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DEVELOPING A LEGAL INFRASTRUCTURE FOR THE CHARITABLE SECTOR:

LESSONS FROM THE HISTORY OF THE ENGLISH COMMON LAW

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INTRODUCTION

The charitable impulse is simultaneously universal and indigenous. Charity is most easily and universally understood as the expression of one human being's compassion for another by taking voluntary action to better the lot of strangers who are less fortunate. Every society has an indigenous charitable ethic and tradition rooted in its religion and culture. Unfortunately, it is very difficult to give legal expression to acts of the heart which are primarily promoting the good of others. The law is much better suited to regulating commercial or criminal activities which are driven by greed or anger than it is to regulating acts of compassion and altruism. However, if a society is going to effectively and efficiently mobilize this charitable impulse for the good of the whole community, it must give the sector an enabling legal infrastructure which enables citizens to freely and independently create solutions to social problems.

In learning from international experience the most common method is to study current laws and regulations. This is very useful in developing what the international standard is at this point in time. The difficulty is that this approach only tells you where the international community is and not how it got there. Consequently, this paper will focus on the religious, cultural and economic environment in which the English common law of charity evolved. This means focusing on the sixteenth century which does not seem nearly as long ago to China as it does to Canada. It is my belief that we would understand both the weaknesses and strengths of the charitable sector much better if we would pay attention to its historical evolution and not just focus on tax privileges. The charitable sector grew and flourished centuries before there was an income tax and donors were given tax benefits. The purpose in discussing English history is not to encourage China to copy it. Rather, China should learn from it to develop an indigenous legal infrastructure which will foster and protect the charitable impulse which exists in China.

While it is easy to agree on what constitutes individual acts of charity, it is difficult to define the boundaries of collective charitable activities. Defining what the law will recognize and support as an indigenous charitable purpose for one country is difficult enough. It is far more difficult when purposes internationally recognized as being charitable are also considered. Some people seem to think that the universal nature of the charitable impulse should be reflected in an internationally uniform legal infrastructure. If China is to develop a legal infrastructure which will most effectively help the growth and freedom of its own charitable sector, China must learn from its own history and values as well as international experience.

There are no real legal or implementational problems involved in carrying out individual voluntary acts of charity. The legal problems in charity begin when charity evolves beyond individual acts of compassion. It is difficult to articulate the legal expression of the community consensus as to which voluntary actions taken by citizens collectively to better their own lot in society and build a better society should be charitable. As citizens demand more support for the charitable sector by way of legal privileges and tax benefits, the state requires a greater role in determining the public policy considerations which will shape the legal expression of charity. In the modern world, the law of charity has become that part of the social contract between the state and its citizens which encourages private citizens and corporations to make financial contributions and to engage in voluntary activities to accomplish lawful purposes considered beneficial to society. As the law of charity is a social contract between the state and its citizens it is necessarily national and indigenous rather than global and uniform.

The charitable sector relies upon the integrity of trustees, directors and managers as well as public recognition of the good works of charitable organizations and good intentions of donors to overcome the inadequacies of legal draftsmen and parliaments in providing a satisfactory legal infrastructure. The existence of the charitable sector as an identifiably distinct component of society is a triumph of the community spirit of the ordinary citizen over the regimented rules of governmental bureaucracy and uncaring avarice of the market economy. While a charitable sector can succeed without a helpful legal infrastructure, history in other countries demonstrates how important helpful courts and legislation is to the vitality of the sector. This paper will look to lessons to be learned from the English Common Law which is arguably the most important source of the law of charity.

VALUES OF SECTOR SHAPED BY INDIGENOUS CULTURE

The values which determine the content of the law of charity (rather than the legal infrastructure) grew out of the indigenous culture in England. Charity was a religious concept long before it became a legal concept. All of the great religions of the world teach the merit and necessity of helping the poor and needy. In the English common law system the concept of charity was shaped by Christian teachings. The word charity means “love” and referred to altruistic acts of kindness and generosity to strangers who were less fortunate than the donor. Islamic law follows the teaching on charity found in the Quran rather than the Bible. China must look to religious and cultural teaching in Confucianism, Buddhism and other indigenous religions and moral precepts in designing the values which are to be promoted in its legal concept of “charity”. It is important to remember that the legal infrastructure was developed to encourage and protect the existing indigenous social and religious values and that the sector did not result from Parliament having created an enabling legal environment.

The modern law of charity places a great deal of emphasis on pluralism and diversity. In the Middle Ages and into the sixteenth century England was not a pluralistic society. Christianity

was the dominant religion and was supported by the King. The fact that England was a homogenous society with common religious values meant that at the outset there was community consensus as to what values and purposes were considered charitable. It took England many years to adapt its law of charity to fully respect pluralism. Similarly, there have been times in China's history when Confucian values supported by the Emperor would have produced an immediate national consensus as to what values would be "charitable". However, no country can go back in history. In the modern world all charitable sectors must promote and protect pluralism and respect the diverse values which follow from that policy.

DEVELOPING A LEGAL INFRASTRUCTURE

One does not need a sophisticated legal infrastructure to give alms to the poor or a cup of water to a thirsty person. The legal problems in charity begin when it evolves beyond the compassionate acts of individuals to also embrace voluntary actions taken by citizens collectively to better their own lot in society and build a better society. A legal infrastructure is needed when money is not simply distributed to poor individuals but is accumulated to buy land and build a hospital and provide on-going medical services. If citizens can not form an organization with legal personality to open a bank account and hold endowments or buy land for charitable purposes it is not possible to collectively act to address social problems independent of the government.

The single most important legal concept in the common law of charity is the charitable trust. Historically, the first charitable trusts were developed in the thirteenth century to enable religious bodies to hold legal title to land indirectly and benefit from charitable endowments. This wonderful legal invention did not come from Parliament but from the courts seeking to be innovative in creating a legal infrastructure to assist worthy causes supported by private donors. This concept originated in the ecclesiastical courts rather than secular courts. Gradually, a separate system of law, known as equity, evolved and was applied in the Court of Chancery. China does not have ecclesiastical or equitable courts and it is very difficult to import the charitable trust into a civil law country. However, it should learn from English history to understand the differences and adapt lessons learned. China should encourage any creative legal developments from its courts or indigenous administrative bodies which will advance the legal infrastructure in addition to the formal laws passed by Parliament.

The common law in England in the fourteenth century did not allow unincorporated entities to own real property and even legal bodies which were incorporated had their legal ability to hold land limited by increasingly restrictive mortmain laws. The evolution of the trust enabled donors to convey property to a named person to be held for the use of a named religious body. Equity's allowance of the trust to hold endowments for religious and charitable purposes did allow the creation of social institutions by private citizens to address the needs of society. When the courts created the charitable trust to solve the property holding problem it is unlikely the courts realized

they were also creating the legal instrument which would be used by almost all charities in England for the next six centuries.

PROBLEMS WITH CORRUPT OFFICIALS

The charitable trust made it relatively easy for private funds to be perpetually held for public purposes. Unfortunately, corrupt officials began to abuse charitable funds and use them for personal benefit. In the middle of the sixteenth century King Henry VIII had Parliament pass a statute which appropriated to the Crown charitable endowments and lands held by the church. The Courts of Chancery were powerless to prevent this greedy appropriation because Parliament had supreme authority in the English legal system and had enacted the statute. However, this period in history pointed out that the charitable sector needed a legal infrastructure which protected the assets belonging to charities both from corrupt charitable trustees and administrators as well as from greedy government officials. The charitable sector in England is strong today because it acknowledged some of the abuses in its historical past and has taken steps in building the modern legal infrastructure to prevent such abuses from occurring again.

CITIZENS' ATTITUDES IMPORTANT

The vitality of the charitable sector in any country depends more on the enthusiasm and attitudes of the citizens than upon the legal infrastructure. The most important period in the history of the English Common Law of charity was the sixteenth century. During this period in history the Protestant Reformation was changing the beliefs, values and culture of the citizens of England. Until this time alms given to charity were administered ineffectively with the intent of alleviating only the most conspicuous poverty. Now donors wanted to do far more than relieve suffering and poverty. They wanted to eradicate the conditions which gave rise to poverty and sickness. The new power elite in England were merchants rather than feudal lords. These newcomers used their wealth to accomplish social change through private funding for charitable institutions such as schools, libraries and hospitals rather than political activity. The charitable sector in China must adapt to the changing social and economic environment to develop legal and fiscal incentives for wealthy citizens to fund it.

Again, the charitable trust was the legal instrument used by these wealthy donors to translate their social aspirations into concrete reality. One of its great attractions was that the common law allows a charitable trust to be established without any government act or sanction of any kind. It was not until the *Charities Act* of 1960 that the state even imposed any registration requirement even after establishment. As a principle of law a charitable trust is valid from the moment it is settled and any subsequent recognition accorded by the Charity Commissioners or the state has no bearing on its legal existence. It is very important that any legal instruments developed to encourage funding from private donors be simple to implement and not require too much bureaucratic approval.

SHORTCOMINGS OF THE CHARITABLE TRUST

The charitable trust was a legal instrument developed primarily to hold land and endowments and distribute funds and services to the needy. It was not a legal instrument designed for empowerment or social activism by the poor to help themselves. Because the courts were concerned about wealthy donors using charitable trusts to benefit their families or corrupt trustees benefiting by distributing funds to their relatives and friends, the law of charity developed strict rules against any personal benefit returning to the trustees and managers of charities. These rules are very important to the integrity of the charitable sector and have enabled it to attain the level of public trust which give ordinary citizens the confidence to donate their money and governments the confidence to extend tax privileges. However, in developing a legal infrastructure in a country where the primary source of funding does not come from wealthy individuals and powerful corporations, it is important that the rules developed do not prohibit ordinary citizens from pursuing self-help and sustainable development economic strategies.

Another consequence of the concern about abuse if trustees distributed to family is that the law of charity favours programs which work only with strangers and do not benefit family or employees. The culture in China emphasizes the duty to help and care for poor relations more than strangers. In designing the legal infrastructure in China consideration should be given to make adaptations to reflect such differences.

The trust has legal shortcomings in the modern world relating to personal liability of trustees and registering title in land offices. Consequently, in North America since early in the twentieth century most charities have been established as incorporated entities rather than as trusts. The incorporated entity is a legal person and better suited to the modern world. Again, the legal infrastructure for charities has evolved to find the legal form which operates most effectively. While the trust remains the most frequent vehicle for charities in England, even England is beginning to move towards the incorporated charity. An incorporation does require some involvement by government bureaucrats. However, it is important to the confidence and enthusiasm of donors that charities be able to incorporate as a matter of right upon meeting only minimum statutory requirements.

GOVERNMENT'S ROLE IN SHAPING THE SECTOR

The legal infrastructure developed in England in the sixteenth century had to respond to the concrete historical reality of corrupt church officials abusing their power over charitable funds, King Henry VIII seizing charitable lands and endowments, and rich donors turning away from mediaeval charity patterns of giving alms. The health of the national economy determines how much money donors have to support the sector and how critical are the social problems. Governments must also respond to these problems. In late sixteenth century the English economy was experiencing a severe economic depression with huge numbers of unemployed people resulting in bread riots in London. The governments response was to pass legislation known as

the "Poor Laws" treating "rogues, vagabonds and sturdy beggars" as a criminal problem. The only money seemed to be in the hands of the rich merchants and Henry VIII's daughter, Queen Elizabeth I, desperately needed private money to address England's social problems.

This was the historical setting in which Queen Elizabeth I went to Parliament to change the legal infrastructure for charities which resulted in a fundamental transformation of the social contract between citizens and the state. The *Statute of Elizabeth I* in 1601 is the most important legislation in the history of the English law of charity as in its Preamble Queen Elizabeth I changed the focus of legal purposes of charity from religion to social problems, education, employment and building public facilities. She succeeded in her goal of having private money from the rich religious donors voluntarily directed to funding secular social services and institutions by passing legislation aimed at protecting charitable trusts not only from abuse by corrupt charity officials but also from government interference such as her father's expropriation of charitable lands and endowments.

The *Statute of Elizabeth I, 1601* succeeded as the primary legislative initiative in the law of charity because it addressed the realities of the abuses and maladministration of the past and held out the hope of preventing such abuses in the future. This time the state chose not to expropriate charitable funds but to become the promoter, partner and protector of charities. Historians claim that more private money was given in the sixty years after the *Statute of Elizabeth I, 1601* than during the entire Middle Ages. The social institutions created by this private generosity significantly addressed the problems of poverty, disease and ignorance until they were overwhelmed by the forces loosed by the Industrial Revolution which made necessary the direct massive intervention of the state in order to ensure the welfare of citizens.

The Preamble significantly changed the purposes the law regarded as charitable and created an entirely new social contract between the citizen and the state under the guise of charity. It is ironic that the common law world takes great pride in having no statutory definition of charity but looks to the Preamble of the *Statute of Elizabeth I* as the starting point of its legal definition. The purposes listed in the Preamble as charitable reflect a great deal of influence from the civil law countries in Europe. Although England had the most important charitable sector in the world at that time, Queen Elizabeth I was quite willing to import and adapt useful lessons from foreign countries.

COURTS DEFINE CHARITABLE PURPOSES

Since the Preamble was enacted there has been no attempt in England for Parliament to legislate the purposes which are charitable. That job has been left to the courts. The leading case, *Pemsel*, was decided in 1891 and set out four broad categories of charitable purposes. These were relief of poverty, advancement of education, advancement of religion, and other purposes which are beneficial to the community as a whole. The courts have not attempted another classification since *Pemsel* but continue to refine what is meant by those four categories. Since the introduction

of the welfare state, charitable purposes have shifted to filling in the gaps of social services left unfunded by the state and away from the partnership in building comprehensive social institutions which was achieved in the *Preamble*.

INTRODUCTION OF TAX CONSIDERATIONS

This historical background demonstrates that the charitable sector evolved without the benefit of any significant tax privileges. The legal infrastructure which was most important was the protection of charitable funds from corruption and legal instruments which made it simple to make and possible to hold charitable endowments. It is only in the twentieth century that the introduction of the income tax system has made tax incentives an important factor. Tax incentives are most important to wealthy citizens who can reduce their tax obligations by deducting charitable donations from their taxable income. It is important to realize that charities in England and North America became strong long before they received tax privileges. Tax privileges were granted by governments to recognize the cost effectiveness of charitable funding and the quality of compassionate services provided by charities. In ways which parallel the evolution of charitable trust, tax privileges were an enabling financial response to a sector which has already proved its worth and integrity. Tax privileges are an immensely important assistance in funding the charitable sector. However, until there are wealthy donors and charitable organizations operating independent of government in efficiently meeting social needs, tax incentives are less important than legal rights.

In developing the legal infrastructure for social organizations great care must be given to protecting and fostering collective freedom of expression. Charities are not allowed political purposes or to engage in partisan political activities. However, charities are valuable voices in forming and articulating public policy and assisting Parliament in periodically updating the "social contract". The legal infrastructure must allow social organizations to be formed and acquire legal existence as a matter of right or the laws will effectively operate as a restriction on freedom of association.

It is likely better to separate the legal rights of incorporation from tax privileges. A social organization must be granted its legal existence as a matter of right upon complying with minimal formalities without consideration of tax implications. However, that does not mean that tax privileges must necessarily follow as is the present law in England. Tax privileges should be determined later in a more thorough examination procedure as they are not a matter of right but of the prevailing social contract.

In my opinion it would be better for China if the focus in tax issues shifted away from benefits given to donors. While income tax issues and donor incentives are glamorous, they raise unrealistic expectations as to the inevitability of private sector donations generously flowing if only tax deductions were available. The focus of tax privileges must shift to taxes which increase

the operating costs of social organizations. These include property, sales, customs and excise taxes.

The most important is the Value Added Tax ("VAT") which has added far more to the operational costs of most charities than donor tax benefits have, or can, offset. In Canada our comprehensive consumption tax has taken the form of a Goods and Services Tax ("GST"). Charities in Canada can claim a rebate equal to one-half of the GST paid on purchases for their "exempt" activities. To my knowledge, Canada is the only country in the world which provides any such rebate. Social organizations need to focus on this type of tax issue as a consumption tax is a significantly larger economic disadvantage than any economic advantage flowing from being "exempt" on income tax because they earn so little income.

CONCLUSION

The law of charity is the social contract between the state and its citizens to encourage financial contributions and voluntary activities within prescribed limits to accomplish lawful purposes considered beneficial to society. As the law of charity is a social contract between the state and its citizens it is necessarily national and indigenous rather than global and uniform. A social contract must make allowances and adjustments for local situations and customs. There is a need for an enabling legal environment which gives donors and organizations full legal rights. However, the legal infrastructure developed in China should learn from international examples without needing to become identical to foreign models.

It is useful to learn from the history of the evolution of the common law. However, geographic analysis supports the view that the future of the law of charity will not be determined in common law countries but in civil law countries. With the United Kingdom being the only common law jurisdiction in Europe, the common law will not prevail in the struggle for "harmonization" in the European Union. The United States has in practice, if not in theory, moved its law of charity out of the common law and into the nether world of administrative regulations and rulings. I think it unlikely that Canada, Australia, New Zealand and India can withstand the preponderance of jurisprudence which will come from the predominantly civil law countries in Europe, Asia, Africa and South America.

The most important issues are not geographic or whether the legal system is common law or civil law. Leaving ideological issues aside, it is doubtful how useful it is for China to import any legal model based upon a dispositive pattern of transferring resources from the rich to the poor. The need in China is for a legal infrastructure which enables citizens to come together to accomplish self-help and mutual benefit programs as much as ”charity". This is done by being innovative as to what purposes will be allowed and guaranteeing the rights of citizens to exercise collective initiatives to address social problems independent of government funds and interference.