

Health-Oriented Overseas NGOs and the New Overseas NGO Law in China

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Abstract

How will the Overseas Non-Governmental Organization (ONGO) Law influence the ability of Health-Oriented Overseas NGOs (HONGOs) to function in China? Will they be heavily constrained, or will their roles as providers of health care services offer them protection?

I address these questions by focusing on state-NGO relations through the lenses of Regulation, Negotiation, and Societalization. Whereas, in the pre-Xi Jinping era, state-NGO relations trended towards greater Negotiation and Societalization – reflecting the growing cooperation between state and civil society – the ONGO law suggests that state-NGO relations will take a shift back towards greater state Regulation.

However, given the state’s goal of maintaining control while benefiting from the contributions ONGOs make to development, we can anticipate “good” ONGOs – those whose activities are seen as supporting state goals (such as HONGOs) – will potentially benefit from aspects of the law and a benign interpretation of its strictures.

I conclude that because HONGOs provide important and helpful services to the state, they will not be adversely affected. Ultimately, this derives from the reality that the requirements of the ONGO law itself matter less than how China’s leadership chooses to target, interpret and implement it.

Keywords: Overseas-NGO Law, Impacts, Interpretations, Overseas Health-Oriented NGOs

I. Introduction

In 2016, Xi Jinping declared health care a major policy priority while also acknowledging that health care is entering a period of serious challenges (Editorial 2016, 1851). For decades, international civil society organizations have played a role in addressing these challenges even as they sought to navigate China's unclear legal and regulatory environment. The Law Governing Overseas Non-Governmental Organizations (ONGOs) (henceforth, the Law) that passed on 28 April 2016 and went into effect on 1 January 2017 will have potentially broad and deep impacts on how health-oriented overseas NGOs (HONGOs) continue their efforts to address these health challenges moving forward.

What are ONGOs? According to article 2 of the Law, ONGOs are non-profit, non-governmental social organizations established abroad (Jia Xijin 2016). This new Law represents an effort by the state to bring clarity, predictability and greater state oversight to state-ONGO relations. Sidel notes that this Law reflects an effort to recentralize power and increase overall security that came with Xi Jinping's rise in 2012 (Sidel 2016). According to Sidel, Xi considers civil society insufficiently controlled by the state, and at least in some of its forms a threat to the country that must be contained and controlled by the central government. Sidel further states that greater central government control will likely have both positive and negative impacts on ONGO activities.

Positive effects are largely identified as arising from the greater clarity that the new Law brings to state-ONGO relations. Specifically, the Law is expected to provide a clearer regulatory environment. For example, in April 2016 Zhang Yong, deputy director of the NPC standing committee's legislative affairs commission, reassured that by

[p]utting foreign NGOs onto a path towards legal governance, this [Law] is part of a general push to govern China in accordance with the law, and a necessary part of building a rule of law society... [and] that by passing this Law, it is definitely possible to make carrying out foreign NGO activities in China more convenient and more orderly; and foreign NGOs' lawful rights and interests will also receive more comprehensive and powerful protections under the standardized guidance of this law. (China Law Translate 2016).

Shieh (2016) expresses cautious optimism, noting that ONGOs adhering to the Law will be able to work with the MPS (Ministry of Public Security) – the institution newly responsible for the Law's implementation – while enjoying fewer worries about transgressing some unknown boundary, while ultimately demonstrating their significant

contributions to China. Indeed, with the Law's enactment, the legal vacuum which has long caused tremendous uncertainty for ONGOs will potentially be ended.

Others view the Law's overall impact as largely negative. In their early assessment, Hsiao and Cheng (2016) suggest that under the new Law, ONGOs face a more restricted, difficult future. Unlike in the past, local governments now lack the latitude to interpret and implement national regulations according to their own interests. To the extent that those interests once meshed with those of ONGOs, the ONGOs will now find it more difficult to function. Indeed, with the Law's implementation, the grey areas in Chinese law that long enabled support for ONGOs based on their wealth and international reputation, as well as on the interests of relevant local state actors (and their willingness to ignore, evade or enforce written and unwritten rules) have dramatically shrunken. William Nee of Amnesty International claims that under the Law, "the authorities... will have virtually unchecked powers to target NGOs, restrict their activities, and ultimately stifle civil society" (Phillips 2016).

Ultimately, the Law's positive and negative impacts will largely depend on how central government officials interpret and implement it. Thus, ONGOs involved in "sensitive" spheres (human rights, labor rights and democracy among others) may face greater restrictions, whereas ONGOs providing services desired by the state (health and education, among others) may benefit. The goal of this article is to evaluate the potential impact of the new ONGO Law on one subset of ONGOs in particular - HONGOs. How will the new Law and its implementation affect the ability of HONGOs to continue or even expand their contributions to improving health in China?

I open by describing the debate over shifting state-ONGO relations before describing the genesis of HONGO activities in China and the changes to the regulatory environment. Finally, I review the new Law as relates to HONGOs in particular. While still early in its implementation, a preliminary assessment of the Law's impact on HONGO activities in China is possible.

II. State-ONGO Relations in China

Shieh (2009, 23-24, 37-38) identifies three modes for understanding the shift in state-CSO (civil society organization) relations in China: Regulation, Negotiation and Societalization. Regulation refers to formal government controls for managing CSOs. Negotiation reflects a more informal relationship built on consensus where the state and CSOs voluntarily interact and arrive at shared views on how to provide services. Societalization is a process in which CSOs provide services and take initiatives without state

involvement. This final mode describes greater autonomy for CSOs from the state. Over time, NGOs, a form of CSO, may move from one mode to another, or in different situations find themselves in a combination of modes. From the 1990s forward, scholars pointed to a trend from strong state control - Regulation - towards greater Negotiation and even Societalization (where CSOs act with increasing autonomy from the state) (Gallagher 2004; Howell 2004; Ma 2004; Saich 2000; Brook and Frolic 1997). This transition occurs largely for two reasons. First, because the once dominant Regulatory mode proved inadequate to keep up with the rapidly growing NGO community, causing many NGOs to circumvent the state regulatory system by working in grey areas and by pushing the Negotiation and Societalization modes.

Second, as Schwartz and Shieh (2009, chp. 1) argue, the transition towards Negotiation and Societalization was driven by China's dismantling of the socialist welfare system, rising unemployment, growing inequality, a rapidly aging population and increasing health and environmental challenges that forced local state actors to identify alternatives to an approach fully dependent on state social service provision. With NGOs providing services, the state at the central and local levels could reduce investment, saving resources for other tasks, while retaining public support and overall satisfaction. Furthermore, faced with often recalcitrant local governments preferring to avoid implementing certain regulations (ex. pollution control or HIV/AIDS treatment), the central government could look to NGOs to pressure them.

As Khalid Malik, the UNDP's (2008) then resident representative in China stated with regards to the Chinese government's approach to Civil Society Organizations in general: "Increasingly, the government recognizes the strengths of CSOs or non-governmental organizations in reaching out to disadvantaged groups, especially in areas such as reducing poverty, addressing environmental challenges and preventing and building awareness on HIV/AIDS" (Malik and Zhang 2009). Reflecting the general optimism, in a 2014 article *The Economist* described a rapid growth in the number of NGOs functioning in China, noting that while many are illegal, they are nonetheless widely tolerated and even encouraged (*The Economist* 2014).

In short, for much of the 1990s-2000s the Chinese government moved, if warily, towards closer state-society cooperation as described by the trend from the Regulation towards the Negotiation and Societalization modes. Observing this trend, scholars of Chinese civil society both in China and abroad expressed cautious optimism that the Chinese government recognized the benefits intrinsic to this relationship and would support a growing role for ONGOs. Indeed, as long as CSOs remained politically rather weak and passive and thus differed from the Western conception of CSOs as challenging the state, such a transition seemed acceptable (Ding 2000, 115-129). However, this calculation changed

with Xi Jinping's rise to power. Civil society organizations were increasingly perceived as potential threats, having failed to abide by to the state-led relationship mandated by the Party.

This perception is not without merit. Referencing the Latin American and Eastern European experiences, a broadly expressed opinion among Chinese leaders is that NGOs have subtle democratizing impacts through their work, the examples they set and their expressed values. NGOs connect global civil society, tying together people around the world and exposing them to foreign values and ideas. Indeed, even NGOs functioning in non-sensitive areas can have a pluralizing and democratizing influence at the grassroots level (Chen 2006). For example the Lion's Club, not an organization that formally advocates for democracy, influences domestic partners through its internal democratic governance structure, participatory mechanisms and equality among members. NGO influence is bolstered by revolutions in technology and communication that potentially undermine the Party's control.

The response under Xi Jinping reflects an effort to return to the Regulation mode as exemplified by Document 9 (Communique on the Current State of the Ideological Sphere) published in 2012, and its Seven Unmentionables (七不講). These identify perceived threats to the continued rule of the CCP (China Digital Times 2013) and are precursors to the NGO Law with their concern that "Western anti-China forces and domestic dissidents [are] incessantly carrying out infiltration activities" in China while challenging China's "mainstream ideology". Notable is the reference to Western NGOs that are perceived as acting within China's borders to spread Western values and foster "anti-government forces" (Belkin and Cohen 2015).

As Zhang Yong asserted during the aforementioned press conference,

It cannot be disputed that China has always maintained an active, open, and welcoming attitude to foreign NGOs seeking to come to China to carry out friendly exchanges, communication, and cooperation. *However..... there are indeed an extremely small number of foreign NGOs that have or are attempting to endanger Chinese social stability and national security* (my emphasis) (China Law Translate 2016).

Will the NGO Law accomplish the Party's goal of strengthening central control and constraining "bad" (advocacy focused NGOs) while allowing "good" (social service providing) NGOs such as HONGOs to continue or even expand their work? In the following section I consider the role played by HONGOs in China before assessing how the new Law may impact them.

III. The Genesis of HONGO Activities in China

The World Health Organization (WHO) defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” (WHO 2018). Factors influencing health include access to physicians and medicines, but also environmental, demographic, social, political and economic conditions. The WHO views domestic and international civil society organizations as integral to achieving health and calls for state-CSO cooperation. NGOs do so by bolstering national and local government efforts to manage public health challenges (WHO 2002, 2). In particular the WHO argues that civil society organizations can advance health agendas in countries where governments generally lack the human and economic capital to alone address public health challenges. This is very much the historical experience of HONGOs in China.

HONGOs first arrived in China with Christian missionaries during the Qing Dynasty. Missionaries often invested in small clinics, hospitals and traveling caregivers as a means to provide modern medical assistance as a means to spread Christian doctrine. With the establishment of the Republic of China, foreign health-oriented initiatives both expanded and secularized. However, the relationship dramatically changed with the outset of Communist rule. Under the CCP, the government rejected the WHO call for state-civil society cooperation in health and instead committed to alone providing health care for all its citizens. In the process the CCP closed down most HONGOs (Wang and Zhao 2014, 23).

Another transition began with Reform and Opening in the 1980s. At this time, the central government ended its commitment to state-funded universal health provision and looked to the market to provide many services the state had once provided. State health spending dropped from 32% of total spending to only 15% between 1978 and 1999 even as health Cooperatives and the health services they provided collapsed across the country. Conditions were particularly difficult in rural China where medical insurance declined from 90% to a mere 5% of the population, leaving 900 million peasants without coverage (Wang and Zhao 2014, 24). Furthermore, because provincial and local governments were required to absorb many of the medical expenses once covered by the central government, a gap grew between wealthy and poor provinces and between wealthy and poor regions within provinces.

Recognizing the problems inherent in the collapsing health services, the Central Party Committee and the State Council responded with the 1997 “Decision on Health Reform and Development,” committing China to once again provide basic universal health care. The Decision drove establishment of three insurance types. Urban Employer-sponsored Medical Insurance (UEMI) was established in 1998 to provide insurance through urban residents’

employers. In 2003, the New Cooperative Medical Scheme (NCMS) began covering rural residents. Finally, in 2007 Urban Resident Medical Insurance (URMI) was initiated to insure those urban residents lacking UEMI. While the extent of coverage differs widely among and within plans, by 2012, 95% of China's population enjoyed some level of coverage (Lu and Zhang 2013, s52).

And yet, significant challenges remain. For example, between 2009 and 2011 the gap between annual state health subsidies to urban and rural residents grew from 1,164.4 RMB to 1,551.1 RMB. The gap in total health-related spending also grew, with NCMS (rural) per capita spending in 2011 totaling 246 RMB whereas UEMI (urban) per capita spending reached 1,960 RMB (Lu and Zhang 2013, s57). Not surprisingly, the result is a persistent and notable gap in rural-urban health outcomes. A 2011 study by Yi, Wu, Liu et. al. (2011) demonstrates these disparities with a focus on two critical indicators - infant and maternal mortality rates. Between 2004 and 2009 rural rates for both were consistently 2-3 times higher than those in urban areas.

Government initiatives to shrink the gap by attracting more and better qualified health workers to serve in rural areas have included financial incentives, tying promotion to rural service and deploying mobile clinics. In 2004 the government required urban hospitals to provide infrastructure, training, equipment and even health worker exchanges (Wang and Zeng 2015, 1441). Yet despite these efforts, the gap in health provision remains a major and seemingly intractable challenge.

Recognizing its own limitations in addressing these health challenges, the state reopened the door to HONGOs in 1998 when the Ministry of Health issued the Regulations for Application, Approval and Authentication of Qualifications of International Organizations seeking involvement in health initiatives in China – an example of the Regulation mode. The regulations call on international organizations to focus on poorer patients and to supplement local medical services with new technologies (Wang and Zhao 2014, 26-7). In short order numerous HONGOs engaged in health-focused work under state leadership. HONGO initiatives focused on developing new technologies and treatments, building medical capacity through training and talent development, laboratory construction, developing national level prevention and control schemes, influencing national health policy, and promoting international cooperation (Wang and Zhao 2014, 29, 32).

To further encourage ONGO activities in desirable spheres, the 12th five year plan (2011-15) called for social management innovation (社會管理創新) with the aim of improving the State's ability to manage and to coordinate with civil society organizations to address common goals (NGO Law Monitor 2016). This included local governments lowering barriers to HONGO registration, cooperating with HONGOs and providing greater clarity through more detailed regulations and standards. In November 2013 Xi Jinping

affirmed State support for NGOs providing social services by shifting the term “social management” (社會管理) to “social governance” (社會治理) implying a more collaborative relationship while also reflecting a shift towards the Negotiation and even Societalization modes.

As a result of these state initiatives, by 2005 international civil society-related funding to China reached USD 229 million, and as Chen, Ryan and Saich (2014, 5) note, by 2015 health became the third most prevalent focus of nonprofits in the country. Indeed, of 29 officially registered ONGOs in 2015, 8 were specifically health NGOs. While disaster relief and poverty alleviation are regularly listed as distinct categories, they are very much part of health as the WHO defines it. As such, health-related investment can be seen as even larger. Meng, Peng and Liu (2011, 63-64) note that by 2010, 17% of foreign NGOs investment was aimed at medical care with another 12% invested in disaster reduction and relief and 18% in poverty alleviation. How are these resources utilized?

Among the many initiatives on which HONGOs focus, HIV/AIDS has been central, particularly in the early years when the central government ignored and then downplayed the epidemic. The government’s attitude shifted following the SARS (Severe Acute Respiratory Syndrome) outbreak, and today HIV/AIDS efforts are funded by both the state and international donors. Key contributing HONGOs include Doctors without Borders (MSF), the Chi Heng Foundation, the Clinton Foundation and the Gates Foundation.

MSF arrived in 2003, building an AIDS facility in rural Hubei to support those who had become infected during plasma donation. A similar project was initiated in Guangxi. Both projects involved close cooperation between MSF and local Centers for Disease Control (equivalent to local public health agencies in the US) that eventually took over the projects and scaled them up. In 2002, the Chi Heng Foundation began work with AIDS orphans in Henan. Chi Heng paid for orphan education and living expenses while also working to educate the gay community about HIV/AIDS prevention (Yip 2014, 148-149).

Both the Clinton and Gates Foundations have invested in HIV/AIDS prevention and treatment since the mid-2000s. The Clinton foundation invests in training care givers and providing technical assistance to the CDC while the Gates foundation focuses on prevention in less developed regions directing its support through the national CDC and GONGOs with ties in local communities (Clinton Foundation 2004; Bill and Melinda Gates Foundation 2009).

In a similar vein, gender and reproductive health issues in China have benefited from early investment in new initiatives by HONGOs whose approaches, where successful, have been adopted and expanded by government. While the Ford foundation has been the most significant actor in this field, it was joined by many others, including the Rockefeller Foundation, International Planned Parenthood and Family Health International. These

organizations generally focused on women's rights and empowerment while mitigating for women some of the worst impacts of China's population policies (Kaufman, Burns, Lee and Jolly 2014, 156-160).

Another focus for HONGOs has been tobacco control. Working alongside inter-governmental organizations such as the WHO and the World Bank, HONGOs including the American Cancer Society, Taiwan's John Tung foundation, the Bloomberg foundation and the Campaign for Tobacco Free Kids (CTFK) have focused on various aspects of tobacco related health risks. For example, CTFK has cooperated with domestic NGOs and local government as well as US universities to educate the public and alter attitudes towards smoking while also seeking to strengthen China's smoking control laws (Koplan and Redmon 2014, 176-185).

Special mention should be made of Hong Kong and Taiwan-based HONGOs. Like other ONGOs, many Hong Kong and Taiwan-based HONGOs have a special relationship with local governments and organizations in China. In many cases, they have a long history in China and have built close, trusting and cooperative, even personal relationships with local agencies. For example, Taiwan's Tzu-Chi Buddhist foundation has been working across China since 1991. In 2010 it was registered and authorized to establish a China-wide charity. Among its many activities, Tzu-Chi invests in disaster recovery including rebuilding hospitals and clinics (China Development Brief 2016; Laliberte 2009; Lu Hwei-syin 2016). Despite its Buddhist (religious) roots, Tzu-Chi has enjoyed good relations with the Chinese government reflected in the MOCA China Charity Award given it in both 2006 and 2008 for "promoting the wellbeing of society and relieving the suffering of the needy". Tzu-Chi was also the first ONGO authorized by the government to be registered under the MOCA and supervised by the State Administration of Religious Affairs.

Hong Kong based HONGOs have also worked extensively in mainland China. These HONGOs often target medical and health service provision at university medical facilities in regions connected to the donors' "hometown" (Faure 2014, 256-265). For example, the Sir Run Run Shaw Charitable Trust donated approximately 10 billion HKD to the Zhejiang University hospital and school of medicine. Other major donors include the HK Society for the Blind, the Chi Heng Foundation, Gracious Glory (Buddhist) Foundation, the Kadoorie Charitable Foundation and the Li Ka Shing Foundation.

Since returning to China, the HONGO community has offered expertise, funding and personnel to support solutions to China's health challenges. However, with implementation of the new ONGO Law, the ability of these HONGOs to continue offering support comes into question.

IV. The Regulatory Environment Leading to the New ONGO Law

NGO regulation in modern China began with the 1982 constitution. However the constitution was quite vague on NGOs and foreign involvement (article 18), with only passing mention of the role non-state organizations might play in health-related services (article 21), and the right of citizens to be involved in associations (article 35). Subsequent efforts to clarify the status of NGOs in China included the 1998 Regulations on the Registration and Administration of Social Organizations and the 2004 Regulations on the Management of Foundations. These were largely intended to encourage NGOs to participate in work favored by the state, while discouraging work deemed problematic (Sidel 2014, 44).

Under the 1998 Regulations, NGOs must re-register annually and may be denied registration if they are deemed to oppose basic principles of the constitution (such as CCP leadership), harm national unity and security or national interests, social interests or the interests of other organizations and citizens, or carry out acts contrary to social or public morals. Also, no NGO may be established in an issue area in which an NGO already exists, nor can NGOs establish branch offices.

In addition to these constraints on their activities, all ONGOs functioned under the dual management system as mandated by the 2005 Regulations for Management of Foundations. Thus, ONGOs were required to register with the MOCA (Ministry of Civil Affairs) or a provincial level civil affairs unit and were required to obtain a Professional Supervisory Unit (PSU - for example, the Ministry of Health or a provincial health bureau). ONGOs either sought sponsorship under the dual management system, registered as a business, or functioned informally. Failing to register with MOCA resulted in a lack of formal protections or access to services provided by the sponsor. Obtaining official approval generally required good connections in government and could result in intrusive and independence-undermining state oversight. These conditions were particularly unattractive and difficult to comply with for smaller, less well established NGOs. And while local experimentation with registration was allowed by the central government, Wu (2010, 330) finds that only 61% of international NGOs operating in China were registered, and the majority of those registered with the ministries of Commerce or Industry, a far simpler process. As a result, by 2015 there were between 1,000-6,000 ONGOs in China with only a small minority of these registered through MOCA and the dual management system (Shieh 2017).

As noted, so long as the state was confident that CSOs offered benefits and did not

threaten its dominance, the state supported their activities and expansion even if they were not formally registered. However with Xi Jinping's rise to power, the state has chosen to revise, strengthen and enhance enforcement of the rules governing the ONGO sector.

To do so, Xi established a new National Security Commission and ordered a survey of all ONGOs in China. This was followed by new laws in 2015, including a counter-terrorism law and a national security law that Simon (2016) argues are directly connected to the ONGO law. But clearly, the most relevant law for understanding the new status of HONGOs in China is the ONGO Law itself.

V. The ONGO Law and its Potential Impact on Health-oriented ONGOs

Rather than review the entire Law, I focus here on those aspects that are most pertinent to HONGOs. The Law defines ONGOs as “non-profit, non-governmental social organizations such as foundations, social groups and think tanks that have been lawfully established outside of mainland China” (art. 2), specifically including NGOs with a health focus (art. 3) seeking to support the public welfare. The Law also specifies who may register and how, when and with whom; acceptable activities, and; the penalties for failing to adhere to the Law. With the aim of adding additional clarity regarding actual procedures ONGOs must follow and the forms they must complete, on 28 November 2016, the MPS released the Guidelines for Registration and Temporary Activities of Representative Offices of ONGOs within the Territory of China (境外非政府組織代表機構登記和臨時活動備案辦事指南).

As with all ONGOs, HONGOs now have two options to conduct activities in China. One option is to establish a representative office for long term activities with the approval of a professional supervisory unit (PSU - 業務主管單位), and register with the Public Security Bureau at the relevant level (art. 6, 7, 9, 10, 15, 40, 41).^① Only on 20 December, 2016 was the official list of approved supervisory units and the spheres in which ONGOs may function released.^② The list of accepted professional supervisory units includes only ministries, government agencies and Party-led mass organizations. The spheres of accepted activities are limited to cooperation on the economy, education, technology, culture, health,

註① Professional Supervisory Unit is translated by the MPS as Business Administration Department. According to the Oct. 14 Draft Guidelines, the MPS role is to provide guidance and coordination to provincial level PSBs.

註② Directory of Activities and relevant PSUs for Overseas NGOs working in China (境外非政府組織在中國境內活動領域和專案目錄、業務主管單位名錄) <http://www.mps.gov.cn/n2254314/n2254409/n4904353/c5579013/content.html?from=timeline&isappinstalled=0>

sports, environmental protection, disaster relief and “other”. The “other” category includes legal services, gender, union work, and overseas research, education and scholarly exchanges.

HONGOs must file annual plans (art. 19), and may only provide services as per their originally filed registration (art. 18). PSBs (Public Security Bureau) at the county level or above are responsible for ongoing supervision, management and support (art. 7).

HONGOs may also provide health-related disaster relief (establishing mobile hospitals, providing medicines, services and support during earthquakes or epidemic outbreaks for example). Here the second route – the temporary activities option – comes into play (art. 16, 17, 28, 30, 41). HONGOs may quickly respond to a disaster *in advance of official approval* by working with a Chinese partner to apply to conduct a temporary activity (not exceeding one year). The Chinese partner obtains approval from a competent authority and files the temporary activity request no later than fifteen days *after* the activity is initiated. A report describing the activity must be submitted by both the ONGO and the Chinese partner no later than 30 days after cessation.

It is important to note that a “partner” may differ from a PSU. A partner may be a government agency, a peoples’ organization (such as the All China Women’s Federation), a public institution (such as a university or hospital) or even a social organization. The partner has no supervisory role and need not be approved by the government in advance.

As with other ONGOs, should HONGOs fail to adhere to the Law’s strictures, they may be sanctioned (art. 45), de-registered (art. 15) or closed down (art. 45, 46) with officials potentially arrested and the ONGO potentially banned from China for up to five years (art. 47). Article five defines the strictures triggering these outcomes. ONGOs will be sanctioned if they threaten China’s security or national ethnic unity, harm China’s national interests, societal public interests, or the legal rights of citizens and other groups. In addition, ONGOs may not engage in for-profit or political activities, or in illegal religious activities. Furthermore, ONGOs may be de-registered if the “activities of the NGO are no longer permitted due to other reasons” or if they engage in activities perceived as undermining state security and harming national or societal public interests (art. 15.4; art. 47.5). Indeed, ONGOs engaged in separatism, undermining national unity or subverting state power or other such crimes “shall be punished in accordance with this article coupled with criminal charges for the persons directly responsible”. The vagueness of these articles and subsections leave the PSB with tremendous leeway to interpret when and why it is legal to act against, or even shut down an ONGO.

Earlier I noted that Hong Kong and Taiwan NGOs have historically enjoyed a special status in China. This seems to change with the new Law. Notably, the Law refers to NGOs that are *Jing Wai* (境外), or outside China’s borders, rather than to *Guo Wai* (國外), NGOs outside the country. While seemingly minor, this distinction ensures that the Law

encompasses ONGOs based in Hong Kong and Taiwan, whereas reference to Guo Wai NGOs might have excluded them. Thus these HONGOs, which in many cases have long functioned in a politically grey area often with the support of local government officials, are now constrained by the restrictions appearing in the Law.

There is one article of the Law that seems to provide potential political space for some ONGOs. This is article 53 which refers to Supplementary Provisions. The article identifies overseas “schools, hospitals, scientific and engineering technology research institutions or academic organizations engaged in exchange and cooperation with their counterparts in China”. It states that “relevant state regulations shall be applied in handling such activities” and that any violations of article 5 (obey China’s laws, don’t threaten security, national unity, etc.) will be addressed “in accordance with law”. Notably, the wording is not “in accordance with *this* law”, and as such these types of ONGOs may be bound by laws *other* than the new ONGO law. While its impact remains unclear, it is possible that article 53 represents a “carve out” for certain ONGOs. The manner by which this article is ultimately interpreted and implemented will have a significant impact on HONGO activities in China.

Finally, the MPS has noted that given the eight month lead-up to the Law’s implementation, there is no need for, and will therefore be no grace period for ONGOs to come into compliance with the Law (Ministry of Public Security Notice 2016a).

VI. Discussion

Though it has been in force for only a short period, the impacts of the ONGO Law are beginning to come into focus. As anticipated, impacts in some cases seem to be positive while in other cases they are proving neutral or even negative.

As noted, HONGOs have a long history of cooperation with state agencies in China. Working together, HONGOs and state agencies have contributed to improved health outcomes and capacity building in the health sphere. From this perspective, the Law’s increased clarity enhances the ability of HONGOs to identify the spheres in which they can function without repercussions while also helping ascertain with whom they can best cooperate. The Law also eases concerns about registration procedures and provides web-based access to required forms. For HONGOs that have long functioned in the political grey areas, such clarity may provide benefits.

Another potentially positive outcome of the Law derives from the new Temporary Activities provision. Many HONGOs provide disaster relief. Previously, such work was fraught with the possibility that HONGOs would be viewed as functioning illegally. However, the new Law enables HONGOs to respond quickly to disasters while only later submitting

paperwork in support of their activities. Furthermore, the requirement to identify a partner to conduct a temporary activity is less onerous than the requirement to obtain a PSU.

Ultimately, due to the nature of HONGO work which tends to avoid highly sensitive areas, and the state's declared prioritization of health, HONGOs are in the relatively comfortable position of being viewed as largely supporting state priorities and contributing to enhancing state legitimacy. We can therefore expect that HONGO applications to work in China will be interpreted favorably within the constraints of the Law.

Nonetheless, there is much in the Law to concern HONGOs. It is true that HONGOs currently in China, and those contemplating entry benefit from access to the official list of PSUs appearing in the implementation guidelines (辦事指南) released in December (Ministry of Public Security 2016b). However, the agencies approved as PSUs are all state, or state-affiliated agencies. These include the national health and family planning commission (國家衛生計生委), the State administration of traditional Chinese medicine (國家中醫藥管理局), and the state food and drug administration (國家食品藥品監管總局), and their provincial-level government departments (省級人民政府主管部門). Hopes that non-state actors might also be included have been disappointed, and it is unclear why those agencies identified as potential PSUs would be interested in taking on the additional burden and potential risks inherent to sponsoring a HONGO.

Also, despite the late roll-out of the Law, the government has declared that there is no reason to provide temporary relief or a bridging period for ONGOs to complete the registration process. As Shi-Kupfer (2017) and Lang note, “the haphazard and fragmented way the new law is implemented seems to suggest a deliberate attempt to make life difficult for at least some international organizations operating in China. In fact, many foreign NGOs that operated in a legal grey area before...are now being pushed into outright illegality”. And while this comment does not refer specifically to HONGOs, it is worth noting that by June, 2017 only 150 ONGOs had registered under the new Law and of those many were trade-focused. A June 2017 listing of ONGOs registered under the ONGO Law identifies 67 with a primary focus on trade, 21 with a primary focus on health, 15 with a primary focus on either environment or education and only 3 primarily focused on potentially sensitive topics (Civil Society capacity building or ethnic affairs) (China Development Brief 2017).^③ Evidently, many ONGOs have chosen to take a “wait and see” approach to continued work in China, and at least some have decided to close offices and curtail their activities until the

註③ The remaining ONGOs work in a wide range of activities including international relations and exchanges and culture. If we follow the WHO's lead and include disaster relief in the calculation of number of HONGOs registered as well as Health as a secondary or tertiary activity, the number of HONGOs registered in China doubles to 42.

ramifications of the Law become clearer.

Ultimately, the greater regulatory and legal clarity that comes with the Law may be a benefit, but it is not inevitably so. HONGOs are not specifically identified as problematic by the state, but by their very nature HONGOs bring with them values and structures that may be perceived as problematic. Thus, HONGOs like other ONGOs will find it more difficult to function in a shrinking political grey area and will be forced to choose among the option of adhering more closely to often constraining state requirements, abandoning their work in China, or risking work without legal coverage in a more tightly constrained system. Concern about crackdowns for even the most benign of behaviors is already deterring some HONGOs from coming to China, while driving others out of the country.

Furthermore, HONGO relations with the MPS will necessarily differ from relations with the MOCA. MOCA has a history of working with HONGOs and is not structured as a security institution. Familiarity often breeds trust and facilitates cooperation. By contrast, the MPS has no experience working with ONGOs and has far more powerful coercive tools available and the legal basis to take more drastic action. At least until (and if) relationships of trust have been fostered, one can anticipate a more invasive and likely less cooperative relationship with the always unnerving threat of closure, equipment confiscation and arrest of HONGO members. This new reality can only increase the anxiety felt by HONGOs either in, or contemplating entry to China.

For those HONGOs based in Hong Kong and Taiwan, conditions have likely changed as well. Specifically included in the new Law, the work of these HONGOs will necessarily be more tightly regulated and based less on the informal relationships that so facilitated previous HONGO activities in China.

Of course, aspects of the new Law remain unclear and many questions remain. How should the article 53 “carve-out” be interpreted? How does this article impact HONGOs affiliated with overseas universities or hospitals? Can those HONGOs continue their work without the scrutiny that comes with the new Law? Also of concern, what is the fate of HONGOs with offices across the country? Must they register each office with the relevant provincial level PSB or is one registration adequate? A November 9, 2016 joint statement released by the MPS and Shanghai city PSB that references articles X and XIII of the Law, seeks to address this question. The statement asserts that branch offices are allowed, though not if their geographic activity areas overlap (Ministry of Public Security on INGO Law 2016). However, what exactly this entails remains unclear. And finally, by what process do HONGO transfer their registrations from the MOCA to the MPS?

While not directly related to the content of the Law itself, another issue that bears consideration is how the Law will be applied by provincial and local governments. Adherence is influenced by the extent to which the central government prioritizes any Law. In addition, throughout China provincial and local governments vary in the extent to which they adhere to central government dictates and Laws due to their perception of central priorities as well as their level of autonomy from the center. Generally speaking, provinces enjoy varying levels of autonomy due to their distance from the capital, their wealth, their population and more. As a result, variation in implementation may be anticipated. Provincial and local governments with relative autonomy and an interest in the services offered by HONGOs may offer a more attractive environment for HONGOs to work in.

VII. Conclusion

Undoubtedly, HONGOs are in an enviable position as compared to the situation facing human rights and other forms of advocacy ONGOs. HONGO work directly contributes to achieving the Xi Jinping regime's priority of improving health across the country. Furthermore, successful HONGO work will improve general public health and help close the gap between rural and urban health outcomes – a source of growing dissatisfaction. That HONGOs have a history of cooperation with the state reaching back to the Qing era encourages trust. Indeed, HONGOs are largely viewed by both local and central government officials as benign contributors to China's development and by extension, to the state's legitimacy. Not surprisingly the result is that HONGOs are second only to Trade-related ONGOs in terms of the number registered under the Law while ONGOs in sensitive areas are largely absent from the list of registered ONGOs.

However, the Law reflects a trend reversal by China's leadership from relinquishing greater political space for NGO activities – Negotiation and Societalization – towards greater central government control through Regulation. Thus, where in the past HONGOs and local governments could develop relationships that achieved shared goals while occasionally avoiding or ignoring central guidelines, the formalized relationships mandated by the NGO Law seems to preclude this option.

Ultimately, as with other Chinese laws, the NGO Law leaves much room for interpretation by those charged with implementation. Government officials can, for example, interpret article 5 (threats to national security, etc.) based on whatever current goals they seek to achieve. Even "good" ONGOs must therefore be cautious. While the Law's greater clarity and additional paths to taking action may be a benefit, the government's control over the Law's interpretation actually ensures continued unpredictability. Should HONGOs

overstep the ever-shifting bounds of approved behavior, they must anticipate treatment reflecting Party interests and not necessarily their own interpretation of the Law.

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中國的境外健康領域非政府組織和 新的境外非政府組織法

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摘 要

境外非政府組織法 (Overseas Non-Governmental Organization Law) 將如何影響健康領域的境外非政府組織 (Health-Oriented Overseas NGOs, HONGOs) 在中國的運作能力？他們是否會受到嚴重限制，還是他們作為醫療服務提供者的角色會為他們提供保護？

本文透過法規管理、談判和社會化的視角來關注國家與非政府組織的關係，從而回答這些問題。在習近平之前的時代中，國家與非政府組織關係趨向於更多的談判和社會化——反映國家和公民社會之間不斷加強的合作——境外非政府組織法的出現則反應了國家與非政府組織關係轉向更重視法規管理的層面。

然而鑑於國家的目標是維持控制，同時從境外非政府組織的貢獻中受益而得到發展，可以預見「好的」境外非政府組織——那些活動被視為支持國家目標的（如健康領域的境外非政府組織）——可能受益於這個法律的某些層面以及對其規範的良性解釋。

本文結論，由於健康領域的境外非政府組織為國家提供重要和有益的服務，他們將不會受到不利影響。源於現實，境外非政府組織法律本身並不比中國領導層如何選擇目標，解釋和實施它來得更為重要。

關鍵詞：境外非政府組織法、影響、解釋、境外健康領域非政府組織

References

- Belkin, Ira and Jerome A. Cohen. 2015. "Will China Close its Doors?" *The New York Times* (June 1).
- Bill and Melinda Gates Foundation. 2009. "Major Commitment to Expand HIV Prevention in China." <http://www.gatesfoundation.org/Media-Center/Press-Releases/2007/11/Major-Commitment-to-Expand-HIV-Prevention-in-China> (July 5, 2016).
- Brook, Timothy and B. Michael Frolic (eds). 1997. *Civil Society in China*. Armonk: ME Sharpe.
- Chen Jie. 2006. "The NGO Community in China: Expanding Linkages with Transnational Civil Society and their Democratic Implications." *China Perspectives* 68 (2006).
- Chen, L. C., J. Ryan, and T. Saich. 2014. "Philanthropy for Health in China: Distinctive Roots and Future Prospects." In *Philanthropy for Health in China*, eds. J. Ryan, L. C. Chen, and T. Saich. Indiana University Press.
- China Development Brief. 2016 "NGO Directory. " <http://www.chinadevelopmentbrief.cn/directory/?sector%5B0%5D=public-health&start&contains> (September 18, 2016).
- China Development Brief. 2017. "The Comprehensive List of Overseas NGOs Registered in China" <http://chinadevelopmentbrief.cn/articles/the-comprehensive-list-of-overseas-ngos-registered-in-china/> (June 16, 2017).
- China Digital Times. 2013. "Internal Edict Warns of '7 Perils' facing CCP. " <http://chinadigitaltimes.net/2013/08/ccp-edict-warns-of-seven-perils/> (October 15, 2016).
- China Law Translate. 2016. "April 28, 2016 FNGO Law Press Conference." <http://chinalawtranslate.com/fngo-law-presser/?lang=en> (September 7, 2016).
- Clinton Foundation, 2004. "Press Release: Clinton Foundation helps China combat HIV/AIDS." <https://www.clintonfoundation.org/main/news-and-media/press-releases-and-statements/press-release-clinton-foundation-helps-china-combat-hiv-aids.html> (July 5, 2016).
- Ding, Yijiang. 2000. "The Conceptual Evolution of Democracy in Intellectual Circles' Rethinking of State and Society." In *China and Democracy*, ed. Suisheng Zhao. New York: Routledge.
- Editorial. 2016. "The Best Science for Achieving Health China 2030." *The Lancet* 388 (10054): 1851.
- Faure, David. 2014. "Charitable Donations for Health and Medical Services from Hong Kong to Mainland China." In *Philanthropy for Health in China*, eds. J. Ryan, L. C. Chen and T. Saich. Indiana University press.
- Gallagher, M.E. 2004. "China: The Limits of Civil Society in a Late Leninist State." In *Civil Society and Political Change in Asia*, ed. M. Alagappa. Stanford: Stanford University

- Press.
- Howell, J. 2004. "New Directions in Civil Society: Organizing Around Marginalized Interests." In *Governance in China*, ed. J. Howell. Lanham: Rowman & Littlefield.
- Hsiao, Hsin-Huang, and Yao Cheng. 2016. "China and INGOs in Social Security" Paper presented at the 45th Taiwan-American Conference on Contemporary China, Taipei: Institute of International Relations, National Chengchi University.
- Jia Xijin (賈西津). 2016. "Legislations for Foreign NGOs: How Will the Second Boot Land?" *Caijing Magazine*. (14 April).
- Kaufman, J., M. Burns, E. Lee and S. Jolly. 2014. "Gender and Reproductive Health in China." In *Philanthropy for Health in China*, eds. J. Ryan, L. C. Chen, and T. Saich. Indiana University Press.
- Koplan, Jeffrey P. and Pamela Redmon. 2014. "Foreign Philanthropic Initiatives for Tobacco Control in China." In *Philanthropy for Health in China*, eds. J. Ryan, L. C. Chen, and T. Saich. Indiana University Press.
- Laliberte, Andre. 2009. "The Institutionalization of Buddhist Philanthropy in China." In *State and Society Responses to Social Welfare Needs in China: Serving the People*, eds. J. Schwartz and S. Shieh. UK: Routledge.
- Lu Shi and Zhang Donglan. 2013. "China's New Rural Cooperative Medical Scheme and Underutilization of Medical Care among Adults Over 45: Evidence from CHARLS Pilot Data." *The Journal of Rural Health* 29.
- Ma, Q. 2004. *Non-governmental Organizations in Contemporary China: Paving the Way to Civil Society?* London: Routledge.
- Malik, Khalid, Tong Lihua and Wenjuan Zhang. 2009. *Civil Society in China: A New Force for Equitable Development-Experiences and Thoughts of a Legal Aid CSO*. UNDP Report.
- Meng Zheqiang, Peng Jianmei and Liu Youping. 2011. Eds. *China Charity Donation Report*. Beijing: China Society Press.
- Ministry of Public Security Notice. 2016a. "Notice on Preparatory Work for Management of Domestic Activities by Overseas NGOs (公安部通報境外 NGO 境內活動管理法準備工作) (November 9)." <http://xw.qq.com/news/20161109013301/NEW2016110901330100> (November 11, 2016).
- Ministry of Public Security Notice. 2016b. "Directory of Activities and relevant PSUs for Overseas NGOs working in China (境外非政府組織在中國境內活動領域和專案目錄、業務主管單位名錄)" <http://www.mps.gov.cn/n2254314/n2254409/n4904353/c5579013/content.html?from=timeline&isappinstalled=0> (12/2016) (January 15, 2017).
- Ministry of Public Security on INGO Law. 2016. "Questions & Answers session with the European Chamber of Commerce." <http://ngochina.blogspot.com/> (September 11).

- NGO Law Monitor. 2016. "Law on the Management of ONGO's Activities in Mainland China" (June 20).
- Phillips, Thomas. 2016. "China passes law imposing security controls on overseas NGOs." *The Guardian* (April 28).
- Saich, T. 2000. "Negotiating the State: The Development of Social Organizations in China." *China Quarterly* 161.
- Shieh, Shawn and Jonathan Schwartz. 2009. "State and Society Responses to China's Social Welfare Needs: An Introduction to the Debate." In *State and Society Responses to Social Welfare Needs in China: Serving the People*, eds. J. Schwartz and S Shieh. UK: Routledge.
- Shieh, Shawn. 2009. "Beyond Corporatism and Civil Society." In *State and Society Responses to Social Welfare Needs in China: Serving the People*, eds. J. Schwartz and S. Shieh. UK: Routledge.
- Shieh, Shawn. 2016. "Some Insights From a Q&A With the Ministry of Public Security on the Overseas NGO Law (Sept. 11)" http://ngochina.blogspot.com/2016_09_01_archive.html (October 5, 2016).
- Shieh, Shawn. 2017. "The Origins of China's new law on Foreign NGOs (01/31/2017)" <http://www.chinafile.com> (February 23, 2017).
- Shi-Kupfer, Kristin and Bertram Lang. 2017. "Overseas NGOs in China: Left in Legal Limbo." *The Diplomat* (March 4).
- Sidel, Mark. 2014. "The Shifting Balance of Philanthropic Policies and Regulations in China." In *Philanthropy for Health in China*, eds. J. Ryan, L. C. Chen, and T. Saich. Indiana University Press.
- Sidel, Mark. 2016. "It Just Got Harder to Make a Difference in China." *Foreign Policy* (29 April).
- Simon, Karla, David Wolf, and Hwei-Syin Lu. 2016. "China and INGOs in Reform and Innovation" Paper presented at the 45th Taiwan-American Conference on Contemporary China, Taipei: Institute of International Relations, National Chengchi University.
- The Economist. 2014. "Enter the Chinese NGO." (12 April).
- UNDP. 2008. *Human Development Report China 2007/08*. China Publishing Group Corporation.
- Wang Tao and Zeng Rong. 2015. "Addressing Inequalities in China's Health Services." *The Lancet* 386 (10002).
- Wang Zhenyao and Zhao Yanhui. 2014. "The Collapse and Reemergence of Private Philanthropy in China, 1949-2012." In *Philanthropy for Health in China*, eds. J. Ryan, L. C. Chen, and T. Saich. Indiana University Press.
- WHO. 2002. "WHO and Civil Society: Linking for Better Health." <http://www.who.int/>

- civilsociety/documents/en/CSICaseStudyE.pdf?ua=1 (July 15, 2016).
- WHO.2018. Constitution of the World Health Organization: Principles. <http://www.who.int/about/mission/en/> (July 6, 2018).
- Wu Yuzhong. 2010. *Big Events of NGOs in China (2010)*. Beijing: Social Science Academic Press.
- Yi, Bin, Li Wu, Hong Liu, Weimin Fang, Yang Hu, and Youjie Wang. 2011. "Rural-urban differences of neonatal mortality in a poorly developed province of China." *BMC Public Health* 11.
- Yip, Ray. 2014. "International Philanthropic Engagement in Three Stages of China's Response to HIV/AIDS." In *Philanthropy for Health in China*, eds. J. Ryan, L. C. Chen, and T. Saich. Indiana University Press.