

ARTICLE

The Governance of Charities in China

Hui Jing*

City University of Hong Kong

Corresponding author. E-mail: hui.jing@cityu.edu.hk

(Received 5 March 2021; revised 19 July 2021; accepted 28 July 2021; first published online 7 December 2021)

Abstract

The passage of the *Charity Law* signals the beginning of a new era in the legal regulation of charities in China. Its provisions reflect the increasing autonomy of charitable actors in exercising their management rights and the reduced control of the government over the use of charity resources. The shift of the state's attitude towards its relationship with the charitable sector brings new insights into the governance of charities in China. This article highlights the public-private law hybrid nature of the new legislative arrangement for charities and outlines the policy dynamics underlying its operation and development. It argues that the hybrid nature of the *Charity Law* was intentionally created by legislators, and the design of the governance framework for charities should therefore be responsive to this new legislative arrangement. Following on this reasoning, the article explores the implications that analysis of the hybrid nature of the *Charity Law* has for the governance of charities in China. It identifies the parties relevant to charity governance, the way in which they interact, and the governance principles that can be applied to charities.

I. Introduction

Since the late 1980s, numerous reforms have been introduced by policymakers to empower the public in social welfare provision in China. Amongst these reforms, the overarching question has been how a sensible balance can be struck between the autonomy of private actors in determining how their assets can be used to advance the state's public welfare goals, and the government's concern that charitable resources should be used in alignment with the promotion of the community's legitimate interests.¹ Drawing upon the experience of charity practice over the past two decades, legislators promulgated the *Charity Law of the People's Republic of China*² ('Charity Law') on 16 March 2016. The Charity Law considerably transformed the formal rules and regulations governing 'state-society relationships':³ a greater scope of autonomy was granted to private actors and more cooperation opportunities were created between private actors and the government in the provision of public welfare services.⁴ Such legislative initiatives demonstrate the state's willingness to transform its role from a direct administrator to a partner of charitable actors.⁵

*Assistant Professor, School of Law, City University of Hong Kong.

¹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)] (Ministry of Civil Affairs, People's Republic of China, 15 Jul 2011), pt 2; 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] (State Council, People's Republic of China, 24 Nov 2014), pts 3–4.

²中华人民共和国慈善法 [Charity Law of the People's Republic of China], adopted 16 Mar 2016 by the National People's Congress.

³Rebecca Lee, 'Modernize Charity Law in China' (2009) 18 Pacific Rim Law & Policy Journal 347, 372.

⁴See Section A of Part III below.

⁵王思斌 (Wang Sibin), '慈善法将有力促进社会工作事业发展 [Charity Law Will Effectively Promote the Development of Social Work in China]', 中国社会报 *China Social News* (29 Apr 2016).

In an environment where the state's control over the charitable sector seems to be relaxed, the role of private actors to self-govern or to govern charities⁶ becomes increasingly significant. The extent to which the governance structure of a charity works has bearing on whether the charity at issue is capable of conducting its activities and managing its assets properly.⁷ The term 'charity governance' has been the subject matter of academic writing for more than two decades. There already exists a large body of literature that discusses the meaning of governance and its application to charities. In *Fundamental Issues of the Non-Profit Organization Law in China*, the authors opine that good charity governance structure entails the establishment of effective checks-and-balances mechanisms between different management bodies and clear procedures for their decision-making.⁸ According to the governance guideline issued by the Department of Civil Affairs of Guangdong Province, charities should be governed on the principles of fairness, democracy, transparency, and effective checks and balances.⁹ Nevertheless, the research in current published works is mainly descriptive; the normative aspects of charity governance have not been thoroughly considered. Questions such as the basis on which the governance principles for charities are designed, and the normative concerns that distinguish charitable organizations from noncharitable organizations in terms of governance, are understudied.¹⁰

To establish a charity under Chinese law, private actors are required to submit the governing document of the proposed charity to regulators for review. The Charity Law requires the charity's governance structure to be 'sound',¹¹ otherwise regulators can disapprove its registration. However, the Charity Law and other legislation make no mention of what 'sound' entails and what standards should be followed to meet the 'sound' requirement. The vagueness in law makes a charity's establishment unpredictable in the eyes of private actors, and creates scope for regulators to arbitrarily exercise their discretion in the assessment of a charity's registration request. Based on this observation, this article chooses to study the governance of charities in China.¹² It focuses on the interpretation of the new legislative arrangement concerning Chinese charities and the policy dynamics underlying its operation and development. There are two reasons for doing so: (a) to better understand the new legislative arrangement that legislators have created for the establishment and administration of charities; and (b) to explore the insights that the new legislative arrangement can provide into the analysis of charity governance.

This article is organized into six parts. After Part I's 'Introduction', Part II discusses the definition of charity governance. It analyzes the semantic meaning of governance, the understanding of

⁶For the purpose of this article, 'charities' here encompass charitable organizations (*cishan zuzhi* 慈善组织), public welfare trusts (*gongyi xintuo* 公益信托) and charitable trusts (*cishan xintuo* 慈善信托). The major forms of charitable organizations under the Charity Law include foundations (*jijin hui* 基金会), social associations (*shehui tuanti* 社会团体) and social service agencies (*shehui fuwu jigou* 社会服务机构).

⁷Australian Charities and Not-for-profits Commission, 'Governance for Good – The ACNC's Guide for Charity Board Members' (Jul 2013) 3 <<https://bower.org.au/wp-content/uploads/2020/02/Governance-for-Good-the-ACNCs-guide-for-charity-board-members.pdf>> accessed 29 Jul 2021.

⁸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 Fangzheng Press] 2006) 126.

⁹广东省民政厅关于社会组织法人治理的指导意见 [Guiding Opinions of the Department of Civil Affairs of Guangdong Province on the Governance of Social Organizations] (Department of Civil Affairs of Guangdong Province, People's Republic of China, 10 Apr 2015), s 2.

¹⁰On the existing limited literature that touches upon these questions, see, eg, 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) 104–123; 赵俊男 (Zhao Junnan), '中国慈善事业治理研究 [Study on the Governance of Charitable Causes in China]' (PhD Thesis, Jilin University 2013) 29–38.

¹¹The term 'sound' used in this provision of Charity Law is '*jianquan* 健全': Charity Law, art 12.

¹²'China' in this article refers to the People's Republic of China, excluding the Hong Kong Special Administrative Region, the Macau Special Administrative Region and Taiwan Region.

governance in specific contexts, and proposes a perspective from which charity governance can be understood. Part III analyzes the legal nature of the legislative arrangement concerning charities. It argues that the Charity Law is a public-private law hybrid, under which there is significant tension between protecting public interest in the use of charitable resources and promoting private actors' autonomy in their management of charities. Part IV explores the theoretical implications that the public-private law analysis has for charity governance. It shows that the public-private law divide is helpful in identifying the parties relevant to charity governance and the way in which they interact. Part V explores the insights that the analysis of the public-private law divide can provide into the design of governance principles for charities and what each principle entails. Part VI summarizes the key findings in the article and concludes with some general comments.

II. Legal Definition of Charity Governance

As this article seeks to examine the governance of charities in China, how the term 'charity governance' is defined constitutes the basis of the topic's analysis. This Part consists of two sections. Section A analyses the semantic meanings of governance. Section B analyses the application of governance in specific contexts; namely, corporate and state governance. Based on these analyses, the meaning of charity governance is defined at the end.

A. Semantic Meanings of Governance

From an etymological perspective, the concept of 'governance' comes from the Latin words *gubernare* and *gubernator*, which refer to 'steering a ship' and to 'the steerer or captain of a ship' respectively.¹³ A close review of the literature shows that the meaning of governance is not precise and is affected by various social and cultural norms.¹⁴ In the consultation paper *Development of Governance Standards*, the concept 'governance' is defined as '[a] set of practices and procedures in place to ensure that an entity operates to achieve its objectives in an effective and transparent manner'.¹⁵ In comparison, David Renz and Fredrik Andersson opine that 'governance' relates to 'the systems and processes concerned with ensuring the overall direction, control, and accountability of an organization'.¹⁶ A uniform definition of governance is generally lacking in existing literature: scholars and practitioners have different perspectives on its meaning.

In defining a thing (eg, a concept), one must recognize that it cannot be 'defined or described by cataloguing all of [its] characteristics'.¹⁷ In most cases, a term is selected when it 'refers to the [common or representative] characteristics to the thing'.¹⁸ This reasoning applies to the definition of governance as well. To have both legal significance and practical use, the generalization of governance should be relatively precise; however, at the same time, certain features or attributes of governance must be discarded as they are too specific for general discussion.¹⁹ Consulting dictionary definitions is a good starting point for selecting a thing's representative 'characteristics'. In authoritative dictionaries such as *Modern Chinese Dictionary* and *Oxford English Dictionary*, it is found that

¹³John H Farrar, *Corporate Governance in Australia and New Zealand* (Oxford University Press 2001) 3.

¹⁴Roman Tomic, 'Good Corporate Governance: The International Challenge' (2000) 12 *Australian Journal of Corporate Law* 142, 143.

¹⁵The Treasury of the Australian Government, 'Development of Governance Standards – Consultation Paper' (Dec 2012) 5 <https://treasury.gov.au/sites/default/files/2019-03/Governance_Standards_Consultation_Paper.pdf> accessed 29 Jul 2021.

¹⁶David O Renz & Fredrik O Andersson, 'Nonprofit Governance: A Review of the Field', in Chris Cornforth & William A Brown (eds), *Nonprofit Governance: Innovative Perspectives and Approaches* (Routledge 2014) 18.

¹⁷PG Turner, 'The Entitlements of Objects as Defining Features of Discretionary Trusts', in Richard C Nolan, Kelvin FK Low & Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press 2018) 247.

¹⁸*ibid.*

¹⁹*ibid.*

'governance' is generally understood as a set of procedures, mechanisms or rules by which something is regulated,²⁰ or as a method of management.²¹

B. Governance in Context

Based on the dictionary definitions of governance, this section studies the meaning of governance in specific contexts such as corporate and state governance. It serves to identify the way in which the dictionary definitions of governance are given effect in a specific context. Although the meaning of governance may have different focuses in various contexts, comparisons with corporate and state governance can still cast light on the interpretation of governance in a charity setting, given that the language used in describing charity governance suggests similar conceptual characteristics and origins as those for corporate and state governance.

1. Corporate and State Governance

Critical writings have studied the meaning of corporate governance from a wide range of disciplines. In the field of financial economics, approaches to corporate governance have tended to focus on the methods with which 'suppliers of finance to corporations assure themselves of getting a return on their investments'.²² In accounting theory, corporate governance is principally centred on 'ensuring the quality of financial information regarding the company and assessing how this information is used to value assets and reward performance'.²³ To legal theorists, due to their different understanding of the role of law in corporate behaviour, there is a paucity of unified interpretation as to corporate governance.²⁴ This term is sometimes interpreted as a set of procedures and practices by which corporates are regulated, managed, or controlled.²⁵ Sometimes the term's definition is focused on the achievement of objectives underlying the operation of a corporate.²⁶ For example, in the *Governance Codes for Listed Companies in China*, corporate governance is defined as dealing with the method by which a corporate is managed and the way in which its objective is achieved through such management.²⁷

How the term 'state governance' is defined is also a matter of controversy. Two characteristics are commonly selected by practitioners and scholars when describing the meaning of state governance. The first relates to the way in which the state is administered. The definition provided in *The Institutional Logic of Governance in China: An Organizational Approach* is a telling example. Its author Zhou Xueguang defines 'state governance' as a set of standards, mechanisms, and procedures

²⁰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] (7th edn, 商务印书馆 [The Commercial Press] 2016) 482.

²¹See J A Simpson & E S C Weiner (eds), *The Oxford English Dictionary* (VI) (2nd edn, Clarendon Press 1989) 710; Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles (Volume 1 A-M)*, vol 2 (4th edn, Clarendon Press 1993) 1123.

²²Andrei Shleifer & Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52 *Journal of Finance* 737, 737. See also Oliver E Williamson, 'Corporate Finance and Corporate Governance' (1988) 43 *Journal of Finance* 567, 588–589; Lucian Bebchuk, Alma Cohen & Allen Ferrell, 'What Matters in Corporate Governance?' (2009) 22 *Review of Financial Studies* 783, 823–824.

²³Paul Ali, Rosemary Teele Langford & Ian M Ramsay (eds), *Corporations Law* (LexisNexis Butterworths 2016) 290. See also Philip Brown, Wendy Beekes & Peter Verhoeven, 'Corporate Governance, Accounting and Finance: A Review' (2011) 51 *Accounting & Finance* 96, 153; Richard G Sloan, 'Financial Accounting and Corporate Governance: A Discussion' (2001) 32 *Journal of Accounting and Economics* 335, 340–341.

²⁴Ali, Langford & Ramsay (n 23) 292–293.

²⁵Chenxia Shi, *Political Determinants of Corporate Governance in China* (Routledge 2012) 25; John H Farrar, 'Developing Corporate Governance in Greater China' (2002) 25 *University of New South Wales Law Journal* 462, 463.

²⁶Yuwa Wei, 'An Overview of Corporate Governance in China' (2003) 30 *Syracuse Journal of International Law and Commerce* 23, 24.

²⁷上市公司治理准则 [Governance Codes for Listed Companies in China] (issued 30 Sep 2018 by China Security Regulatory Commission, People's Republic of China), art 3.

through which the state system is regulated and controlled.²⁸ The second characteristic concerns the values that underpin the operation of the state system, including political stability, cultural prosperity and social peace.²⁹ It holds that the essentiality of state governance lies in the carrying out of these normative values. Professor Xiao Bin's definition in *Four Perspectives in Modernized State Governance in China* is illustrative. He maintains that the focus of state governance is on how the state should be administered, so as to ensure that its policy objectives are achieved in an effective, transparent and fair manner.³⁰

2. Charity Governance

Based on the discussions above, one can identify two elements that are relevant to the understanding of governance. The first concerns the rules or procedure by which an entity (corporate, state or charity) is managed or administered. This element is consistent with the common characteristics of governance as observed in the dictionary definitions. The second element relates to the purpose or objective underpinning governance, namely a good governance structure serves to facilitate the fulfilment of an entity's objective.³¹ Taking into account these two elements, this article construes 'governance' as a set of rules or practices by which an entity's objective is achieved through its management. Accordingly, the term 'charity governance' is defined as a set of mechanisms that ensure the responsible persons³² of a charity comply with their duties, so as to effectively realize the charitable purpose, or the public benefit, that the charity pursues. This definition focuses 'charity governance' on the control of responsible persons' power and on the mechanisms that can be undertaken to ensure their accountability for exercising that power.

III. The Public-Private Law Hybrid Nature of the Charity Law

After defining the meaning of charity governance, this part analyzes the legal nature of the Charity Law. The reason for doing so is two-fold. First, the legal nature of the Charity Law reflects the state's view on how charities should be governed and administered, which in turn illuminates the policy dynamics underlying the operation of the Charity Law system. Secondly, analysis around the legal nature of the Charity Law involves discussion about the assignment of powers and obligations to a charity's governing body, stakeholders, and regulators. This can shed light on the parties relevant to the control of responsible persons' power and the relationship of checks and balances between them. These aspects relate closely to the understanding of charity governance, as discussed in Part II.

This Part consists of three sections. Sections A and B highlight the public law and private law norms in the legislative framework concerning charities. Where appropriate, comparisons with English charity law³³ are conducted so as to delineate the unique way in which the two norms manifest themselves under the Chinese Charity Law. Section C explores the interaction of the two norms and the relevance of China's particular social and policy circumstances to such interaction.

²⁸周雪光 (Zhou Xueguang), 中国国家治理的制度逻辑：一个组织学研究 [The Institutional Logic of Governance in China: An Organizational Approach] (三联书店 [Joint Publishing] 2017) 15, 17.

²⁹中共中央关于坚持和完善中国特色社会主义制度，推进国家治理体系和治理能力现代化若干重大问题的决定 [Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Upholding and Improving the Socialist System with Chinese Characteristics and Promoting the Modernization of the National Governance System and Governance Ability] (issued 31 Oct 2019 by Central Committee of the Communist Party of China), pt 1.

³⁰肖滨 (Xiao Bin), '中国国家治理现代化战略定位的四个维度 [Four Perspectives in Modernized State Governance in China]' (2015) 2 中国人民大学学报 [Journal of Renmin University of China] 13, 13.

³¹See Section A of Part II above.

³²'Responsible persons' here refer to individuals who are responsible for managing a charity. They can be members of a charity's governing body (including committee members or directors) or trustees (including insolvency administrators).

³³Given that the United Kingdom has three legal systems: English law, applying in England and Wales, Northern Irish law, applying in Northern Ireland, and Scots law, applying in Scotland. When English law is referred to in the article, it particularly means the law of England and Wales.

A. The Public Law-Leaning Tendency

Two aspects highlight the public law-leaning tendency of the Charity Law: public welfare benefit and exclusive charitable use. These two requirements highlight the state's control over the use of charitable resources. The state reserves the power to define the meaning and scope of public welfare benefit. Entities whose purposes are considered outside the scope cannot be established as charities. The requirement of exclusive charitable use corresponds to, and is correlative to, that of the public welfare benefit. Under this requirement, charity assets should be exclusively used for charitable purposes in order to advance the state's public welfare goals as much as possible.

1. Public Welfare Benefit

The public welfare benefit requirement is implicated in Article 3 of the Charity Law. Pursuant to this provision, an entity established with the object of carrying out public welfare activities (*gongyi huodong*) is considered to be a charity. Article 3 enumerates the scope of legitimate charitable purposes (eg, alleviating poverty and helping orphans), which are in substance consonant with the state's public welfare interests. Within the ambit of these charitable purposes, private actors have the freedom to define the form of benefit that their charities intend to create, and the parts of the society that are eligible to receive such benefit. Nevertheless, the degree of freedom that private actors can exercise is considerably constrained: it can only be exercised in a way that complies with the state's pursuit of its public welfare goals.³⁴

In England, the public benefit doctrine is also crucial to the concept of charity. It is the public benefit, not the private interest, that motivates the courts to take a flexible approach towards the regulation of charities.³⁵ Nevertheless, English charity law presents a different interpretation of public benefit. Here, charities are not required to create benefits for the political community as a whole³⁶ or for the interest of the entire state.³⁷ Rather, this doctrine only requires charities to be for public benefit in an 'altruistic [or other-regarding nature], and not the public-welfare-compliant sense'.³⁸ This explains why incidents of the public benefit doctrine, such as the numerical negligibility test and the personal nexus rule, are focused on preserving the altruistic quality of charities,³⁹ rather than promoting the state's political agenda.

2. Exclusive Charitable Use

The second aspect that reflects the Charity Law's public law-leaning tendency is the requirement of exclusive charitable use, which is regulated under Articles 52 and 105 of the Charity Law. This legislative requirement shares the same logic as that of the public welfare benefit; namely, charitable resources must be exclusively used for the furtherance of the state's public welfare goals, and any use of charitable assets for private purposes is strictly forbidden by law. In order to implement this requirement, legislators have set up numerous mechanisms to facilitate the monitoring of regulators and the public over the use of charity resources. For instance, the Charity Law requires that any persons or entities who are affiliated to responsible persons cannot be designated as beneficiary recipients.⁴⁰ Meanwhile, any transaction that proceeds between the charity and its stakeholders should be disclosed to the public in an adequate and timely manner. In terms of regulation,

³⁴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) 533–534.

³⁵Jonathan Garton, *Public Benefit in Charity Law* (Oxford University Press 2013) [6.09].

³⁶Hubert Picarda, *The Law and Practice Relating to Charities* (4th edn, Bloomsbury Professional 2010) 225.

³⁷Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing 2016) 62.

³⁸ibid 80. See also Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press 2014) 88–89; Mary Snyne, *The 'New' Public Benefit Requirement: Making Sense of Charity Law?* (Hart Publishing 2015) 79.

³⁹Garton (n 35) [5.25]; Hilary Delany, 'The Law Relating to Charitable Trusts – Judicial Guidance and Statutory Intervention' (2011) 33 *Dublin University Law Journal* 196, 208; Linda Sugin, 'Rhetoric and Reality in the Tax Law of Charity' (2016) 84 *Fordham Law Review* 2607, 2632.

⁴⁰Charity Law, art 58.

regulators are granted by law wide powers to oversee whether charity funds are used in compliance with this requirement. They can conduct supervisory conversations to require responsible persons explain their decisions,⁴¹ request information disclosure on the disposition of charity assets,⁴² and suspend a charity's registration license where its violation of the exclusive charitable use requirement is considered severe.⁴³

Similarly, the purpose of a charity is required to be exclusively charitable under English law. The charitable status of an entity will be lost if any purposes that are not charitable are incorporated.⁴⁴ Yet in a long line of cases, the well-entrenched requirement on exclusive charitable use has been relaxed. Two grounds are now upheld by English courts as exceptions to the exclusivity requirement, ie, ancillary purposes and severance.⁴⁵ Under these grounds, an entity's charitable status can still be upheld where its private purpose is merely incidental or subsidiary to its charitable purpose;⁴⁶ or a severance can be made between its charitable and non-charitable purposes.⁴⁷ In contrast to the Chinese approach, English law prefers not to strike down the validity of the whole charity merely because of the inclusion of non-charitable purposes. It is more flexible in allowing different purposes and thus it reserves to the largest extent assets advanced for charitable purposes in the public domain.

B. The Private Law-Leaning Tendency

In addition to public law norms, legislators also incorporated substantial private law norms into the structure of the Charity Law. These private law norms primarily manifest themselves as the conferral of wide powers to benevolent owners (ie, donors and settlors) and responsible persons. Through the wide powers they are given, donors can choose the method by which the assets they donate are disposed of, and responsible persons are motivated to actively participate in the carrying out of charitable activities. The analysis below proceeds first with benevolent owners and then responsible persons.

1. Benevolent Owners

The term 'benevolent owners' here include donors and settlors (in the context of a trust). Under the Charity Law, donors are granted a wider scope of autonomy: they are entitled to choose the types of charitable purposes the assets they donate may serve.⁴⁸ In the daily management of a charity, they are also entitled to inquire how these donated assets are used, and bring litigations when these assets are misappropriated by responsible persons. Such legal rights are exercisable by a donor even if the donation agreement (if any) makes no mention of them.⁴⁹ The management rights of a donor are also evident when it comes to the disposition of surplus funds. Under the Charity Law, where the charitable purpose for which assets are donated are completed or cannot be fulfilled, donors are allowed to determine how these surpluses can be dealt with, provided they have made prior arrangements in respect of the surplus with the charity.

When charities are established in the form of trusts, settlors are also granted greater management rights. For example, under a Chinese charitable trust, settlors are entitled to change the scope of beneficiaries,⁵⁰

⁴¹ 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 Trial Implementation] (issued 16 Mar 2016 by Ministry of Civil Affairs, People's Republic of China), arts 2–15.

⁴² Charity Law, arts 71–74.

⁴³ *ibid* art 98.

⁴⁴ GE Dal Pont & Stefan Petrow, *Law of Charity* (LexisNexis Butterworths 2010) para 13.2; *Ofrex (George Drexler) Foundation (Trustees) v IRC* (1965) 3 All ER 529, 530.

⁴⁵ *Bath and North East Somerset Council v HM Attorney General* [2002] EWHC 1623(Ch) para 25; Garton (n 35) [2.19].

⁴⁶ Pont and Petrow (n 44) [3.29].

⁴⁷ Garton (n 35) [6.08].

⁴⁸ Charity Law, art 40.

⁴⁹ *ibid* art 42.

⁵⁰ 慈善信托管理办法 [Administrative Measures for Charitable Trusts] (issued 10 Jul 2017 by China Banking Regulatory Commission and Ministry of Civil Affairs, People's Republic of China), art 38.

increase the amount of trust assets,⁵¹ appoint trust supervisors,⁵² and consent to relieve trustees of their fiduciary liabilities in certain circumstances.⁵³ This approach is deeply rooted in the background against which the Chinese *Trust Law* was enacted,⁵⁴ standing in marked contrast to the role of a settlor under common law. Due to the concerns of sham trusts and adverse tax consequences, settlors under common law are reluctant to actively participate in a trust's management. Instead, they prefer to 'drop out of the picture'⁵⁵ and adopt indirect mechanisms (eg, a letter of wishes⁵⁶ or serving as a trust protector⁵⁷) to secure a certain role in the management structure.

2. Responsible Persons

Private law norms in the Charity Law can also be observed through the lens of responsible persons. They are granted by law a wide scope of powers in managing charity affairs. Take their investment power for instance. Under the Charity Law, responsible persons can invest charitable assets in various ways, such as purchasing securities, or making equity investment by means of shareholding and mergers.⁵⁸ Legislators have conferred a greater degree of discretion to responsible persons, and the only constraint on its exercise is the requirement of proper performance of the duty of care.⁵⁹ Alongside the abolishment of the supervisory agency (*yewu zhuguan danwe*) requirement under the Charity Law, the conferral of flexible investment powers to responsible persons has the effect of motivating them to manage charity assets actively. Responsible persons do not need to worry that regulators and their supervisory agencies have divergent opinions as to their investment decisions. More significantly, with the passage of the *Interim Measures for Administering Investment Activities by Charities*,⁶⁰ a new layer of legal protection has been provided to responsible persons through limiting the scope of their liabilities associated with investing charity funds. As long as their decision-making process follows the procedures specified in the charity's governing documents, and there are no violations of law or regulations in the carrying out of investment activities, they are no longer liable to the losses of charity assets.⁶¹

Similar to the power to invest, the Charity Law also gives responsible persons considerable power to fundraise. Under the pre-2016 regulatory framework, it was insurmountably difficult for a charity to receive government approval for fundraising.⁶² Though granted the power to fundraise, due to government's suspicion of charities, responsible persons rarely had opportunities to exercise this

⁵¹ *ibid.*

⁵² *ibid* art 11. In contrast, the appointment of a trust supervisor is mandatory in the context of public welfare trusts. See 金锦萍 (Jin Jinping), 公益信托与慈善信托专论 [Legal Issues on Charitable Trust] (社会科学文献出版社 [Social Sciences Academic Press] 2020) 121; 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, 204; 金锦萍 (Jin Jinping), '慈善信托的规制之道 - 兼评<慈善信托管理办法>' [Regulation of Charitable Trusts - Comment on <Administrative Measures for Charitable Trusts>] (2017) 16 中国社会组织 [China Social Organization] 23, 24.

⁵³ Charity Law, art 31.

⁵⁴ 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, 456.

⁵⁵ Tey Tsun Hang, 'Reservation of Settlor's Powers' (2009) 21 *Singapore Academy of Law Journal* 517, 524.

⁵⁶ Arthur Underhill et al, *Underhill and Hayton Law Relating to Trusts and Trustees* (17th edn, LexisNexis Butterworths 2007) 943.

⁵⁷ Lynton Tucker et al (eds), *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) 1266.

⁵⁸ 慈善组织保值增值投资活动管理暂行办法 [Interim Measures for the Administration of the Investment Activities for Value Preservation and Appreciation of Charitable Organizations] (issued 30 Oct 2018 by Ministry of Civil Affairs, People's Republic of China), art 4.

⁵⁹ *ibid* art 6.

⁶⁰ See generally, *ibid.*

⁶¹ *ibid* art 14.

⁶² 吕鑫 (Lyu Xin), '慈善募捐的自由与限制 - 美国经验的启示' [Freedom and Restriction of Charity Fundraising - Lessons from the US Experience] (2011) 4 *浙江学刊* [Zhejiang Academic Journal] 144, 152.

power in the past twenty years.⁶³ However, the Charity Law has loosened fundraising restrictions. It prescribes that, while the fundraising status of a charity is under review, its responsible persons are allowed to fundraise from particular donors such as the charity's members.⁶⁴ For charities that do not have fundraising qualifications, responsible persons are also granted the opportunity to fundraise, provided that their fundraising activities are conducted in cooperation with charities that have already received fundraising certification.⁶⁵ Such a relaxed approach envisions a tension between protecting public interest in the use of fundraising money and promoting fundraising activities on the part of charities. Behind this approach lies the state's desire that the capacity of responsible persons be strengthened so as to maximize the potential of charities in the furtherance of its public welfare goals.

C. Tension in the Public-Private Law Hybrid Nature

The above analysis illustrates the existence of both public law and private law norms in the structure of the Charity Law. A new question arises from this public-private law analysis: in what ways do these two types of norms interact with each other? This question has not yet been explicitly resolved by legislators or policymakers. However, exploring this question can enlighten the understanding of the tension between the autonomy interest that private actors have in the management of charities and the public interest that the society may derive from the use of charity assets. The requirements of exclusive charitable use and public welfare benefit, as analyzed in Part III-A, are particularly relevant to investigating this question. They both demand that charity assets be exclusively used for public welfare benefit. Although private actors have management rights, their exercise of these rights is subject to the enforcement of the state's public welfare policy.⁶⁶ This understanding can provide insights into the question noted above in three respects.

The first relates to the scope within which private actors can make autonomous decisions. Under the state's list of legitimate charitable purposes, private actors have the autonomy to determine what purpose the charity in question intends to pursue, and which section of the community can receive benefits from the execution of this purpose. It is the benevolent owners who choose to transfer a certain amount of private assets to charities. Therefore, the state allows them to enjoy a certain degree of freedom in the disposal of their donated assets. Moreover, as a means of motivating private philanthropy, the state also adopts facilitative regimes to support a private actor's decisions concerning the disposition of charity assets.

The second respect focuses on the state's control over charitable resources. Upon the valid establishment of a charity, its donors and responsible persons are forbidden by law from taking account of their private interests when managing charity assets – charitable resources are mandated to be used to benefit the society as a whole.⁶⁷ Indeed, responsible persons are granted greater control over the management of charitable assets; and charity donors are eligible to prescribe the method by which their donated assets are administrated.⁶⁸ Nevertheless, such forms of management rights can only be exercised to a limited degree; that is, they must be in line with the legitimate interests of the state. The state's control over charities is secured through charity regulation. Regulators act as a channel through which the state maintains communication with the charitable sector.⁶⁹ The state grants regulators

⁶³ 吕鑫 (Lyu Xin), '分配正义: 慈善法的基本价值 [Distributive Justice: The Basic Value of Charity Law]' (2018) 5 浙江社会科学 [Zhejiang Social Sciences] 41, 47.

⁶⁴ Charity Law, art 28.

⁶⁵ *ibid* art 26.

⁶⁶ *ibid* art 98.

⁶⁷ Miu Chungyan et al, 'Charity Development in China: An Overview' (2007) 17 *Asia Pacific Journal of Social Work and Development* 79, 83.

⁶⁸ See Section B of Part III above.

⁶⁹ Anthony J Spires, 'Contingent Symbiosis and Civil Society in an Authoritarian State: Understanding the Survival of China's Grassroots NGOs' (2011) 117 *American Journal of Sociology* 1, 8.

extensive powers with the intent that they can easily intervene in responsible persons' management of charity assets and instruct them on how charitable resources can or should be used.⁷⁰

The third respect concerns understanding the tension that exists between the two sets of norms in light of China's particular policy and social conditions. The Charity Law was introduced in a background where the Chinese government was facing tremendous demand for charities, but the pre-2016 legislative framework had not been working satisfactorily.⁷¹ In view of the increasing importance of NGOs in addressing several social needs,⁷² the state sought to use this new sweeping law to motivate the non-government sector to finance and play a crucial role in public welfare provision. Because of these policy concerns, legislators granted private actors greater autonomy and provided them with increased access to decision-makers when policies or laws relating to the carrying out of their activities are enacted.⁷³ At the same time, however, as manifested in the Charity Law's public law norms, the state was unwilling to relinquish its control over the charitable sector. Charity regulators, as the agent of the state, were therefore endowed with extensive powers in order to assist the state in managing charity activities in alignment with its policy agenda. Under the new Charity Law, the powers and obligations between private actors and regulators have been assigned in a particular way which continues to subordinate the autonomous interests of private actors to the interests of the broader community and, ultimately, to the interests of the state.

IV. Implications of the Public-Private Law Analysis for Governance

The analysis in Part III has shown that, in light of China's institutional context, the hybrid nature of the Charity Law was intentionally created by legislators. The tension between public law and private law in its structure is exemplified in the tension between the public welfare objects that the state expects charities to pursue, and the autonomy that the state grants private actors in using their assets for the furtherance of charitable purposes. It is found that public law norms prevail and are predominant in the legal framework for charities, as the hybrid model of the Charity Law continues to privilege state control over the management rights of private actors. Following from this observation, this Part explores two implications that analysis of the public-private law hybrid has for the governance of charities in China: (a) the parties relevant to charity governance; and (b) the way in which they interact.

A. Parties Relevant to Charitable Governance

As suggested in Part II, charity governance is focused on how responsible persons' performance of their roles should be controlled, so as to ensure that the public benefit a charity pursues can be achieved to the largest extent. Following this understanding, one can identify four parties that are relevant to charity governance. They are the persons or entities who are capable of playing a role in exerting pressure on responsible persons to ensure that they comply with their duties.

The first are the benevolent owners (eg. donors or settlors).⁷⁴ They can exercise their statutory or contractual powers to oversee whether the assets they have transferred to charities are administered in alignment with their charitable purposes. The second are the beneficiary recipients. They have the motivation to inquire what the timeframe for distribution of charity assets is and whether the assets they receive comply with the amount or proportion specified in the distribution notice. The third are the regulators. They can exercise their regulatory powers to oversee whether charities are administered in alignment with the state's expectations and to punish responsible persons when

⁷⁰ *ibid.*

⁷¹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)] (Standing Committee of the People's Congress, People's Republic of China, 9 Mar 2016), pt 1.

⁷²Adam S Chodorow, 'Charity with Chinese Characteristics' (2012) 30 UCLA Pacific Basin Law Journal 1, 4.

⁷³Spires (n 69) 9.

⁷⁴See Section B of Part III above.

their management of charity assets is incompliant with regulatory measures. The final party is the general public. They can access the information disclosed by responsible persons, report the misuse of charity funds to the relevant regulators, and participate in charity-promoting activities to improve public awareness of charities. The private laws norms, as analyzed before,⁷⁵ concern the exercise of powers by benevolent owners and responsible persons. Therefore, they mainly relate to the internal relationship between responsible persons, benevolent owners, and beneficiary recipients. The public law norms,⁷⁶ in contrast, pertain to the use of charity assets for public benefit. Therefore, they are concerned primarily with the roles of the regulator and the general public.

B. Interaction between the Parties

The public-private law analysis is particularly helpful for exploring the interaction between the four relevant parties and outlining the key aspects that charity governance covers ('governance aspects'). The state constructed the public-private law hybrid model of the Charity Law to regulate the creation and development of charities. The public-private law divide in the law thus permeates and informs the design of the governance framework for charities. Such a divide lays the foundation on which each of the four parties interacts.

1. The Internal Relationship between Relevant Parties

The private law norms relate to the internal relationships between benevolent owners, responsible persons, and beneficiary recipients; namely how they interact and for what reasons. Through concluding donation or trust agreements, benevolent owners can prescribe the purpose for which the assets transferred are used, instruct the scope within which the assets transferred are invested, and monitor whether the beneficiary recipients selected meet the criteria specified under the agreements.⁷⁷ The role of benevolent owners thus throws light on charity governance in three specific aspects: (a) the mechanisms by which the checks and balances between benevolent owners and responsible persons are established; (b) the assignment of powers and duties to benevolent owners and responsible persons; and (c) the way in which benevolent owners and responsible persons perform their powers and duties, and the criteria for the assessment of such performance.

Like benevolent owners, beneficiary recipients can also play a certain supervisory role in the governance structure, albeit in a different way. The distribution of charity assets can bring about financial benefits on the part of beneficiary recipients, and therefore they may have the incentive to oversee whether charity assets are distributed properly by responsible persons. In the governance setting, the key question is whether these recipients are provided with adequate mechanisms to protect their interests from being unfairly prejudiced. It relates to whether beneficiary recipients have the standing to file lawsuits in respect of responsible persons' maladministration of charity assets. If they do, what are the scope and basis of their standing? In the context of governance, understanding the role that a beneficiary recipient may play is important in two situations: (a) where benevolent owners collude with responsible persons to use the charity form as a sham to perpetrate illegal acts, eg money laundering and tax evasion; and (b) where benevolent owners are unwilling to play a positive role in supervising the use of charity assets, eg they only care about the reputational benefit that they may derive from their donation.

2. The Roles of Regulators and the Public

The public law norms are associated with the roles of the regulator and the public. The analysis above⁷⁸ has shown that regulators are government agencies tasked to protect the legitimate interests

⁷⁵See Section B of Part III above.

⁷⁶See Section A of Part III above.

⁷⁷Charity Law, art 54.

⁷⁸See Section C of Part III above. See also Anna Jane High, 'Grassroots NGO Regulations and China's Local Legal Culture' (2013) 9 Socio-Legal Review 1, 11.

of the state. The state's conferral of wide powers to regulators allows them to exert a systematic effect on the life cycle of a charity. Before charities are established, regulators are empowered to interpret whether the purpose of a proposed charity is charitable and whether the charity work they outline meets the threshold of public welfare benefit. When a charity comes into existence, they have the power to inspect whether it is operated in compliance with regulatory goals. The way in which regulators interact with responsible persons raises two aspects that are highly relevant to charity governance: (a) the content and scope of regulatory powers; and (b) the liability of regulators for unlawful performance of their powers and responsibilities.

Unlike regulators, the public is not directly involved in a charity's management. Nevertheless, they can still perform a certain role in charity governance. With the increasing exposure of scandals involving misuse of charity funds over the past two decades, the public generally lacks trust and confidence in responsible persons' management of charities.⁷⁹ Where a charity is established for politically or socially sensitive purposes, the public, echoing a distrustful sentiment, are disposed to investigate whether the charity in question has benefited the larger part of the community or merely a specific section of the public.⁸⁰ Meanwhile, in the absence of legal criteria for the assessment of a responsible person's performance, there is scope for the public to criticize their management behaviour. It is recognized that any public criticism will give rise to irrevocable reputational damage on the part of charities.⁸¹ This reasoning connects the public to charity governance in three aspects: (a) the extent and scope of a charity's management information being made public; (b) the degree of the public's motivation to play a supervisory role; and (c) the mechanism to protect responsible persons' interest from being unfairly damaged under public scrutiny.

V. Design of Governance Principles

After analyzing the public-private law hybrid nature of the Charity Law and the implications that this analysis has for the understanding of charity governance, this Part discusses the design of governance principles for charities. The term 'governance principles' here refer to the standards guiding the way in which charities are administered. These principles only cover the minimum requirements for governance of a charity, and are to be understood as a set of abstract-level principles, as opposed to precise rules that mandate detailed mechanisms necessary for a good governance structure.

There are two reasons for analyzing governance principles: first, to further examine the way in which the public-private law hybrid analysis can apply to the interpretation of charity governance; and secondly, to offers insights into the design of governance principles for both regulators and private actors. As noted in the 'Introduction' section, the setting up of a 'sound' governance structure is essential to the successful registration of a charity, but it is unclear how the term 'sound' is understood. The analysis here can illuminate this question to a certain extent and provide a reference point for private actors in governance practice.

A. Concrete Governance Principles

Three governance principles for charities are proposed for examination: (a) the suitability and duties of responsible persons; (b) the charitable nature of a charity; and (c) the accountability to

⁷⁹许琳 (Xu Lin) & 王扬笛 (Wang Yangdi), '从慈善需要到慈善行为 [From Charitable Needs to Charitable Behaviour]' (2020) 50 西北大学学报 (哲学社会科学版) [Journal of Northwest University (Philosophy and Social Sciences Edition)] 140, 144.

⁸⁰王振耀 (Wang Zhenyao), 现代慈善与社会治理: 2013 年度中国公益事业发展报告 [Modern Charity and Social Governance: the 2013 Annual Report of the Charitable Sector in China] (社会科学文献出版社 [Social Science Academic Press] 2014) 205.

⁸¹ibid 207–208.

stakeholders. The section below explains the way in which each principle is developed under the analysis of the public-private law divide, and the content that each principle contains. It should be noted that these three principles are not exhaustive: they only represent a preliminary attempt at designing governance principles for charities. As suggested above, this part aims to identify the relevance of the public-private law hybrid analysis to the understanding of charity governance. Working out a complete list of governance principles is outside the scope of this article and must await clarification on another occasion.

1. *The Suitability of Responsible Persons*

The first principle is ‘suitability of responsible persons’. The definition of charity governance suggests that controlling a responsible person’s exercise of power lies at the heart of a charity’s administration. The public-private law hybrid nature of the Charity Law also envisions a tension between respecting responsible persons’ discretion in determining how charities should be managed and establishing mechanisms to prevent them from misappropriating charity assets for advancing their personal interests. The hybrid analysis, in conjunction with the definition of charity governance, points towards the significant role of responsible persons in the governance structure of charities. There is little doubt that charities should not be managed by persons who may pose risks to the pursuit of their charitable work. The principle of ‘suitability of responsible persons’ is thus developed to guide the selection of responsible persons on the part of a charity. The principle requires a charity to take reasonable steps to ensure that each of its responsible persons is suitable and has not been previously disqualified from working as a responsible person.⁸²

As explained above,⁸³ the proposed principle is intended to be part of a set of high-level principles, rather than precise rules. Depending on its organizational form, its size, the source of its funding, and the needs of its stakeholders, charities can take various steps to ensure that the responsible persons they select are suitable. Two minimum requirements can be abstracted from this principle. The first relates to the appointment and removal of a responsible person. Before a responsible person is appointed, the charity should investigate whether the candidates have been convicted of certain offences that are severe enough to disqualify them from being a responsible person, or whether they have been disqualified by a regulator before.⁸⁴ If, after taking these necessary steps, a charity finds that the responsible person(s) in question fail to pass the requirements before they are appointed, or at any time when they are serving on the governing board, it has to take reasonable steps to remove them from office.

The second requirement concerns the performance of a responsible person’s duties. The ‘suitability’ of responsible persons here entails the consideration of whether they are able to, or have the capacity to, properly perform their duties. The performance of a responsible person’s duty relates directly to the fulfilment of a charity’s work and the pursuit of its charitable goals. To enhance and protect public confidence in the charitable sector, it is necessary to provide a minimum level of assurance to the community that a charity’s responsible persons are managing the charity’s affairs effectively. The analysis in Part IV suggests that three governance aspects are highly relevant to the operation of this principle: the assignment of duties to responsible persons, the way in which they perform their duties, and the criteria for assessing their performance. In light of these governance aspects, a charity should take reasonable steps to ensure the legal as well as contractual duties apply to responsible persons and that they abide by these duties strictly. The steps that a charity can accordingly take include: (a) adopting reasonable measures to bring these duties to the

⁸²The Charity Law prescribes three scenarios under which a person cannot work as the responsible person: see Charity Law, art 16.

⁸³See Part V.

⁸⁴Mike Eastwood, *Charity Trustee’s Handbook* (Directory of Social Change 2017) 29.

attention of its responsible persons,⁸⁵ (b) providing regular training for all of its responsible persons to refresh their knowledge of their duties,⁸⁶ and (c) having clear clauses in the governing documents that set out what a responsible person's duties are and how they are expected to perform them.⁸⁷

2. The Charitable Nature of a Charity

The second principle is 'the charitable nature of a charity'. This principle accords with the public law norms in the legislative arrangement concerning charities. Ensuring that a charity is effectively set up and serving a charitable purpose is in alignment with the state's policy objective of empowering the role of charities in public welfare provision.⁸⁸ To assure that public interest in the management of a charity's affairs is adequately protected, this principle is developed. It directs charities and their responsible persons to work toward their charitable purposes, allows the public to identify a charity's charitable character, and entitles regulators to assess whether the gains arising from the enforcement of a charity's charitable purpose falls within the scope of 'public welfare benefit'. The implications of this principle suggest that serious thought ought to be given to the two governance aspects noted in Part IV: the extent and scope for the disclosure of a charity's management information, and the establishment of mechanisms to control responsible persons' performance of their management roles.

At the registration stage, a charity is required to submit its governing documents (eg, constitution, trust instrument, or code of conduct) to regulators for review. The easiest way for a charity to meet this principle is to include sections or clauses in its governing documents to outline its purpose, vision, plans and strategic goals, and the way in which its charitable work will be carried out. Depending on the size of a charity and the nature of its activities, other ways of ensuring compliance with this principle may include: (a) the charity having a mission statement that clearly sets out its charitable nature and displaying this statement at its office site(s);⁸⁹ and (b) the charity offering an explicit explanation of its charitable purpose and activities through its website.⁹⁰ Merely setting up a charity is not sufficient; a charity should also continue to be charitable and work towards its charitable purpose until it winds up or closes down. To meet this requirement, a charity can, for instance, set up control mechanisms in its governing document to ensure its assets and any profits or proceeds from the performance of its activities are exclusively applied to its charitable purpose.⁹¹ This part of the principle is consistent with the understanding of the 'exclusive charitable use' requirement, as analyzed in Part III.

3. Accountability to Stakeholders

The final principle is 'accountability to stakeholders'. The term 'stakeholders' here is construed broadly, including the charity's members (if any), benevolent owners, volunteers, employees, and beneficiary recipients. This principle is aligned relatively closer to private law norms, as it focuses primarily on the interaction between a charity's responsible persons and its stakeholders. As

⁸⁵Australian Institute of Company Directors, *Good Governance Principles and Guidance for Not-for-Profit Organizations* (Sep 2016) 38 <https://www.companydirectors.com.au/~/_media/cd2/resources/director-resources/nfp/pdf/nfp-principles-and-guidance-131015.ashx> accessed 13 Aug 2021.

⁸⁶Eastwood (n 84) 69–70.

⁸⁷Yvonne D Harrison, Vic Murray & Chris Cornforth, 'The Role and Impact of Chairs of Nonprofit Boards', in Chris Cornforth & William A Brown (eds), *Nonprofit Governance: Innovative Perspectives and Approaches* (Routledge 2013) 79.

⁸⁸Sara A Newland, 'Innovators and Implementers: The Multilevel Politics of Civil Society Governance in Rural China' (2018) 2018 China Quarterly 22, 32.

⁸⁹Bruce R Hopkins & Virginia C Gross, *Non-Profit Governance: Law, Practices, and Trends* (John Wiley & Sons Inc 2009) 75; Eastwood (n 84) 41.

⁹⁰韩丽欣 (Han Lixin) (n 10) 202.

⁹¹Australian Charities and Not-for-profits Commission, 'ACNC Governance Standards Guidance' (Aug 2013) 4 <https://www.nfpilaw.org.au/sites/default/files/ACNC_governance_standards_guidance_PDF_554KB_0_0.pdf> accessed 29 Jul 2021.

explored in Part IV, benevolent owners and beneficiary recipients can play a certain role in holding responsible persons accountable to their exercise of power. In the ongoing management of a charity, its employees and volunteers may also have the desire to learn about its operation and how its assets are used. Adopting mechanisms to facilitate these stakeholders' reach of charity-related information and provide them with opportunities to raise concerns is essential to maintaining consistent communication between stakeholders and responsible persons. The principle of 'accountability to stakeholders' is therefore developed to require charities to take reasonable steps to be accountable to their stakeholders.

Being accountable means allowing a charity's stakeholders to know and understand what the responsible persons are doing and the outcomes of how they perform their duties. It also means a charity should provide stakeholders with adequate opportunities to make inquiries and raise questions on how a charity is managed. This line of thought connects this principle to the two governance aspects discussed in Part IV: the mechanism by which the checks and balances between responsible persons and stakeholders are established; and the extent to which a charity's management information is disclosed. To address these two aspects, the common approaches that a charity can take include (a) setting up mechanisms to allow its stakeholders easy access to information on its activities and financial statements;⁹² (b) having clear policies or procedures in place to manage the conflicts of interest or disputes between its responsible persons and stakeholders or amongst its responsible persons;⁹³ and (c) adopting policies for handling its stakeholders' questions and complaints about the use of charity resources.⁹⁴ These steps only represent the principle's minimum requirements, and should be taken in light of the size of the charity in question, its governing structure, and the way in which its activities are conducted. For instance, a larger charity will be expected to take more steps to sufficiently meet the expectations of this principle. In their governing documents, it will be appropriate to have more formal processes or mechanisms on issues such as (a) providing complete and accurate reports annually to its stakeholders to explain the activities it has undertaken;⁹⁵ and (b) standardizing the procedure by which meetings with members or other key stakeholders are held, as well as the way matters regarding charity management are voted on.⁹⁶

B. Ways for Implementing Governance Principles

The foregoing analysis has shown that the public-private law analysis can provide a perspective from which the governance principles concerning charities are constructed. Principle (a) – the suitability of responsible persons – reflects the tension between the norms of public law and private law. Principle (b) – the charitable nature of a charity – demonstrates public law thinking. Principle (c) – the accountability to stakeholders – expounds on private law thinking. Following from this understanding, the next question to ask is: what are the possible ways to give effect to these governance principles? This question relates to the operation of the Chinese legal system.

Since the late 1970s, legislative powers in China have been decentralized:⁹⁷ Chinese laws at a national level tend to be drafted in broad terms, and, at the same time, administrative regulations such as notices (*tongzhi*) or measures (*banfa*) are generally issued to supplement the

⁹²Hopkins & Gross (n 89) 76; Eastwood (n 84) 110–113.

⁹³Eastwood (n 84) 23.

⁹⁴Hopkins & Gross (n 89) 75.

⁹⁵ibid 76; Eastwood (n 84) 108.

⁹⁶Australian Institute of Company Directors (n 85) 34.

⁹⁷Young Nam Cho, 'The Politics of Lawmaking in Chinese Local People's Congresses' (2006) 187 *China Quarterly* 592, 595; Sarah Biddulph, Sean Cooney & Ying Zhu, 'Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking' (2012) 34 *Law & Policy* 373, 394; Hui Jing, 'The Duty of Loyalty in Chinese Trust Laws' (2020) 13 *Journal of Equity* 347, 348–349.

implementation of these broad terms. The procedures for enacting regulations or subnational laws are much more time-saving and straightforward compared to those for national laws.⁹⁸ The legislative framework concerning charities is illustrative here. The Charity Law sets out the general legal framework, and the broad terms under the Charity Law are fleshed out in subordinated regulations enacted by the State Council and the Department of Civil Affairs,⁹⁹ as well as in subnational regulations of varying levels of authority and consistency.¹⁰⁰ In the future, where the state is willing to regulate governance practice concerning charities by means such as publishing governance principles or issuing guidance on the establishment of governance mechanisms, the analytical framework of the public-private law divide can be insightful in several respects, as has already been expounded in this article. The legislative mode in China also creates scope for setting down governance principles in law by way of notices, measures, or other types of regulations (*guizhang*).

VI. Conclusion

This article studies the governance of charities in China from the perspective of the public-private law divide. It contributes to the scholarship concerning charity governance in two aspects. First, it finds that the tension between ensuring that charitable resources are used in a way that benefits the legitimate interests of the state as a whole, and allowing private actors to exercise their autonomy in deciding how their assets can be used, is predominant in the structure of the Charity Law. The governance of charities should be responsive to such a tension. Secondly, in contrast to the descriptive analysis prevalent in the current literature, this study primarily focuses on the normative aspects of charity governance. It highlights why a public-private law hybrid model was created by legislators for the regulation of charities in the first place, and outlines how such a hybrid model can inform the design of a governance framework for charities.

At the same time, this article is only an initial step towards understanding charity governance under the post-2016 legislative framework. As the Charity Law was only passed in 2016, the empirical evidence concerning the operation of the post-2016 legislative framework is not abundant. In this light, this article does not attempt to offer comprehensive insight into governance practices concerning charities. Questions such as the way in which the hybrid model of the Charity Law is given effect in practice and whether there exists any deviation between law and practice in terms of charity governance are not discussed here. In contrast to the interpretation of positive law, exploration of these questions is of practical significance to the management and regulation of charities in China – it can help identify the difficulties confronting governance actors in real life and the insights that the analytical framework of the public-private law divide can provide into the analysis of these difficulties. Over the past five years, the central government has issued various charity policies that contribute significantly to the expansion and growth of the charitable sector in China. With the collection of more empirical evidence on charity activities in the future, further research can be

⁹⁸Virginia 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, 46; Sean Cooney, 'Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1052; Biddulph, Cooney & Zhu (n 97) 386–387.

⁹⁹See, eg, 基金会管理条例 [Regulations on Administration of Foundations] (issued 3 Aug 2004 by State Council); 社会团体登记管理条例 [Regulations on Registration Administration of Associations] (issued 6 Feb 2016 by State Council).

¹⁰⁰See, eg, 长沙市慈善事业促进条例 [Regulations of Charity Promotion in Changsha City] (issued 1 Sep 2012 by Standing Committee of the People's Congress of Changsha City); 江苏省慈善事业促进条例 [Regulations of Charity Promotion in Jiangsu Province] (issued 1 May 2010 by Standing Committee of the People's Congress of Jiangsu Province); 宁波市慈善事业促进条例 [Regulations of Charity Promotion in Ningbo City] (issued 1 Oct 2011 by Standing Committee of the People's Congress of Ningbo City); 浙江省实施<中华人民共和国慈善法>办法 [Measures for the Implementation of the Chinese Charity Law in Zhejiang Province] (issued 30 Nov 2018 by Standing Committee of Zhejiang Provincial People's Congress).

conducted into the aforesaid questions in order to get a fuller picture of the governance of charities and the way in which charitable actors interact with the state in the provision of the common good to the general public.

Author Biography

Dr JING Hui joined the CityU School of Law as Assistant Professor in October 2020. His teaching and research interests encompass equity and trust, property, intellectual property law and charity law. Dr Jing completed his PhD at the University of Melbourne. Prior to his PhD, Dr Jing obtained his master degree (by research) in Intellectual Property Law from the Peking University and his LLB with top 5% academic performance from the China University of Political Science and Law. Before joining academia, Dr Jing worked at the China National Foreign Trade Financial & Leasing Company and the Beijing Office of Zhong Lun Law Firm between 2014 and 2017.