



REGULATING NGOS AND FOREIGN INFLUENCE IN INDIA AND CHINA

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The time around the beginning of this year had interesting developments regarding the government's attitude towards domestic NGOs and their international sources of funds, in both India and China. On December 27th 2016, Indian media reported that out of 33,000 Indian NGOs, 20,000 would lose their qualification for receiving foreign funding under the Foreign Contribution Regulation Act. Meanwhile, the People's Republic of China Law on the Management of Foreign NGO Activities within Mainland China took effect from January 1st 2017, which drew another round of discussion on the operation of Western NGOs in China. This issue of the Law & Policy Brief describes and analyses the features of this new regulatory experiment in China and compares it to the legal and policy regime on the same subject prevailing in India.

Easing Domestic NGOs' Development While Controlling Foreign NGOs

NGO development in China has been very brief. It began mainly after the Reform and Open Up policy in 1978 when market economy was introduced to China. As the Chinese scholar Tao Chuanjin noted, the market economy promotion actually contributed to the birth of civil society in China. The position of the Chinese government towards NGOs is becoming clear after two decades of experimentation. Currently the government is pursuing two different approaches towards domestic NGOs and foreign NGOs.

China has taken steps to ease domestic NGOs' development, such as removing the requirement of finding a competent authority for supporting NGO's registration especially from 2011. Since then, a number of policies for easing NGO registration were released. The same year, the Ministry of Civil Affairs started allowing three types of NGOs working on charity, social service and social welfare issues to get direct registration without having to find a competent authority to support it.

In March 2013, the Chinese Central Government released the Plan for the Institutional Restructuring of the State Council and Transformation of Functions, which abolished the political bond requirement for all NGOs registration except four types: political NGOs, legal NGOs, religious NGOs and international NGOs. Based on the statistics released by the Ministry of Civil Affairs, by the end of 2015, the total number of registered NGOs in China was 662,000. The new experimentations and policies have been codified into the new law, popularly known as the Charity law passed in March 2016.

In addition to reducing barriers for domestic NGOs' registration, domestic funding policies have also been promoted. From 2012, the central government has encouraged contracting with civil society organizations (CSOs) for service delivery. In September 2013, the General Office of the State Council (Central Government) issued a policy document, Guiding Opinion on Contracting with Civil Society Organizations for Service, which sharply increased the funding available from the government for local NGOs.

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For example, in 2014 the annual government funding for service purchasing from CSOs reached 340 million US dollars which is 40.7% increase compared to that of 2013. Policies with tax incentives have also been promoted for spurring charitable donation from private sectors. As observed by an article in the Economist in 2015, “annual contributions to charity have risen tenfold in five years [2011-2015], to \$15.2 billion.”

New Law on the Management of Foreign NGOs' Activities

While paving the way for domestic NGOs' development, Chinese government has taken steps to regulate and to control foreign NGOs' activities in China. The most recent formal and legal step is to pass the Law on the Management of Foreign NGO Activities (hereinafter, Foreign NGO Law). The law aims to make the regulation of foreign NGOs' activities in China more transparent but also more controlled in a procedural way, such as setting a mandatory pre-registration requirement for activities in China. Foreign NGOs' management is not subject to the Charity Law but is governed by this new law. In 2015, the Bill was opened for public opinion which drew a wide discussion especially among many Western NGOs who were operating in China. After reviewing the submissions, the Bill was revised, including the title and then was passed on April 28th 2016 by the Standing Committee of 12th National Peoples' Congress. The law includes seven chapters: general provisions, registration and filing, regulation of activities, facilitation measures, supervision and management, legal responsibility, supplementary provisions. The next part will focus on its purpose, regulation mechanisms and other measures that are worthy of attention.

1. Both Regulation and Controlling

It is fair to say one of the important purposes of this law is to regulate the foreign NGOs' activities in China since there has been no law in this area. The law begins with a positive tone that, it is “to regulate and guide activities conducted by foreign NGOs within mainland China, safeguard their lawful rights and interests, and promote exchanges and cooperation.” In Chapter IV, it also provides facilitation measures for the registration.

It is estimated that there are around 1000 foreign NGOs conducting regular activities in China and another 6000 for temporary activities. The only two available polices related to foreign NGOs' registration are Temporary Rules for Foreign Chamber of Commerce in China (1989) and the Regulation on Charitable Foundations (2004).

But the majority of foreign NGOs in China are not under the categories of chamber of commerce or foundation. In order to get legal status, some have tried to register as businesses. But many are just unregistered entities. Since what they are doing is good for the Chinese society they have been allowed to operate in the grey area. The grey operation has created a lot of problems for their operation in China, such as inability to have a bank account, no formal way to hire employees etc. The stated objective of the new law is to address this issue.

But the intent of controlling foreign NGO activities in China is also very clear. First, in Article 5, the law clearly mentions that “Foreign NGOs carrying out activities within mainland China must abide by Chinese laws, must not endanger China's national unity, security, or ethnic unity; and must not harm China's national interests, societal public interest and the lawful rights and interests of citizens, legal persons and other organizations.” Second, the competent authority for domestic NGO administration is the Ministry of Civil Affairs and its lower level bureaucracies, but the administration of foreign NGOs is the Ministry of Public Security (MPS) and its Province level bureaus which are more focused on public security and national security. Third, the law also lists other restrictions for foreign NGOs such as no support of political or religious activities, no fundraising in China, no membership development in China unless getting special permission from the central government and getting pre-approval for all non-registered NGOs' temporary activities in China etc.

2. Regulation Mechanism

The law provides for regulating foreign NGOs' activities through a system of pre-approvals. It develops two categories of activities with different approval mechanisms which includes activities conducted by registered foreign NGOs and the temporary activities by unregistered foreign NGOs. For registered NGOs' activities, they need to send annual activity plan to the Professional Supervisory Authority (PSA) for pre-approval and then report to the registration authority. For unregistered Foreign NGOs' activities they need to find a Chinese partner, and to get prior approval for the activities, and also need to report after the completion. It therefore becomes very critical for foreign NGOs with regular activities in China to get registered. The whole second chapter of the law talks about the conditions and procedures for foreign NGOs' registration in China. Unlike the majority of domestic NGOs, they are asked

to find a public authority either as government agencies or government-funded professional organizations to be their professional supervisory authorities (PSA) before their registration with the MPS or its province-level bureaus. As mentioned before, the PSA requirement has just been abolished for the registration of most domestic NGOs due to the barriers it has created for registration. But for foreign NGOs, this has been kept in place by this law.

3. Indirect Regulation

Even though the law mainly focuses on regulating foreign NGOs' activities it sets clear requirements for fund flow management. Articles 21 to 25 talk about the fund use regulation. For registered foreign NGOs, they can only use fund from lawful sources through their bank account in mainland China. For unregistered NGOs, they need to use fund through their Chinese partner's bank account. The foreign funding is required to come in through wire transfer according to the regulation of foreign exchanges. Foreign NGOs cannot ask Chinese beneficiaries to use the fund for any purpose that is in conflict with Chinese law. Foreign NGOs cannot raise funds in China and they should get audited according to the Chinese law and through the audit firms in China.

In addition to these instances of direct regulation, there is also indirect regulation focusing on domestic partners. Article 32 says, "Units and individuals in mainland China must not accept retention, funding, agency, or covert agency to carry out foreign NGOs' activities in mainland China, from foreign NGOs that have not registered a representative office or filed to carry out temporary activities."

Stakeholders' Monitory on the Enforcement of the New Law

There is still a lot of uncertainty regarding the enforcement and impact of this new law on the operation of foreign NGOs in India. All foreign NGOs were required to get registered under the new law from January 1st 2017. But even after five months, a number of technical questions remain unresolved. For example, which organization will be defined as the NGOs covered by the law? Who will be professional supervisory bodies? How to coordinate among different professional supervisory bodies? How complicated will the registration process be? How strictly will the MPS and its province-level bureaus enforce the law?

On November 28 and December 20, 2016, seven months after passing the law and one month before it taking effect, the MPS released the Guidelines on Organizational Registration and Temporary Activities Reporting under the Foreign NGO Law (MPS Filing Guideline) and the Catalogue of Fields of Activities and Categories of Projects and Professional Supervisory Authority Units (Catalogue of Fields and PSA List) which includes lists of activities and professional supervisory authorities for the reference of foreign NGOs' registration in China. It covers economy, education, social assistance, social welfare, environment protection, gender equality, women development, science, intellectual property, culture, filming, broadcast and video development, health, sports, civil society research etc. However, areas of religion, political reform, human rights and even legal reform are not included in the 2017 list.

The uncertainty of the new law has created reduction of foreign funding in China. According to the Chinese media Caixin, compared to 2013, the number of foreign NGOs with funding for domestic NGOs dropped almost 40% in 2015. But the impact is likely to be uneven among foreign NGOs in different fields. For example, in December 2016 when New York Times interviewed foreign NGOs about their attitude toward the new law, some NGOs such as Wildaid felt very positive about getting a legal status, while many others especially in the human rights field, such as the Open Society Foundation were not so enthusiastic.

Based on stakeholders' observations, there are the several challenges exposed in the enforcement. First, some big foreign NGOs find it hard to find a proper PSA to support their registration either due to the ambiguous definition of professional connection or due to lack of incentive from the potential PSA Units. Second, the definition of activities. The law still does not mention clearly what activities shall be covered. For example, will social media promotion, small meeting, big conference, licensing trademarks be covered? It seems to be on a case by case basis. Third, the question of which organizations will be covered by the law has been interpreted broadly to include not only "foreign foundations and other charity groups" but also "industrial associations, chambers of commerce and professional societies (collectively Mutual Benefit NGOs)" as well as CSR department of multi-national corporations. The enforcement of the law is still at the experimentation stage. Both authorities and foreign NGOs are learning by doing. After one year, the picture could be clearer.

Comparative Understanding by Referring to the FCRA Enforcement in India

Despite some similarities, there are several differences in the regulation of foreign NGOs in India and China. First, the main function of the Foreign NGO Law is to ensure that the foreign NGOs' activity shall be under close monitoring of the Chinese government especially with respect to their influence on domestic NGOs and human rights activists. But it does not prohibit government, politicians, media or other stakeholders from receiving contribution from foreign NGOs since one-party system has little space for foreign NGOs to influence Chinese politics. The Indian FCRA on the other hand focuses on prohibiting the influence of foreign funding on politicians, journalists, judges in order to prevent outside influence on internal matters, such as the country's development agenda.

Second, the both domestic and foreign NGOs are governed by the same legal regime in India, whereas the latter are regulated by a different and stricter law in China. Except the Ford Foundation which came to India very early in 1952, many international NGOs such as Green Peace, Save the Children can get independent registration as societies or trusts like Indian domestic NGOs. They can raise fund and apply for tax exemption in India. But in China, the foreign NGOs' registration is under a separate law. They need to find a professional supervisory body for their registration which has been abolished for the domestic NGOs. They can only have a representative office in China but is not a full legal person as other registered Chinese NGOs.

Third, China focuses on directly regulating foreign NGOs' activities in China while India focuses on regulation of foreign influence through the regulation of domestic stakeholders. The Foreign NGO Law clearly targets all foreign NGOs and specifically, their activities. The Indian government tries to reduce the foreign NGOs' influence in Indian state's policies through strengthening the enforcement of FCRA to target NGOs relying foreign funding. Their regulation model is also very different. For example, in India, the government focuses on pushing transparency of most NGOs with consequence of losing the FCRA licence for violation while asking few sensitive ones for pre-approval. But in China, the regulation model is pre-approval for all foreign NGO activities either annually for registered foreign NGOs or activity-based approval for unregistered foreign NGOs.

Fourth, India and China have slightly different concerns regarding the areas that they want to protect from foreign influence. Religion, political and human rights

are not preferred either in India or China for foreign NGOs to get involved in. But for other areas preference is also slightly different. India is more concerned with economic development while China is more sensitive to social and political stability. Government in India worries about NGOs setting the domestic agenda without understanding the big picture since the democratic system creates a lot of channels for NGOs to push a certain cause. The Indian government's concern has been that some Indian NGOs funded by foreign donors "have been noticed to be using people-centric issues to create an environment which lends itself to stalling development projects". China's situation is a little different. The legitimacy concern of one-party ruling and the emerging social conflicts due to the unbalanced development in the last 30 years make the Communist Party very sensitive to social stability. In explaining the background to the new law the representative from the National People's Congress explained that "some foreign NGOs have been noticed to support activities threatening social stabilities and national security in China".

Despite of the above-mentioned differences, both countries emphasize the same concern of national security or national interest in dealing with foreign NGOs or foreign funding. Even though India and China have different emphasis on the part of security the common goal is almost the same which is to set their own agenda for development. As the global governance scholar Patrick Stewart observed, one of the common positions emerging among the BRICS countries is that "they all embrace traditional conceptions of state sovereignty and resist heavy-handed Western intervention."

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