Beijing University in 1968. He was rushed to the hospital but was denied admission, because he was the son of a capitalist, Deng Xiaoping. By the time he reached another clinic, he was paralyzed. His back was broken, and he has since been confined to a wheelchair, becoming a paraplegic.*

and Qinghai earthquakes on an unprecedented scale. Officials are correct to point to these earthquakes to prove the universal existence of compassion and charity.

However, the problem is that there is no universal visceral urge to support Peking opera or other art and cultural activities contemplated in the fourth charitable purpose in the Trust Act. There is no visceral impulse to maintain and protect the environment as set out in the 6th purpose. Sophisticated donors and tycoons are eager to move beyond reactive, visceral "charity" to developmental "philanthropy" which they want to be more scientific, professional and pro-active. My friend Chen Yimei described these global trends in her excellent and comprehensive paper yesterday. China needs to look ahead to the day it will no longer want its largest private foundations funding primarily disaster relief but will educate these foundations to fund education, healthcare, research and the arts and culture. Professor Xu Tongwu mentioned the *Pemsel* case of 1891 as the second stage in the development of charity law in England. For purposes of this discussion, I characterize the *Pemsel* decision as the point when the common law moved beyond visceral charity and opened up the definition to include education, the arts and other purposes which go beyond our innate visceral instincts as to what is charitable.

China must develop a definition which moves beyond visceral charity just as did the court in *Pemsel*. This definition must be rooted in Chinese soil and containing the DNA of the Chinese people. If the Chinese people do not recognize and understand the defined purposes as being indigenous and part of their values and culture, they will not embrace the purposes. China cannot simply copy the 13 purposes listed in the *Charities Act 2006* because the Communist Party is not ready to fully and unreservedly embrace all those purposes. It is possible the Chinese people themselves are also not ready to embrace all those purposes.

When China considers the relevance of the charitable trust it should not simply seek to get a legal understanding of the trust. Instead it is important to come to an understanding of the historical evolution of the trust, and in particular the charitable trust. The trust is a very difficult legal concept to understand because in the common law world it was not the product of legislation such as China's *Trust Law*. England's Parliament did not legislate the trust into existence the way it is attempting to create a Charitable Incorporated Organization as a result of the *Charities Act 2006*. There is no law in which the rules and limitations of a trust are clearly stated in statutory terms.

Lawyers from common law countries have complicated legal definition of a trust which is difficult to understand and implement in a civil law jurisdiction. It is even more difficult to understand the legal definition in the context of Chinese social and cultural environment. Consequently, I have created a conceptual definition specifically for this seminar in Suzhou which I will call Bromley's conceptual definition of a trust.

- A trust is an informal legal mechanism to bring good moral conduct to the management of assets on behalf of others

- A trust imports the moral and ethical conduct taught by Christianity, being the dominant religious/ethical teachings of England's society at the time
- A trust is only available to manage the assets dedicated to benefiting other persons or purposes. A trustee cannot simply hold assets on trust for his own benefit
- Charitable trusts evolved out of necessity through the courts rather than the legislature because of the inadequacy of existing laws and legal entities to manage and protect assets held for public benefit
- Charitable trusts embody the DNA of England's moral and ethical values in doing social good
- Trustees have legal but not beneficial ownership of the assets
- Trustees have a fiduciary duty to act in the best interest of the trust and its beneficiaries by exercising the trustee's own best judgment and discretion
- A trust is different from the legal concept of "agency" because trustee's do not take direction from the beneficiaries as to the management of the trust's assets but exercise their own best judgment

Consequently, the trust is a wonderful legal mechanism for charity because it requires decisions to be made in the best interest of the persons or purposes benefiting from the trust rather than the trustee. Charities require a form of governance and legal structure which demands that the persons in positions of control act morally and ethically and without corruption or self-interest. When people give alms to beggars or small gifts to canvassers on flag days, no sophisticated legal mechanism is needed to hold the assets given to charity. However, when enough money is given to build a school or a hospital or create an endowment, the charity needs a legal mechanism to hold and protect that property. Consequently, back in the 15th century, the courts in England created a completely new and innovative legal mechanism to hold and protect charitable assets and enable the trustees to be held accountable for their actions if they do not act in the best interests of the beneficiaries.

The trust was not an easy concept to introduce into the law of England. It did not even come out of the common law. When the trust came into existence in the 15th century, the common law was black letter law which had to be applied by the common law courts exactly as it was written. This frequently produced very harsh and unjust results in a feudal society with vast inequalities in power relationships when the rich and powerful sought to exploit and abuse the poor and weak. Consequently, courts of equity were created to bring "equity" and justice to issues which could not be dealt with fairly by common law courts. It was out of these Chancery and ecclesiastical courts of equity that the trust evolved as a means of holding property for others in morally and ethically just terms.

A moral code is not needed when we own property for ourselves and our actions are constrained only by the law. However, when we hold property for others, an ethical dimension must be added to minimum legal requirements. China needs to find the means of importing this ethical imperative into the law of charitable assets if it is to prevent corruption. The

charitable trust as a legal concept embodies the DNA of England's moral and ethical values when doing social good. The beauty of the trust is that it imported the moral values rooted in English soil without ever definitively writing them down.

When one of England's most famous judges was asked to explain how one could understand the principles of the trust because they were not written down in any statute or set out conclusively in any decided legal case, his response was that one should read the Christian Bible. While I do not expect legal experts in China to begin reading the Bible to understand the trust, that was a profoundly correct and useful answer. The importance of that answer to China is that in the centuries when the trust evolved as a legal concept England was a profoundly Christian country with Christian values imbuing its conduct and aspirations. A good and honest Christian knew what was the right thing to do in an honorable way without being told by the law. He knew good conduct because Christian values had been instilled in him through his Christian training. Because she read and believed her Bible, a trustee knew that she should not profit from her position as a trustee through corruption or betray the purposes for which the trust was created. Her religious beliefs taught her what was righteous conduct when confronted with a problem or circumstance which had not been contemplated by the settlor of the trust or Parliament.

The best way to understand the historical and conceptual background for the trust is to assume that it was a legal concept developed during the period when Confucianism dominated the moral teachings of China. The Chinese trust would be imbued with the values of the classical Wuchang (五常) consisting of five elements: Ren (仁, Humanity), Yi (義, Righteousness), Li (禮, Ritual), Zhi (智, Knowledge), Xin (信, Integrity), as well as the classical Sizi (四字) with four elements: Zhong (忠, Loyalty), Xiao (孝, Filial piety), Jie (節, Continency), Yi (義, Righteousness). The legal principles in the trust would also be guided by moral and ethical values such as Cheng (誠, honesty), Shu (恕, kindness and forgiveness), Lian (廉, honesty and cleanness), Chi (恥, shame, judge and sense of right and wrong), Yong (勇, bravery), Wen (溫, kind and gentle), Liang (良, good, kindhearted), Gong (恭, respectful, reverent), Jian (儉, frugal), Rang (讓, modestly, self-effacing).

If China could create a new legal mechanism for the holding of charitable assets which implicitly required the holders of the assets to have these ethical and moral precepts govern their conduct, China would have created a charitable trust rooted in Chinese soil. I would not be able to understand it and you would have difficulty explaining it to foreign legal experts. However, any upright Chinese citizen schooled in Confucian moral and ethical values would know the rules that should govern their conduct without those rules ever appearing in legislation. China would have created a legal mechanism that captured the ethical DNA of the Chinese people.

The overwhelming significance of the trust as a legal model for China is that it is rooted in the moral, ethical, religious and social values of the country in which it was created, England. The trust is a unique legal concept because it does not legislate what actions a trustee should take in specific circumstances. Instead, it draws upon the moral and ethical values which it

presumes an honest person of goodwill possesses and tells him or her to act accordingly. A lawyer may have trouble defining the technical provisions of a trust; but an honest and honourable layperson has a visceral, if not an intellectual or technical, understanding of the principles of a trust. In an earlier era of the Communist Party, the trust might have been the legal vehicle to import and enforce the values of Chairman Mao's "little red book" into legal relationships. In today's world, it is China's challenge to find the source of moral and ethical values and conduct which it wants to instill in people in order to develop and govern a harmonious and charitable society. England's charitable trust provides the world's best model of a legal concept rooted in the soil of the country which created it.

At the time the legal concept of the trust evolved England was a homogenous Christian country. Today, it is much harder to maintain Christianity is the basis for such principles because the country is far more diverse with many different and competing religious, moral and ethical systems claiming the allegiance of different citizens. Consequently, the trust has become increasing a legal rather than a moral concept. Its infinite flexibility and lack of precise rules today can be exploited for tax benefits and other reasons quite alien to its origins.

The trust poses other legal challenges to China's current legal realities. A trust is not a legal person. Being a legal person in your own right is intellectually inconsistent with the concept of holding and administering property for the benefit of others. The problem in China is determining how a legal concept that is not recognized as a "person" at law can have the ability to open bank accounts and carry on charitable activities? It is doubtful that China is ready to waive all the present civil law requirements for an entity to be a legal person in order to open bank accounts etc. However, it could grant those powers to individual trustees.

Another feature of the trust which will be difficult for China to adopt is that a trust requires no action or approval by any state institution or regulator or even a court to be constituted. For a trust to become valid, a settlor simply delivers some property to a trustee upon terms determined by the settlor. There is no need to register a trust in any state institution or registry. However, since the passing of the Charities Act, 2006 it is necessary for a charitable trust to register with the Charity Commission. England's trust law has radically less government regulation than is contemplated by China's draft Charity Law.

When considering registration, it would greatly increase the freedom and autonomy of charities if the charity law would remove the dual registration requirement. In a society increasingly free from government restrictions on social action, it would be a liberating change to remove this requirement for dual registration.

There are many purposes which benefit society in different ways but they are not all equally valuable. The courts of equity decided that they would extend the benefits, privileges and protections of the court only to trusts that had exclusively charitable purposes. Consequently, a trust to hold and operate a beautiful Suzhou garden only accessible to a few people is not worthy of the court's protection and is a void trust of no legal effect because it is not for exclusively charitable purposes. However, a trust to operate a hospital or provide necessities

to poor persons is charitable. Consequently, the need to limit the beneficial purposes which are accorded all the privileges and protections of charity status brings us back to the importance of the definition of charity.

It is a matter for China, not foreign experts, to determine which purposes are worthy and important enough to be classified as charitable in your current society. These purposes change over the years. For example, in the era when most people were laborers and had plenty of manual exercise, sport was not charitable because it was viewed as a luxury activity only available to the wealthy. However, in today's world when most people work in chairs at desks or in factories, sport provides necessary exercise to improve health and other benefits. Consequently, sport is now charitable in England – even if most other common law countries have not followed England's progressive leadership.

Another example relevant to China is the environment. Historically, the environment was not charitable because it was not recognized that people benefited from a healthy environment. Charity was restricted to purposes that benefited people. However, as the courts realized that clean rivers and unpolluted air are important to the health of people, protecting and improving the environment became a charitable purpose. Again, the important thing for China to learn is not the particular purposes which England considers charitable today. Instead it must learn from the history of the charitable trust that the purposes considered of great importance and priority to society will change with changes in society. However, China should also learn from its own history and remember that non-government organizations identified the importance of the environment to the future of China's quality of life long before this reality was recognized by the Communist Party.

This Sino-UK Charity Legislation Seminar provides the time to draw only some of the broadest lessons from England's charitable trust. One of the most important is that it was a creation of the courts rather than Parliament. It is difficult to imagine that China, being a civil law country rather than a common law country, could allow its courts to create such an innovative legal concept and instrument to foster and enhance social benefit. However, before one completely rejects that possibility, remember that the trust could not have grown out of the common law courts as they existed in England when trusts began. It was only centuries later that the principles of equity were incorporated into the common law. Maybe there is some chance that China will establish a special branch of courts similar to England's creation of equity courts to create a legal concept or mechanism which can draw from the moral and ethical traditions rooted in Chinese soil which will develop a concept of charity which is suited to the current realities of Chinese society. However, it would be much more useful to have the agenda of these courts to develop and regulate charitable purposes rather than create a new legal mechanism.

An important source of learning about the current realities of Chinese society and determining what purposes will take root in the Chinese soil is the new Regulation passed in Jiangsu Province. This Regulation, and others being developed in places like Kwangtung and Shanghai, will provide concrete experiences as to which purposes should be given priority

and how activities should be regulated. The concrete lessons learned from Regulations developed in both rural and urban, coastal and interior, developed and underdeveloped regions of China will provide a basis for informing the national Charity Law when it is finalized. In a uniquely Chinese way, proceeding by way of Regulation in advance of enacting a charity law is a form of subsidiarity in legal development.

This significance of this seminar being held in Jiangsu is much greater than the wonderful hospitality shown by our hosts in the beautiful garden city of Suzhou. The significance is that Jiangsu is moving ahead of the national law in passing a provincial Regulation which will enable China to develop real experience in the charitable sector. In a few years we as international guests look forward to returning to Suzhou not as foreign experts but as foreign observers learning from the experience you will have gained in this Chinese exercise of subsidiarity.

England in centuries past turned to the values of Christianity to inform the legal principles of the charitable trust developed to empower and protect the charitable programs and impulses of its altruists and social activists. When Chairman Mao was in control of China's political process the drafters of charity law would have been instructed to follow his dictate of "learning from the people". This was a Communist concept rooted in Chinese soil and could be a useful guiding principle in determining what purposes today should qualify as being charitable in China. However, if charity law is to remain altruistic and serve only others rather than ourselves, it is necessary to have moral and ethical principles greater than simply those learned from the people. It is critical that the legal concept and mechanism of charity be free from self interest and corruption. In learning from the history, evolution and principles of England's charitable trust, China should not be focused on importing legal theory from England. Instead, it should be learning from England to create a Chinese legal concept and mechanism to enable and protect indigenous social innovation in China as effectively as did the charitable trust in England.