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The NGO Law in China and its Impact on Overseas funded NGOs

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Abstract

The Law of the People's Republic of China on Administration of Activities of Overseas Non-governmental Organisations in the Mainland of China (Overseas NGO Law), adopted at the 20th Meeting of the 12th Standing Committee of the National People's Congress on 28 April 2016, came into force on 1 January 2017. The Chinese authorities explained that this new law is a major step "to standardise and guide the activities of overseas non-governmental organisations" in line with the objective of the Chinese Communist Party "to comprehensively promote the rule of law and to build a socialist country under the rule of law". However, foreign NGOs in China have reacted to the new law with grave concern and anxiety. This article provides an analysis of the main features of the Law and assesses its intention, impact and consequences.

Keywords

NGO; Law; China; Civil Society

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Introduction

The Law of the People's Republic of China on Administration of Activities of Overseas Non-governmental Organisations in the Mainland of China (Overseas NGO Law), adopted at the 20th Meeting of the 12th Standing Committee of the National People's Congress on 28 April 2016, came into force on 1 January 2017. The Chinese authorities explained that this new law is a major step 'to standardise and guide the activities of overseas non-governmental organisations' in line with the objective of the Chinese Communist Party (CCP) 'to comprehensively promote the rule of law and to build a socialist country under the rule of law' (Yang 2016). However, foreign NGOs in China have reacted to the new law with grave anxiety (South China Morning Post 2016). The major concern is that, rather than providing a constructive legal framework for the safe and smooth operation of foreign NGOs in China, the new law has turned some of the damaging extra-legal measures into explicit legal rules that further empower the security apparatus to control and harass foreign NGOs.

The main features of the Overseas NGO Law

The Overseas NGO Law consists of 54 articles in 7 chapters and covers a multitude of aspects, including principles and policies for overseas NGOs, legal responsibilities of overseas NGOs, the regulation of registration and filing, the regulation of activities and the regulation of supervision and management, and operational guidelines (The Standing Committee of the National People's Congress 2016). It is stipulated in Article 2 of the Overseas NGO Law that 'This law concerns overseas NGOs carrying out activities within China. 'Overseas NGOs' refers to non-profit, non-governmental social organisations such as foundations, social groups and think tanks that have been lawfully established outside of mainland China'. Instead of using the concept of 'foreign NGOs', the term of 'Overseas NGOs' (*jingwai feizhengfu zuzhi*) also covers NGOs in Hong Kong, Macau and Taiwan. The first comprehensive regulation of foreign NGOs in China, the law is characterised by its major provisions to control NGOs and restrict their activities.

Since China's entering into its 'reform and opening' era in the late 1970s, thousands of foreign NGOs have carried out programs and activities in China, contributing to China's development and engagement with governments, business, civil society and the general public of the outside world. As China has never released any official data on the exact number of foreign NGOs in China, no one really knows how many of these organisations are operating in the country. At a press conference during the 12th National People's Congress on 4 March 2016, Fu Ying, former vice foreign minister of China, revealed that 'there are more than 7,000 foreign NGOs operating in China' (Fu 2016). But this figure may not account for many foreign NGOs which, as a strategy to survive within the unfavourable regulatory regime, are registered as commercial entities or not formally registered at all.

The regulation and operation of NGOs, both domestic and foreign, are extremely messy in China. In strict legal terms, there are no legal domestic NGOs in China. They are either legal but not an NGO or an NGO but not legal. The Chinese party-state officially refers to a whole range of domestic not-for-profits organisations as 'social organisations' (*shehui zuzhi*),

an equivalent to NGOs in the West. The categories used by the party-state to register these organisations include Mass Organisations (*qunzhong zuzhi*), Social Associations (*shehui tuanti*), Professional Associations (*zhuanye tuanti*), Social Service Organisations (*shehui fuwu jigou*), Civil Non-enterprise Institutions (*minban fei qiye danwei*), Foundations (*jijinhui*), Philanthropic Organisations (*cishan zuzhi*), and Public Service Units (*shiyue danwei*). The peculiar regulatory framework of the party-state entails that, if legally registered, these social organisations are either a quasi-governmental agency or an extension of the party-state (Feng 2001; Feng 2006).

The ‘dual management system’ established by the *Regulations on the Registration and Management of Social Organizations* in 1989 (revised in 1998) has been a fatal restraint on the development of NGOs in China (The State Council 1998). The ‘dual management system’ requires social organisations to seek prior approval by and affiliations to a government or Party body as the ‘professional management unit’ (*yewu zhuguan bumen*) responsible for their operations. After approval is granted, they must register with the Ministry of Civil Affairs or its local bureaux, which acts as the ‘registration management unit’ (*dengji guangli jiguan*) responsible for their supervision and annual review. The *Regulations* also stipulate that applicant organisations must undergo a lengthy application and approval process and comply with a wide range of other requirements, including achieving the quota of at least fifty individual members or thirty institutional members, a fixed location and office, and minimum assets of 100,000 RMB. Furthermore, while there are many liabilities but no incentives for a government or Party body to sponsor an NGO, the Ministry of Civil Affairs or its local bureaux may rely on a wide array of reasons to deny registration. Over the last few years, local governments in some provinces have been experimenting with ways to lower barriers to entry. They have reformed the ‘dual management’ system to waive the requirement of sponsorship for certain categories of service social organisations such as trade associations, chambers of commerce, science and technology associations, and public welfare and charitable organisations.

In reality, there are on the one hand quasi-governmental agencies disguised as NGOs, often referred to as government-organized NGOs (GONGOs), with legal status, and on the other hand genuine NGOs without legal status or proper registration. Public Service Units are obviously quasi-governmental agencies, generally established and funded by the government and staffed with government employees on state payroll. Public universities, research institutes, public schools and hospitals fall in this category. In the same way, the traditional ‘mass organisations’ such as the Communist Youth League, the Trade Unions, the Women’s Federation, the Federation of Industry and Commerce, the Association of Science and Technology, the Association of Social Sciences, and the Association of Writers and Artists, are organised directly by the party-state and remain firmly part of the party and government apparatus. Even those new self-funded professional associations officially established in the reform era, such as the Association of Entrepreneurs, the Association of Individual Labourers, the Chamber of Commerce, and the Association of Lawyers, are also an extension of the government apparatus and their key managers are appointed by the party-state. Those genuine grassroots NGOs independent from the government either choose to legally register

with the Bureau of Industry and Commerce as a for-profit business, or operate without formal registration and legal protection. It is widely estimated that only one-tenth or two-tenths of 'social organisations' are registered legally or properly in China (Watson 2008; Deng 2010). According to the *White Paper on the Development of the Human Rights Undertakings in 2012* issued by the Press Office of the State Council of the PRC, there were approximately half a million legally-registered social organisations in China by the end of 2012 (Liu and Tian 2013). This means that currently there are as many as 5 million domestic NGOs and GONGOs operating in China.

The situation of overseas NGOs in China had been similar to domestic NGOs. There were a tiny few elite NGOs, which were treated by the party-state as friends in accordance with the united-front strategy, finding their special ways to collaborate with a Chinese government institution in a special arrangement. This privileged minority included trade and commercial groups such as the U.S.-China Business Council and European Chamber of Commerce, top universities such as New York University and Stanford University, and giant foundations such as the Bill and Melinda Gates Foundation and the Li Ka Shing Foundation. Rather than overcoming the daunting difficulty of the 'dual management' system and registering a representative office, the large majority of overseas NGOs either chose to register as a business entity, or remain unregistered and work under the radar through Chinese partners in a regulatory grey area.

The new Overseas NGO Law has made the life of these NGOs even harder in terms of both registration and activity. The 'dual management' system has been maintained and shifted for the worse. Overseas NGOs are now required to register with and report to the Ministry of Public Security or its provincial bureaux instead of the Ministry of Civic Affairs or its local bureaux. Article 7 of the Law stipulates that 'Within the scope of their authority, the public security organs of local governments at the county level or above are responsible for supervision, management, and service provision for the activities of overseas NGOs within China'. This change has put overseas NGOs under direct supervision by the police.

The new law is a very strict regulation that gives overseas NGOs only two legal channels for operating in China: register a representative office in China for approved activities or 'file a record' to carry out 'temporary activities' regardless of the nature or length of those activities. The overseas NGO and its Chinese partner will need to file the required materials about their collaboration and any necessary approvals with the police. They will also be required to file reports on their activities to the police. The law authorises the police, in conjunction with relevant government departments, to decide the areas, scope and projects for the activities of overseas NGOs. In particular, the new law bans overseas NGOs from engaging in 'religious activities' and 'political activities' (Article 47), which are very vaguely defined and can be interpreted by the hard-line police to including everything done by NGOs. Article 47 of the Law also stipulates that the police will enact severe administrative or legal punishments against overseas NGOs if they are involved in a wide range of activities such as advocacy inciting resistance against the enforcement of laws and regulations, collecting state secrets, spreading rumours or other 'harmful information', and 'other activities that undermine state security and harm national interests or societal public

interests'. The punishments include revocation of registration certificates, confiscation of property, freezing of bank accounts, and criminal charges.

Another area of concern is that the law goes a step further to raise barriers for accessing foreign funding of NGOs in China. Over the last few years, there has been increasingly closer regulatory oversight over foreign funding to Chinese grassroots NGOs. In the meantime, the Civil Affairs authorities in charge have sometimes chosen to take a lenient approach in enforcing those regulations and leave a grey area for Chinese grassroots NGOs to receive foreign funding. Under the new law, all foreign NGOs operating in China are to file reports on all of their Chinese partners, funding sources, and activities to the public security apparatus. This requirement intensifies restrictions on funding to those unregistered or not properly registered grassroots NGOs in China and funding from those politically 'sensitive' international NGOs, such as the National Endowment for Democracy and the Open Society Institute.

Intention, impact and consequences

What is the purpose or intention for the Chinese authorities to enact such a draconian new regulation? Do they want to raise the barriers and drive foreign NGOs out from China? On behalf of the Standing Committee of the National People's Congress, Fu Ying told the world that the new Overseas NGO Law was not to stop the activities of overseas NGOs in China. On 1 April 2017, China's government-run Xinhua News Agency published an article claiming that the registration procedure under the new law was 'more convenient, efficient, and simple'. (Liu 2017). Even Dr Shawn Shieh, who has worked in the independent grassroots NGO sector in China and Hong Kong for over a decade and has published extensively on the difficulties facing civil society in China, agrees that, apart from expanding the administrative authority and resources of the police, 'another intent of the law is to require more transparency and accountability on the part of the implementing authorities, and the Ministry of Public Security in particular'. He points out that without this law 'Public Security organs and local governments already have the authority to close down many of the foreign NGO projects and offices in China that are unregistered or improperly registered' (Shieh 2017). Shieh's optimism is shared by other researchers who believe that 'the goal of the Chinese government is not to destroy the NGO sector and civil society, but instead a tactical move in a long term strategy so that the state can gain as much benefit (and minimise as much risk) from the NGO sector as possible' (Hsu and Teets 2016).

There is no doubt that a clear and constructive legal framework is needed for healthy operation of foreign NGOs in China (Yin 2009). Ever since the start of 'reform and opening' in the late 1970s, there have been constant calls for the Chinese government to enact specific laws to safeguard the freedom of press and the freedom of association, which are enshrined in the Chinese constitution. Even the Tiananmen Massacre in 1989 did not put an end to these aspirations. Under the tenures of Jiang Zemin and Hu Jintao between 1990 and 2012, there was an effort to accommodate the Chinese civil society, which re-emerged on the party-state's partial withdrawal from society after 30 years of totalitarian rule (Feng 2001). The development of civil society and the rule of law were regarded as an integral part of 'good

governance' in China (Yu 2012). However, the dominant priority of the Chinese communist rulers since 1989 has been 'stability preservation' (*weiwen*), or, to be more accurate, communist regime preservation, at expense of the development of civil society and the rule of law. The rising rights consciousness, the emerging civil society and the convergence of the Chinese democracy movement and rights defence movement have led to an increasingly harsher response from the Chinese communist regime, overwhelmed by the sense of insecurity (Feng 2013b). This retrogressive response by the Chinese communist ruling elite to the growing democratic aspirations and activism has culminated in the rise of the Xi Jinping dictatorship (Lam 2015; Ringen 2016).

The new Overseas NGO Law has disappointed the expectations of offering legal remedies for and improvements on past poor practices, precisely because the current paramount leader Xi Jinping is much more stubborn in defending the Leninist party-state and more seriously obsessed with the agenda of preventing Soviet-style collapse. In Xi's series of speeches since his rise to the top at the end of 2012, there are stunning emphases on ideological purity and dazzling calls for 'great struggles' against the internal and external threats to 'regime security' (Mudie 2017; Lampton 2015). Xi's major concerns are succinctly summarised in the 'Communiqué on the Current State of the Ideological Sphere' (widely known as Document No. 9), which identifies the promotion of 'Western constitutional democracy', 'universal values', 'civil society' and other 'false ideological trends' as major attacks launched by 'Western anti-China forces and internal dissidents'. The document lashes out against the 'hostile forces' at home and abroad:

'Their goal is to use Western constitutional democracy to undermine the Party's leadership, abolish the People's Democracy, negate our country's constitution as well as our established system and principles, and bring about a change of allegiance by bringing Western political systems to China'.

It is also pointed out in the document that 'Advocates of civil society want to squeeze the Party out of leadership of the masses at the local level, even setting the Party against the masses, to the point that their advocacy is becoming a serious form of political opposition' (The General Office 2013). The Western conspiracy to instigate 'colour revolutions' for regime change tops the list of the major threats perceived by the Xi leadership, who are actively establishing a comprehensive control state in China.

I tend to argue that the new Overseas NGO Law serves well the United-Front Strategy of the CCP, allowing or even encouraging 'friends' of the international NGO sector to make financial and other contributions to the party-state while exercising vigilance and control on 'external hostile forces'. Indeed, Article 53 of the law makes an allowance that 'where overseas schools, hospitals, scientific and engineering technology research institutions or academic organisations engage in exchange and cooperation activities with schools, hospitals, scientific and engineering technology research institutions or academic organizations within China, relevant state regulations shall be applied in handling such activities'. Activities in these areas are simply free gifts to the party-state. By the same token, the party-state is also more than happy to accept funds and services of emergency relief, poverty alleviation,

disease control and other charitable activities of international NGOs who provide needed help to ease responsibilities and financial burdens of the government.

The Overseas NGO Law is a state security law, mainly targeting grassroots NGOs working on sensitive areas such as rights protection, advocacy and religion. By moving management from the Ministry of Civil Affairs to the Ministry of Public Security and granting police broad powers over foreign NGOs, it is obvious that the primary goal of the new Overseas NGO Law entails stricter control over foreign NGOs in China (Chin 2016). This new law is another typical bold act taken by the current Chinese administration under Xi Jinping. Compared to its immediate predecessors, the Xi Jinping leadership is characterised by a stronger sense of entitlement, confidence and mission to exercise despotic power and to use formal laws as a more effective tool for political repression. Responding to the thorny issue about the competing authorities of the Party and the law, Xi categorically dismisses the issue as a ‘false proposition’, reiterating that in China the Party establishes the law and the law embodies the Party’s viewpoints (Xi 2015). For Xi, not only does the Party stand above the law but the Party is the law. In line with the Party’s principle of ‘governing the country according to law’, the Xi administration has waged a series of fierce campaigns against civil society and foreign influences in the country. The administration has adopted new security-oriented laws one after another to provide stronger legality for its campaign against political dissent, including the Anti-espionage Law in 2014, the Counter-terrorism Law, the National Security Law in 2015, and the Cybersecurity Law in 2016. The Overseas NGO Law is hailed as an important component of this new ‘system of national security laws’ (Mo 2017). These new laws have been used for the repression of NGOs, human rights and labour activists, and lawyers on blanket charges such as ‘illegal operation (*feifa jingying*)’, ‘picking a quarrel and provoking a dispute (*xunxin zishi*)’, and, more extremely, ‘subversion of state power’ or ‘inciting subversion of state power’. The National Security Commission chaired by Xi was created in 2014 to coordinate all these efforts. In the second part of 2015 starting at midnight on 9 July, about 300 lawyers and rights activists were interrogated, detained, harassed or arrested by police on charges of political crimes such as accepting funding from overseas and ‘endangering state security’. Several foreigners who had been working for Chinese and foreign NGOs were convicted under these laws. In January 2016 a Swedish citizen, Peter Dahlin, appeared on state-run television and ‘confessed’ to his guilt of violating Chinese law and ‘hurting the feelings of the Chinese people’ through his work with an NGO that supported Chinese human rights lawyers, a group the government called an ‘illegal organization that sponsored activities jeopardizing China’s national security’ (Phillips 2016). The first overseas NGO worker arrested in China since the new Overseas NGO Law came into effect was rights activist Lee Ming-cheh from Taiwan, who was ‘disappeared’ (secretly detained by Chinese political police) in March 2017, formally arrested for ‘subverting state power’ in May 2017 after being held incommunicado for 68 days, and stood trial on 11 September 2017 (BBC 2017; Horton and Buckley 2017).

It is true that the Chinese security apparatus, including both the Ministry of Public Security and the Ministry of State Security, has already routinely taken extra-legal or criminal measures to harass both domestic and foreign NGOs in China. What has been achieved by the

new Overseas NGO Law is to openly bring those extra-legal or extra-judicial practices of Chinese security apparatus against the NGO sector into the formal legal system. Armed with the new Overseas NGO Law, the Chinese authorities can legally punish dissenting groups and at the same time demonstrate to the outside world that they are strengthening 'law-based administration' (*yifa xingzheng*) and 'governing the country according to law' (*yifa zhiguo*). They have followed the authoritarian tradition of imperial China in 'governing the population' with severe punishment under strict laws (Simon 2013; Teets 2014; Feng 2016). As coined by one researcher, the new rulers in China are creating a 'perfect dictatorship', a dictatorship so sophisticated and working so well that it in many ways does not even look dictatorial (Rengen 2016). In its control over NGOs, the party-state has adopted a strategy much more sophisticated than a simple ban, favouring NGOs engaging in charity and social services, monitoring NGOs of particular sensitivity, guarding NGOs engaged in advocacy and legal assistance, and punishing NGOs engaged in 'subversive' political and religious activities.

The new law has serious consequences for foreign NGOs in China. Their fate is settling in three broad categories. The first group are the tiny minority who achieve successful registration for legal operation in China. Six months after the new law took effect, only 82 foreign NGOs had completed the registration as required by the new law, accounting for about 1% of the 7000 foreign NGOs believed to be operating in mainland China. Most of them are business associations and chambers of commerce who previously registered with the Ministry of Civil Affairs or the Ministry of Commerce. Many of them are uncertain how strict their government supervisors will be and whether they will be able to carry on working as before (Gan 2017; Shi-Kupfer and Lang 2017). The second group are those who choose to suspend their operations or abandon China altogether as they are working in politically sensitive areas such as human rights, the rule of law and church-related activities. Some of them have tried to register but run into a variety of problems, such as difficulties in convincing potential government sponsors to work with them due to a lack of incentives and fear of the potential risks. As an example, the American Bar Association, which helped train hundreds of Chinese lawyers since 2004, has relocated from Beijing to Hong Kong. The third group are the overwhelming majority, those grassroots small NGOs in the areas of environmental protection and labour rights in particular, who still choose to work in China in an informal way, continuing their work without formal registration despite the law. Some of them have scaled down their operations, turning their programs into temporary activities and terminating new funding to their Chinese partners (Shi-Kupfer and Lang 2017).

Conclusion

Given that the new Overseas NGO Law formally places foreign NGOs under the supervision of the police and gives the police broad powers to question their workers, inspect their offices, look into their documents, confiscate their assets and even arrest their Chinese partners, the safety of foreign NGOs in China is a legitimate concern. It is naïve to believe that the law will be able to limit the discretionary power of the security apparatus by providing a detailed framework, procedures, and responsibilities for regulating foreign NGOs. Over the last four decades, hundreds of good laws have been transplanted in China

from the West for the safeguard of legal interests and rights of citizens. However, the party-state has also enacted 'evil laws' in violation of basic human rights and has been extremely selective in enforcing its own laws.

Overseas NGOs as well as domestic NGOs in China need new laws for protection rather than regulations for further restriction and punishment. It is unfortunate that the Overseas NGOs Law, which places the registration and supervision of overseas NGOs and their activities in China directly under the Ministry of Public Security instead of the Ministry of Civil Affairs, is a mechanism of state control rather than protection and facilitation for foreign NGOs. Worries about regime security are the major drivers behind the law's establishment and timing. Drawing negative lessons from the collapse of communist states in Eastern Europe and the 'colour revolutions' in the former Soviet Union and in the Arab Spring uprisings, Xi Jinping and his associates have taken resolute measures against foreign NGOs funding social forces in China that may eventually develop into an organised opposition.

The post-totalitarian regime in China has made the absence of organised opposition, disorganisation of society and atomisation of individuals the preconditions for the survival of the party-state. Based on the calculation that communist one-party rule will survive as long as isolated popular protests are not organised as a nation-wide campaign and can be suppressed one by one, the ruling elite have banned political opposition and restricted the development of civil society. They want to make sure that there is no space for diverse and genuine NGOs to thrive and the incipient civil society to reach its full potential. The 'dual management system' and other control mechanisms have been devised to set the scope and limitations for the development of civil society, which is welcomed when it provides needed services to the party-state but not allowed to function beyond state control (Feng 2013).

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