

Charity Governance in Hong Kong: Some Legal Questions

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Legal Questions

- Definition of Charity: charitable purposes
- Political Purpose and Political Activity
- Composition of the Charity Commission

Charitable purposes

A charity must be established "for purposes which are exclusively charitable according to law".

Inland Revenue Department, A Tax Guide for Charitable Institutions and Trusts of a Public Character (revised ed Sep 2010) at http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

Charitable purposes

Charitable purposes are defined by common law:

- the relief of poverty;
- the advancement of education;
- the advancement of religion: and
- other purposes of a charitable nature beneficial to the community not falling under any of the preceding heads.

Special Commissioners of Income Tax v Pemsel [1891] 3 Tax Cases 53, at 96, per Lord Macnaghten.

Charitable purposes

"The advancement of **human rights**, conflict resolution or reconciliation"

*The Sub-committee has no difficulty with the proposition that the advancement of human rights can well be charitable. We note, however, the view that there is a need **to distinguish charitable from political purposes** and the difficulty of defining the distinction. We invite comments specifically on whether this particular category should be included in the statutory definition and how it should be defined.*

Article 4 of the Basic Law

The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law.

Article 39 of the Basic Law

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

Charitable Purpose ≠ Political Purpose?

"[A] trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because **the court has no means of judging whether a proposed change in the law will or will not be for the public benefit**, and therefore cannot say that a gift to secure the change is a charitable gift."

Bowman v Secular Society Ltd [1917] AC 406, at 442. , per Lord Parker of Waddington

Charitable Purpose ≠ Political Purpose?

"[T]he court will not regard as charitable a trust of which a main object is to procure an alteration of the law of the United Kingdom for one or both of two reasons: first, **the court will ordinarily have no sufficient means of judging** as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would **usurp the functions of the legislature.**"

McGovern v Att-Gen [1982] Ch 321, at 336, 337, per Slade J

Charitable Purpose ≠ Political Purpose?

Special Considerations in Hong Kong's constitutional order:

- Hong Kong has a bill of rights
- The courts of the HKSAR have the power to review the constitutionality of legislation enacted by the Legislative Council

Charitable Purpose \neq Political Purpose?

"(1) Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes falling within the spirit of Lord Parker's pronouncement in *Bowman's* case can never be regarded as being for public benefit in the manner which the law regards as charitable.

(2) Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country."

McGovern v Att-Gen [1982] Ch 321, at 340, per Slade J

Charitable Purpose \neq Political Purpose?

only purpose
v.
primary purpose

Charitable Purpose \neq Political Purpose?

express purpose

v.

implied purpose

Charitable Purpose \neq Political Purpose?

purpose

v.

activity

(implied purpose
inferred from activity)

Political Purpose & Political Activity

“Speaking out: Guidance on Campaigning and Political Activity by Charities” (CC9),
The Charity Commission for
England and Wales

Political Purpose & Political Activity

- To be a charity an organisation must be established for charitable purposes only, which are for the public benefit. An organisation will not be charitable if its purposes are political.
- Campaigning and political activity can be legitimate and valuable activities for charities to undertake.

(CC9)

Political Purpose & Political Activity

- However, political campaigning, or political activity must be undertaken by a charity only in the context of supporting the delivery of its charitable purposes. Unlike other forms of campaigning, it **must not be the continuing and sole activity of the charity**. policy or decisions either in this country or abroad.

(CC9)

Political Purpose & Political Activity

Campaigning:

• **awareness-raising** and to efforts to **educate** or involve the public by mobilising their support on a particular issue, or to influence or **change public attitudes**.

• also activity aims to ensure that existing laws are **observed**.

(CC9)

Political Purpose & Political Activity

Political activity:

- Activity aimed at **securing, or opposing**, any change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in this country or abroad.
 - It includes activity to **preserve** an existing piece of legislation, where a charity opposes it being repealed or amended.
- (CC9)

Political Purpose & Political Activity

- There may be situations where carrying out political activity is the best way for trustees to support the charity's purposes. A charity may choose to focus most, or all, of its resources on political activity **for a period**. The key issue for charity trustees is the need to ensure that **this activity is not, and does not become, the reason for the charity's existence**.
- Charities can campaign for a change in the law, policy or decisions where such change would support the charity's purposes. Charities can also campaign to ensure that existing laws are observed.

Political Purpose & Political Activity

Aid/Watch Incorporated v Commissioner of Taxation
[2010] HCA 42, High Court of Australia

“The system of law which applies in Australia thus postulates for its operation the very ‘agitation’ for legislative and political changes ...it is **the operation of these constitutional processes which contributes to the public welfare**. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes.

...in Australia there is no general doctrine which excludes from charitable purposes ‘political objects’ and has the scope indicated in England by *McGovern v Attorney-General*. ”

Political Purpose & Political Activity

RE GREENPEACE OF NEW ZEALAND INCORPORATED CIV 2010-485-829, High Court of New Zealand, per Heath J

“Albeit with a degree of reluctance, I feel constrained to apply the full extent of the Bowman line of authority on the basis that I am bound to do so by the Court of Appeal decision in Molloy. In modern times, there is much to be said for the majority judgment in *Aid/Watch*. Unlike Ronald Young J, I have no real concerns that the political system in Australia ought to bring about a different conclusion, having regard to our **mixed member proportional system of parliamentary election, our reliance on select committees to enable policy to be properly debated and the existence of ss 13 and 14 of the New Zealand Bill of Rights Act 1990**, dealing respectively with freedom of thought, conscience and religion, and freedom of expression. I leave that question open for consideration, in an appropriate case, by the Court of Appeal or the Supreme Court.”

Political Purpose & Political Activity

political activities
to an extent



Inferred that a political purpose
becomes an implied purpose of the
organization



The only purpose of the organization
is no longer the original charitable
purpose

Political Purpose & Political Activity

- Why the nature of the activity of an organization could change the nature of the purpose of the organization?
- Why an organization cannot have a primary and a secondary purpose?
- Why political purpose is not a charitable purpose?
- Why promoting public debates on public issues cannot be recognized as generating public benefit?

Political Purpose & Political Activity

- Whether the constitutional system of Hong Kong should recognize public debate as a public benefit?

Political Purpose & Political Activity

Special Considerations in Hong Kong's constitutional order:

- One country Two systems
- executive-led
- no democratic election
- weak political parties
- bill of rights
- Interpretation by the SCNPC...

Political Purpose & Political Activity

s. 2, Societies Ordinance:

"political body" (政治性團體) means-

(a) a political party or an organization that purports to be a **political party**; or

(b) an organization whose principal function or **main object is to promote or prepare a candidate for an election**;

Political Purpose & Political Activity

A narrow meaning of political activity for Hong Kong:

“to further the interests of a particular political party or to promote or prepare a candidate for an election”

Composition of Charity Commission

UK Charity Commission: Membership

- (1) The Commission shall consist of a chairman and at least four, but not more than eight, other members.
- (2) The members shall be appointed by the Minister.
- (3) The Minister shall exercise the power in sub-paragraph (2) so as to secure that—
 - (a) the knowledge and experience of the members of the Commission (taken together) includes knowledge and experience of the matters mentioned in sub-paragraph (4),
 - (b) at least two members have a seven year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990, and
 - (c) at least one member knows about conditions in Wales and has been appointed following consultation with the National Assembly for Wales.
- (4) The matters mentioned in this sub-paragraph are—
 - (a) the law relating to charities,
 - (b) charity accounts and the financing of charities, and
 - (c) the operation and regulation of charities of different sizes and descriptions.

Composition of Charity Commission

s 3 Judicial Officers Recommendation Commission

- 1) There is hereby established a Judicial Officers Recommendation Commission, which shall consist of—
 - (a) the Chief Justice, who shall be the Chairman;
 - (b) the Secretary for Justice; and
 - (c) 7 members appointed by the Chief Executive of whom
 - (i) 2 shall be judges;
 - (ii) 1 shall be a barrister and 1 shall be a solicitor, each holding a practising certificate issued under the [Legal Practitioners Ordinance \(Cap 159\)](#); and
 - (iii) 3 shall be persons who are not, in the opinion of the Chief Executive, connected in any way with the practice of law.
 - (1A) Before making an appointment under subsection (1)(c)(ii) the Chief Executive shall consult the Bar Council of the Hong Kong Bar Association regarding the appointment of a barrister and the Council of the Law Society of Hong Kong regarding the appointment of a solicitor.
 - (1B) When consulted under subsection (1A) the Bar Council of the Bar Association may recommend any barrister to the Chief Executive for appointment and the Council of the Law Society may so recommend any solicitor, but the Chief Executive may appoint a person other than a person so recommended.