

**Recent Developments
in
Chinese Law Affecting CSOs/NGOs¹**

by

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This brief paper discusses two recent developments with regard to funding for CSOs in China and their work with international NGOs (INGOs).³ The first is the promulgation of the Notice of the State Administration of Foreign Exchange (SAFE) on “Issues Concerning the Administration of Foreign Exchange Donated to or by Domestic Institutions,” (No. 63 [2009] of the State Administration of Foreign Exchange (effective 3/1/2010)).⁴ The second is the promulgation of a regulation in Yunnan Province establishing a documentation system for INGOs in that province.⁵ While each of these has been strongly criticized by human rights organizations, I believe that both regulations address real concerns and that they are, in a comparative perspective, not over-reaching. I will also assert that in fact the Yunnan regulation

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² This paper has been prepared as part of ongoing research for my book *Reinvigorating Civil Society in China: A Socio-Legal Analysis* (Oxford: Oxford University Press, forthcoming 2011). I wish to thank Daniel Yang, who discussed some of the ideas with me, and Ms. YANG Anqi for her edits.

³ I apologize at the outset to those for whom some of the terms are “inside baseball,” but this is not intended to explain them. If you are not knowledgeable about NGOs/CSO in China, then I suggest reading my more scholarly work.

⁴ I am working with the translation by Orange King of the Beijing Yirenping Center, available at www.iccsl.org.

⁵ I am using an informal translation provided to me by my research assistant, YANG Anqi.

is a step in the right direction. Finally, I will compare the developments in China to the legal situation in other countries to give some perspective on what all of this really means.

As people familiar with my work know, I have always argued that the Chinese government should do more to protect the freedom of association guaranteed by the 1982 Constitution of the PRC and the ICCPR, which China has signed but not ratified. But that does not mean that the government/party should be blind to issues that might reasonably be addressed in ways that will affect key liberties by curtailing them in a fashion reasonably consistent with a balance between freedom and over-regulation. If, on the other hand, arguments can be made that what China is seeking to do through these regulations curtails freedoms in a fashion that is inconsistent with claims it makes on behalf of rule of law, then perhaps that issue should be raised by commentators and CSOs alike.

There is the question, of course, of why “this” is happening now – raised by the foreign press as a “clamp-down”⁶ on CSOs and various other forms of citizen participation and dissent. It is not, for example, a time when a big event, such as the Tian’anmen incident in 1989 and the Falun Gong incident in 1999 have raised serious security concerns. But there are signs of increasing unrest in the country-side, of greater autonomy claims by minority populations (such as the Uighurs), of labor unrest in the manufacturing belt and elsewhere, and of citizens asserting their claims increasingly in rights-based terminology, etc. Do all of these add up to a reason for imposing additional restrictions on foreign funding for CSOs and on the activities of foreign CSOs in China? Many China watchers believe that the whole is greater than the sum of the parts at the present time and that the “clamp-down” could, indeed, backfire, by creating more unrest as fewer and fewer outlets for citizen frustration remain available. It is not clear whether that is true, but such concerns should be taken into account when one looks at the political, as opposed

⁶ This is the term used by NPR in its recent broadcast.

to the legal, dimensions of the new rules. Nevertheless this paper looks at the issues in the more limited legal context and stresses ways in which the developments either do or do not comport with good practice with regard to the regulation of civil society organizations.⁷

1. The SAFE regulation on foreign exchange funds coming into (and going out of) China. This regulation deals in relevant part with the receipt of foreign exchange by CSOs in China. It requires that the recipient and the donor engage in certain acts in order for the transfer of funds to be allowed. These include:
 - a. The requirement that “receipts and payments of foreign exchange of domestic institutions shall be transacted through a designated foreign exchange account, which shall be set up at the designated foreign exchange banks (“Banks”) and incorporated into the foreign exchange account management system by the Banks;”⁸
 - b. In order to open such accounts a CSO must fill out an application, and it must present a notarized bilingual certificate of its registration in its home country, the approval of the supervisory authority in China, the notarized constitution of the INGO, and notarized IDs of foreign staff;
 - c. The presentation of “correlative documents” may be required “as stipulated in th[e] Notice for the examination and approval of the Banks to proceed the receipts and payments of foreign exchange donations;”

⁷ See, e.g., Leon E. Irish, Robert Kushen, and Karla W. Simon, *Good Practices for Laws Affecting Civic Organizations* (New York: Open Society Institute, 2nd ed. 2004).

⁸ There is little doubt that an officially registered SO or *minfei* will find it very easy to comply with the rules.

- d. INGOs should sign co-operative agreements with relevant domestic organizations within the province; those agreements should not include political, religious, ethnic, or other conditions that violate the law and regulations of China; the co-operative agreements should be signed by both parties' representatives or authorized principals and they should be notarized in China;
- e. With respect to religious organizations receiving more than 1 million RMB in donations documents presented to the Banks must show the consent of the State Bureau of Religious Affairs (SBRA) and, in some cases, also the approval of the local government; and
- f. Banks are required to report "suspicious" transactions to SAFE.

It is the set of rules requiring notarization of the cooperative agreements and how they apply to the "independent" CSOs (those registered as enterprises) that has created the most anger in the CSO community and among human rights commentators. In fact there was a letter written to SAFE to protest the requirement that the grant document appears to need to be notarized by both parties to it (in person, in China) and to ask for clarifications of the language in the regulation, which admittedly is vague.

The notarization requirement necessarily raises a set of issues:

- Is it too burdensome in terms of requiring unnecessary bureaucracy?
- Is it unworkable?
- Does it discriminate against the enterprise-registered CSOs and is that permissible under Chinese law?
- How does such a requirement fare in comparative perspective?

These issues will be addressed in turn.

- a. Is this regulation too bureaucratic? That remains to be seen. While it may be, and while the bureaucracy clearly is unprepared to address the new system as yet, there is really no way to tell whether it will work smoothly or not. One can assume it will take awhile for the system to be implemented. In her recent piece in *Asia Catalyst*,⁹ Meg Davis raises not only the issue of over-bureaucratization but also something that tends to go along with it – corruption. That is a valid concern if there are too many bureaucratic hurdles to face, and that would raise the specter of rule by men, not rule of law, addressed below.
- b. Is the regulation unworkable? Probably not. Even if they do not have a permanent office in China, all the grant-makers I know of send a program officer to China at least once a year (to evaluate grants made in the past and to look over potential new grantees). It seems highly likely that they could arrange their business in such fashion as to make it possible to comply with the new regulation – notarization in person, in China. While I have no doubt that some CSOs might not survive the time during which all of this needs to gear up for implementation, that does not make it wholly unwarranted for the government to set up such a system in the first place.¹⁰ It has also been mentioned in *Asia Catalyst* and elsewhere¹¹ that it may become possible for agreements to be notarized in the consular offices of foreign embassies. Whether that will happen remains to be seen.

⁹ <http://asiacatalyst.org/blog/2010/06/chinas-new-nonprofit-regulations-season-of-instability.html#more>.

¹⁰ With regard to recent legal changes for CSOs in Japan, there was much wailing and gnashing of teeth on the part of the CSO community that the highly bureaucratized system would fall of its own weight. It has not, of course.

¹¹ Christian Science Monitor article

c. Needless to say, if this regulation is discriminatory, that is if it imposes additional requirements on CSOs that are registered as enterprises as opposed to registered SOs or *minfei*, it would be problematic. Inasmuch as it is unclear to me whether it is really legal to be registered as a business and engage principally or entirely in *gongyi* activities, I will not venture into that area here. Some authorities in China suggest that it is; some suggest that it is not. In the US, an organization would not be incorporated as a business and engage only in *gongyi* activities, nor would it want to be because it would lose important tax benefits (there is no business tax in the US, and most real CSO want to qualify for the income tax charitable contribution deduction that goes along with *gong yi* status). Hence, in the US and most other countries this issue would not arise. It arises in China because of the difficulties of registering an SO or a *minfei*, under rules known as the “dual management” system.¹²

But to the larger issue of whether an argument can be made against the SAFE regulation on the basis of discrimination, I will make the assumption that it remains¹³ legal to register a *gong yi* organization as a business enterprise in China. Hence, making it more difficult for business-enterprise-registered CSOs to obtain foreign funds could be a type of discrimination between SO and *minfei* registered organizations and *gong yi* organizations registered as enterprises. This might violate the principle in Chinese law that all persons, including legal persons, are equal before the law. It is on that basis that discriminatory treatment – if it exists -- of the business-enterprise-registered CSOs that they should appeal to SAFE. Violating the

¹² See Karla W. Simon and Hang Gao, *Opening the Space: New Rules for China's Community Organizations*, available as a working paper on SSRN.

¹³ It was initially, after 1979, permissible.

rule of law in China and making it into more of a rule of man is something that two previous Directors General of the NPO Bureau of MCA have noted in a co-authored paper from the late 1990's.¹⁴

- d. Looking at the issue more broadly and in the context of imposing some legitimate rules to oversee funds coming in from outside China to CSOs, it is important to note that this is probably appropriate and that the rules in China in general are not as bad as those in some countries (see below re India, “the world’s largest democracy”). If we have learned anything from the events of September 11, 2001, and the ensuing developments with regard to terrorist organizations world-wide, no country is required to allow foreign funds to come into it to fund organizations it finds suspicious. In fact, the Foreign Action Task Force (FATF) includes as one of its nine special recommendations one on “non-profit organizations,” which have in the past (remember the horrific 1998 embassy bombings in Tanzania and Kenya) been used as foils for terrorists, as well as resources for money launderers. There is no suggestion in my citation to FATF that ANY of the organizations registered as enterprises in China are in any way involved in terrorism, but I do mean to say that there are legitimate world-wide concerns with regard to foreign funding for CSOs (indeed, the US Treasury Department has strict rules with regard to the outflow of funds to make sure that US foundations do not inadvertently fund terrorist groups; perhaps the portion of the SAFE regulations on funds going out of China also reflect these concerns).

There is another reason that China might wish to regulate monies coming in from outside the country to fund the CSO sector, which has nothing to do with money-

¹⁴ Wu Zhongze & Chen Jinluo,

laundering or terrorism, and that is the old-fashioned problem of corruption. Clearly in China the “independent” CSOs have the “halo effect;” in other words, they are seen in the West as good and kind and innovative and better in performing social services than that bad, old Chinese government. In many parts of the developing world this view of CSOs sits alongside another one, which is that they are corrupt and exist only to bring in donor funds to pay high salaries and then disappear after doing no good. I have worked in enough of the developing world to know that the problem of the “briefcase NGOs” is a real one, perceived not only by government bureaucrats but also by the legitimate members of the sector itself and by the general public. Yiyi Lu, in her recent book, discusses the fact that some CSOs in China also face suspicions of corruption on the part of the general public and the bureaucrats because, in part, of the sources of their funding.¹⁵ Efforts by the government to better police the inflow of funds can thus be seen not only as not pernicious but also as rational.

For comparative purposes, one should note that many countries have regulated the receipt of foreign contributions by CSOs, some for many years. In India, for example, under the [Foreign Contribution \(Regulation\) Act of 1976 \(FCRA\)](#), all not-for-profit organizations in (e.g., public charitable trusts, societies and section 25 companies) wishing to accept foreign contributions must a) register with the Central Government; b) agree to accept contributions through designated banks; and c) maintain separate books of accounts with regard to all receipts and disbursements of funds. Furthermore, not-for-profit entities must report to the Central Government all foreign contributions received within 30 days of the receipt of the contribution, and

¹⁵ See Yiyi Lu, *Non-Governmental Organizations in China, The rise of dependent autonomy* (Abingdon, Oxon: Routledge, 2009)

must file annual reports with the Home Ministry. The entity must report the amount of the foreign contribution, its source, the manner in which it was received, the purpose for which it was intended, and the manner in which it was used. Foreign contributions include currency, securities, and personal property, except personal gifts under Rs.1,000. Funds collected by an Indian citizen in a foreign country on behalf of a not-for-profit entity registered in India are considered foreign contributions. Moreover, funds received in India, in Indian currency, if from a foreign source, are considered foreign funds.

2. The Yunnan regulation on INGOs. In my analysis I begin in a different place than those who decry the end of the free-wheeling atmosphere for INGOs in Yunnan Province, a situation that the Chinese government increasingly began to see as intolerable. To be clear at the outset, it is important to note that under the national level *shetuan* (SOs) and *minfei* regulations INGOs are not permitted to register at all. The only foreign organizations that are permitted to register in China are foundations, under the 2004 Foundation Regulations (though, anecdotally, many have had difficulties doing so). Thus obtaining a quasi-legal status under local regulations in Yunnan – being documented¹⁶ -- helps the INGOs there to gain legal recognition for what they do, even though they are denied *faren* (legal person) status. Lacking such status, it is not entirely clear whether they will continue to be able to open bank accounts (as they were able to do in the halcyon days of no regulation whatever), but one assumes they are going to continue to be able to do so given that they are foreign entities and can open foreign currency accounts.

¹⁶ How a documentation system works is described in the paper on CCOs.

Creating a documentation system for INGOs in Yunnan can from this vantage point be seen as a progressive step, despite the fact that some commentators decry it. It is the first step toward formal registration of a branch of a foreign SO in China (and the rules will hopefully be made national in the long-promised new regulations for SOs). It does not make a foreign entity a GONGO, as Meg Davis asserts in her Asia Catalyst blog, any more than registration of branches of the Ford or Asia Foundations in China makes them GONGOs. It simply brings them within the system and does so in a way that may be an experiment for scaling up to national level regulations that will permit INGOs to be documented throughout China.

When one compares the situation in Yunnan with the situation for foreign CSOs in other developing countries, one can well see that the government is probably only doing what any sane and rational government trying to attract foreign funds would do. Can any organization go into any developing country, say in Africa, including a democracy such as Ghana, and simply set up an office and start any projects it wants to start with permission? Of course not. African countries tend to require that a foreign CSO enter into a Memorandum of Understanding (MOU) with the host government, which describes the project/projects the INGO wants to engage in. This is probably necessary because the developing country has a development loan or series of loans coming from the World Bank, and its own national development plan is negotiated pursuant to the terms of World Bank loans and IMF fiscal agreements. When an INGO wants to do something in the country, its plans must accord with the entire super-structure.

This makes a lot of sense, given that both public and private development agencies have at times done a lot of stupid things in developing countries, including paving unneeded roads, building schools when funds for books in existing ones would have been more appropriate, etc. If China wants to “get a handle” on what INGOs are doing in Yunnan, perhaps it has less insidious reasons than some commentators suggest. Perhaps it wants to bring order out of chaos, and from what I know of MCA, that is not surprising as the things INGOs do in Yunnan generally come within the scope of its brief. In addition, working with the government to devise a plan of work that achieves all objectives should not really cut down on innovation but increase it. There are lots of demonstrations of good and useful CSO-GO interaction and innovation throughout China.

One aspect of the new regulations in Yunnan that did give me pause was the requirement that an annual work plan be filed by the INGO with its sponsor. Yet the regulation allows for deviation from the plan upon agreement with the sponsor, and that should permit flexibility. What would be most useful is if the work plan can be amended retroactively, e.g., in case of a national disaster. So, for example, one of the things that has been difficult in recent years for both domestic and international CSOs in China is forming an effective response to earthquakes. If earthquake relief is not in the work plan but the INGO is on-site, it should be permitted to use its capabilities to assist the victims. While there may be sensitivities as to causes of death that the government does not wish to expose to foreigners (e.g., shoddy construction of school buildings in the Wenchuan Earthquake), that should not deter MCA and the sponsor from allowing for retroactive

amendment of the work plans in the event of natural disaster – most on the ground workers for INGOs are Chinese anyway.

In conclusion, let me repeat that both new regulations, while seemingly very restrictive and alarming to many are really not that surprising. Obviously a lot depends on the good will of the government agencies regarding their implementation. In addition, it remains to be seen whether tightening the rules on the CSO community will in the long run be good or bad for the Chinese government in reducing the tensions that exist within its society at the present time.