

Commentary

Coalition for Peace & Ethics



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Second Draft of the People's Republic of China Foreign Non-Governmental Organizations Management Law (Draft) *(Second Reviewed Draft) (中华人民共和国境外非政府组织管理法 (草案) (二次审议稿))*

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Abstract: In 2015, Chinese authorities recently unveiled a Second Draft of the People's Republic of China Foreign Non-Governmental Organizations Management Law (Draft) (Second Reviewed Draft) (中华人民共和国境外非政府组织管理法 (草案) (二次审议稿)). State authorities solicited commentary on this draft law. In his Commentary, the author explained that, considered from the perspective of the CCP line the Draft NGO Law offers both challenge and opportunity. Yet it requires refinement to minimize the challenges and increase opportunities in line with the CCP's Basic Line. The CCP's General Program requires that the CCP "must meet the requirements of reform, opening up and socialist modernization, persist in scientific, democratic and law-based governance, and strengthen and improve its leadership." The Draft NGO Law can be improved to meet this fundamental obligation in the following ways..



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This commentary considers the Second Draft of the People's Republic of China Foreign Non-Governmental Organizations Management Law (Draft) (Second Reviewed Draft NGO Law or Draft NGO Law) (中华人民共和国境外非政府组织管理法（草案）（二次审议稿） for its compatibility with the Basic Line of the Chinese Communist Party (CCP). In summary, while the general thrust of the Draft NGO Law is consistent with the CCP line, it is not clear that it avoids the possibility of contradiction with the CCP's fundamental line of modernization. The Draft NGO Law can be improved to meet this fundamental obligation in the following ways.

In the course of the Third Plenum of the 18th Central Committee of the CCP (November 2013), a decision was adopted on issues concerning “Comprehensively Deepening Reform.” Included among the items considered was the role of service organizations.

Kindling the vigor of social organizations. We will correctly handle the relationship between the government and society, intensify efforts to separate government administration and social organizations, encourage the social organizations to clarify their rights and obligations, and enforce self-management and play their role in accordance with the law. Social organizations should be commissioned to provide public services that they are apt to supply and tackle matters that they are able to tackle. We will support and develop volunteer service organizations. We will achieve a true disconnection of trade associations and chambers of commerce from administrative departments, prioritize fostering and development of such social organizations as trade associations and chambers of commerce, scientific and technological associations, charity and philanthropic organizations, and urban and rural community service organizations. These organizations can directly apply for registration in accordance with the law when they are established. We will strengthen the management of social organizations and foreign NGOs in China, and guide them to carry out their activities in accordance with the law. (Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform, Adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on November 12, 2013).

A year later, at the Fourth Plenum of the 18th Central Committee declared its intention to “Strengthen the management of foreign non-governmental organizations operating in China, guide and supervise their deploying activities according to the law.” This decision was made in the context of a consideration of the larger issue of managing and restraining non-CCP social organizations, including issues relating to their organization and control to:

Give rein to the positive functions of people's organizations and social organization in the construction of a rule of law society. Establish and complete mechanisms and institutional channels for social organizations to participate in social affairs, safeguard the public interests, assist masses in need, help particular

groups, and prevent law-breaking and crime. Support sector associations and commercial association-type social organizations in playing a rule in self-discipline and specialist services.

In 2015, Chinese authorities unveiled a Second Draft of the People's Republic of China Foreign Non-Governmental Organizations Management Law (Draft) (Second Reviewed Draft) (中华人民共和国境外非政府组织管理法（草案）（二次审议稿）). The Draft NGO Law has raised substantial criticism in the West. These focus on issues of ambiguity, impediment of relations among academic institutions, and the characterization of relations between China and NGOs as principally issues of state security. These criticisms suggest the scope and tenor of reactions to the Draft NGO Law by institutions and states with the authority to convert their criticisms into state policy among states with which China interacts in important respects—socially, economically and otherwise. For that reason alone, it is useful for Chinese authorities to understand these criticisms and factor them in to their deliberations about the political effect of the Draft NGO Law.

But the Draft NGO Law also represents both a challenge and an opportunity for China. The challenge is to avoid contradiction with the fundamental line of the Chinese Communist Party. The opportunity is to harmonize and better fulfill socialist modernization that comprehensively builds a moderately prosperous society, comprehensively deepens reform, comprehensively implements the rule of law, and comprehensively strengthens Party discipline.

The Constitution of the Chinese Communist Party comprehensively sets out the substantive framework within which the CCP exercises its vanguard political role. In particular, the General Program of the CCP Constitution provides:

Reform and opening up are the path to a stronger China. Only reform and opening up can enable China, socialism and Marxism to develop themselves. The Party must carry out fundamental reform of the economic structure that hampers the development of the productive forces, and keep to and improve the socialist market economy; it must also carry out corresponding political restructuring and reform in other fields. The Party must adhere to the basic state policy of opening up and assimilate and exploit the achievements of all other cultures. It must be bold in making explorations and breaking new ground in reform and opening up, make its reform decisions more scientific, better coordinate its reform measures and blaze new trails in practice. (http://www.chinatoday.com/org/cpc/china_communist_party_constitution.htm)

Simultaneously, the CCP emphasizes the premises within which the CCP advances its vanguard role in the context of China's place in the world:

The Communist Party of China adheres to an independent foreign policy of peace, follows the path of peaceful development and a win-win strategy of opening up, takes both the domestic and international situations into consideration, and

vigorously develops relations with other countries in order to bring about a favorable international environment for China's reform, opening up and modernization. In international affairs, it safeguards China's independence and sovereignty, opposes hegemonism and power politics, defends world peace, promotes human progress, and pushes for the building of a harmonious world of lasting peace and common prosperity. It develops relations between China and other countries on the basis of the five principles of mutual respect for sovereignty and territorial integrity, mutual nonaggression, noninterference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence.

(http://www.chinatoday.com/org/cpc/china_communist_party_constitution.htm)

Considered from the perspective of the CCP line the Draft NGO Law offers both challenge and opportunity. Yet it requires refinement to minimize the challenges and increase opportunities in line with the CCP's Basic Line. Approaching a review of the Draft NGO Law from the four essential requirements for building the CCP—adhering to the CCP's basic line; persevering in emancipating the mind, seeking truth from facts, keeping up with the times, and being realistic and pragmatic, persevering in serving the people wholeheartedly; and upholding democratic centralism—suggests room for improvement. These are suggested below. In summary, while the general thrust of the Draft NGO Law is consistent with the CCP line, it is not clear that it avoids the possibility of contradiction with the CCP's fundamental line of modernization.

The CCP's General Program requires that the CCP “must meet the requirements of reform, opening up and socialist modernization, persist in scientific, democratic and law-based governance, and strengthen and improve its leadership.” The Draft NGO Law can be improved to meet this fundamental obligation in the following ways.

1. The “Go Out” policy has presented the CCP with the problem of harmonization of rules—should the rules applied to organizations within China be the same as those which must be followed by organizations when they operate outside of China. For the most part, Chinese authorities, and quite correctly at this stage of the development of China, have chosen a “middle way”—to acknowledge that Chinese enterprises and organizations operating abroad must (1) follow local law and ought to comply with international norms as applied in the locality of operation, and (2) be treated like other enterprises in those states in which they operate, (3) must adapt these to Chinese conditions, and (4) must follow national law under the leadership of the CCP in their operations within China. That is a sound basis not just for structuring law and policy applicable for Chinese enterprises and organizations operating abroad, but for foreign NGOs operating within China. This balances the principles of non-interference with those of equality and mutual benefit. It is not clear that the Draft NGOP Law fulfills that obligation. At a minimum, the foundational strategy of an NGO Law should be to treat all NGOs under the same law—not one law for foreigners and one for Chinese. And then, to the extent of differences arising from the distinct conditions affecting foreign NGOs, clearly identified, special provisions can be written for them. That avoids hegemonism and the creation of

“unequal treatment” which China’s own history suggests is the cause of disharmony and instability. And, indeed, meeting the 3rd Plenum of the 18th Congress’ goal of “Kindling the vigor of social organizations” can be best achieved through a united front action that treats all social organizations in the same way, with appropriate special rules where the characteristics of such organizations require it.

2. The basis for the regulation and management of social organizations should be focused on their aims and operation, rather than on their “citizenship” or global connections. The CCP has made it clear that social organizations serve an important role of socialist modernization. The objective of managing social organization in accordance with law must be undertaken to further socialist modernization under the leadership of the CCP. To that end it should not matter whether the cat is black or white as long as it catches mice. Focus on regulation by objective rather than citizenship is more efficient and produces more clear regulation. To do otherwise is to present the potential for contradiction that neither serves the state nor the project of socialist modernization and the realization of China’s dream. The Draft NGO Law works well as a regulatory device, but it works less well as a means of mobilizing productive capacity. In that respect it suffers from an inadvertent bureaucratism—the Draft NGL Law appears more worried about the formalities of organization than the development and management of productive forces to serve society. Indeed, what is least clear in the Draft NGO Law are precisely those activities and efforts that are to be encouraged for social organizations, irrespective of their origins. An NGO Law applicable to all social organization would be a first step toward better realizing socialist modernization. A secondary focus on the special characteristics of foreign social organizations may then be more rationally constructed in the spirit of China’s useful premises developed in its Go Out policies.

3. Article 3 of the Draft NGO Law provides a healthy start to the task of developing the productive forces of NGOs, even foreign NGOs. The use of NGOs to further China’s economics, education, science and technology, health, culture, sports, environmental protection and charity points the Draft NGO Law in the right direction. Yet there is no reason to suppose that these activities will be conducted any differently by social organizations operating within China merely because they have been established by or through NGOs formed outside of mainland China (Art. 2). Indeed to suggest otherwise constructs yet another contradiction about the nature of socialist modernization, one that suggests that it is incapable of scientific development, and may only be attained not through the attainment of scientifically developed objectives and projects but through the efforts of specific people or organs. Indeed the missed opportunities for consolidating and harmonizing the services of NGOs toward socialist modernization and rule of law activity is apparent in Article 8 that establishes a valuable NGO management information system but appears to limit it to foreign NGOs. The same applies to Article 9 that establishes a segregated system for rewarding the good works of foreign NGOs. That sort of segregation and isolation limits the utility of well managed foreign NGOs—including educational institutions and scientific and technological efforts, to the detriment of the state.

4. If China is to make the greatest use of social organizations for socialist modernization, then it appears that the characterization of the work of foreign NGOs as touching principally matters of internal security appears to further augment the contradiction inherent in the organization of the Draft NGO Law. It is for that reason that the administrative focus of the Draft NGO Law appears to run counter to the spirit of socialist modernization. Despite the quite reasonable warnings of Shangli Lin (林尚立, 两种社会建构:中国共产党与非政府组织, 中国社会科学 (英文版) Lin Shangli, CCP and NGO—Two Social Constructions) it is not clear that well regulated foreign NGOs, like well regulated domestic NGOs, fully dedicated to the objectives of developing productive forces along substantive lines specified under the leadership of the CCP do not challenge the CCP. Rather, like for profit enterprises, if properly managed, they can enhance the vanguard role of the CCP in working toward China's Dream. To ignore that productive capacity is to instill another contradiction. On the one hand it would suggest that the CCP is incapable of ridding the state of challenges to its authority, it is reduced to managing a challenge to its authority through the Draft NGP Law. But that is a preposterous declaration. On the other hand it suggests that NGOs bring no positive benefit to the state and the people, and must be watched carefully because they are inherently subversive. Yet that also suggests the weakness of the CCP and the possibility that the course of socialist modernization since 1989 at least, has produced substantial error that the Draft NGO Law acknowledges. This might appear to be another preposterous declaration. Still, the imposition of an oversight architecture based in the State Council Public Security Department (art. 7 et seq.) can lead to the conclusion that those who created the Draft NGL Law held one of these two preposterous declaration. It might have been more auspicious for the Draft NGO Law to consider vesting authority for the management of all NGOs in the Ministry of Civil Affairs under a traditional multi-level management system (分级管理, fenji guanli). To that end, the technical regulations for organization (Articles 10 et seq.) represent an administrative exercise rather than obne best served by burdening security services. In this respect, perhaps Wencheng Zhang might have a better approach (张文成, 关于我国执政党与民间组织关系的思考, 当代世界与社会主义 Zhang Wenwu, Thought on the Relationship between the Ruling Party and Social Organizations). And indeed, burdening the security services with such administrative burdens might reduce the efficiency of these important operations by diverting focus and resources from protecting the state against security breaches, to tending to the minutiae of administrative regulation.

5. Yet it is also clear that security, and the preservation of the Chinese path is of central importance to the vanguard role of the CCP and the protection of the state. There can be no argument with that proposition as a matter of the CCP basic line and the normal and customary objectives of a government protective of the nation. Yet the constraints on foreign NGOs are no different than those that ought to apply to domestic NGOs. But the security concerns should not produce contradiction. There should be a sensitivity to aligning what Wang Ming has identified as the three important policy orientation of the regulation of the social organization sector (irrespective of the origin of the organization (王名, 走向公民社会——我国社会组织发展的历史及趋势, 吉林大学社会科学学报 Wang Ming, History, Development and Trends of Social Organization in China). There is no reason,

for example that Article 5 (“Foreign NGOs carrying out activities within mainland China shall abide by Chinese laws; must not endanger China's national unity, security, or ethnic unity; must not harm China's national interests, society's public interest, or other groups' and citizens' lawful rights; and must not violate public order and customs”) should not apply to all NGOs thorough well crafted laws clear and easy to understand and apply. Yet even Article 5 contains ambiguities—the provision forbids illegal for-profit, political, or religious activities, but that seems to suggest that some of these activities might be legal—though they are not specified. But security concerns, concerns that affect all NGOs operating in China, become needlessly complicated when distinct rules exist for managing domestic and foreign NGOs. There is no reason that regulations cannot be developed that specify activities that are forbidden and that provide safe harbor rules so that any NGO can be assured that if they follow the rules they will be acting within the law.

6. There is another contradiction to changing the focus of foreign NGO management from civil administrators to security services. NGOs that must worry at every step about whether they satisfy security concerns will tend to devote less resources to the good work for which they are formed. Where the allocation of resources become unreasonable—likely under a regulatory scheme that focuses on security rather than socialist modernization within the Chinese political context—then productive forces that might be used to advance the economic resources of the nation will be misallocated. And indeed, a regulatory system that becomes administratively burdensome, that makes the costs of complying with administrative rules excessive produces two distinct threats. The first is misallocation of economic or productive forces, dissipated in compliance issues. The second, and one that produces a deep contradiction, is that it increases the possibility of corruption. The later would produce a direct contradiction with the core CCP anti-corruption line and the application of mass line principles to the internal operation of both administrative state and CCP. These issues are particularly acute with respect to the “Temporary Activities” Rules (Articles 18-22). These create substantial administrative burdens with little evidence of benefit to the state. It might have been easier to permit Chinese institutions, including enterprises, NGOs, and state organs, to develop a system of temporary sponsorship, and to place the administrative burden on those institutions who seek to bring foreign NGOs to China on a temporary basis. This applies with equal force to collaborative efforts among educational institutions and to aid efforts in the face of natural catastrophes (earthquakes, storms and the like). The current Draft NGL Law suggests bureaucratism and bourgeois obstructionism that has been rejected in the CCP Line. It is not clear that Chapter VI (Supervision and Management) avoids these errors.

7. The regulation of Conduct Provisions (articles 23-38 suggest a suspicion of foreign elements that cannot be managed through law in the ordinary course. That itself suggests a weakness of the Chinese political and administrative structures that are belied by the reality of the current state of Chinese political stability and advanced administrative systems. A few examples suggest the difficulty. Article 26 on funding unnecessarily constrains foreign NGOs from raising or using funds. The law could reach the same result by requiring substantial and real time disclosure of funding sources, rather than by

micro-regulation of funding activities. Of course, the state is free to specify a list of forbidden sources (terrorist organizations, criminal enterprises etc.). But all state do that and such laws should apply equally to Chinese as well as foreign NGOs. Beyond that, precise disclosure rules serve the state more efficiently, reduce the possibility of corruption and law breaking, and enhance the productive forces of NGO activity. Similarly, Article 32-38 appear to create a contradiction with the CCP basic line (“The Party must adhere to the basic state policy of opening up and assimilate and exploit the achievements of all other cultures. It must be bold in making explorations and breaking new ground in reform and opening up, make its reform decisions more scientific, better coordinate its reform measures and blaze new trails in practice”). It also suggests ethnic and national chauvinism detrimental to the scientific advancement of Chinese economic, social and cultural life. These provisions build a wall around the people when, under the direction of the CCP, the vanguard obligation appears to direct that these walls be refashioned to protect but not to prohibit advancement through the acquisition of knowledge from all sources. Rather than the complex rules, difficult to enforce in context, the writers of the Draft NGO Law might study with greater care Regulation of Leading Party Members' Groups of CCP (Trial Implementation) 中国共产党党组工作条例（试行）(http://news.xinhuanet.com/politics/2015-05/29/c_1115455011.htm). Specifying rules for the inclusion of Leading Party Members' Groups in organizations.

8. It is not clear how certain provisions of the Draft NGO Law meet the basic requirements of the Four Comprehensives, especially to comprehensively deepen reform and to comprehensively govern the country according to law. For example, Articles 57 and 58 quite correctly provide for strictness in preventing violation of law. Yet unfortunately they appear to vest the public security organs with power to confiscate property and detain individuals without the intervention of either the procuratorate or the courts. Moreover, the extent of administrative discretion in the control of the activities of foreign NGOs weakens the ability of NGOs to conform to law or to constrain officials within a cage of rules. For example, Articles 3 and 5 delineate activities that NGOs may engage in and those that are forbidden. Yet these provisions are subject to the discretionary power of public security department because these two articles closely related to the regulatory power (registration approval and inspection approval) of the public security department that empowered by this bill. But it is precisely that discretion that increases the possibility of corruption and reduces the power of law to provide rules for enterprises seeking to act lawfully. Indeed, in In order to fully appreciate acceptable and unacceptable conduct prescribed by the authority in article 3 (permitted) and 5 (forbidden), these must be read with the article 14 (illegibility for registration), article 45 (Competent operation entities' authority), and article 46 (Public security operation entities authority), and article 59 (detailed conducts result cancelation or revoke of registration and even criminal liability).

9. Lastly, the Draft NGO Law does not appear to consider pragmatism and the international position of China to the extent that might be useful. Hu Jintao, in his report to the 18th CCP Congress 2012 emphasized (Part XI) of the need to foster “equality, mutual trust, inclusiveness, mutual learning and mutually beneficial cooperation in

international relations and making joint efforts to uphold international fairness and justice. . . . A country should accommodate the legitimate concerns of others when pursuing its own interests; and it should promote common development of all countries when advancing its own development. Countries should establish a new type of global development partnership that is more equitable and balanced, stick together in times of difficulty, both share rights and shoulder obligations, and boost the common interests of mankind.” The Draft NGO Law suggests a contradiction here. In a sense, it is structured to deliver a message that China mistrusts foreign organizations. That is unfortunate for two reasons related to the CCP’s vanguard obligations. First, as noted earlier, that approach may not be the appropriate way to further the essence of socialist modernization and the structures of opening up. But it is also neither pragmatic nor helpful to China’s efforts to “actively participate in multilateral affairs, support the United Nations, G20, the Shanghai Cooperation Organization, BRICS and other multilateral organizations in playing an active role in international affairs, and work to make the international order and system more just and equitable” (Hu Jintao, Report to 18th CCP Congress 2012, Part XI). This Draft NGO Law is likely to detrimentally affect China’s efforts to project its own views and perspectives through Chinese NGOs operating outside of the Mainland. It invites foreign states to view more critically Chinese efforts to engage in multilateral efforts—everything from the Confucius Institutes to other organized efforts for aid and education. It is hoped that senior CCP officials will consider these broader and important elements of long term Chinese policy and engagement as it finalizes the forms that its necessary regulation of NGOS, foreign and domestic, will take.