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Abstract
An appreciation of the well-known common law 'definition' of charity leads to the conclusion that, although not referred to as the law of charity within China itself, the Law of Donation to Public Welfare Projects of the People's Republic of China can be understood as having a similar operation to the common law of charity. This paper will examine that Law. First, however, it examines the centrally charitable spirit articulated in China's oldest and most dominant philosophy, Confucianism. It also sets out briefly the history of the attempted realisation of a charitable spirit by the Chinese Communist party, in its combination of a modern socialist system with the influential traditional ideas of China society. The paper then analyses the establishment and content of China's public welfare project law, and uses a particular project, the Hope Project, as an important illustration of the practical operation of Chinese charity law.

Keywords
charity law, People's Republic of China, Law of Donation to Public Welfare Projects

Cover Page Footnote
I am very grateful to Prof. Charles Rickett for his academic guidance, supervision and endless encouragement during the whole progress of this research essay, and to Mr. Wyle Basrawi for his enlightening comments. Both of them played a part in this paper's appearance, although they must not be held responsible for its defects!

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SOME REFLECTIONS ON "CHARITY LAW" IN THE PEOPLE'S REPUBLIC OF CHINA*

*Elizabeth Z Lang***

Introduction

This paper answers the question: to what extent is there a law of charity in the People's Republic of China? China has for the past 53 years been a socialist legal system, although it has recently redefined itself as a jurisdiction of multiple legal systems, to include the Mainland, Hong Kong and Macau. The latter two territories were returned to Chinese sovereignty in 1997 and 1999 respectively. They are governed as "Special Administrative Regions", and presently maintain their own political, economic and legal systems. This paper deals only with the law of the Mainland.

There is, at the outset, the problem of locating the source of charity law in China. The translation of the term 'charity' into Chinese throws up notions of 'benevolence' and 'philanthropy'. As is well established in the common law tradition itself, however, these notions are not synonyms for the legal concept of 'charity'.[1] An appreciation of the well-known common law 'definition' of charity leads to the conclusion that, although not referred to as the law of charity within China itself, the Law of Donation to Public Welfare Projects of the People's Republic of China can be understood as having a similar operation to the common law of charity. This paper will examine that Law. First, however, it examines the centrally charitable spirit articulated in China's oldest and most dominant philosophy, Confucianism. It also sets out briefly the history of the attempted realisation of a charitable spirit by the Chinese Communist party, in its combination of a modern socialist system with the influential traditional ideas of China society. The paper then analyses the

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1 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and the trusts for other purposes beneficial to the community, not falling under any of preceding heads'. [1891] AC 531, 583.

establishment and content of China's public welfare project law, and uses a particular project, the Hope Project, as an important illustration of the practical operation of Chinese charity law.

The Idea of "Charity" in Traditional Chinese Philosophy and in Modern Chinese Socialism

Confucianism and the Charitable Spirit: Traditional Chinese Philosophy

As with the common law of charity, which locates itself historically in the Christian values underlying both the Charitable Uses Act of 1601 (the Statute of Elizabeth) and its early judicial development, Chinese "charity law", to the extent that it exists, locates itself in China's history and traditions.

China has a 5,000-year history and civilization. Confucianism, stemming from the teachings of Confucius[2], became the dominant culture and philosophy, embraced particularly by the majority Han people of central China, but also by other minority groupings. Two of the last three imperial dynasties, which governed China towards the end of its feudal period, were all derived from minority groups, but they all accepted the teachings of Confucianism. In other words, the governors or leaders did not challenge the dominance of Confucianism. Confucian ideas have had the greatest and longest-lasting influence on Chinese culture and society from the time of Confucius himself up until the present day. Furthermore, as one of the 'Three Ways', together with Taoism and Buddhism, Confucianism also developed into a leading traditional religion of the majority Han Chinese.

Confucius articulated his philosophy by way of education, and his 72 original students were government officers or consultants to the governor during and after the period of Confucius's lifetime.[3] His students recorded and organized his ideas and thoughts into four books, which became major textbooks used by feudal Chinese governments before 1911[4] to test candidates who wanted to become government officials. As governors during the feudal period of Chinese history, almost all the Kings (and the solitary Queen), and their officers, paid considerable attention to applying the spirit and theory of Confucianism in practice.[5] The King would choose

2 Confucius lived from 551-479 BCE, and quickly became after his death the dominant moral and political philosopher of Chinese history.

3 Confucius's educational regime centred on daily tutorials, without any notes. The method can be compared with that of Plato in Ancient Greece.

4 The Republic of China was established as the result of a revolution led by Sun Yat-sen in 1910. Although Sun advocated a change from the old ideas of Confucianism and insisted on making China a Western-style free and democratic country, older ideas still dominated the average Chinese and permeated their daily lifestyles.

5 Mencius (Meng Tzu) (c 390-305 BCE) extended and systematized Confucius's ideas. However, with Confucianism's adoption in the Han dynasty as the official moral and political doctrine of the state, the Confucian tradition became so broad that 'Scholar' or

three topics in the annual examination and the candidates would complete research essays about how to assist the King in better governing the country. For example, one of four books is named after *Lun Yü*, in which Chapter 1, 'The Article of *li yun da tong'*, contains a description of Confucius's Utopia, an ideal society where the old, the aged, the lonely, the widowers and the widows are all looked after by the people. In general terms, it can be suggested that the moral ideas of Confucius were very similar to the Christian ideals that informed the Statute of Elizabeth of 1601.

The foundations of Confucius's moral philosophy are found in categories that are familiar to the structure of ethics in Western philosophy. Each category embodies the values considered morally important. Whilst many may think of Chinese philosophy as intuitionistic or mystical, Confucianism has been said to be much more rational than Western philosophy. Confucian ethics are certainly clear and uncompromising, with points of similarity to the views espoused by Immanuel Kant and by the Christian tradition.

The fundamental virtue of Confucianism was 'rén'[6], meaning 'benevolence, charity, humanity, love and kindness'. Confucius defined the application of 'rén' as 'aìrén', meaning 'love of others'. Confucius himself had a simple moral and political teaching: to love others; to honour one's parents; to do what is right instead of what is of advantage; to practise 'reciprocity', ie, do not do to others what you would not want done to yourself; and to rule by moral example (dé) instead of by force and violence. In particular, Confucius thought that a ruler who had to resort to force had already failed as a ruler – 'Your job is to govern, not to kill'[7]. This was not a principle that Chinese rulers always obeyed, but it was the ideal of benevolent rule. It should be noted, however, that even these humane principles were paternalistic and statist, without a hint of the ideals of individual liberty that are the basis of Western liberal and democratic societies. Nevertheless, the Confucian ideal avoided the worst aspects of paternalism in advocating a principle of government by example and by 'not doing'(wú wéi), avoiding therefore practices of authoritarian control. Confucius thought that whilst government by laws and punishments could keep people in line, government by example of virtue (dé) and good manners (li) would enable the people to control themselves.[8]

'Literatus' became all but synonymous with 'Confucian', and so Confucianism could simply be called the Ju Chia [Ru Jia], or School of the Literati.

6 Analects XII: 22.

7 Analects XII: 19.

8 Analects II: 3.

Under the influence of Confucian philosophy and culture for more than two thousand years, most of the people of China had become used to depending upon the government- in whatever form - to solve societal and social problems.

Charity in the Modern Chinese Socialist System

The standard view of the more recent history of China is that China commenced a new historical period from 1949, or, more accurately, from 1956.[9] The Chinese Communist Party ('the CCP')[10] spent the seven years between 1949 and 1956 (after its victory in the Civil War of 1945-1949) breaking down the old system established by the Republic of China (1911-1949)[11] and creating a socialist system to operate as the initial part of future Communist society. The CCP, once in power, began to copy the political and economic system of the Soviet Union, which was the only communist example at that time, and which, so the CCP thought, was the only way to change China from 'a semi-colonial and semi-feudal' country into a new communist society. The guiding theory in building the new political and legal systems was Marxism-Leninism, and its interpretation in the Thoughts of Mao Zedong.[12]

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9 As to the prevailing interpretation of the history of China from 1840 to 1949, see the Preamble to the Law of the Constitution of 1982: 'Feudal China was gradually reduced after 1840 to a semi-colonial and semi-feudal country. The Chinese people waged wave upon wave of heroic struggles for national independence and liberation and for democracy and freedom. Great and earth-shaking historical changes have taken place in China in the 20th century. The Revolution of 1911, led by Dr Sun Yat-sen, abolished the feudal monarchy and gave birth to the Republic of China. But the Chinese people had yet to fulfil their historical task of overthrowing imperialism and feudalism. After waging hard, protracted and tortuous struggles, armed and otherwise, the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism, and bureaucrat-capitalism, won the great victory of the new democratic revolution and founded the People's Republic of China. Thereupon the Chinese people took state power into their own hands and became masters of the country…'

10 The CCP was established in 1921, and most members of the first generation leadership in the People's Republic of China post 1949 were founders of the CCP, including Mao Zedong. Deng Xiaoping was the leader of the CCP branch in Paris, along with Zhou Enlai.

11 The remnant of the Republic of China exists today as Taiwan.

12 The Preamble to the Law of the Constitution of 1982 states: 'Both the victory of China's new democratic revolution and the successes of its socialist cause have been achieved by the Chinese people of all nationalities under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, and by upholding truth, correcting errors and overcoming numerous difficulties and hardships. The basic task of the nation in the years to come is to concentrate its effort on socialist modernization. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's

However, although modern China is regarded as radically different in its nature from pre-1949 China, being 'Communist', the 53 year Communist history has not vanquished much of the prior traditional philosophy, including Confucianism. The CCP has attempted to break down both traditional ideas and Western democratic ideas, while encouraging the pursuit of revolutionary ideals, such as 'class struggles' during the Cultural Revolution (1966–1976)[13]. Nevertheless, people in China still in large measure believe in and live by many of the traditional thoughts and ideas in judging what is right and what is wrong, and whether something is good or something is bad. These ideas include the inherent value of charity or benevolence, which is widely regarded as an indispensable part of Chinese culture.

The Cultural Revolution did not achieve its aim of establishing a purely Communist culture. Rather, on the contrary, although it damaged the traditional foundations of Chinese culture that Chinese people had inherited from their ancestors, it did not destroy them. People learned to keep both silent and blind, in order to protect themselves. Chinese society lost much of the original openness and energy of the early Chinese ethic. Furthermore, for almost 30 years of China's modern communist history, the average people in China had no opportunity to engage openly with other theories. The Government still plays the dominant role in the social and political life of the nation and its people. In the context of public welfare or charity issues, the Government understands itself to be the provider of such welfare. The Government's role in Chinese society is all encompassing.
Moreover, this reality has been legally confirmed in the Constitutional Law, which is the root of all other law, legislation or local administrative regulation.[14] The Preamble to the Constitutional Law of 1982 states:

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democratic dictatorship and follow the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system, and work hard and self-reliantly to modernize industry, agriculture, national defence, and science and technology step by step to turn China into a socialist country with a high level of culture and democracy."

13 From 1966 to 1976, China was controlled by a 'gang of four'. There were no legal judgments or judicial decisions, since the Cultural Revolutionary Committees in grades decided all cases. In 1976, Deng Xiaoping put an end to the Cultural Revolution and carried out another revolutionary policy known as 'Reform and Open'. China started to imbibe more Western philosophy in 'democracy and science', and transplanted much law from common law legal systems, in an effort to adapt to the worldwide environment. After Hong Kong and Macau returned to China in 1997 and 1999, China has become one of the multiple legal system countries in the world. 'One-country, two-systems' illustrates that Mainland China retains its socialist legal system, and the Special Administrative Regions keep their respective economic, political and legal systems for a fixed time. It is not easy to say therefore that China has a civil law legal system.

14 During its short 53-year national history, Communist China has had four written constitutional laws, each of which represented the dominant thoughts and ideas at the relevant time.

> This Constitution affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state in legal form; it is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.

The Law continues[15]:

(1) The state upholds the uniformity and dignity of the socialist system.
(2) No law or administrative or local rules and regulations shall contravene the Constitution.
(3) All state organs, the armed forced, all political parties and public organizations, and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be looked into.
(4) No organization or individual may enjoy the privilege of being above the Constitution and the law.

This general context is extremely important in understanding the provisions of the Constitutional Law requiring the state to carry out public welfare and other commonwealth projects. Articles 19–23 of the Constitutional Law provide a statement of what might, in general terms, be said to be the Chinese law of charity, where the socialist nature of the legal system means that the state, or government, is the fountainhead of the provision of "charitable" services. Private provision of such services appear to be discouraged, even impossible, in such a climate. These key Articles state:

> **Article 19 [Education]**
> The state undertakes the development of socialist education and works to raise the scientific and cultural level of the whole nation. The state establishes and administers schools of various types, universalises compulsory primary education and promotes secondary, vocational and higher education as well as pre-school education.
> The state develops educational facilities in order to eliminate illiteracy and provide political, scientific, technical and professional education as well as general education for workers, peasants, state functionaries

15 Article 5: Socialist Legal System, Rule of Law.

and other working people. It encourages people to become educated through independent study.
The state encourages the collective economic organizations, state enterprises and institutions and other sectors of society to establish educational institutions of various types in accordance with the law.
The state promotes the development of natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions.

Article 20 [Science]
The state promotes the development of the natural and social sciences, disseminates scientific and technical knowledge, and commends and rewards achievements in scientific research as well as technological discoveries and inventions.

Article 21 [Health]
The state develops medical and health services, promotes modern medicine and traditional Chinese medicine, encourages and supports the setting up of various medical and health facilities by the rural economic collectives, state enterprises and undertakings and neighbourhood organizations, and promotes public health activities of a mass character, all to protect the people's health. The state develops physical culture and promotes mass sports activities to build up the people's physique.

Article 22 [Culture]
The state promotes the development of literature and art, the press, broadcasting, and television undertakings, publishing and distribution services, libraries, museums, cultural centres and other cultural undertakings, that serve the people and socialism, and sponsors mass cultural activities.
The state protects places of scenic and historical interest, valuable cultural monuments, and treasures and other important items of China's historical and cultural heritage.

Article 23 [Intellectual Education]
The state trains specialized personnel in all fields who serve socialism, increases the number of intellectuals, and creates conditions to give full scope to their role in collective modernization.

The public welfare projects these Articles articulate can be thought of as involving purposes reflecting those purposes regarded as charitable in the common law, because these appear in the Preamble to the Charitable Uses Act of 1601:

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

and were classified by Lord Macnaghten in his famous statement in *IRC v Pemsel*[16]:

> Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and the trusts for other purposes beneficial to the community, not falling under any of preceding heads.

However, there is one major problem in equating the common law definition of charity with the provisions included in the Chinese Constitutional Law: this relates to the advancement of religion. This purpose raises an issue of some sensitivity in both the common law of charity and in the Chinese law of charity. The Preamble to the Statute of Elizabeth appears to lack a definitive reference to religion and religious activities. But it is an inevitable purpose because religion, in its Christian form, is the very origin of the common law of charity. With respect to the advancement of religion in modern common law jurisdictions, no distinction is drawn in case law between one religion and another, or one sect and another, so the advancement of any religious doctrine can be considered charitable. The advancement of religion simply means the promotion of spiritual teaching in a wide sense. In the New Zealand decision of *Centrepoint Community Growth Trust v CIR*[17], for example, Tompkins J held that the trust, which had as one of its purposes the advancement of the spiritual education and humanitarian teaching of Herbert Thomas Potter, was charitable as being a trust established for the advancement of religion. For the purposes of the common law, the criteria of religion are the belief in a supernatural being, thing or principle, and the acceptance of certain canons of conduct in order to give effect to that belief.[18]

Religion in China can be said to be a rather grey area, although it is clear that under the Constitutional Law Chinese citizens have the right to maintain a faith,

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16 Supra n, 1.

17 [1985] 1 NZLR 673.

18 Leading cases on the advancement of religion include: *Thornton v Howe* [1862] 31 Beav 14; *Re South Place Ethical Society* (1980) 1 WLR 1565; *Church of the New Faith v Commissioner of Pay-roll Tax* (1982-83) 154 CLR 120; *Centrepoint Community Growth Trust v Inland Revenue Commissioner* (1985) 1 NZLR 673.

and to practise their religion, at least within certain limitations.[19] The relevant provision states:

> **Article 36 [Religion]**
> (1) Citizens of the People's Republic of China enjoy freedom of religious belief.
> (2) Not state organ, public organization, or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in any religion.
> (3) The state protects normal religious activities. No one may make use of religion to engage in activities that dispute public order, impair the health of citizens or interfere with the educational system of the state.
> (4) Religious bodies and religious affairs are not subjects to any foreign domination.

The legal definition of religion requires that churches, temples and existing-religious bodies must have been established for a long time and must have a relatively wide public acceptance and acknowledgement within China. The state also administers all religious activities, in order to provide uniformity for all ethnic groupings in China. Thus, the Constitutional Law can protect normal religious activities from interference by any individuals or organizations. However, it is technically and practically impossible for the CCP to encourage any project or activity whose purpose is the "advancement of religion" in the sense that this terminology has in the common law of charity. This would be completely contrary to the principles and theoretical foundations of the Constitution of the CCP itself.

At the same time, of course, the CCP wishes Chinese citizens to adopt a faith in Communism, step by step. This is part and parcel of the Communist ambition. Once the people have some physical or material need, or their spirits are low, the CCP should be the object of veneration, rather than (any other) God. Simply put, the CCP cannot support any spiritual leader or faith beyond itself, or allow any idealist or religious position to be accorded the same importance as itself, since that would be to give up its control over citizens' lives.

Thus, although donations for religious activities, or to religious organizations, are not forbidden under the law, any donation expressed to be for religious projects or activities or for the advancement of religious purposes will not be supported by this law. Accordingly, one major difference between the common law of charity and the Chinese law of charity is that the latter does not, and cannot, allow for any overtly religious element within its definitional boundaries.

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19 Zhenting Tan, 'The Chinese Law of Trusts-A Compromise Between Two Legal Systems' (2001) 13 Bond LR 224, 237: 'Because China is a socialist country, a trust for the advancement of religion is not regarded as a charitable trust though Chinese Constitution provides for the freedom of religion'.

Chinese charity law is, at best, concerned with those non-religious elements within the common law of charity. Until relating recently, the Chinese state's monopoly provision of public welfare, as mandated by the Constitutional Law, meant that there was no 'private' law of charity as such in China. Charity law was simply part of the activity of the state. It was simply part of what the common law tradition would call 'public law'. There are, however, signs of a recent change, and it is to this that I now turn.

An Analysis of the Law of Donation to Public Welfare Projects

In 2002, the Yangtze River broke out in flood once again, but this time the flood was not as serious as the flood of 1998. Then, floods in the rivers and lakes destroyed many people's houses and other property.[20] The Chinese Government took some effective and efficient measures to save lives and to protect property. However, since the floods occurred just one year after the Asian financial crisis of 1997, the Government encountered major financial difficulties in the context of dealing with the impact of the flood, due to the huge budget blowouts and rampant deflation in the economy. Many commercial companies expressed a wish to donate funds to the Government to help solve its problems. Some collector-box suppers and other donation television programmes were organized and publicized by the China Central Television Station. However, many enterprises reneged on their promises, which put the Government into an awkward position. On the one hand, people all over the world knew that the Government had 'received' donations from various sources, in order to help people to rebuild their lives and homes as quickly as possible. On the other hand, the Government did not in fact receive the amounts of money it had expected to, although it had publicly declared how much it would commit to construction projects. Even taking into account the Government's authoritarian power, it could not force donors actually to donate.[21] There was no relevant legislation to regulate the issue. As a response to the crisis, the National People's Congress of the People's Republic of China passed the Law of Donation to Public Welfare Projects of the People's Republic of China ('Law of Donation'), which was published on 28 June 1999 and took effect from 1 September 1999. The Chinese Government wished to use this law to '[e]ncourage donations, regulate donations

20 Natural disasters occur yearly in China. The worst one was in the summer of 1976 before the death of the core of first-leader generation, Mao Zedong, and the earthquake almost destroyed the Tangshan City in one minute. Although the International Red Cross Society and other foreign organizations wanted to provide all kinds of rescue to Chinese, the government refused to accept any assistance capitalist countries. Now, Tangshan has become a whole new city to Hebei Province and is nicknamed, 'phoenix city'. The flood in 1998 was the deciding element to the 'Sanxia Dam Project' which will definitely damage the natural sceneries along the Yangtze River.

21 In the 1980s, the Chinese Government by way of (automatic) deduction of a certain amount from their monthly salaries, promoted the purchase National Bonuses and Debits. In some respects, it appears this scheme was a type of taxation.

and the acceptance of donations, and protect the legal rights of donors, donees and beneficiaries'[22]. The major provisions of the Law of Donation are now outlined.

Article 2 provides that '[a]ny person, legal person, co-operative body and other organization can donate property to public welfare projects, social groups and non-profit societies'. Article 11 states that 'public welfare groups and non-profit societies can accept donations according to this part of this law'. 'Public welfare groups' refers to foundations and benevolent organizations established by law with the object of developing commonwealth and/or public welfare projects. 'Non-profit societies' refers to societies that are established legally, without a purpose of gaining profits, including educational institutions, scientific research institutions, medical organizations, public cultural organizations, social public sporting agencies and other social welfare mechanisms. A 'public welfare project', in relation to any scheme, means non-profit projects which are '[a]ctivities of rescue and recovery in respect of a disaster; relief of poverty and of the disabled; and relief of any other community of people or individuals in needy circumstances; advancement of education, science, culture, hygiene and sports; environmental protection; public facilities construction; and any other projects for the promotion of social well-being of a community'.[23]

Under Article 4, a 'donation shall be voluntary, and shall not further profit-gaining activities for the benefit of any individual, individuals or enterprises …' Article 5 states: 'The uses of donated property shall follow the donor's intention, in accord with the public welfare purposes.' Article 12 requires the donor and donee to make an agreement on the type, quality, quantity and purpose of the donated property. It also states that the donor has the right to decide the quantity and purposes of the donation, and the manner of use of the donated property; and that the donated property shall be vested in the donee according to the donation agreement at the time and in the manner determined by the donor.

It cannot be doubted that the Law of Donation has satisfied the desire of the CCP to regulate donation activities by legislation. It illustrates both the importance of public welfare projects in the socialist executive system, and, at the same time, the growing need to fund such projects from 'private' sources. This raises an immediate issue. Is the legislation about public matters or private matters?

The Law of Donation looks at first sight like a law seeking to regulate issues and activities that belong properly to the spheres of government administration and executive policy. Public welfare projects are, consistent with the socialist political system, pre-eminently social and political issues, and the realm of the state. Indeed, in Chapter 5 of the Law of Donation, which regulates the legal responsibilities of a donee, Articles 28-31 provide for a range of administrative and

22 Law of Donation. Article 1.
23 Law of Donation, Article 3, Interpretation.

criminal penalties. The activities made subject to criminal sanctions include fraudulently purchases of foreign exchange or evasion of exchange control laws, tax evasion and failure or underpayment of tax, importing property into China without permission of the Customs authorities and without paying relevant duties, and selling, transferring or using donated property for other purposes. Article 31 states: 'If any functionary of a donee institution under this law abuses his power, neglects his duty or engages in malpractice for personal gain, thus causing heavy losses to the donated property, criminal responsibility shall be investigated pursuant to law, and liability will follow if a crime has been committed.'

However, the effective operation of the Law of Donation depends upon the donor setting up a donation or voluntary contribution through a contract or agreement with a donee. It seems somewhat contradictory that the Law uses the archetypal private legal form of contract to define and realize the actual donation. It is unclear whether the legislators wished by this means primarily to enhance the protection of the donation itself, or merely to establish a private relationship between a donor and a donee. The donor and the donee appear therefore to be able to sue each other, under the contract, and to obtain contractual remedies, which might, for example, include compensation for a donee who has made some expenditure in preparation for undertaking the agreed activities, or restitution for a donor if a donee ultimately obtains other donations to take the place of a defaulting donor's donation. It is clear that the donor-donee relationship referred to in the Law does not exhibit any elements of a common law fiduciary relationship. The Law does not refer to, nor does it appear to permit, any form of trust in respect of the donation. The possibility of making a donation by some form of trust will be discussed herein.

Somewhat strangely, given the Law's explicit reference to administrative and criminal penalties, as indicated above, the Law does not expressly provide for any sanctions in respect of a donee's breach of contract (or other duties owed to the donor or the 'beneficiaries'). Given that the legislative form of donation to public welfare projects is a private law contract, this omission seems rather odd. It increases the confusion as to the true nature of the Law of Donation.

Any features the Law of Donation that might be taken as reflecting a facilitative device for private transacting must, however, be examined within a wider context. The aim of the Law was to increase the incidence of voluntary donations for public welfare projects. In the context of the executive system in China, public welfare groups and non-profit societies are part of the governmental structure. They represent the Government's practical pursuit of service activities in the public welfare area. Public welfare groups and non-profit societies can only be established through a complicated process of application and approval from the Government, through the State Council. This reveals much.

'[T]he State Council, that is, the Central People's Government of the People's Republic of China, is the executive body of the highest organ of state power; it is the highest organ of the state administration.'[24] The State Council exercises as number of important functions and powers of relevance to 'charitable' activities. As the Constitutional Law states, these include[25]:

> (6) to direct and administer economic affairs and urban and rural development;
> (7) to direct and administer the affairs of education, science, culture, public health, physical culture and family planning;
> (8) to direct and administer civil affairs, public security, judicial administration, supervision and other related matters; …

Accordingly, when a donor wishes to contribute money or property in the form of a legal donation, the donor can only select from those organizations already available to them, even though that may not be the donor's actual preference. The Government in effect tells a potential donor that he or she has a restricted choice as to whom he or she may donate. The only unrestricted choice available is as to the scale of the donation. As a result, whatever the Law of Donation appears to permit, in reality donors cannot direct their donations, as deeds of goodwill, as they may really wish to. This practical limiting feature also conflicts with the essentially private nature of the mechanism of donation mandated by the Law. The donor is effectively told that because the state represents the public in respect of receiving any donation, the donor cannot choose any other potential types of public benefit. It is only when a donor donates to an organization established and approved by the state that a donation will be regarded as being of benefit to the public or a section of the public. It is in this way that the Chinese law of charity recognises a public benefit component, although this is achieved in an indirect manner, and is in effect a rather limited notion of public benefit. Public benefit can only be pursued through officially accredited organizations, and is thus defined by what those bodies do.

A further important question arises, in large measure as a consequence of this 'reality'. That question is whether the public or a section of the public will actually receive the benefit from any donation. In some cases, the capital or interest from donated property may often be used by the donee for purposes outside the donor's original intention, which may nonetheless be of benefit to the community in some other way. However, in some cases it is possible for the donated property to be misdirected to individuals, without benefiting the public or a section of the public, because of a number of features of the Law itself.

24 Law of the Constitution, Article 85.
25 Law of the Constitution, Article 89.

There is no requirement under the Law of Donation for public notice or advertisement about any donation received by a public welfare group or non-profit society. As a result, it is difficult for citizens, as the potential beneficiaries of donations, to obtain information. In practice, therefore, citizens cannot act as gatekeepers in respect of donations since they often lack information as to the very existence of a donation, and, where they know a donation has been made, the donor's intention is contained in the terms of the donation, which is of course simply a (private) contract or agreement between donor and donee.

What then is the source of a donee's legal responsibility and obligations? If it is in the legal agreement, the donor has the right and power to enforce the donee's obligations and to control his or her actions and activities. However, if the structure of a donation is in reality something more akin to a common law charitable trust, under which the relevant citizens have some right to participate in the benefits as determined by the donor, the donor might lose any right, or at least an exclusive right, to control the use of the property transferred to the donee. The question of the origin of the legal responsibilities of the donee raises several issues. Are those duties found in the donee's administrative duties, which themselves are the result of the donee's authorization by the governmental structure? Or are they found only in the contract with the donor? Or is the true legal position of the donee defined by a combination of the two? There is no clear answer to this issue, but a number of matters can be discussed that might help indicate an answer.

Article 1 of the Law of Donation expressly refers to the protection of the legal rights of "beneficiaries", implying therefore that the beneficiaries have legal rights, thereby providing them with locus standi to enforce those donations from which they are intended to benefit. However, as suggested above, there is no effective system of disclosing the terms of contracts of donation, and the Law itself is silent as to any mechanism of enforcement by the specified or expected beneficiaries. Furthermore, there is no provision for the State Council or some other specific government department to act in a role akin to that of the Attorney-General as parens patriae in the common law of charity, to protect the public benefit by an enforcing donee's obligations to pursue the purpose for the betterment of those intended to benefit. The state can pursue administrative and criminal proceedings, but not, it seems civil proceedings. The beneficiaries' rights are, it appears, rather empty.

The Law of Donation also regulates the unilateral variation by the donee of the purposes intended by the donor to be the destination of the donated property:

> **Article 28 (Variation of Donation)**
> If the donee changes the character of or the purposes of the donated property without the permission of the donor … the people's government can dispose of the donated property to other public welfare

> groups or non-profit societies which carry out projects or works that are the same as or similar to the original purpose of the donation.

The prominence of the Government here is noteworthy. Apart from some ambiguity as to exactly when a variation arises, it is the Government that will decide who will be the successor institution or public welfare group, and thus where the donated property will be used. If anything, this reinforces the public law character of the Law of Donation.

Much of the ambiguity as to the identity and enforceability of duties of (charitable) donees might be reduced were donations able to be made, as in the common law, using a trust or trust-like structure. The further and more effective development of the pursuit of public welfare projects in China might well be aided by the adoption into Chinese law of the charitable trust structure. This structure has in the common law system provided exactly what the Law of Donation in its Article 1 states to be the ambition of that Law, but which we have seen has not in fact been promoted in the Law itself. Along with the protector status recognised to reside in the Attorney General, the trust model very effectively encourages donations, regulates donations and the acceptance of donations, and protects the position of the various interested parties, donor, donee and 'beneficiaries'. The trust model, however, is not presently known to Chinese law.[26]

The "Hope Project" – A Case Study

Under the Constitutional Law, the Compulsory Education Law of the People's Republic of China states '[t]he state shall establish a system of grants-in-aid to support the school attendance of poor students'[27], and '[t]he State Council and the local government at various levels shall be responsible for raising funds for the operating expenses and capital construction investment needed for the implementation of compulsory education; the fund must be fully guaranteed; the state shall subsidize those areas that are unable to introduce compulsory education because of financial difficulties; the state shall encourage individuals and all segments of society to make donations to help develop education'.[28]

The Hope Project is the most popular public welfare project in China. It has the greatest number of participants, and is the largest and longest-lasting donation appeal project in China. To explain clearly the reasons why this project has attained such attention and support from the population, it is necessary briefly to return to modern Chinese history.

26 For a useful summary, see Zhenting Tan's article, supra n, 19.
27 Article 10.
28 Article 12.

During the 10-year period of the Cultural Revolution[29], China gave up any form of education that was regarded as a prison to the people's revolutionary thinking. The moratorium on the acquisition of knowledge in science and arts was thought to improve the revolution and to better realize Communism for the future. Professional eductors, from primary school to university levels in the public education system, along with any practitioner or professional in areas of scientific, cultural or medical research, were sent to farms or factories to receive re-education from peasants and workers. Scholarly authorities in various disciplines and research fields were regarded as enemies of the state. When the Cultural Revolution came to an end, Deng Xiaoping called for 'the spring of science', and for the re-establishment such ideas as '[s]cience and technology is productivity'; and '[i]ntellectuals are part of the working class'. He clearly pointed out the direction for the current reform drive in science and education.[30]

However, following the Cultural Revolution, the state did not have an adequate budget to carry out compulsory education as required under the Constitutional Law and the Compulsory Education Law. In addition, few people, in view of their experiences during the Cultural Revolution, wished to be involved as professional educators in schools. Furthermore, educators could not get the kind of political and economic treatment they deserved in view of their contributions to Chinese society when compared with other occupations. The public compulsory education system thus lacked operating funds and sufficient human resources. Additionally, in most poor areas, particularly in the western part of China, people did not recognise the importance of education, and parents refused to provide education for their children.

The Youth and Children Foundation of China, a non-profit society, appealed to all members of Chinese society, in particular those people living in cities in south-east China, who had achieved greater wealth as a result of their earlier exposure to notions of economic development and a more open political policy, to donate funds to support small communities in western China in the development of effective compulsory education. The Foundation's slogan was: 'Children are the future and hope of state!' Their project accordingly became known as 'the Hope Project'. The project aimed to create public attention, sympathy and interest, on the basis of the potential donors' obligations as Chinese citizens.

Initially, donors deposited money into the bank account of the Youth and Children Development Foundation of China, and the Foundation directed the money to the areas in need of financial support from central or local government. However, this

29 1966-1976.

30 Deng Xiaoping delivered a keynote speech at 4th China National Science Congress in March 1978. For further details, see www.cyber.law.harvard.edu/ChinaDragon/news

method lacked any advertising or notice back to the donors about how donations were used, where they were used, and so on.

In 1999, *The Next Magazine*, a Hong Kong periodical, reported illegal and criminal activities in the running of the Hope Project, with misuse of donated funds for non-educational government construction and for the private benefit of government officials and employees China Youth Development Ltd[31]. The state could not guarantee that money donated by Chinese citizens and other non-Chinese donors was being used for compulsory education. The newspaper article led to a defamation trial in the High Court in Hong Kong, between China Youth Development Ltd as plaintiff and *The Next Magazine* and others as defendant.[32] Inadequate evidence to establish the alleged defamation meant that the action failed.

After that, the Youth and Children Development Foundation of China began to use donated funds directly to fund primary schools' infrastructure construction, and schools began to be named after individual donors, whether natural persons or corporations. By this means, a donor could identify the final outcome of their donation, and could locate the actual 'beneficiaries' of the donation.

However, this response was not appropriate to attract donations from average people in China, since most of them cold not afford to donate adequate funds to construct an entire school. Their financial ability extended to affording help for individuals to study or complete their compulsory education. The Foundation thus developed another method - the 'one-to-one' education-assistance plan - customized to individual donors. A list of named potential beneficiaries, students "in needy circumstances", was provided, from which donors could choose. Donors could then establish personal relationships with their chosen students through letters and visits. Thus, donors could direct their donations to their preferred beneficiaries. The donated money was still deposited into the bank account of the Foundation and administered by it.

The Hope Project, in its objective and structures, looks rather like a typical common law charitable endeavour. It would likely be validated as a charitable purpose under the Preamble to the Charitable Uses Act 1601 and under the advancement of education head of Lord Macnaghten's *Pemsel* categorisation. It would also likely satisfy the requirements of public benefit and exclusive charitableness, in that, although donors choose to link their donations with named students, those students are not listed with any personal, relationship or

31 *China Youth Development Ltd v The Next Magazine Publishing Ltd* (2000) HKEC 678.
32 Ibid.

employment relationship in mind.[33] They are simply students from particular geographical areas. Further, the students benefit from having their education provided for them, rather than by any personal gift of funds to them.

There is present a 'trust-like' expectation on the Foundation, enforceable presumably by the donor under the terms of the donation agreement. What is a little unclear, however, is what will happen if, in the future, the Foundation changes its constitution or ceases to carry out the public welfare educational projects. Will a donation to the Foundation, as a gift specifically for the Hope Project, or for some other project administrated by this Foundation, be regarded, in so far as it remains unspent, as the Foundation's property? Or will the unspent donation be required to be disposed of to some other qualified donee fund or organization to carry out the same or similar activities? This raises directly the issue whether, under the Law of Donation, a donation, even though required to be processed through a contract or agreement with the donee, is to be understood as exclusively devoted to the relevant project or purpose for which it was given. Under Article 28, discussed earlier, it would appear not.

Suppose that an individual or company donates funds to the Foundation with the express intention of benefiting a person or persons who would not be regarded in the common law as the public or a section of the public, being identified by the donor by virtue of a personal link with that donor. Is such a donation possible? It would appear to be effective, since there is nothing in the Law of Donation that limits donations in the manner in which the common law does by its public benefit test.

Conclusion

Confucian philosophy has remained deeply ingrained in the average Chinese psyche. Confucianism is also the dominant religion throughout Chinese society, although it has no formal manifestation. Confucian thoughts and ideas, centred upon the notion of loving others, have a close and strong affinity with 'the spirit and intendment' of the Preamble to the Statute of Elizabeth I of 1601. Both can be regarded as the fundamental origin and source of the practice and legal structure of charity in two very different legal systems. Confucian ideals can be understood as the spiritual and emotional source of the Law of Donation to Public Welfare Projects of the People's Republic of China, although the methodology and administration of that Law are essentially socialist.

The law of charity in common law countries, despite its origin in a statutory instrument, and despite further statutory additions, is fundamentally found in the

33 The leading cases establishing this requirement are: *Re Compton, Powell v Compton* [1945] Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Dingle v Turner* [1972] AC 601.

development of case law over 400 years. The Law of Donation, on the other hand, is a modern legislative attempt to create a law of charity. It is one part of an overarching socialist legal system. Nevertheless, the Law presents a major internal contradiction. Is the law of charity part of private or of public law? An examination of the Law reveals that it in fact wavers between the two, and is largely unable to deal with important questions such as the nature of a donee’s duties, or of other persons’ rights. Whether or not a trust model can be introduced to aid in the development of a conceptually sound and effective law of charity is debateable. But some such advance would be most beneficial.