CHARITY IN ROMAN LAW: ROOTS AND PARALLELS

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Most developed cultures subscribe to the notion that duty to one's fellow men requires money to be devoted to various purposes which are for the public benefit. It is salutary to remind ourselves, wrapped up as we are in our Anglo-Saxon cocoon, that English law has more in common with Roman Law and practice in this sphere than is usually conceded by the commentators. This is a point which lawyers throughout the European Community would also do well to remember when confronting our framework of charity law.[2]

Equally when explaining or justifying various features of our system of charity law to European lawyers it is sometimes appropriate (and in some cases important) to refer to Roman law with which many Continental systems have affinities. An appeal to the similarities and parallels in Roman law can diplomatically persuade our European brethren that the English law of charities is by no means an Anglo-Saxon aberration.

The similarities and parallels should not, of course, be exaggerated. Moreover, a short survey of the kind attempted by this article obviously cannot aspire to any kind of scholarly discussion of the type which Roman lawyers[3] and ancient historians have already essayed.[4] Nevertheless it is hoped that it will be found useful if the main

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2 This article is an expanded version of a paper presented to a Seminar on Charities and Europe organised by the Charity Commission at Leeds Castle in February 1992.

3 See C E F Rickett, "Charitable Giving in English and Roman Law" (1979) Camb LJ 118-147, especially at 130-147, to which this article is much indebted. For earlier comparisons see W W Buckland and A McNair, *Roman Law and Common Law* (2nd ed 1952) 57 et seq.

4 A R Hands, *Charities and Social Aid in Greece and Rome* (1968).

similarities and parallels are noted and the roots of some of the English notions identified.

Motive

The first point to note about the beneficence of ancient Rome is that until the advent of Christianity religion played little if any part in motivating beneficence. The motive behind most charitable giving was the pursuit of honour, either during the donor's lifetime or posthumously, rather than any feeling of what the Greeks called *eleemosune* and the Latins called *misericordia* (pity). Indeed Cicero in his *De Officiis*[5] notes that most men are not so much generous by nature as induced rather to be so by the lure of prestige: they wish to be seen as beneficent. And Stoic philosophy was very much on its guard against pity as a ground for generosity. Nevertheless we may be sure that pity for the destitute was a factor, though not necessarily a dominant factor, in the pattern of Roman giving.

The desire for posthumous glory also clearly coloured gifts for monuments, periodical feasts and games in memory of the testator or some relation of his, just as in many testamentary gifts for charity in our law reports it is easy to detect an obviously commemorative element. Christianity later gave an additional justification to philanthropic and charitable gifts: the simple doctrine of loving one's neighbour as oneself.

A Terminological Parallel: "Charity" and "Piae Causae"

A word or two on terminology is also appropriate. The word "charity" has no exact equivalent in Latin. The nearest one gets to it is the concept of *piae causae*.[6] It is no part of the aim of this modest résumé to pursue the interesting question, particularly identified with the Justinianic period, of whether the term *piae causae* (pious causes) had by then come to indicate juristic persons[7] or always referred to the purposes marked out by founders.[8] But it would appear that when the term did refer to purposes it was not confined simply to those based on compassion or pity. Just as in England, lawyers use the words "charity" and "charitable" to designate purposes which go beyond the eleemosynary (compassionate) so the designation *piae causae* covers civic facilities as well as the obvious types of relief of the poor and unfortunate. So in both systems the lawyer's terminology differs from the layman's understanding of the words used.

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5 Cicero, *De Officiis* I, 14, 44.

6 See generally: P W Duff, *Personality in Roman Law* (1935). For bibliography see W W Buckland, *Textbook of Roman Law* (2nd ed 1932); R Monier, *Manuel élémentaire de Droit Romain* (6th ed 1947) Vol 1, 337-340; J A C Thomas, *Textbook of Roman Law* (1976) 474; A R Hands, *Charities and Social Aid in Greece and Rome* (1968) 147-150 and 151-174.

7 Saleilles, *Melanges Gerardin* (1907) 513-551.

8 Cugia, *Studi Fadda* (1906) Vol 5, 227-264.

Charitable Purposes

Charitable giving in Rome served many of the purposes which English law recognises as charitable. In contrast with the Judaeo-Christian tradition of charity, which laid emphasis on the relief of the poor, the sick and the unfortunate, the early Greek and Roman concept of charity stressed benefit to the community.[9]

(i) *Public Facilities*

The Athenian citizen Herodes Atticus gave a water supply to the city of Troy, a theatre to Corinth, a stadium to Delphi, aqueducts for Canusium in Italy and baths for Thermopylae. Romans whom we know to have endowed public baths included Quintus Avelius Priscus at Corfinium in central Italy, Gaius Torasius Severus in Spolietum also in central Italy and the younger Pliny in Comum.

(ii) *Charities of Compassion (Eleemosynary)*

However, charities of compassion (which in the older English cases are called eleemosynary charities) did have a place in pre-Christian Rome. Between AD 96 to 180 the relief of the poor and the unfortunate came to be recognised as a civic duty and as a worthy purpose. Moreover, private citizens in Imperial Rome followed the example of Emperors like Nerva Trajan Hadrian and Antoninus Pius and established *alimenta* schemes which supplied food and clothing to needy children. The relief of the corn supply was indeed a frequent method of showing generosity and statues and other memorials pay tribute to generous donors to the corn supply, such as Quintus Avelius Priscus at Corfinium in central Italy and Marcus Haterius Summus in Iuvavum (Salzburg).

(iii) *Secondary and Higher Education*

While the Greeks appear to have embraced some measure of public elementary education in some of their city states (see Hands, *Charities and Social Aid in Greece and Rome* (1968) 116-127) the Romans were less benevolent in this field. The most that can be said is that doctors and teachers (but not primary teachers) were granted exemptions from taxation through an edict of Vespasian in AD 74 and so funds were indirectly provided in that way to support higher education. The effect of this was apparently to encourage the establishment of secondary schools which Ulpian (who died in about AD 228) implies were common place in villages during the second century AD. This use of tax exemption as an encouragement of charitable endeavour is of course a feature of our English system and tax relief is available in other European community countries. Vespasian also

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[9] For many of the examples which follow see Hands *op cit*, especially 175-209.

established two chairs in Latin and Greek rhetoric in Rome out of public funds, an example which Marcus Aurelius followed a century later by endowing four chairs of philosophy in Athens. There are also instances of public libraries being set up by individual benefactors and we know that the younger Pliny, a charitable donor of conspicuous generosity, was one such benefactor.

(iv) *Health and Hygiene*

There is, it seems, little evidence of medical care for the poor in Rome and no firm evidence of any *legal* obligation resting on a "public" doctor to serve the poor. On the other hand, through gifts made by the wealthy, many public baths were, as noted above, constructed for general use and gifts of oil for use in the baths also appear in the sources. So, through hygiene the health of the community at large was served.

Enforcement

While there is much similarity in what was considered charitable or for the public benefit, classical Roman law had no developed system such as we have for enforcement of gifts to charitable purposes. That was often left to conscience. Certainly in classical times there is no suggestion of any *legal* obligation binding the recipient body or person charged with carrying out the relevant purpose. Where the gift was to a town the town could of course normally be relied on to perpetuate as a matter of civic pride the public purpose served by the gift. In other cases, the gift could be made conditionally (*sub modo*), that is to say so that it would go over to another township if the condition was not observed. That is a device familiar in the English law of charities and is not affected by the rule against perpetuities.

Thus in *Christ's Hospital v Grainger* (1849) 1 Mc & G 460 there was a gift over from the Corporation of Reading to the Corporation of London should the former neglect to observe the relevant directions of the will. And in *Re Tyler* [1981] 3 Ch 252 is to be found an example of a gift over from one charity to another if the testator's vault should not be kept in repair.

Maladministration and the Regulation of Administration

Another thing which Rome teaches us is that human nature does not change in regard to abuse of charitable funds. Between AD 192 and 324 many emperors "borrowed" funds belonging to charities from municipal treasuries. To prevent such practices Constantine used the Church rather than the State to distribute public funds to the needy, and donors were encouraged to make gifts through the Church. However, with the growth of Church involvement church officials themselves were not above criticism. They too were found using poor relief funds for other purposes. This practice was specifically prohibited by Valentinian in AD 453. By then the Church had become the chief almoner in the Roman Empire, a role which it was to maintain throughout the middle ages.

The laws regulating the powers and duties of the various ecclesiastical charities became more and more conflicting and confused and by the middle of the sixth

century AD were scant protection against maladministration and diversion. Tribonian, Justinian's palace *quaestor* and great adviser, attempted to resolve this problem by providing that the foundation of an ecclesiastical establishment created a legal person of an ecclesiastical nature with a capacity of its own. The charitable entity was thus separated from the recipients and the entity became the responsibility of the administrators selected by the donor.

Perpetuation of Charitable Purposes

A corner-stone of the perpetuation of charitable purposes in English law is the *cy-près* doctrine which ensures that once a charity is established the failure or impracticability of a purpose will not defeat the continued existence of the charity since some other appropriate purpose will be supplied. Roman law in its developed state, as the late Professor Patrick Duff commented in his study *Personality in Roman Law* (1935), had worked out a number of rules for the due administration of *piae causae*: see ibid at 203-205. And Professor Jolowicz in his *Roman Foundations of Modern Law* (1957) 138 also calls attention to the fact that in the Byzantine empire the dissolution of a charitable corporation led to a transfer of its property to the papal *fiscus* (Treasury) which was then under an obligation to apply it to objects analogous to those for which the corporation had existed. This was not just a Christian development. It dates back to the third century AD, as a well known passage in Justinian's Digest shows. A legacy was given to a city for the purpose of preserving the memory of the testator by using the income to hold annual games. The games were illegal. Modestinus, who died in AD 244 and was a pupil of the great jurist Ulpian and the last of the classical jurists, proposed the following solution:[10]

> "Since the testator wished games to be celebrated which are not allowed, it would be unjust that the amount which he has destined to that end should revert to the heirs. Therefore, let the heirs and the principal citizens be cited, and let an investigation be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner."

This is, so far as I am aware, the earliest example of what with various refinements is our *cy-près* doctrine, a concept which has echoes in other European jurisdictions, many of which provide on the winding up of associations of public utility that the surplus funds shall be applied to institutions or purposes of a similar nature. In English law the *cy-près* doctrine can likewise apply in cases where the purpose is illegal: means chosen for advancing a charitable object, but not if the general intention is illegal: see Picarda, *Law and Practice Relating to Charities* (1977) 229-231 and cases there cited. It is for the Court or the Charity Commissioners to decide what is the appropriate "nearest purpose" to one which fails.

Benevolent Construction of Charitable Gifts

The last instance where Roman law again provides a striking parallel is in connection with testamentary gifts for charity. It became established during Justinian's era that charitable legacies were entitled to special favour and were to be deemed privileged testaments to be supported by a liberal construction and were not to fail because of the uncertainty of beneficiaries or purposes. A similar liberality in construction is to

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[10] Digest 33.2.16.

be found in English law. In the words of Lord Loreburn in *Weir v Crum-Brown* [1908] AC 162 at 167 "there is no better rule than that a benignant construction will be placed on charitable bequests". There are recent reminders of this benignant approach in *IRC v McMullen* [1981] AC 1 and in *McGovern v A-G* [1982] Ch 321 which both involved *inter vivos* trusts.[11]

[11] For other examples see Picarda *op cit* 166.