

Evolution of China's Charity Law

By Blake Bromley, Principal,
Benefic Group,
Vancouver, Canada

In 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 imbed 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 frequently fail 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 proactive. 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 tithes 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 environment" 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 Rockefellers 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.

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 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.



China and Charity
– the giving begins
July/August 2009, Issue 198

offshoreinvestment.com/archive