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Regulation of Civil Society in China: Necessary Changes after the Olympic Games and the Sichuan Earthquake

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Abstract

This Article will address the following topics with regard to the regulation of civil society in China: (1) Making the existing regulations for social organizations (shehui tuanti, "SOs"), non-profit non-commercial entities (minban fei qiye danwe, "NCEs"), and foundations (jijin hui) more user-friendly, including making it possible for de facto networks that provide and coordinate disaster relief to be recognized, perhaps as semi-legal entities for a short period of time. The liberalization of the SO regulations should permit mutual benefit organizations to be established in order to fully implement the freedom of association guaranteed by Article 35 of the Chinese Constitution. (2) Making public fund-raising easier for small and medium-sized CSOs. Although the amount donated to charity increased in 2007, the new tax rule permitting all certified charities to receive donations has not been implemented. In addition, the provision giving the government a leading role in fundraising for national emergencies should be removed from the Public Welfare Donations Law ("PWDL"). (3) Passing the Charity (cishan) Law to coordinate the development of the law governing public benefit organizations and begin the process of privatizing charity in China. This should eventually lead to establishing a public benefit commission comparable to public benefit commission in Japan, which is patterned after the Charity Commission for England and Wales. (4) Relaxing the controls on volunteering. While the current municipal rules may work well with regard to a planned event such as the Olympics, they impede the development of volunteer networks at times of national disasters. As suggested earlier, the approach discussed here is an integrated one, and it should be implemented as such in order to make it possible for CSOs to function more effectively as partners of the state. This Article will also draw an interesting comparison between current developments regarding CSOs in China and changes in the legal regulation of such organizations in Japan in response to the "Great Awaji-Hanshin (Kobe) Earthquake" in 1994.

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REGULATION OF CIVIL SOCIETY IN CHINA:
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GAMES AND THE SICHUAN EARTHQUAKE

*Karla W. Simon**

[A] substantial change will take place in the relationship between the NPOs and the government in China, where the present dependent and supplementary relationship will gradually give way to a cooperative relationship.¹

INTRODUCTION

Creating an environment for China's civil society organizations ("CSOs")² that will be more empowering has never been unimportant, but is especially so now—after the Paralympic

* Professor of Law, Catholic University of America. I am grateful for discussions with Dr. Leon Irish regarding the preparation of this Article and to the participants at the China Colloquium, sponsored by the Louis Stein Center for Law & Ethics and the Leitner Center for International Law and Justice, held at Fordham Law School on October 3, 2008.

1. Yan Mingfu, former Vice Minister, Ministry of Civil Affairs ("MoCA") and former Director General of the China Charity Federation ("CCF"). This quote is taken from Yan's preface to a book of conference proceedings for the first international conference convened to discuss the development of civil society organizations in China; it was held at Tsinghua University in 1999. See Yan Mingfu, *Preface* to *THE NON-PROFIT SECTOR AND DEVELOPMENT: THE PROCEEDINGS OF THE INTERNATIONAL CONFERENCE IN BEIJING IN JULY 1999*, at 1-2 (Zhao Liqing & Carolyn Iyoya Irving eds., 2001).

2. One term in Chinese that might be applied to civil society organizations ("CSOs") is *minjian* or popular organizations. It is not a technical term, but it is an accepted one. Looking at this from a legal standpoint, however, one must conclude that China has three principal forms of recognized CSOs: social organizations ("SOs") (*shehui tuanti* or *shetuan*); foundations, both public fundraising organizations and private foundations (*jijin hui*); and non-state, non-commercial organizations ("NCEs") (*minban fei qiye danwei*). To the extent that such organizations have the same dual management requirements, the thesis of the Article with regard to the benefits of reducing the bureaucratic difficulties CSOs face applies equally to them; the Article, however, concentrates on SOs and foundations.

Games in September, the Olympic Games in August, and the Sichuan Earthquake in May.³ The questions of what legal/regulatory changes would be beneficial for such organizations, those who volunteer for them, and those who donate to them are especially significant after the Sichuan Earthquake of May 12, 2008. Problems with the harnessing of human and financial resources for disaster relief once again attracted the attention of millions of Chinese citizens and its increasingly aware “netizens” at the time of the earthquake.⁴ Issues about volunteers and the regulations that govern them also have resonance in connection with the Olympics and Paralympics, which brought thousands of volunteers from all over China to Beijing.⁵ Legal questions around the status of CSOs and their relationship with the party-state must be dealt with if China is going to be able to address the social and economic needs of its people in the twenty-first Cen-

3. The government signaled its intent to become more vigilant with regard to donations of money and goods in connection with the earthquake—the State Council (China’s cabinet) issued a circular at the end of May, asking audit offices and fiscal departments to track how the government departments and non-governmental organizations handled the donations and publicize the results regularly. See *China Tightens Management on Quake Donation, Asking Auditors, Supervision Departments, Media to Watch Over* [sic], CHINA VIEW, May 31, 2008, http://news.xinhuanet.com/english/2008-05/31/content_8291852.htm. Other reports detail that at least 10,000 auditors were sent by the authorities to ensure that there would be no corruption with regard to the funds collected for quake victims. See *Thousands of Auditors Track China Quake Relief Goods, Funds against Corruption*, PEOPLES DAILY ONLINE, June 18, 2008, <http://english.people.com.cn/90001/90776/90785/6432776.html>.

Despite the attention paid to the corruption problem, at least 200 officials are reported to have been involved in diversion of funds, etc., with as many as twenty having been fired. See *Nearly 200 Officials Punished over China Quake Relief*, ABC NEWS, Sept. 10, 2008, <http://www.abc.net.au/news/stories/2008/09/10/2361308.htm>.

In addition to tackling corruption in the aftermath of the earthquake, officials have suggested that there is a need for greater transparency “in the process of using quake-relief goods and funds.” Press Release, The People’s Republic of China, Top Chinese Official Vows Punishment for Quake Relief Corruption (Sept. 4, 2008), http://english.gov.cn/2008-09/04/content_1087860.htm. Exactly what form that transparency will take remains to be seen.

4. Both the Western and the Chinese press reacted to the enormous outpouring of volunteer and financial resources to aid earthquake victims; the Xinhua Official News Agency even quoted *The Economist’s* coverage of the work being done in China! There have been discussions about the extent to which the earthquake will change the dynamic for civil society, and at least some scholars are insisting that it will. See Jens Kolhammar, *Earthquake and Civil Society in China*, CHINA ELECTIONS & GOVERNANCE, June 5, 2008, <http://en.chinaelections.org/newsinfo.asp?newsid=17827>.

5. See *Thousands of Volunteers Ready for Olympic and Paralympic Games, Beijing 2008 Olympic Games Home Page*, <http://en.beijing2008.cn/volunteers/news/latest/n214456879.shtml> (last visited Feb. 19, 2009).

ture. While the state has increasingly viewed CSOs as important partners in meeting societal needs since the reforms to modernize and downsize government in the 1990s, the relationship must mature in order to achieve more successful outcomes. This Article proposes an integrated approach to creating more space for civil society in China. It thus addresses the legal changes that will be necessary to attain Yan Mingfu's vision of a more cooperative state-civil society relationship within a foreseeable time frame.

Although it had been suggested that there would be a set of new social organization ("SO") regulations⁶ in the first half of 2008 and/or that the Charity Law would be passed by the National Peoples' Congress in March 2008 (to regularize issues with regard to giving and volunteering in advance of the Olympics),⁷ neither of these came to pass. The failure to meet these goals may be due to the increased security measures⁸ and tightening of the reins with regard to speech and association⁹ leading up to the Games (possibly resulting from the protests in Tibet and the ensuing clashes during the torch relay).¹⁰ With recent events in

6. The Congressional-Executive Commission on China ("CECC") mentioned in its 2008 Annual Report that there were reported discussions about the revision of the 1998 SO Regulations in both June and August 2008. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA 2008 ANNUAL REPORT 144, 258 n.18 (110th Cong., 2nd Session, Oct. 31, 2008) [hereinafter CECC 2008 ANNUAL REPORT]. The existing regulations for Social Organizations were promulgated by the State Council in 1998; particulars that deserve reform are discussed below. See *infra* note 14.

7. See *Comments on the Draft Charity Law for the Peoples' Republic of China*, 5 INT'L J. CIV. SOC'Y L. 12, 12 (2007), available at http://www.iccsl.org/pubs/07-01_IJCSL.pdf [hereinafter Charity Law Comments].

8. Although the Chinese government had promised its citizens that they would be allowed to "demonstrate" peacefully at three sites far from the Olympic venues during the time of the Games, no permits to hold demonstrations were granted. In addition, some applicants to protest were sent to reeducation through labor camps. See Olympic Protest Zone Applicant Sent to Re-education through Labor, Chinese Human Rights Defenders, Oct. 29, 2008, http://crd-net.org/Article/Class9/Class10/200809/20080924082105_10704.html.

9. These included closing one foreign non-governmental organization ("NGO") and its Chinese counterpart—China Development Brief—and the expulsion of Nick Young, one of the most vocal of foreigners on behalf of Chinese civil society. Writing on October 10, 2007, Nick Young detailed the events surrounding the closure and the Chinese government decision not to allow him to return to China. See Nick Young, *Message from the Editor*, CHINA DEV. BRIEF, Oct. 10, 2007, <http://www.chinadevelopmentbrief.com>. The clamp-down on other CSOs is discussed in the CECC 2008 Annual Report, *supra* note 6, at 144-46.

10. Extensive coverage of the protests surrounding the torch relay in various countries can be found in numerous newspaper articles. See, e.g., Katrin Bennhold and Eliza-

China beginning to change, the Chinese public's view of the role of donors and volunteers in natural disasters¹¹ and absent the adoption of the proposed changes in the legal landscape, the current legal and fiscal framework is ripe for academic dialogue and discussion with public officials.

This Article will address the following topics with regard to the regulation of civil society in China:

- Making the existing regulations for social organizations (*shehui tuanti*, "SOs"), nonprofit non-commercial entities (*minban fei qiye danwei*, "NCEs"),¹² and foundations (*jijin hui*)¹³ more user-friendly, including making it possible for *de facto* networks that provide and coordinate disaster relief to be recognized, perhaps as semi-legal entities for a short period of time.¹⁴ The liberalization of the SO

beth Rosenthal, *Olympic Torch Goes Out, Briefly, in Paris*, N.Y. TIMES ONLINE EDITION, Aug. 4, 2008, <http://www.nytimes.com/2008/04/08/world/europe/08torch.html?pagewanted=1>.

11. See Jim Yardley and David Barboza, *Quake Tragedy Stirs Ordinary Chinese to Charity*, INT'L HERALD TRIB., May 20, 2008, <http://www.iht.com/articles/2008/05/20/asia/20citizens.php>. This Article describes the efforts of an ordinary Chinese citizen, Hao Lin, who volunteered his counseling services to earthquake survivors. Mr. Lin spoke of his fellow citizens and stated "[o]rdinary people now understand how to take action on their own." *Id.* Although there were recognized disaster relief and volunteer organizations, such as the Sichuan Red Cross, available to provide relief, they were overwhelmed, and many citizens chose to provide assistance outside the state-linked channels. *Id.*

12. These organizations are regulated under the Provisional Regulations on the Regulation and Management of Non-profit Noncommercial Organizations (also known variously as Private Non-Enterprise Units ("PNEUs") and Civil Nonbusiness Institutions ("CNIs")). See *Min ban fei qi ye dan wei deng ji guan li zan xing tiao li* [Provisional Regulations on Registration and Management of Private Non-Enterprise Units] arts. 5-8 (promulgated by the St. Council, Sept. 25, 1998, effective Sept. 25, 1998) ST. COUNCIL GAZ. (P.R.C.), translated in CHINA DEV. BRIEF, <http://www.chinadevelopmentbrief.com/node/300>. The principal issue with regard to these organizations is to distinguish them from the *shiye danwei* or public institutions. See generally Karla W. Simon, *Reform of China's Laws for NPOs—A Discussion of Issues Related to Shiye Danwei Reform*, 2 ZEITSCHRIFT FÜR CHINESISCHES RECHT [Journal of Chinese Law] 71, 77-78 (2005) [hereinafter Simon, *Reform of China's Laws for NPOs*].

13. Foundations are subject to regulation by a State Council regulation adopted in 2004. See discussion *infra* note 14.

14. The networks that addressed the problems in Sichuan following the earthquake were informal volunteer charitable organizations, but it is possible to imagine that some smaller private foundations might be involved in such networks as well. There is evidence that the existence of the requirement to register caused one organization, the Sichuan Union Relief Office, to disband after seventeen days of operations. See Earthquakes Expose China's Urgent Need for NGO Legal Reform, Congressional Executive Commission on China ("CECC"), <http://www.cecc.gov/pages/virtualAcad/>

regulations should permit mutual benefit organizations to be established in order to fully implement the freedom of association guaranteed by Article 35 of the Chinese Constitution.¹⁵

- Making public fund-raising easier for small and medium-sized CSOs. Although the amount donated to charity increased in 2007,¹⁶ the new tax rule permitting all certified charities to receive donations has not been implemented.¹⁷ In addition, the provision giving the government a leading role in fundraising for national emergencies should be removed from the Public Welfare Donations Law (“PWDL”).¹⁸
- Passing the Charity (*cishan*) Law to coordinate the development of the law governing public benefit organizations and begin the process of privatizing charity in

index.php?showsingle=106931 (citing a June 2, 2008 Radio Free Asia report on the situation) (available only in Chinese).

The organization was coordinating the work of 100 CSOs engaged in disaster relief operations. *Id.*

In general, this Article will concentrate its attention on SOs and foundations, as NCEs are very specialized types of entities. They are fee-based, service-providing organizations, such as private schools, research institutions, etc. When they were distinguished from SOs in 1998 (with their own set of regulations), this was done to move away from a less clear 1989 regulation, which had lumped them all together. *See* She hui tuan ti deng ji guan li tiao li [Regulations on Registration and Management of Social Organizations] (promulgated by the State Council, Oct. 25, 1989, effective Oct. 25, 1989) (P.R.C.), translated in CHINA DEV. BRIEF, available at <http://www.china-developmentbrief.com/node/298>.

15. *See* XIAN FA art. 35, (1982) (P.R.C.). A Chinese version of the Chinese Constitution is available at http://www.law-lib.com/law/law_view.asp?id=82529, and an English version is available at http://english.gov.cn/2005-08/05/content_20813.htm (both last visited Feb. 19, 2009).

16. The China Charity Donation Analysis Report 2007 released by Zhongmin Charity Donation Information Center and the Charity Coordination Office of China's Ministry of Civil Affairs, the first of its kind ever released by the official department, shows that in 2007 China received a total of RMB22.316 billion in funds and in-kind donations from the public and enterprises, which was an increase of 123% compared with that of the previous year. Ministry of Civil Affairs Charity Report, <http://www.chinacsr.com/en/2008/02/04/2083-ministry-of-civil-affairs-releases-charity-report> (last visited Feb. 19, 2009).

17. *See* discussion *infra*.

18. *See* People's Republic of China Public Welfare Donations Law, art. 11 (promulgated by the Standing Comm. Nat'l People's Cong., June 28, 1999, effective Sept. 1, 1999), translated in INT'L CTR. FOR CIV. SOC'Y L. (Documentation Center), available at http://www.iccl.org/pubs/China_Public_Welfare_Donations_Law.pdf (1999) [hereinafter PWDL]. Some have suggested that this sort of provision was also supposed to be included in the Charity Law, although it is not clear that recent drafts do include it.

China. This should eventually lead to establishing a public benefit commission comparable to public benefit commission in Japan, which is patterned after the Charity Commission for England and Wales.¹⁹

- Relaxing the controls on volunteering. While the current municipal rules may work well with regard to a planned event such as the Olympics, they impede the development of volunteer networks at times of national disasters.

As suggested earlier, the approach discussed here is an integrated one, and it should be implemented as such in order to make it possible for CSOs to function more effectively as partners of the state.

This Article will also draw an interesting comparison between current developments regarding CSOs in China and changes in the legal regulation of such organizations in Japan in response to the “Great Awaji-Hanshin (Kobe) Earthquake” in 1994. While the new legal regime for CSOs in Japan has not as yet been fully developed,²⁰ there is ample evidence that social reaction to the difficulties facing CSOs and volunteers providing relief services during the earthquake led to significant changes in the legal rules. This permitted easier creation of CSOs and access to volunteer resources. Addressing the problems began quickly, in the aftermath of the earthquake, and within three years a new legal regime was in place.²¹ The extent to which the Chinese government and leadership have internalized the need for change in this regard for Chinese CSOs remains to be seen. It is also unpredictable whether Chinese society will continue to advocate for changes in the system to break the state-party “monopoly”²² on charity and the manner in which disaster relief is

19. See discussion *infra*.

20. See Karla W. Simon, *Enabling Civil Society in Japan, Reform of the Legal and Regulatory Framework for Public Benefit Organizations*, 27 J. JAPANESE L. — (forthcoming 2009) (on file with author).

21. See Tatsuo Ohta, *Public Benefit Organizations in Japan: Present Situations and Remaining Challenges*, 4 INT'L J. CIV. SOC'Y L. 72, 75 (2006), available at <http://www.iccsl.org/pubs/06-10-IJCSL.pdf>.

22. A blogger named Guo Yu Kuan suggested that China government should open the market to charity work. The writer said the distrust towards China's Red Cross in implementing the Sichuan earthquake disaster relief is mainly due to the monopoly problem; if there is competition, the charity organizations would be more open and transparent. Posting of Guo Yu Kuan to my1510, <http://www.my1510.cn/article.php>

provided and volunteer services are controlled.

I. CONTEXT

I begin the Article by contextualizing the role of CSOs and their legal regime within the legal system for private/semi-private citizen action in China. Because the distinctions between CSOs and the state have been developed from 1949 onward and remain blurred to this date, not only theoretically²³ but also legally, understanding the process of legal reform is conceptually difficult for people versed in the issues from a Western perspective. Leading Western scholars in the field of nonprofit or not-for-profit organizations²⁴ suggest that CSOs should not only be private and subject to the non-distribution constraint,²⁵ they should also be voluntary and self-governing.²⁶ This implies a distance from the state that most CSOs in China lack.²⁷

On the other hand, there is clearly a continuum of organizations in China that fit within the general sphere of civil society organizations as they are understood in the West—those that are separate from the state, the business sector, and the state sector.²⁸ There are obviously quite a few government-organized and operated non-governmental organizations (“GONGOs”) in China. But on the continuum toward the unregistered grass-

?ef24fccd023f45ab (May 31, 2008, 14:24) (translation available at <http://english.people.com.cn/90001/90776/6422100.html>).

23. See Carolyn L. Hsu, *Rehabilitating Charity in China: The Case of Project Hope and the Rise of Non-profit Organizations in the PRC*, ALL ACADEMIC RESEARCH, Aug. 11, 2006, http://www.allacademic.com/meta/p_mla_apa_research_citation/1/0/4/1/1/p104118_index.html (Paper presented at the annual meeting of the American Sociological Association, Montreal Convention Center, Montreal, Quebec, Canada).

24. This is the preferred term used in the United States. In other countries, organizations are known as voluntary organizations (Canada) or charities (United Kingdom). Increasingly, however, unifying terms have become acceptable, and I have chosen one of these for this Article—civil society organizations.

25. See Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 848, 851-54 (1980).

26. See Lester Salamon & Helmut Anheier, *In Search of the Nonprofit Sector I: The Question of Definitions*, 3 VOLUNTAS 267, 305-38 (1992).

27. See Qiusha Ma, *The Governance of NGOs in China Since 1978: How Much Autonomy?*, 31 NONPROFIT & VOLUNTARY SECTOR Q. 305, 312-13 (2002).

28. Theories of civil society have been advanced by many and are largely irrelevant in terms of the discussion here; the term is being used simply for purposes of convenience and does not imply a specific set of interactions between certain organizations and those clearly within the other sectors.

roots organizations²⁹ which are free entirely from government regulation (but in peril if they do anything the government does not like),³⁰ there are others with varying degrees of autonomy,³¹ including organizations registered as for-profit or commercial entities.³²

The formal legal position of CSOs in China suggests a great deal about how they are viewed within the party-state system. Prior to the establishment of the People's Republic of China ("PRC") in 1949, existing CSOs were, to some extent, encouraged by Mao Zedong.³³ After 1949, they were, for all intents and purposes, outlawed and/or absorbed into the party-state sys-

29. See generally Jillian S. Ashley & Pengyu He, *Opening One Eye and Closing Another, The Legal and Regulatory Environment for Grassroots NGOs in China Today*, 26 B.U. INT'L L. J. 29 (2008).

30. Because they are not formally established, they risk the possibility of being shut down by the government in an arbitrary manner. Nevertheless, many unregistered organizations exist. In addition, some organizations exist "within" registered CSOs or other organizations, such as universities. See generally Ashley & He, *supra* note 29. For a Chinese-language discussion of the taxonomy of associational life in China, which includes these varying types, see generally KANG XIAOGUANG, CHUANGZAO XIWANG: ZHONGGUO QINGSHAONIAN FAZHAN JIJINHUI YANJIU [CREATING HOPE: A CASE STUDY OF THE CHINA YOUTH DEVELOPMENT FOUNDATION] (1997).

31. One thing that helps to free some organizations from the previously experienced high levels of government control is the need to engage in fundraising. This frequently leads these organizations to foreign funders. See Kin-man Chan, *The Development of NGOs Under a Post-Totalitarian Regime: The Case of China*, in CIVIL LIFE, GLOBALIZATION, AND POLITICAL CHANGE IN ASIA 20, 31-32 (Robert P. Weller ed., 2005). Structural changes can also help to ensure greater autonomy. A web-based publication, CHINA DEVELOPMENT BRIEF, contains a description of the transformation of one of the old government-organized and operated non-governmental organizations ("GONGOS"), the Foundation for Underdeveloped Regions of China, into a more CSO-like entity with a new name (China Foundation for Poverty Alleviation) and a new attitude toward the public, including transparency, evaluation, and reorientation toward a smaller number of achievable objectives. See generally *Poverty Relief Group Lays New Foundations*, CHINA DEV. BRIEF, <http://www.chinadevelopmentbrief.com/node/215> (last visited Nov. 26, 2008).

32. For many years, there have been many organizations registered with the commercial authorities, although the 1998 regulations' creation of possibility of registering as an NCE was an attempt to abolish this practice. See Tony Saich, *Negotiating the State: The Development of Social Organizations in China*, 161 CHINA Q. 124, 134 (2000). However, this has proven unsuccessful—organizations still manage to register as commercial entities.

33. See Zhang Ye, *Chinese NGOs: A Survey Report*, in EMERGING CIVIL SOCIETY IN THE ASIA PACIFIC COMMUNITY 93, 95 (1995) [hereinafter Zhang, *Chinese NGOs*]; see also Zhang Ye, *China's Emerging Civil Society*, BROOKINGS INSTITUTION, http://www.brookings.edu/~media/Files/rc/papers/2003/08china_ye/ye2003.pdf [hereinafter Zhang, *Emerging Civil Society*].

tem.³⁴ After reform and opening-up began under Deng Xiaoping, a more sector-friendly³⁵ regulation of civil society entities began with the establishment of the Department of Social Organizations (*Shetuan Si*) within the Ministry of Civil Affairs (“MoCA”) in 1988.³⁶ It continued with the adoption of the new 1982 Constitution, which recognized the right to freedom of association in Article 35, and the General Principles of Civil Law (“GPCL”), which became effective on January 1, 1987. In the GPCL, social organizations³⁷ are grouped with government organs and public institutions as legal entities that are different from enterprises.³⁸ Subsequent to the introduction of the GPCL, the State Council issued two sets of regulations concerning CSOs: on foundations in 1988³⁹ and on social organizations

34. Details of the history of the regulation of CSOs in China can be found in Simon, *Reform of China's Laws for NPOs*, *supra* note 12, at 77.

35. Scholars point to a substantial change in emphasis regarding markets and the nonpublic economy with the onset of the reforms. See, e.g., BIN LIANG, *THE CHANGING CHINESE LEGAL SYSTEM, 1978-PRESENT 17-42* (2008). What happened with regard to CSOs is similar, but the confusion regarding the extent to which the state should continue to be involved in their operations persists three decades later. Changes in China's outlook under Deng Xiaoping emphasized market developments, and what needs to occur now is a transition to a stronger recognition of social issues. This appears to be happening, as the Conclusion points out.

36. See Zhang, *Chinese NGOs*, *supra* note 33, at 97.

37. The term “social organizations” is a socialist one and could also be found in the laws of the Soviet Union.

38. Section 2 of the “Legal Persons” chapter of the General Principles of Civil Law (“GPCL”) applies to enterprises, while Section 3 applies to SOs, public institutions, and government organs.

39. See *Jijin Guanli Banfa* (Rules on the Management of Foundations), http://www.law-lib.com/law/law_view.asp?id=5267 (last visited Nov. 26, 2008). The Rules were issued by the State Council on September 27, 1988. Foundations were recognized as a form of “social organization” because they were not specifically referred to as a type of legal person in the GPCL. The 1989 Regulation on SOs also referred to “grant-making institutions” as being within the category of SOs. The 1988 Rules on the Management of Foundations were intended to provide guiding principles only and lacked many pertinent provisions, such as delineating categories of foundations, stipulating appropriate governance structures, etc. See Carl Minzner, *New Chinese Regulations on Foundations*, 2 INT'L J. CIV. SOC'Y L. 110, 110 (2004), available at http://www.iccsl.org/pubs/04-04_IJCSL.pdf. Yang Yue, an official at MoCA, suggests that the failure to provide details about the regulation of foundations led the People's Bank of China (which was required to sign off on registration) to increase its supervision of foundations in 1995. See Yang Yue, *The Current Situation and Recent Developments in the Administration of Chinese Foundations and Their Legal Environment*, in MATERIALS OF BEIJING INTERNATIONAL SYMPOSIUM ON THE LEGISLATION OF FOUNDATIONS 4 (2002) (manuscript on file with author). Eventually, however, the People's Bank relinquished its controls as MoCA increased its capacity to oversee foundations. *Id.*

in 1989.⁴⁰ Although this first period of regulation has been described by the head of what was later called the MoCA “Department on NGOs”⁴¹ as being somewhat chaotic,⁴² it was clearly a time when the state apparatus was struggling to find a way to harness resources to address social and economic needs without losing too much control of the social/civil sector. One of the most interesting features of the legal landscape for CSOs in China is that, despite the Constitution’s guarantee of freedom of association, certain kinds of social organizations, such as alumni associations or social clubs, are expressly forbidden. According to Professor Ge Yunsong, the “Reply on Matters in the Application for Establishing Social Organizations,” issued by MoCA on October 27, 1990, specifically requires SOs to have public benefit purposes.⁴³

The resources that the state was attempting to harness by developing regulations on social organizations and foundations included donations from overseas Chinese⁴⁴ as well as donations from Chinese citizens at all levels of the economy. Indeed, in 1987, after studies of international models of citizen support for the sector had been made,⁴⁵ the State Council (Chinese cabinet)

40. The 1989 SO regulations were also quite vague and lacked many of the provisions that should be included in a modern system of rules. An official of MoCA interviewed by the author in 1996 referred to them as more of a “procedure.” See Interview with Wu Zhongze, Head of the Bureau of NGO Mgmt., Ministry of Civil Affairs, Beijing, P.R.C. (Oct. 27, 1996). They did, however, introduce the principle of dual management. *Id.*

41. After 1995, the year in which the Fourth World Conference on Women was held in Beijing, the term “NGOs” came into vogue in China. The government later referred to such organizations as “NPOs.” See generally Yan, *supra* note 1. More recently, the government itself has been referring to the organizations as “CSOs.” See *Terms of Reference, in* STUDY ON OUTSOURCING TO CSOs FOR SOCIAL SERVICES: INTERNATIONAL EXPERIENCE AND LESSONS, AND RECOMMENDATIONS FOR CHINA 1 (2008) (manuscript on file with author).

42. See Ma, *supra* note 27, at 309 (quoting Chen Jinluo, former director of the NGO Department at MoCA).

43. See Ge Yunsong, *On the Establishment of Social Organization Under Chinese Law*, 2 INT’L J. OF NOT-FOR-PROFIT L. (2000), available at http://www.icnl.org/knowledge/ijnl/vol2iss3/art_2.htm.

44. See Richard J. Estes, *Emerging Chinese Foundations: The Role of Private Philanthropy in the New China*, 4 REG. DEV. STUD. 165, 170 (1998).

45. See All China Charity Foundation, *Mr. Cui Naifu and Chinese Welfare Lottery, Welfare Lottery and Chinese Charity Cause*, <http://cszh.mca.gov.cn/article/english/newsroom/charitymagazine/200801/20080100011349.shtml> (last visited Nov. 26, 2008). One of the possibilities that had been suggested was support for charity from horse racing, as was being done in Hong Kong. The website of the Hong Kong Jockey Club states that the Club:

introduced the first "Social Welfare Lottery," which was intended to raise funds from ordinary Chinese citizens for the support of government-sponsored endeavors to meet the needs of the Chinese people.⁴⁶ This method of fund-raising was phenomenally successful,⁴⁷ but, unlike in Hong Kong, where a non-governmental entity raises the most funds for charities, this form of support concentrates power over CSOs in the hands of the city and other local governments that administer the lottery. This power is further enhanced by municipal charity foundations, which have entered the fund-raising sphere since the mid-1990s.⁴⁸

The blurring of institutional boundaries among the three different types of entities serving public needs (government organs, public institutions, and SOs) is intensified further by the practice of appointing former government officials, generally from the supervisory units (see below Section II), to leadership posts in so-called non-government organizations.⁴⁹ In addition, the most successful of China's CSOs tend to be those founded by the government, mass organizations, or former cadres.⁵⁰

While most scholars suggest that the decision to obscure the boundaries between the state and CSOs was conscious and strategic,⁵¹ others disagree.⁵² The weight of authority is carried by

[C]an trace its long tradition of donating to charitable causes back to at least 1915, but it was in the 1950s as Hong Kong struggled to cope with post-war reconstruction and a massive influx of immigrants, that this role became integral to its operation. In 1955, the Club formally decided to devote its surplus each year to charity and community projects. In 1959, a separate company, the Hong Kong Jockey Club (Charities) Ltd, was formed to administer donations. This company has in turn evolved into the Hon Kong Jockey Club Charities Trust, established in 1993.

See Hong Kong Jockey Club, http://www.hkjc.com/english/charity/charity_racing.asp (last visited Nov. 26, 2008).

46. See Wang Zhiyong, *Two Decades of China's Lottery*, <http://www.china.org.cn/english/China/222227.htm> (last visited Nov. 26, 2008).

47. *Id.* The amount raised in the past twenty years from both the welfare lottery and the sports lottery totaled approximately US\$32 billion.

48. See Vivienne Shue, *State Power and the Philanthropic Impulse in China Today*, in *PHILANTHROPY IN THE WORLD'S TRADITIONS* 332, 340-43 (Warren F. Ichman et al. eds., 1998). For more discussion on the municipal charity foundations, see *infra* Section III.

49. See Chan, *supra* note 31, at 26.

50. See Hsu, *supra* note 23, at 15; Chan, *supra* note 31, at 26.

51. See Chan, *supra* note 31, at 27; Ma, *supra* note 27, at 309; Zhang, *Chinese NGOs*, *supra* note 33, at 96-99; see generally Saich, *supra* note 32.

52. See Hsu, *supra* note 23, at 15-16 (suggesting that Xu Yongguang and other founders of the China Youth Development Foundation ("CYDF") deliberately chose the name of the organization to evoke a connection to the All China Youth League in order

those who believe that it would have been impossible to find any CSO-type entity in China in the late 1980s without a very close relationship to the party-state. Zhang Ye,⁵³ for example, argues that there was at one time an “undocumented rule” according to which one leading member of the sponsoring organization was required to be an important official in the sponsored CSO.⁵⁴ This sort of control continues today for all registered CSOs, including private foundations set up by entrepreneurs with their own wealth⁵⁵ or by corporations.⁵⁶ For example, the Narada Foundation, which was founded in 2007 and does not appear to have a sponsoring organization (meaning that it is registered directly with MoCA), has as one member of its board of trustees Ms. Yang Yue, Deputy Director of the Bureau of Administration of non-profit organizations (“NPOs”).⁵⁷

A. *Comparison to Japan*

Due in substantial part to the fact that Japan is a multi-party democracy with a robust free press, the scope of whose impact on the changes in the legal environment cannot be discounted, any comparison to Japan may seem unwarranted. In fact, scholars who researched the development of the “Specified Nonprofit Activities Corporation” (“SNPC”) law passed by the Japanese Diet (Parliament) in 1998 in direct response to the Awaji-Hanjin earthquake, suggest that opposition parties played a truly dynamic role in persuading the ruling party that reforms were needed.⁵⁸ The comparisons between Japan and China should

to “borrow some legitimacy”). Other commentators suggest that the CYDF was founded by the Youth League. See John W. Cook et al., *THE RISE OF NONGOVERNMENTAL ORGANIZATIONS IN CHINA: IMPLICATIONS FOR AMERICANS* 14 (1994).

53. Zhang Ye, former Resident Representative of the Asia Foundation in Beijing, has contributed quite a bit to discussions of the role of CSOs in China.

54. See Zhang, *Chinese NGOs*, *supra* note 33, at 99.

55. See generally *More Rich Chinese to Dabble in Charity: Research*, CHINA DAILY, Jan. 20, 2008, http://www2.chinadaily.com.cn/china/2008-01/20/content_6406800.htm (stating that the China Charity Information Center, partly sponsored by MoCA, had completed research for 2007 showing that China’s new rich were increasingly donating to their own private foundations).

56. See generally *China Southern Launches New Foundation to Assist Cash-Strapped Students*, BUSINESS WIRE, June 28, 2005, http://findarticles.com/p/articles/mi_m0EIN/is_/ai_n14702501.

57. See generally Narada Foundation’s website, <http://www.naradafoundation.org/english/board.asp?aa=3&cc=2> (last visited Nov. 26, 2008).

58. See Robert Pekkanen, *Japan’s New Politics: The Case of the NPO Law*, 26 J. JAPANESE STUD. 111, 120-36 (2000).

not, however, downplay the role that public opinion can have on small scale political change in China.⁵⁹ In addition, at the theoretical level, legal changes in Japan have had an impact on the development of legal rules and the rule of law in China. The legal rules for civil society is one area in which the Chinese are at least looking to models closer to home than, for example, Canada or the United Kingdom.⁶⁰

The similarities between the formal legal regime in China, as contrasted with Japan, are worth emphasizing to the extent of the structural elements of the Civil Code, adopted in Japan at the end of the Nineteenth Century and in Republican China at the beginning of the Twentieth Century.⁶¹ Regarding juristic persons, both Civil Codes required:

- that the permissible entities be organized for public benefit,⁶²
- that the organizers have permission from the government to set them up;⁶³ and

59. Needless to say, the Chinese blogosphere is replete with discussions about how badly the relief efforts in Sichuan were managed. The problems ranged from the needs of harnessing both the volunteer personnel and acquiring the necessary financial aid. An American journalist has summed this up in her piece on an American blog. *See generally* Posting of Lauren Hilgers to Balkinization, http://balkin.blogspot.com/2008/08/giving-in-china_11.html (Aug. 11, 2008, 12:10 EST). She suggests that “[n]ow, as the dust settles, many of those donors are starting to wonder where, exactly, their money went. Under China’s current regulations, they may never find out.” *See id.* para. 2. This is because the entire process of fund raising for charity lacks adequate transparency—a deficiency that the Charity Law seeks to remedy. *See infra* Section IV.

60. The Chinese drafting group for the Charity Law has had the recent reforms in Japan translated into Chinese. *See* Interview with Li Jian, Director, Legislative Affairs Office, Ministry of Civil Affairs, in Beijing, China (Dec. 5, 2006) (on file with author). Drawing on my long-term experience working with government officials and CSO leaders and scholars in China, it is clear that experiences in other Asian countries, including particularly those in Japan and Taiwan, counts for a good deal when it comes to possible models for reforms.

61. *See generally* Yin-Ching Chen, *Civil Law Development: China and Taiwan*, 2 *STAN. J. E. ASIAN AFF.* 8 (2002), available at <http://www.stanford.edu/group/sjeaa/journal2/china1.pdf>. Although the GPCL does not draw heavily on the Republican Civil Code, the permission requirement of that Code is reflected in the regulations adopted for SOs, foundations, and NCEs.

62. Until the *chukan hojin* or “intermediate” NPO law was adopted in 2001, all registered associations had to be for public benefit. In that year the Diet changed the situation by adopting legislation, which is now being folded into the new legal framework for all “general” NPOs. *See generally* Simon, *supra* note 20.

63. *See* Minpo, art. 34, translated as Japanese Civil Code, Act No. 89 of 1896, art. 34, available at http://www.cas.go.jp/jp/seisaku/hourei/data/CC_2.pdf (as it existed before the “Drastic Reform” of the legal regime related to public benefit organizations in 2006); *see generally* Simon, *supra* note 20.

- that public benefit foundations meet a high initial endowment requirement.⁶⁴

Moreover, one administrative feature of the system in Japan, which the Diet and the sector are now seeking to remedy, is the frequent placement of retired or just former government officials in positions of importance in the CSO.⁶⁵

Because of the party-state's continued blurring of the state and civil society, the situation in China is much more difficult to change than it was in Japan. In fact, the Japanese government itself made clear in the run-up to the 2006/2008 reforms that it needed *independent* CSOs to assist it in harnessing resources to meet social and economic needs.⁶⁶ It is unlikely that stress will be laid on a similar independence for CSOs in China, in large part because of the fear (whether real or manufactured) of releasing uncontrollable forces that could challenge the state-party apparatus.⁶⁷ On the other hand, watching a neighbor with similar strictures on CSOs created by legal structures in the Civil Code reduce these requirements in order to achieve important societal purposes may prove to be instructive for the Chinese government. If loosening the bonds binding CSOs to the state goes well in Japan, the Chinese government may decide to experiment more fully with possible ways to allow its CSOs more freedom. One way to do that is suggested in the next Section.

The developments in the decade between 1998 and 2008 with regard to the legal environment for CSOs in Japan are quite

64. See Minpo, *supra* note 63, art. 34.

65. This issue has received much attention. See generally Simon, *supra* note 20. It is also a feature of CSOs in China. See Saich, *supra* note 32, at 134.

66. The constant theme in the documents developed during the most recent reform process in Japan stresses this aspect of the need for reforms. See generally Documentary Supplement, http://www.iccs.org/pubs/Japan_Doc_Supp.pdf (last visited Feb. 19, 2009).

67. One of the rationales for not relaxing the dual management system for CSOs is the fear of the "color revolutions" experienced in Ukraine, Georgia, and other post-communist countries. See the notes of Zhu Weiguo talk at the 2003 "Beida Forum" (suggesting that this was a political decision made at the top, not one with which the MoCA personnel were necessarily in accord) (on file with author). The Beida Forum was held in March 2003, and is discussed in Simon, *supra* note 12, at 72-73. It used to be claimed that China did not want to fall apart like the Soviet Union or that it wanted to avoid the emergence of an organization like Solidarity in Poland. See Saich, *supra* note 32, at 133. This allowed officials to fend off Western suggestions that more independence for CSOs would be desirable.

significant.⁶⁸ In an immediate response to the Kobe Earthquake, the Diet (Parliament) passed the Specified Nonprofit Corporations (“SNPCs”) Act in 1998.⁶⁹ This legislation created the new legal form of SNPCs, which allows people to engage in various public benefit activities merely by registering their organizations with the local government organs.⁷⁰ In subsequent years the Diet has improved the legal environment for SNPCs while also modifying the rules with regard to the public benefit CSOs provided for in the Civil Code. Once the new 2006/2008 reforms are fully in place (after a transition period), the following changes will have been made:

- A new legal framework for “general not-for-profit corporations” will be provided for in the Civil Code of Japan.⁷¹
- The present general public benefit corporations (“PBCs”) will fall under the new category of not-for-profit corporations as will the mutual benefit form of organization (*chukan hojin*),⁷² and those two current legal forms will be eliminated.⁷³
- The new “General Not-for-Profit Association and Foundation Act” (General Act) contains provisions that will be incorporated in the Civil Code to apply to all organizations that seek to become legal entities irrespective of whether they wish to apply for recognition of “charitable status.”⁷⁴

Under the new Civil Code provisions, there will be a simpli-

68. See generally Simon, *supra* note 20. This discussion draws extensively on the analysis in that article.

69. See generally *Law to Promote Specified Nonprofit Activities*, CIV. SOC’Y MONITOR, No. 8, Dec. 2003, available at http://www.jcie.or.jp/civilnet/monitor/npo_law.html.

70. See *id.*

71. There are several issues about overlapping coverage of the new laws with the SNPC legislation, but they are not explored here. See generally Simon, *supra* note 20.

72. The *Chukan Hojin Ho*, Law No. 49 of 2001, was adopted June 15, 2001, effective April 1, 2002.

73. The third piece of legislation passed in May 2006 will require amendments to the Civil Code and 300 other pieces of legislation. See Morihisa Miyakawa, *An Outline of Three PBC Related Reform Laws*, 4 INT’L J. CIVIL SOC. L. 64, 68 (2006), available at <http://www.iccs.org/pubs/06-10-IJCSL.pdf>. The 2001 legislation on *chukan hojin* will be repealed and all associations and foundations, whether for public or mutual benefit, will easily be allowed to register themselves as legal entities without any permission or approval required. This is significant because it will for the first time bring the Japanese Civil Code into line with, e.g., the German Civil Code in regard to associations and foundations.

74. See *id.* at 66.

fied legal process for incorporation, making it entirely non-discretionary and applying standards similar to those for for-profit corporations. Thus, the General Act permits CSOs to apply for registration at the local Registry Office, after a notary has inspected the corporate documents for conformance with the Act.⁷⁵

A new application system for not-for-profit corporations that seek to be classified as “authorized public benefit corporations” or APBCs⁷⁶ has been introduced and will be tested during the transition period. This status will be determined by a “Public Benefit Corporation Commission” (*koeki nintei tou iinkai*) (“PBCC”).⁷⁷ The Commission has been established in the Cabinet Office,⁷⁸ and it includes a mix of academics, scholars, and sector professionals.⁷⁹

Similar “councils”⁸⁰ are established to carry out the authorization and oversight functions at the local prefectural level in addition to the one at the national level.

The new legislation contains strict rules dealing with gov-

75. *See id.*

76. Although the unofficial translation provided on the internet (at <http://www.cas.go.jp/jp/seisaku/hourei/data/AAPII.pdf>) refers to these organizations as “public interest” corporations, I intend to continue using the term “public benefit,” as it is more consistent with the term used in other countries to designate organizations serving the public. The Japan Association of Charitable Organizations (“JACO”) had recommended that all foundations be required to be public benefit foundations under the new system, but that view did not prevail. *See* Ohta, *supra* note 21, at 85-86. With the reforms in place, the Japanese situation will be much like that in Germany, where private interest foundations (*Stiftungen*) are permitted. According to a recent study, half the countries in Europe require foundations to have a public benefit purpose, while the other half permit them to have any lawful purpose. *See* THE EUROPEAN FOUNDATION: A NEW LEGAL APPROACH 62 (Klaus J. Hopt et al. eds., 2006). This option is not being suggested for China, however.

77. This is variously also translated as “Committee.” *See, e.g.,* Miyakawa, *supra* note 73, at 64.

78. Technically, the authorizing administrative agency is the Prime Minister’s Office itself. *See* Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations, Law No. 49 of 2006, art. 3 (unofficial translation available at <http://www.cas.go.jp/jp/seisaku/hourei/data/AAPII.pdf>). However, that office delegated the authority to the Commission pursuant to Article 59, Law No. 49 of 2006.

79. There are seven members of the Commission; *see infra* for a discussion of the role of the Commission as proposed for China.

80. The “councils” are intended to assist the prefectural governors, who are technically the authorizing administrative agencies at the local level.

ernance, oversight, and it addresses various technical problems inherent in the PBC System prior to the reforms.

In summing up the reforms, it is important to note that the new Japanese system fully respects the freedom of association, while at the same time creating strict scrutiny for organizations that seek to be charities or public benefit entities. This is the type of fundamental reform that this Article proposes should be adopted in China.⁸¹

II. MAKING THE EXISTING REGULATIONS FOR SOS AND FOUNDATIONS MORE USER-FRIENDLY

A. General

The first step in the proposed integrated reform process would be to make it significantly easier to form SOs and to lighten the burdens on the formation of foundations. It should be noted at the outset that the current rules that govern the creation of virtually all CSOs in China, apart from the reference to them in the GPCL, are administrative regulations. The only actual laws, passed by the National People's Congress ("NPC"), that affect CSOs are the "Public Welfare Donations Law" ("PWDL"),⁸² the tax laws,⁸³ and the Trust Law of the People's Republic of China (which governs charitable trusts).⁸⁴

The PWDL regulates: which activities are considered "public

81. The type of accountability and oversight required for public benefit CSOs would be required under the proposed Charity Law. See discussion *infra*.

82. So-called "donative" contracts are also regulated by Chapter 11 of the 1999 Contract Law of the People's Republic of China, available at <http://www.chinaiprlaw.com/english/laws/laws2-11.htm>.

83. For a pre-2008 description of the tax laws and their applicability to CSOs, see generally LEON E. IRISH, JIN DONGSHENG, & KARLA W. SIMON, CHINA'S TAX RULES FOR NOT-FOR-PROFIT ORGANIZATIONS (2008), available at http://siteresources.worldbank.org/INTCHINA/1503040-1122886803058/20601839/NPO_tax_En.pdf. The changes made in 2008 are discussed *infra* Section III.

84. The Trust Law (*Minpo*) of the People's Republic of China was promulgated by the Standing Committee of the Ninth National People's Congress of the People's Republic of China on April 28, 2001, effective Oct. 1, 2001. For a discussion of the law and its history and usage, see Charles Zhen Qu, *The Doctrinal Basis of the Trust Principles in China's Trust Law*, 38 REAL PROP. PROB. & TR. J. 345, 346-57 (2003); see also Zhenting Tan, *The Chinese Law of Trusts: A Compromise Between Two Legal Systems*, 13 BOND L. REV. 224, 224 (2001), available at <http://www.austlii.edu.au/au/journals/BondLRev/2001/9.html#Heading78>. The author points out various differences between the Welfare Donations Law ("PWDL") and the Trust Law with regard to charitable trusts.

welfare” activities⁸⁵ (the activities are generally the same as those listed in the proposed Charity Law,⁸⁶ and I will use the term “public benefit” to encompass both);⁸⁷ relationships between donors and recipients;⁸⁸ ways in which donees should use and manage donated property;⁸⁹ and what legal responsibilities apply to donors and donees.⁹⁰

The tax laws describe the tax benefits that are available to donors and CSOs.⁹¹ The Trust Law provides that “charitable”⁹² trusts may be formed, but it does not appear to have been used as yet.⁹³

Other aspects of CSO regulation have until now been accomplished by regulations issued by the State Council (Cabinet), after consultation with the Ministry of Civil Affairs.⁹⁴ Only recently has the Ministry actually been tasked with developing its own legal drafting capacity and with setting up a Legislative Affairs Department.⁹⁵ The Department’s members are now working closely with the State Organs Law and Administrative Law Department of the Legislative Affairs Commission of the Standing Committee of the National People’s Congress to write new legislation, including the Charity Law discussed in Section IV.⁹⁶

85. See PWDL, *supra* note 18, art. 3.

86. See *infra* Section III.

87. The terms used in Chinese are different. “Public welfare” is *gong yi*, while “charity” is *cishan*. The broad interpretation of the definitions is, however, essentially the same and translates best into English terminology as “public benefit.” For further discussion of the meaning of and relationship between the two terms, see *infra* Section IV.

88. See PWDL, *supra* note 18, arts. 1, 9-15.

89. See *id.* arts. 16-23.

90. See *id.* arts. 28-31 (Number 4 refers to preferences that should be made available to organizations engaging in public welfare activities, but it does not grant such benefits on its own; they are available under other legislation, such as tax legislation).

91. See *infra* Section III.

92. The term used in Chinese is *gong yi*.

93. This information was disclosed during conversations with Chinese law professors. The development of the Trust Law was influenced by the creation of such laws in Japan and Taiwan, as well as Hong Kong. Even though these countries are within the civil law tradition, they have decided to use common law instruments such as the trust.

94. MoCA has been referred to as a “weak” agency within the Chinese government. It does not oversee important economic issues, which reduces its status.

95. Wang Lai Zhu, the person who formerly headed this department was not a lawyer, but a social worker. The new director is Wang Jianjun who was former Deputy Director of the Personnel and Education Department of MoCA, and presumably is also not a lawyer.

96. They also interact with academics, such as Dr. Jin Jinping, Associate Professor of Law at Peking Law School, and foreign academics such as myself.

Prior to the addition of a legal drafting team to the Ministry, regulations that were proposed by MoCA went to the State Council for approval; it was not always willing to promulgate the regulations in exactly the form that MoCA had expected.⁹⁷

Students of the current legal environment for CSOs in China know how difficult it is to form either an SO (which is the Roman law legal form of association, with a socialist law overtone) or a foundation (again, a Roman law legal form). Both forms of organization require “dual management” in China.⁹⁸ This means that each organization, before it is registered at the local or national level office of MoCA, must have a supervisory unit (*yewu zhuguan danwei*)⁹⁹ approve (*shencha*) its registration. The supervisory unit is also responsible for oversight of the organization’s finances, etc.

B. Social Organizations

In practice the dual management requirement means that many SOs remain unregistered because the potential supervisory bodies will not agree to engage in overseeing these organiza-

97. This was true, for example, with respect to the foundation regulations, where the Ministry had sought to get rid of dual management at least for some foundations, but the State Council rejected this attempt to loosen the reins. See Minzner, *supra* note 39, at 110-12.

98. For SOs, see Shehui tuanti dengji guanli tiao li [Regulations on Registration and Management of Social Organizations] arts. 27-28 (Sept. 25, 1998) (P.R.C.) translated in CHINA DEV. BRIEF, available at <http://www.chinadevelopmentbrief.com/node/298> [hereinafter SO Regulations]. An outline of the content of regulations that govern formation and management of SOs can be found in Ge, *supra* note 43. For foundations, see Jijinhui guanli tiao li [Regulations on Management of Foundations] (promulgated by the State Council, Mar. 8, 2004, effective June 1, 2004), ST. COUNCIL GAZ., translated in CHINA DEV. BRIEF, available at <http://www.chinadevelopmentbrief.com/node/301> [hereinafter Foundation Regulations]. Analysis of the foundation regulations can be found in Minzner, *supra* note 39. For an analysis in German, see generally Markus Hippe & Knut B. Pissler, *Einführung in das neue Stiftungsrecht der VR China* [Introduction to the New Foundation Law in the PRC], 4 ZEITSCHRIFT FÜR CHINESISCHES RECHT [JOURNAL OF CHINESE LAW] 341 (2004).

99. See SO Regulations, pt. 3, art. 9; Foundation Regulations, pt. 2, art. 9. Markus Hippe and Knut B. Pissler state that Zhu Weiguo, a high-ranking official in the Legislative Affairs Commission of the Standing Committee of the National People’s Congress (“NPC”), in his through-going and semi-official “analysis” of the foundation regulations referred to the “supervisory unit” by its colloquial name—“mother-in-law!” Hippe & Pissler, *supra* note 98, at 342 n.16 (quoting Zhu Weiguo, *Analysis of the Regulation for the Management of Foundations* (*Zhongguo fazhi xinxi wang*)), <http://www.chinalaw.gov.cn> (Chinese) (last visited Feb. 19, 2009) (German text is translated by author)).

tions.¹⁰⁰ There appears to be no way to force these units to act on a request that they become a sponsor—the agreement required is not clearly a license that could come within the 2004 Administrative Licensing Law.¹⁰¹ However, the failure to act may be the subject of judicial review.¹⁰² Obtaining approval for registration from government agencies or mass organizations that are sought as sponsoring organizations does not appear to require them to act at all—the granting of permission is entirely discretionary on their part.¹⁰³ Indeed, because it is not clear what documents need to be submitted to obtain sponsorship by an appropriate entity,¹⁰⁴ potential sponsors can seemingly drag out the process as long as they wish.¹⁰⁵

The requirement for dual management thus allows the government to manipulate the number of organizations that can be registered in any given locality. In addition, the SO Regulations specifically provide that the Ministry of Civil Affairs may deny registration if “in the same administrative area there is already a social organization active in the same (xiang tong) or similar (xiang si) area of work, there is no need for a new organization to be established.”¹⁰⁶ According to Professor Ge, official documents describe this provision as aiming to avoid a situation in which there might be too many organizations, “developing without planning,” and possibly causing “malicious competition” among organizations.¹⁰⁷ It is thus entirely possible that the pro-

100. See Chan, *supra* note 31, at 25.

101. See generally Administrative Licensing Law of the People's Republic of China (promulgated by the Standing Comm. of the Tenth Nat'l People's Congress of the People's Republic of China, Aug. 27, 2003, effective July 1, 2004); Lester Ross, *Rethinking Government Approvals The New Administrative Licensing Law*, CHINA L. & PRAC. 30-32 (Wilmer Cutler Pickering, LLP (Beijing, China) June 2004).

102. See generally Ge, *supra* note 43. Ashley and He cite to one instance in which a person attempting to form a SO did go to court to force the Ministry of Health to act. See Ashley & He, *supra* note 29, at 30-32 (referring to the case of Dong Jian and the Eye Care Association. The result of the litigation has thus far given Dong no relief, but he vows to continue to litigate the question).

103. From the Eye Care Association litigation, it does appear, however, that they must definitively give a reason if they refuse to become a sponsor (the reason given in that case was that there was already an association carrying out the purposes for which Dong Jian's organization was sought to be established). See *id.*

104. See generally Ge, *supra* note 43.

105. See generally Ashley & He, *supra* note 29.

106. See SO Regulations, *supra* note 98 (this was the provision eventually cited in the case of the Eye Care Association).

107. See generally Ge, *supra* note 43 (citing THE INTERPRETATION OF THE REGULA-

cess of attempting registration may lead government officials to establish an SO, so as to make it impossible to register one that is not tightly tied to the government.

This attitude toward social organizations reflects historical concerns about unregulated social movements. But it also fails to do two things: it does not give Chinese citizens access to the constitutionally protected freedom of association to form all kinds of associations; and it inhibits the establishment of responsive associations that might be formed to respond to natural disasters.

As to the freedom of association, the important lesson learned in Japan is that a modern Civil Code system must allow mutual benefit CSOs to gain legal existence. This was accomplished in 2001, when the special legislation for *chukan hojin* (“intermediary” corporations) was enacted.¹⁰⁸ It was then carried into the Civil Code by the new “General Act,” allowing free establishment of all organizations that do not seek public benefit CSO status.

As to the latter, the informal networks formed to respond to the Sichuan Earthquake are but one recent example of the need for an easier registration process allowing access to a legal form.¹⁰⁹ As the media coverage both inside and outside China suggests, the government was quick to recognize that it needed

TIONS ON THE REGISTRATION AND MANAGEMENT OF SOCIAL ORGANIZATIONS AND THE INTERIM REGULATIONS ON THE REGULATION AND MANAGEMENT OF PRIVATE NON-ENTERPRISE UNITS 36 (The Dep’t of Politics and Law of the State Council & The Bureau of Admin. of Non-governmental Orgs. of the Ministry of Civil Affairs eds., 1999)).

108. See generally Simon, *supra* note 20.

109. MoCA has accomplished some good with its decision to allow the local experiments with a one-stop registration process for foundations and SOs. It appears that this has already begun for SOs, although a recent report in a Hong Kong newspaper has not been verified. The report says that in Guangdong (including Shenzhen), Shangdong, and Jiangsu, certain grassroots charity organizations are exempted from the “mother-in-law” requirement and that MoCA would be alone responsible for both supervision and registration. See E-mail from Pengyu He, Associate, Davis Polk & Wardwell, LLP, to Karla Simon, Professor of Law, Columbus School of Law, Catholic University of America (Dec. 12, 2008) (on file with author); e-mail from Pengyu He, Associate, Davis Polk & Wardwell, LLP, to Karla Simon, Professor of Law, Columbus School of Law, Catholic University of America (Dec. 29, 2008) (on file with author). As suggested earlier (*supra* note 57), the Narada Foundation appears not to have a mother-in-law and is registered directly with MoCA. See also Sun Weilin, Head of National Bureau of NGO Management, Zai quan guo min jian zu zhi guan li gong zuo shi pin hui shang de jiang hua [Speech at the National NGO Management Conference] (Jan. 31, 2007), <http://www.chinanpo.gov.cn/web/showBulletin.do?id=25790&dictionid=3500&caid=350012>.

to rely on the efforts of CSOs to help coordinate earthquake relief. In an article published by *China Elections*, the favorable comments included a quote from Ouyang Song, a senior Communist Party official, who called the role of NGOs responding to the earthquake “active and orderly,” and a suggestion by “Guo Hong, a Chengdu-based sociology professor, saying that ‘the government will not automatically be more open towards NGOs’ but [the quake] has given them an opportunity to see the power of the grass roots and [they] might start trying to establish a system for how NGOs can operate.”¹¹⁰

Going in that direction would mean that the dual management system would be abolished, thus breaking the logjam that now confronts independent SOs seeking registration in China. Whether the earthquake experience will result in a loosening of the restrictions remains to be seen, but the promised new version of the SO regulations provides the government with an opportunity to experiment in allowing SOs to be formed without “permission.” This solution would be similar to the recent legal changes in Japan, similarly preserving the fundamental freedom of association, which the Chinese constitution guarantees the Chinese people. Only those SOs that choose to be and are defined as charity organizations, would be subject to strict scrutiny under the new Charity Law. If this were to be done, the new Charity Law would contain the provisions to accomplish the type of organizational integrity and the institutional oversight necessary for organizations operating for public benefit.¹¹¹

C. Foundations¹¹²

The 2004 foundation regulations provide for two different types of organizations—private foundations (those formed by private individuals or businesses) and public-fundraising foundations. The latter, earlier recognized by the 1989 SO regulations as SOs,¹¹³ would appear to be the local fund-raising foundations discussed in detail by Vivienne Shue.¹¹⁴ As her book chapter

110. See generally Kolhammar, *supra* note 4.

111. See *infra* Section IV.

112. One of the salutary changes in the new regulations is that they permit foreign foundations to register representative offices under certain conditions. See Minzner, *supra* note 39, at 110-11.

113. See generally SO Regulations, *supra* note 98.

114. See Shue, *supra* note 48, at 340-43.

points out, these organizations began to be formed in the mid-1990s as popular (*minjian*) charities, but they had all the attributes of GONGOs.¹¹⁵ Professor Shue recounts how many Chinese people were even then becoming weary of fund-raising drives being conducted by these charities to raise funds for projects that were related to goals of the state, noting, however, that

[I]t is also clear that a very large proportion of what is regarded as legitimate charity work in China today is being carried out by institutions organized nationally and staffed throughout the country by the party-state itself.¹¹⁶

The former kind of foundation is new and is intended to make it possible for wealthy individuals and rich corporations to form their own entities to carry out charitable activities. There has clearly been a positive response in that regard, as the giving statistics from 2007¹¹⁷ and press reports regarding new foundations indicate.¹¹⁸

Although the dual management requirement is inhibitive of the formation of foundations, I have no quarrel with the notion that they must be public benefit organizations. Thus, making them subject to the additional scrutiny that the Charity Law will provide for public benefit CSOs seems appropriate (although “triple management” should in no event be allowed!).¹¹⁹ In addition, the regulations appear to permit the Ministry of Civil Affairs to act as the registering and oversight agency with regard to large national private foundations,¹²⁰ and the experience of the Narada Foundation offers proof that MoCA will assume this role.¹²¹ The language of the regulations also opens the possibility that as a practical matter MoCA may not necessarily enforce the dual management requirement of the 2004 regulations with regard to smaller foundations when it chooses not to.

On the other hand, the fact that foundations are required to have high endowments is something that should be reconsid-

115. She cites to discussions with officials in Shanghai and Qingdao with regard to the municipal charity foundations in their cities. *See id.* at 340-42.

116. *Id.* at 340.

117. *See supra* note 16.

118. The 2004 regulations have spurred the development of foundations based on enterprises or individual wealth. *See, e.g.,* Narada Foundation, *supra* note 57.

119. The possibility is discussed *infra* Section IV.

120. *See* Minzner, *supra* note 39, at 112 n.5.

121. *See generally* Narada Foundation, *supra* note 57.

ered. If they are national private foundations, they appear to be expected to have twenty million yuan (US\$292,000) in permanent endowment.¹²² In addition, local private foundations that do not engage in fund-raising are expected to have two million yuan (US\$29,200) in permanent endowment. As to fund-raising foundations, the local ones are expected to have four million yuan (US\$58,400) in permanent endowment, which is increased to eight million yuan for the national ones (US\$116,800).¹²³ These thresholds are very high for Chinese circumstances, in particular for the fund-raising foundations.

III. MAKING PUBLIC FUND RAISING EASIER

During 2007 there were two important developments that should enhance the fiscal framework for China's CSOs in ways that are designed to increase both individual giving and corporate social responsibility ("CSR") while also promoting poverty alleviation, social cohesion, and economic development in the country. These included changes in tax legislation and tax procedures. In addition, in 2008 the Ministry of Civil Affairs upgraded its operations dealing with charity statistics and other charity activities from a semi-independent "bureau" to a Ministry Department.¹²⁴ Unfortunately, the new tax rules regarding fund raising have yet to be fully implemented.¹²⁵

A. Background

In 2003, the World Bank and the Ministry of Civil Affairs commissioned the International Center for Civil Society Law ("ICCSL") and a Chinese expert who works for the Taxation Science Research Institution to produce a study of the procedural and substantive rules regarding the tax benefits for charity and charitable giving in China.¹²⁶ The project was supported by the Ministry of Finance ("MoF") and the State Administration of

122. See Minzner, *supra* note 39, at 112 n.5.

123. See Foundation Regulations, *supra* note 98, § 8.2.

124. See generally *China Adds Government Department for Charity Activities*, PEOPLE'S DAILY ONLINE (PRC), Sept. 11, 2008, <http://english.people.com.cn/90001/90776/90785/6498060.html> (citing the Xinhua Official News Agency) [hereinafter *China Adds Government Department*]; see also *infra* Section IV.

125. See generally IRISH, JIN, & SIMON, *supra* note 83.

126. *Id.*

Taxation (“SAT”), and resulted in a report,¹²⁷ published in 2004, which will be referred to as the Tax Report in the following discussion. The Tax Report contains thirty two recommendations, nineteen of which are substantive and the remainder procedural. The recommendations were aimed at fundamentally restructuring the fiscal rules governing charity and giving to charity. They are beginning to be implemented, as several of the recent changes in the fiscal rules reflect the proposals that were made.¹²⁸

1. Changes in Tax Law

In March 2007, the NPC adopted a complete overhaul of China’s Enterprise Income Tax (“EIT”); the new EIT became effective on January 1, 2008. The new tax system eliminates the differences in tax treatment between foreign and domestic companies investing in China.

The significant change in this context is that the new EIT permits the same percentage limitation (twelve percent) on the charitable contribution deduction for both foreign and domestic companies.¹²⁹ This represents an increase from three percent to twelve percent for domestic companies. The language of Article 9 of the new EIT reads as follows: “Expenditure incurred in connection with donations for public interest may be deducted when computing taxable income if it does not exceed 12% of the year’s total profits.”¹³⁰

The upper limit on donations by individuals remains at thirty percent of income, which is a fairly generous amount by international standards.¹³¹

127. *Id.*

128. The timing of the changes reflects the influence of the report. See Press Release, Ministry of Foreign Affairs of the People of China, China Considers Tax Breaks on Charitable Donations (May 30, 2006), <http://www.china-embassy.org/eng/xw/t255559.htm>.

129. See Enterprise Income Tax Law (promulgated by Decree No. 63 of the President of the People’s Republic of China, Mar. 16, 2007, effective Jan. 1, 2008) and Implementation Rules of the People’s Republic of China (promulgated by Decree No. 512 of the State Council of the People’s Republic of China, Dec. 6, 2007, effective Jan. 1, 2008) (translated in and available at http://www.deloitte.com/dtt/cda/doc/content/cn%28zh-cn%29_tax_EITLawImpRulesPRCbyDeloitteChina_190308%287%29.pdf).

130. *Id.*

131. For example, the United States allows a deduction of up to fifty percent of adjusted gross income for cash donations to “public charities.” See 26 U.S.C. § 170(b)(1)(A) (1954).

Despite these favorable developments, there have been some indications that at least one of the important recommendations of the Tax Report has not been followed. This was the suggestion that CSOs not be taxed on their passive investment income (interest and dividends earned on investments). One of the important sources of funding for charities and other CSOs is the revenue they receive from their investments. With respect to Chinese foundations, for example, the high permanent capital requirements discussed earlier will end up producing significant interest income for a foundation in the course of any given year. If this income is to be taxed, as anecdotal evidence suggests it may be under the EIT,¹³² the amounts available for actual charitable work are commensurately reduced. According to one source, the SAT has taken this issue under advisement and may soon release new policies with regard to tax exemption of revenues earned on funds held by CSOs.¹³³ A change to reflect the recommendation in the Tax Report would be welcome.

2. Changes in Procedures

In January 2007 MoF and SAT issued a Notice entitled: "On the Policies and Relevant Management Issues concerning the Pre-tax Deduction of Public Welfare Relief Donations."¹³⁴ The procedures outlined in the Notice are effective from January 18, 2007, but it is unclear to what extent they have been implemented.¹³⁵

132. See Wang Biqiang, *A Taxing Time for China's Non-Profits*, THE ECONOMIC OBSERVER ONLINE, Feb. 19, 2008, http://www.eo.com.cn/ens/biz_commentary/2008/02/19/92615.html.

133. See *id.* As of this writing no new policies have been announced.

134. *Notice of the Ministry of Finance and the State Administration of Taxation on the Policies and Relevant Management Issues concerning the Pre-tax Deduction of Public Welfare Relief Donations*, No. 6 of the Ministry of Finance, Jan. 18, 2007, http://www.icnl.org/knowledge/news/2007/3-02_ChinaPubWelfEng.pdf [hereinafter *Notice*].

135. There was a marked increase in charitable giving in 2007, as reported by the Zhongmin Charity Donation Information Center and the Charity Coordination Office of China's Ministry of Civil Affairs in February 2008. See generally Ministry of Civil Affairs Charity Report, *supra* note 16.

This increase is probably not due to an increase in the number of charities to which contributions could be made directly, but rather to increased awareness about charitable giving and to the creation of some new private foundations. For example, the report specifically mentions government promotion of charitable giving as being significant. With respect to giving after the Sichuan Earthquake, the Ministry of Finance ("MoF") and the State Administration of Taxation ("SAT") jointly issued a circular *Caishui* [2008] No.62 ("Circular 62") dated May 19, 2008, addressing various tax

- a. The Notice clarifies the following issues with regard to qualification of organizations to receive tax deductible contributions and procedures for qualification.

Tax deductible donations may be made to all public “welfare social associations or foundations established upon approval of the department of civil affairs of the State Council.”¹³⁶ After several years of permitting deductions only if donations were made to pass-through organizations, such as the China Charity Federation and the Red Cross Society,¹³⁷ the Government has decided to make the situation easier for donors. On the other hand, the new procedures for qualifying the organizations that are permitted to receive tax deductible contributions will obviously take time to implement.¹³⁸

In order to qualify as a public welfare organization to which such deductible contributions can be made, there must be a “confirmation of the public finance and taxation authorities” that the organization so qualifies. This confirmation will be made by the appropriate level MoF and SAT officials.¹³⁹

In order to be confirmed as such an organization, the CSO must apply for recognition. It must show that, among other things, it

- Is non-profit;
- Is established and managed consistently with the law;
- May not distribute any surplus upon dissolution or termination,¹⁴⁰

treatments for those quake-affected enterprises and individuals. Circular 62 also broadly addresses the tax treatments of charitable donations made by enterprises and individuals. It appears not to add anything to the existing law and it specifically does not suggest that more charities than the enumerated ones would be eligible to issue receipts. See generally Price Waterhouse Coopers, *China Tax Treatments for Charitable Donation*, Issue 6, May 2008, available at http://www.pwccn.com/home/eng/chinatax_news_may2008_6.html#sub_1.

136. Notice, *supra* note 134, § I.

137. Thirty-two organizations were held to qualify as pass-throughs, and were designated as such in regulations issued by MoCA. These included such GONGOs as the Chinese Red Cross, the China Charity Federation, the China Youth Development Foundation, etc.

138. When this actually is realized, it will also implement a provision in the PWDL, which states in Article 9 that those eligible to be donors “may choose to donate to any public welfare social organization. . . .” See PWDL, *supra* note 18, art. 9. On the other hand, I view it as unlikely that the procedure will be implemented in advance of the enactment of the Charity Law.

139. Notice, *supra* note 134, § I.

140. There is a curious statement with regard to current earnings, which says that

- May not engage in business activities unrelated to its public welfare purposes;
- Has an oversight body that is not “aimed at making private profits”;¹⁴¹ and,
- Has a sound financial and accounting system.¹⁴²
- The organization must submit the following in order to qualify for recognition:
 - An application;
 - The document approving its registration; and,
 - Its charter.¹⁴³

The new rules reflect several of the recommendations in the Tax Report.

- b. The Notice also clarifies how an organization must handle the donations it receives and how it deals with its donors.¹⁴⁴

“No donor may participate by any means in the distributions of the assets of [a qualified] organization, nor may it/he have ownership to such assets.”¹⁴⁵

“[The] non-profit public welfare social associations and foundations, as well as the people’s governments at or above the county level and their departments that have the eligibility for donation-based pre-tax deductions shall use the public welfare relief for education, civil affairs, other public welfare undertakings, or for the districts that suffer from natural disasters or the poverty-stricken districts.”¹⁴⁶

The organizations must “separately use the vouchers for public welfare relief donations as uniformly printed under supervision of the central or provincial public finance department according to the financial affiliation, and affix their respective

an organization must only meet this test: “proceeds and operational surplus are *mainly* used for the activities aimed at the purposes for its creation.” *Notice, supra* note 134, § II(4) (emphasis added). If that means that such proceeds may be invested but that they are not permitted to be distributed, then the organization would be more like a “typical” charitable organization. There should be more clarity about the intention of the specific terminology used in the Notice.

141. *Notice, supra* note 134, § II(8). This appears to create a rule that members of the board must be volunteers and thus to establish a minimal conflict of interest rule.

142. *See id.* § II(7).

143. *See id.* §§ III(1)–(3).

144. These add to the PWDL requirements and deal principally with different issues.

145. *Notice, supra* note 134, § II(9).

146. *Id.* § IV.

special financial seals; and shall issue receipts if any individual asks for it for his donations.”¹⁴⁷

- c. The Notice also clarifies what a donor must do in terms of claiming a deduction on its tax return.

Under the new rules,

- The donor must submit along with his/its tax return:
- The certification by the authorities of the donee organization;
- The receipt received from the donee organization;¹⁴⁸ and,
- “Other materials as required to be submitted.”¹⁴⁹

This system, when it is finally implemented, will go a long way toward making it easier for smaller sized and more independent charity organizations to fundraise. It will certainly reduce the monopoly on fundraising currently held by the large government related charities and the municipal charity foundations.

What these changes in the tax laws do not do, however, is detail the ways in which charity CSOs obtain licenses to engage in public fundraising; and, it seems that these issues will be dealt with in revisions to the PWDL and the draft Charity Law. Article 24, Paragraph 2 of the draft Charity Law states that only organizations with a “[c]ertificate of the certification for charitable organizations” may engage in fundraising activities from the general public (*shehui gongzhong*).¹⁵⁰ This does not apply “if laws or administrative regulations provide otherwise.”¹⁵¹ Limiting public fund raising in this manner gives MoCA control over the organizations that raise money from the public. This should generally be seen as an important consumer protection, and thus it would be important to enact similar rules in the final Charity Law.

The various other rules with respect to permits for fundraising in the draft Charity Law (Articles 26-27) and the rules with respect to public fund raising (Article 28) are, however, not de-

147. *Id.* § V.

148. Article 16 of the PWDL requires the donee organization to furnish the receipt. See PWDL, *supra* note 18, art. 16.

149. *Notice*, *supra* note 134, § VI.

150. Charity Law Comments, *supra* note 7, at 23.

151. Article 24(2) also addresses the issue of a license but without complete specificity. See *id.*

tailed enough to protect the public at the present time. While Articles 26 and 27 of the draft outline the licensing procedure: “certified charitable organizations” must apply at the MoCA offices of the people’s governments above the county level, there is no clarity as to what information will be required for a license, etc. In addition, it is important to note that in times of natural disaster, the need for a license may inhibit some fundraising—this may prove to be problematic if there are no organizations that have sufficient public trust to collect and disburse the massive funds needed in cases like the one presented by the Sichuan Earthquake. It will be important to put the Charity Law in place quickly so as to allow more independent CSOs to obtain charity status and fundraising licenses.¹⁵²

IV. DEVELOP THE CHARITY LAW IN A WAY THAT ENHANCES THE “PRIVATIZATION” OF CHARITY IN CHINA

It is increasingly important that the proposed Charity Law be passed as soon as possible, and that could happen as early as next year if the political situation warrants its passage.¹⁵³ Although charity had become a significant issue in China towards the end of the last century,¹⁵⁴ the importance of charitable orga-

152. An unofficial organization, Bull Blog in Sichuan, was alleged to have raised money for quake victims illegally, but it later was able to prove that it had collected and paid it all for charitable purposes. See generally Qin Xudong, et al., *Quake Shakes Official Charities in China*, CAIJING MAGAZINE, June 30, 2008, <http://english.caijing.com.cn/2008-06-30/100072278.html>.

153. An email from Pengyu He suggests that the timeline was thought to be earlier as of March 2008. Referring to a Chinese news article on the MoCA website, available at <http://www.mca.gov.cn/article/zwgk/mzyw/200803/20080300012469.shtml>, he states: “This news piece [from the MoCA website] does not have much substance, but only stated that the new charity law is still being drafted and hopefully will be presented to the State Council for review and for public comments by the end of the year of 2008.” E-mail from Pengyu He, Associate, Davis Polk & Wardwell, LLP, to Karla Simon, Professor of Law, Columbus School of Law, Catholic University of America (Oct. 20, 2008) (on file with author). Confirmation of this time horizon was obtained from a MoCA official in November; in an email, Chen Yimei confirmed a statement by Li Jian (Director in the Legislative Affairs Bureau of MoCA) that the draft will be submitted to the NPC in 2009. Chen also says “it’s hard to say what time it will become a law.” Email from Chen Yimei, Ford Foundation Program Officer, to Karla Simon, Professor of Law, Columbus School of Law, Catholic University of America (Nov. 27, 2008) (on file with author).

154. The development of the charity lottery and municipal charity foundations is indicative of this trend. See Wang Zhiyong, *Two Decades of China’s Lottery*, CHINA.ORG.CN, Aug. 27, 2007, <http://china.org.cn/english/China/222227.htm>. On the other hand, what seems to have happened in the early years of the twenty-first century is the recog-

nizations for China's development became increasingly prominent after Premier Wen Jiabao announced in 2005 that the government would seek to work with charity organizations.¹⁵⁵ The Ministry of Civil Affairs was charged with developing legislation to regulate the activities of charitable organizations.¹⁵⁶ Drafting the legislation began in earnest in 2006, with the publication of a first draft in September;¹⁵⁷ the contents of the law are discussed in more detail below. This new attitude toward the sector reflects one of the suggestions made in the 2004 Tax Report, which encouraged the party-state to address the important issue of better distinguishing between public benefit CSOs and others.¹⁵⁸

Administrative recognition of the need to manage charity affairs in a more integrated way prior to the enactment of the legislation came first in 2007, when the ministry established an office for the coordination of charity activities.¹⁵⁹ Following the Sichuan earthquake, a new department to promote charity and social welfare was set up within MoCA on September 11, 2008, according to a report published in the People's Daily Online.¹⁶⁰ This new department, which takes over the functions of the Charity and Donation Information Center, launched in February 2007,¹⁶¹ will deal with the welfare lottery, charity activities, donations, and welfare projects for the elderly, disabled people, and children.¹⁶² The department will draft rules¹⁶³ on volunteer af-

inition of the need to encourage private citizens and businesses to set up their own foundations (after the promulgation in 2004 of the new foundation regulations). See Xinhua News Agency, *Charities Turn to Private Sector*, CHINA.ORG.CN, Jan. 22, 2008, <http://www.china.org.cn/english/China/240235.htm>.

155. See Wen Jiabao, Premier, People's Republic of China, Report to the Third Session, 10th National People's Congress, Report on the Work of the Government, The Master Work Plan for 2005, available at <http://www.10thnpc.org.cn/english/2005lh/122817.htm#2>.

156. See Draft of 2006-9-15 and discussions with the officials of the Legislative Affairs Office, Ministry of Civil Affairs (on file with author).

157. *Id.* The discussion in this Article is based on that draft as no others have been made public.

158. See IRISH, JIN, & SIMON, *supra* note 83, at 142.

159. *China Development Brief* also reports that in February 2007 the Ministry of Civil Affairs launched the China Charity and Donation Center. See *generally Government Centre Aims to Converge "Parallel Lines" of Charity*, CHINA DEV. BRIEF, Feb. 18, 2007, <http://www.chinadevelopmentbrief.com/node/1005> [hereinafter *Parallel Lines*].

160. See *generally China Adds Government Department*, *supra* note 124.

161. See *generally Parallel Lines*, *supra* note 159.

162. See *generally China Adds Government Department*, *supra* note 124.

fairs and work on a nationwide volunteer network. It is also entrusted with creating a regulation on running the welfare lottery and managing the welfare fund raised through the lottery. It will develop plans on how to spend the money raised on various charity programs.

Some of these issues are governed by other legislation, e.g., the law related to the welfare lottery.¹⁶⁴ What is the Chinese government aiming to accomplish with the Charity Law? The intention of the law is stated to be as follows: "This Law is hereby formulated to protect the legitimate rights and interests of parties concerned in charity activities, promote healthy development of charity and cultivate a charity culture."¹⁶⁵ One clear objective of the legislation that is not stated but that is shared by many Chinese citizens is that charity should become more of a private venture instead of being state-controlled.¹⁶⁶

As it was first conceived the law was drafted to address the following:

- Definition of charity (public benefit) (Chapter 1, Article 3);
- Definition of the agencies involved in the oversight of charitable undertakings; requirements for becoming a charitable organization (contents of articles of incorporation, etc); defining the process of "voluntary charity verification" and what organizations may undertake such verification (Chapter 2);
- Fund raising regulations (Chapter 3);

163. According to Li Jian, the Charity Law itself will set out broad principles, while specific rules on volunteering will be promulgated by this new department. Email from Li Jian, Director, Legislative Affairs Office, Ministry of Civil Affairs, to Karla Simon, Professor of Law, Columbus School of Law, Catholic University of America (Sept. 12, 2008) (on file with author). For a discussion of the volunteer rules and regulations, see *infra* Section V.

164. See generally Notice of the State Council Regarding the Strengthening of the Administration of Lottery Market, promulgated by the State Council on Dec. 9, 1997; Provisional Measures for the Administration of Issuance and Sale of Welfare Lotteries in China promulgated by Ministry of Civil Affairs, available at <http://fczx.mca.gov.cn/article/zcwj/200712/20071200008945.html> (available in Chinese only).

165. Charity Law Comments, *supra* note 7, at 14.

166. See generally Tang Yuankai, *Underpinning Charity Work*, BEIJING REV., Nov. 23, 2007, http://www.bjreview.com.cn/quotes/txt/2007-01/19/content_53106.htm. Yang Lun, a leading television presenter and proponent of the Charity Law is quoted as saying: "Government still plays the leading role in charity, and this hampers the establishment and admittance of charitable organizations, and also results in unclear functional distribution and low efficiency." *Id.*

- Rules for charitable trusts (Chapter 4);
- Rules for volunteers (Chapter 5);
- Relationship between corporate social responsibility and charity (Chapter 6);
- Supportive mechanisms for charities, including tax benefits (Chapter 7);
- Legal responsibilities of charities (Chapter 8); and,
- Other provisions (Chapter 9).

Because aspects of the law are dealt with in other sections of this Article (e.g., tax policy and public fund raising in Section III, and volunteers in Section V) and because other issues are not strictly legal but are more related to “cultivating a charity culture,” (the role of corporate social responsibility), the discussion here will address only the questions of definition, who qualifies and how, and legal responsibilities.

A. *Problems With the Definition*

Currently there are several places where charity or public welfare activities are defined in law and regulations. These include the PWDL, the foundation regulations, the Trust Law, and the tax regulations discussed in Section III. The draft Charity Law differs to some extent from the definition of “public welfare undertakings” in Article 3 of the Public Welfare Donation Law, which reads as follows:

ARTICLE 3: The following non-profit activities shall be deemed public welfare undertakings to which the regulations apply:

I. Disaster relief, poverty alleviation, and assistance to the handicapped, as well as activities for social groups [*shehui tuanti*] and individuals in straightened circumstances.

II. Education, scientific, cultural, public health, and athletic undertakings.

III. Environmental protection and construction of public facilities.

IV. Other public welfare undertakings promoting social development and progress.¹⁶⁷

The definition of charity also appears to differ from that of “public welfare” for public welfare trusts (*gong yi xintuo*) in the relevant article of the Trust Law (Article 60). This is not men-

167. See PWDL, *supra* note 18, art. 3.

tioned in the draft Charity Law. It is also presumably narrower than the “public benefit” terminology used in the Foundation Regulations and the tax rules.

Gong yi is the term used in all of these legal documents. It is defined in Article 60 of the Trust Law in the context of “public welfare trusts” and in Article 3 of the Public Welfare Donation Law in the context of “public welfare undertakings” (*gong yi shiye*). The Foundation Regulations include no definition of “public welfare,” but refer to the term *gong yi shiye* (public welfare institutions) in Article 2 to define foundations. And the language in the new tax rules with regard to entities qualifying to receive donations¹⁶⁸ is that they must use the money “for education, civil affairs, other public welfare undertakings, or for the districts that suffer from natural disasters or the poverty-stricken districts.”¹⁶⁹ In fact, the word for charity (*cishan*) has only been used one time until now in these Chinese laws and regulations. In Article 10, Paragraph 2 of the Public Welfare Donation Law, there is a reference to the regulations of social organizations being established “with the principal aim of developing charities.”¹⁷⁰

The definition of “charity” in the draft Charity Law, includes certain enumerated purposes in Article 3. It first includes a list of four general purposes:

- Emergency and crisis relief for regions, individuals and groups in difficulties;
- Relief for disadvantaged people;
- Education, health, science, culture, sports for social benefit; and,
- Promotion of urban and rural community development and environment.¹⁷¹

In addition to the specifically enumerated categories, Article 3, Paragraph 5 includes the term “other charitable activities,” which provides for future development of the concept of charity.

There has been some consideration in the Chinese litera-

168. See *supra* Part III.

169. See generally *Notice*, *supra* note 134.

170. PWDL, *supra* note 18, art. 10. There are other references to *cishan*, however. According to Vivienne Shue, a Qingdao official told her about the proposed formation of the Qingdao Municipal Philanthropic Commission (*Cishan Hui*). See Shue, *supra* note 48, at 341.

171. See *Charity Law Comments*, *supra* note 7, at 15.

ture of whether the meaning of the two terms is actually the same or different. According to Pengyu He,¹⁷² in a blog posting by Liu Youping titled “Chinese Have Misunderstood *Cishan* for Decades” many Chinese think that the meaning of *cishan* is limited and only refers to passive assistance to the poor, such as donating food and clothing and mostly in the context of poverty alleviation or disaster relief. In comparison, *gong yi* has a much broader meaning, i.e., providing social goods, especially at a more institutional level, such as increasing educational opportunities and improving public health. The author concludes the article by saying that the meaning of *cishan* is widely misunderstood and should have the same broad meaning as *gong yi*.¹⁷³

Mr. He also notes that a prominent scholar in China, Ms. Zi Zongyun, in her article: “The Approach of Modern Foundations” disagrees.¹⁷⁴ She believes that *cishan* in Chinese is limited to poverty alleviation, but that the *gong yi* activities that modern foundations engage in have a much broader objective, namely to create equal opportunities, particularly through education and public health.¹⁷⁵

It will, of course, be important to develop consistent statements as to what types of purposes/activities constitute charitable ones for purposes of the Charity Law and related legislation. If *gong yi* is what is intended, then perhaps the use of the term *cishan* should be discarded.

B. Who Qualifies and How?

Article 7 of the draft Charity Law states that there are three organizational forms available for charitable organization status: foundations, SOs, and civil non-commercial institutions. However, it does not describe exactly how the Charity Law will affect those organizations. What is not clear from discussions with

172. Pengyu He holds a 2007 J.D. from Harvard Law School and is an associate at Davis Polk & Wardwell, LLP. I am grateful to him for his interpretation of the Chinese text of the sources cited in the next two notes. E-mail from Pengyu He, Associate, Davis Polk & Wardwell, LLP, to Karla Simon, Professor of Law, Columbus School of Law, Catholic University of America (Oct. 12, 2008) (on file with author).

173. See generally Posting of Liu Youping to blog.sohu.com, <http://lyouping.blog.sohu.com/68046199.html> (Oct. 22, 2007, 17:37 UTC) (available in Chinese only).

174. See generally Zi Zongyun, *The Approach of Modern Foundations*, available at <http://www.chinanpo.gov.cn/web/showBulletin.do?id=23542&dictionid=1500&catid=15008> (last visited Feb. 19, 2009).

175. See generally *id.*

MoCA and State Council officials is the extent to which currently registered not-for-profit organizations of all types will need to go through another level of administrative applications and oversight processes in order to become “verified charities” and what exactly are the benefits they will obtain if they do so. In structuring the law it would be useful to clearly delineate that an organization is not a charity unless it is certified as such (see below, however, with respect to foundations). That way an organization that engages in some charitable activities but whose purpose is not exclusively charitable will know that it does not need to apply for charitable status (e.g., the All-China Lawyers Federation is a social organization, which engages in some educational activities, but it is clearly not a charity).

On the other hand, it is equally important that there should not be a “triple management system” created by the Charity Law. In other words, it should be sufficient for a newly created agency to oversee all the aspects of institutional development, transparency, and accountability (reporting requirements) without having to involve a sponsoring organization in the formation process.¹⁷⁶ For example, all foundations are required to be public benefit organizations, and they are required to follow specific governance rules that will contribute to transparency and accountability, including the requirement of having an audit committee.¹⁷⁷ As such, there should be no additional requirement that they receive permission from a sponsor in order to be registered and “verified” or “certified”—one level of application process should suffice.

As to the possible procedures to be used, Article 8 provides a bit more clarity about the relationship between the Charity Law and the existing regulations with regard to the establishment of SOs and laws affecting their operations. It includes provisions for a “voluntary verification procedure” for charitable organizations.¹⁷⁸ This verification procedure is likely to involve

176. If an organization had to find a sponsor and register with MoCA in order to obtain legal status and then needed to also be “certified” by MoCA and the tax authorities in order to become a charity, that would constitute a “triple” registration process, which would be superfluous. Following the Japanese example, the organization should be allowed simply to come into being and then receive additional oversight if it wants to be a charity.

177. See Minzner, *supra* note 39, at 111-12.

178. Charity Law Comments, *supra* note 7, at 19.

MoCA and SAT at the local level. This apparently means that a linkage is intended between “verified” charitable status and tax benefits, although that linkage is not fully spelled out. This provision suggests that the procedures set out in the Notice promulgated by SAT and MoF in January 2007¹⁷⁹ will be the ones to be followed. This seems, however, to put the cart (the implementing rules) before the horse (the legislation).¹⁸⁰ In addition, the governance requirements in the Notice are not fully promulgated in the current regulations for any SOs that might qualify as “verified” or “certified” charities; foundations do, however, have explicit governance rules. On the other hand the draft Charity Law, in Article 12 provides for the following:

- Paragraph 1 states that governance organs of “verified” or “certified” charities must include having not only a Board of Directors but also a Supervisory Board. The Board of Directors in a “certified charitable organization” is obliged to make “collective strategic decisions” (*jiti juece*), while the Supervisory Board is responsible for “supervision.”¹⁸¹
- Article 12, Paragraph 2 states that no more than one-third of the members of the Board of Directors and the Supervisory Board of a “certified charitable organization” may receive remuneration. There are, however, no standards set for remuneration of Board members nor are there clear conflict of interest rules or rules about related parties on the Board of Directors or Supervisory Board.¹⁸²
- Article 12, Paragraph 3 states that “certified charitable organizations” should provide the directors and supervisors with the necessary provisions to fulfill their tasks. What this means, however, is unclear.¹⁸³

The discrepancies as to governance between the requirements of the January 2007 notice on taxation and the draft Charity Law need to be clarified.

179. See discussion *supra*.

180. This is not entirely strange, as will be clear from the discussion in Section V. There are now detailed rules with regard to volunteers and volunteer organizations in two municipalities, and one is expected soon in Shanghai. The provisions in the Charity Law that will state the principles for such regulations have yet to be enacted.

181. See Charity Law Comments, *supra* note 7, at 19.

182. *Id.*

183. *Id.* at 20

An alternative to having the decisions with regard to charitable status made by MoCA and SAT organs would be for those two agencies, the Ministry of Finance and the Central Audit Bureau to establish a Public Benefit Commission along the lines of the one established to grant public benefit CSO status in Japan. Although there have been many discussions by Japan's charities about whether the rules established by the new Commission are good or necessary (obviously many organizations have concluded that they are too complex),¹⁸⁴ this development in a country with a Civil Code culture so similar in many ways to the culture of the GPCL could easily be copied if there were a willingness to consider it. As it is conceived by the law, the new Commission in Japan has the following attributes:

1. It is an Executive Agency belonging to the Cabinet Office, and it is under the control of the Minister in charge of the matter (The Prime Minister).¹⁸⁵
2. It consists of seven commission members knowledgeable about the CSO sector, who are appointed by the Prime Minister and approved by the Diet, and it also has a Chief Executive and staff. The term of membership is three years, but the members can be reappointed for a second term. The National Commission sets all the policies.¹⁸⁶
3. In each of the local prefectural governments, an organization of a similar type (called councils) is to be established for the purpose of recognizing charitable status at the prefectural level.¹⁸⁷
4. Any Incorporated Charitable Association or Foundation, which has offices or is conducting activities in two or more prefectures, is under the jurisdiction of the National Commission. All others are under the jurisdiction of each of the Prefectural Councils.¹⁸⁸
5. The Commission or Council has the legal power to

184. See Simon, *supra* note 20, at 46-47.

185. See Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations, *supra* note 78, art. 32; see generally Simon, *supra* note 20.

186. See Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations, *supra* note 78, arts. 34-36.

187. See *id.* art. 50.

188. See *id.* art. 3; see generally Simon, *supra* note 20.

make an inquiry into the management and activities of any Public Benefit Corporation (“PBC”) (not-for-profit incorporated association or foundation with charitable status) and to make an inspection at the office of PBC. When the appropriate agency has some suspicion about misconduct, mismanagement, or disqualification of a PBC, it will give an instruction or an order to rectify the problem within a fixed time period. However, if the problems are not rectified and remain still unsettled at the end of that time, the agency has the legal power to revoke the recognized charitable status of the PBC in question.¹⁸⁹

What is clear from this structure in Japan is that the government retains considerable control over the public benefit CSOs through the Commission, which is not an independent agency like the model for all newer “charity” commissions, the Charity Commission for England and Wales. That should give comfort to the Chinese government, which would thus not have to relinquish all of its power with regard to public benefit activities in China. But moving the decision-making to the commission would take the determination of charitable status and the oversight of public benefit CSOs out of the hands of government bureaucrats and will go a long way toward the privatization of charity in China.

C. *Legal Responsibilities*

The articles of Chapter 8 of the Charity Law contain the administrative sanctions for not following the provisions of the law, and some appear to be too strict (including possible jail time for persons convicted of relatively minor offenses).¹⁹⁰ While the sanctions of both civil and criminal law will apply to various actions of public benefit CSOs and the officials associated with them with regard to such things as negligence, breach of contract, crimes, etc., the real question is the extent to which there should be special sanctions that apply to CSOs and those that are involved in management and governance of them. In general, there should be a clear linkage between the fiduciary

189. See Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations, *supra* note 78, arts. 27-28.

190. It is rumored that the original draft contained penalties of this nature.

responsibilities of Board and Supervisory Board members and the penalties for improper behavior. In addition, the sanctions should be graduated, with only limited sanctions applying in the event of minor violations of the law, such as a one-time failure to file reports on time.

Thus, the Charity Law in China should provide for fines, penalty taxes, possible replacement of members of the board, or possible termination of public benefit status if there are repeated violations of the requirements of the Charity Law and other applicable legal provisions. Decisions to impose such sanctions should be appealable to the courts, and a reasonable time should be provided for such appeals. In no case should there be a revocation of public benefit CSOs status without notice and an opportunity to go to court. It is unclear to what extent the draft uses this approach, because the Chinese text was not translated with regard to the penalty structure and approach.

V. *RELAXING CONTROLS ON VOLUNTEERING*

Beginning in 2005 with the adoption of a Volunteer Regulation in Shenzhen Municipality,¹⁹¹ China has sought to regulate the ways in which volunteers operate either at the municipal level or nationally.¹⁹² The other municipal level regulations that have been issued to date are the ones issued in Beijing in December 2007 in advance of the Olympics.¹⁹³ Shanghai is also considering regulations, which will probably be issued in ad-

191. See Regulation of Shenzhen Municipality on Volunteer Services, Announcement of the Standing Committee of the Peoples Congress of Shenzhen Municipality No. 125, ch. 1, art. 2 (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 13, 2005, effective July 1, 2005) (P.R.C.), available at <http://www.lawinfochina.com/law/displayModeTwo.asp?id=4378&keyword=municipality>.

192. See generally *China Issues Regulations to Promote Voluntary Spirit*, XINHUA, Dec. 5, 2006, http://news.xinhuanet.com/english/2006-12/05/content_5439449.htm. The report says that the regulations were issued by the Communist Youth League Central Committee and that they "outline the volunteer registration process that should be followed by Communist youth leagues and volunteer organizations at township, county, city and provincial levels and in colleges." *Id.* While these are not government-issued regulations, they fit within the same pattern as the regulations from Shenzhen and Beijing. *Id.*

193. See *Beijing Volunteer Regulations*, BEIJING DAILY, Sept. 2009, http://www.beijingdaily.com.cn/bjxw/bjsz/wjxg/200709/t20070930_357301.htm; *Beijing Issues Regulations to Promote Volunteer Work*, XINHUA, Dec. 5, 2007, http://news.xinhuanet.com/english/2007-12/05/content_7209854.htm.

vance of Shanghai World Expo 2010.¹⁹⁴ It is important to note as well that these municipal level regulations may end up becoming models for national legislation on volunteers—the proposed Charity Law contains a chapter on volunteers that has many of the same features as the Beijing and Shenzhen regulations.¹⁹⁵

Features of the regulations suggest that they are probably useful when managing volunteer activities for *planned* mass events such as the Olympics or the Paralympics. In fact, having such regulations may be the best way to organize the many thousands of volunteers that helped with those events. While that is true, the current regulations will be inadequate to address problems in many situations in which there are large scale national disasters such as the Sichuan earthquake in May 2008, when thousands of people flooded into the province to provide disaster relief. For example, “volunteers” are required to be registered as such, and “volunteer service organizations”¹⁹⁶ are as well. Whether a system that depends on advance registration of both persons and organizations can meet immediate needs in situations such as the earthquake remains problematic in concept and has proven to be impractical in fact. There is evidence, for example, that the Sichuan Charity Federation (“SCF”) was ill-equipped to deal with the logistical problems presented by the huge numbers of people and supplies that suddenly flooded into

194. See generally 2010 World Expo Seeks Volunteers, <http://www.china.org.cn/english/2004/Jul/102511.htm> (last visited Jan. 9, 2009). For an example of current rules applicable to volunteer management in Shanghai, see the regulations of the Shanghai Culture Development Foundation, <http://shcdf.eastday.com/eastday/English/node58231/node58233/userobject1ai1044664.html> (last visited Feb. 19, 2009).

195. Under Article 41 of the draft, the Charity Law permits registered charitable volunteers to work for: 1) charitable volunteer organizations (*cishan zhiyuan zuzhi*); and 2) those charitable organizations that underwent the “verification” procedure, and “to enjoy the rights” mentioned in Article 42. All volunteers have the duties mentioned in Article 43, which include not accepting remuneration and not organizing or participating in any activity that may violate the principles of volunteer services in the name of any volunteer or volunteer service organization. According to Li Jian, it now (October 2008) seems that the Charity Law will provide only principles while the regulations of the various municipalities will supply the details. See generally Li email, *supra* note 163.

196. The Shenzhen volunteer regulation defines volunteer service organization as follows: “Article 16. The constitution of a volunteer service organization shall include such contents as the registration of volunteers and group volunteers, the rights and obligations of volunteers, the establishment, organization and structure and functions and duties of the volunteer service organization.” Regulation of Shenzhen Municipality on Volunteer Services, *supra* note 191, at ch. 3, art. 16.

Chengdu.¹⁹⁷ While SCF might be the sort of organization that should be a registered volunteer organization, there is a much greater need in natural disaster situations for flexibility as to what organizations can recruit volunteers, organize them, and provide relief services. When as many as 150,000 volunteers¹⁹⁸ arrive to aid with disaster relief, it is clear that something more flexible is required. A parallel example can be found in Japan, where a contemporaneous news article by Nicholas Kristof in the *New York Times* noted that the yakuza crime organizations were better prepared to render disaster relief after the Kobe Earthquake than unregistered volunteer groups.¹⁹⁹ This suggests that there is ample room for the Chinese government to recognize and give legitimacy to ad hoc groupings that respond to needs.

Furthermore, over the longer term, as much as some of the aspects of the volunteer regulations are useful, their attitude toward volunteering is entirely too restrictive. While it may be true that most volunteers, in, e.g., the United States, will work with (register with) recognized volunteer organizations, such as the United States Red Cross, it is also true that many churches, community organizations, and others will be able to provide small-scale relief services. In China's perception the fall-back provider is, of course, the People's Liberation Army,²⁰⁰ as the response to the Sichuan Earthquake emphasizes. To that extent, it could be argued that the volunteer regulations involve a loosening rather than a tightening of the situation. On the other hand, the practical situation faced by citizens in both Japan and China in the face of the massive earthquake destruction suggests the need for greater flexibility when natural disasters occur.

What may be useful for China to promote at this stage is a group of grassroots organizations that can help to train and facil-

197. See, e.g., Qin Xudong et al., *Quake Shakes Official Charities in China*, *supra* note 152.

198. See Peter Ford, *China Cautiously Lifts Controls for Flood of Quake Volunteers*, *CHRISTIAN SCIENCE MONITOR*, May 29, 2008, at 1, available at <http://www.csmonitor.com/2008/0529/p01s05-woap.html>.

199. See Nicholas Kristof, *The Quake That Hurt Kobe Helps Its Criminals*, *N.Y. TIMES*, June 6, 1995, at A3, available at <http://query.nytimes.com/gst/fullpage.html?res=990CEFD7133BF935A35755C0A963958260&n=Top/Reference/Times%20Topics/Subjects/O/Organized%20Crime>.

200. Approximately 130,000 soldiers were estimated to have participated in the relief efforts. See *China's new Peoples Army pours out to help victims of the quake*, *TIMES ONLINE (U.K.)*, May 19, 2008, available at <http://www.timesonline.co.uk/tol/news/world/asia/article3958222.ece>.

itate volunteering in natural disaster situations (among others).²⁰¹ If that route were to be chosen, the Chinese government might well look at the situation in South Korea, where the Federation of Volunteer Efforts (“FOVE”) in Korea involves itself in a nationwide volunteer network that is wholly independent of government.²⁰² Volunteer organizations in Korea tend to be grassroots organizations, and that kind of volunteer activity, while just as spontaneous in China as in Korea, must really be *sub rosa* in a country that wants to regulate the field of charity volunteering as tightly as China does.

CONCLUSION

It has been many years since the Chinese government began the process of regulating CSOs under the modern legal regime that it developed beginning in 1998. During that short time it has made remarkable progress. Various pieces of legislation (the PWDL, the chapter on donative contracts in the Contract Law, and the Trust Law) have been enacted since 1998; the regulations on formation and management of SOs and foundations have been amended; there is a new provisional regulation on creation and supervision of non-commercial organizations; and there have been regulations on volunteers adopted at the municipal level in several instances. At the present time, MoCA is drafting a Charity Law, which aims to help define a great deal about the public benefit portion of civil society. What appears not to have happened thus far is the development of an approach to the legal status of civil society in China that is a holistic one. This Article has attempted to do that.

I have proposed the following:

1. That public benefit status be decoupled from registration and that all proposed CSOs in China—mutual benefit as well as public benefit—be entitled to register in a simple registration process (after a notary public has approved the legal requisites of the papers);

201. See generally Hu Xingdou, *Commentary: China must legalize charity*, UPIASIA, Sept. 27, 2007, http://www.upiasia.com/Society_Culture/2007/09/27/commentary_china_must_legalize_charity/7365/ (discussing the difficulty faced by grass roots volunteer organizations that seek registration); see also Ford, *supra* note 198.

202. I have visited the organization and had meetings with officials. See Federation of Volunteer Efforts in Korea, Inc., <http://www.volunteer.or.kr/volunteer/sub.aspx?content=0901&sleft=09&stop=09> (last visited Dec. 19, 2008).

2. That the requirement for a sponsor be eliminated;
3. That public benefit status be determined only for those organizations that seek it (including all foundations);
4. That public benefit status be granted by a semi-independent Public Benefit Status Commission as in Japan;
5. That there be very stringent requirements for certification of public benefit CSOs, including strong governance rules (including fiduciary responsibilities) as well as transparency and accountability provisions;
6. That only those organizations that achieve the status be entitled to receive tax deductible donations (in accordance with existing procedures); and,
7. That only the organizations that receive the status be entitled to engage in public fundraising.

On the other hand, I also suggest a need to decouple public benefit CSO status from the permission to develop ad hoc grassroots volunteer networks in the face of natural disasters. While the government response to the networks developed to help after the Sichuan Earthquake may suggest that this is already acceptable, at least one case²⁰³ makes it clear that the government will not be lenient with regard to the requirements for registration. In addition, it would be far better if that position could be made more concrete in rules promulgated by MoCA. It might, for example, be useful to promote volunteer training—by both the government and CSOs, including GONGOs—in a far more significant way than has been done to date. That would make it easier for volunteers to respond to crises, including natural disasters, and for informal networks to be formed.

I do not entertain any romantic notions that the government will immediately respond favorably to all my proposals—civil society is sensitive and the laws and regulations that govern it will continue to be influenced by political events both inside and outside China. Nevertheless, I note that the proposals are in keeping with the new stresses for the party on “people’s livelihood”²⁰⁴ and “scientific management”²⁰⁵ in the development of

203. See discussion of Sichuan Union Relief Office, *supra* note 14.

204. According to Li Keqiang, Vice Premier, this means that “the government should prioritize education development, create more jobs, improve social welfare, bridge income gap and seek solutions in medical care and environment.” See generally *China will deepen reform, improve people’s livelihood*, HULIQ NEWS, <http://www.huliq.com/>

space for the social sector and for achieving better relations with civil society organizations to enhance social and economic development. In that context, it seems quite appropriate for the Chinese government to consider the proposals in this Article, not only because they emulate what the Japanese government has done so recently, but principally because they will lead more quickly to the kind of partnership between government and civil society in China that Yan Mingfu spoke so approvingly of in 1999, at the birth of this new era of CSO regulation.²⁰⁶ The approach to a new legal framework for CSOs in China needs to be a broad one and to encompass real vision as opposed to incremental tinkering.

54594/china-will-deepen-reform-improve-people039s-livelihood (last visited Dec. 19, 2008).

205. The themes resonated in the 2007 sessions of the NPC and the National People's Consultative Congress. See *China's "Two Sessions" Highlight People's Livelihood, Democracy*, PEOPLE'S DAILY, Mar. 16, 2007, para. 3, http://english.peopledaily.com.cn/200703/16/eng20070316_358260.html. These themes were then picked up at the recent session of the Seventeenth Party Congress. See Wang Jing, *Party Congress Closes, Scientific Outlook Stressed*, CRI NEWS, Oct. 22, 2007, <http://english.cri.cn/4026/2007/10/22/1481@286301.htm>.

206. See Yan, *supra* note 1, at 1-2.