

Introduction

I Background

A Development of the Social Welfare System in China over the Past Six Decades

In China, charitable activities played a critical role in social welfare delivery in both the Imperial Era¹ and the Republican Era (1911–49).² However, after the establishment of the People's Republic of China (PRC) by the Communist Party of China (CCP or 'party'), due to the socialist ideology held by the leadership at that time, charity was considered part of the capitalist regime and 'an instrument of the ruling class that was used to control, denigrate, and mark off as different the poorer classes of society'.³ Accordingly, after the establishment of the PRC, in conjunction with the implementation of a planned economy (*jihua jingji* 计划经济), China established a socialist social welfare system for the general public.⁴ All independent charities were either prohibited as unlawful organizations or incorporated into the government (for example, the Red Cross Society of China).⁵ Since the implementation

¹ Karla W. Simon, *Civil Society in China: The Legal Framework from Ancient Times to the 'New Reform Era'* (Oxford University Press, 2013), 77; Yu-Yue Tsu, 'The Spirit of Chinese Philanthropy: A Study in Mutual Aid' (PhD Thesis, The Faculty of Political Science, Columbia University, 1912), 23; Thomas David Dubois, 'Before the NGO: China Charities in Historical Perspective' (2015) 39(4) *Asian Studies Review* 541, 542; Elizabeth Z. Lang, 'Some Reflections on Charity Law in the People's Republic of China' (2003) 15(2) *Bond Law Review* 358, 358.

² Chung Yan Miu, Huang Xin, Kenneth W. Foster, and Frank Tester, 'Charity Development in China: An Overview' (2007) 17(1) *Asia Pacific Journal of Social Work and Development* 79, 80; Dubois (n 1) 542.

³ Miu et al. (n 2) 80.

⁴ Deborah Davis, 'Chinese Social Welfare: Policies and Outcomes' (1989) 119 *China Quarterly* 577, 578; Ruby C. M. Chau and Sam W. K. Yu, 'Social Welfare and Economic Development in China and Hong Kong' (1999) 19(1) *Critical Social Policy* 87, 94–5.

⁵ 徐卫 [Xu Wei], 《慈善宣言信托制度构建研究》 [Research on the Construction of Charitable Declaration Trusts] (法律出版社 [Law Press], 2012) 16.

of the 'Reform and Opening Up' (*gaige kaifang* 改革开放) policy in 1978, China has faced severe pressure to deliver social welfare services. Hundreds of millions of the needy and disenfranchised remain in dire need of healthcare, education, and financial support. Although China is presently the largest developing country in the world, the Chinese government struggles to satisfy the general welfare needs of the majority of its citizens; the government's public finance expenditure in the foregoing areas is far from sufficient and cannot meet the increasing demand for public welfare.

Confronted with these problems, the Chinese government has gradually realized the necessity of providing a supportive social welfare system while developing a market economy.⁶ It believes that this kind of social welfare system cannot be the same as the traditional planned economy model.⁷ As a compromise, 'a new multilevel system'⁸ involving the government, market, and non-profits was established. In this system, although the government still plays a role in public welfare provision, the non-governmental sector – including markets, NGOs, households, and individuals – is expected to finance and provide the majority of social welfare delivery.⁹ In the 2000s, the Chinese government at different levels launched a series of initiatives, clearly identifying NGOs as important partners in their efforts to address pressing social needs.¹⁰ The basic model of public welfare service in China was, thus, established. On the one hand, the state further increased its public expenditure on social welfare to enhance the well-being of its citizens. On the other hand, it gradually promoted the involvement of charities and other social

⁶ Qiusha Ma, 'The Governance of NGOs in China since 1978: How Much Autonomy?' (2002) 31(3) *Nonprofit and Voluntary Sector Quarterly* 305, 306; Rebecca Lee, 'Modernize Charity Law in China' (2009) 18 *Pacific Rim Law & Policy Journal* 347, 354; 韩丽欣 [Han Lixin], 《中国慈善组织治理法治化研究》 [Research on the Governance of Chinese Charities] (法律出版社 [Law Press], 2015) 4; 徐卫 [Xu Wei] (n 5) 13–16.

⁷ 徐卫 [Xu Wei] (n 5) 14–16.

⁸ Zhenyao Wang and Yanhui Zhao, 'The Collapse and Reemergence of Private Philanthropy in China, 1949–2012' in Jennifer Ryan, Lincoln C. Chen and Tony Saich (eds.), *Philanthropy for Health in China* (Indiana University Press, 2014) 28–9.

⁹ Ying Xu and Ngan-Pun Ngai, 'Moral Resources and Political Capital: Theorizing the Relationship between Voluntary Service Organizations and the Development of Civil Society in China' (2011) 40(2) *Nonprofit and Voluntary Sector Quarterly* 247, 248; Miu et al. (n 2) 83; Lee (n 6) 354.

¹⁰ Adam S. Chodorow, 'Charity with Chinese Characteristics' (2012) 30 *UCLA Pacific Basin Law Journal* 1, 4.

organizations in public welfare provision.¹¹ This model provided a platform for charities to participate in the provision of social welfare.

B Tight Governmental Control and the Lack of Public Trust

The loosening of control over the charity sector has contributed to the growth and development of charitable organizations. According to the recent official statement on the development of registered social organizations (*shehui zuzhi* 社会组织), there were around 662,000 registered social organizations by the end of 2015, which received donations of about RMB 6.1 billion and mainly conducted activities in areas such as education, social services, health, culture, sports, and environmental protection.¹² However, it is worth noting that, under the legal framework before 2016, the government monopolized charitable resources and controlled the majority of charities recognized by law, and most independent charities could not be registered and were therefore regarded as illegal organizations. The government's tight control over the charitable sector is achieved through the application of a registration procedure (*dengji zhi* 登记制). This procedure is specified in the law regulating charities,¹³ which empowers regulators to conduct a substantive examination of the documents submitted by relevant parties seeking to establish a charitable entity. Regulators are empowered to use their administrative discretion to decline the establishment of certain charitable entities whose operations are deemed to pose risks or to require changes to be made to the scope and activities of the proposed charitable entity before granting approval. Approval by regulators is essential to the valid establishment of a charity.

¹¹ Yijia Jing and E. S. Savas, 'Managing Collaborative Service Delivery: Comparing China and the United States' (2009) 69 *Public Administration Review* 101, 102.

¹² 中国信托业协会 [China Trustee Association] (ed.), 《慈善信托研究》 [Research on the Charitable Trust] (中国金融出版社 [China Financial Publishing House], 2016) 74.

¹³ 《社会团体登记管理条例》 [Regulations on Registration Administration of Associations] (People's Republic of China) State Council, 6 February 2016, art 3; 《民办非企业单位登记管理暂行条例》 [Interim Regulations on the Administration of the Registration of Privately-Operated Non-Enterprise Organizations] (People's Republic of China) State Council, 25 October 1998, art 5; 《基金会管理条例》 [Regulations on Administration of Foundations] (People's Republic of China) State Council, 3 August 2004, art 6. Registration requirement gives the government the power to manipulate what types of charities can be established and what types of public welfare services they can provide, see Xiaoming Feng, 'China's Charitable Foundations: Development and Policy-Related Issues' (2015) 48(2) *Chinese Economy* 130, 144; Anna Jane High, 'Grassroots NGO Regulations and China's Local Legal Culture' (2013) 9 *Socio-Legal Review* 1, 22; Xu and Ngai (n 9) 249; Chodorow (n 10) 10.

Over the past two decades, this legal arrangement has impeded the willingness of private individuals and enterprises to form charities, make charitable donations, and participate in voluntary work carried out by charities. The government's tight legal control over charitable resources has led to public dissatisfaction with the process.

The public is also dissatisfied with the charitable sector in China regarding transparency and accountability. Because of ill-defined governance mechanisms in law and inefficient internal governance rules in charities, scandals involving the misuse of funds have frequently been exposed by the media or the general public. These have greatly damaged the charitable sector's credibility and public trust.¹⁴ For example, in 2013, the Song Qingling Foundation of Henan Province was exposed by the media as having spent more than RMB 120 million (USD 16.99 million) on building a 27-metre tall sculpture, but this sculpture was immediately demolished after construction.¹⁵ Another well-known scandal involving misappropriation of charitable funds was the case of Guo Meimei, a young woman whose social media posts showed her posing in front of a luxury car and wearing expensive gifts of jewellery. The car and the majority of the jewellery were funded by Wang Jun, the former vice chairman of the China Red Cross.¹⁶ A third scandal involved the Red Cross Society of Sichuan Province. Its former executive vice president, Wen Jiabi, was sentenced to 16 years imprisonment for accepting bribes of RMB 550.09 million (USD 77.88 million) and embezzling public funds amounting to

¹⁴ Lin Nie, Helen K. Liu and Wenhao Cheng, 'Exploring Factors That Influence Voluntary Disclosure by Chinese Foundations' (2016) 27(5) *International Journal of Voluntary and Nonprofit Organizations* 2374, 2380; Guosheng Deng, Shuang Lu and Chien-Chung Huang, 'Transparency of Grassroots Human Service Organizations in China: Does Transparency Affect Donation and Grants?' (2015) 39(5) *Human Service Organizations: Management, Leadership & Governance* 475, 476; 韩丽欣 [Han Lixin] (n 6) 1; Jing and Savas (n 11) 105.

¹⁵ Raymond Li, 'Unexplained Destruction of Statue in Henan Raises Suspicion', *South China Morning Post* (7 July 2013), available at: <www.scmp.com/comment/insight-opinion/article/1276973/unexplained-destruction-statue-henan-raises-suspicion> (last accessed 18 June 2020).

¹⁶ 樊小玲 [Fan Xiaoling], 《机构形象传播中主体意识的缺失与重建 – “郭美美”事件引发的“红会”危机案例分析》 [Absence of Subject Consciousness in the Communication of Institutional Image and Its Reconstruction – A Case Study on the 'Red Cross' Crisis in the 'Guo Meimei Scandal'] (2013) 5 华东师范大学学报 (哲学社会科学版) *Journal of East China Normal University (Humanities and Social Sciences)* 118, 119–20; 陈先红 [Chen Xianhong], 《郭美美事件: 微博江湖“真”“假”困局》 [Guo Meimei Scandal: Dilemmas of 'True' and 'False' in Weibo] (2011) 21 人民论坛 *People's Forum* 60, 60–1.

RMB 295.342 million (USD 41.82 million).¹⁷ These scandals have, to a large extent, discouraged the public from participating in charitable causes. As a result of frequent charity-related scandals, charitable donations in China fell by more than 80 per cent between June and August 2011.¹⁸ Private individuals were especially unlikely to make charitable donations; the majority of donations came from enterprises. There are two main reasons enterprises make charitable donations. The first is that enterprises receive a tax deduction: according to Chinese tax policies, charitable donations are tax-deductible for legal entities but not individuals.¹⁹ The second is that enterprises, in their pursuit of higher financial returns, employ charitable donations to improve their reputations.²⁰

C Establishment of a New Legal Framework for Charity Operation

In light of the above problems, Chinese legislators and policymakers have held a large number of conferences and forums since the late 1980s to discuss legislative reforms to promote the development of charitable causes. The discussion of legal reform has revolved around two objectives, which are formally articulated in central government policies.²¹ The first objective is to strengthen the autonomy of benevolent property

¹⁷ 'Former Executive Vice President of Sichuan Provincial Red Cross Was Sued for Corruption', *Best China News* (20 August 2016), available at: <www.bestchinanews.com/Domestic/7092.html> (last accessed 1 June 2020).

¹⁸ Chodorow (n 10) 49.

¹⁹ 《关于公益性捐赠税前扣除有关问题的通知》 [Notice Concerning the Relevant Issues of Pre-Tax Deduction of Public Welfare Donations] (People's Republic of China) Ministry of Finance; State Administration of Taxation; Ministry of Civil Affairs, 31 December 2018, arts 1–2.

²⁰ Xiufeng Chen and Li Li, 'The Rise of Corporate Social Responsibility and Charitable Foundations in China' in Chien-Chung Huang, Guosheng Deng, Zhenyao Wang and Richard L. Edwards (eds.), *China's Nonprofit Sector: Progress and Challenges* (Transaction Publishers, 2014) 23–4.

²¹ 《中国慈善事业发展指导纲要（2011–2015年）》 [Guidelines for the Development of China's Charitable Causes (2011–2015)] (People's Republic of China) Ministry of Civil Affairs, 15 July 2011, ss 2, 3; 《全国人民代表大会关于国民经济和社会发展第十二个五年规划纲要的决议》 [Resolution of the National People's Congress on the Outline of the Twelfth Five-Year Plan for National Economic and Social Development] (People's Republic of China) National People's Congress, 14 March 2011, ch 33; 《中共中央关于全面深化改革若干重大问题的决定》 [Decision of the Central Committee of the Communist Party of China on Several Major Issues on Comprehensively Deepening Reforms] (People's Republic of China) Central Committee of the Communist Party of China, 12 November 2018, s 13; 《中国农村扶贫开发纲要（2011–2020年）》 [Outline of Poverty Alleviation and Development in China Rural Areas (2011–2020)] (People's

owners and minimize the influence of political forces on the development of the charitable sector. The second objective is to adopt modernized facilitative regimes to buttress the development of the sector and facilitate the management and use of charitable resources generally. From a legal perspective, at the heart of these two objectives is how to strike a balance between the autonomy of private individuals to determine how their resources are used in promoting the state's public welfare goals and the central government's need to ensure that charitable resources are used to benefit the legitimate interests of broader society without facilitating illegal and improper practices. Private individuals are forbidden from using charitable resources for private use: they have the autonomy to determine how to exercise their management rights, but only to the extent that such exercise aligns with the state's public welfare policy.

Alongside the discussion of legislative reforms, a growing number of academics and practitioners have considered the possibility of adopting trusts to develop charitable causes. Over the past two decades, there have been three major institutional forms for establishing charities: foundations (*jijin hui* 基金会), social associations (*shehui tuanti* 社会团体), and privately-operated non-enterprise organizations (*minban feiqiye danwei* 民办非企业单位). They have high establishment thresholds²² and are subject to the requirement that they do not engage in commercial activities. These forms are generally used by government organs or private companies with large-scale assets. It is financially difficult for an individual to establish a charity through these forms. In contrast, as will be discussed further in Chapter 3, trusts are seen as having three main institutional advantages over foundations, social associations, and privately-operated non-enterprise organizations. First, trust creation has no threshold for initial start-up funds. Second, the *cy pres* doctrine can be applied in certain situations to save a trust from failure and thus preserve the trust assets in the public domain on an ongoing basis. Third, trusts can carry out commercial activities if the profits obtained are exclusively used for charitable purposes.

Republic of China) Central Committee of the Communist Party of China and State Council, 27 May 2011, ss 6, 8.

²² For example, for the purpose of establishment, a foundation should have initial capital of not less than RMB 8 million in the case of a national public foundation, not less than RMB 4 million in the case of a local public foundation, and not less than RMB 2 million in the case of a non-public foundation. The initial capital should be currency capital deposited in a bank account. See 《基金会管理条例》 [Regulations on Administration of Foundations] (People's Republic of China) State Council, 3 August 2004 (n 13) art 8.

To encourage the general public to play a proactive role in developing charitable undertakings, legislators, drawing on the experience of public welfare trusts in Japan²³ and South Korea,²⁴ introduced public welfare trusts to the Chinese legal system in 2001 with the promulgation of the Chinese Trust Law.²⁵ However, public welfare trusts have been unsuccessful over the last twenty years: no more than twenty public welfare trusts have been successfully established.²⁶ There are two reasons for this failure. The first is the difficulty that benevolent property owners have in identifying public welfare administration authorities (regulators). The law makes no mention of who the regulators of public welfare trusts are and how they can be identified. The parties to public welfare trusts find it difficult to determine to whom a registration application can be submitted.²⁷ The second reason relates to the conservative attitude taken by regulators towards registration.²⁸ In practice, regulators have been unwilling to approve the establishment of public welfare trusts due to the concern that their supervision of public welfare trusts might attract public scrutiny and that any regulatory failure or scandal will result in irrevocable reputational damage.²⁹ For these two reasons, a gap has opened up between the advantages that public welfare trusts were supposed to have in developing charities and the limited role they play in practice.

Drawing on the failure of public welfare trusts, Chinese legislators introduced the charitable trust in 2016 with a view to unlocking the

²³ Makoto Arai, 'Trust Law in Japan: Inspiring Changes in Asia, 1922 and 2006' in Lusina Ho and Rebecca Lee (eds.), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 44–5.

²⁴ Ying-Chieh Wu, 'Trust Law in South Korea: Developments and Challenges' in Lusina Ho and Rebecca Lee (eds.), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 47; 王建军 [Wang Jianjun], 燕翀 [Yan Chong], and 张时飞 [Zhang Shifei], 《慈善信托法律制度运行机理及其在我国发展的障碍》 [The Operational Mechanism and Theories Related to the Charitable Trust and Its Development Obstacles in Mainland China] (2011) 4 环球法律评论 *Global Law Review* 108, 109.

²⁵ 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001, ch 6.

²⁶ For details on these established public welfare trusts, see 赵廉慧 [Zhao Lianhui], 《信托法解释论》 [Interpretative Theory of Trust Law] (中国法制出版社 [China Legal Publishing House], 2015) 526–9.

²⁷ See analysis in Section II of Chapter 3.

²⁸ 中国信托业协会 [China Trustee Association] (n 12) 65; 赵廉慧 [Zhao Lianhui] (n 26) 542.

²⁹ See analysis in Section III of Chapter 4.

potential of trust institutions to promote charitable causes. They constructed a new legal framework for this model. In this framework, greater scope was given to the civil capacity of legal actors,³⁰ and special regulators (i.e., civil affairs departments and banking regulatory authorities)³¹ were introduced to supervise charitable trust affairs. The 2016 legislative reforms facilitated the use of charitable trusts and made their establishment and regulation easier than for public welfare trusts. However, it is unclear to what extent and in what ways charitable trusts relate to the old model of public welfare trusts. Do legislators expect charitable trusts to replace public welfare trusts in the furtherance of charitable causes? Or do legislators expect the two models to operate in parallel? The law makes no mention of these issues. Rather, it uses the expression ‘trusts belong to (*shuyu* 属于) public welfare trusts’³² to describe the relationship between the two models. This legislative language has given rise to intense debate. Some opine that the two models are identical and thus share the same legal meaning.³³ Others propose that public welfare trusts are in nature distinguishable from charitable trusts.³⁴ As the charitable trust model has only recently been established, there is a great deal of uncertainty in its operation, and the design of the laws and regulations to promote and regulate it is likewise continually developing.

³⁰ Siyi Lin, ‘China’s New Charity Law: A New Era of Charitable Trusts’ (2018) 24(8) *Trusts & Trustees* 768, 770–1.

³¹ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017, arts 47–51.

³² 《中华人民共和国慈善法》 [Charity Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 16 March 2016, art 44; 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017 (n 31) art 2.

³³ 倪受彬 [Ni Shoubin], 《现代慈善信托的组织法特征及其功能优势 – 与慈善基金会法人的比较》 [The Advantage and Character of Modern Charitable Trusts as Organizations: Compared to Charity Foundations] (2014) 46(7) *学术月刊 Academic Monthly* 86, 87; 王建军 [Wang Jianjun], 燕翀 [Yan Chong], and 张时飞 [Zhang Shifei] (n 24) 110.

³⁴ 中国信托业协会 [China Trustee Association] (n 12) 62–6; 李文华 [Li Wenhua], 《完善我国慈善信托制度若干问题的思考》 [Thoughts on Several Issues of Perfecting the Charitable Trust System in China] (2017) 7 *法学杂志 Law Science Magazine* 89, 91; 刘迎霜 [Liu Yingshuang], 《我国公益信托法律移植及其本土化: 一种正本清源与直面当下的思考》 [The Transplantation and Localization of Charitable Trusts in China: A Thought of Radical Reform and Facing up to the Present] (2015) 27(1) *中外法学 Peking University Law Journal* 151, 154–5.

In this context, important questions remain about how charitable trusts function in China. This book focuses on one central question: How are charitable trusts governed in both law and practice? The charitable trust model was introduced when public welfare trusts had failed, with legislators seeking to use this new model to encourage public participation in charitable undertakings. This book examines the similarities and differences between charitable trusts and public welfare trusts to identify the legislative changes that the new charity law has made to the governance framework for charitable trusts. This analysis elucidates the role that legislators expect charitable trusts to play in the Chinese legal system, as well as the changes in the relationship between the state and private individuals in the provision of social welfare goods.

In addition to the law, this book will also critically examine the practical implementation of the legislated governance framework. The Chinese bureaucratic system indicates that government control over charitable trusts and the charitable sector is not going to change any time soon.³⁵ The establishment and development of charitable trusts bear the mark of China's political and social norms. In this context, this book will study the ways in which trust parties and regulators engage with the law, evaluating the strengths and weaknesses of the current legal governance framework and identifying the factors that influence the behavioural patterns of each actor.

II Literature Review

This section provides an overview of the existing literature on Chinese charitable trusts, especially works relating to two pertinent aspects of the governance of charitable trusts: first, the policy and social contexts in which Chinese charitable trusts operate; and second, the legal rules governing Chinese charitable trusts. After examining these two aspects, this book will be located relative to the existing literature.

A The Policy and Social Context for Charitable Trusts

The institutional context in which the charitable trust model has evolved and is evolving has been extensively explored by Chinese legal scholars, economists, and social scientists, as well as their English-speaking

³⁵ Dejian Li, 'Reform of Charity Governance in China: From Economic and Comparative Perspectives' (PhD Thesis, Faculty of Law, The University of Liverpool, 2017) 270.

counterparts. In substance, the two bodies of literature overlap considerably with each other, both touching upon the development and reform of Chinese charity laws.

The literature on the relevance of China's social, political, legal, and economic conditions to the evolution of Chinese charities and the laws governing them is extensive and diverse, both in Chinese and in English. This literature essentially reflects the insights of legal realists, for whom the application of law is not simply 'a mechanical exercise in deductive reasoning'.³⁶ To better understand the practical implementation of written laws, one must attend to the 'reactions of [relevant actors] to [specific] facts and to the life around them'.³⁷ As Hanoch Dagan suggests in *Reconstructing American Legal Realism and Rethinking Private Law Theory*: '[L]aw cannot be understood merely by reference to its static elements (its existing rules); understanding the doctrinal materials at any given moment as the things to be classified misses the inherent dynamism of the law'.³⁸ Such realist thinking is prevalent in the literature relating to Chinese charities. The application of realist thinking in the

³⁶ Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue' (2010) 16(2) *Legal Theory* 111, 122. See also Oliver Wendell Holmes, 'The Path of the Law' (1997) 110(5) *Harvard Law Review* 991, 998; Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart, 2012) 48; Kristen Rundle, 'Opening the Doors of Inquiry: Lon Fuller and the Natural Law Tradition' in George Duke and Robert P. George (eds.), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017) 452; Charles C. Goetsch, 'The Future of Legal Formalism' (1980) 24(3) *American Journal of Legal History* 221, 222–3; Jude Wallace and John Fiocco, 'Recent Criticisms of Formalism in Legal Theory and Legal Education' (1980) 7(3) *Adelaide Law Review* 309, 311; Gerard McMeel, 'What Kind of Jurist Was Peter Binks' (2011) 19 *Restitution Law Review* 15, 33; Christine B. Harrington and Barbara Yngvesson, 'Interpretive Sociolegal Research' (1990) 15(1) *Law & Social Inquiry* 135, 140–1; G. Edward White, 'From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America' (1972) 58(6) *Virginia Law Review* 999, 1004; Grant Gilmore, 'Legal Realism: Its Cause and Cure' (1961) 70(7) *Yale Law Journal* 1037, 1038.

³⁷ Brian Z. Tamanaha, *Beyond the Formalist–Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010) 80.

³⁸ Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press, 2013) 131. See also Hanoch Dagan, 'Doctrinal Categories, Legal Realism, and the Rule of Law' (2015) 163 *University of Pennsylvania Law Review* 1889, 1916; Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (1997) 76(2) *Texas Law Review* 267, 267; Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111(2) *Ethics* 278, 281; Allan Beever and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68(2) *Modern Law Review* 320, 336; Carlos E. Gonzalez, 'Statutory Interpretation: Looking Back – Looking Forward' (2006) 58(3) *Rutgers Law Review* 703, 717; Ilene H. Nagel, 'The

Chinese context requires consideration of the Chinese political and economic environment, government developmental policies, and important party policies. According to Ying Xu and Ngan-Pun Ngai, 'As the government wants to maintain political stability, the current administrative rules and regulations that concern these [charities] do not aim to expand their social rights and freedoms, but rather give various officials the legal right to intervene in, interfere with, or control [charitable] activities'.³⁹ In contrast to the Western democratic model, China's party and state make political and social stability their policy priority: '[M]aintaining economic growth with social stability has been and will continue to be the central leadership's political priority.'⁴⁰ China's party and state prohibit any action directly threatening political or social stability or challenging the authority of the political system.⁴¹ On the other hand, so long as a new institution does not adversely affect, but rather contributes to, political stability and societal control, the CCP and state often allow for, and even promote, its development, taking initiatives to remove obstacles created by their previous policies.⁴² The current charity-promoting policy is a good example. As Lincoln Chen, Jennifer Ryan, and Tony Saich state, '[A]s China continues to allow nonprofits to expand their role, the government has begun to shift the balance, opening space for [charities] to solve social problems while maintaining control over the growth and development of civil organizations that could become a threat to [political and social] stability'.⁴³

Over the last three decades, the government's tight political control of the charitable sector has significantly impeded the development of civil organizations in China. There have been intense discussions of legislative reforms to empower and encourage charities to develop charitable undertakings. The suggested legislative reforms can be divided into two categories. The first is based on micro-analysis, focusing on identifying the challenges facing the charity law system and its possible solutions. For

Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Release' (1983) 17(3) *Law & Society Review* 481, 512.

³⁹ Xu and Ngai (n 9) 248.

⁴⁰ Xian Huang, 'The Politics of Social Welfare Reform in Urban China: Social Welfare Preferences and Reform Policies' (2013) 18 *Journal of Chinese Political Science* 61, 79.

⁴¹ Xu and Ngai (n 9) 253; High (n 13) 29; Li (n 35) 265.

⁴² Li (n 35) 265.

⁴³ Lincoln C. Chen, Jennifer Ryan and Tony Saich, 'Introduction: Philanthropy for Health in China: Distinctive Roots and Future Prospects' in Jennifer Ryan, Lincoln C. Chen and Tony Saich (eds.), *Philanthropy for Health in China* (Indiana University Press, 2014) 8.

example, Feng Xiaoming suggests that there should be a clear legal definition of the relationship between government, enterprises, and civil society, and that the registration procedures for charities should be simplified and the dual management requirement (whereby charities are required to have a sponsor organization to assist the civil affair departments in the creation and oversight of all charities) should be dismantled.⁴⁴ Similarly, Rebecca Lee opines that modernizing the facilitative regimes for charity operation depends on ‘minimizing government influence over the establishment and management of charitable organization[s]; developing a coherent legal definition of charity to standardize charitable operation; providing more support to small, grassroots charitable organizations so as to promote diversity in charity operation; and enhancing fiscal incentives for charitable organizations to buttress development of the sector generally’.⁴⁵ The second category of legislative reforms is based on macro-analysis, focusing on how to coordinate the relationship between civil society and government and how to foster a vibrant and autonomous civil society in light of China’s political and social culture. For instance, Pitman Potter argues that, to create an environment favourable to the growth and prosperity of charities, the government should minimize its bureaucratic control over the charitable sector and secure the autonomy of charities in delivering public welfare.⁴⁶ Recognizing the importance of China’s policy and social traditions, Adam Chodorow argues that legal reform alone is not enough to create an autonomous civil society; rather, policymakers and legislators should change both China’s legal rules and its social and political conditions.⁴⁷

Studying the links between China’s social and policy conditions and its law-making process and law enforcement is not exclusive to the charity sector. The English and Chinese literatures have also engaged extensively with these links when examining corporate governance, Chinese judges’ decision-making, and enforcement campaigns in China.⁴⁸ Regarding

⁴⁴ Feng (n 13) 152.

⁴⁵ Lee, ‘Modernize Charity Law in China’ (n 6) 353.

⁴⁶ Pitman B. Potter, ‘Belief in Control: Regulation of Religion in China’ (2003) 174 *China Quarterly* 317, 337.

⁴⁷ Chodorow (n 10) 54. See also C. David Lee, ‘Legal Reform in China: A Role for Nongovernmental Organizations’ (2000) 25 *Yale Journal of International Law* 363, 429.

⁴⁸ See, e.g., Virginia E. Harper Ho, ‘Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China’ (2013) 46 *Vanderbilt Journal of Transnational Law* 375; Xin He and Kwai Hang Ng, ‘In the Name of Harmony: The Erasure of Domestic Violence in China’s Judicial Mediation’ (2013) 27(1)

corporate governance, one view is that, due to the increasing forces of economic competition and globalization, it is difficult for national governments to maintain their own policies or regulatory systems.⁴⁹ Many scholars have argued that economic globalization will lead to convergence across nations in corporate governance practice.⁵⁰ Chenxia Shi rejects this argument. By identifying political factors as the key determinants of corporate governance development in China, she states that market globalization and China's integration into the world economy will not lead to the convergence of its corporate governance with international models. China's social, political, and legal traditions are essential to shaping its corporate governance model. Significant factors include China's longstanding preoccupation with state ownership of property, its top-down regulatory system and weak enforcement, and its distinctive business regulatory culture.⁵¹

This social and policy context also plays a vital role in influencing the decision-making of Chinese judges. Xin He and Kwai Hang Ng, in *Embedded Courts: Judicial Decision-Making in China*, suggest that the behaviours of Chinese courts are shaped by different social forces, including administrative embeddedness, political embeddedness, social embeddedness, and economic embeddedness.⁵² Because of these social forces, Chinese judges' behaviour often differs from what one might

International Journal of Law, Policy and the Family 97; Xin He and Kwai Hang Ng, 'Inquisitorial Adjudication and Institutional Constraints in Chinese Civil Justice' (2013) 35(4) *Law & Policy* 290; Sarah Biddulph, Sean Cooney and Ying Zhu, 'Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking' (2012) 34(4) *Law & Policy* 373; Carlos Wing-Hung Lo, Gerald E. Fryxell, Benjamin van Rooij, Wei Wang and Pansy Honying Li, 'Explaining the Enforcement Gap in China: Local Government Support and Internal Agency Obstacles as Predictors of Enforcement Actions in Guangzhou' (2012) 111 *Journal of Environmental Management* 227; Jie Gao, 'Governing by Goals and Numbers: A Case Study in the Use of Performance Measurement to Build State Capacity in China' (2009) 29(1) *Public Administration and Development* 21.

⁴⁹ David Brady, Jason Beckfield and Wei Zhao, 'The Consequences of Economic Globalization for Affluent Democracies' (2007) 33 *Annual Review of Sociology* 313, 318; William Sites, 'Primitive Globalization? State and Locale in Neoliberal Global Engagement' (2000) 18(1) *Sociological Theory* 121, 121–2.

⁵⁰ Brady, Beckfield and Zhao (n 49) 313, 318.

⁵¹ Chenxia Shi, *Political Determinants of Corporate Governance in China* (Routledge, 2012) 18. See also Virginia E. Harper Ho, 'Corporate Governance as Risk Regulation in China: A Comparative View of Risk Oversight, Risk Management, and Accountability' (2012) 3 (4) *European Journal of Risk Regulation* 463, 475; Ho (n 48) 427.

⁵² Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press, 2017) 191. The policy goals of the central government have

expect from a strict reading of the law. The conclusion drawn by Xin He and Kwai Hang Ng is consistent with Brian Tamanaha's observation in *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* that judges do not strictly follow legal rules and precedents; rather, they make choices in consideration of practice-related social and institutional factors, as well as their moral views and personal biases.⁵³ A similar process is at work in China's enforcement campaign. China responds to enforcement failures in areas such as food safety, environmental pollution, and working conditions differently from other nations, demonstrating a strong preference for 'extralegal forms of political intervention'⁵⁴ in law enforcement. As Sarah Biddulph, Sean Cooney, and Ying Zhu argue, 'It is the strong planned nature of the campaign and its emphasis on state leadership of [law-making] and enforcement that continues to shape the development of China's particular version of the rule of law'.⁵⁵

been internalized into the institutional constraints of the courts. Extra-legal factors permeate the decision-making process of Chinese courts. See Yuqing Feng and Xin He, 'From Law to Politics: Petitioners' Framing of Disputes in Chinese Courts' (2018) 80 *China Journal* 130, 131; Kwai Hang Ng and Xin He, 'The Institutional and Cultural Logics of Legal Commensuration: Blood Money and Negotiated Justice in China' (2017) 122(4) *American Journal of Sociology* 1104, 1138; Xin He and Fen Lin, 'The Losing Media? An Empirical Study of Defamation Litigation in China' (2017) 230 *China Quarterly* 371, 373; Xin He, 'No Malicious Incidents: The Concern for Stability in China's Divorce Law Practice' (2017) 26(4) *Social & Legal Studies* 467, 467–8; Xin He, 'Administrative Reconsideration's Erosion of Administrative Litigation in China' (2014) 2(2) *Chinese Journal of Comparative Law* 252, 252; He and Ng, 'Inquisitorial Adjudication and Institutional Constraints in Chinese Civil Justice' (n 48) 290; He and Ng, 'In the Name of Harmony: The Erasure of Domestic Violence in China's Judicial Mediation' (n 48) 113.

⁵³ Tamanaha (n 37) 6. See also Alexander Green, 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality' (2011) 4(1) *European Journal of Legal Studies* 122, 132; McMeel (n 36) 33; White (n 36) 1004; Gilmore (n 36) 1038; Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (n 38) 267; Leiter, 'Legal Realism and Legal Positivism Reconsidered' (n 38) 281.

⁵⁴ Biddulph, Cooney and Zhu (n 48) 374.

⁵⁵ Ibid. 373. See also Sarah Biddulph, 'The Production of Legal Norms: A Case Study of Administrative Detention in China' (2003) 20 *UCLA Pacific Basin Law Journal* 217, 240; Benjamin van Rooij, 'China's War on Graft: Politico-Legal Campaigns against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the US' (2005) 14(2) *Pacific Rim Law & Political Journal* 289, 289; Benjamin van Rooij, Rachel E. Stern and Kathinka Fürst, 'The Authoritarian Logic of Regulatory Pluralism: Understanding China's New Environmental Actors' (2016) 10(1) *Regulation & Governance* 1, 4–5; Virginia E. Harper Ho, 'From Contracts to Compliance: An Early Look at Implementation under China's New Labor Legislation' (2009) 23 *Columbia Journal of Asian Law* 35, 45; Young Nam Cho, 'The Politics of Lawmaking in Chinese Local People's Congresses' (2006) 187 *China Quarterly* 592, 594; Benjamin van Rooij,

Although the literature examined so far is not directly linked to Chinese charitable trusts, it is still pertinent for two reasons. First, it identifies and explores the social, economic, political, and legal factors relevant to law-making and law enforcement in China more generally. These factors can help identify the factors related to the governance of charitable trusts and how they interact in the design and development of legislative governance rules for charitable trusts. Second, the hypothesis of this book is that the governance framework of Chinese charitable trusts can only be understood in light of China's particular circumstances and the relevant laws, administrative practices, and private actions of trust parties. Notwithstanding the rich literature on the institutional context within which charitable trusts operate, the various policy and social factors are often identified and discussed in a highly abstract and generalized manner. Furthermore, the current literature does not provide a detailed analysis of whether these policy and social factors are related to the governance of charitable trusts and, if so, how they impact the creation and administration of charitable trusts. In this regard, this literature review helps one understand the challenges and complexities confronted in the governance of charitable trusts. Two lines of inquiry are particularly relevant in this regard: (a) how the Chinese institutional setting affects the ways in which trust parties and regulatory officials behave and (b) to what extent legislated governance goals are implemented in practice.

B Legal Rules Governing Chinese Charitable Trusts

There is a substantial body of literature in Chinese analysing specific questions on the legal rules governing Chinese charitable trusts. These rules and the related literature are explored in detail in Chapters 3 and 4. The Chinese literature mainly concentrates on a textual analysis of the law, with a focus on three aspects of the governance of charitable trusts: (a) the dominant role of settlors in the administration of charitable trust affairs; (b) the negative role that regulators play in supervising charitable trusts; and (c) the under-determined legal nature of beneficiaries.

Gerald E. Fryxell, Carlos Wing-Hung Lo and Wei Wang, 'From Support to Pressure: The Dynamics of Social and Governmental Influences on Environmental Law Enforcement in Guangzhou City, China' (2013) 7(3) *Regulation & Governance* 321, 341; Ho (n 48) 427; Lo et al. (n 48) 235; Gao (n 48) 21.

The works dealing with the first aspect recognize that a tension between settlors and trustees plays a central role in the governance structure of Chinese charitable trusts. This tension has three aspects: (a) the legal title of charitable trust assets; (b) the allocation of powers between settlors and trustees; and (c) the legal character of the Chinese charitable trust; that is, whether it is more like an agency relationship than a trust. These three aspects are inter-related. First, the Chinese Trust Law stipulates that, to create a trust, the settlor needs to entrust their property rights to the trustee and allow the trustee to administer or dispose of such property rights in the interests of a beneficiary or for any intended purposes.⁵⁶ The legal term ‘entrust’ suggests that settlors are entitled to retain the legal title to charitable trust assets.⁵⁷ This legislative approach illustrates that protecting the autonomous interests of settlors is critical to the creation and ongoing operation of charitable

⁵⁶ 《中华人民共和国信托法》 [Trust Law of the People's Republic of China] (People's Republic of China) National People's Congress, 28 April 2001 (n 25) art 2.

⁵⁷ Lusina Ho, *Trust Law in China* (Sweet & Maxwell Asia, 2003) 41; Lusina Ho, Rebecca Lee and Jinping Jin, ‘Trust Law in China: A Critical Evaluation of Its Conceptual Foundation’ in Lusina Ho and Rebecca Lee (eds.), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 86; Lusina Ho, ‘Trust Laws in China: History, Ambiguity and Beneficiary's Rights’ in Lionel Smith (ed.), *Re-Imaging the Trust: Trusts in Civil Law* (Cambridge University Press, 2012) 195–6; Rebecca Lee, ‘Conceptualizing the Chinese Trust’ (2009) 58(3) *International & Comparative Law Quarterly* 655, 660; 何宝玉 [He Baoyu], 《信托法原理研究》 [Research on the Jurisprudence of Trust Law] (中国政法大学出版社 [China University of Political Science and Law Press], 2005) 10–11. The term ‘entrust’ contemplates the transfer of legal title for the creation of a valid Chinese trust. See Charles Zhen Qu, ‘The Doctrinal Basis of the Trust Principles in China's Trust Law’ (2003) 38 *Real Property, Probate and Trust Journal* 345, 357–8; Kai Lyu, ‘Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis’ (2015) 36 *Loyola of Los Angeles International and Comparative Law Review* 447, 455; 周小明 [Zhou Xiaoming], 《信托制度: 法理与实务》 [Trust System: Theory and Practice] (中国法制出版社 [China Legal Publishing House], 2012) 41–2; 陈向聪 [Chen Xiangcong], 《信托法律制度研究》 [Research on Trust Law System] (中国检察出版社 [China People's Procuratorate Press], 2007) 6; 谭振亭 [Tan Zhenting], 《信托法》 [Trust Law] (中国政法大学出版社 [China University of Political Science and Law Press], 2010) 7; 赵廉慧 [Zhao Lianhui] (n 26) 183–5. The Chinese Trust Law is modelled on the Trust Act of Taiwan, of Japan, and of South Korea, but in the three jurisdictions the transfer of legal title is required for the creation of a valid trust. See Wen-Yeu Wang, Chih-Cheng Wang and Shieh Jer-Shenq, ‘Trust Law in Taiwan: History, Current Features and Future Prospects’ in Lusina Ho and Rebecca Lee (eds.), *Trust Law in Asian Civil Law Jurisdiction: A Comparative Analysis* (Cambridge University Press, 2013) 70–1; Masayuki Tamaruya, ‘Japanese Law and the Global Diffusion of Trust and Fiduciary Law’ (2017) 103 *Iowa Law Review* 2229, 2238; 谢哲胜 [Xie Zhesheng], 《信托法》 [Trust Law] (元照出版公司 [Angle Publishing], 2009) 45, 110–11; Arai (n 23) 29; Wu (n 24) 48–9.

trusts. Second, under the existing legal framework, settlors are endowed by law with extensive powers while trustees are burdened by law with broad duties. This legislative approach is deeply rooted in the background against which the Chinese Trust Law was enacted.⁵⁸ Moreover, due to the silence of the law regarding what these powers and duties entail, some scholars have argued that this approach makes it easy for the settlor to intervene and creates significant uncertainty around the performance of the trustee's duties.⁵⁹ Third, when (a) and (b) are viewed together, it becomes clear that charitable trusts closely resemble agency relationships.⁶⁰ But in what ways and to what extent are Chinese charitable trusts similar to and different from Chinese agency relationships? This question has not yet been thoroughly investigated in the existing literature. What is more, the literature does not consider the significance of the answer to this question for understanding the governance of Chinese charitable trusts.

The literature in Chinese also engages extensively with the narrow issue of the significance of the government regulator's changing roles and powers in the establishment of Chinese charitable trusts, from registration (*dengji* 登记) to recording (*bei'an* 备案).⁶¹ Many works argue that,

⁵⁸ Ruiqiao Zhang, 'Trust Law of China and Its Uncertainties: Examination of the Rights and Obligations of Trust and Ownership of Trust Property' (2015) 10 *National Taiwan University Law Review* 45, 69; 何宝玉 [He Baoyu], 《信托法原理研究 (第二版)》 [Research on the Jurisprudence of Trust Law (2nd ed.)] (中国法制出版社 [China Legal Publishing House], 2015) 171; 《关于〈中华人民共和国信托法(草案)〉的说明》 [Explanations on the Trust Law of the People's Republic of China (Draft)] (People's Republic of China) Standing Committee of the People's Congress, 24 December 1996, ss 1–3; 《全国人大法律委员会关于〈中华人民共和国信托法(草案)〉修改情况的汇报》 [Report of the Law Committee of the National People's Congress on the Revision of Trust Law of the People's Republic of China (Draft)] (People's Republic of China) National People's Congress, 3 July 2000, ss 1–3; 赵廉慧 [Zhao Lianhui] (n 26) 268; 何宝玉 [He Baoyu] (n 57) 11; Lyu (n 57) 456.

⁵⁹ 何宝玉 [He Baoyu] (n 58) 171–2; 赵廉慧 [Zhao Lianhui] (n 26) 266.

⁶⁰ 高凌云 [Gao Lingyun], 《被误读的信托 – 信托法原论》 [A Misreading of Trust: Discussion on the Origin of Trust] (复旦大学出版社 [Fudan University Press], 2010) 261; 王众 [Wang Zhong], 《中国信托法原理与实例精要》 [Principles and Examples of the Chinese Trust Law] (中国政法大学出版社 [China University of Political Science and Law Press], 2017) 8; Lee (n 57) 660; Ho, *Trust Law in China* (n 57) 41–2; 何宝玉 [He Baoyu] (n 58) 15–19.

⁶¹ 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017 (n 31) ch 3; 《中华人民共和国慈善法》 [Charity Law of the People's Republic of China] (People's Republic of China) National People's Congress, 16 March 2016 (n 32) art 47.

through recording as opposed to registration, regulators are legally entitled to engage in only a formal⁶² examination of the trust documents and have no discretion to decline recording applications where the trust documents meet the formal requirements of the law. Consistent with the textual interpretation of the term ‘recording’, some scholars have observed that policymakers have given more scope to the civil capacity of legal actors.⁶³ Furthermore, regulators for charitable trusts are clearly tasked with educating and supporting charity participants on best practices in the carrying out of charitable activities.⁶⁴ The law has also adopted numerous collaborative measures to encourage the public to play an active role in raising awareness of charitable trusts. Many scholars suggest that the current favourable regulatory environment reflects the increasing level of autonomy and capacity of private parties and reflects the fact that regulators have attributed great value to the role of individuals in the advancement of state–society relationships.⁶⁵ While this conclusion is drawn from an analysis of the changed legal provisions, the literature has not explored whether this textual change has been

⁶² 吕鑫 [Lyu Xin], 《从公益信托到慈善信托: 跨国移植及其本土建构》[From Public Welfare Trusts to Charitable Trusts: Transnational Transplantation and Local Construction] (2019) 10 社会科学战线 *Social Science Front* 199, 203; 魏艳 [Wei Yan], 《慈善信托政府监管权配置研究》[Research on Allocation of Administrative Regulatory Powers for Charitable Trusts] (2018) 6 国家行政学院学报 *Journal of Chinese Academy of Governance* 103, 104; 楼秋然 [Lou Qiuran], 《理解慈善信托中的“近似原则”: 美国经验与中国借鉴》[Understanding Cy Pres in Charitable Trusts: American Experience and Its Adoption in China] (2019) 3 中国政法大学学报 *Journal of China University of Political Science and Law* 49, 61; 王涛 [Wang Tao], 《慈善法的立法理念、制度创新和完善路径》[Research on the Legislative Idea, System Innovation and Development Path of the Chinese Charity Law] (2018) 33(1) 法学论坛 *Legal Forum* 143, 146.

⁶³ Lin (n 30) 770–2.

⁶⁴ See《国务院关于促进慈善事业健康发展的指导意见》[Guiding Opinions of the State Council on Promoting Healthy Development of Charitable Causes] (People’s Republic of China) State Council, 24 November 2014, chs 4–5; 《中国慈善事业发展指导纲要(2011–2015年)》[Guidelines for the Development of China’s Charitable Causes (2011–2015)] (People’s Republic of China) Ministry of Civil Affairs, 15 July 2011 (n 21) s 3; 《中共中央关于全面深化改革若干重大问题的决定》[Decision of the Central Committee of the Communist Party of China on Several Major Issues on Comprehensively Deepening Reforms] (People’s Republic of China) Central Committee of the Communist Party of China, 12 November 2018 (n 21) s 13; 《慈善信托管理办法》[Administrative Measures for Charitable Trusts] (People’s Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017 (n 31) ch 6; 《中华人民共和国慈善法》[Charity Law of the People’s Republic of China] (People’s Republic of China) National People’s Congress, 16 March 2016 (n 32) ch 9.

⁶⁵ 楼秋然 [Lou Qiuran] (n 62) 62; 王涛 [Wang Tao] (n 62) 144.

reflected in regulatory practice, nor has it considered the factors in addition to law that may influence regulatory practice.

There is also an extensive Chinese literature on the legal nature and role of beneficiaries in Chinese charitable trusts. A striking debate prevails among legal scholars regarding the legal nature of the object. Are the objects who receive benefits from charitable trusts beneficiaries or merely recipients? The distinction between beneficiaries and recipients is not theoretically significant in the context of common law charitable trusts. However, this distinction is particularly meaningful in understanding the nature of Chinese charitable trusts and the role of objects receiving charitable trust benefits. If these objects are beneficiaries, it means they have an interest in the proper distribution of charitable assets and are therefore entitled to claim distribution. If these objects are only recipients, it means they have no interest in the proper distribution of charitable assets and therefore play no role in the governance structure of charitable trusts. The distinction between 'beneficiary' and 'recipient' is not clear in the area of Chinese charitable trusts. In law, the term 'beneficiary' is used extensively, suggesting that the objects who receive benefits are beneficiaries in the trust law sense.⁶⁶ In contrast, many academic papers and commentaries have regarded the term 'beneficiary' as speculative, arguing that it can be interpreted as meaning either beneficiary or recipient.⁶⁷

Current academic debates have mainly focused on the conceptual distinction between beneficiary and recipient. While scholars have recognized that the interpretation of an object's nature has an important bearing on our understanding of its capacity to exercise supervisory roles,⁶⁸ they have fallen short of pointing out the relevance of the distinction between 'beneficiary' and 'recipient' to the rights or powers that the objects may have in the governance of charitable trusts. In the

⁶⁶ See 《慈善信托管理办法》 [Administrative Measures for Charitable Trusts] (People's Republic of China) China Banking Regulatory Commission and Ministry of Civil Affairs, 10 July 2017 (n 31) arts 10–11; 《民政部、中国银行业监督管理委员会关于做好慈善信托备案有关工作的通知》 [Notice of Civil Affairs Department and China Banking Regulatory Commission on the Recordation Work for Charitable Trusts] (People's Republic of China) Civil Affairs Department and China Banking Regulatory Commission, 25 August 2016, s 2.

⁶⁷ 中国信托业协会 [China Trustee Association] (n 12) 62, 84; 赵廉慧 [Zhao Lianhui] (n 26) 555; 陈向聪 [Chen Xiangcong] (n 57) 278–9; 谭振亭 [Tan Zhenting] (n 57) 199–200; 谢哲胜 [Xie Zhesheng] (n 57) 219.

⁶⁸ 赵廉慧 [Zhao Lianhui] (n 26) 554–5.

current literature, the answer to the question of which term, 'beneficiary' or 'recipient', best describes the objects receiving trust benefits has not been directly related to the analysis of the governance of charitable trusts. The real question that needs to be explored is what powers or rights the objects of a charitable trust may have.

Current literature concerning the unique features of Chinese charitable trusts has identified the efforts that lawmakers have made towards the construction of a legal framework for charitable trusts; it has also contributed to the discussion of the underlying objectives of charitable trusts to promote charitable undertakings and strengthen settlor autonomy. However, this literature has not considered the relevance of each objective to the design of the governance structure of charitable trusts, the ways in which the two objectives interact, and the implications of this for understanding the legal nature of charitable trusts.

In the area of charitable trusts, the current literature has examined the legislative provisions governing the internal relationship between trust parties and the role of regulators; however, it has not considered how trust parties interact with regulators in the day-to-day governance of charitable trusts, what uncertainties trust parties and regulators may encounter when performing their legal roles, and what strategies they have adopted to mitigate the risks that may arise out of the implementation of the law. Legal realists have argued that, because the application of law is not an 'exercise in mechanical deduction',⁶⁹ it is possible that actual practices may differ from what one might expect to arise from a strict interpretation of the law.⁷⁰

In terms of the ambiguities in the current legal framework and the legal uncertainties that arise from these ambiguities, much of the Chinese literature has recited the problems and has proposed solutions based on textual interpretation of legal rules without undertaking a comprehensive analysis of the broader social and policy contexts within which the rules were developed and operate. In particular, the literature does not consider what specific ambiguities the current legal framework has created and how policy and social factors affect the ways in which trust parties and regulators address these ambiguities. This is anomalous, as there is little point in proposing reforms to the challenges and legal uncertainties of today without understanding how charitable trust laws are practically

⁶⁹ Leiter (n 36) 116.

⁷⁰ Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 13.

implemented and the extra-legal factors affecting the governance and administration of charitable trusts.

In contrast to the abundant Chinese literature on charitable trusts, there is very little literature in English examining their introduction and development in mainland China. An exception is Lin Siyi's analysis of the advantages and disadvantages of the Chinese charitable trust system.⁷¹ The dearth of English literature is scarcely surprising given that the charitable trust model was only recently introduced into the Chinese legal system in 2016. However, although the public welfare trust – an institution serving the same function of encouraging charitable causes – has been present in the Chinese legal system for two decades, there nonetheless remains a dearth of English literature on this topic. This is surprising, suggesting either that the topic has been discounted or discussed without exhaustive analysis or that its significance has not been fully appreciated by writers in English.

C Locating This Book in Relation to Existing Literature

The current study of the governance of charitable trusts contributes to the literature by locating charitable trusts within the Chinese legal, policy, and social contexts and by examining the ways in which the legislated governance rules regarding charitable trusts are implemented in practice. It engages with both the Chinese and English language literatures in three ways.

First, it engages in a detailed analysis of the legal regulatory framework, identifying gaps in the current laws governing charitable trusts. This analysis reveals the continuities and discontinuities between public welfare trusts and charitable trusts regarding the checks-and-balances mechanisms between trust parties; it also identifies the ways in which regulators interact with trust parties in the governance of charitable trusts. At the macro-level, this analysis identifies the progress that legislators have made to strengthen the autonomy of private individuals in charitable undertakings.

Second, this book analyses the regulation of charitable trusts in practice. The comparison between law and practice reveals the social and policy norms that underpin the traditional legal system for charities and that continue to inform the regulatory system of charitable trusts today.

⁷¹ Lin (n 30) 771–5.

To carry out this comparison, semi-structured qualitative interviews with regulatory officials were conducted in both eastern developed areas and western undeveloped areas in China. Regional differences⁷² in the regulatory practices of charitable trusts – a supportive regulatory environment in the east and a conservative one in the west – suggest that the policy and social context is relevant to the performance of regulators' roles in practice. The law and its institutional context should be examined together to identify how legal actors engage with the law and how the law is carried out in practice.⁷³ In this light, this book explores the social and policy factors that regulators have taken into account when implementing the law.

Third, this book extends the literature examining the checks-and-balances mechanisms between settlors and trustees by exploring how

⁷² See analysis in Section III of Chapter 4.

⁷³ Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 4(4) *Law & Society Review* 719, 719. There is a vast literature examining the correlation between law and its institutional context. Cotterell and Sarat suggest that 'far from community dissolving as law becomes more prominent, the growing complexity and bulk of law reflects the increasing complexity, intricacy and richness of communal social relationships in their various networks'. See Roger Cotterrell and Austin D Sarat, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing Ltd, 2006) 161. Friedman states that 'legal institutions are responsive to social change; moreover, they have a definite role, rather poorly understood, as instruments that set off, monitor, or otherwise regulate the fact or pace of social change'. See Lawrence M. Friedman, 'Legal Culture and Social Development' (1969) 4(1) *Law & Society Review* 29, 29. Reimann holds that 'comparative law has come to look at the world in terms of coexisting legal cultures, i.e., as parts of large social structures consisting of economies, religions, and social habits'. See Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50(4) *American Journal of Comparative Law* 671, 677. For works devoted exclusively to the correlation between law and its institutional context, see Roger Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities' in Andrew Harding and Esin Öricü (eds.), *Comparative Law in the 21st Century* (Kluwer Academic Publishers, 2002) 35–54; David Nelken, 'Legal Transplants and Beyond: Of Disciplines and Metaphors' in Andrew Harding and Esin Öricü (eds.), *Comparative Law in the 21st Century* (Kluwer Academic Publishers, 2002) 19–34; 杜健荣 [Du Jianrong], 《法律与社会的共同演化 – 基于卢曼的社会系统理论反思转型时期法律与社会的关系》 [Co-Evolution of Law and Society Reflection – On the Relationship between Law and Society in Transition Period by Luhmann's Social System Theory] (2009) 2 法制与社会发展 *Law and Social Development* 109, 109–17; 范愉 [Fan Yu], 《新法律现实主义的勃兴与当代中国法学反思》 [The Rise of New Legal Realism and Reflections on Current Chinese Law] (2006) 4 中国法学 *China Legal Science* 38, 38–51; 季卫东 [Ji Weidong], 《法律议论的社会科学研究新范式》 [New Method of Social Scientific Study in Legal Discussion] (2015) 6 中国法学 *China Legal Science* 25, 25–41.

contracts are used to redistribute each party's powers and duties. The settlor is endowed by law with extensive powers while the trustee is burdened by law with onerous duties. Charity law does not clearly define what these powers or duties entail and how the role of each party is to be discharged. This book examines real-world contracts and interviews with relevant actors (i.e., trustee managers and settlors) to identify how trust parties use contracts in the governance of charitable trusts and the reasons behind these uses.⁷⁴ Contract theorists acknowledge that contracts are widely used as tools to allocate risks between relevant parties.⁷⁵ In the Chinese charitable trust setting, trust parties tend to use contractual tools to vary the legal framework of charitable trusts to mitigate the risks posed by regulatory practice and the vagueness of the law. The present book enriches contract law scholarship and legal realist scholarship by examining how trust parties use contracts to distribute their powers and duties and what role extra-legal factors have played in the planning and development of relevant contract clauses. It shows that the vagueness of the law creates risk for trust parties, motivating them to use contractual tools to guide the management of charitable trusts. This observation, along with the analysis of regulatory practice, provides insights for trust practitioners and academics seeking to understand how newly-recorded charitable trusts are actually governed in China.

This book examines charitable trusts with reference to the legal rules governing them, locates their governance practices within policy and social contexts, and synthesizes the three perspectives outlined. In doing so, this book seeks to make an original contribution to scholarship on the governance of Chinese charitable trusts.

⁷⁴ See analysis in Section III of Chapter 5.

⁷⁵ See, e.g., Stephen A. Smith, *Contract Theory* (Oxford University Press, 2004) 308; Jeannie Marie Paterson, Andrew Robertson and Arlen Duke, *Contract: Cases and Materials* (Thomson Reuters, 2016) 540; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart, 3rd ed., 2016) 131; Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55, 63; Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21(1) *Journal of Legal Studies* 115, 130; Stewart Macaulay, 'An Empirical View of Contract Law' (1985) 1985 *Wisconsin Law Review* 465, 475; Albert Choi and George Triantis, 'The Effect of Bargaining Power on Contract Design' (2012) 98(8) *Virginia Law Review* 1665, 1670; Alan Schwartz and Robert E. Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113(3) *Yale Law Journal* 541, 555.

III Legal Definition of Charitable Trust Governance

A Semantic Meaning of Governance

This book examines the governance of Chinese charitable trusts. As such, the analysis of this book depends on how one defines the term ‘charitable trust governance’. Semantically, there is no uniform interpretation of ‘governance’.⁷⁶ Context plays a vital role in unravelling its meaning.⁷⁷ Etymologically, it derives from the Latin words *gubernare* and *gubernator*, which refer to ‘steering a ship and to the steerer or captain of a ship’.⁷⁸ ‘Governance’ originates from the old French word *gouvernance*, which means ‘control and the state of being governed’.⁷⁹ The term is not a ‘precise one and its meaning is affected by cultural variables’.⁸⁰ As David Renz and Fredrik Andersson observe, ‘[T]he concept of governance has been defined less clearly than is necessary to advance research in this field’.⁸¹ Legal words, in essence, ‘are best understood and investigated by reference to the content of the doctrines that create the concepts rather than by reference to dictionary definitions’.⁸² Nevertheless, dictionary definitions are a good starting point. Examining how ‘governance’ is defined in dictionaries can shed light on subsequent discussions of charitable trust governance in China. In authoritative dictionaries such as the *Modern Chinese Dictionary*, the *Oxford English Dictionary*, and the *New Shorter Oxford English Dictionary on Historical*

⁷⁶ The term ‘governance’ refers to the ‘set of practices and procedures in place to ensure that an entity operates to achieve its objectives in an effective and transparent manner’. See The Treasury, The Australian Government, *Development of Governance Standards-Consultation Paper* (December 2012) 5. The term ‘governance’ refers to ‘the systems and processes concerned with ensuring the overall direction, control, and accountability of an organization’. See David O. Renz and Fredrik O. Andersson, ‘Nonprofit Governance: A Review of the Field’ in Chris Cornforth and William A. Brown (eds.), *Nonprofit Governance: Innovative Perspectives and Approaches* (Routledge, 2014) 18.

⁷⁷ See analysis in Section II-A.

⁷⁸ John H. Farrar, *Corporate Governance in Australia and New Zealand* (Oxford University Press, 2001) 3; 韩丽欣 [Han Lixin] (n 6) 105; Shi (n 51) 26.

⁷⁹ 韩丽欣 [Han Lixin] (n 6) 105; Shi (n 51) 26; Farrar (n 78) 3.

⁸⁰ Roman Tomasic, ‘Good Corporate Governance: The International Challenge’ (2000) 12 *Australian Journal of Corporate Law* 142, 143.

⁸¹ Renz and Andersson (n 76) 18.

⁸² Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart, 2010) 77.

Principles, ‘governance’ is generally understood as a set of procedures, methods, or rules by which something is regulated,⁸³ or as a method of management.⁸⁴

B Governance in Context

Existing scholarship has extensively analysed the meanings of ‘corporate governance’ and ‘charity governance’. Exploring how these terms have been understood can illuminate how the dictionary meaning of governance is implemented in particular contexts. This analysis can then contribute to the understanding of governance in the Chinese charitable trust setting. Although the meaning of governance varies in these three legal contexts, comparisons between charity governance and corporate governance shed light on the interpretation of charitable trust governance – particularly given that the language used to describe charitable trust governance suggests similar conceptual characteristics and origins as those for corporate governance and charity governance.

1 Corporate Governance and Charity Governance

Critical writings and commentaries from a wide range of disciplines have studied the meaning of ‘corporate governance’.⁸⁵ Examination of these

⁸³ The term ‘regulate’ means ‘to control, govern, or direct by rules or regulations’. See J. A. Simpson and E. S. C. Weiner (eds.), *The Oxford English Dictionary* (XIII) (Clarendon Press, 2nd ed., 1989) 524; Lesley Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Volume 2 N-Z) (Clarendon Press, 4th ed., 1993) 2530. See also 汉语大字典编纂处 [Office of Chinese Dictionary Compilation], 《现代汉语词典》 [Modern Chinese Dictionary] (四川辞书出版社 Sichuan Dictionary Press, 2014) 276; 中国社会科学院语言研究所 [Institute of Language Studies, Chinese Academy of Social Sciences], 《现代汉语词典》 [Modern Chinese Dictionary] (商务印书馆 The Commercial Press, 7th ed., 2016) 482.

⁸⁴ J. A. Simpson and E. S. C. Weiner (eds.), *The Oxford English Dictionary* (VI) (Clarendon Press, 2nd ed., 1989) 710; Lesley Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Volume 1 A-M), vol 2 (Clarendon Press, 4th ed., 1993) 1123. See also Susan Butler (ed.), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed., 2009) 722; Ray Finkelstein, P. J. Butt, Rod Howie and David Hamer (eds.), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5th ed., 2015) 285; Raymond Finkelstein, David Hamer, R. N. Howie, Margaret Allars, R. CD. McCallum and J. C. Gibson (eds.), *LexisNexis Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed., 2016) 689; 中国社会科学院语言研究所 [Institute of Language Studies, Chinese Academy of Social Sciences] (n 83) 1690; 汉语大字典编纂处 [Office of Chinese Dictionary Compilation] (n 83) 1021.

⁸⁵ In the field of financial economics, corporate governance relates to the methods by which suppliers of finance to corporations assure themselves of getting a return on their

scholarly works yields no standard definition. According to some scholars, 'corporate governance' relates to the set of procedures and practices by which companies are regulated, managed, or controlled;⁸⁶ others emphasize the fulfilment of institutional objectives.⁸⁷ For example, the China Security Regulatory Commission's *Governance Codes for Listed Companies in China*⁸⁸ states that 'corporate governance' deals with the methods by which a corporation is controlled and directed and the ways in which its objective is achieved by way of internal management.

Likewise, the term 'charity governance' is also open to interpretation. In some scholarly writings, it is defined according to the internal management of charities. In *Fundamental Issues of the Non-Profit Organization Law in China*, 'charity governance' is defined as a set of rules, standards, and procedures through which a charitable organization is managed, controlled, or regulated.⁸⁹ Other works have incorporated the values underlying the creation and operation of charities into the

investments. See Andrei Shleifer and Robert W. Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737, 737; Oliver E. Williamson, 'Corporate Finance and Corporate Governance' (1988) 43(3) *Journal of Finance* 567, 588–9; Lucian Bebchuk, Alma Cohen and Allen Ferrell, 'What Matters in Corporate Governance?' (2009) 22(2) *The Review of Financial Studies* 783, 823–4. In accounting theory, corporate governance mainly focuses on ensuring the quality of the company's financial information and determining how to use this information to evaluate assets and reward performance. See Philip Brown, Wendy Beekes and Peter Verhoeven, 'Corporate Governance, Accounting and Finance: A Review' (2011) 51(1) *Accounting & Finance* 96, 153; Richard G. Sloan, 'Financial Accounting and Corporate Governance: A Discussion' (2001) 32(1) *Journal of Accounting and Economics* 335, 340–1.

⁸⁶ See Shi (n 51) 25; John H. Farrar, 'Developing Corporate Governance in Greater China' (2002) 25(2) *University of New South Wales Law Journal* 462, 463. See also Ian M. Ramsay, 'The Corporate Governance Debate and the Role of Directors' Duties' in Ian M Ramsay (ed.), *Corporate Governance and the Duties of Company Directors* (Centre for Corporate Law and Securities Regulation, 1997) 2; Daniel Greenberg (ed.), *Jowitt's Dictionary of English Law (Volume 1: A–I)* (Sweet & Maxwell, 4th ed., 2015) 586; Trischa Mann (ed.), *Australian Law Dictionary* (Oxford University Press, 2nd ed, 2013) 188.

⁸⁷ There is no agreement on what a company's objective is. The objective of a company can be classified into three types: prioritizing the shareholders' interests, prioritizing the shareholders' interests while simultaneously considering the interests of other stakeholders, and prioritizing the stakeholders' interests. See Reagan Grayson-Morison and Ian Ramsay, 'An Analysis of Companies' Business Objectives' (2014) 32(6) *Company and Security Law Journal* 438, 438; Donald C. Clarke, 'Corporate Governance in China: An Overview' (2003) 14(4) *China Economic Review* 494, 498–9.

⁸⁸ 《上市公司治理准则》 [Governance Codes for Listed Companies in China] (People's Republic of China) China Security Regulatory Commission, 30 September 2018, art 3.

⁸⁹ 北京大学非营利法组织研究中心 [Peking University Law School Nonprofit Organization Law Research Center], 《中国非营利组织法的基本问题》 [Fundamental Issues of the Non-Profit Organization Law in China] (中国方正出版社 [China

definition of ‘charity governance’. An illustrative example is the definition given in *Research on the Governance of Chinese Charities*: ‘charity governance’ refers to a set of principles or rules that enable charities to be managed in a way that achieves their public benefit objectives in an effective and transparent manner.⁹⁰

2 Charitable Trust Governance

In contrast to the abundant discussions of the definitions of ‘corporate governance’ and ‘charity governance’, the literature examining how the governance of charitable trusts should be understood is sparse.⁹¹ The dearth of literature is hardly surprising because the charitable trust model was only introduced into the Chinese legal system in 2016. Based on the understanding of corporate governance and charity governance

Fangzheng Press], 2006) 126. For scholarly writings that endorse this definition, see, e.g., 王涛 [Wang Tao] (n 62) 145; 李德健 [Li Dejian], 《公共利益与法人自治的平衡 – 中国慈善法人制度变革的进路选择》 [The Balance of Public Interest and Legal Person Autonomy – Selection of Approaches for Reform of the Chinese Charity Legal Person System] (2016) 31(163) 法学论坛 *Legal Forum* 54, 58; 董蕾红 [Dong Leihong] and 李宝军 [Li Baojun], 《论慈善组织的政府监管》 [On the Government Supervision over Charitable Organizations] (2015) 6 山东大学学报(哲学社会科学版) *Journal of Shandong University (Philosophy and Social Sciences)* 77, 78–9.

⁹⁰ 韩丽欣 [Han Lixin] (n 6) 122. For other works that endorse this definition, see, e.g., 马金芳 [Ma Jinfang], 《我国社会组织立法的困境与出路》 [The Dilemma and Outlet of the Social Organization Legislation in China] (2016) 6 法商研究 *Study of Law and Business* 3, 10; 高静华 [Gao Jinghua], 《慈善透明的困境与治理策略》 [Dilemmas of the Transparency of Charities and Governance Strategies] (2018) 15 中国社会组织 *China Social Organization* 53, 55; 谢琼 [Xie Qiong], 《立体监管: 我国慈善事业发展的理性选择》 [Stereoscopic Supervision: Rational Choice for the Development of Charitable Causes in China] (2015) 4 国家行政学院学报 *Journal of Chinese Academy of Governance* 73, 75. In Australia, the consultation paper *Review of Not-for-Profit Governance Arrangements*, issued by the Department of the Treasury (Australia) in 2011, is important in understanding the meaning of governance. This paper provides charities with a wide range of suggestions for the practice of good governance. In this paper, charity governance is defined as the practices and procedures within and by which the charity is run to achieve its objectives in a transparent and effective manner. See The Treasury, The Australian Government, *Review of Not-for-Profit Governance Arrangement-Consultation Paper* (2011) 5. See also The Treasury, The Australian Government (n 76) 5. This definition has been endorsed by the governance guide (*Governance for Good: The ACNC's Guide for Charity Board Members*) issued by the Australian Charities and Not-for-profits Commission in 2013. See Australian Charities and Not-for-profits Commission, *Governance for Good: The ACNC's Guide for Charity Board Members* (July 2013) 3.

⁹¹ Evelyn Brody observed that charitable trust governance is focused on the governing of trustees. See Evelyn Brody, ‘Charity Governance: What’s Trust Law Got to Do with It?’ (2005) 80 *Chicago-Kent Law Review* 641, 686.

previously discussed, one can identify two elements that are most relevant to the definition of 'governance'. The first deals with the rules or procedures by which an entity (corporation or charity) is managed or administered. The second relates to the purpose of governance: namely, an entity is governed to achieve its institutional objectives in an effective and transparent manner. When these two elements are viewed together, it can be said that governance is concerned with the rules or practices by which the objective of an entity is achieved through management. In this light, this book defines the governance of charitable trusts as a set of mechanisms that ensure the trustee of a charitable trust complies with their duties in order to effectively realize the charitable purpose or public benefit that the charitable trust pursues. This definition of charitable trust governance focuses on the control of trustees' power and on the mechanisms available to ensure their accountability for exercising that power.

IV Hypothesis and Research Questions

A Hypothesis

This book focuses on the governance structure of Chinese charitable trusts, assessing it from the perspective of China's particular political, social, and economic conditions. It tests the hypothesis that the governance framework for Chinese charitable trusts can only be fully understood in light of relevant law, administrative practice, and private actions taken by trust parties. This hypothesis comprises three inter-related aspects. First, the law sets up a governance framework for charitable trusts but is vague and under-determined in various respects. Second, administrative practice is a significant component of the governance framework because regulators in China are subject to intense administrative and policy pressures and are thus highly responsive to extra-legal concerns. Third, private action is essential in the governance framework because trust parties vary the framework of the law to mitigate risks posed by administrative practice and the vagueness of the law.

As discussed in Section III, 'charitable trust governance' denotes any governance mechanism ensuring that the trustee of a charitable trust complies with their duties in order to effectively realize the charitable purpose or the public benefit pursued by the charitable trust. This definition indicates that the focus of charitable trust governance is on how a trustee's exercise of power should be controlled. Based on this understanding, there are four types of actors relevant to the governance

of charitable trusts, each of whom exerts pressure on trustees to ensure they comply with their duties. Settlers can exercise their statutory or contractual powers to supervise the trustee's administration of charitable trust affairs. Beneficiaries might have standing to bring proceedings to remedy the misuse of charitable trust assets where they have particularized (or individualized) interests in the proper distribution of trust assets after receiving notice. Regulators can exercise their regulatory powers to interfere with the management of charitable trusts and to punish trustees for non-compliant behaviours. Finally, the general public can access information disclosed by trustees and report the misuse of charitable funds to the relevant regulators. The subsequent discussions of charitable trust governance in this book will focus on the roles of these four actors and the ways in which they interact both in law and in practice.

This book identifies the factors that shape the governance framework for charitable trusts – legal, administrative, and contractual. It examines the realization of these factors in the creation and ongoing administration of charitable trusts. It also examines the rules governing the creation and administration of charitable trusts and how these rules are implemented in practice. A closer scrutiny of the Chinese Charity Law suggests that, in contrast to public welfare trusts, legislators have constructed a public law–private law hybrid model for charitable trusts. On the one hand, the state has given greater scope to the civil capacity of legal actors. Private actors are permitted to define the ways in which their private funds are used for charitable purposes as defined by the state. On the other hand, the state is unwilling to relinquish its control over the use of charitable trusts, granting regulators extensive powers to monitor whether charitable assets are being used in alignment with the state's social welfare goals.⁹² This public law–private law hybrid is reflected in the vagueness of the legal rules governing charitable trusts, which has created risks for both trust parties and regulators. Furthermore, the social and policy environment in which charitable trusts are established and operate plays a vital role in determining how the legal governance framework is implemented in practice. Regulators have long been subject to intense policy and administrative pressures and have greater incentives to consider extra-legal factors when implementing the law. Trust parties

⁹² See analysis in Section II of Chapter 4.

are willing to take private action to define the ways in which they interact so as to mitigate risks posed by regulatory practice and the vagueness of the law.⁹³

The literature reviewed in Section II indicates that political objectives largely dictate the development of the charitable sector in China. Although the Chinese Charity Law was implemented to mediate the relationship between civil society and the state, the balance leans more in favour of the state's public welfare goals. In fact, the state uses the new charity law to guide the public's charitable activities in order to advance its own public welfare goals. The government has exercised strict control over the charitable sector for a long time; therefore, it will be difficult to change its traditional methods and ideas within a short time.⁹⁴ Given this, one may ask the following question: In what way does this policy and social context influence the implementation of the legislated governance framework? The answer can shed light on how trust parties engage with the law in practice and further illuminate the continuities and discontinuities between regulators' behavioural patterns before and after the new charity law was introduced.

To test the above hypothesis, the book takes the following steps. First, the legal governance framework for Chinese charitable trusts is examined across a range of issues. To this end, Chapter 2 discusses the public law-private law hybrid model that legislators have created for charitable trusts. Chapter 3 traces the legislative process of the Chinese Charity Law and the Measures for Charitable Trusts, investigating what legal rules have been constructed for the governance of charitable trusts.⁹⁵ This examination compares charitable trusts and public welfare trusts, as well as the rules underpinning both. Chapter 3 explores the nature and scope of the autonomy of parties to determine what types of benefits the trust will create and which sectors of the community can receive such benefits. Chapter 4 analyses the ways in which regulators control the establishment and development of trusts for the purpose of promoting public benefit.

Second, by examining charitable trust contracts and interviewing persons with charitable trust experience, Chapters 4 and 5 analyse the ways in which trust parties and regulators perform their roles in practice. This analysis locates the governance of Chinese charitable trusts in their

⁹³ See analysis in Section III of Chapter 5.

⁹⁴ Li (n 35) 270.

⁹⁵ See analysis in Chapter 3.

institutional context. In doing so, it identifies the political and social factors relevant to governance practice and their influence on the implementation of legislated governance rules.⁹⁶

B Research Questions

The analyses in Section IV-A raise three questions to be answered in this book. The first question is, How has the charity law shaped the governance structure of charitable trusts? To answer this, Chapters 2 and 3 study the laws and regulations relevant to public welfare trusts and charitable trusts, respectively; practice in respect of public welfare trusts over the last two decades; and legislative changes that the new charity law has made to the governance framework for charitable trusts. It is revealed that, while charitable trusts are tasked with a similar legislated objective to public welfare trusts (i.e., promoting charitable undertakings), there are fundamental differences regarding the legislated governance rules. The rules governing charitable trusts have elevated the scope of autonomy of private parties and, in theory, limited the extent to which the creation and ongoing operation of a charitable trust is subject to state intervention.⁹⁷ These differences incline towards the conclusion that, in contrast to the public law model of public welfare trusts, legislators have constructed a public law–private law hybrid model for Chinese charitable trusts.

While the hybrid model demonstrates the state's desire to promote private philanthropy, it also shows its unwillingness to relinquish control over charitable undertakings.⁹⁸ Chapter 2 explores the particular mixture of public law and private law norms that co-exist in the Chinese charitable trust, as well as the implications of this hybrid model for the governance of charitable trusts. Based on the analysis of the charitable trust's hybrid nature, Chapter 3 discusses the legal regulation of trust parties; it covers the assignment of statutory powers and duties to settlors and trustees, the ways in which the checks-and-balances mechanisms between them are established, and the roles that beneficiaries under a charitable trust might play in the governance framework. Chapter 4 explores the new regulatory framework for charitable trusts, providing a textual analysis of the law relevant to the assignment of statutory

⁹⁶ See analysis in Chapters 4 and 5.

⁹⁷ See analysis in Section III of Chapter 3.

⁹⁸ See analysis in Section II of Chapter 2.

powers to each regulator (i.e., civil affairs departments and banking regulatory authorities), how the two regulators interact in law, and what regulatory measures they can undertake.

The second question is, How have regulators implemented the legal regulatory regime in practice? Chapter 4 explores this question by drawing upon empirical findings from the regulatory practice of charitable trusts. Under the legal framework, regulators are granted broad powers to oversee whether trust assets are being managed in compliance with the state's broader interests. However, the regulatory framework is vague and incomplete regarding what these regulatory powers and duties entail in substance and how they should be exercised. This vagueness in the law has created substantive risks for regulators, motivating them to adopt strategies to protect their interests from being adversely affected when engaging with the law.⁹⁹ Chapter 4 identifies the deficiencies of the current regulatory framework, the legal uncertainties that these deficiencies have created, and the strategies that regulators have taken in the exercise of their powers and responsibilities.

Apart from the law, China's social and political circumstances, within which charitable trusts are introduced and operate, play a vital role in shaping the decision-making of regulatory officials.¹⁰⁰ In the Chinese bureaucratic system, regulators are highly responsive to extra-legal factors in their implementation of the law.¹⁰¹ This approach helps regulators strictly control the use of charitable trusts for public welfare purposes and minimizes the risks that may arise from the performance of their responsibilities.¹⁰² Drawing on the empirical findings from regulatory practice, Chapter 4 identifies the extra-legal factors shaping the regulatory framework and the ways in which these factors are realized in the administration and supervision of charitable trusts.

The two questions already mentioned lead to a third: What private actions have trust parties taken when engaging with the law? Chapter 5 explores this question through an examination of charitable contracts collected for this research. In the public law-private law hybrid model, trust parties are granted greater autonomy to determine the distribution of rights and responsibilities between them in the day-to-day management of

⁹⁹ See analysis in Section II of Chapter 4.

¹⁰⁰ See analysis in Section III of Chapter 4.

¹⁰¹ Ibid.

¹⁰² Ibid.

charitable trusts.¹⁰³ The law establishes checks-and-balances mechanisms between trust parties. However, it does not clearly define how these mechanisms should operate and what measures can be taken by trust parties when these mechanisms are inadequate to regulating their relationship.¹⁰⁴ In view of the risk posed by regulatory practice and the vagueness of the law, the parties to charitable trusts are strongly motivated to use contracts to clarify their powers and duties and to define the ways in which they interact with regulators. Similar to regulators, practice shows that trust parties consider a wide range of extra-legal factors in the planning and development of contract clauses, seeking to use these clauses to mitigate risks in the performance of their legal roles.¹⁰⁵

To explore how contractual tools are used by trust parties, Chapter 5 examines three subsidiary questions. In what ways are contracts used in the management of charitable trusts? What types of relationships are regulated by charitable trust contracts? And how do extra-legal factors affect the planning of contract terms between trust parties? To address these questions, Chapter 5 considers areas where the law governing the relationship between trust parties is vague, the risks that trust parties may confront when implementing the law, and the policy and social norms underlying the creation and ongoing administration of charitable trusts.

C Questions beyond the Scope of This Book

Although this book examines the governance structure of charitable trusts both in law and in practice, it focuses on how legislated rules are implemented in practice in the governance of charitable trusts. Examination of such governance practices can help to identify problems or deficiencies in the current legislative framework. For example, the current law makes no mention of the role beneficiaries might play in the governance of charitable trusts,¹⁰⁶ and it does not evaluate the extent to which a more restrictive approach regarding the settlor's role in charitable trust governance might adversely affect their willingness to make donations.¹⁰⁷ It fails to detail the rules governing information disclosure, and it does not require trustees to explain in their financial and annual

¹⁰³ See analysis in Section III of Chapter 3.

¹⁰⁴ Ibid.

¹⁰⁵ See analysis in Section III of Chapter 5.

¹⁰⁶ See analysis in Section IV of Chapter 3.

¹⁰⁷ See analysis in Section III of Chapter 3.

work reports how well they have realized the public benefit goals the trust was set up to deliver.¹⁰⁸ This makes it more difficult for settlors, regulators, and the general public to understand and evaluate the performance of charitable trusts and their trustees. This book discusses these problems alongside its analysis of the governance of charitable trusts. However, it does not articulate a detailed pathway for the reform of the governance rules of Chinese charitable trusts: this would require an examination of these problems from a more comprehensive perspective, encompassing law, sociology, and politics.

Furthermore, this book does not provide an in-depth analysis of the different theories concerning the governance of charitable trusts or issues relating to how an appropriate balance might be struck between the needs of the state in using trusts to promote charitable undertakings and the needs of benevolent owners to have more autonomy to deal with their properties. Rather, it focuses on the legal construction of the current system and the challenges it has created. It also evaluates the legislated governance structure of charitable trusts in light of the policy and social contexts in which they operate, identifying the factors influencing how each actor engages with the law.

V Research Methods

This book is an in-depth study of the legal rules governing Chinese charitable trusts and how the legislated governance goals are implemented in practice. It adopts three methods: textual analysis of the legal rules and other legal mechanisms, such as charitable trust contracts; semi-structured qualitative interviews with individuals with charitable trust experience; and translation of Chinese sources.

A *Textual Analysis*

Documentary sources include legislation, explanatory memoranda, official speeches, public information on recorded charitable trusts, academic treatises, and comparative works. These sources relate to the book's analysis in different ways. Legislation and explanatory memoranda provide information on legal rules that have been constructed for the governance of charitable trusts and the core values that charitable trusts

¹⁰⁸ See analysis in Section II of Chapter 4.

exist to pursue. Official speeches provide information for policy reasons underlying the legislative reform of charitable trusts and the interaction between the state and the general public in promoting charitable undertakings. Public information on recorded charitable trusts provides information on charitable trust practice, including what types of charitable trusts have been created, what their charitable purposes are, and how they have been administered and regulated. Academic treatises provide information on areas where current research can be continued or expanded and on areas where this book can make further contributions. Comparative works provide information on continuities and discontinuities between charitable trusts and public welfare trusts regarding governance and measures that lawmakers have taken to unlock the potential of trusts to develop and further charitable causes.

The textual analysis is divided into two parts. The first part is an interpretation of Chinese charitable trusts; it includes a critical analysis of legislative provisions, the nature and function of Chinese charitable trusts, and the threshold for establishing Chinese charitable trusts. In contrast to the deep historical roots of charitable trusts in common law, charitable trusts are new to the Chinese legal system. The successful establishment of Chinese charitable trusts still faces many problems. In this regard, the textual analysis here clarifies and compares¹⁰⁹ analogous domestic institutions, such as Chinese public welfare trusts and Chinese agency systems. Comparing these two institutions provides a framework for understanding how Chinese charitable trusts operate and helps identify three issues in the model of governance set out by legislation: (a) the ways in which settlors and trustees perform their roles in law, (b) the relationship between Chinese charitable trusts and Chinese agency

¹⁰⁹ At present there is no uniform agreement on the nature of comparative law. Some scholars opine that comparative law is a research method, while others suggest that comparative law is a research methodology, a discipline, or a science. For works devoted exclusively to the nature of comparative law, see J. Michael Rainer, *Introduction to Comparative Law* (Manz, 2010) 19–25; H. Patrick Glenn, 'Against Method' in Maurice Adams and Dirk Heirbaut (eds.), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford University Press, 2014) 177; Jaakko Husa, 'Research Designs of Comparative Law: Methodology or Heuristics?' in Maurice Adams and Dirk Heirbaut (eds.), *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford University Press, 2014) 53–5; Jaap Hage, 'Comparative Law as Method and the Method of Comparative Law' in Maurice Adams and Dirk Heirbaut (eds.), *The Method and Culture of Comparative Law: Essays in Honor of Mark Van Hoecke* (Hart, 2014) 44–5; A. Kh Saidov, *Comparative Law*, tr William Elliott Butler (Wildy, Simmonds & Hill, 2003) 28–31; Reimann (n 73) 683–7.

systems, and (c) the role and function of the regulatory authority in the governance of Chinese charitable trusts.

The second part is an examination of the legal nature of Chinese charitable trusts. As already noted in Section I, because of the onerous requirement to obtain regulatory approval, only twenty public welfare trusts have been successfully established over the last twenty years. Drawing on the failure of public welfare trusts, lawmakers have established a new governance model for charitable trusts, imbuing this newly established institution with its public law–private law nature. Studying the ways in which public law norms interact with private law norms can help explain why lawmakers chose to legislate a whole new regime (the charitable trust) rather than reform the model of public welfare trusts. Furthermore, this study sheds light on how the checks-and-balances mechanisms between trust parties are established. At the macro level, it also assesses the efforts of lawmakers to advance ‘state–society relationships’.¹¹⁰ Legislative history offers an explanation of the development of the law.¹¹¹ Charitable trusts are introduced in a context in which large numbers of poor, disabled, and unemployed people have created a huge social demand for charitable causes. As such, to explore the legal nature of charitable trusts, this book will also examine the policy and social contexts within which charitable trust rules operate and develop.

B Semi-structured Qualitative Interviews

The governance model of the Chinese charitable trust has not been studied at all by Chinese scholars, let alone using empirical research methods. An analysis of the law suggests a tension between settlors and trustees, both of whom are given wide discretionary powers, implying that regulatory agencies play a passive role in supervising the administration of Chinese charitable trusts. The law concerning Chinese charitable trusts has only been in place since 2016; as such, many aspects of the practice of governance are still in their formative stages, with the extant literature not

¹¹⁰ Lee, ‘Modernize Charity Law in China’ (n 6) 372.

¹¹¹ Esin Örüçü, ‘Unde Venit, Quo Tendit Comparative Law’ in Andrew Harding and Esin Örüçü (eds.), *Comparative Law in the 21st Century* (Kluwer Academic Publishers, 2002) 3; Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited, 2007) 193; Martin Löhnig, ‘Comparative Law and Legal History: A Few Words about Comparative Legal History’ in *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoecke* (Oxford University Press, 2014) 114.

offering any in-depth analysis of the questions noted in Section IV-B. Given this, gaining insights into the ways in which the legislative scheme of the charitable trust has been practically implemented is significant for evaluating the strengths and weaknesses of the current governance structure for Chinese charitable trusts. Law is an aspect of broader society; as such, it is necessary to examine the law and its institutional context together to identify the ways in which the law is implemented in practice. This book engages in direct contact with human participants through the method of semi-structured qualitative interviews to explore how each of these powerful actors interacts in the day-to-day governance of charitable trusts and to clarify the ways in which regulators exercise their roles and responsibilities of oversight of charitable trusts.

Thirty-one interviews were conducted in Beijing, Shanghai, Shenzhen, Hangzhou, and Guangzhou from October 2018 to January 2019, where most of the charitable trusts are established and where the main regulators and legislators are located. Additional later interviews and more informal discussions with trustee managers and lawyers working in the charitable sector continued into early 2020. Ethics approval was granted before the commencement of this empirical study. Interviews were carried out to obtain insights from participants on the basis that their responses would be anonymous. Two categories of interviewees were involved, and all interviewees had expertise and experience in Chinese charitable trusts. The first category of interviewees comprised private actors, including lawyers, academics, and trustee managers. Interviews with this category of actor elicited their opinions on the ways in which the settlor and the trustee perform their roles, issues of day-to-day governance, and measures taken to comply with legislated governance goals. The second category of interviewees comprised public actors: namely, officials working in regulatory agencies. Interviews with these actors enabled the author to investigate the interaction between the two institutional objectives – promoting charitable undertakings and securing the autonomy of trust parties – of Chinese charitable trusts, the standing of the beneficiary, and the attitude of regulatory authorities to the regulation of Chinese charitable trusts. To ensure anonymity, the identifying information of the interviewees has been replaced with codes: L for lawyers, A for academics, T for trustee managers, and R for regulatory officials.

The qualitative analysis of empirical data gathered through interviews enriches the understanding of the governance practice of Chinese charitable trusts. The qualitative analysis in this book yields two significant findings. First, there is a considerable gap between theoretical analysis

and practice regarding the governance of Chinese charitable trusts. Second, the policy and social contexts play an important role in realizing the governance goals set out by legislation: regulators and trust parties do not respond to the legal governance model perfectly, and their behaviours are significantly affected by factors transcending the law.

C Translation of Chinese Sources

This book draws on both English and Chinese sources. As such, the author's translations of relevant legal rules and concepts into English are essential to the analysis. The translation of Chinese legal concepts into English can be problematic when there are no close equivalents in English. This is particularly true in the case of Chinese charitable trusts. Accordingly, each chapter that examines the governance of Chinese charitable trusts – for example, Chapter 2 in the case of public welfare trusts (*gongyi xintuo* 公益信托) and Chapter 4 in the case of recording (*bei'an* 备案) and supervisory conversation (*jianguan tanhua* 监管谈话) – provides an explanation of the Chinese terms and how to understand them in English. Unless otherwise indicated, all English translations of Chinese text and materials are the author's own and are based on the following four principles. First, regarding Chinese to English translations, accuracy in meaning has been preferred over literal translation. Take the concept *jing zhun fu pin* (精准扶贫). This concept often occurs in connection with policy documents or official speeches. While its literal meaning is 'precise poverty alleviation', it has been translated here as 'targeted poverty alleviation'. Second, regarding the interview data, accuracy in meaning has also been preferred over literal translation. By focusing on the precise meaning of individual words and terms, a literal or technical translation cannot accurately convey the actual meaning of the interview respondents. Third, semi-official English translations – namely, English translations available on websites, such as those of PKU law or Westlaw China, which do not have any official status – have been modified where the translation is considered suboptimal or deficient. Fourth, where it assists in understanding, the original Chinese text has been included in parentheses after the English translation to identify the relevant concepts. Illustrative examples are the three major institutional forms for establishing charities in China: foundations (*jijin hui* 基金会), social associations (*shehui tuanti* 社会团体), and privately-operated non-enterprise organizations (*minban feiqiye danwei* 民办非企业单位).