

Shawn Shieh¹

The Chinese State and Overseas NGOs: From Regulatory Ambiguity to the Overseas NGO Law

¹ Chinese University of Hong Kong, University Services Centre for China Studies, Hong Kong, China, E-mail: shawnshieh@gmail.com

Abstract:

This article discusses the significance of the Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China (hereafter the ONGO Law) for the Chinese state's regulation of overseas NGOs in the reform period. We show how the ONGO Law represents a dramatic shift in the regulation of ONGOs from a situation of regulatory ambiguity to one where ONGOs now come under a comprehensive law that seeks to regulate all their activities in mainland China. In doing so, the Law has created a dramatic shift in the legitimacy of ONGOs in China. Before the Law was enacted, ONGOs operated in a legal grey area where their work was opaque, received little recognition, and enjoyed limited legitimacy in the eyes of the government and public. The Law will change all of that, making the work of ONGOs more visible and transparent, and providing a formal channel for dealing with the government. At the same time, in putting the implementation and enforcement of the Law in the hands of the Ministry of Public Security (MPS), and creating a legal framework that is restrictive rather than enabling, the Chinese state has sent a very different and contradictory message to ONGOs who see themselves being viewed more as objects of suspicion than as legitimate stakeholders in China's development.

Keywords: China, Overseas NGO Law

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Introduction

Early in Xi Jinping's first term as President, in December 2014, a Vice-Minister of Public Security announced a draft of a new law to regulate the activities of all overseas NGOs (ONGOs) operating in China. The announcement caught many observers by surprise and copies of the draft law, which had not been made public, quickly circulated privately among scholars, NGO staff, and journalists. The intense concern elicited by the draft law was understandable. Since the first ONGOs began entering China in the late 1980s, the Chinese state had generally taken a hands-off approach to dealing with them. Many of the estimated thousands of ONGOs in China, did not have registered representative offices; instead they worked quietly, often with Chinese partners and sometimes alone, in a grey legal area. There was little indication that this status quo would change when Xi became president in 2013. The Ministry of Civil Affairs had carried out a pilot program to register ONGOs in the province of Yunnan a few years earlier, but most of the regulatory efforts during this period were focused on drafting a Charity Law and new regulations for domestic NGOs. No one expected a national law regulating ONGOs to come out so quickly, and for regulatory authority over ONGOs to be transferred from the Ministry of Civil Affairs to the Ministry of Public Security (MPS).

In this article, we analyze the ONGO Law's significance for the Chinese state's regulation of ONGOs in the reform era. We show how the ONGO Law represents a dramatic shift in the regulation of ONGOs from a situation of regulatory ambiguity to one where ONGOs now come under a comprehensive law that seeks to regulate all their activities in mainland China. In doing so, we argue, the Law created a dramatic shift in the legitimacy of ONGOs in China. Before the law was enacted, ONGOs operated in a legal grey area where their work was opaque, received little recognition, and enjoyed limited legitimacy, in the eyes of the government and public. The Law will change all of that, by making ONGO work more visible and transparent, and providing ONGOs with formal channels for dealing with the government.

Our discussion is divided into several sections. We first define the scope of overseas NGOs (ONGOs) covered by the Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China (hereafter the ONGO Law), and provide some background on the history of ONGOs' re-entry into China during the "reform and opening" period and the sporadic, fragmented

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measures taken by the Chinese government to regulate ONGOs until the enactment of the ONGO Law in April 2016. We then examine the Law's formulation and implementation from 2014 to the present.

Defining ONGOs in China

The “non-profit, nongovernmental, social organizations” that must comply with the ONGO Law is a very large and diverse group. They are part of what is called the third sector, the voluntary sector, the civil society sector, or the charitable or philanthropic sector. This sector consists of informal and formal groups that share several common qualities: they are largely voluntary, nonprofit, private (e. g. nongovernmental) and self-governing (Salamon and Sokolowski 2004). They are also mission-driven although their missions vary widely from assisting their members, to providing services to those in need, to advocating on behalf of certain communities. Together these qualities distinguish the third sector from government (the first sector) and business (the second sector). They include humanitarian and relief organizations, faith-based organizations, campaigning organizations, private universities, research institutes and think-tanks, foundations, and cultural, trade, professional, scientific and sporting associations. The ONGOs we are concerned with are generally formal organizations with staff and offices that are registered outside of China, including the territories of Hong Kong and Macau, and have programs and/or offices in China as well as other countries. They do not include Chinese NGOs that have overseas offices.

ONGOs in China during “Reform and Opening”

From 1949–1978, China had very little contact with the outside world and very few dealings with international organizations and NGOs. That changed in 1978 with Deng Xiaoping's “reform and opening” policies which greatly expanded China's engagement with the international community. In addition to liberalizing the foreign trade and investment environment, and allowing international cultural and educational exchanges, the Chinese government began to welcome the international development community to assist in China's development. During the 1980s multilateral lending agencies, such as the United Nations Development Program and the World Bank, followed by ONGOs, began to set up operations in China.

During this period, Chinese civil society began to grow as social resources flowed from a “government-controlled structure into a more multifaceted social structure” (Deng 2010, 184). Social needs led people to form their own associations to collectively tackle issues as the Chinese government realized it could not meet all citizen needs. NGO-like organizations called government-organized NGOs (GONGOs, *guanban zuzhi*) emerged during the 1980s and began to enter into partnerships with multilateral agencies and ONGOs (Deng 2010, 186). In the early 1990s, more independent grassroots Chinese NGOs such as Friends of Nature and Red Maple added diversity and complexity to a small but fast-growing civil society sector.¹

The Ford Foundation was the first ONGO to attain special operational status in China in 1988. The director of the foundation's China program, Peter Geithner, negotiated with the State Council to put Ford under the jurisdiction of the China Academy of Social Sciences (Wheeler 2012, 168). Following the example of the Ford Foundation, Beijing gradually formalized a path for other ONGOs to follow on a case by case basis.

The expansion of global civil society further facilitated the rise of NGO activity in China and ONGOs began to enter China in growing numbers seeking to work with domestic actors to address China's developmental challenges. The relationship between state and society gradually began to change as China accepted international rules and sought greater participation in the international community, in particular its entry into the World Trade Organization in 2001. China's rapid growth over the last three decades led it to participate in a growing number of international agreements to address pressing global problems such as gender inequality, HIV/AIDS and climate change (Ma 2006, 169). China's interaction with the international community became increasingly complex, following three interrelated trajectories: “bilateral or multilateral cooperation at government levels or between the Chinese government and UN organizations; donations and other kinds of support for Chinese charitable organizations by foreign private businesses; and the international non-profit sector operation in China” (Ma 2006, 170).

Perhaps the most cited example of the impact of global civil society on China is the 1995 United Nations Fourth World Conference on Women held in Beijing. This conference is widely seen as a turning point for the development of China's civil society. As part of this conference, a NGO forum on women played an important role in introducing ONGOs to China (Ma 2006, 167). As the term NGO entered public discourse, organizations established by women and other groups, and even GONGOs such as the All-China Women's Federation (ACWF), began calling themselves NGOs (Wheeler, 165). In the years following the UN Conference, the politi-

cal environment became increasingly hospitable to NGOs, and China saw significant increases in the number of ONGOs, GONGOs, and grassroots NGOs.

It is difficult to say exactly how many ONGOs are now operating in China due to the absence of clear regulations for the registration and management of ONGOs. By the late 2000s, the number of unregistered ONGOs – defined as “those that are not registered with the Ministry of Civil Affairs (MCA)” – had grown to substantial numbers. Official estimates of around 7,000 have been given but it is unclear how this figure was calculated. In 2005, Wang Ming, one of China’s best-known NGO scholars, provided an estimate of 3,000–6,000 ONGOs, including about 2000 foundations, 1000 implementing groups, 2500 chambers of commerce and 1000 faith-based organizations (Huang 2012, 4).

The Chinese Government’s NGO Policy Prior to the ONGO Law (1978–2015): Regulatory Ambiguity

Prior to the ONGO Law, the Chinese government avoided formulating a comprehensive set of policies and regulations towards ONGOs that would legitimize their presence. At the local level, Chinese authorities took an ambivalent attitude toward ONGOs, welcoming them but regarding them with suspicion. On one hand, the government saw them as valuable in providing development assistance in the form of money, manpower, technology and expertise to addressing China’s development challenges. On the other, the government was wary of ONGOs as potential competitors for international funding and because of the values they represented, particularly those engaged in the promotion of democracy and “Western values” (Hsia and White 2002, 336–337). Suspicions of ONGOs were heightened after the “color revolutions” that took place in 2004–05 in the former Soviet republics of Ukraine and Georgia. Chinese leaders and their advisors saw ONGOs, such as the National Endowment for Democracy, the International Republican Institute and the Open Society Institute, as playing a key role in bringing about regime change in these countries. In the aftermath of the “color revolutions”, Chinese authorities launched an investigation of both international and Chinese NGOs and commissioned studies of NGOs in China. The Ministry of Foreign Affairs was also said to have opened a Foreign NGO Management Office within their Bureau of International Organizations to review the work of ONGOs in China (Mooney 2006; Yongding 2005).

The Chinese government’s efforts to regulate ONGOs reflect its contradictory attitudes toward the regulation of NGOs, both domestic and overseas, during this period (Deng 2010; Simon 2013: Chs 10–11). When ONGOs first began to enter China in the late 1970s and 1980s, there were no laws or regulations governing the registration or management of social organizations² and ONGOs. It was not until the late 1980s that the Chinese government began to develop laws and regulations governing both domestic and overseas NGOs (Table 1).³

Table 1: Laws and regulations regulating NGOs in China.

Name of regulation	Year	Scope of regulation: domestic NGOs, ONGOs, or both
Measures for Management of Foundations	1988	Domestic NGOs. The first regulation for Foundations, which is one type of social organization
Provisional Regulation for the Administration of Foreign Chambers of Commerce	1989	ONGOs. The only stand alone regulation addressing ONGOs until the 2016 ONGO Law
Regulation for the Registration and Management of Social Groups	1998	Domestic NGOs. Regulations for Social Groups, a type of social organization similar to membership associations.
Regulation for the Registration and Management of Civil, Non-Enterprise Units	1998	Domestic NGOs. Regulations for Civil, Non-enterprise Units, a type of social organization similar to social service organizations
Provisional Regulation for Banning Illegal NGOs	2000	Both. Addresses illegal domestic NGOs and ONGOs
Regulation for Management of Foundations	2004	Both. A revision of the 1988 Measures for Management of Foundations, it is the first regulation to provide for registration of ONGO representative offices
Yunnan Provisional Regulation for Standardizing the Activities of ONGOs	2009	ONGOs. A local regulation that creates a filing document (<i>bei'an</i>) system for ONGOs in Yunnan province

Charity Law	2016	Domestic NGOs. A comprehensive national law creating charitable organization status for social organizations, and regulating charitable activities
Law on Administration of Activities of ONGOs in the Mainland of China	2016	ONGOs. Comprehensive law regulating registration and management of all ONGO activity in mainland China
Regulations for Registration and Management of Social Groups, Social Service Organizations and Foundations	2016	Domestic NGOs. Drafts of revised regulations are issued for all three types of social organizations, with the final versions expected in 2018

As Table 1 shows, regulations for ONGOs developed more slowly and sporadically than those for domestic NGOs. The first national-level regulations solely addressing ONGOs was the 1989 Provisional Regulations for the Administration of Foreign Chambers of Commerce in China (*waiguo shanghui guanli zanxing tiaoli*). It focused on a small subset of ONGOs in China whose mission is to promote trade and economic exchanges between their members and China. Because foreign chambers of commerce were seen as important in creating an environment for foreign firms to do business in China, they were given preferential treatment compared with other ONGOs (Zhu 2011, 124). Unlike other NGOs, foreign chambers of commerce did not need to find a “professional supervisory unit” (PSU, *yewu zhuguan danwei*, which is a government agency that works in that NGO’s field) to sponsor it before registering (Ma 2006, 173). Moreover, while the Foreign Chamber of Commerce regulations allow only one chamber of commerce per country to register, the reality is that some countries have multiple chambers of commerce which remain unregistered (Zhu 2011, 124).

Soon after the Foreign Chamber of Commerce regulation came out, the MCA stated that regulations for other categories of ONGOs would be forthcoming, but none were ever issued (Zhu 2011, 123). Instead, for reasons unknown, the MCA’s approach changed to including ONGOs in the regulations for domestic NGOs rather than creating stand-alone regulations for ONGOs. Thus the only other national regulation addressing ONGO registration and management was the 2004 Foundation Management Regulation, which was devoted mainly to the registration and management of Chinese foundations, but also included language allowing ONGOs engaged in public-interest activities to register a representative office in China. Under this regulation, like their Chinese counterparts, ONGOs had to find a professional supervisory unit (PSU) in their sector willing to take responsibility for supervising them before they could register with the MCA.

After the 2004 Foundation Regulation was issued, the MCA requested that ONGOs that had been registered as companies re-register under the Foundation Regulations. Yet only a few ONGOs were able to do so because of the difficulty of finding a PSU. By 2008, only 11 had managed to register under the 2004 regulations. By 2015, that number stood at 29. Generally speaking, the ONGOs that succeeded in registering had a clearly defined area of work, and good relations with a qualified government agency in its field of work that agreed to be its PSU. For example, the World Wildlife Fund had been working for years on environmental issues with the State Administration of Forestry which ended up being its PSU when it registered with the Ministry of Civil Affairs in 2007. Likewise, the Bill and Melinda Gates Foundation had been working on public health in cooperation with the Ministry of Health, which agreed to be its PSU. In contrast, NGOs such as the Ford Foundation, which has a much longer history in China than Gates, were unable to register because they worked in multiple thematic areas and their long-time partner, the Chinese Academy of Social Sciences was not a qualified PSU.⁴

The inability of the vast majority of ONGOs working in China to register through the 2004 Foundation Regulations meant there were hundreds, possibly thousands, of ONGOs working in a legal grey area. These ONGOs found other ways to maintain a presence in China. Some registered with the Industry and Commerce bureau as a representative office of a foreign enterprise while others remained unregistered but maintained an office and staff by attaching themselves to their local Chinese partners.⁵ The large majority, which did not have an office or staff in China and therefore did not have to worry about setting up a representative office, continued to participate in activities and projects from their offices outside of China (Huang 2012, 10).

Given the lack of clear regulations for ONGOs, local authorities were often unclear about the legal status of ONGOs and began asking the MCA for guidance whenever they encountered ONGOs. It was not until the late 1980s that the MCA developed internal guidelines for local authorities on how to deal with NGOs, both domestic and overseas, known as the Three Nos (“no recognition, no banning, no intervention”). Those guidelines basically reinforced the official ambivalence towards NGOs, stating that even though many NGOs lacked legal status in China, authorities should not recognize them, intervene in their affairs or ban them unless they threatened state security or social stability (Deng 2010, 190). Deng (2010) argues that these internal guidelines help to explain why so many ONGOs remained in China even after 2000 when MCA issued the Provisional Regulation for Banning Illegal NGOs. Under this Provisional Regulation, which was rarely enforced, the vast majority of ONGOs and many domestic NGOs in China were technically illegal, but generally tolerated by local authorities as long as they did not engage in illegal or sensitive activities.

Starting around 2008, as part of an effort to improve the regulation of NGOs, the MCA began engaging local governments to explore new regulatory models. As a province experiencing a large influx of ONGOs, the Yunnan provincial authorities took the lead in issuing a provisional regulation for ONGOs in December of 2009 that was seen by some observers as a possible model for national-level ONGO regulations (Teets 2014). This new regulation required ONGOs to file documentation for the record (*bei'an*) with the provincial Civil Affairs and Foreign Affairs departments. The *bei'an* system does not give ONGOs “legal person” status, but is seen as an intermediate step toward that end. As part of the documentation process, ONGOs were required to document every project they carried out in the province as well as their local partners. Interviews with ONGOs in Yunnan suggest they welcomed the opportunity to gain quasi-legal status, but encountered problems with implementation and found parts of the new regulation to be overly restrictive. For example, ONGOs that filed documentation had to work with local partners that were properly registered which meant that local grassroots groups that were unregistered or registered as businesses were no longer able to accept funding from ONGOs as a result of this new regulation.⁶ By 2013, around 40 foreign NGOs had filed documentation and MCA leaders were touting the Yunnan regulations as a model for national policy.⁷

As this section shows, the Chinese government’s policy towards ONGOs over the last 30 years has been largely to tolerate them without creating a clear set of laws or regulations governing their activities. By not issuing laws and regulations for ONGOs, the Chinese government avoided legitimizing these organizations and providing them a legal basis for their activities. As one NGO staffer who had also worked in MCA noted, this policy of having no policy was convenient for authorities because it allowed them to ban ONGOs if their work is seen as threatening to state security or social stability.⁸ Lacking legal status, ONGOs were more careful in their work, and kept a low profile, knowing that one wrong move could result in their expulsion from China. At the same time, Chinese leaders and government departments were divided over how best to craft legislation that would welcome certain categories of ONGOs while discouraging ONGOs working in more sensitive areas. Maintaining regulatory ambiguity thus allowed the MCA to avoid the delicate issue of issuing and enforcing concrete regulations for ONGOs, and possibly getting entangled in international incidents. If ONGOs were suspected of violating laws, or engaging in sensitive activities, the MCA could let the local police or security bureaus deal with them (Deng 2010, 193–94).

This regulatory regime underwent a sudden change when Xi Jinping became the Communist Party General Secretary in October 2013. In place of a sporadic, fragmentary and ambivalent approach to regulating ONGOs, the new leadership acted quickly starting in 2014 to draft a clear, comprehensive and more draconian law covering all ONGO activities in mainland China.

The End of Regulatory Ambiguity: Formulating the ONGO Law: April 2014–April 2016

Xi Jinping’s rise to power coincided with a new governance approach with several important elements: centralized policy formulation, and an emphasis on national security and “governing the country according to law” (*yifa zhiguo*). By the spring and summer of 2013, a major crackdown on activists, lawyers, bloggers, and journalists was taking place to head off potential threats to social stability.⁹ By the end of 2013, a National Security Commission (NSC) headed by Xi Jinping was established. In April 2014, the NSC held its first meeting and a month afterwards ordered a national survey of ONGOs operating in China. During the 2014–2016 period, a major anti-corruption drive launched by President Xi gathered momentum, along with continuing repression against NGOs, human rights and labor activists, and lawyers.¹⁰ Several foreigners who had been working for Chinese and overseas NGOs were evicted in 2015 for working with improper visas, and in January 2016 a Swedish citizen, Peter Dahlin, appeared on state-run television and “confessed” to working for 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 2017).

As Table 1 shows, these developments took place simultaneously with a “rule of law” campaign that culminated in 2016 with the passage of two major NGO laws, the Charity Law and ONGO Law, and revised drafts of the three major regulations governing the registration and management of social organizations. This same period saw the quick passage of several national security-related laws including a counterterrorism and national security law (Shieh 2016).

The first sign of the ONGO Law came in December 2014 with the announcement that the National People’s Congress (NPC) Standing Committee was deliberating the first draft of the law (Famularo 2015). That announcement caught many observers by surprise. The form that the ONGO Law took was very different from previous regulations such as the 2004 Foundation Regulations and the Yunnan ONGO regulations. First, this was a national law being proposed, not just a ministerial regulation. Second, the ONGO Law covered all “non-profit, non-governmental organizations” including trade and professional associations, and public inter-

est ONGOs. More ominously, the announcement was made by a Vice-Minister of Public Security, who stated that the registration and management authority for ONGOs would now be vested in the Ministry of Public Security (MPS), not the MCA which was the regulatory authority for NGOs. He noted that the regulation of ONGOs had been raised as an urgent issue at the Third Plenum in October 2013 and the Fourth Plenum in October 2014, and that the MPS had been working with the MCA and other departments as early as April 2014 on researching and drafting the law. The mention of April is significant because it coincides with the first meeting of the National Security Commission and suggests that the decision to make the MPS responsible for regulating ONGOs was made at that meeting.

The first draft of the ONGO Law was not made public, but an English translation quickly circulated. The draft's draconian language reflected the Law's national security emphasis. It gave ONGOs only two ways to operate legally in China. One was for the NGO to register a representative office, which required getting approval from a PSU working in the same field as the NGO, and then applying for registration with provincial Public Security departments. For NGOs that did not want to establish a representative office but only wanted to carry out projects and activities in China, the second option was to register for a "temporary activities" permit lasting one year. Applying for a permit would require getting approval from a PSU, and collaborating with a Chinese partner to apply for a permit from the relevant Public Security department. The draft law stated that ONGOs working outside these two channels would be operating illegally.

Getting the ONGO Law draft through the legislative process was an uphill climb, a reflection perhaps of the MPS's unfamiliarity with regulating such a diverse set of organizations, pushback from ONGOs, governments and businesses and the need to coordinate with the MCA and other agencies (Shieh 2017b). As is the norm, the law went through three drafts before passage. The second draft, issued in early May 2015, was the only one publicized to solicit comments from the public. After that draft appeared, it took nearly a year before a final version was approved by the NPC Standing Committee in April 2016.

The revisions made in the final version of the ONGO Law reflect the drafters' recognition that certain provisions would prove administratively burdensome. The most significant example was the simplification of procedures for NGOs carrying out "temporary activities." In the first and second drafts, NGOs were required to get approval from a PSU, and find a Chinese partner to collaborate with. After that, it still needed to apply for a "temporary activities" permit from the relevant Public Security department and wait for approval. After receiving public comments from NGOs, academics, universities, and foreign governments and businesses about the draft, the MPS dropped the requirements for PSU approval, and Public Security approval for a permit, in the final version of the law, and only required that NGOs work with their Chinese partner to "file documents" (*bei'an*) about their "temporary activity."

In other instances, the MPS realized that certain procedures and requirements either overlapped with or conflicted with procedures and requirements in other laws and regulations. The first draft, for example, prohibited ONGOs from having branch offices – in addition to their main representative offices – but when it was discovered that some science and technology ONGOs already had branch offices, the final version of the law allowed for branch offices "specified by the State Council." Similarly, the first draft only allowed ONGOs to register one representative office in China, but later drafts removed that limit and allowed them to register multiple offices. The final draft also included language that "overseas schools, hospitals, natural sciences and engineering technology research institutes, or academic organizations" engaged in exchanges with their Chinese counterparts were already doing so "in accordance with relevant regulations of the State" and therefore would be exempted from the Law.

The way the ONGO Law evolved makes it clear that Xi Jinping's rise to power and his concerns about China's security environment were the major drivers behind the law's establishment and timing.¹¹ In recent years, Chinese leaders, learning from Russia, Egypt, and other countries, have paid close attention to accusations of foreign NGO involvement in the "color revolutions" in the former Soviet Union and in the Arab Spring uprisings, and are worried about ONGOs funding social forces in China that could metastasize into an organized opposition (Famularo 2015).

At the same time, the many months spent on the drafting and revisions suggests the law is being taken seriously by Chinese leaders as a governance tool to strengthen "law-based administration" (*yifa xingzheng*), while recognizing the role played by ONGOs in China's development, and strengthening their regulation. In this sense, the Law can be seen as part of Xi Jinping's broader "governing the country according to law" (*yifa zhiguo*) campaign to improve Party discipline and governance over the Chinese state and society. By strengthening regulation of a group of social actors associated with foreign values and agendas, the law provides legal channels for those actors to carry out their activities while also strengthening the authorities' ability to collect information on these actors and better protect China from perceived external threats to its sovereignty and social stability. One other intent of the law may be to require more transparency and accountability on the part of the implementing authorities, and the MPS in particular. By providing a detailed framework, procedures, and

responsibilities for regulating ONGOs, one could argue that the law seeks to limit the discretionary power of the MPS even while it expands its administrative authority and resources (Shieh 2017b).

The Implementation of the ONGO Law (April 2016–August 2017)

From the time the ONGO Law was promulgated in April 2016 to the time it went into effect on January 1, 2017, the implementation process has been focused on the following areas: 1) providing documents such as “Guidelines on the Registration of Overseas NGOs’ Representative Offices and Filing for Temporary Activities,” and “List of Fields of Activity, Categories of Projects and PSUs for Overseas NGOs Carrying Out Activities in Mainland China” promised by the MPS; 2) meeting with foreign embassies and NGOs to answer their questions about the Law; 3) setting up the provincial NGO offices and the online platforms; and 4) taking care of the easier task of getting NGOs that were already registered with MCA and Industry and Commerce transferred to the MPS system.

Implementation of the law in each of these areas started slowly and documents did not become available to ONGOs until only about a month before the law went into effect. The “Guidelines” were not issued until November 28 and the “List of Fields of Activity” and online platforms for filing documents were not made available until late December. By January 2017, only PSBs in selected provinces such as Beijing, Shanghai and Guangdong appeared to have their ONGO service counters and staff up and running (Jia 2017a). The lack of preparation reflects the suddenness with which the ONGO Law came about, and the reality of the implementing authority being the MPS, an agency with almost no experience and capacity in dealing with ONGOs and their operations and programs.

In January, the MPS announced that a group of 33 NGOs had successfully registered a representative office. Most of these had been registered with MCA under the 2004 Foundation Regulations or were trade/commercial associations registered with Industry and Commerce. There was a lull over the next few months until April when another group of 30 NGOs were registered. For NGOs seeking to register representative offices, the main difficulty appeared less to be the registration authority (e. g. Public Security) and more about finding a PSU willing to sponsor them.¹²

ONGOs filing documentation for “temporary activities” proceeded even more slowly than the registration of representative offices. It was not until March that the first “temporary activities” were filed.

In the second half of 2017, as other provincial PSBs began to get their ONGO services and staff up and running, the pace of registering representative offices and filing “temporary activities” picked up. By the end of 2017, 259 ONGOs had registered a total of 305 representative offices (an NGO can establish more than one representative office) in 26 of China’s provinces. The large majority of these ONGOs came from North America, Hong Kong, Macau and Taiwan, Northeast Asia and Europe in that order. Their fields of work were concentrated in economy and trade (about 50 percent), followed by poverty alleviation and disaster relief, health, education, environmental protection and culture.¹³ During this same period, a total of 230 ONGOs had completed 487 filings for temporary activities. The large majority of these ONGOs were from Hong Kong and Macau, followed by the U.S., and Germany. In contrast to ONGO representative offices, only a small number of “temporary activity” filings were in the economic/trade field; most were in the fields of education, poverty alleviation, disaster relief and assistance to people with disabilities, social work, and health.

The progress made during the second half of 2017 suggests that the MPS authorities were able to overcome earlier challenges and doubts about getting PSUs to sponsor foreign NGOs. NGOs such as the Nature Conservancy, Ford Foundation, Asia Foundation, Give2Asia, Environmental Defense Fund, Heinrich Boll Foundation, and Oxfam Hong Kong, had been unable to register before under the 2004 Foundation Management Regulations in large part because they were unable to find a willing PSU. All these NGOs were able to find a willing PSU and successfully register. In some of the more challenging cases in which the NGO worked in multiple issue sectors, the MPS was able to bring in new PSUs that had not been on the original PSU directory to sponsor these NGOs.¹⁴ The most notable of these is the Chinese People’s Association for Friendship with Foreign Countries (CPAFFC) which serves as the PSU for the Ford, Asia, Heinrich Boll, Konrad Adenauer and Rosa Luxemburg foundations, and Give2Asia.¹⁵

While the implementation of the ONGO Law has proceeded fairly smoothly despite the slow start, a number of questions remain unresolved at this early stage. One is the degree of discretion that the MPS will give to the provincial PSBs in the implementation process. The MPS stated there would be no grace period for NGOs, yet there are still many NGOs that have not registered representative offices or filed temporary activities. At this point, the MPS appears to be taking a flexible position towards ONGOs that have not yet complied with the law (Jia 2017b). They may be taking this stance because they recognize ONGOs still face many challenges in complying with such a comprehensive, onerous law. Many ONGOs wishing to register a representative office are

still searching for an appropriate and willing PSU. Others seeking to file “temporary activities” are still working on the paperwork with their Chinese partners. The question is how long the MPS will tolerate this situation, and if they will give provincial PSBs discretion to handle these cases or seek to impose a unified approach to implementation across all provinces. If the MPS cannot persuade qualified PSUs to sponsor ONGOs, as MPS authorities themselves have stated on more than one occasion, then ONGOs will have strong justification for not being able to comply with the law.¹⁶

A related question is whether implementing regulations will be issued to clarify ambiguities in the ONGO Law. The MPS has stated there will be no implementing regulations which raises the question of how the numerous ambiguities in the ONGO Law will be resolved.¹⁷ If we see the Law as a tool to constrain the power of the MPS, then the absence of implementing regulations will give Public Security authorities more discretion in the implementation process. But it may also work the other way by giving ONGOs more flexibility in interpreting the law. What for example counts as a “temporary activity”? Looking at the filings made so far, and speaking with ONGOs that have gone through the process, provincial PSBs have been willing to accept a wide variety of “temporary activities” ranging from one-day meetings to projects lasting for a year.¹⁸ There are also questions raised by the “carve out” in Article 53 of the ONGO Law. That article states that “overseas schools, hospitals, natural science and engineering technology research institutes or academic organization” that engage in “exchanges and cooperation” with schools, hospitals, natural science and engineering technology research institutes, or academic organizations in the mainland of China” should do so in accordance with other relevant regulations, and therefore do not need to comply with the ONGO Law. But the wording of this article leaves much unclear. Do these types of organizations need to comply with the law if they engage in exchanges or cooperation with other types of organizations in mainland China such as social organizations or companies?

There is also the fundamental issue of what kinds of organizations should be covered by the ONGO Law, and who should make that determination (Jia 2017b). As Article 2 of the ONGO Law states, “Overseas NGOs...[refer to] foundations, social groups, think tanks and other non-profit, nongovernmental social organizations legally established overseas.” The use of the term “social organization” here confuses matters because it is a uniquely Chinese term with no legal equivalent in other countries. For example, in Hong Kong, many nonprofit, NGO-type organizations are registered as for-profit companies limited by guaranty. Some of these NGOs have charitable status, in which case their nonprofit nature may be clearer. But what about those NGOs that do not have charitable status? Legally speaking they are registered as companies, even though they act as nonprofits. The case is even more difficult for social enterprises which are for-profit businesses that have a social mission. Do they need to comply with the ONGO Law, and should Chinese authorities be making that determination? In the case of Hong Kong companies, the Chinese authorities would run the risk of making decisions grounded not in law, but in politics.

The ONGO Law and the Future of NGOs in China

In the past, authorities allowed ONGOs to work in China if their work was beneficial. In other words if their contribution was viewed by Chinese authorities as legitimate in a substantive way, even if procedurally the ONGO was not registered or operating according to the relevant regulations, then the authorities would permit the work of the ONGO. Up until 2016, this was the rule of thumb: substantive legitimacy trumped procedural legitimacy and as a result very few ONGOs were told to pull out of China. One could argue that the rapid growth in China’s economy and global influence over the last decade began to change this status quo by lowering the substantive legitimacy of ONGOs. ONGO funding and technical assistance is still needed in China, but not to the same degree as 10–15 years ago.¹⁹ But without a clear regulatory framework, procedural legitimacy was still in question. The passage of the ONGO Law represents a more sudden change in the status quo by reversing the relationship between substantive and procedural legitimacy. The detailed and comprehensive nature of the Law, the transfer of registration authority from MCA to the MPS, and the growing repression of certain elements of Chinese civil society, send a clear signal to ONGOs that procedural legitimacy is now as important or more so than substantive legitimacy. In other words, the legitimacy of NGOs in China will be measured as much by whether they follow formal procedures as by the kind of work they do. What this means for the future of NGOs in China is that the state at the national and local levels will no longer be an observer of, or collaborator with, ONGOs. Instead they will use the regulatory framework to proactively shape the work of ONGOs in China. We can already see evidence of this in reports that ONGOs have had to provide funding to projects that fall in line with government priorities such as One Belt, One Road in order to secure PSU approval.²⁰ At the same time, the regulatory framework should not be seen as a one-way street. ONGOs can and should use their new-found legitimacy and access to the government to shape implementation of the Overseas NGO Law

and other laws, in order to strengthen their own legitimacy and the legitimacy of their issues and the partners in China.²¹

Notes

- 1 For a comprehensive discussion of the many different types of organizations that populate the civil society sector in China, see Yu (2011), “Civil Society in China,” Wang (2011) and Shieh (2017a).
- 2 “Social organizations” (*shehui zuzhi*) is the official Chinese term for domestic NGOs or nonprofits. It encompasses three different categories: social groups (e. g. membership associations); private non-enterprise units (e. g. social service organizations) and foundations. In this article, the terms “social organizations” and “domestic NGOs” are used interchangeably.
- 3 For an authoritative discussion of the development of the legal and regulatory environment for NGOs, see Zhu (2011).
- 4 Interviews with staff at the World Wildlife Foundation, Ford Foundation, Asia Foundation and Bill and Melinda Gates Foundation in Beijing, March 2012.
- 5 Interview with ONGO staff in Beijing, March 2012.
- 6 Teets (2014). Interviews with ONGO staff in Beijing. June 22, 2011.
- 7 A list of overseas NGO representative offices in Yunnan that have filed documentation or canceled their filing [yi bei’an, zhuxiao jingwai feizhengfu zuzhi zai dian daibiao jigou mingdan] http://xxgk.yn.gov.cn/Z_M_004/Info_Detail.aspx?DocumentKeyID=4ACCBF10EBA74A5780C1B0039B1FAA13
- 8 Interview in Beijing, March 20, 2012.
- 9 Congressional-Executive Commission on China 2014 Annual Report, http://www.cecc.gov/sites/chinacommission.house.gov/files/documents/AR14CivilSociety_final.pdf
- 10 Congressional-Executive Commission on China 2016 Annual Report, https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/AR16CivilSociety_final.pdf
- 11 Interview with the director of a Chinese NGO that assists ONGOs to work in China and has close ties with the government, April 25, 2016, Beijing.
- 12 ONGO roundtable discussion in Hong Kong, May 10, 2017. Also see (Liu 2016).
- 13 <http://chinadevelopmentbrief.cn/articles/statistics-on-ongo-registrations-and-temporary-activities-for-2017/>
- 14 <http://www.chinafile.com/ngo/analysis/four-more-previously-unlisted-entities-become-psus>
- 15 The CPAFFC was founded in 1954 as a national GONGO specializing in foreign affairs. Over the years, it has cooperated with numerous NGOs, and participated in civil society activities, to promote China’s relationship with the world. Since its establishment, CPAFFC has collaborated with over 500 NGOs from over 150 countries.
- 16 According to one NGO researcher who had interviewed ONGOs in Beijing and Shanghai in September 2017, the word going around was that the MPS would take a harder line in enforcing the law in 2018. Interview in Hong Kong, September 29, 2017.
- 17 The Ford Foundation country representative emphasized the importance of having implementing regulations to clarify how implementation of the law will be carried out from the national to the local level. See her interview in “Our Registration Story: The Ford Foundation,” *China Development Brief*, August 21, 2017. Accessed March 11, 2018. <http://www.chinadevelopmentbrief.cn/articles/our-registration-story-the-ford-foundation/>
- 18 Roundtable ONGO discussion in Hong Kong, September 30, 2017.
- 19 Interview with ONGO staff in Beijing, March 2012.
- 20 Interviews with ONGOs in Hong Kong, September 29, 2017, and Beijing, January 21–22, 2018.
- 21 The proactive attitude of ONGOs is reflected in various interviews about their registration experience in which they discuss their submissions to a draft of the ONGO Law when it was issued for public comment back in May 2015, and how they are currently providing suggestions to various government departments and experts on how implementation of the law can be improved. See “Our Registration Story: The Ford Foundation” and “Our Registration Story: The Asia Foundation,” *China Development Brief*, October 24, 2017. Accessed March 12, 2018. <http://www.chinadevelopmentbrief.cn/articles/our-registration-story-the-asia-foundation/>

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