

SPECIAL ISSUE

CHINA: WAGING "LAWFARE" ON NGOS

ABOUT

The Chinese have long been obsessed with strategic culture, power balances and geopolitical shifts. Academic institutions, think-tanks, journals and web-based debates are growing in number and quality, giving China's foreign policy breadth and depth.

China Analysis, which is published in both French and English, introduces European audiences to these debates inside China's expert and think-tank world and helps the European policy community understand how China's leadership thinks about domestic and foreign policy issues. While freedom of expression and information remain restricted in China's media, these published sources and debates provide an important way of understanding emerging trends within China.

Each issue of *China Analysis* focuses on a specific theme and draws mainly on Chinese mainland sources. However, it also monitors content in Chinese-language publications from Hong Kong and Taiwan, which occasionally include news and analysis that is not published in the mainland and reflects the diversity of Chinese thinking.

The French version of *China Analysis* can be accessed online at www.centreasia.eu.

Introduction

by Mathieu Duchatel

China's government agencies and domestic institutions are in the process of fine-tuning the country's first law on NGOs, the "Law on the Administration of Overseas Non-Governmental Organisations". Since the so-called Arab Spring and the emergence of the conflict in Ukraine, Beijing has been persuaded that the West is pursuing a strategy of "regime change" that will ultimately target the Chinese Communist Party. Although the NGO law is apparently a domestic matter of "the rule of law", the new legislation cuts to the very heart of China's relations with the West in general and Europe in particular – even if its deep distrust of the United States is without doubt China's main concern.

The perceived ideological hostility of the West underpins the NGO law, as it does several other decisions taken by Xi Jinping since the 18th Party Congress; the National Security Law adopted this summer is a case in point. Under its current provisions, the NGO Law will allow the Ministry of Public Security (MPS) to prohibit foreign NGOs from operating on Chinese soil if these organisations endanger China's national security. All foreign NGOs will have to find a government sponsor, and every year, NGOs will have to obtain authorisation from the MPS by submitting a work plan and a full budget in advance. In response, some NGOs might leave China as a matter of principle, and others may simply be unable to continue operating. But a large group will abide by the changes, and as they do, their

day-to-day operations will become constrained, not least by the new bureaucratic obligations that the law imposes.

The NGO law undeniably fills a legal vacuum that has made operating in China uncertain and unclear - which means that in some ways this law is, in principle, a welcome development. The main technical discussion in this special issue of *China Analysis* revolves around the question of how a foreign NGO should be defined, and what qualifies as one. But the government's real priority is clearly not to help NGOs by creating an environment that makes it easier for them to fulfil their objectives. And the usual argument made by law-enforcement agencies worldwide when expanding their powers – “he who walks straight has nothing to fear” – is a problematic assertion, given that the MPS may lack the expertise to judge the nature of the work of NGOs, and that it already has the power to expel individuals who threaten Chinese national security.

Indeed, there is a bureaucratic dimension to the NGO law issue, which shows how China's bureaucratic politics affect the interests of European organisations operating in China. It is clear that the political intent of the law is primarily ideological, but implementation is another matter, and reflects bureaucratic manoeuvring within the upper echelons of China's power structures. Weakened by the Zhou Yongkang corruption case, and with no patron or representative within the Politburo Standing Committee, the Ministry of Public Security appears to be striking back.

The European Union and a number of European states have raised concerns about the law in Beijing through diplomatic channels. In the long term, the evolution of an illiberal China-Russia axis opposed to Western values is a worry for those who wish to foster Europe's global influence, and this concern raises many questions about how values should shape European foreign policy. Neither is it in Europe's interests to allow a growing misunderstanding with China on the nature of civil society. Unlike Russia when it enacted its own NGO law – which was evidently a source of inspiration for China – Chinese authorities are proceeding with caution; circulating public drafts is a way to gather opinions from abroad and to assess the international impact of China's final decision.

At the same time, there are nuances in China's position on how to administer foreign NGOs. Some of these organisations are valued for their contribution, especially in environmental affairs, as China faces up to a disastrous ecological crisis. Foreign NGOs have been involved in capacity building in many areas of China's development since the beginning of the reform era, and China seems to want to avoid hindering their operations. China may proceed either by allowing administrative exemptions or by loosening the enforcement of the law to maintain a degree of flexibility. Indeed, as in many situations in China, the law will set the framework, but implementation will reflect political priorities, and loopholes may well appear.

However, these nuances are not considered in our written sources – a sign of how constrained public debate is on this sensitive issue.

1. The implications of China's new Foreign NGO Law for foreign NGOs operating in China

Hugo Winckler

Sources:

Ma Jun, "Foreign NGOs are facing stronger control in China", *Ifeng (Hongkong)*, 18 March 2015.¹

Fu Yugang, "The legislative body is pushing to help the development of foreign NGOs in China", *China Times*, 29 July 2015.²

Wu Shan, "China will regulate for the first time on NGOs, creating worries within the sector", *Caijing*, 25 May 2015.³

Huang Qingchang, "Foreign NGOs operating in China are welcome", *Renmin Ribao – People's Daily*, 27 July 2015.⁴

The legal landscape in China is changing quickly, and its implications are hard to discern. It has sometimes been the case that administrative simplifications have served as a pretext for the Chinese government to place more stringent requirements or limitations on the operations of foreign entities. Many commentators fear that this is what is happening with the new draft of the "Law on the Administration of Overseas Non-Governmental Organisations" (境外非政府组织管理法, *jingwai feizhengfu zuzhi guanli fa*, hereafter the Draft), which has raised concerns within the NGO community in China and abroad.⁵ China's attitude towards NGOs has long been ambivalent, and it seems that the regime still sees NGOs both as a threat and as a potential opportunity.

The new Draft will have a significant impact on many aspects of NGO operations in China, and may require a large number of foreign NGOs to fundamentally change their public affairs strategy. This paper will examine the political intent behind the Draft and explore its content in order to draw some conclusions on the legal environment that may result after the Draft is implemented.

NGOs as legal entities in China

Wu Shan reports that according to official statistics, there are around 1,000 foreign NGOs carrying out long-term projects in China, with 4,000 to 6,000 involved in short-

term activities. To carry out these projects, NGOs rely on foreign cash flows. The rapid growth of the NGO sector has raised concerns within political circles in China, since they represent a new and largely unregulated political force that is involved in civil society and the economy. Wu Shan says that the decision to increase regulation on foreign NGOs was laid out in the "Decisions of the Plenum on important matters regarding the improvement of the rule of law" (中共中央关于全面推进依法治国若干重大问题的决定, *zhonggong zhongyang guanyu quanmian tuijin yifazhiguo ruogan zhongda wenti de jue ding*), which summarised the outcome of the fourth plenum of the 18th Congress in 2014. But the new Draft represents an additional effort to regulate the sector, as well as to check any potentially destabilising activities by NGO actors.

The new Draft will have a sizeable impact on freedom of activity for NGOs in China – but the paradox is that it will do this by providing NGOs with a legal status. Wu Shan notes that this piece of legislation will be the first act specifically designed to regulate the administration of foreign NGOs in China. Until now, the legal regime of foreign NGOs was drawn from the 2004 "Regulations on foundations management" (基金会管理条例, *jijinhui guanli tiaoli*), the 1989 "Foreign chamber of commerce administration provisional rules" (外国商会管理暂行规定, *wai guo shanghui guanli zanxing guiding*), and a wide range of more general legal provisions.

Ma Jun says that in the current legal landscape, and in the absence of a formal legal status crafted especially for NGOs, many have registered as companies (公司, *gongsī*). However, NGOs have regularly been forced to close down after state investigations, because they had no real business activities. Other NGOs have operated within Chinese territory without any kind of formal legal existence, which has made aspects of their work – such as obtaining visas or opening bank accounts – quite complex.

So, on the bright side, the proposed Draft will provide foreign NGOs with a legal existence; they will no longer be in a legal grey area. According to Ma Jun, this will make it easier for NGOs to take part in official activities such as poverty alleviation programmes and will give them more rights under the law.⁶ As Huang Qingchang reports, during a joint press conference held by the Public Security Bureau and the Ministry of Civil Affairs on 25 July 2015, the Chinese authorities praised foreign NGOs for their help in developing China, providing education, and modernising the private sector. By doing so, the Public Security Bureau was trying to show that its intent was to welcome foreign NGOs into the Chinese political and legal system.

1 Ma Jun is a journalist for *Ifeng*.

2 Fu Yugang is executive director of the Shanghai Financial and Legal Research Institute.

3 Wu Shan is a journalist for *Caijing*.

4 Huang Qingchang is a journalist for *Renmin Ribao*.

5 For a free translation of the document, see "Foreign NGO Management Law (Second Reading Draft) Full Text", *China Law Translate*, 5 May 2015, available at <http://chinalawtranslate.com/foreign-ngo-draft-2/?lang=en>.

6 Currently, many NGOs in China have no formal existence because of their lack of registration. As such, they cannot act as a legal entity in China – since, from a legal perspective, they do not exist.

Reform motivated by security concerns

Nonetheless, the Draft has very real and negative consequences for NGOs. It stresses the importance of the “administration” (管理, *guanli*) of NGOs by the Public Security Bureau – which we should understand as meaning strong political control. Huang Qingchang quotes a participant in the 25 July joint press conference, who had another clear political message: “he who walks straight has nothing to fear” (走得正就不怕, *zou de zheng, jiu bu pa*).

Wu Shan cites Jia Xijin, vice-president of the Tsinghua University research centre on NGOs, who says that the new legislation demonstrates a change in perspective that was also evident in April 2015’s second version of the Draft of the “National Security Act” (国家安全法, *guojia anquan fa*). This act said that “resisting unhealthy cultural infiltration” (抵御不良文化渗透, *diyū buliāng wēnhuā shèntōu*) should be a national security priority.

Jia Xinjin says the Draft’s stated objective is to reinforce Chinese national security, which means combatting international threats but also shoring up political stability. Jia thinks the new Draft will enable the Public Security Bureau, by means of its investigative powers, to intervene in or at least to closely supervise the management of many social and economic activities in China. The Public Security Bureau will be allowed to access all information on individual NGOs’ activities, which means that all civil society or private initiatives involving NGOs will be easily investigated. All NGO activities will require prior approval from the Public Security Bureau, which will authorise these activities only if they fall in line with its mission: to promote and maintain the current political order. Jia Xinjin states that this objective has little to do with the wide range of NGO activities and concerns.

Ma Jun says the Draft is therefore mostly dominated by concerns about “maintaining stability” (维稳, *weiwēn*). It could have a profound impact in China, since foreign NGOs are deeply integrated into China’s economy and society at all levels, for example through cultural exchanges, scholarships, poverty alleviation programmes, and education. But the administration has become increasingly concerned that NGO activities may pose a risk to China’s stability.

The main features of the foreign NGO Act

Fu Yugang says that to carry out activities within Chinese borders, foreign NGOs will, under the new Draft, either have to register a permanent representative office in the country (Article 6) or apply for a temporary activity permit (Article 18). In other words, all foreign NGOs will need prior approval from

the government in order to be active within Chinese borders. Moreover, Article 11 of the Draft says that NGOs who apply for a representative office in China must obtain the sponsorship of a Professional Supervisory Unit (业务主管单位, *yewu zhuguan danwei*): that is to say, a domestic administrative entity or a state-related entity with which the NGO will be working.⁷ Fu Yugang suggests that this may be a serious obstacle for some NGOs because it may be hard for some to find a professional supervisory unit that will agree to sponsor their application, since this would mean assuming some level of political or legal liability for these foreign NGOs in Chinese territory.

Article 15 of the Draft presents yet another limitation: it restricts the duration of the approval to five years. After that, the whole application process must be conducted again. As a result, NGOs will always have to face the threat that their right to operate within Chinese territory will not be renewed.

Wu Shan says that NGO registration and administrative follow-up will be carried out at the provincial level rather than the county or municipal levels. As a result, grassroots administrations that might welcome the help of a foreign NGO within their territory will be powerless; they will need to obtain support at the provincial level. Furthermore, there will be two levels of administrative supervision – by the provincial Public Security Bureau and by the civil affairs administration (which was originally in charge of most civil society activities). This will create two parallel layers of standards with which NGOs must comply, which will make administrative proceedings even more complex than they already are.

Fu Yugang points out that the registration process is made more complicated by the lack of clearly defined legal concepts. He says that it is not clear which entities or activities fall within the scope of the new Draft. For example, what actually constitutes “activities” (活动, *huodong*) is not clearly defined. However, as soon as an “activity” is carried out, a permit is required. The meaning of the term “foreign NGO” is also poorly defined. All the Draft says is that the entity should be “not-for-profit” (非营利, *fei yingli*) and “non-governmental” (非政府, *fei zhengfu*). Fu says that these legal deficiencies are bound to create uncertainty and misunderstanding. This will serve to grant more power to the Public Security Bureau. The Bureau, he says, will benefit from the lack of clarity, since the new legal framework will be based on a prior authorisation regime rather than a liability regime. This, in turn, will put greater pressure on NGOs, which will ultimately bear the consequences of failing to comply with the law.⁸

⁷ It is not clear which entities will be entitled to act in the capacity of a professional supervisory unit, and it is possible that, for example, smaller universities or research centres may not be given authorisation to act as professional supervisory units. This might create disparities in access to NGO or non-profit work, because these universities would not, for example, be able to sponsor the activities of a foreign research institute in China.

⁸ In legal theory, there are two ways of regulating activities: a liability regime and a prior authorisation regime. In a liability regime, civil entities can act freely but will be held accountable for misconduct (that is, the administration can only react). In a

Fu says that another problem is the meaning of the word “foreign”. In a globalised economy, it has become more and more difficult to distinguish between a foreign NGO and a domestic NGO. For instance, it is clear that a branch of a large foreign-based NGO is “foreign”, but it becomes more complicated when the entity in question is a smaller NGO that is funded by foreign capital but mostly or exclusively present in China. This is important because the law concerns only “foreign NGOs” (境外非政府组织, *waijing feizhengfu zhuzhi*), and because the legal provisions that apply are different for domestic and foreign NGOs.⁹

Fu Yungang also points out that the notion of “within Chinese territory” (境内, *jingnei*) is not clear in the era of the internet; many NGOs can act in China from abroad through a website, among other means. This raises the question: what constitutes NGO activities *within China* and what does not?¹⁰

Wu Shan says that these ambiguities may have a wider impact than expected, because a temporary activity permit will be needed for short-term activities. This raises the question of whether a Western professor doing field research in China on a grant from a foreign foundation or university could be considered to be conducting NGO activities in China? What about a staff member of a foreign NGO that has no ongoing activity in China (say a college, a hospital, or a life science research institute) but is attending a meeting there? Under the new Draft, both could be read as being NGO-related activities in China.

The new Draft will also considerably strengthen the scope for state supervision of foreign NGOs. First, Article 24 of the Draft requires that “representative offices of foreign NGOs shall send an activity plan for the following year – including project implementation, use of funds, and other such content – to the professional supervisory unit for their consent before 30 November of each year”. Secondly, the Draft provides the Public Security Bureaus with stronger investigative powers (in Article 49). These new powers include the right to enter foreign NGO offices, to conduct on-site investigations, to question individuals, to review documents, and to seize venues and facilities. Thirdly, under Article 28, foreign NGOs will be required to use their funds only within the extent of their registered scope of business or partnership agreements. And finally, the Public Security Bureau will have to approve their proposed allocation of funds.

The Draft therefore changes the management model of foreign NGOs by enhancing the role of China’s Public

prior authorisation regime, administrative permission is required before any action (that is, civil entities can only react).

9 The major difference is that domestic NGOs are prohibited from receiving funds from abroad, as well as the recent proposition that all domestic NGOs should establish a political bureau responsible for assessing the compliance of the NGO with Party regulations.

10 This notion is particularly interesting in light of the Chinese concept of Internet sovereignty and the current Great Firewall policy.

Security Bureaus over that of the civil affairs administration. This change is significant not least for its symbolic impact. The Public Security Bureaus are usually in charge of maintaining political stability and avoiding social disorder. Some commentators note that Document 9, which laid out the Chinese Communist Party’s view that civil society and Western concepts are still an important threat to the political apparatus in China, was not written all that long ago.¹¹

The new Draft will considerably strengthen the scope for state supervision of foreign NGOs

Moreover, a foreigner must not represent more than one foreign NGO within Chinese borders. These restrictions may have a significant impact, for example, on any NGO that is mostly staffed by foreigners, such as national chambers of commerce, college alumni associations, and so on. All of these changes will have an effect on foreign NGOs, which now have to assess how to adjust their legal strategy in China.

Conclusion: what should foreign NGOs do?

The new legal environment does not prohibit foreign activities in China, and may even facilitate them, to a certain extent, by giving NGOs legal status. Nonetheless, NGOs will have to play by the rules of the Public Security Bureaus and will have to follow guidelines on permits and on acceptable physical and online activities, all of which will have to comply with Chinese regulations.

As a consequence of this Draft, foreign NGOs will have to adapt to its three most important aspects. First, they must carefully review which Chinese NGOs they are currently financing, and how they can maintain cash flows to them in such a way as to comply with the new regulations. Secondly, they must prepare for the new application process and determine which activity permits they need. Thirdly, they will have to set out compliance practices and guidelines to monitor their exposure to the new regulations. Finally, the need for prior approval for all activities, with a stated budget and a detailed plan of action, will force NGOs to clarify their intentions and to plan and draft their goals for operating in China.

11 Document 9 is a memo drafted by senior leaders to Party members about the threat of Western democratic ideals to Communist ideology. For more information on Document n°9, see Stanley Lubman, “Document N°9: The Party Attacks Western Democratic Ideals”, *China Real Time*, 27 August 2013, available at <http://blogs.wsj.com/chinarealtime/2013/08/27/document-no-9-the-party-attacks-western-democratic-ideals/>.

12 Stanley Lubman, “China asserts more control over foreign and domestic NGOs”, *China Real Time*, 16 June 2015, available at <http://blogs.wsj.com/chinarealtime/2015/06/16/china-asserts-more-control-over-foreign-and-domestic-ngos/>.

NGOs must adjust to the new reality: this new Draft will provide the Chinese administration with strong tools to deter NGOs from taking any action that could be considered as at odds with the core interests of the Chinese Communist Party.

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