

Shrinking Spaces in China by the Law Regulating International NGOs?

A European and Transnational Stakeholder Perspective on the Contentious Policy Process of its Implementation

Context: This essay has been elaborated based on a speech delivered in Sanya, Hainan, during the yearly workshop of the *EU – China NGO Twinning Programme* as board member of this programme and an international consultant to CANGO, an umbrella organization of Chinese NGOs. The main aim of this speech was to inform our Chinese civil society partners about the deep and ongoing concerns of the European NPOs. In addition to the speech this text includes arguments and a call for a future European debate how to respond to these and other Chinese challenges in a citizen diplomacy perspective. The openness and directness of the speech is due to the rather dramatic impact of this law and its challenge to European civil society partners. The rather unusual, direct approach of addressing thorny issues was softened and legitimized by the perception of the Law as shock strategy and its framing as our European concerns. Chinese partners understand very well and respect that our values and perspectives are different, even if the critique maybe perceived as harsh and difficult to understand from their point of view. More: according to my 25 years of working with Chinese partners these expect that their international partners voice their interests and concerns as part of a game of cooperation and negotiation based on mutual trust. Only then, the diverging interests can be negotiated; and only then, international partners are respected and taken seriously. This is a lesson that many European politicians, in terms of a simplistic version of correct intercultural communication and respect denying conflicts of interests, and a comprehensible but overdrawn appreciation of Chinese culture in general and the development performance of the last 40 years, only learnt recently. German ex-chancellor Gerhard Schroeder never did learn this lesson as his close connections to Putin reveal.

The responses during the discussion of the speech may be relevant too. Senior Chinese partners responded in a relaxed, serene way: “It is just normal that Europeans have a different experience and perspective.” We have to be aware that our Chinese CS partners have not been the authors of the Law; the lead agency for civil society development even has been subordinated in the case of INGOs to the Ministry of Public Security; nor have Chinese CS stakeholders been consulted in a serious way; in several ways, they can be considered as losers of the new Law themselves: future options of funding might be reduced in some policy fields and during the first half of the year important projects had to be canceled or postponed because their finances dried up as their international partners had not yet succeeded

to register. In contrast, the younger Chinese participants this time did not enter the debate at all - in contrast to a previous, analogous critical speech about this Law last year. As the composition of the audience had not changed substantially an obvious conclusion might be that this silence is due to the extremely tense political atmosphere in anticipation of the upcoming 19th Party Congress in October. The responses of the European partners were outspoken and supportive: they agreed with its critical stance and tried to convey and translate the relevant messages to our Chinese hosts.

Dear partners, dear friends,

My topic is the contentious impact of the new law regulating international NGOs (INGO Law) which came into effect starting on 1 January 2017. This is a rather difficult task, for two reasons: First, we are still in the early stages of its implementation as an open, ongoing process with many uncertainties and ambiguities. Second, this law and the way of its implementation is a rather contentious issue and the view of about all European NPOs about it is rather critical. There have been and still are many loud, broad and continuing concerns regarding the Law on all international levels (nation states and internationally operating NGOs, international media and, most important, by responsible bodies and players in the UN). Within the international community a kind of international united front requesting minimum standards and rights for INGOs in China has emerged. How the Chinese government and Chinese civil society will respond to these international concerns during the implementation process is of utmost importance not only for China and Europe but for the development of global civil society as well. And how both sides will handle this critical juncture will be a sign for the degree of maturity of EU – China civil society relations. If we are lucky our relationship will mature and grow up. If not, our civil societies will not be able to play their role of promoting mutual understanding and cooperation.

These unexpected loud and broad voices of concern have surprised the Chinese government which now tries to calm these concerns. At the same time, first Chinese voices have emerged which take the international voices of concern seriously, try to understand them and launch a debate how these concerns can be considered in the process of implementation of this Law. In China, laws are less detailed and binding, more like guidelines. Therefore, the space of shaping the implementation of the law is much more open than in the European tradition. Chinese legislators expect detailed feedback by affected actors during the process of implementation to get to know their “subjects” and to understand their concerns. If we take these different legal and policy processes seriously then there still might be some opportunities to co-shape the Law by re-negotiation during the process of implementation.

This essay is structured by the approach to conceive the processes of law-making and law implementation as contentious and dialogical interaction.

My key questions are:

- Where do we stand now (11/2017) in terms of registration of European NGOs?

- How do European NGOs perceive the INGO Law and how do they respond to it, pragmatically and strategically?
- How did the Chinese government and civil society stakeholders respond to the loud voices of concern?

The text is structured accordingly: 1. Analysis of the status and difficulties of implementation of the Law; 2. Overview how European civil society (CS) stakeholders perceive, interpret the Law and of the strategic options of individual NGOs to respond; 3. The response of the Chinese government to the loud voices of concern, Here the focus is on the revision of the Law in consideration of the international debate; 4. Strategic reflections on how European society and politics should respond to the Law in the context of China's new foreign policy of exporting its authoritarian values, norms and development model.

It may be useful as for the reader to summarize my key insights:

- The present evidence suggests that the INGO Law was perceived by European CS stakeholders as a shock strategy in the sense of intended rupture of international civil society trust networks. Registration has been slow and selective: only a minor part of all INGOs have succeeded to register by now (248 of 7000). It may be that the speed of registration will accelerate, but selectiveness probably will continue.
- The slow and selective registration process of INGOs is not only due to evident temporary and structural Chinese barriers and policy priorities within the new political and legal-institutional framework but as well to a strategic reconsideration of the possibility and meaning of a China engagement by European NPOs. There is much doubt, hesitation and strategic reconsideration.
- Nevertheless, it would be misleading to ignore the (limited) responsiveness of Chinese politics to international concerns. As China is aware of its huge global footprint the vocal voicing of concerns by a broad alliance of international civil society stakeholders already led to some relevant revisions of the new Law though important building stones were not removed. During the implementation process the Public Security Agencies responded by an open and a supportive attitude. The international CS community is part of the game should try to mobilize its influence as far as possible and test the open attitude of MPS. The scope of international impact and its limits can only be determined after we have played our role and is dependent on the effectiveness of the strategy of global CS stakeholders. The result is a matter of international negotiation capacities too.
- The new Law forced individual European NGOs to reconsider the strategies of their China engagement. We sketch the strategic options which are now being considered without assessing and comparing them in detail. There is no "one solution fits all" strategic receipt as the (sectoral and networking position, etc.) positioning, resources

and strategic goals of individual INGOs are different. A detailed assessment would be very useful, but needs more solid empirical research based on interviews with selected NGOs and the creation of platforms of exchange between European NGOs. Both are part of a research, exchange and advocacy project focused on European NGOs, where the author and renowned institutional partners (University of Nottingham, Institute of Development Studies, Sussex, Rights in Practice and the German Network for Civil Society / Bundesnetzwerk Bürgerschaftliches Engagement/BBE) are involved, funded by the Ford Foundation.

- The voicing of concerns by many national governments, the UN and other international institutions indicates that more than the continuing presence or withdrawal of individual INGOs is involved. The INGO Law has to be assessed as part of a much broader Chinese strategy challenging not only the economy but also the polity and societies¹ of the informal community of democratic states including EU member states. China has been at least selectively rigging economic competition by often hidden state subsidies (photovoltaics); in some cases it tried to erode or circumvent international environmental or human rights standards though the China-led Asian Infrastructure Investment Bank (AIIB) is said to have a good record regarding environmental standards; China tries to export its authoritarian norms and aims to become a world leader of technologies of surveillance; it even pursues a strategy of dividing the EU by 1by attracting Eastern European states within the framework of 16+1 with at first view huge, attractive loans, yet implying future dependencies within a very asymmetrical setting of negotiating power as these 16 European states have less than 100 million inhabitants against 1.4 billion mainland Chinese. These challenges need a concerted political response of all democratic states within an inclusive approach involving political, societal and economic actors. Considering the crisis of leadership of the Western world in the Trump “era” Europe has to play a leading role. Will the EU live up to this challenge?

Slow process of registration, difficulties of Implementation and its partially dramatic effects

Let’s start with an overview about the process of registration guided by these questions: how many INGOs have been registered by now? Who and which kinds of INGOs have been registered in the first place? Why is the registration process for INGOs rather slow and selective? Which are the barriers and which have been facilitating factors?

¹ Regarding the Chinese challenges of European societies see the short overview by Jan Gaspers, MERICS: China fordert die Gesellschaftssysteme der EU heraus, Frankfurter Rundschau, 30.08.2017: <http://www.fr.de/wirtschaft/eu-und-china-china-fordert-die-eu-heraus-a-1341047>

The number of registered NGOs by now (11/2017) is far below of the official number of 7.000 INGOs operating in China before the law given by NPC spokeswoman Fu Ying in March 2016. The registration process started rather slowly. After 4 months only 69 INGOs had been registered; in November after 10 months the Ministry of Public Security (MPS) published a number of about 248 INGOs. If we compare the speed of the registration process of INGOs with the speed of registration of Chinese NGOs under the new Charity Law starting in 09/2016 we cannot avoid the conclusion that the registration of Chinese NGOs has been much easier and faster: after only 4 months already over 500 NGOs had been registered, more than double as INGOs after 10 months.

This uneven speed of registration probably has two main reasons: institutional and political. The registration of Chinese NGOs was facilitated by institutional continuity: the Ministry of Civil Affairs (MCA) continued to be the lead agency. In contrast, in the field of INGOs the political responsibility shifted from MCA to the Ministry of Public Security (MPS). This institutional shift of the lead agency predictably, and probably intendedly, disrupted previous trust networks and meant, that beyond necessary regulatory innovations and instruments (clarification of procedures, lists of professional supervisory units, etc.) a new institutional infrastructure, new capacities and new trust relationships had to be developed. This takes time. Without bridging solutions cooperation was disrupted. Even the survival of INGOs with offices in China was threatened. In the case of Chinese NGOs both, the trust network stayed intact, and the political control was assured.

The lack of bridging solutions suggests that this disruption probably has been politically intended. The clear evidence of divergent processes of registration as a consequence of the two different laws for Chinese NGOs, the Charity Law, and that for INGOs suggests as well that the political will and strategies behind these uneven developments have been diverging: in the case of Chinese NGOs a strategy of selective empowerment and of creating a favourable environment for some types and sectors of NGOs by MCA has prevailed whereas the INGO Law was overshadowed by the dominant political mistrust regarding INGOs as a potential threat and the desire to regain absolute control. The impression that the INGO Law has been designed to exclude or marginalize transnational cooperation in areas deemed as sensitive, which is confirmed by other evidence as well, could only be refuted by a liberal, tolerant mode of implementing the Law. We can suppose that the international community will have a close look which path of implementation will be pursued.

The process of registration of INGOs not only has been slow but also highly selective. The criteria of selection were shaped by pragmatic and cultural reasons but also reflect the political priorities and some restrictive criteria of the Chinese government. For pragmatic reasons during the first month all 29 INGOs which had been registered as INGOs before (only 29 of about 7000 INGOs had been registered as NGOs; many had been registered in different ways, e. g. as enterprises) succeeded to register. More than half of all 144 INGOs registered during the first six months had their representative offices in three regions: around Beijing

(47), Shanghai (35) and already less Guangzhou (12); Yunnan (9) and Sichuan (5).² INGOs with a long presence in China, and therefore excellent networks, succeeded earlier to register too, if their portfolio did not focus on sensitive issues.

Nevertheless, political loyalty and political priorities played an important role as well. Loyal INGOs of Overseas Chinese did not have any difficulties to register. Economic and scientific-technological bodies and associations (Chambers of Commerce, business associations, science and technology-focused organizations) were also among the first to be registered. Yet, there are exceptions from the combined criteria of pragmatism, political loyalty and new political priorities under Xi Jinping: This indicates that there are still spaces of ambiguity. The fact that e. g. the Ford Foundation already succeeded to register can be read as a signal that even lighthouses of liberalism might be tolerated. Ford has a long history of loyal cooperation with China (it started its activities in 1978 as the first big international NPO)³, loyal to the policies of reform and opening in the broad sense, but nonetheless representing Western democratic ideas which have been demonized by the party as threats in official documents and politics since 2012.

Until now no request of registration has been rejected and China does not deter INGOs with a blacklist as in Russia. It even celebrates successful registration to demonstrate the principal appreciation of the work of International NGOs.⁴ But the slowness, selectiveness and difficulties of registration cannot be denied. The difficulties of registration may be exemplified by the case of Greenpeace. Though Greenpeace, as other international environmental NGOs (WWF, etc.) had adapted and sinicized its strategy and action repertoire to prevalent Chinese conditions, it was asked to reduce or cannibalize its portfolio in China. My informed guess is that, though Greenpeace does not contest the long-term government strategy of energy transition and sustainable development, it assumes the right to advance its own assessment and strategies in accordance with global Greenpeace strategies. This can be exem-

² Tee Zhuo: Six Months In: An Analysis of Foreign NGO Activity in China, 26.07.2017, China File, NGO Project: <http://www.chinafile.com/ngo/analysis/six-months-analysis-of-foreign-ngo-activity-china>

³ Jia Xijin: China's Implementation of the Overseas NGO Management Law, China Development Brief, 06.03.2017: http://webcache.googleusercontent.com/search?q=cache:http://chinadevelopmentbrief.cn/articles/chinas-implementation-of-the-overseas-ngo-management-law/&gws_rd=cr&dcr=0&ei=XxLuWb2vFlzAgAaPn6zwBw

This is the first systematic Chinese account of the inconsistencies and undefined spaces of the INGO Law and the challenges, difficulties and inconsistencies of its implementation. Jia Xijin is working on a research project about the process of implementation of the INGO Law.

⁴ See the comparison of Russia's and China's approach by Elizabeth Plantan: Comparing Recent NGO Laws in Russia and China. Do Russia's Laws Foreshadow China's Future? China File, The China NGO Project, 20.08.2017: <http://www.chinafile.com/ngo/analysis/comparing-recent-ngo-laws-russia-and-china>

plified by the anti-coal campaign of Greenpeace (and WWF). Both agree with the Chinese government that the role of coal has to be reduced dramatically but a Greenpeace report argued for a faster than the official pace of energy transition. According to the assessment of Greenpeace the role of coal and other fossil fuels can be substituted totally till 2050 by renewable energies. Therefore, frictions with government policies are predictable. Besides, Greenpeace, as other globally operating NGOs, has an easy access to global networks, spaces and resources and cannot be controlled as easily, e. g. in terms of publication, as Chinese NGOs.

In the meantime the slow speed of registration has had dramatic effects. In a meeting in May of German NGOs with China activities several reported that they had to suspend their activities temporarily. Several participants even saw their organizational quality and survival threatened as they had to dismiss their qualified staff well trained on the job and could no longer pay rents because their Chinese budgets were drying out. Chinese NGOs which were used to finance often more than half of their operations from international funding had to interrupt these activities as well. Nevertheless, in their case the cut of international financing was softened as their projects funded from Chinese private or public sources could be continued.

How to interpret the slow registration process: Chinese legal-administrative bottlenecks or the start of strategic reconsiderations by European NGOs?

At a workshop with British NGOs till recently engaged with China in June 2017 only one NGO, focused on poverty alleviation in Sichuan, had succeeded to register in Chengdu. This NGO had a long history of regional cooperation, an excellent local reputation and trust network and is positioned within a sector of strategic relevance for reaching priority goals of the Chinese government. A second important result of this workshop was that more than half of British NGOs had not yet made up their mind and still hesitated themselves, if they should try to register under the new framework conditions now, wait or disengage. This means that the slow process of registration is not only due to important legal-administrative bottlenecks but also to ongoing strategic reconsiderations of European NGOs of their China engagement. This must not necessarily imply a general disinvestment but may also mean the search for new strategies and modes of civil society cooperation with China which minimize the risks of an engagement in China and allow to consider as far as possible the values and strategic visions of European NGOs as we will see later. Chinese observers often focus exclusively on legal-administrative barriers and neglect the reflexive processes of European NGOs. Yet, on the European side too, the INGO Law has become a highly political issue. The INGO Law can be considered as the political kick-off and tipping point of a reassessment of Chinese politics by European society. We start with the evident legal-administrative bottlenecks.

Legal-administrative barriers of registration of INGOs

There are many evident reasons why legal-administrative barriers have retarded the process of registration. For now the attitude and policy of Public Security (MPS) is not the bottleneck. Most participant observers consider the Professional Supervisory Units (PSU) as main bottleneck.

According rather diverging sources the general attitude of the responsible Public Security Bureaus towards registration of INGOs seems to be highly open and supportive. This does not mean that there are no problems for the responsible security bureaus to handle the process of registration. Yet these are in general not due to the lack of political will and openness to facilitate the challenging registration process as smooth as possible. The bottlenecks on part of Public Security are due to the fact that the shift of responsibility from MCA to MPS demanded to build a new service infrastructure from scratch with a staff which did not have any professional experience cooperating with civil society institutions. My informed guess is that there will be one big exception from the supposed political innocence of Public Security: cooperation on those issues considered as sensitive by the Chinese government because these issues are either framed in terms of rights or because they imply a high degree of social autonomy, often implying more autonomous network associations as considered by the Chinese government as tolerable.

This argument is in line with the fact that since recently those “Western” concepts which had already been forbidden for some years (civil society, NGOs, social movement and social protest) are now effectively eliminated largely from public discourse. NGOs are either renamed social organizations or charities. The leading research institute for issues of civil society development, the *NGO Research Center (NGO-RC)*, led by Prof. Wang Ming, one of the political core group promoting civil society development, was recently renamed *Research Center for Social Organizations*. The orders of the department of censorship of the party now are effectively executed by the “word police” who now tries to streamline a Chinese political discourse without the “threatening” meanings and implications of Western concepts, in this case civil society and empowered citizenship.

There are many reasons why the PSU can be considered as institutional-administrative bottleneck of the registration process up to now:

- The list of PSU is rather narrow in terms of their legal status and their affinity with civil society. 90% of them are state agencies. CANGO, the national umbrella network of NGOs, though a GONGO, was not on the list of PSUs.
- Besides, there are two big disincentives which discourage the motivation of those mandated as PSU: first, the new INGO Law means more work for a PSU without any additional staff and budget; second, the INGO Law with its highly bureaucratic and only just emerging, partly inconsistent procedures and general clauses within the context of a campaign against Western culture implies a high degree of political-

administrative insecurity and a fear of political sanctions in a rigid but uncertain political environment. Jia Xijing, probably the most competent Chinese academic expert on this Law because of her combined legal and social science competencies, has listed several aspects where the Law is under-defined or inconsistent and open to different interpretations.⁵

- There is a large hierarchical gap *within* both supervisory agencies (MPS and MCA). The decisions are made at the top and operational responsibility is on the respective local level. At the same time, the mechanism of coordination between the two Ministries (MPS and MCA) is a critical issue in all countries, but in particular in the Chinese polity based on vertical pillars with uneasy horizontal interaction.
- Last not least, the scope, and sometimes scale, of the PSU and of the INGOs do not match. Whereas state agencies mandated as PSU have a clearly defined, narrow mandate and portfolio with strict sectoral and regional limits and a low flexibility in time, NGOs have a wider scope, develop services on demand, have to change priorities and need sectoral and regional flexibility. Therefore there is a fundamental, structural mismatch in terms of mandate, portfolio and strategy between designated PSU and INGOs.⁶

Beyond the fact that during the present conjuncture the PSUs, because of the reasons explained above, must be considered as bottleneck, there are further reasons for the delay of registration. After the consent of the PSU as a supervisory unit there is a long deadline of 3 months for the final approval of a representative office by public security authorities. Finally, the Chinese process of authentication and verification of the necessary documents is rather complicated, not well-known and time-consuming because every document has to be verified at the national level. For all these reasons, the slow process of registration was to be expected. With capacity building, establishment and rehearsing of routines, some political incentives and nudging we can expect that the speed of registration may accelerate.

The next challenge will be if the selectiveness of registration will be pursued rather strictly. Will the open and cooperative attitude of the security authorities continue in the future for INGOs with a portfolio affecting so-called sensitive issues? From a European perspective this will be the most important litmus test because many doubts of European NGOs refer to this issue. Therefore, I will sketch with a few strokes some of these doubts.

⁵ Jia Xijing: Analysis on the Effect of China's Overseas NGO Law under the Differences in Legal Thinking, *The China Nonprofit Review* 9 (2017) 23-43

⁶ Professor Jia Xijing: the First Six Months of the ONGO Law's Implementation, China Development Brief, 12.09.2017: <http://chinadevelopmentbrief.cn/articles/jia-xijin-the-first-six-months-of-the-ongo-laws-implementation/>

Political logic of the INGO Law: European perceptions and perspectives

Most European civil society stakeholders have perceived the Law as an political shock strategy, intended to break the broad trust networks between European and Chinese civil society actors and to deter cooperation on issues deemed as sensitive by the Chinese government but considered as legitimate and non-intrusive by European actors. This diverging assessment probably is based on diverging visions of normative concepts of development, both rooted in our diverging development trajectories.

This is a difficult, complex subject. Therefore, I focus here on the different framing which may account for the divergent understanding of the Law. The main divergent political-cultural frames probably refer to the concept of development and the understanding of the rule of law. The European concept of development has become in the course of the last millennium of European history (the first relevant document, the Charter of Liberties, was issued in England by Henry I. in 1100) rights-based. European development took off after citizens gained more and more rights (the Prussian development path is a little bit more complicated) and this is why the European concept of development is based on the co-development of citizen rights and economic development, with political rights for all citizens as a final step, developing gradually and often contested.

In contrast, the Chinese development path pursued under communist rule has a clear sequence: socioeconomic development first, at the costs of human rights. Human rights and democracy even are considered as an obstacle during an early stage of development. Co-development has been observed in China between market development and state institutions, but only in terms of capacities not rights.⁷ In China this development model has proven to be effective in economic terms – at high human, social and environmental costs. It is very questionable, if it can be exported to other developing countries. Nevertheless, this is, under Xi Jinping, part of the Chinese international policy agenda. The West and Europe have to live up to this challenge. In the first place, Europe has to improve its economic performance and in this respect it might be useful to learn some lessons from China: long-term planning, the mobilizing and strategic role of infrastructural investments, etc..

The second divergence is based on a different understanding of the rule of law as interpreted by the Xi Jinping leadership. Whereas the European understanding of the rule of law is centered on the protection of individual liberties, the Chinese understanding in the historical legalist tradition is centered on the stability and effectiveness of governance, as highlighted by Shawn Shieh: "This "rule of law" is not the rule of law that we know in liberal democracies; rather as various commentators note, it is an instrument that Chinese leaders see as necessary if they want to reduce local government discretion, push through reforms and

⁷ See the interesting analysis in Yuen Yuen Ang: How China Escaped the Poverty Trap, Ithaca 2016, Cornell University Press. The only category of rights mentioned in the index are property rights.

strengthen governance with the goal of maintaining sustainable growth and social stability.”⁸

This may be perceived as a black versus white argument. Certainly, this is only one important kernel of the truth and not the whole truth which is much more complex as there are many diverse discourses and overlapping meanings of the rule of law.⁹ In many ways the expansion of legal reforms in China has facilitated more economic and social, and sometimes even political liberties – and vice versa. But, in our context, it is evident that the new INGO Law is part of a series of laws addressing diverse security threats conceived in a broad and vague way, perceived as threatening the stability of the Communist one-party state. The main threat of the INGO Law are not international NGOs with an agenda of democracy promotion (as a matter of fact there have been only very, very few; this issue could have been dealt with without such an authoritarian, restrictive law); the main threat are Chinese civil society organizations and citizens eager to continue or enter into a dialogue of Chinese and Western/European cultural traditions. This dialogue has been the norm during the period of *reform and opening* till recently though it did touch fundamental political dimensions only in academic debates. This open and dialogical cycle of Chinese politics now has come to a (permanent or temporary?) end.

Why this string of security laws and why the closing of the previously much more open international communication and dialogue? The available evidence suggests that the Chinese government knows that the authoritarian model of state – society relations is eroding and threatened. From this perspective the INGO Law can be considered as a preventive strategy to dig a wall against the rising tide of more autonomous, more active and locally often more rebellious societal actors challenging the monopoly of power of the CCP and prevent that these movements enter into a dialogue with international ideas of liberalism and democracy. These, creatively translated, reconfigured and adapted to China’s development trajectory might not lead to a democratic transition in the short term but nevertheless into a political movement of democratization as gradual reform process claiming constitutional rights of speech, assembly and association as well as the accountability of power by institutionalizing the voices of the people through public participation. In this perspective the authoritarian involution of the government of Xi Jinping also is a defensive response to the surging democratizing logic of Chinese society and politics, additionally supported by the assertive nationalist rhetoric of making China great again.

⁸ Shawn Shieh: Putting the Overseas NGO Law in Perspective, NGO China blogspot, 12.03.2017: <http://ngochina.blogspot.de/2017/03/gaining-some-perspective-on-overseas.html>

⁹ Eva Pils has given an excellent, differentiated overview of the diverging Chinese rights discourses, often inspired by Western rights concepts and their counter-discourses in the legalistic tradition “with its characteristic equation of law and power.” (p. 31). See Eva Pils: Human Rights in China, Cambridge 2018, Polity Press

But the governance strategy and politics of Xi Jinping is much more and more complex, if we look at it through the lens of Hirschman's theory of shifting involvements of private interests versus public action.¹⁰ Xi's approach tries to develop a populist and authoritarian response to both the crisis of inequality / injustice and the moral crisis of China's society and polity. His strategy is to impregnate party and society with moral values framed within a thin interpretation of the authoritarian Confucian tradition and to reorient the societal and political actors after a long cycle of dominant private interests initiated by Deng towards public goods – but not public citizen action - as defined in strict hierarchical lines of communication from above by the party leadership, exacting hierarchical loyalty of divergent party factions, fragmented state institutions and a more and more contentious society to the political center. In the middle run such an approach will fail, as enforced loyalty in the context of an urbanized, society of well-educated citizens is fragile, a fragility mostly hidden behind masks of feigned loyalty.¹¹ Authentic political loyalty can only be based on shared values, as highlighted by Liu Binyan in his memoirs.¹²

The indicators for a trend towards a more autonomous and active voicing of concerns and expanding public spaces of debate are manifold. Here a short summary: The number of NGOs (official counting!) has risen dramatically in the last 20 years and more than doubled since 2000; the yearly number of local mass protests (with more than 1000 participants) has risen as well to about 180.000 in 2012, the last year when this information was published; the mass of internet users, most of them participants in social media debates, has grown dramatically to more than 60% of the total population – an internet penetration rate far above other emergent countries, e. g. India (about 20%). The national clean air movement against air pollution in most Chinese cities has mainly used this new public arena created by technological innovation to voice their concerns and claims, often effectively.

From a European perspective and within a European democratic frame there are several reasons for the conclusion that the new INGO Law has political motives and a clear political logic:

- The dominant security logic of the Law is termed in general clauses which leaves much leeway for arbitrary decisions. This is creating a feeling of uncertainty and insecurity on behalf of (European) INGOs.

¹⁰ Albert O. Hirschman: *Shifting Involvements. Private Interests and Public Action*, Princeton 1982, Princeton University Press

¹¹ In Cuban literature, which is as well confronted with the problem of forced loyalty, this issue occupies center stage of a much broader and more outspoken literary debate. See e. g. Leonardo Padura: *Labyrinth der Masken*, Zürich 2006, Unionsverlag

¹² Liu Binyan: *A Higher Kind of Loyalty*, New York 1990, Pantheon Books, in particular pages 193f, 218ff, 267f.

- The hostility to liberal and democratic ideas or success stories is evident by the fact that Taiwan and Hong Kong are affected by the new INGO Law as well though these are considered as part of the Chinese nation and not Overseas NGOs. The new INGO Law is not aiming at foreign NGOs; it is aiming at democratic ideas and democratic, rights-based civil societies and CSOs. A case in point is Lee Ming-cheh, a human rights advocate from Taiwan, already detained in China in March, has been formally arrested on a charge of “subverting state power,”¹³
- Knowing that democratic ideas have been defined as threats European civil society activists with a historical democratic identity feel under general suspicion as potential enemies as there is no clear delineation between democracy promotion as intrusive strategy and democratic ideas which are part of an international consensus and e. g. enshrined in the Human Rights Convention signed but not ratified by China. Based on which (national or global) legitimacy does China claim the right to exclude democratic ideas from international dialogue and cooperation? Why does the Chinese government not comply with the UN Human Rights Convention which it has signed? These are urgent issues China should clarify as precisely as possible within this law or other laws to guarantee a maximum of legal security as possible for international civil society partners.
- We have already seen that the new Charity Law is much more open and supportive of NGOs socialized within a paternalistic culture of state-controlled civil society than of Western NGOs socialized within democratic cultures.
- Changing the lead agency without offering bridging solutions suggests that the erosion of existing CS cooperation and trust networks was intended and more than a simple policy failure.
- Last not least, the INGO Law is part of a long cycle of restrictive or closing policies and measures. This cycle of shrinking spaces of citizen dialogue and cooperation started at least in 1997 when the Great Firewall was established and then accelerated after the (orange) color revolutions in Central Asia after 2004 and then again after the Arab spring – always alongside of an expanding CS cooperation. The INGO Law was not the first step; it was the generalization via institutionalization of this restrictive policy trend which started at least with a new set of rules on foreign donations implemented since March 1, 2010, by the State Administration for Foreign Exchange (SAFE) a policy of selective severing of financial links between some INGOs and Chinese NGOs

¹³ China Charges Activist From Taiwan With ‘Subverting State Power’, New York Times, 29.05.2017: <https://www.nytimes.com/2017/05/29/world/asia/taiwan-china-activist-lee-ming-cheh.html>

in sensitive areas.¹⁴ The juxtaposition of shrinking and expanding CS spaces will not end here but the general European impression is that there will be much more channeled cooperation with arbitrary micromanagement and rigged cases construed to deter and intimidate in line with the Chinese saying “kill one to deter hundred”.

How did European NGOs respond to the INGO Law? An overview of the strategic options being considered

The focus here is exclusively on the options and strategies by individual NPOs. As already stressed, among the European community of stakeholders of CS cooperation with China the impression of a shock or at least a serious challenge of their strategic assumptions of cooperation with Chinese NGOs is widespread. It already is visible that the option “business as usual” no longer is viable. A relevant part of those European NGOs already engaged with China have serious doubts about a further engagement with China.

There are three main reasons of their doubts, hesitations or disengagement. First, the threshold of registration is rather high in terms of efforts (time, manpower) and substantially higher costs. I have heard of a case where these administrative costs for temporary activities might rise about tenfold. In this way international NGOs have to pay a high price in exchange for a restriction of their liberties and rights. These costs not only are a problem for smaller NGOs working with a generally tight budget. Second, the risks of a further engagement are rather high because the INGOs are without clear, precise legal guidance and any enforceable legal protection, at good will of a powerful Ministry of Public Security with an all-encompassing mandate to investigate, to control and finally to interrupt or dissolve INGOs. Third, the attractiveness of a continuing engagement is low as the democratic identity of European INGOs is not respected or acknowledged. The conflict is not about democracy promotion, which is not on the agenda of European NGOs; it is about our democratic values and identity and about open, trustful communication. Can China really expect that European NGOs deny their democratic identity when they cross the frontier to China? And: How can China justify that democratic ideas and values, which are prevalent in the majority of nations world-wide and have been enshrined in several Conventions of the United Nations, are excluded from international civil society cooperation in China, and often secretly in international and UN arenas as well, whereas China is trying with an enormous propaganda effort to promote its authoritarian values and norms internationally?

The global competition of political ideas is a fact which can neither be denied nor prohibited. This competition has to be open and fair, on a level playing field. European NGOs do not intend to interfere in Chinese internal political affairs and it would be wrong and ridiculous to try to impose our democratic ideas and norms grown up in a European historical-political

¹⁴ HRIC Briefing Note: Tighter Regulation of Foreign Funding Support of Chinese Civil Society Groups, Human Rights in China (HRIC), 27.05.2010: <http://www.hrichina.org/en/content/403>

ecosystem in a big and powerful state as China with a very different historical trajectory. But China has no legitimacy, and, in my assessment, will not succeed excluding democratic ideas at their frontiers in a world dominated by democratic states. If it would succeed, the price for China in a more and more connected world with a more and more globalizing China would be high in terms of the intended transition towards a sustainable innovation economy and society.

To define democratic ideas as hostile and European democratic NGOs as enemies would not only block a fruitful international dialogue, it would as well impoverish Chinese public debate. It would mean as well the cultural isolation and incapacitation of its citizens. Needed internationally are respect and understanding for different cultural traditions but at the same time a respectful and open dialogue. Because of its cultural diversity and richness, China really has no reason to fear such a dialogue. If China would meet this challenge and accept such a dialogue this would not only facilitate the necessary economic, social, cultural and as well political innovation (which will be a complex, long, contested process and cannot be reduced to the rupture of a democratic transition) of China. I am convinced that China because of its rich, diverse traditions and of the size and richness of its intellectual capacities in the middle run would be able to lead the development of the world, in the first place developing and emergent nations, into a brighter more sustainable and democratic future.

Let us return to the responses of European NGOs: Some have already made up their minds: either to disinvest or at least to wait and see if their worst case scenarios will occur or be contradicted by more open and tolerant Chinese policies. As this is still an ongoing debate the results are not predictable. Therefore, at this moment (11/2017), only an overview of the options discussed is possible. Here a first sketchy overview of the strategic options debated:

Option 1 is to stay and retreat on common ground to negotiate acceptable agreements. This option will be feasible on all issues concerning shared international public goods, and it will be easily feasible on all issues where international conventions exist which are valued by the Chinese government. This is true for climate policies and sustainable development but not for human rights in general as China has a very selective, doubtful appraisal of human rights.

But even on these topics the critical issue is how those democratic building blocks, which are part of the prevailing international consensus and therefore have been part of the Chinese discourse in the past, will be handled now. From the perspective of the global conceptual consensus, sustainable development projects cannot be meaningfully implemented without public transparency, public participation, mechanisms of accountability, public monitoring and debate. These are criteria which cannot be contested in principle. **Option 1b** therefore is framing these issues within a Chinese narrative which does include these democratic criteria as part of a shared global tradition.

Option 2 means to *wait and see* trying to learn if registration for future cooperation does make sense and, if yes, to identify the best practices of registration under the new Law. In our London workshop (June 2017), the majority of British NGOs opted for this strategy.

In **option 3**, after the new Law European NGOs made up their mind to disengage, and for those who had planned to engage with China, to give up their plans or postpone their engagement till the situation has improved.

In **option 4** the NPOS decide to continue *cooperating with China with trusted Chinese partners, based on agreements on results, on firm legal ground from the outside and “adopt a strategy of “smart indigenisation”*. This would mean providing grants to allow Chinese partners to sit in the driving seat of projects and programmes, thereby ensuring Chinese ownership and sustainability of initiatives.”¹⁵ This option is more easy for foundations which fund projects of Chinese CSOs than for NGOs in general.

Option 5 is a strategic move to *transfer the representative office to the more liberal Hong Kong*. This strategy was pursued by the American Bar Association (ABA) at the end of 2016. ABA had anticipated, probably correctly, that the “business” of funding and supporting Chinese lawyers and rights-related NGOs would become very difficult under the new Law though the activities of ABA cannot be subsumed under the heading of external democracy promotion. The rights movement (Weiquan) is a movement of Chinese citizens referring to the official goal of promoting the rule of law based on the assumption that the rule of law presupposes citizens which know and claim their rights.

In **Option 6** there are two different modes which should be distinguished. The first **option (6.1)** means to focus on *dialogue and cooperation in established global arenas*, mainly around international conventions, e. g. the Climate Convention, supported by bilateral platforms. This strategic option has some advantages: the shared reference to agreed-upon global norms, institutionalized procedures and a calendar of regular, rather frequent meetings, the possibility of building of international coalitions against possible Chinese pressure, if necessary; in some cases, e. g. climate politics, Chinese and European interests and priorities converge, etc.. To facilitate this kind of cooperation in shared priority areas bilateral CS cooperation must be firmly institutionalized within the EU/European States – China architecture of cooperation. The second strategic **sub-option 6.2** would mean to focus on *trilateral platforms outside of China where either Europe or China, in the best case both, have big stakes*. The new silk-road project is a case in point.

Nevertheless, in these cases the prevalent attitude of European civil society stakeholders is that these international projects should be based on some shared international norms: open

¹⁵ Andreas Fulda: A new law in China is threatening the work of international NGOs, The Conversation, 06.01.2017: <https://theconversation.com/a-new-law-in-china-is-threatening-the-work-of-international-ngos-70884>

multilateralism; inclusive, horizontal, autonomous (not state-restricted) civil society cooperation; some essential freedom rights: free speech, free association, free access to information. The present design and practice of the new silk-road project does not yet fulfill these preconditions. In many ways China is trying to export its authoritarian norms and technologies (e. g. internet surveillance technologies). The regional extension of the big internet firewall aimed at censoring Western ideas, debate and information does not create a favorable environment for free and mutual respectful and beneficial civil society cooperation.

How did China respond to the European and global voices of concern and protest?

Nobody can deny that there was a need to regulate the activities of INGOs in China and that China has the legitimacy to do so. This sector was highly under-regulated as there was a huge legal grey zone. Only 29 INGOs of about officially 7000 had registered before with the Ministry of Civil Affairs. But, though China as a sovereign nation state has the uncontested right to regulate INGOs, international civil society actors and stakeholders cooperating with China have a legitimate stake in all those Chinese issues which affect international public goods. These are no more only Chinese but transnational issues as the global impact and footprint of China is huge. To name just a few aspects: coal production and use in China is about 50% of world production and consumption; 30% of all GHG emissions from fossil fuel resources are from China (this percentage is still growing dramatically), in comparison to the US (15%) and to the EU (28.9%).

As the Chinese government is well aware of those global interdependencies it published the draft of the INGO Law in 2015 in English and asked for international feedback as well. As a matter of fact the review period after the submission of the draft, normally less than a month, was extended to more than 10 months. Most of the feedback has been rather critical, often asking the withdrawal of the draft law. The USA, President Obama, and Germany chancellor Merkel, have been the most outspoken voices of concern of international nation states. Merkel admonished that “certain conditions have to be fulfilled in order to reach more common ground: Foreign academic organizations, NGOs and foundations should be allowed to “fully operate” in China...” A spokesman of the US government informed during a visit of Xi Jinping in the US that “today’s discussions focused on concerns that the draft legislation would further narrow spaces for civil society in China.”

Because of the interdependencies in a globalizing world *the Chinese government has taken the critical voices of the global and European community*, and after that, the strategies of hesitation and disengagement *into consideration* though it is not yet clear, if it takes them really seriously. Neither is the meaning of the strategic considerations and moves of the Chinese government easily to read, nor, if there is a debate within the leadership and leading state agencies how to respond. As well it is still too early to assess how different Chinese stakeholders of international civil society cooperation (Ministry of Civil Affairs, the political core group for civil society development, different types and sectors of NGOs, GONGOs,

foundations, community of civil society researchers and experts, etc.) will respond. The evidence on all these issues is still scarce, incomplete and only emerging. How these (informal) debated and learning processes will develop, is largely dependent on the question of the open-ness or closed-ness of the political atmosphere. During the run-up to the 19th party congress the atmosphere was very tight and any open debate of this issue was not possible.

Nevertheless, the European CS stakeholders would be ill-advised to ignore that many Chinese NGOs, even GONGOs were affected negatively by the Law as well and that the majority of the Chinese civil society actors has a substantial interest in as much unrestricted international cooperation as possible. Chinese Think Tanks are designing strategies of globalization and some NGOs or GONGOs, in the first place the potential national champions, are considering plans of globalization. All of them know, or should know, that this must be based on reciprocity. The Chinese government has to balance diverse and sometimes contradictory interests. The strategy of control is balanced by the interests and strategy of an emerging Superpower to promote international economic, political and CS cooperation. Xi Jinping has positioned China in Davos in early 2017 as the standard bearer of international market competition; cooperation and civil society are an essential building stones of a concept of a sustainable and socially just market economy advocated by China.

As the evidence of the diverse Chinese responses to the voices of concern of the international community is still scant and mostly hidden in the dark, in-transparent cellars of Chinese monopolistic party politics it needs more solid research and a relaxation of the political atmosphere to bring it to the limelight to make an assessment of the interactions of the global community of CS stakeholders and their Chinese counterparts possible. But there is no doubt that there is and will be interaction: dialogical, cooperative and contentious interaction. The common future of Europe and China can only be constructed by dialogue, conflict and negotiation.

Considering the present limits of our knowledge I will try to sketch the most visible responses of the Chinese government and CS stakeholders. There have been three stages: first, the global concerns and Chinese response to the international critiques of the law which was selective but not marginal; second, the silent, implicit reaction to the wave of concerned global voices by the open and cooperative attitude of Public Security; third, first voices within the community of Chinese stakeholders of international CS cooperation which start to take the international concerns serious and plead to consider some of these concerns by shaping the law during the process of implementation.

Here I focus only on an overview of the international debate on the Law and the unusual long Chinese political deliberation on this debate, whereas the second and third stages still need some more openness and research.

A broad alliance of shared concerns based on liberal-democratic values

International critique of the Law was fundamental, loud and broad which shows the high priority of China's role in international cooperation from the perspective of the democratic nations and the UN. The debate was fundamental, as the role of civil liberties and of reciprocity in transnational relations were at stake. It was broad as all levels of Western society (national governments, civil society actors and stakeholders in a broader sense, etc.) and very different sectors, not only human right defenders or NGOs but international lawyers and journalists associations, etc. were involved. Among the nation states the US and Germany were most vocal but the EU and Canada expressed their urgent concerns as well. In some countries, e. g. the US, "a coalition of groups spanning diplomacy, academia, civil society and business are organizing to petition the government to tone down the law...".¹⁶ The voicing of critique was broad as well in terms of issues concerned. The reservations and questions referred to many topics, often interconnected, not only to the difficulties of registration: micromanagement of INGOs within a surveillance strategy based on mistrust, demonization of democratic ideas, the freedom of speech and journalistic investigation (China ranks 176 of 180 countries in terms of press freedom) and the freedom of association and advocacy, lack of defendable minimum rights, etc.. Even INGOs which have opted for registration ask themselves: Which are, considering the general clauses, firm legal foundations, free spaces and limits of our activities? How can we defend ourselves, if we are investigated or threatened because of wrong accusations?¹⁷ How can we protect our Chinese partners without renouncing our mission? How can we defend our partners if they are accused on such broad terms inviting for arbitrary misuse for "threatening security and stability" or "picking quarrels and provoking trouble"?

It is highly significant that different levels and departments of the UN system loudly voiced their concerns as with this Law China challenged global norms enshrined in different global conventions. Ban Ki-Moon during his last visit to China as UN Secretary General admonished China „to create the space for civil society to play its crucial role“ because „a flourishing civil society and free media are key to China's development“. A group of UN human rights experts, headed by Maina Kiai, UN Rapporteur on Human Rights, advocated in May 2016 to repeal the INGO Law as "we fear that the excessively broad and vague provisions, and administrative discretion given to the authorities in regulating the work of foreign NGOs can be

¹⁶ Foreign governments, non-profits pressure China to revise the draft law, Reuters, 01.06.2015: <http://www.reuters.com/article/us-china-ngos/foreign-governments-non-profits-press-china-to-revise-draft-ngo-law-idUSKBN0OH2I720150601>

¹⁷ According some sources litigation is possible within the existing laws, e. g. the Administrative Litigation Law against decisions of MPS but not if a PSU withholds its support. Though till now no registration has been denied, the available evidence hints to a political not a legal decision. It is up to China to prove the opposite.

wielded as tools to intimidate, and even suppress, dissenting views and opinions in the country...". The contentiousness of this issue was visible when the UN Rapporteur on human rights and poverty Philip Alston was denied to meet leaders of relevant state agencies "because they were on holidays". This is a paradox as the assessment of Alston in his final mission statement was balanced as the following summary by Human Rights Watch indicates: "While the Special Rapporteur recognized China's remarkable achievements in alleviating poverty, he rightly addressed the restrictions on civil society's participation in shaping anti-poverty policies and programs, the violations of civil and political rights and economic and social rights arising from government action and inaction pertaining to anti-poverty work, and the lack of meaningful accountability mechanisms for such violations. As the Special Rapporteur noted, *recently promulgated laws such as the Management of Foreign Non-Government Organizations and Charity Law further restrict the role NGOs play in advocacy around anti-poverty policy issues.*"¹⁸

It is noteworthy that these concerns were reflected in the Chinese policy process. There was not an open, public debate but, as stressed by Shawn Shieh, author of an NGO China blogspot¹⁹ accompanying the policy process of adopting and implementing the LAW, international comments were considered "ten months after the (deadline of the, H. F.) comments session. This delay indicates that there is some debate over this. The draft law contained things of serious concern, not just for international NGOs but also for those within the system."²⁰ Between the first draft and the final decision by the National People's Congress (NPC) there were more than two years. Even during the session period of the NPC in March 2016 discussion and negotiation were still going on as highlighted by Fu Ying, the spokeswoman of the NPC: "We still have to deal with various recommendations and opinions in order to revise this law well....It has still not yet been definitely decided which session of the Standing Committee will submit the law." Yet the hopes that the law would be delayed,

¹⁸ Human Rights Watch, 09.06.2017, China should end restrictions on civil society participation in anti-poverty policies, and cooperate with UN mandate-holders without interference:

<https://www.hrw.org/news/2017/06/09/china-should-end-restrictions-civil-society-participation-anti-poverty-policies-and> See the *End-of-mission statement on China, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights*, United Nations Human Rights, Office of the High Commissioner, 23.08.2016:
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20402&LangID=E>

¹⁹ <http://ngochina.blogspot.de/>

²⁰ Shawn Shieh, who has followed the law in his blog closely, cited in *Delay in Passage of Chinese NGO Law Raises Questions*, Philanthropy News Digest, 15.03.2016,
<http://philanthropynewsdigest.org/news/delay-in-passage-of-chinese-ngo-law-raises-questions>

shelved altogether or at least watered down substantially have been wishful thinking. As we will see, there have been relevant improvements but within clear limits.²¹

Scope of the revisions: no minor but no strategic revisions

A close comparison at the final Law and the draft reveals that there have been relevant revisions which often have been underestimated in Western media perceptions which mostly talked of more or less cosmetic changes. At the same time many key messages of the draft did not change. What has been revised, and which tenets have not been changed? Here is a short summary of revisions and continuities.²²

The first change concerned the name of the Law focusing now on Foreign NGOs *activities* and not INGOs as such. The change of wording signals that the goal is to facilitate registration, not to hinder it, but at the same time to facilitate surveillance and control of activities. Probably the most important changes refer to the scope of the definition of Foreign NGOs. Whereas in the second draft any “not-for-profit, non-governmental social organization formed outside mainland China” were addressed, in the final version exchanges and cooperation between foreign schools, hospitals, natural and engineering science associations, research establishments and academic organizations (not social sciences!) have been exempted, though there still remain a lot of grey areas. Yet, some rather burdensome restrictions were made more flexible: INGOs may have more than one regional office, if they have activities in several provinces; the imperative to re-register after a time limit of 5 years of registration has been removed; employees and volunteers may be more freely recruited without approval by respective government departments. Another big change has been the introduction of two different categories of INGOs, one with a representative office and another with temporary activities which allowed a very useful simplification of registration procedures for temporary activities.

But, there has been one important aggravation of the Law as well: a greater “transparency” bottom-up to enable surveillance of all funding sources and spending for all activities, whereas before supervision of finances was the business of a third party consultant focusing on the “technical” transparency. Here the generalized mistrust by the party state of Foreign NGOs and a political micromanagement and control approach is evident.

This hints to some important remaining restrictive principles of the Law: The dominant security logic of the Law with a generalized suspicion of all Foreign NGOs as potential enemies

²¹ Didi Kirsten Tatlow, China Wrestles With Draft Law on Nongovernmental Organizations, New York Times, 11.03.2016: <https://www.nytimes.com/2016/03/12/world/asia/china-ngo-law.html>

²² See the comparisons of Shawn Shieh: The Origins of China’s New Law on Foreign NGOs, China File; 31.01.2017: <http://www.chinafile.com/reporting-opinion/viewpoint/origins-of-chinas-new-law-foreign-ngos> .. See also *Comparison of 2nd Draft and Final Passed FNGO Laws*, China Law Translate, 10.05.2016: <http://www.chinalawtranslate.com/comparison-chart/?lang=en>

because of their democratic identity (see below); the general clauses with vague definitions of legal infringements which open up spaces for arbitrary actions of the police; an approach of the Law less as a regulatory law and much more a supervisory law based on micromanagement and surveillance strategies; the all-encompassing mandate of the Ministry of Public Security (MPS) revealing definite aspects of a police state mistrusting not only INGOs but Chinese citizens as well; INGOs still need approval of the police for their activity plans and annual reports; the prohibition of fundraising for INGOs in China (Why?); no membership recruitment with the exception of international scientific associations and societies; and last not least, the lack of credible and effective legal instruments and procedures for INGOs to contest false accusations.

The critical issue of the Law is not only about registration. The first critical issue is who will succeed to register based on which criteria (see above). The second critical issue of the Law is the fact that INGOs in principal are at mercy of the Chinese state, mainly Public Security, without any effective rights of litigation. Public Security may be more or less tolerant but there are no enforceable, inviolable, constitutional rights – not for INGOs, and in many ways not for Chinese citizens. These voice their concerns, they develop NGOs, they organize local protests - often very successfully, they form sectoral networks, they debate in social media, etc., but there are no constitutionally guaranteed and protected rights of free speech, free access to information, free assembly, free association and free choice and unrestricted of their government. This is why, Southern Weekly, a leading newspaper in Guangzhou, in a New Year editorial in January 2013 called for a debate on constitutionalism and constitutional rights which was immediately suppressed. Nonetheless, and because of the campaign against Western, democratic ideas paradoxically, there is a relevant constitutionalist current within the CCP.

Nevertheless, it would be misleading to interpret the relationship of revisions and continuities in Hegelian terms of essence and appearance or in simple binary oppositions.²³ The essential terms of the democratic tradition, e. g. freedom or civil society, are no absolute entities and therefore should not be thought in a dualistic fashion in a simple contrast of their opposites. Civil society, as freedom, cannot be conceived within a binary reference frame, they are scalar concepts which can be measured on a rather long scale. To assess the degree of freedoms or civil society spaces even small scalar units can be relevant. If we dismiss the revisions as simple cosmetic changes, we lose out of sight and ignore the opportunities and processes of CS cooperation they may facilitate. There are no reasons to renounce any public spaces of cooperation in a kind of premonitory obedience.

²³ See the reflections on this issue and the critique of binary classifications by Richard Rorty: *Philosophy and Social Hope*, London 1999. Penguin Books, p. xx.

The dragon wants to be perceived as a tactful, considerate dancer and MPS a tolerant, supportive partner

How did Chinese Public Security act in practice in terms of the Law? The national MPS tried to speed up the creation of an open access infrastructure for the registration of INGOs. Only in a few provinces there have been some delays. The slow process of registration has been due mainly to the need to start from scratch and to other factors: the PSU, the difficulties of coordination in a new legal and procedural setting and – to a certain extent – to intercultural and political problems. European NGOs are not accustomed and even reluctant to negotiate with the police as partner; nor are they accustomed to consult closely with an implementing agency. Nearly all Western and European participant observers concede that their main counterparts, the Chinese Agencies of Public Security, have been as open, cooperative, and yes, supportive as possible. But can we really rely that this will be the rule and that this openness is applied to INGOs focused on so-called sensitive areas, e. g. human rights, as well? No, as the Law does not guarantee any enforceable rights, this openness and cooperative attitude of MPS is not guaranteed.

The present attitude of the Chinese government and MPS can be perceived as a strategic response designed to dispel the now prevailing concerns and doubts of international NGOs. It is politically motivated because of the present political conjuncture and the political interests of the Chinese government to be perceived by INGOs as open, supportive and reliable; it is not legally protected. The dragon, which in the Chinese tradition is not perceived as a threat, now likes to be perceived as an elegant and tactful dancer. Yet, his intentions are more or less clear: channeling INGO cooperation into political priority sectors (poverty alleviation, sustainable development, environmental protection, climate policy, social services like health, etc.) and marginalizing the so-called sensitive sectors and actors promoting social autonomy and defending rights which are undermining the monopoly of power and therefore perceived as threats by the monopolistic party state.

As in some sectors and for some issues shrinking spaces of CS cooperation are intended and the risks of potentially arbitrary micromanagement are evident, we are, in the near future, on a bumpy, conflictive road. Does this imply that we have to accept these premises and that the only option is to disengage? I think that this assessment is too simple and the strategic conclusion understandable, but as a general rule wrong. As China has become more assertive and is challenging European economy, politics and civil society there are many reasons for European politics, here CS stakeholders to live up to this challenge. Additionally, there are many convincing and urgent reasons to continue and to expand cooperation, in particular in all policy fields related to global public goods. Nevertheless, as China's international politics is challenging our democratic norms and identity sometimes openly, often secretly influencing international norms and procedures, there must, should and hopefully will be, alongside of cooperation, much more open, inclusive, horizontal and respectful civil society *public* debate about our different identities, norms, concepts and development

models. This is a game China has started as a consequence of its rise, growing economic power and a new assertiveness that we have to accept as the new normal if we do not want to accept passively and obediently the erosion of global civilizational and democratic standards enshrined in global conventions.²⁴

Beyond the strategic options of individual NGOs sketched above European politics and CS stakeholders need to develop a strategic response to the new INGO Law and other aspects of China's international soft power offensive. This requires an urgent European debate on this issue which is of strategic importance for the competitiveness of the European economy and the survival and a sustainable future of a global polity and society where human and citizen rights and an active, autonomous civil society count and which are necessary to reverse the myriad of international and national structures of institutionalized inequalities and injustice.²⁵ Contesting the many forms of social injustice and other issues (environmental crisis, climate change, etc.) will only be effective with the support of autonomous, not patronized civil societies. The European model of social democracy and a social market economy presupposes social, economic and political citizen rights and cannot be sustained without an empowered, vital and free civil society.

Global norms and institutions of the United Nations, though often perceived as weak, are our common, global reference and natural allies. Rob Precht has argued that the INGO Law could prove to be a “blessing in disguise” and an incentive to reconsider and to broaden the strategic approach of international NGO, e. g. in the case of human rights by using a “currently underutilized tool to counter the growing indifference to the plight of human rights victims in China: *enlisting the help of businesses and universities.*”²⁶ His reasoning for a broader approach is convincing: “To be taken seriously, human rights need to be seen not

²⁴ Timothy Snyder stresses “anticipatory obedience” as his first of his lessons on tyranny in the twentieth century. See Timothy Snyder: *On Tyranny. Twenty Lessons from the Twentieth Century*, Bodley Head 2017, Vintage Publishing. I refer here to the role of European and global citizens. From our German and Eastern European experience we know how difficult “living in the truth” (Vaclav Havel) is under autocratic conditions. From this experience we know as well that there is no reason for any kind of moral arrogance. But from this experience we know as well how important “living in the truth” is for reasons of moral integrity. Paradoxically, the European experience of two very painful and bloody tyrannies in the last century has facilitated the democratic learning processes after 1945. This could and should be part of the global memory but unfortunately such experiences are not easy to diffuse for nations with different historical trajectories and experiences. For this reason intercultural exchange and debate is so important.

²⁵ See the inspiring analysis for the USA of renowned management theorist Henry Mintzberg: *Rebalancing Society. Radical renewal beyond left, right and center:*

http://www.mintzberg.org/sites/default/files/rebalancing_society_pamphlet.pdf

²⁶ Rob Precht: *Is the Foreign NGO Law a Blessing in Disguise*, China File – The China NGO Project, 15.09.2017: <http://www.chinafile.com/ngo/analysis/foreign-ngo-law-blessing-disguise>

just as a concern of special interest groups and persecuted minorities. *Respect for human rights is everyone's business.* This principle needs to be embraced and publicized by a range of societal actors, including large businesses and universities and other opinion leaders.”²⁷ China indeed should have a bigger stake in international politics and institutions according to its grown impact but it cannot claim any right to erode or ignore these global human rights institutions, the international conventions and norms agreed upon and the tools and standards developed by them.

The underutilized tool Rob Precht mentioned are “the UN’s ‘Guiding Principles on Business and Human Rights’” which according to Precht might be effective for making public and contesting human rights violations in China: “Adopted in 2011, the Guiding Principles recognize the critical role businesses play in protecting human rights. According to the Guiding Principles, an enterprise’s corporate responsibility entails making a clear and public policy commitment, implementing due diligence processes, and providing or cooperating in the creation of remedies for human rights violations committed by their business partners. In the China context, this would mean that businesses need to make commitments on public platforms such as annual reports and company websites to uphold human rights. The Guiding Principles also say that the due diligence process needs to be ongoing. In light of a government crackdown on the human rights community, ongoing due diligence would require companies to identify the campaign as a human rights harm and to propose means of mitigating this harm. For example, it might be feasible for university presidents to make a joint public statement calling for fair trials for arrested activists.”²⁸

In terms of INGO cooperation with China we naturally have to obey Chinese laws. But, as we have seen, in the Chinese legal tradition there is some space for shaping the Law by consultation and negotiation. We should make it clear that our support is conditional on the premise that arbitrary treatment by an almighty autocracy are not compatible with a fruitful, trustful cooperation based on mutual recognition. This European approach has to be inclusive and should include all rights NGOs, our brothers in democratic spirit.

If there has been a strategic fault of European CS stakeholders and politics in general, then it was the implicit tactics to silence our concerns about the string of arbitrary treatments of rights NGOs during the last years culminating in the wave of repression against lawyers in the mid of 2015, the so-called 709 crackdown.²⁹ Most European CS stakeholders did not an-

²⁷ Ibid.

²⁸ Ibid.

²⁹ Rob Precht observes a „growing international complacency about human rights violations committed by the Chinese government. The Western world’s increasing indifference to China’s human rights situation was exemplified when Chinese authorities released from prison the critically ill Liu Xiaobo, who died shortly thereafter.” Rob Precht: Is the Foreign NGO Law a Blessing in Disguise, ChinaFile –

ticipate that this would be a systematic strategy and lead, as a next step, to an approach of authoritarian surveillance and micromanagement of INGOs. Most of INGOs because of their organizational survival instinct were blind to this risk because at first most have not been affected and hoped that by staying silent the spaces of CS cooperation would not be endangered. The lessons we can learn from this fault are that we should advocate and defend our rights-based development approach from the beginning; and that we are weaker and more vulnerable, if we are divided by pursuing narrow individual or sectoral interests. The results of the ongoing contention and negotiation are dependent on our performance: if we will play it well, in an inclusive way mobilizing all our resources and allies or not. *The liberties of INGOs in China and of Chinese civil society as well, are as strong as the strategy and negotiating power of global CS stakeholders, with the UN and international conventions as pillar, and in the first place, of Chinese CS stakeholders.* Politics is, as Chinese know very well, contentious politics. Leadership, strategy, allies, mobilization, competition of ideas and negotiation competencies are essential resources in this game.

Both, the European and the Chinese experiences, offer lessons to prevent that debate and contention endanger the urgent cooperation. After 1945, in Europe the norms and rules of representative, electoral democracy in general have been strong enough to prevent systemic crises of democracy because of self-destructive conflicts. In China there has been a more restricted but similar civilizing process within the party by gradually instituting after 1978 rules of succession, of power sharing (collective leadership and informal factions with governments representing different informal alliances), restraint of the power of the leader, etc.. These gradual development and institutionalization of these rules led to the partial, always fragile and incomplete civilization of intraparty politics after 1978, and with the exception of 1989, have prevented that the enormous challenges and conflicts reflected within the party have torn the party apart – a permanent risk during the Cultural Revolution under the charismatic, dominant leadership of Mao, unrestricted by such rules.

For a successful balancing of cooperation, competition (economic and of ideas) and contention the international community, here the transnational CS community needs some analogous rules, institutions and a culture of conflict management. In the mid-term, considering the global importance of cooperation and constructive debate between European and Chinese civil society, there is a need for a policydebate which kind of institutions might be the most viable and meaningful institutional platforms to debate challenges and strategies of

The China NGO Project, 15.09.2017: <http://www.chinafile.com/ngo/analysis/foreign-ngo-law-blessing-disguise><http://www.chinafile.com/ngo/analysis/foreign-ngo-law-blessing-disguise>

The China NGO Project of China File is the leading international platform for monitoring and debating the INGO Law.

cooperation.³⁰ A probably short-term more viable option for Europe could be to develop the so-called *People-People-to-People Conferences* on the EU and the national levels, which by now are rather elitist and statist with narrowly controlled participants and an official agenda into institutional tools which really correspond to their name in terms of participants, agenda and flexible, participatory horizontal organization.³¹

If we look at the state of the Western world, the crisis of leadership caused by the Trump government is the most important problem for an effective Western response to the Chinese challenge of international civil society cooperation though there are many US civil society stakeholders of cooperation with China. But CS stakeholders need political support as well. Can the EU live up to this challenge?

Here is a short selection of specialized information sources about the international debate regarding the *Chinese Overseas NGO Law*:

The China NGO Project of China File: <http://www.chinafile.com/ngo> “The China NGO Project is a community-driven platform from China File that provides practical information and analysis on the situation of non-governmental organizations (NGOs) working in China, focused primarily on the implementation of the Law on the Management of Foreign Non-Governmental Organizations’ Activities in the People’s Republic of China (the Foreign NGO Law).”

NGOs in China blogspot (Shawn Shieh): <http://ngochina.blogspot.de/> Shawn Shieh has accompanied the policy processes of shaping and implementing the law very closely and was a reliable source for this essay. Shawn Shieh is also author of the *Civic Freedom Monitor: China* published by the *International Center for Non-For-Profit Law (ICNL)* as part of the *NGO Monitor* series. The national reports are updated regularly.

China Development Brief: <http://chinadevelopmentbrief.cn/research/> Under the heading of *Translations of Laws and Regulations* you can find the English translations of the Law, its

³⁰ For a first overview and a basic assessment of the available institutional tools see the last chapter of Horst Fabian: *China’s new Overseas NGOs Law: Uncertain, contested future of EU – China civil society cooperation but no closed spaces*, BBE Europa-Nachrichten, Newsletter für Engagement und Partizipation in Europa. Nr. 11/2016: <http://www.b-b-e.de/fileadmin/inhalte/aktuelles/2016/11/enl-11-2016-fabian-beitrag.pdf>

³¹ See the critique by Andreas Fulda of the *UK-China High Level People to People Dialogue: Video Policy Brief No 5: Video Policy Brief No 5: How a lack of faith in people is undermining UK-China relations* | Dr Andreas Fulda, <https://vimeo.com/243841949>

regulations and tools (Handbook, etc.). One article of Jia Xijing, one of the leading Chinese experts specialized on the ONGO Law, cited in the text was published as well here.

At the website of the *Mercator Institute of China Studies (MERICS)*: <https://www.merics.org/1>) and at the Online Journal *Analysis* of the *China Policy Institute of Nottingham University* (<https://cpianalysis.org/>) you can find very useful information and debate on Chinese politics. Both are not exclusively specialized on civil society issues and the INGO Law.

Autor

Dr. Horst Fabian war 20 Jahre lang (1992-2012) Programmkoordinator Ostasien von CIM/GTZ, dem Personalvermittler der deutschen Entwicklungszusammenarbeit. Vorher hatte er u.a. zu Themen der kubanischen Politik und Entwicklungspolitik wissenschaftlich publiziert. In China hat er ab 1992 das CIM-Portfolio mit den Schwerpunkten Umweltschutz und Förderung der Zivilgesellschaft aufgebaut und durch das Zivilgesellschafts-Portfolio auch einen ersten Baustein für die spätere Entwicklung des EU-China Civil Society Dialogue gelegt. Seit seiner Pensionierung arbeitet er als informeller zivilgesellschaftlicher Botschafter Europa-China (u. a. als internationaler Berater von CANGO, einer führenden chinesischen NGO-Dachorganisation, und als „Board Member“ des „EU-China NGO Twinning Program“) sowie als unabhängiger Forscher zu Themen der ökologisch nachhaltigen Entwicklung, der Zivilgesellschaft, der Demokratisierung Chinas und Kubas sowie zu Fragen der zivilgesellschaftlichen Kooperation mit China.

Kontakt: horst.fabian47@t-online.de

Redaktion

BBE-Newsletter für Engagement und Partizipation in Europa

Bundesnetzwerk Bürgerschaftliches Engagement (BBE)

Michaelkirchstr. 17/18

10179 Berlin

Tel.: +49 30 62980-114

europa-bbe@b-b-e.de

www.b-b-e.de