



# Political Influence in the Regulation of Chinese Charitable Trusts

Hui Jing 

## Abstract

With the 2016 *Charity Law*, Chinese legislators created a public-private hybrid model for the governance of charitable trusts. By endowing private actors with greater rights in the creation and management of charitable trusts, this hybrid model demonstrates the State's intention of changing the functioning of the charitable trust sector from complete dependence on the State to a partnership. However, embedded in China's particular institutional environment, the partnership relationship still bears the mark of strict government control, which is secured by granting extensive powers to regulators. This article analyzes the newly established regulatory framework for charitable trusts and outlines how regulators exercise their power in practice. The findings show that the tradition of regulators being subject to intense administrative pressures remains unchanged and that political concerns permeate every aspect of the regulation of charitable trusts.

**Keywords:** Administrative regulation, individual autonomy, political control, governance

## Résumé

Avec la *Loi sur la charité* de 2016, les législateurs chinois ont créé un modèle hybride « public-privé » pour la gouvernance des fiducies caritatives. En dotant les acteurs privés de plus de droits dans la création et la gestion des fiducies caritatives, ce modèle hybride démontre la volonté de l'État de faire évoluer le fonctionnement du secteur des fiducies caritatives d'un modèle qui est entièrement régulé l'État vers un modèle de partenariat public-privé. Cependant, dans l'environnement institutionnel particulier de la Chine, la relation de partenariat porte toujours la marque d'un contrôle gouvernemental strict, un contrôle qui est garanti par l'octroi de pouvoirs supplémentaires aux autorités de réglementation. Le présent article analyse le nouveau cadre réglementaire pour les fiducies caritatives et s'attarde à décrire comment les autorités de réglementation exercent leur pouvoir dans la pratique. Les résultats de cette recherche montrent que la tradition selon laquelle les régulateurs sont soumis à d'intenses pressions administratives reste inchangée et que, par conséquent, les préoccupations politiques continuent à imprégner tous les aspects de la réglementation des fiducies caritatives.

*Canadian Journal of Law and Society / Revue Canadienne Droit et Société*, 2023, Volume 38, no. 1, pp. 46–66. doi:10.1017/cls.2022.28

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**Mots clés:** Réglementation administrative, autonomie individuelle, contrôle politique, fiducies caritatives, gouvernance

## I. Introduction

By passing the *Trust Law* of the People's Republic of China (*Trust Law*),<sup>1</sup> Chinese legislators introduced the public welfare trust model meant to unleash the potential of trusts in promoting charitable causes.<sup>2</sup> However, the public welfare trust model was not successful, with no more than twenty public welfare trusts being established over the past two decades.<sup>3</sup> Drawing on the failed experience of public welfare trusts, in 2016, Chinese legislators introduced the charitable trust model with the enactment of the *Charity Law* of the People's Republic of China (*Charity Law*).<sup>4</sup> The introduction of the charitable trust model lie within the scope of the State's goal of encouraging the public to use the trust tool to promote charitable undertakings.<sup>5</sup> To qualify as a charitable trust, a trust must have a purpose that falls within the ambit of the charitable purposes specified in article 2 of the *Charity Law*. These purposes include alleviating poverty, assisting the disabled, promoting the development of education, and improving the ecological environment.<sup>6</sup> In contrast to the public-law orientation of public welfare trusts, Chinese legislators created a "public-private hybrid"<sup>7</sup> model for charitable trusts. Under this model, Chinese legislators incorporated substantial private norms into the legal structure of charitable trusts: trust parties have greater autonomy in deciding what types of public benefit are created and how management rights can be exercised. This hybrid model demonstrates the State's intention to use the charitable trust device to promote private philanthropy.<sup>8</sup>

Prior to the enactment of the *Charity Law*, the literature discussing the pre-2016 regulatory framework showed that the crucial problem underlying the earlier regulation lay in the government's strict, extensive control over the charitable sector. Embedded within China's distinctive social, economic, and political conditions are numerous "restrictive and repressive measures"<sup>9</sup> through which the State regulates the charitable sector.<sup>10</sup> In the words of Rebecca Lee, "[t]o ensure that

<sup>1</sup> 《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 (Trust Law).

<sup>2</sup> Trust Law, art 60.

<sup>3</sup> For an account of the failure of public welfare trusts, see Part III.

<sup>4</sup> 《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 (*Charity Law*).

<sup>5</sup> Hui Jing, "The Legal Nature of the Chinese Charitable Trust," in *Asia-Pacific Trusts Law: Theory and Practice in Context*, ed. Matthew Harding and Ying Khai Liew (Hart, 2021), 271, 276.

<sup>6</sup> For an account of these purposes, see 金锦萍 [Jin Jinping], 《公益信托与慈善信托专论》[Discussions on Public Welfare Trusts and Charitable Trusts] (社会科学文献出版社 [Social Sciences Academic Press], 2020) 117–19.

<sup>7</sup> Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart: 2016), 12.

<sup>8</sup> Jing, "The Legal Nature," 276.

<sup>9</sup> Anthony J. Spiers, "Regulation as Political Control: China's First *Charity Law* and Its Implications for Civil Society," *Nonprofit and Voluntary Sector Quarterly* 49, no. 3 (2020): 571, 572.

<sup>10</sup> Adam S. Chodorow, "Charity with Chinese Characteristics" *UCLA Pacific Basin Law Journal* 30 (2012): 1, 8–12; Rebecca Lee, "Modernize *Charity Law* in China," *Pacific Rim Law & Policy Journal* 18 (2009): 347, 354–55.

it remained a key stakeholder in the charitable sector, the Chinese government retained strong controls over the [charitable] sector through various mechanisms and developed a charitable sector that would collaborate with it but never challenge its legitimacy.<sup>11</sup> Rather than being autonomous and independent like their Western counterparts,<sup>12</sup> Chinese charities<sup>13</sup> are more accurately described as “instrument[s] of state social control.”<sup>14</sup>

The passage of the *Charity Law* demonstrates the State’s concerted effort to establish a supportive environment to facilitate the growth of charities in China. A literal reading of the *Charity Law* and the relevant explanatory note<sup>15</sup> suggests that the State intends to change the role of the charitable sector “from complete dependence on the government to [a] partnership with it.”<sup>16</sup> The charitable trust model was introduced against this background. The manner in which it has been regulated over the last five years illustrates the State’s attitude towards its relationship with the charitable sector in the post-2016 era. As of 16 September 2022, 953 charitable trusts have been successfully established since the hybrid model’s introduction in 2016,<sup>17</sup> in striking contrast to the scarcity of public welfare trusts over the past two decades. This number suggests that the introduction of the charitable trust model has been a success and that it has the capacity to encourage public participation in the promotion of charitable undertakings. However, the following question arises: Can the development of Chinese charitable trusts really be attributed to the role of the *Charity Law*? Charity practices over the last five years have demonstrated that regulators both facilitate and impede the functioning of charitable trusts. Facilitation occurs in the sense that regulators have implemented numerous educational measures and cooperative programs to promote public awareness of charitable trusts. Meanwhile, impediments involve the fact that, akin to the pre-2016 regulation, regulators still consider a wide range of political factors when performing their oversight duties. These factors motivate regulators to strictly control the use of charitable resources, constraining the exercise of management rights by trust parties. Given this observation, it is worth exploring the actual role that regulators have played in charitable trust practices and the function

<sup>11</sup> Lee, 355.

<sup>12</sup> In jurisdictions with a long philanthropic culture and tradition, such as England, Canada, and Australia, their charitable sectors are highly voluntary and independent. See Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press, 2013) [5.42]; Chan, 109–12; Matthew Harding, “Distinguishing Government from Charity in Australian Law,” *Sydney Law Review* 31, no. 4 (2009): 559, 566–72.

<sup>13</sup> In this article, “charities” encompasses charitable organizations, public welfare trusts, and charitable trusts. According to Article 8 of the *Charity Law*, charitable organizations are duly established non-profit organizations that are compliant with the *Charity Law* and whose purposes are to carry out charitable activities for the public. The major forms of charitable organizations include foundations, social associations, and social service agencies.

<sup>14</sup> Spires, 574.

<sup>15</sup> 《关于〈中华人民共和国慈善法(草案)〉的说明》 [Explanations on the *Charity Law* of the People’s Republic of China (Draft)] (People’s Republic of China) Standing Committee of the People’s Congress, 9 March 2016, s 1.

<sup>16</sup> Lee, 372.

<sup>17</sup> The data is accessible in the national information disclosure platform *Charity in China*, available at <https://cszg.mca.gov.cn/biz/ma/csmh/e/csmheindex.html>.

that the *Charity Law* has performed in the wide use of charitable trusts by the public.

This article explores regulatory practices regarding charitable trusts using data collected during semi-structured qualitative interviews. The significance of this study is two-fold. First, as the new law associated with charitable trusts has been in place for only five years, many aspects of the regulatory regime are still in their infancy. An examination of regulatory practices can clarify how regulators discharge their duties, the gap between law and practice with respect to charitable trust regulation, and areas for future reform. Second, an analysis of regulatory practices can offer insights into the “state-society relationships”<sup>18</sup> in China. As noted above, the charitable trust model was introduced because the State wished to empower “private entities to proactively participate in the provision of social services to the public.”<sup>19</sup> Regulators, as “creature[s] of the government,”<sup>20</sup> represent the interests of the State and are obliged to follow its directives. An examination of how regulators perform their duties may reveal the State’s actual opinions on the role of charitable trusts in delivering public welfare services. It may also furnish broader insights into the State’s post-2016 approach to the regulation of the charitable sector at a general level.

This article is organized into five parts. After the Introduction, Part II introduces the semi-structured qualitative interview method used in this research. Part III explores the regulatory framework of charitable trusts in terms of both law and practice, identifying the ambiguities in the newly established regulatory framework and the strategies that regulators have adopted to address these ambiguities when performing their duties. An analysis of the extra-legal factors that influence regulators’ decision-making processes in Part IV highlights the predominance of political factors in the regulation of charitable trusts. Part V concludes.

## II. Methods and Data

To examine the regulation of charitable trusts, semi-structured qualitative interviews were conducted with various actors involved in the charitable trust sector. A total of thirty-one formal interviews were conducted between October 2018 and January 2019 in Beijing, Shanghai, Shenzhen, Hangzhou, and Guangzhou, where the main regulators and legislators reside and where the majority of charitable trusts are established. Additional interviews and more informal conversations and discussions with charity trustees and other professionals working in the charitable trust sector continued into late 2019. The interviewees included public actors and private actors. Public actors consisted of regulatory officials; the interviews were meant to solicit their opinions on how regulators should exercise their supervisory powers and how charitable trust actors should cooperate with the State in the provision of public welfare services. Private actors consisted of academics and

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<sup>18</sup> Lee, 372.

<sup>19</sup> Hui Jing, “The Autonomy of Charities in China,” *Hong Kong Law Journal* 52 (2021): 321, 323.

<sup>20</sup> Harding, 569.

practitioners, such as lawyers and trustee managers. Interviews with these participants enabled the author to observe the ways in which charitable trust actors interact with regulators during the establishment of charitable trusts and the daily management of charitable assets. Interviewees were given the option of anonymity. Anonymized interviews had their identities removed and replaced with the following codes: “L” for lawyers, “A” for academics, “T” for trustee managers, and “R” for regulatory officials.

### III. The Regulatory Framework for Charitable Trusts

As explained in Part I, Chinese legislators introduced the charitable trust model to replace public welfare trusts in carrying out charitable undertakings. The public welfare trust model failed primarily due to its fragmented regulatory framework.<sup>21</sup> For example, the *Trust Law* required public welfare trusts to be registered with public welfare administration authorities but made no mention of who these authorities were. Consequently, the responsibility for regulating public welfare trusts in practice was shared amongst public security bureaus and various government organizations at the provincial, municipal, and county levels. Such a fragmented regulatory system contributed to higher compliance costs for trust parties and dissuaded people from establishing public welfare trusts. The failed experience with public welfare trusts motivated legislators to establish a specialized regulatory framework for charitable trusts.<sup>22</sup>

This new direction was given concrete form through the enactment of Article 6 of the *Charity Law* and Article 6 of the Administrative Measures for Charitable Trusts (MCT).<sup>23</sup> According to these two articles, banking regulatory authorities (BRAs) and civil affairs departments (CADs) are specifically empowered to regulate charitable trusts. The law grants the two regulators extensive powers, enabling them to play an active role in the creation and day-to-day management of charitable trusts. At the same time, the law contains various ambiguities with regard to this newly established regulatory framework. For example, the law does not specify the details of the regulatory powers and how they should be exercised. Neither does it provide a clear definition of the relationship between the two regulators and the liability of each in the case of unlawful use of regulatory powers. Such vagueness has encouraged regulators to consider extra-legal factors when discharging their oversight duties. The section below discusses the regulatory framework for charitable trusts in the context of law and practice. This discussion examines the following three subjects: (a) the relationship between the two regulators, (b) the legal powers that these regulators are granted and how these powers have been exercised in practice, and (c) the educational measures that regulators have taken to encourage the development of charitable trusts.

<sup>21</sup> Jing, “The Legal Nature,” 284.

<sup>22</sup> Ibid.

<sup>23</sup> 《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 2007 (MCT).

## 1. The Relationship between CADs and BRAs

### 1.1 The Domain of Law

Article 6 of the MCT stipulates that CADs and BRAs are responsible for regulating the creation and administration of charitable trusts. However, the law and its explanatory memoranda fall short of clarifying the relationship between the two regulators. A possible clue can be found in the MCT's Article 48: CADs and BRAs "shall establish a regular regulatory cooperation mechanism to strengthen interim and ex-post regulation, and effectively improve the effectiveness of regulatory operations." The wording of Article 48 suggests that there is, or should be, a cooperative relationship between the two regulators; however, what this cooperation mechanism should look like remains unspecified.

Articles 47, 49, and 51 of the MCT, when read and interpreted together, may provide insights into this cooperation mechanism. Two observations can be made here. First, the law prescribes collaboration between BRAs and CADs in supervising the administration of charitable trusts: BRAs are "responsible for the supervision of charitable trust businesses of trust companies and the custody of funds in charitable trust accounts by commercial banks";<sup>24</sup> by comparison, CADs "are responsible for recording charitable trusts and their related supervision and administration."<sup>25</sup> Contrary to registration, recording only requires regulators to conduct formal examination over charitable trust documents submitted by trust parties. How the two regulators exercise their powers in revoking charity trustees' registration licenses is illustrative of their cooperation mechanism: depending on the identity of the charity trustee concerned,<sup>26</sup> when charity trustees commit violations in administering trust affairs, BRAs are empowered to revoke the registration licence of the trust company,<sup>27</sup> and CADs are empowered to revoke the registration licence of the charitable organization.<sup>28</sup>

The second observation concerns the overlap between CADs and BRAs in their exercise of statutory powers. The existing law allows both CADs and BRAs to inspect charity trustees in the performance of their duties,<sup>29</sup> to entrust third-party agencies with assessing the management of charitable trusts,<sup>30</sup> and to conduct supervisory conversations with charity trustees.<sup>31</sup> However, no guidelines are provided by the law on how the two regulators should cooperate with each other in exercising these overlapping powers. For example, should they reach a consensus before issuing regulatory decisions, or are they allowed to exercise their powers separately, without coordination? Such questions persist and need to be clarified in future judicial interpretations or legislation.

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<sup>24</sup> Ibid, art 47.

<sup>25</sup> Ibid.

<sup>26</sup> In Chinese law, only charitable organizations and trust companies can take the trusteeship for charitable trusts, see *Charity Law*, art 46.

<sup>27</sup> 《信托公司管理办法》[Measures for Administration of Trust Companies] (People's Republic of China) China Banking Regulatory Commission, 23 January 2007, art 59.

<sup>28</sup> *Charity Law*, art 98.

<sup>29</sup> MCT, art 49.

<sup>30</sup> MCT, art 50

<sup>31</sup> MCT, art 51

## 1.2 The Practice Domain

What the law stipulates is not necessarily consistent with practice, for “all jurisdictions have some gap between aspirational rules and their practical enforcement.”<sup>32</sup> Therefore, an exploration of how the cooperation mechanism contemplated by the law functions in practice can help reassess legislative arrangements for the distribution of regulatory powers. A closer scrutiny of the interview data revealed two findings. First, there are no streamlined means for exchanging data between the two regulators. In the absence of clear data-sharing processes between CADs and BRAs, it is unsurprising that the current regulatory framework imposes “reporting red tape”<sup>33</sup> on recorded<sup>34</sup> charitable trusts. Three of the charity trustees interviewed<sup>35</sup> stated that they had been asked to submit similar or duplicate reports to different regulators.

Second, it is questionable whether BRAs are appropriate regulators for charitable trusts. Contrary to the flourishing development of charitable trusts in common law,<sup>36</sup> nearly 80 per cent of the trusts created in China are commercial in nature.<sup>37</sup> Over the last two decades, regulatory practice has enabled BRAs to gain extensive experience in supervising commercial trust businesses. Such businesses mainly focus on generating and distributing private benefits, in marked contrast to the objectives underpinning charitable trusts. A series of notices (*tongzhi* 通知) and opinions (*yijian* 意见) have been issued by BRAs to assist trust companies in controlling and preventing the risks (e.g., liquidity risk and credit risk) related to the operations of commercial trust businesses. Nonetheless, questions remain regarding the extent to which BRAs are capable of supervising the administration of charitable trusts.

Regulatory practice shows that, compared with BRAs, CADs have played a dominant role in supervising charitable trusts.<sup>38</sup> Though the law does not elaborate on how the two regulators should cooperate when exercising their powers, CADs have taken proactive measures to specify their own roles and the ways in which their powers can be exercised. CADs have also been willing to frequently issue letters and notices to charity trustees to inspect whether charitable trusts are administered in alignment with the State’s public welfare policy.<sup>39</sup> By contrast, BRAs have not played an active role in regulatory practice. In contrast to CADs, regulating charitable trusts is outside the focus of BRAs’ supervisory work; accordingly, BRAs are not subject to intense policy and administrative pressures when

<sup>32</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015), 13.

<sup>33</sup> Australian Charities and Not-for-profits Commission, *Strengthening for Purpose: Australian Charities and Not-for-Profits Commission Legislative Review* (Commonwealth of Australia: 2018), 106.

<sup>34</sup> For an analysis of the recording of charitable trusts, see Part III-2.

<sup>35</sup> See interviews with T1, T5 and T7.

<sup>36</sup> Chan, 22; Alison Dunn, “As Cold as Charity: Poverty, Equity and the Charitable Trust,” *Legal Studies* 20 (2000): 222, 223.

<sup>37</sup> Lusina Ho, “Business Trusts in China: A Reality Check,” *University of Cincinnati Law Review* 88, no. 3 (2020): 767, 768; Stephen Tensmeyer, “Modernizing Chinese Trust Law,” *New York University Law Review* 90 (2015): 710, 728–30.

<sup>38</sup> See interviews with R1, R2 and R3.

<sup>39</sup> See interviews with R1, R2, L1 and L2.

discharging their oversight functions with regard to charitable trusts. Consequently, BRAs do not have strong incentives to clarify the procedures to be followed in the exercise of their powers and how they should interact with charity trustees in the daily management of charitable trusts. The following statement from one regulatory official demonstrates this aspect: “Colleagues at BRAs rarely talk to us about the regulation of charitable trusts. I know our CADs should cooperate with BRAs, but I don’t know how the cooperative mechanism actually works. I haven’t seen any proactive role that BRAs have played in regulatory practice.”<sup>40</sup>

## 2. The Content and Scope of Regulatory Powers

Consistent with state policies regarding the intensive supervision of charitable activities,<sup>41</sup> the law grants CADs and BRAs wide regulatory powers to approve the establishment of charitable trusts and supervise their ongoing administration. In the creation phase, CADs have the power to determine whether a charitable trust can be recorded. When a charitable trust is legally established, the two regulators have the power to demand the submission of annual reports by charity trustees, revoke the registration licences of charity trustees, and conduct supervisory conversations. Allowing regulators to maintain a high degree of control over charitable trusts, this legislative arrangement demonstrates how the State controls charitable resources via the charitable trust device. The following section discusses the content and scope of these regulatory powers and how they have been exercised in practice.

### 2.1 The Creation of Charitable Trusts

According to Article 15 of the MCT, CADs at or above the county level have the power to determine whether a charitable trust can be recorded (*bei'an* 备案). Prior to the enactment of the *Charity Law*, a public welfare trust came into existence only when the trust parties obtained registration (*dengji* 登记) approval from public welfare administration authorities.<sup>42</sup> This approval requirement endowed relevant authorities with a high level of discretion to reject applications when, according to their judgement, the purpose of a trust was inconsistent with the public welfare goals of the State.<sup>43</sup> One lawyer offering legal suggestions for the creation of public welfare trusts said the following: “Registration is a tool intentionally used by the State to control the undertaking of public welfare activities. Institutions whose purposes are contrary to the State’s goals are never allowed to be established.”<sup>44</sup>

Moreover, the *Trust Law* provides no criteria for identifying relevant administrative authorities for the establishment of public welfare trusts. In practice,

<sup>40</sup> See interview with R2.

<sup>41</sup> 《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, ch. 4; 《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, ch. 3.

<sup>42</sup> Trust Law, art 62.

<sup>43</sup> Siyi Lin, “China’s New *Charity Law*: A New Era of Charitable Trusts,” *Trusts & Trustees* 24, no. 8 (2018): 768, 770; Jing, “The Legal Nature,” 285.

<sup>44</sup> See interview with L1.



responsibilities for the registration of public welfare trusts are shared by CADs, public security bureaus, and a wide variety of government entities, depending on the purpose of the trust, the identity of relevant trust parties, and the activities that the trust intends to carry out. Accordingly, the parties related to public welfare trusts need to consult with various government agencies to determine the recipient of the registration application. Due to these obstacles, no more than twenty public welfare trusts have been successfully established over the last two decades.<sup>45</sup> Based on the experience of public welfare trusts, the *Charity Law* stipulates that CADs and BRAs are specialized regulators and that recording functions as a measure for the creation of charitable trusts.<sup>46</sup>

The key aspect that the *Charity Law* leaves unresolved is the legal nature of recording. The participants interviewed had divergent understandings of recording. Seven participants<sup>47</sup> reported that, consistent with the literal meaning of recording, regulators' examination of the creation of a charitable trust should be formal rather than substantive; by contrast, the majority of the interviewees<sup>48</sup> observed that the examinations conducted in practice are substantive rather than formal. There have been cases of applications for recording being declined by CADs in Beijing and Shanghai, despite the documents submitted being in full compliance with the requirements specified by the law. Four of the ten lawyers with recording experience stressed that CADs in Beijing, Shanghai, Shenzhen, and Guangzhou have a high degree of discretion in recording charitable trusts. For example, three lawyers<sup>49</sup> said that the regulatory officials in Beijing refused to record open-ended<sup>50</sup> charitable trusts; more importantly, there is no legal recourse when an application is refused. By contrast, CADs in Guangzhou and Shanghai are more open to recording open-ended charitable trusts, as evidenced by the fact that more than ten charitable trusts of this type have been successfully recorded in the two cities.<sup>51</sup>

The three regulatory officials interviewed stated that the recording of charitable trusts was, in fact, a substantive and not a formal examination.<sup>52</sup> They provided two reasons for this. First, as the law does not clearly define the legal nature of recording, regulators are empowered to determine the type of examination. Second, charitable trusts are still in their formative stage; therefore, regulators choose to conduct substantive examinations of trust documents to evaluate whether the charitable trusts to be established carry the risk of damaging the State's public welfare

<sup>45</sup> 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) 526–29.

<sup>46</sup> MCT, ch 3.

<sup>47</sup> See interviews with Zhao Lianhui (Professor, China University of Political Science and Law), Chen Han (Associate Professor, China University of Political Science and Law), A3, A6, A7, L8 and L9.

<sup>48</sup> See interviews with Hou Ou'ya (Trustee Manager, China Everbright Trust Company), Zhou Mo (Trustee Manager, Minmetals International Trust Company), R1, R2, R3, T1, T2, T7, L1, L2 and L5.

<sup>49</sup> See interviews with L1, L2 and L3.

<sup>50</sup> The term “open-ended” means that the trust assets can be increased and that the criteria for selecting beneficiaries can be changed during the ongoing operation of a charitable trust.

<sup>51</sup> For information on these recorded trusts, see <https://cszg.mca.gov.cn/biz/ma/csmh/e/csmhindex.html>.

<sup>52</sup> See interviews with R1, R2 and R3.

interests. Three charity trustees with experience in recording charitable trusts emphasized the pre-communication procedure between charitable trust creators and regulators. They all made similar remarks, which can be summarized as follows: “Prior to the initiation of the recording procedure, we need to communicate with relevant officials on certain issues, including the nature of the charitable purpose and the identity of trust parties. In this process, regulators will advise us on how trust documents should be amended. In the absence of their satisfaction with the application documents, regulators will not record our charitable trusts.”<sup>53</sup>

## 2.2 *The Ongoing Administration of Charitable Trusts*

In the ongoing administration of charitable trusts, both CADs and BRAs have the power to conduct supervisory conversations with charity trustees and demand information disclosure. These powers enable regulators to extensively control the public’s use of charitable trusts. Similar to the vagueness of the law regarding the relationship between the two regulators, the regulatory powers established by the law are also fraught with ambiguities.

### 2.2.1 **The Power to Conduct Supervisory Conversations**

When charity trustees are suspected of having violated the law, the two regulators can initiate separate supervisory conversations to compel these trustees to explain their management decisions.<sup>54</sup> This measure includes the power to conduct on-site inspections of charity trustees’ domiciles and the places where charitable trust affairs are carried out, as well as to inspect and duplicate materials relevant to the administration of charitable trusts.<sup>55</sup> In practice, there are two situations that can motivate regulators to initiate supervisory conversations: (a) when regulators receive complaints or accusations via public complaint hotlines regarding potential maladministration by charity trustees or (b) when regulators themselves identify non-compliance risks during on-site inspections. The interview data<sup>56</sup> suggested that supervisory conversations are, in essence, a form of administrative investigation (*xingzheng diaocha* 行政调查) carried out by government bodies. This kind of investigation is part of the administrative decision-making process and entails both educational and disciplinary elements. For educational purposes, through supervisory conversations, regulators advise trustees on how to rectify minor violations of the law and what steps can be taken to comply with regulatory requirements. For disciplinary purposes, regulators possess broad discretion in conducting supervisory conversations and may issue administrative punishments to charity trustees when the management of charitable trusts severely contravenes the laws or

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<sup>53</sup> See interviews with T1, T5, and Hou Ou’ya (Trustee Manager, China Everbright Trust Company).

<sup>54</sup> Measures for Administration of Trust Companies, art 53; MCT, art 51.

<sup>55</sup> *Charity Law*, art 93; Measures for Administration of Trust Companies, art 47.

<sup>56</sup> See interviews with Zhao Lianhui (Professor, China University of Political Science and Law), A3, A6, A7, A8, T1, L1, L8 and R2.

regulations. In such a scenario, a supervisory conversation leads to a change in or elimination of the rights or obligations of the stakeholder interviewed.<sup>57</sup>

Supervisory conversations have been used extensively by Chinese environmental and food-safety regulators over the last ten years. When private parties engage in minor infringements of the law, regulators employ means such as conversations, guidance, and warnings to advise these parties that they should rectify their wrongdoing in a timely manner so as to prevent serious legal liabilities that could result from perpetuating the illegal acts concerned.<sup>58</sup> However, several problems exist regarding the broad application of supervisory conversations. In their interview, Professor Lyu Xin stressed the following: “Ambiguities as to the legal nature of supervisory conversations, the scope of their applications, and how they should be conducted remain unsolved. The absence of clarifications may create the risk of regulators abusing their supervisory powers.”

Due to the foregoing ambiguities, regulators possess broad discretion when exercising their power to conduct supervisory conversations. They may therefore have considerable incentives to carry out supervisory conversations when investigating violations by charity trustees.<sup>59</sup>

As the *Charity Law* was enacted only in 2016, to date, the CADs and BRAs in Beijing, Shanghai, and Guangzhou have yet to conduct any supervisory conversations with charity trustees.<sup>60</sup> However, it is expected that future supervisory conversations for charitable trusts will involve the ambiguities explained above. Between 2015 and 2016, the Measures of Administrative Interviews for Social Organizations<sup>61</sup> and the Provisions on the Interview Works in the Administrative Law Enforcement by Social Organization Registration and Administration Organs (for Trial Implementation)<sup>62</sup> were respectively promulgated by the Beijing Civil Affairs Bureau and the Ministry of Civil Affairs. These two documents, which stipulate the procedures for conducting supervisory conversations with persons in charge of social organizations,<sup>63</sup> may provide insights into supervisory conversation use in the area of charitable trusts. For charitable trust parties, the clarification of the procedures and contents of supervisory conversations by the regulators of

<sup>57</sup> 孟强龙 [Meng Qianglong], 《行政约谈法治化研究》 [Study on the Legalization of Administrative Interviews] 行政法学研究 *Administrative Law Review* 6 (2015): 99, 105; 王虎 [Wang Hu], 《风险社会中的行政约谈制度: 因应、反思与完善》 [The System of Administrative Interviews in Risk Society: Response, Reflection, and Improvement] 法商研究 *Study of Law and Business* 1 (2018): 22, 26.

<sup>58</sup> See interviews with A3, A7, L1 and L2.

<sup>59</sup> See interviews with A4 and L2.

<sup>60</sup> See interviews with A4, R1, R2, A3 and A7.

<sup>61</sup> 《北京市社会组织行政约谈办法》 [Measures of Administrative Interviews for Social Organizations in Beijing] (People's Republic of China) Beijing Civil Affairs Bureau, 25 October 2015.

<sup>62</sup> 《社会组织登记管理机关行政执法约谈工作规定(试行)》 [Provisions on the Interview Works in the Administrative Law Enforcement by Social Organization Registration and Administration Organs (for Trail Implementation)] (People's Republic of China) Ministry of Civil Affairs, 16 March 2016.

<sup>63</sup> 《北京市社会组织行政约谈办法》 [Measures of Administrative Interviews for Social Organizations in Beijing] (People's Republic of China) Beijing Civil Affairs Bureau, 25 October 2015, art 2–18; 《社会组织登记管理机关行政执法约谈工作规定(试行)》 [Provisions on the Interview Works in the Administrative Law Enforcement by Social Organization Registration and Administration Organs (for Trail Implementation)] (People's Republic of China) Ministry of Civil Affairs, 16 March 2016, art 2–15.

charitable trusts is of tremendous practical significance. This clarification is important not only for assessing the potential liabilities of those running charitable trusts but also for establishing remedial relief in response to administrative punishments that may arise from supervisory conversations.

### 2.2.2 Power to Demand Information Disclosure

CADs and BRAs are empowered to demand that charity trustees disclose relevant information to the public. Regulatory practice shows that the two regulators exercise this power strictly.<sup>64</sup> Two reasons account for this. First, the misuse of charity funds over the last two decades has led to a significant reduction in public trust and confidence in the charity sector.<sup>65</sup> To increase public trust in the creation and operation of charitable trusts, regulators monitor the ongoing administration of these trusts, and information disclosure is a good way for regulators to learn about the management of charitable trust affairs.<sup>66</sup> Second, since the implementation of the *Charity Law* five years before the present research was conducted, governments at all levels have continued to increase their policy support for the development of charitable trusts.<sup>67</sup> To ensure that such policy privileges are not abused by trust parties, CADs issue letters and notices to verify whether the information required by law has been disclosed in a timely and adequate manner.<sup>68</sup>

Article 56 of the MCT stipulates that trustees are obliged to disclose four types of information on the national information platform: (a) details of the establishment of charitable trusts, (b) reports on asset conditions and the handling of trust affairs, (c) reasons for changes in and termination of charitable trusts, and (d) other information required by CADs for processing the recording of charitable trusts. Failure to make public the handling of charitable trust affairs and the financial conditions of charitable trust assets may entail legal liabilities for charity trustees.<sup>69</sup> Interviews with trust lawyers<sup>70</sup> and trustee managers<sup>71</sup> suggested that the fourth information type is mainly related to the assessment of and administrative punishment for specific charitable trusts. The interviewed regulatory officials<sup>72</sup> stated that the disclosure of disciplinary actions is essential to maintaining public trust and confidence, as the general public needs to be assured that CADs and BRAs are effective regulators and perform their jobs well. Nevertheless, given that a charitable trust's reputation is critical to its ability to perform its work, the three officials also stated that considerable caution was required in terms of issuing punishments for potential or actual offences by charity trustees.

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<sup>64</sup> See interviews with A4, R1, R2, R3, L1, A5, T1 and T5.

<sup>65</sup> Lee, 367.

<sup>66</sup> See interviews with A4, R1, R3 and T5.

<sup>67</sup> For an account of these trust-promoting policies, see Part III-3.

<sup>68</sup> See interviews with R1, R2, R3, A5, T1 and T5.

<sup>69</sup> *Charity Law*, art 105; MCT, art 59.

<sup>70</sup> See interviews with L1 and L2.

<sup>71</sup> See interviews with T1 and T5.

<sup>72</sup> See interviews with R1, R2 and R3.

The law stipulates that charity trustees should disclose to the public the four types of information listed above, but it falls short of clarifying the extent or degree of the information that should be disclosed under each type. The law's vagueness has created several ambiguities that impede the proper operation of this information disclosure system in China. For instance, should the level of transparency required of a charitable trust be affected by the scale and type of its assets or the nature of its charitable purpose? To what extent should information regarding trust asset conditions be disclosed? At the macro level, questions that await clarification include the following: How should the tension between public interest and private parties' right to privacy be dealt with in information disclosure regarding charity activities? In what way can the public's trust and confidence be protected, maintained, and enhanced in the process of carrying out charitable trust purposes?

One may argue that the Ministry of Civil Affairs, the regulator for charitable organizations, has issued the Measures for Information Disclosure<sup>73</sup> (MID) to guide the information disclosure of charitable organizations; therefore, the information disclosure duty of charity trustees in charitable trusts can be regulated in the same way as for charitable organizations. This argument has merits at the practical level because following the MID information disclosure standard can provide certainty and predictability to charity trustees in charitable trusts regarding their information disclosure duty. Nevertheless, it should be noted that considerable institutional differences exist between charitable organizations and charitable trusts: the former have organizational characteristics, whereas the latter are not incorporated and, therefore, do not function as juridical persons. Such institutional differences require unique considerations regarding the design of information disclosure rules for charitable trusts, such as the following: How can the "information needs of different stakeholders"<sup>74</sup> in charitable trusts be fairly protected? How can "the cost of the negative effects of external intervention [by information disclosure law] and [the benefits of] reducing the charity trustees' moral hazard"<sup>75</sup> be balanced in a charitable trust? These considerations may impact the determination of what kind of content needs to be provided in charity reports by charity trustees and the standards for the preparation of such reports. Consistent with this analysis, it is important, both practically and theoretically, for legislators to issue information disclosure guidelines that are specific to charitable trusts. Until such guidelines become available, it is difficult to assess whether sufficient transparency is available to regulators and the public regarding the use of charitable trust assets.

### 3. *The Regulatory Approach Based on Educating the Public*

In the last five years, driven by the central policy of promoting charitable undertakings, CADs and BRAs have launched numerous educational and consultation

<sup>73</sup> 《慈善组织信息公开办法》[Measures for Information Disclosure of Charitable Organizations] (People's Republic of China) Ministry of Civil Affairs, 6 August 2018.

<sup>74</sup> Timothy G. Duncheon, "Litigation Risk as a Justification for Agency Action Notes," *New York University Law Review* 95, no. 1 (2020): 193, 207.

<sup>75</sup> Dejian Li, "Reform of Charity Governance in China: From Economic and Comparative Perspectives" (PhD Thesis, Faculty of Law, The University of Liverpool, 2017), 238.

measures to promote public awareness of charitable trusts. Regulators have aimed to use such measures to educate private actors and encourage them to use charitable trusts to promote the public welfare goals defined by the State. At the national level, the Guiding Opinions of the State Council on Promoting the Healthy Development of Charitable Causes (Opinions on Development of Charitable Causes) explicitly assigned regulators the administrative task of educating and supporting charity participants on best practices for carrying out charitable activities.<sup>76</sup> Likewise, at the local level, the Key Work Points of Civil Affairs Bureaus required local CADs to organize training or education programs regarding the recording of charitable trusts, the administration of charitable trust affairs, and the disposition of charitable trust assets.<sup>77</sup> Following such policy rhetoric, CADs have implemented a wide variety of educational and consultation programs to help the public understand what charitable trusts are and how they can be used to further the development of charitable undertakings in China.

More specifically, at the national level, CADs have initiated various research projects related to charitable trusts, some of which have been conducted in cooperation with local trust associations and academic institutions. At the same time, in the last five years, local-level CADs have organized a variety of forums for leading charity trustees, including trust companies and charitable organizations, to share best practices regarding the management of charitable trusts. Regulatory agencies at the forefront of the charitable trust sector have increasingly focused on creating partnerships with private charitable actors when framing or setting up their regulatory goals. For example, the Implementation Plan for Promoting the Development of Charitable Causes in the Haidian District of Beijing stresses that “the public plays a positive role in the implementation of charity-related policies.”<sup>78</sup> The strategy for charitable trusts in Jiangsu envisions a collaborative mechanism under which the government enacts charity-promoting policies, and the public oversees how these policies are implemented in practice.<sup>79</sup> In addition, CADs in eastern coastal areas, such as Zhejiang, have issued charity progress reports for their jurisdictions and have awarded and praised leaders with outstanding charitable trust performance.<sup>80</sup> In such a favourable environment, an

<sup>76</sup> 《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, ch. 3–6.

<sup>77</sup> See, e.g., 《2020年上海慈善事业促进工作要点》[Key Work Points of Shanghai Charity Promotion Work in 2019] (People's Republic of China) Shanghai Civil Affairs Bureau, 20 March 2020, ss 1–4; 《2021年东莞市民政工作要点》[Key Work Points of Dongguan Civil Affairs Bureau in 2021] (People's Republic of China) Dongguan Civil Affairs Bureau, 29 April 2021, s 24.

<sup>78</sup> 《北京市海淀区关于促进慈善事业发展的实施方案》[Implementation Plan for Promoting the Development of Charitable Causes in Haidian District of Beijing] (People's Republic of China) Haidian District Government of Beijing, 14 March 2017, s. 7.

<sup>79</sup> 《江苏省慈善信托备案管理暂行办法》[Interim Measures for the Administration of Recording of Charitable Trusts in Jiangsu Province] (People's Republic of China) Jiangsu Provincial Civil Affairs Department and Jiangsu Office of the China Banking Regulatory Commission, 23 October 2017, art 51, 57–58.

<sup>80</sup> 《浙江慈善事业发展报告(2019)》发布 [Release of <Charity Development Report 2019 in Zhejiang>] (30 April 2019), available at <http://gongyi.cctv.com/2019/04/30/ARTIqarTUIHumGhfDqxBlOW190430.shtml>.

increasing number of actors outside the CAD and BRA framework have sought to improve the understanding and administration of charitable trusts. Such efforts include establishing independent research and training institutes, advisory services associated with Chinese universities,<sup>81</sup> and, sometimes, individual legal and accountancy firms.

The wide application of educational and training measures demonstrates regulators' incentives to follow and execute the central policy of developing charitable causes. Based on the experiences in and lessons from environmental and labour law enforcement, an important concern arises: Is it easy for charity trustees to negotiate compliance with regulators? The six interviewees<sup>82</sup> who answered this question expressed the following common thought: contrary to environmental and labour law regulation,<sup>83</sup> charitable trust regulators are powerful and unlikely to be easily influenced by charity trustees. Three factors underpin this observation. First, CADs and BRAs possess broad powers under the *Charity Law*, which enable them to play a proactive role in discovering and addressing noncompliance issues. Second, regulators in the last two decades have witnessed many scandals involving the misuse of charity funds. Therefore, it is not difficult for them to identify the risks arising from the creation and day-to-day administration of charitable trusts. Third, in China's distinctive political and social circumstances, regulatory officials are fully aware that any regulatory failure or scandal would result in administrative punishment on their part.<sup>84</sup> This is due to the unspoken rules of the operation of the Chinese bureaucracy. Two officials responsible for the regulation of charitable trusts elaborated on this point: "Once the media exposes regulatory failures or scandals, the government will step in quickly to correct the mistakes. If such failures or scandals come to the attention of higher authorities, the officials concerned may be demoted or in some cases removed."<sup>85</sup>

Subject to these unspoken rules, regulators are willing to strictly exercise their powers when dealing with violations of the law and have a greater incentive to disclose their disciplinary decisions so as to demonstrate to the public that they are performing their roles properly.

<sup>81</sup> For example, Peking University, Shanghai Jiao Tong University, Beijing Normal University and Zhejiang University of Technology have each established public welfare research centres.

<sup>82</sup> See interviews with Zhou Mo (Trustee Manager, Minmetals International Trust Company), R1, R2, T1, T5 and T7.

<sup>83</sup> For an account of the enforcement gap in environment and labour law regulations, see Benjamin van Rooij, Rachel E. Stern, and Kathinka Fürst, "The Authoritarian Logic of Regulatory Pluralism: Understanding China's New Environmental Actors," *Regulation & Governance* 10, no. 1 (2016): 1, 4–6; Virginia E. Harper Ho, "From Contracts to Compliance: An Early Look at Implementation under China's New Labor Legislation," *Columbia Journal of Asian Law* 23 (2009): 35, 101–102.

<sup>84</sup> Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press, 2017), 130.

<sup>85</sup> See interviews with R1 and R3. For an account of these unspoken rules, see Hon. S. Chan and Jie Gao, "Performance Measurement in Chinese Local Governments," *Chinese Law & Government* 41 (2008): 4, 8; Sean Cooney, "Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China," *Fordham International Law Journal* 30 (2007): 1050, 1095; Ng and He, 130.

#### **IV. Regulatory Style in Practice**

Part III examined the regulatory framework for charitable trusts by showing that CADs and BRAs are endowed by law with extensive powers and have broad discretion in how to exercise them. These powers allow regulators to maintain extensive control over the creation and day-to-day management of charitable trusts. However, the law is ambiguous and provides insufficient guidelines on how the powers should be exercised. This ambiguity motivates regulators to employ various strategies to ensure that their interests are not adversely affected in the implementation of the law. At the same time, given the Chinese bureaucratic system, regulators have long been under administrative pressures from the State to discharge their regulatory roles in ways that facilitate national capacity building and ensure the proper implementation of the State's public welfare policies.<sup>86</sup> Accordingly, regulators tend to consider extra-legal concerns when performing their regulatory responsibilities.<sup>87</sup> The following section analyzes these strategies and extra-legal factors to demonstrate how CADs and BRAs discharge their supervisory roles in practice.

##### **1. Administrative Considerations**

The above analysis has shown that regulators do, in fact, carry out substantive examinations of documents submitted by charitable trust parties. Two reasons account for this regulatory practice. First, as the law refrains from elaborating on the legal nature of recording or the difference between recording and registration, CADs and BRAs are empowered to determine what type of examination to conduct at their sole discretion. It is unclear whether this legislative arrangement has been deliberately created by legislators, but there is no doubt that the vagueness in defining recording has, indeed, created scope for regulators to exercise discretion with regard to charitable trust creation.<sup>88</sup> Second, to ensure that charitable trusts are used to advance the State's public welfare goals, CADs and BRAs seek to substantively examine trust documents in the recording phase. In the eyes of regulators, all charitable trusts deemed to be deviating from the State's public welfare goals need to be refused from the outset.

The interview data showed that whether a charitable trust can be successfully recorded in practice depends heavily on the following two considerations: the purpose of the charitable trust and the identities of the charitable trust parties. Regarding the former, charitable trust practice has shown that a charitable trust would find it difficult to pass the review process if its purposes were politically or socially sensitive.<sup>89</sup> As to the latter, regulatory practice has shown that allowing influential government bodies to participate in the creation of charitable trusts

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<sup>86</sup> Jie Gao, "Governing by Goals and Numbers: A Case Study in the Use of Performance Measurement to Build State Capacity in China," *Public Administration and Development* 29, no. 1 (2009): 21, 22; Chan and Gao, 5.

<sup>87</sup> Gao, 22.

<sup>88</sup> See interviews with Hou Ou'ya (Trustee Manager, China Everbright Trust Company), A4, T1 and A5.

<sup>89</sup> See interviews with T1, T7, L2, L8 and L9.



facilitates a trust's review and approval process.<sup>90</sup> These considerations are consistent with the fact that regulators in China have long been subject to direct and intense administrative and policy influences. Extra-legal factors supplement legal rules in the course of regulators performing their oversight functions.

## 2. *The Influence of Administrative Factors*

Administrative and policy considerations permeate the regulatory practices related to charitable trusts from Western to Eastern China. The interview data showed that regulators mainly consider two types of administrative factors when performing their supervisory roles: regional development priority and perceived risk. Furthermore, varying applications of these administrative factors have led to regional differences, namely a supportive regulatory environment in the east and a conservative one in the west. The following section analyzes how the two factors interact with each other in the regulatory practices related to charitable trusts and how they contribute to the emergence of regional differences in regulation.

### 2.1 *Regional Development Priority*

In China, the decentralization policy with respect to legislative powers was implemented in the late 1970s.<sup>91</sup> Along with the implementation of the decentralization policy, the central government establishes overall policy goals to guide administrative work in all areas of China. Governments at the local level are expected to translate these abstract policy goals into specific performance targets and organize their administration work around these targets.<sup>92</sup> Charity practices have revealed regional differences in the translation of the central policies regarding charitable trusts: although these policies have been adopted enthusiastically in the eastern coastal areas, they have received a far less spirited welcome in the undeveloped western areas.

In this section, first, the regulatory practices in the underdeveloped western areas are analyzed. As shown in Part III, the State has issued numerous policies focused on the development of charitable trusts. Nevertheless, these policies have generally been poorly defined, abstract, and difficult to measure in an objective manner. Detailed guidelines are lacking regarding the evaluation standards for policy accomplishments, the weight awarded each criterion, and the procedures for carrying out assessment work. Given the difficulty in objectively measuring the work related to charity development, government officials in the undeveloped western areas have been inclined to apply their limited resources to achieve objectives that are easier to quantify and assess.<sup>93</sup> In these areas, policy priority has mainly been given to alleviating poverty and helping the needy,<sup>94</sup> in line with

<sup>90</sup> See interviews with Bai Shucai (Lawyer, Bo He Partners), T1, L1, L2, L7 and L9.

<sup>91</sup> Sarah Biddulph, Sean Cooney, and Ying Zhu, "Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking," *Law & Policy* 34, no. 4 (2012): 373, 394.

<sup>92</sup> Chan and Gao, 5; Ng and He, 124.

<sup>93</sup> See interviews with Chen Han (Associate Professor, China University of Political Science and Law), A3 and A6.

<sup>94</sup> The national performance evaluation system guides the work priorities of civil servants at both central and local levels. See van Rooij, Stern, and Fürst, 4; Maria Edin, "State Capacity and Local

the central government's policy in this region. More specifically, poverty is the most prominent problem in China's economic and social development, and the undeveloped western areas continue to have large numbers of people living below the poverty line.<sup>95</sup> Improving the living conditions of the poor is, according to the 13th Five-Year Plan for Poverty Alleviation,<sup>96</sup> a clear task assigned to the governments of Western China. Therefore, it is unsurprising that local governments in the undeveloped western areas tend to focus their limited resources on poverty alleviation. With regard to charitable trusts, the vagueness of the law on recording has encouraged regulators to consider development agendas when determining what types of charitable trusts can be established and what kinds of public benefits can be created. This practice is attributable to the fact that regulators are openly part of local governments and therefore willing to follow the directives of local governments and develop good relationships with government leaders.<sup>97</sup> After all, support from these leaders is what really matters for their long-term career development.<sup>98</sup> Echoing this logic, the information in *Charity in China* shows that, in western provinces, the vast majority of the charitable trusts recorded are related to poverty alleviation. This recording practice is consistent with the policy needs of local governmental officials.<sup>99</sup>

The economic conditions in the eastern coastal areas, unlike those in the undeveloped western areas, are relatively stable. In addition to experiencing more rapid economic development, eastern-area CADs have faced greater policy pressures in the development of charitable trusts than their western counterparts.<sup>100</sup> This national policy pressure has set the prevailing agenda for regulators in Eastern China. Accordingly, the CADs in the eastern regions, such as Beijing, Shanghai, and Guangzhou, have sought to remedy the vagueness of the law by developing clear guidelines and criteria for implementing the legislated charity goals. For example, in the last five years, east coast regulators have enacted a wide range of measures, encouraging the public to supervise the management of charitable trusts and report violations by charity trustees.<sup>101</sup> Other regulatory innovations designed to facilitate

Agent Control in China: CCP Cadre Management from a Township Perspective," *China Quarterly* 173 (2003): 35, 39; Carl F. Minzner, "Riots and Cover-Ups: Counterproductive Control of Local Agents in China," *University of Pennsylvania Journal of International Law* 31 (2014): 53, 57–58.

<sup>95</sup> 《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 Republic of China) Central Committee of the Communist Party of China and State Council, 27 May 2011, ch. 2–3.

<sup>96</sup> 《“十三五”脱贫攻坚规划》 [“13th Five-Year Plan” for Poverty Alleviation] (People's Republic of China) State Council, 23 November 2016.

<sup>97</sup> Anthony J. Spires, "Contingent Symbiosis and Civil Society in an Authoritarian State: Understanding the Survival of China's Grassroots NGOs," *American Journal of Sociology* 117, no. 1 (2011): 1, 8.

<sup>98</sup> Cooney, 1064; Virginia E. Harper Ho, 50; Benjamin van Rooij, "Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns," *Development and Change* 37, no. 1 (2006): 57, 64.

<sup>99</sup> See interviews with L1, L2, T1 and T7.

<sup>100</sup> See interviews with A3, A6, A7, T1 and L9.

<sup>101</sup> 《北京慈善信托管理办法》 [Beijing Administrative Measures for Charitable Trusts] (People's Republic of China) Beijing Bureau of Civil Affairs, 21 September 2016, art 37; 《江苏省慈善信托备案管理暂行办法》 [Interim Measures for the Administration of Recording of Charitable Trusts in Jiangsu Province] (People's Republic of China) Jiangsu Provincial Civil Affairs Department and Jiangsu Office of the China Banking Regulatory Commission, 23 October 2017, art 58.

charitable trust development include incorporating the objective of developing charitable trusts as part of the performance appraisal system (the *kaohe* 考核 mechanism in the Chinese bureaucratic system) of local officials,<sup>102</sup> as well as awarding and praising leaders with outstanding charitable trust performance. Due to the supportive regulatory environment, east coast regulators have witnessed enormous growth in the development of charitable trusts in their areas: for all the charitable trusts recorded to date, almost 65 per cent have been established in the developed eastern areas, covering a wide variety of charitable purposes from science, culture, and education to environmental protection.

## 2.2 Regulators' Perceptions of Risk

The second factor involves regulators' perceptions of the risk associated with supervising charitable trusts. Regulators in the undeveloped western areas often suffer from resource constraints, which do not allow them to perform proactive and consistent enforcement work. Their inspections are, accordingly, generally prompted by public complaints.<sup>103</sup> Due to funding and staffing shortages, these regulators tend to avoid making decisions on matters that may expose them to public criticism or administrative punishment.<sup>104</sup> Such thinking is further reinforced by the operation of the Chinese bureaucratic system. Regulatory scandals or failures may garner public media coverage and corresponding public attention. This may lead to higher-level government interventions,<sup>105</sup> thereby jeopardizing the career prospects of the regulatory officials in question.<sup>106</sup> Charitable trusts are newly emerging institutions, and there are numerous uncertainties in regulation waiting to be resolved. Driven by the desire to minimize regulatory risks, regulators in the undeveloped western areas have been reluctant to create a favourable environment for the establishment and management of charitable trusts.

By contrast, eastern-area regulators have taken a supportive and open approach to charitable trusts, although they have considered the same legal and reputational risks as regulators in the western areas. Two factors contribute to this regional difference. First, regulators in eastern areas have relatively adequate resources for carrying out inspections thoroughly and consistently. To implement the central policy of furthering charitable undertakings, CADs with a high degree of regulatory capacity are willing to invest resources in promoting the development of charitable trusts. The second reason lies in the increasing level of public participation. As discussed earlier, regulators in coastal areas have implemented a series of educational and training programs to promote public awareness of charitable trusts. The growing level of public participation is instrumental in motivating regulators to play a proactive role in developing and overseeing charitable trusts within their

<sup>102</sup> 《关于慈善信托管理工作的实施细则》[Regulations on the Management of Charitable Trusts] (People's Republic of China) Guangdong Provincial Civil Affairs Department and Guangdong Office of the China Banking Insurance Regulatory Commission, 21 February 2019, art 55.

<sup>103</sup> See interviews with A4, R2, A5, T7, L1 and L2.

<sup>104</sup> Lesley K. Mcallister, "Dimensions of Enforcement Style: Factoring in Regulatory Autonomy and Capacity," *Law & Policy* 32, no. 1 (2010): 61, 66.

<sup>105</sup> Cooney, 1095.

<sup>106</sup> Gao, 29; Virginia E. Harper Ho, 50–51.

jurisdictions. The view expressed by one regulatory official during their interview corroborates this point: “In certain areas, if the public there has manifested a strong interest in participating in charitable undertakings, the regulators there would have more incentive to take positive measures to support the creation of charitable trusts.”<sup>107</sup>

The reasoning behind this observation is not difficult to discern: the higher the level of public participation, the higher the public’s expectation that regulators should properly carry out their responsibilities. In light of this analysis, it can be asserted that the increasing public participation in charitable trusts in eastern areas has created external pressure, encouraging regulators there to proactively perform their supervisory and educational roles.

## V. Conclusion

This article has examined the regulatory practices related to charitable trusts in the era of the new charity law. Regulators’ performance of their roles in practice demonstrates that the political philosophy underpinning the new legislative framework has undergone little change. The tradition of intense political pressure on regulators persists, permeating all aspects of charitable trust regulation. Although legislators established a public–private hybrid model for charitable trusts, the scope of charitable trust parties’ management rights is considerably constrained under the current regulatory framework: the State allows individuals to decide what public benefits are created through charitable trusts and which segments of society are entitled to those benefits. However, this autonomy is granted only when its exercise is consistent with the State’s public welfare goals. Although the newly established legislative framework for charitable trusts demonstrates the State’s intentions of establishing a partnership with the charitable trusts sector, this “partnership” bears the marks of China’s particular institutional norms.

Though this article focused on charitable trusts, its findings illuminate the regulation of the charitable sector more generally. Regardless of the legal forms for undertaking charitable causes (e.g., charitable trusts or charitable organizations),<sup>108</sup> charitable trust regulation suggests that regulators’ behavioural patterns have remained mostly unchanged under the post-2016 legislative framework. Regulators continue to be subjected to the policy and administrative pressures of the State to execute State policy in the performance of their regulatory activities. As such, regulators continue to be highly responsive to extra-legal factors in the performance of their regulatory responsibilities. The number of charitable trusts established so far may appear to signal the potential of the post-2016 legislative framework to promote charitable undertakings. However, a closer inspection of regulatory practices over the last five years suggests that it is too early to decide whether this newly established framework can genuinely facilitate the development of charitable trusts as well as other forms of charities in China. More empirical evidence is needed to test the potential of charitable trusts to promote charitable

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<sup>107</sup> See interview with R1.

<sup>108</sup> For an account of charitable organizations in China, see Part I.

activities, whether charitable trusts are capable of replacing public welfare trusts in promoting the State's public welfare goals, and the willingness of the general public to participate in the establishment and development of charities in the future.

Dr. Hui Jing  
Assistant Professor, Faculty of Law  
The University of Hong Kong, Hong Kong  
[hjing@hku.hk](mailto:hjing@hku.hk)