The Charity Law and Practice Review

THE CHARITABLE TRUST IN ENGLISH, FRENCH AND MAURITIAN LAW

S Bhoushan Domah[1]

Mauritius: Country Profile

Mauritius is a small island lost in the Indian Ocean. It is 35 miles by 45. The island was discovered by the Dutch in the late 16th century. They did not enter possession of it until 1598. It had no indigenous population, such that human life was literally planted in the island over the ages. About three hundred slaves were landed on the island but, after they had exploited the timber and exterminated the Dodos, the Dutch decamped. The French then moved in on the still uninhabited place and, by 1710, they began to manifest a determined interest to occupy. They indeed set up an initial administration which they soon handed over as a concession to the East India Company.

The French interest in the place was less selfish. They brought along their families and relations as administrators, transported slaves to work in the fields and, after the abolition of slavery, indentured labourers mainly from Asia and Africa: Hindus and Muslims from India, and negroes from Africa. A small community of Chinese from China also landed to carry out trade.

The law they proclaimed was the law then applicable in France which later evolved into the Code Civil des Français, which in turn culminated into the well-known Code Napoleon. They set up their own system of Courts.

In 1810, however, in an armed confrontation with the British, France was forced to capitulate.

Article 8 of the Act of Capitulation signed between the two powers specially provided that the religions, laws and customs of the inhabitants shall remain untouched by the new colonisers. Indeed, the new Napoleon Codes were not introduced in the island until 1831 and 1832.

But - and this is where the dualism of our system can be traced back to - the British were not at ease with the inquisitorial continental system even if the dispute still continued as to the extent of their commitment for the preservation of the already existing laws. Any inevitable modification of the system had to be piecemeal. They soon introduced the law of evidence to apply to a system of law that knows no law of evidence as such. They also converted legal process into the accusatorial method

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[1] S Bhoushan Domah, Doctor-in-Law and D E S (Aix-Marseille University) LLM, LLB (London University), Barrister (Middle Temple), President, Intermediate Court. Lecturer, Faculty of Laws, University of Mauritius. Nuffield Fellow 1994.
Tel: (010) 230 454 4920 Fax: (010) 230 464 8500.

and eventually altered not only the court structure but the court's appellation and competence. Judgments henceforth were no longer in the cryptic French style but in the lengthy English law style started and brought under the name of the King. The Courts were also given powers to give judgments in Equity. Indeed, where sometimes amendments had to be done to the French Codes, they were done in English by statutes in English style.

The result is that, today, this is how hybrid Mauritian law is: a major part of our civil as well as criminal law is mostly continental with its adherence to modified versions of the French Civil Code, the French Penal Code, the Code de Commerce and the Code de Procédure Civile. At some places, where these have been modified, there has been an importation of English law: for example, conspiracy in criminal law and the Rules of Court in civil law, etc. On the other hand, laws related to trade and shipping, finance and banking, companies and commercial activities, and bankruptcy and Bills of Exchange are mostly British with live and semi-live vestiges of old French law.

Despite the fact that our laws concerning transactions and operations by legal persons are all inspired of the latest available in the common law world and we have a Companies Act 1983 borrowed from the New Zealand model, that has not prevented the existence of certain forms of partnerships which are typically French in origin, nature and operation: les sociétés civiles, les sociétés commerciales, ou les sociétés en commandite, etc.

Our Constitution is based on the Westminster model. We have not adopted the French divide between private law and public law. We have not inherited from the French their system of Conseils d'Etat and therefore our administrative law is typically British.

Our law of property is basically French. For that reason, conveyancing, wills, donations, hypotheques, mortgages, etc, are transacted under French law by the notaries. Even if we do have a Court of Equity, we do not have a common law concept of trust.

With increased economic activity, Mauritius has set up various economic and commercial trusts, such as unit trusts, that now operate along the principles of English law on the matter. But philanthropy is undertaken according to the French system. Nonetheless, we still can and do create private trusts either under the common law before a Notary, by methods of public registration or we may exist "de facto" as a "société de fait", with all the risks which that involves.

Charitable Trust: The French and the English Methods

The Frenchman is considerably mystified by the generic method by which English law gives effect to charitable pursuits in England. The Englishman, on the other hand, is intrigued as to the excessive formalism involved in the implementation of charitable intents in French law. The Mauritian legal system, with its hybrid English and French law, seeks to obtain its "bien oú il le trouve", sometimes in French law and lately in English law.

In English law, the legal structure providing a trust relationship is basically independent of government intervention and is a dynamic symbol of social freedom. On the other hand, French law on social and voluntary work of citizens is characterised by a prior approval, involvement and part control by the State.

A charitable trust, in English law, is more of an "institutional" activity than a corporate one. On the other hand, in France, charity work is undertaken within the traditional framework of more or less standard corporate techniques. In Mauritius, it is a combination of both the French and the English, though it is more French than English.

The English Charitable Trust and the French "Patrimoine Affecté"

The French likens an English charitable trust to the French notion of "patrimoine affecté", i.e., property which does not belong directly to a person but is constituted as an independent estate (patrimoine) entrusted to certain human or moral persons for a dynamic purpose.

The fundamental distinction between equity and law of the English system is very foreign to French jurists. The latter are at pains to understand that there can be a separation of ownership between legal interest and beneficial interest over a property.[2] Yet, to the Mauritian as well as the Englishman:

> "the principle is a very simple one. A man may transfer his property, without valuable consideration, in one of the two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised ... constitute himself a trustee ... and declare that he will hold it from that time forward on trust for the other person."

A typical illustration where the difference of approach in English law and French or Mauritian law, for that matter, is where a son, with his own money and with the tacit approval of the father, has raised a house over the property of the latter. The French Code has rationalised the principles within a strict legal framework: the son has a "droit de superficie"[3] and the father is bound by it as long as the house stands.[4] English law, on the other hand, has looked at it from the point of view of equitable estoppel.[5]

History of the Difference between the Two Approaches

This difference of approach between French law and English law can be traced to a very early date: in their 16th century historical development, more especially in the

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2 *Richards v Delbridge* [1874] LR 18 Eq 11; 43 LJ Ch 459; 22 WR 584.

3 Alex Weil, droit civil, Les Biens, para 693.

4 Article 553-55 of the Mauritian Code; cf arts 553-555 of the French Codes; see also *Bhoglah v Bhojee* 1925 MR 87; *Ally v Ally* 1932 MR 126; *Gopy v Mahess* 1941 MR 111; *Mathoora v Zuffoor* 1982 SCJ 113; *Darsun v Darsun* 1982 SCJ 418.

5 *Ives (ER) Investment Ltd v High* [1967] 2 WLR 789.

difference of the nature of struggle between the Church and the State. When two elephants fight, while some forms of grass underneath get crushed, others develop a resilience.

The Beginning of English Charity Law

For England, the period of emergence of the notion of secular charity may be seen towards the end of the Reformation of Henry VIII.[6] Before the Reformation, charitable gifts were not so often constituted as independent entities but were rather donated directly to religious bodies. The whole system of charities of the middle ages was administered by the Church. Bequests for the relief of the poor were placed in the hands of the clergy and donations were given to clerical managers.[7]

The paradox came to be recognised that, even if charity was part of the Christian doctrine, benevolent donations to the Church did not necessarily do good to others; that it swelled only the chests of ecclesiastical institutions.

When the Reformation suppressed the monasteries, their property was transferred to the King.[8] As law began gradually to replace religion, charity in England became an independent institution with trusteeship as its juridical basis. Charity became a secular activity. Thus, instead of making a direct or conditional gift to a religious body, the property was given on trust. The donated patrimony became trust property; and was to be administered separately. A legal or human person was trusted by the donor - he became the trustee. There was a specific purpose: these were the objects. They were intended for specific persons or class of persons: the beneficiaries.

Charity Law: A Secular "Religion"

Charity law, in this sense, quickly emerged as the new "religion", and may be evolving today as the "world religion".

> "It would be hard to over-estimate the importance of the function which may be performed by such trusts and therefore the responsibility which rests upon the trustees' shoulders. They are perhaps the only agencies which at the present day are able to survey the whole field of social action, to assess where unmet needs exist or where there is over-lapping or a no-man's land, to inspire voluntary organisations to greater co-operation, to new endeavour or to reform the old methods to meet new situations". [9]

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6 Escarra, *Les fondations en Angleterre*, p 75.

7 *The Cambridge Modern History*, Vol II, p 108.

8 27 Henry VIII (1535) c 28; 31 Henry VIII (1539) c 13.

9 Report of the Committee on the Law and Practice Relating to Charitable Trusts, 1952 (Cond 8710) ("the Nathan Report") para 59.

Indeed, already in 1952, The Nathan Committee reported the existence of about 110,000 charitable trusts.[10] They administered a vast amount of capital, in addition to considerable holdings of land. These 110,000 trusts held stock and securities to the order of £200,000,000.[11] New charitable trusts were still being founded at the rate of about ten a week.

Presumably, this International Charity Conference could be the forum for up-dated statistics on the matter.

Continuing Influence of Religion

Call it religious, humanist or social, but it is quite remarkable that charity law is considerably influenced by religious thinking. While the starting-point of law is a set of rights, the starting-point of charity law is a set of duties and responsibilities.

The trustee of a charitable trust is under duties of a fiduciary nature: a duty efficiently to administer the property, a duty not to delegate, etc. These duties are enforceable in a court of Equity. In case of fraud or breach of trust, trust property may be followed into its product, or into the hands of persons who acquired the property without paying valuable consideration or with knowledge of a breach of trust.

The History of the French Law of Charity

The French have placed charitable donation as falling within a traditional legal frame-work: it involves prior government approval, clear definition of objects, (however narrow, provided it is of some importance), state registration and control. The English, on the other hand, could constitute charities informally.

Yet state intervention, supervision and control, even in English law, has not been non-existent. Statute law has played an important role in the development of the English law of charitable trust, right from an early date, though not as overwhelmingly as in France. Thus, in the Charities Act 1960[12], central authorities, such as the Charity Commission and the Minister of Education, have been vested with extensive powers: they can decide as to whether a particular charitable trust is any longer an institution perpetuating the charitable intentions of an individual and whether it is not merely a colourable device to decentralise the administration of public funds.

In France, on the other hand, as the Reformation did not have much effect on the status of the Church,[13] both the spirit and the technique continued the same and little changed in the charitable system of the Middle Ages, administered as it was by the

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10 Ibid, para 545.

11 Ibid, para 545(h).

12 8 & 9 Eliz II c 58.

13 Olivier-Martin, *Histoire du droit français*, p 494.

ecclesiastical bodies. The Church continued its managerial monopoly of charity. Charitable gifts had first to be the property of ecclesiastical bodies before the benefits could be passed on to beneficiaries. The creation of independent entities was thus short-circuited. Hence, whereas in 17th century England religion had become a *species* of charity, in France religion and charity were more or less institutionally confounded.[14]

This led to a situation, in France, where there was political antagonism as much against charity in general as against the Church itself. On the other hand, in England, charity was welcomed as charity with a new departure, with the disestablished Church.

Thus, while in England the trust device was responsible for the proliferation of charity, in France the Church continued to accumulate everything. The consequent economic paralysis of the country can be gauged by the fact that the estate of the Ancient Regime was as much as one fifth of all lands in France. It also possessed other sources of income of immense value.[15] All this property, beside being denied to the open market, was seriously mismanaged.[16] This was the state of affairs even at a time when many congregations had dwindled:

> *"Elles ... ne comptaient plus qu'un nombre insuffisant de membres pour réunir le chapitre qui devait nommer l'abbé ..."*[17]

No wonder then that the French *fondation* was not well looked at by the elite of 18th century France.[18]

> *"...de quelque utilité que puisse être une fondation, elle porte dans elle-même un vice irrémédiable qu'elle tient de sa nature, l'impossibilité d'en maintenir l'exécution ... Presque toutes les fondations anciennes ont dégénéré de leur institution primitive. Alors le même esprit qui avait fait naitre les premieres en a fait etablis de nouvelles sur le même plan ou un plan différent, lesquelles après avoir dégénéré a leur tour sont aussi remplacées de la même manière. Par ces doubles et triples emplois ... la somme des fonds retirés de la circulation générale s'augmentent continuellement ..."*[19]

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14 "Il n'y avait guère alors que des fondations ayant un but réligieux, des fondations en vue d'établissements eccclésiastiques .." (Esmein, Bull, Soc d'Etudes legisl [1909] p 98); see also Sauvel, "Les fondations" 60 Rev de droit publ et Sc. polit [1954] 325, 330).

15 Sagnac, *La législation civile de la Révolution*, p 155 seq; Garaud, *La Révolution et la propriété foncière*, p 309.

16 An alienation had often to be approved by a number of different authorities; cf for example, Imbert, *Les hôpitaux en droit canonique*, p 75-76.

17 Bull Soc d'Études legisl (1909), p 103 (dixit Barboux).

18 Turgot, (see below), French statesman: viz *The Encyclopedie. The Encyclopedie* is a standard work of the age and a mirror of late 18th century ideas.

19 Turgot, *Oeuvres avec notes de Dupont de Nemours*, p 301-302.

Before the Revolution, efforts had not been made to stop the accumulation of property in the hands of mortmain.[20] The first reaction can be traced to 1749 (unfortunately only forty years before the Revolution!) with the promulgation of the "*Edit d'août*", identical to the English Statute of Mortmain (1736) and, according to Saleilles, inspired, indeed, by the latter.[21] The main problem with this edict was that it attempted to regulate future dispositions and left untouched past accumulations.

Indeed, along with other eliminations, the French Revolution also brought down the French charitable system. Between 7th November 1789 and Brumaire 18, An II, the number of statutes reached 12, the effect of which was to expropriate property from the hands of ecclesiastics, with consequent decimation of the majority - but not all - of the only type of charities that existed in France: charity through the Ecclesiastics.[22] A few of them still survive to date.[23]

The French, with their formal attitude to law, could, with difficulty, cope with the notions of Equity and Trust as obtained in English law. Equity and Trust became a dynamic way of organising the national economy towards a concept of welfare state, in England.

> "Four centuries ago, England could accomplish through its trust what in France one was still unable to do in the eighteenth, or even the nineteenth century."

Even the most approximate notion of "patrimoine affecte" was a difficult concept for the French lawyer. This is Saleilles:

> *"... la difficulté de construction se retrouve partout où il y a une propriété d'affectation; et cela tient encore à la vieille théorie d'une fiction de personnalité. Cette théorie qu'on acceptait si facilement en matière de groupements collectifs et d'associations, a toujours paru plus étrange ... dans son application aux simples patrimoines*

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20 De Ferron, *d'Agnuesseau et les gents de mainmorte*, p 28-30.

21 Saleilles, *De la personnalité juridique*, p 224; the French Statute, however, was mainly directed against the religious congregations, while the English Statute was passed for purely economic reasons. "Le Statut de 1736 consacrait l'inévitable réaction qui devait suivre le developpement trop intensif d'une institution bienfaisante: c'etait une mesure de sécurité économique; l'Edit de 1749 consacrait la premiere phase d'une lutte puissante contre la fortune de l'Eglise: c'était une mesure de sécurite politique. Il y a une forte nuance entre les deux". (Escarra, *les fondations en Angleterre*, p 107).

22 Fenelon, Les Fondations et les établissements ecclesiastiques, p 66.

23 The fear of mortmain is deeply rooted in French law. We find it not only reflected in the hostility against fondations and associations, but also in many other branches of the law. Von Gierke had clear sense of its depth and power. Comparing with German law, he wrote "La crainte de la mainmorte n'a t'elle poussé chez vous de racines trop profondes ... Remarquez, par example, que votre Code civil, en matière héréditaire, interdit toute substitution, tandis que nous avons consacré dans la nôtre la succession, en sous-ordre. Nous sommes loin d'avoir un droit de réserve aussi rigoureux que le vôtre, et nous ne connaissons pas votre partage forcé entre cohéritiers. Nous avions nos fideicommis de famille et notre succession paysanne au profit de l'heritier désigné ... nos fondations de famille." (Letter by Von Gierke addressed to the French Society d'Etudes legislatives, which had asked for his advice when discussing a proposal for the introduction of a fondation-technique in France; cfr Bull de la Soc d'Etudes legislatives [1907] p 70, 76).

> *d'affectation. C'est que là ... où il y a association, il y a pour expliquer ou pour supporter la fiction de personnalité, des individus vivants ... Mais dans une fondation existant en dehors de tout groupement collectifs, il n'y a plus derrière aucune collectivité d'êtres réels ...*"[24]

The French approach was, therefore, more formal, if for that reason, inhibitive. Charity, of necessity, ought to find its validity in the "droit positif". The French had rather built their notion of charity within the conventional legal framework of "fondation" and "association".

In contrast, the effect of the Reformation in England, Germany and the Netherlands was a disassociation of the charitable system from the Church. Thus, in these three countries the charitable trust, the *Stiftung* and *Stichting*, developed as concepts independent of the law of contract.[25]

The French and Mauritian Fondation

It should be noted that in French law, unlike in English law, a contract can be struck between two parties, even if there has been no consideration. That is so in Mauritian law as well, as we have inherited the French Civil Code. All that law requires is the formalities for a contract, provided the substance thereof is licit.

> *Art. 1101: Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelquechose.*
>
> *Art. 1108: Quatre conditions sont essentielles pour la validite d'une convention:*
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> *le consentement de la partie qui s'oblige;*
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> *sa capacité de contracter;*
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> *un objet certain qui forme la matière de l'engagement;*
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> *une cause licite dans l'obligation.*

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24 Saleilles, Bulletin de la Société D'Etudes législatives (1909), p 110.

25 As concerns the German Stiftung, see: Pleimes on Stiftungsrecht: "das recht der selbstandigen Hauptgeldstiftung hat die Wissenschaft des 16 and 17 Jahrunderts im Deutschland selbstandig ausgebilder ... Dass diese dogmatische Entwicklung im gang kam, war die Folge eines einmaligen Ereignisses, der Reformation ..." (Pleimes, *Irrwege de Dogmatik im Stiftungsrecht*, p 21-22). In the Netherlands, the stichting still falls short of the far-reaching development known in Germany and England: "Peut-être qu'au Pays-Bas on serait parvenu à des conceptions plus nettes si l'évolution n'avait pas été coupée par la Revolution française." (Feenstra, op cit p 262-263).

Hence, while English law had recourse to the concept of trust to admit at common law a legal obligation for a donation, French and Mauritian law deal with it by way of contract.[26]

> *"Le droit comparé enseigne que certain systèmes juridiques ne conçoivent pas le contrat autrement qu'à titre onereux. Ainsi le common law recourt à d'autres techniques que le contrat (le trust) pour les actes à titre gratuit."*[27]

The term that came to be used for charitable donations was *fondation*. But it had, by law, after the Revolution, to be effected in a formal way.[28] A fondation, dependent as it was upon the legislative will, had to be first approved as a charity, to become a valid "fondation".

The legal growth of charity, in France, then, as well as differing from that in England also differed from those in Germany and the Netherlands. In Germany, charitable trust goes by the name of *Stiftung*, while in the Netherlands it is called *Stichting*. Similar to the trust of English law, they insist upon the existence of both the separate fund and that of independence of the natural or legal person entrusted with the administration of it.

Constitution of Charity in French and Mauritian Law

There are two methods, basically, of constituting charitable trusts in France: either through a *donatio sub modo* or through incorporation of the gift of "association". Mauritius has inherited both these methods.

To create a "fondation", one declares to the public authorities that one offers the property indicated for such and such a purpose asking at the same time that the public authorities approve and create a special legal person in order to accept the gift and carry out the fondation.

On the other hand, a *donatio sub modo* or a third party stipulation is where a trust-worthy individual or legal person is given charge to do something specific "*a titre gratuit*": for example, a gift to a university with a charge to award annually a prize of some sort.

Both these methods, it should be noted, suffer from one failing or another, compared to the English trust, German *Stiftung* and the Dutch *stichting*. In the case of a *donatio sub modo*, the charitable gift may not be specifically enforced. Moreover, in the case of an "association", its very existence is dependent upon the goodwill of the legislature.

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26 See also: Maurice Tancelin, *Théorie du Droit des Obligations*, Les Presses de l'Universite Laval, Québec, 1975, para 29.

27 Ibid, para 29.

28 Hauriou, *Précis de droit administratif*, p 271, contra: Font Reaulx, "Les fondations", Trav. de la semaine internat de droit, p 61.

Inasmuch as there still exists in France no trust-like technique, and charitable enterprises must be created in a formal way, there have been attempts to introduce a specific *fondation*-technique, but in vain.[29] Theoretically simple as it might look for the French *Assemblée* to pass a statute introducing a concept similar to the German *Stiftung* or a law of charitable trusts of the English type, in practice, the French are uncomfortable with such a regime as foreign to their idea of how their Codes should work. It is also said that they are not so much afraid of mortmain, as of the very many small or eccentric *fondations* which a liberal *fondation*-technique might bring.

Mauritians are quite used to the system of trust, having studied it in English law schools. They, on the other hand, are quite ill-at-ease with the French way of running charity work. For this reason, whereas our legal system could not admit the English law of trust until recently, such a possibility is becoming more and more real with the recent introduction of unit trusts in our law. Many charitable organisations also exist on a "de facto" basis. And some that are formally set up under the French method are allowed almost entire autonomy of action because of our English institutional traditions.

All is certainly not wrong with the conventional formal manner in which French charity laws work. To their credit, even in England, charitable trusteeship, fast becoming a para-state organism, is reshaping itself with a popularity for formal incorporation and a demand for some legislative control.

Techniques of the French or Mauritian Fondation

The setting up of a *fondation* involves obtaining a priori approval of the public authorities. It follows that the public authorities give, on approval, to the project a special legal personality, which permits it to accept the gift in question and carry out the objects of the *fondation*.

It is the general principles of private law that determine its operation. Its execution rests entirely in the hands of the contracting parties or their successors; there is no supervising authority.

The second method is diametrically opposite: the public authorities not only approve the constitution but also retain rights of supervision and control. From this point of view, the *via media* struck of the English law of trust between the two French extremes is of great significance: English law has opted for voluntary action with only limited, if relevant, state control.

English law has also espoused the principle of privity of contract, being averse to a "*jus quaetium tertio*" arising by way of contract.[30] Such a right can only be conferred by way of other devices such as a trust. On the other hand, in French law, a "*stipulation pour autrui*" is an accepted principle in its law of contract.

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29 Proposal discussed by the Société d'Études legislatives, crf Bull Soc (1909), p 433; Government proposal in 1919; Proposal discussed by the Académie de Législation de Toulouse, Bill de la Soc (1920).

30 Lord Haldane, in *Dunlop Pneumatic Tyre Co Ltd v Selfridges* [1915] AC 847, HL

The interpretation of the courts, in fact, of a third party stipulation is *sui generis* and quite liberal. Beneficiaries have to be certain and they have a right to sue on the obligation, so long as they have expressed an acceptance.[31] However, this method of setting up a charitable trust has its limits. The beneficiaries in a trust relationship are not always certain at the moment of constitution and, for that reason, are unable to express an acceptance so that this method excludes one category of charitable trust, the beneficiaries of which are not yet certain or are unable to indicate their agreement. It also is a vulnerable type of trust in that the founder may change his mind and revoke the donation.[32]

The next difficulty is that the property subject to the *fondation* becomes the property of the holder or intermediary party and mixes with his own property.[33] The obligation of the intermediary party is a "*personal*" one towards the beneficiaries as well as towards the stipulator. The result is that when the intermediary party becomes bankrupt, beneficiaries and stipulator become ordinary creditors. On the other hand, when the property disappears by accident, the burden falls on the intermediary party who must make whole the charity with his own money.[34] When he dies, the obligation passes to those who accept his estate.

In cases of fraud or of the refusal to act by the intermediary party, effective remedy against an intermediary party who does not conform to the conditions of the gift is deficient. For example, when he diverts property from the purposes for which it was given, none can specifically enforce the obligation: it is an obligation "to do" (*l'obligation de faire*),[35] and in French law "*neminem potest cogi ad factum*".[36] The only remedy available is either to sue the intermediary for damages or to revoke the gift.

Next, after death of the founder, it is open to the heirs on whom the gift devolves to revoke the benevolence. French jurists very much envy the English system of obligations of trustees and propose, for the French system, the setting up of some form of institutional supervision: for example, by the public authority which would see that the will of the stipulator is executed, and that the benefits intended for the

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31 Contra: modern doctrines cf. De Page, Traite, vol II No. 676 seq.

32 In order to prevent this, a public authority such as the City Council is allowed to accept the gift in the name of all possible beneficiaries (Fenelon, op cit p 215).

33 Lepaulle, *Traité théorique et pratique des trusts*, p 258.

34 Truchy, *Des fondations*, p 306; Fenelon, op cit p 202-204.

35 Viz art 1126 of the French Code and same number of the Mauritian Code.

36 A solution is to give judgment for damages against the unwilling intermediary in favour of another who has obliged himself to carry out the fondation as stipulated; as was decided by the Court to Appeal of Lyon: "... Lorsqu'un hospice a accepté un legs avec la condition de prendre à sa charge à perpétuité un certain nombre d'orphelins appartenant à une commune, si la commune, contestant le mode d'exécution adopté pour l'acquittement de cette clause, demande à executer elle même la fondation aux frais de l'établissement légataire, les juges peuvent ... transformer l'obligation de l'hospice en une prestation pécunaire envers la commune, que celle-ci devra employer au mieux de l'interêt des orphelins ..." (Lyon, 29th Avril 1853, D P, 1854, II, 187).

beneficiaries are not diverted because of fraud or conspiracy among the heirs of the stipulator and the intermediary party.[37]

The weakness of the French system can also be overcome by the creation of a fondation by way of a third party stipulation, by choosing as intermediary "*une personne morale*", that is, a legal rather than a physical person. This method ensures more continuity, and to some extent diminishes the risks of fraud or conspiracy with the heirs. But the difficulty with this method is that the approval of the government is necessary, since according to arts 910 and 937 of the Civil Code, a legal person cannot accept a gift for benevolent purposes without government approval.[38]

It should be noted that a *fondation*, unlike in English law, need not be necessarily for "public benefit". The only limitation to the constitution of a charitable trust under this method is that it should not be against "ordre public".

French and the Mauritian Law and the Cy-Près Doctrine

In the French Law and consequently the Mauritian Law of charity, there is no "cy-près doctrine" as such. Thus, when the purpose of the fondation, because of change of circumstances, can no longer exactly be given effect to, there is an automatic reversion to the heirs of the founder. The gift cannot be channelled to analogous purposes.[39]

Institutional Fondation

The other method for creating a fondation is by way of *stipulation alteri* involving State intervention. This implies recognition of a donation as being of public interest and giving it legislative status. The gift then acquires legal personality and has the status of *établissement d'utilité publique*.[40] Obviously, the will of the Executive has a lot to do with the validity of such an institutional fondation.[41] State recognition is only granted after the government has retained some political and administrative control. It is appropriate where the substance of the fondation is of some proven importance.[42]

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37 Vareilles Sommieres, *Personnes morales*, p 603.

38 Cf Truchy, op cit, p 145.

39 Cf Sauvel, "Les volontés des morts et les difficultés des vivants", 206, Rev pol et parl (1952) p 237; Sauvel is, however, criticised for exaggerating his thesis by neglecting the fundamental distinction between simple condition and the notion of cause impulsive et determinante; cfr cass civ, 30th Novembre 1878, D, 1878, I, 304; cass civ 28th Juin 1887, D, 1887, I, 435; cass req, 29th Novembre 1892, D, 1893, I, 67 cass civ, 12th Mai 1909, J, 1910, I, 291.

40 *Etablissements d'utilité publique* are legal persons of private origin, the activities of which are held to be of general interest.

41 The recognition is made by Décret en Conseil d'état; cf Sauvel, "Les Fondations", 60 Rev de dr publ et sc pol (1954) Conseil d'Etat, livre jubilaire, p 433-445.

42 Truchy, op cit, p 188-189.

The difficulty with this type of *"fondation"* arises when the gift is to be made by will. The method exacts the existence of the legatee at the time of the death of the testator. Since the legal person comes into being only when recognition is granted, and since such recognition is made only after the death of the testator, the bequest is void for uncertainty.[43] One way round this difficulty is to charge the legatee with an obligation to ask for recognition.[44]

The Strengths of the Trust Device for the Voluntary Sector

The "trust" device has shown marked dynamism in the English common law on the matter of giving effect to society's altruistic pursuits in the face of conventional institutional constraints. The juridical trust technique in England was, indeed, a transcendence from the socio-economic-cum-socio-religious conditions of the country.

The civil law approach of formal institutional framework to accommodating the charitable instincts of human society, reflected in the law of France, has been quite the opposite to that in England. In the absence of the trust device, development of the voluntary sector has been quite inhibitive.

The different course of social history in England brought about by the Reformation, with a diversion towards secularisation, which had begun some 250 years earlier than in France, saved England from some of the inadequacies of the French system.

Indeed, had there been in France a trust-like device, French law may well have had to be re-written, with an entirely different twist as much in the field of "fondations" as in many other areas.[45]

The conclusion is inescapable that, in the twentieth century, there is value to be attached to, on the one hand, the freedom of human society to undertake altruistic pursuits and, on the other, state control of such pursuits.

The Limitations of the Trust Device for the Voluntary Sector

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43 Cass, 12th Avril 1864, S 1864, I, 153; cass, 4th Aout 1866, S 1867, I, 61; cass 7th Fevrier 1912, S 1914, I, 305.

44 The application now is generous. As was held by the Cour de cassation: "Il n'importe que le testament ne prescrive pas aux légataires de demander, pour l'hospice la reconnaisance d'utilité publique, si les juges de fait constatent que les légataires pourraient la demander, afin d'assurer la stabilité de leur oeuvre après l'avoir mise en état de fonctionner, l'omission dans le testament d'une clause prévoyant pour l'hospice la reconnaissance d'utilité publique ne vicie pas le legs" (cas civ 12th Mai 1902, S 1905, I, 137).

45 "...et l'on peut supposer que l'histoire de la Révolution eut été différente si, au cours du XVIIIe siécle, l'administration des 'biens d'Eglise' avait su être assouplie. À tout prendre, les fondations, que la nationalisation de ces biens a mises à néant n'y eussent pas perdu." (Sauvel, "Les volontés des morts et les difficultés des vivants" 206 Rev pol et parl [1952], 237, 242).

Voluntary organisations do not rely wholly on the trust device for its operation. Even in England, despite the existence of the trust technique, a number of persons still prefer formal associations for the carrying out of their voluntary work.[46]

An association can in England be formally set up, very much comparable to the French corporate body: the "*association sans but lucratif*".

But, as different from French law, where the divisions of the various ways of running charity work are rigid, English law is flexible.

The Trust and Voluntary Associations in England

It is in this way that the trust enables clubs and societies to operate without being incorporated. The 17th and 18th centuries were times when the process of incorporation was cumbrous and often dependent on the discretion or political prejudices of the Crown. The trust device was quite convenient for engaging property in trust. The difficulties concerning co-ownership, limited liability. power of suing and being sued were all short-circuited by vesting the property in

the hands of trustees for the benefit of the members of the society.[47]

This was the way in which many non-conformist religious, social and political bodies emerged. Many other voluntary associations have used and continue to use the trust concept as the basis of their constitution. Indeed, the number of associations, of which trusteeship is the juridical basis, is impressively large.[48]

Nevertheless, one school of thought is that the trust device for charity work has lost its dynamism in the new socio-economic conditions of our present-day society. Some practitioners are of the view that trust should have been replaced long ago by a more appropriate association system.

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46 Voluntary associations are based on an agreement more or less permanent, whereby two or more persons pool together activity and property, with a purpose other than gain; cf art 1873-28 of the Mauritian Civil Code (infra).

47 The legal position of the members of an unincorporated association has primarily a contractual basis: the constitution of the society, the rules of membership, etc... will have to be regulated by express or implied contracts. The relationship of officers and members rests upon a contract of agency (cf Lloyd, The Law of Unincorporated Associations, p 18-19); contract, however, is a very limited instrument. It cannot confer upon the society the power of suing and being sued, and a stipulation concerning limited liability can have no effect on non-consenting third parties. In order to remedy this, the trust is employed. Trustees are appointed in whom the legal title of the property is vested. The members, instead of being joint owners of the property, have now an equitable interest. For an action which is to be brought in connection with the property, the trustees can sue and be sued without the cumbrous procedure of a representative action (Lloyd, '*Actions instituted by or against Unincorporated Bodies*', 12 Mod Law Rev [1949], 409, 410). The trustee shall also make all transactions with third parties. As such, the position of the members of the club is much more favourable than in the case of agency: an agent, when acting intra vires, may bind the members in an unlimited way; a trustee, however, binds only himself and indirectly the trust fund.

48 Lloyd, 'Actions instituted by or against Unincorporated Bodies', 12 Mod Law Rev (1949), 409.

The advocates argue that English law on the matter of association for charity work relies excessively on trusteeship.

> "... where the law has gone wrong is in failing to evolve a sphere of association law in its own right, instead of trying very largely to seek solutions by an artificial application of the law of contract and ... trusts."[49]

Foreign lawyers echo the remarks of Maitland, when they complain why the English continue to use trusteeship while nowadays incorporation can be obtained off the shelf, as it were, and has many more advantages.

> "Apparently there is a wide-spread though not very definite belief that by placing itself under an incorporated Gesetz, however liberal and elastic that Gesetz may be, a Verein would forfeit some of its liberty, some of its autonomy, and would not so completely be the mistress of its own destiny as it is when it has asked nothing and obtained nothing from the State."[50]

Some practitioners believe that it is a fallacy to suppose that an association is hedged by state control and loses its autonomy of operation. Many associations enjoy an enviable independence of operation, even if formally constituted as an association, independent of trust.

One can understand private dining clubs being run within the legal framework of contract and trust, but one does ask whether important quasi-parastate organisms such as social and professional bodies should be allowed to be so run. Can people with important professional rights be arbitrarily deprived of them because the law on which they became members of the body in question was set up under private law? The London Stock Exchange is a case in point: *Weinberger v Inglis*.[51]

In the case, all the judges of the Court of Appeal agreed that the expulsion of Weinberger was unjustified, but declared themselves unable to interfere on grounds of what they called social or public policy.

The limitations of the trust technique, then, is that, because it forms part of private law as opposed to administrative law, the Courts are disinclined to look at their internal operation. Had there been no trust, the law of associations might have evolved better methods.[52]

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49 Lloyd, `The Law of Associations', *English law in the Twentieth Century*, p 114.

50 Maitland, `Trust and Corporation', Coll pap, Vol III, p 377.

51 *Weiberger v Inglis* [1919] AC 606.

52 More recent decisions seem to take social issues into consideration. Lord Denning in the case of *Lee v The Showmen's Guild* [1952] 2 QB 329, makes a fundamental distinction between ordinary clubs and important professional or trade organisations. In the latter instances, the court nowadays seems to interfere with the proper character of a decision not only with regard to procedural matters but also with regard to the ground of the decision. Cf Lord Denning, loc cit, p 343.

In France, the absence of the trust has pushed the legislature to enact a special law for the operation of voluntary associations, with a show of greater social realism.

In French law, the law of associations is found in "la loi de 1901". This text classifies associations in accordance with the amount of property to which the purposes are linked. Inspired by the fear of mortmain, the law insists on the social importance of the association and state involvement for its validity.

The French Law of Associations

Before the Revolution, the most important and prominent associations known to Frenchmen were the religious houses and congregations. Associations suffered the same fate as "fondations" in the eyes of the philosophers of the Revolution. They were criticised as being a brake on democratic government, with resulting impairment of the "volonte generale".[53] For those reasons, we witness several Statutes, just after 1701, designed to restrict the number and types of associations. In 1810, the new Penal Code instituted a requirement that all associations of more than twenty persons to obtain an authorisation before they could operate as per its Article 291.

Authorisation, which was dependent upon administrative discretion, could be refused or withdrawn *ad nutum.* Under Article 292, it was an offence punishable by fines for any person to provide facilities for meetings where no prior authorisation had been granted.[54]

There was some subsequent relaxation in the law such that eventually was instituted a free *regime* for the constitution of associations selected by its usefulness to the community. By the end of the century, article 291 was enforced only against political bodies. All this was finally abolished in 1901.

Those associations which had been authorised, or which did not need an authorisation because they had fewer than twenty members, were regulated by the general law of contract and co-ownership[55] with all the difficulties that such a system carried.

The special Act of 1901, passed after an agreement had been reached on the status of religious congregations,[56] did better. Mauritius has adopted this method of setting up an association in its article 1873 al. 28 of the Civil Code.

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53 Enc Dalloz, Vo Association, no 2.

54 Since these provisions were penal law and since penal law is to be strictly interpreted and applied, associations who wanted to escape the authorisation requirements divided themselves into a number of sub-units comprising less than twenty persons. An Act of 10th April 1834 stopped this loophole and in clear terms subjected :"...associations de plus de vingt membres, alors même que ces associations: seraient divisées en sections d'un nombre moindre ..."

55 One often adopted the system of Tontine.

56 Maitland, `Moral Personality and Legal Personality'. Sel Essays, p 231; Esmein, *Eléments de droit constitutionnel*, Vol II, p 644 seq.

Setting up and Types of French Associations

The setting up of all such associations is characterised by prior formalities and state intervention and control. The founders, first, make a declaration to the administrative authorities and certain documents must be published in the Journal Officiel upon which the association obtains a special type of legal personality for its operation classed as "*petite personnalité*".[57]

The capacity of this association to acquire and own property is very limited. They are incapable of acquiring any property by gift. Further, they cannot own realty other than the centre of operation and that which is "*strictement nécessaire*" to the accomplishment of the aims of society.[58] This is a suitable method for the creation of a club. Unlike English law, the semi-public character given to the association is immediately perceptible.

However, associations of some importance can employ the alternative method, under the Act of lst July 1901. After they have proved themselves for some time as "*association de petite personnalité*", they can apply to be recognised as "*établissements d'utilité publiques*". This can only be effected by *décret en Conseil d'Etat* and only when the association is considered to be of general interest. The *Conseil d'Etat* will give recognition on the strength of a charter of a standard type which subjects it to administrative control.[59] On recognition, the association has a legal capacity to own and acquire property to a greater extent than before. It may also acquire property by gift, subject of course to administrative approval[60].

A third type of association in French law is the association of "droit commun": operating as it does without legal personality based on the general law of contract and co-ownership. This sort of association has advantages as well as disadvantages. It does not need government approval, is not subject to government control, may be rendered flexible and efficient by the terms of the agreement and is best suited for temporary and modest pursuits. But there is always the problem of suing and being sued. Though the courts seem in recent times to have become more lenient with regard to representative actions, the system as a whole is still unsafe and unsettled.[61] In Mauritius, such an association will sue and be sued in the name of all the members for the time being. One member, then, can represent all the others.

As the system operates in France and Mauritius nowadays, the division between profit-making and non-profit-making organisations provides a basis to separate two classes of institutions to which different rules apply. On the other hand, England as well as the United States have nowadays adopted the corporate technique for the running of many charities and benevolent associations. The result is that non-profit-making organisations can acquire legal personality in the same way as the ordinary

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57 Viz *Mahboob c Rabita-Al-Alam-Al-Islami* 1979 MR 181 and art 1873-29 of the Mauritian Civil Code.

58 Loi du lst Juillet 1901, art 6.

59 Cf Hardoin, *Les apports aux associations*, p 85-86.

60 Art 910, Civ Code, and Loi du 4th Fevrier 1901, sur la Tutelle administrative en matière de dons et de legs; cf Fournier, *De associations a but charitable*, p 84 seq.

61 Cf Enc Dalloz, Vo Association, no 141 & cases cited.

business enterprises. French law, on the other hand, for purposes of incorporation, has continued to make a distinction between "voluntary societies" and "business" enterprises.

Article 1873-28 of our Civil Code provides:

> *"L'Association est la convention par laquelle deux ou plusiers personnes mettent en commun d'une facon permanente leurs connaisances ou leur activité dans un but autre que de partager des bénéfices ou de profiter de l'économie qui pourrait en résulter."*[62]

There is no easier way of incorporating an association in French law. One is tempted to have recourse to business law as in the United States and even England and, therefore, seeks in aid the French *Code de Commerce*. But, a word of warning here: its scope is strictly limited to enterprises whose purpose is gain.[63] Furthermore, voluntary organisations which mistakenly adopt the procedure provided by the Commercial Code do not benefit from any special regime.[64]

Conclusions

An analysis of the systems of law considered above affords us the following reflections:

1. Human philanthropy transcends the body politic in which it is born and regenerates it such that any attempt to confine and contain it within the body politic may not do that body politic much good.

2. On the other hand, inasmuch as human philanthropy is born within the body politic, it has to draw from it to survive so that a balance has to be struck between the two: emergence from State control and intervention by the State.

3. The "trust" technique in English law to regulate the voluntary sector has served England very well so far. It has saved English law from the inhibitions inherent in the French formal system. But it may well need some necessary re-orientation in face of the challenges of the new society of the 20th century. The essence has to be preserved and the old and out-moded abandoned.

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62 Art 1973-30 binds such a body to operate within the civil law of obligations and contract.

63 La société se distingue de l'association en ce qu'elle comporte essentialement comme condition de son existence la répartition entre associés des bénéfices ... Il faut entendre ... par bénéfice, un gain pécuniaire ou un gain matériel qui ajouterait a la fortune des associés ..." (Cass Chambre Réunies, 11 Mars 1919, D P, 1914, I, 257).

64 Cass civ, 20 Octobre 1896, I, 145; cf also cass req, 30 Juillet 1901, S 1905, I, 502; cass, 29 Novembre 1897, D P, 1898, I, 108; trib civ de la Seine, 19 Janvier 1927, D P, 1928, III, 57.

4. On the French side, the existence of only the law of contract and ownership has forced French law to have recourse to State intervention, with the consequent loss of apolitical image, autonomy, enterprise and initiative.

5. State intervention may not be an evil in all cases, in that in appropriate situations, especially where the constitutional structure is properly manned, the confidence of the general public may be better acquired.

6. There are benefits to be gained from State involvement in the setting up of charitable trusts. But there is also the danger that a society may not be able to transcend the here and the now of politics and consequently the human society in question may not emerge at all.

7. At a time when concepts of human rights and human duties are being increasingly canvassed, the role of the voluntary sector should consist in standing aside from and foreseeing state action, or inaction, in the interests of the individual.

8. The role of the voluntary effort, its vantage position to overview state activity, working as it does from the actual social need of the individual, its ability to set new standards or to undertake new work of its own volition, its ability to pioneer for the disadvantaged, to work outwards from the individual and render democracy safer cannot be over-emphasised.[65]

9. For multi-racial, multi-lingual, multi-communal Mauritius, where all things are politicised and which has fast developed economically without a proportional development in its intellectual thinking and emergence, the voice of the voluntary organisation is a crying need, the more so in its present-day conditions of economic success amidst relative intellectual poverty.

10. The Mauritian adherence to the French system of undertaking charitable pursuits may not be adequate. A re-orientation in our hybrid system is highly desirable.

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[65] Nathan Report, para 55.

EDUCATION MATTERS

Debra Morris[1]

Two cases of interest, both relating to school closures, have been reported in 1994. The first, *Marchant v Onslow,*[2] concerned interpretation of provisions relating to reverter of school sites. In the second case, *Gunning v Buckfast Abbey Trustees Registered*[3], the issue of interest to charity lawyers was who may bring charity proceedings. Details of the new Inland Revenue concession concerning the Reverter of Sites Act 1987 have also been announced and will be outlined.

Marchant v Onslow

Before looking at the case itself, it may help to provide some background information concerning the Reverter of Sites Act 1987.

School Sites Act 1841

In the early 19th century, before the provision of schools by the state, schools were generally endowed from private sources. In order to facilitate and thus encourage private landowners to donate land for this charitable purpose, the School Sites Act was passed in 1841. This provided a simplified and cheap form of conveyance for sites of up to one acre for schools and school teachers' houses out of a landowner's estate or manor. Under this Act, conveyances included the proviso that if the land ceased to be used for the purposes for which it had been granted it would immediately and automatically revert to the grantor. Further Acts were passed which both explained and extended the provisions of the 1841 Act, and the right of reverter was retained.[4]

The exercise of the right of reverter has, in the past, given rise to complex problems, concerning the nature of the interest of the trustees once the site ceased to be used for the specific charitable purposes. These problems were caused by conflicting provisions in the Law of Property Act 1925. This may cause particular problems if no reverter claim is actually made, which is not inconceivable if the trust was set up

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1 Debra Morris - Lecturer in Law, University of Liverpool PO 147, Liverpool L69 3BX. Tel: (0151) 794 2825. Fax: (0151) 794 2829.

2 [1994] 2 All ER 707.

3 (1994) *The Times*, 9th June.

4 Similar Acts were enacted in order to encourage the donation of sites for the provision of churches, and libraries and museums. See Places of Worship Sites Act 1873 and Literary and Scientific Institutions Act 1854.