

“Creating an Enabling Legal Environment For Chinese NPOs”

Oral Testimony

by

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An “enabling legal environment” for the non-government, not-for-profit (NPO) sector – also known as civil society – in any country consists of the following:

- Supportive “legal framework” legislation – the legislation relating to the establishment, governance, and oversight of NPOs;
- Supportive legislation regulating NPO-state relations, allowing partnerships between state entities and NPOs to be established (both with respect to service provision and policy development);
- Supportive tax legislation, permitting various forms of tax relief for NPOs and their donors, thus creating an environment in which NPOs and the business sector can work together for the good of society; and
- Other necessary legislation affecting NPOs and their operations (e.g., fund raising legislation).

Most developing and transition countries have struggled with the issues involved in creating such an enabling legal environment, in large part because they are fearful of the consequences of creating a truly independent NPO sector, with economic resources as well as access to the people by virtue of meeting important social needs (in other words, possible political access coupled with economic resources). Thus, China has not been alone in dealing with NPOs out of suspicion and fear.

Yet the Chinese government has been very clever in seeking step-by-step to create a more open and supportive legal environment for NPOs. Since the late 1980’s the government has had in place policies to encourage certain types of NPOs to come into being. Although these organizations have at times been affiliated with the Chinese Communist Party (CPC) structures, such as the All China Youth Federation and the All China Women’s Federation, many of them have also been independent of the CPC, if not the state. In fact, in the 1980’s the government made a clear decision to encourage certain semi-independent organizations to come into being, by adopting regulations that permit both associations (social organizations) and foundations to be formed, albeit with rather stringent government control and oversight.

The types of organizations that were created in those years (top-down, rather than bottom-up) include the various foundations for the poor and for struggling communities (such as a Foundation for Underdeveloped Regions, the China Charity Federation, the China Youth Development Foundation) as well as such organizations as the Amity Foundation, a Chinese Christian organizations that supports rural development, one of the few organizations that can claim a sort of independence from the state. These various foundations and federations were perceived from the outset as a means to attract donations from

overseas as well as PRC-based Chinese to help the state implement programs it perceived to be necessary; for example, to raise funds to help victims of the Yangtze floods (China Charity Federation) or to develop resources to support school children in poor communities (Project Hope of the China Youth Development Foundation). While not true NPOs or civil society organizations because of their linkage to the state and their top-down creation, many staff members who work for these entities nonetheless have become powerful spokespersons for the creation of more independent entities, which might grow away from state control.

Most recently the government has begun to experiment with regulations that permit more autonomy for NPOs. While the 1998 regulations on associations (social organizations) and non-state, non-commercial institutions have continued the dual oversight structure present in the 1980's regulations, they at the same time show that the government and the CPC are beginning to be aware of the need to free such organizations from overly stringent types of controls. The 1998 association regulations permit, for example, 50 citizens to come together to form an association – something that was never allowed in the past, when top-down creation of organizations was the norm. In addition, more has been made about “self-management” by NPOs, something that received little emphasis in the past. And, perhaps most significant in terms of the evolution in government/CPC thinking, recent discussions of possible new foundation regulations suggest that the state and the CPC are moving in the direction of freeing such entities from invasive government oversight by recognizing more Western forms of fiduciary responsibility.

A further sign that the government has an interest in a more enabling legal framework for NPOs can be seen in the adoption of laws that allow better tax incentives for charitable giving. This goes hand-in-hand with the awareness that China's increasing private wealth (made possible under Deng Xiaoping Theory) should be better harnessed to contribute to social and economic development. At present, the Donations Law and the Income Tax Law permit deductions of up to 30% of net income for individual entrepreneurs and up to 3% for corporate donors – both domestic and China-based foreign donors. More recently, members of the 10th National Committee of the Chinese People's Political Consultative Congress (CPPCC), were quoted in *China Daily* as being in favor of more broadly based incentives for charitable giving. In addition, the government is aware that it must create more a more appropriate tax exemption regime for NPOs.

There is also more openness to input from other countries about the way in which the legal system can be more enabling for NPOs; this is true despite the “Falun Gong setback” in 1999.¹¹ In 2003-2004 the government will have organized or participated in four conferences or workshops to discuss various aspects of NPO regulation and governance (two in fall 2003 and two in spring 2004), and the International Society for Third Sector Research (ISTR) plans to hold its Asia Region meeting in Beijing in October 2004. After publicly opening up to foreign technical assistance in this area in 1999 at Asia Foundation and Ford Foundation/UNDP sponsored conferences (there had been a great deal of pre-1999 technical assistance, but it was never discussed in public fora), the government seems to have become increasingly aware of the need to develop a legal framework that will give more freedom to NPOs. In fact the two events held in the latter half of 2003 were paid for solely with government funds and involved significant non-Chinese participation.

What this all will lead to is not clear. It may all be “eye-wash,” but I doubt it. The government knows full well that it must relinquish controls and create more independent civil society partners if it is going to survive. The social and economic problems China currently faces cannot be solved by government alone – but how fast or slowly the changes occur will depend on many factors that have nothing at all to do with technical legal reform efforts. Nevertheless legal reform is necessary, because without it many organizations will remain in a legal twilight, described in a recent US Embassy-Beijing briefing paper –

to avoid the strictures surrounding registration and oversight as an NPO (association, social organization) many register as “corporations” under current law. While this has been tolerated for organizations that are not particularly sensitive from a political standpoint, such organizations are still subject to corporate tax and may face other difficulties.

Recent developments suggest that the government has become aware that legislation is needed, not just regulations, which have a more temporary character and are not tied into the proposed new Civil Code. But the underlying theoretical issues remain: how should the legal reforms take account of increasingly troublesome social and economic realities; how should they reflect the need to modernize Chinese society, to make it more fully participatory? Certain objectives are clear:

1. The state should move away from overt “control” of NPOs and their activities and toward membership and fiduciary governance structures, with continuing government oversight;
2. More mechanisms should be provided within the law for transparency (good internal reporting, record-keeping, and accounting rules) buttressed by the development of the governance norms previously mentioned;
3. There should be clearer accountability (not “control”) mechanisms – to the state for funds received and programs implemented; and to the public and beneficiaries as well, because they should have ultimate oversight of these issues;
4. There should be more thought given to a clearer tax exemption regime for NPOs as well as to creating tax incentives for the working population (through workplace giving) and rationalizing the existing incentives for entrepreneurs and businesses; and
5. Regulation of fund raising and asset management by NPOs should be strengthened, so as to protect the public and the non-state assets devoted to its welfare.

In addition to these crucial aspects of the written law, it is also essential that the laws (or the current regulations) be applied in a fashion that supports rather than stifles civil society. Naturally that involves a change in mind-set for many government bureaucrats – principally those in the NGO Bureau of the Ministry of Civil Affairs -- but recent experience suggests that such a change is occurring. In the first place, government personnel from all over China came together in November 2002 -- in a public setting for the first time – to discuss the issues I am raising here today. Second, the government is earnestly seeking to train its personnel so as to engender more supportive attitudes among them. Younger staff members of the NGO Bureau of the Ministry of Civil Affairs have attended trainings in the United States and other countries, which expose them to ways of looking at civil society that are more open than what they see at home. Third, the new upper echelons of the Ministry, both in Beijing and the provinces, seem determined to learn about how they can work more closely with more independent NPOs – they are seeking training and access to more information about how this is accomplished in other countries.

Writing in 1996, one of the chief American scholars on civil society in China, Dr. Richard Estes of the University of Pennsylvania noted as follows:

Chinese legislative authorities simply have not had sufficient time, nor have they accumulated sufficient administrative experience, in knowing how to frame an integrated [set of laws] that effectively deals with the various roles, functions, tax status, accountability procedures, and similar issues [for] a rapidly developing, quasi-independent, social sector.

In the intervening years, administrative practice has become much more developed, and knowledge of the ways in which the laws and oversight of other countries address NPO legal issues has increased immeasurably. In July 1999, at the Asia Foundation sponsored conference in Beijing, with government officials (from MOCA as well as other oversight agencies), legal academics, and NPO leaders in the audience, I suggested that the regulations and regulators view Chinese NPOs as little children that need to be led by the hand. NPOs, on the other hand, view themselves at least as teenagers and want to be allowed to do things on their own. It may still be that the view of NPOs as children – and possibly unruly children at that – remains. But my sense is that the government is slowly coming to the realization that the NPO sector is in fact growing up. And it is my hope that the next few years will be ones in which the essential issues – both of the law and of its application -- are addressed so that the legal environment for China's civil society can become truly enabling.

^[1] Falun Gong scared the Chinese government – it is a non-government organization that operates outside the normal regulatory structure. Thus, government attitudes toward Falun Gong briefly affected thinking about how government should deal with NPOs and civil society more generally.