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Western Funding for Rule of Law Initiatives in China

The importance of a civil society based approach

THOMAS E. KELLOGG

ABSTRACT: Recent research has suggested that Western donors working in China have channelled most of their funds to government-affiliated entities, including state-affiliated think tanks, academic institutions, and government agencies, rather than to grassroots civil society organisations. A more state-centred approach may have made sense in the early years of the reform era, when few non-governmental organisations existed in China that could serve as effective partners to Western donors. Yet the rapid growth and development of the civil society sector in China over the last several years means that a number of new actors are doing very important work on a range of issues related to human rights and the rule of law. The author argues that Western funding for newly-formed grassroots civil society organisations is crucial to the ongoing development of Chinese civil society. In addition, because grassroots groups can often make fuller use of key advocacy tools, such as interest group mobilisation, media advocacy, and strategic litigation, they may in some cases be even more effective in pursuing progressive goals than academic or government-affiliated entities. Western donors active in China should take note of the rapidly-changing civil society landscape in China and make efforts to ensure that their funding strategies are in line with the evolving country context.

KEYWORDS: legal reform, Western philanthropy, civil society, rights-based advocacy.

What is the role of Western funders in China? This seemingly straightforward question has been difficult for many to answer. For many donors, one particularly thorny question has been whether to channel funding and other forms of support of government and academic partners, or whether grassroots civil society organisations, which are often the key recipients of Western rule of law funding in other parts of the world, should play a more active role.

Both approaches have their merits: given the state's deep involvement in virtually all aspects of Chinese life, meaningful change is often impossible without the state's active participation or, at the very least, tacit approval. At the same time, civil society organisations, even in their current relatively weak and underdeveloped state, can and do play a key role in focusing both government and public attention on issues that need to be addressed, and in proposing progressive solutions to those problems.

In this article, I argue that all Western entities working on rule of law in China – including not just private foundations, but also US and European government-affiliated donor organisations and international NGOs active in China, among others – need to pay more attention to the development of civil society organisations, in particular rights-based and advocacy-based civil society organisations. I argue that support for such organisations can be beneficial not only in terms of the growth and development of the civil society sector, but also in terms of substantive progress on the rights-based issues that these groups address. In some ways, as I will argue in more detail below, rights-based civil society organisations may be more effective in their pursuit of a progressive reform agenda than government-affiliated organisations or university-based entities, both because they are able to initiate grassroots-level momentum for change, and because they are able to have

an impact on the enforcement of China's own laws, a key weakness that has hindered progress on the development of the legal system as a whole.

I argue that a deeper focus on advocacy-based civil society is all the more important in 2012, for the simple reason that the momentum for government-led, top-down reforms seems to have slowed. In the absence of reformist momentum at the top – save, as I note below, on a few key issues such as open government information and certain aspects of criminal justice reform – the need for creative and innovative bottom-up approaches becomes all the more crucial. I also offer a few suggestions from a practitioner's perspective on strategies for deeper engagement with grassroots NGOs in China.

Historical background: Changing China, evolving funding strategies?

The preference for collaboration with government or academic partners has deep roots.⁽¹⁾ The earliest Western donors funding civil society and rule of law initiatives began working in China in the mid-1980s, just a few years after the reform era began in 1978. At that time, there were virtually no civil society organisations in China with which to work – academic and government partnerships were almost the only option.

Donor engagement intensified in the mid-1990s, when Western-funded rule of law programming began to be seen as a more politically palatable

1. In 2002, for example, a leading scholar of Chinese law pointed to the preference by foreign actors for government-affiliated partners. According to Alford, "The vast bulk of (foreign assistance)... has tended to flow through and be directed toward actors that are either a part of the state or closely affiliated therewith." William Alford, "The More Law, the More...?", Hope et al. (eds.), *How Far Across the River: Chinese Policy Reform at the Millennium*, Stanford (CA), Stanford University Press, 2003, p. 138.

alternative to more traditional forms of human rights advocacy. In 1994, then-President Clinton famously “delinked” human rights concerns from the annual renewal of China’s most favoured nation trading status. Casting about for a substitute for the human rights-trade conditionality that he had finally concluded was unworkable, President Clinton eventually embraced a cooperative rule of law approach as the new centrepiece of his China rights policy.⁽²⁾ In 1997, the US and China formalised their agreement to cooperate on initiatives to aid in the development of the rule of law in China.⁽³⁾ Many European countries followed suit around that time.⁽⁴⁾ Within five years, the US Congress had overcome its initial reluctance to engage, and began to offer significant funds to American NGOs, universities, and law schools looking to develop cooperative rule of law programs with Chinese actors. For many, Chinese universities, think tanks, government-affiliated entities such as the All-China Lawyers Association and the All-China Women’s Federation, and government agencies were seen as the best possible partners for Western-funded legal reform programs.

International donor engagement in China grew at a rapid pace.⁽⁵⁾ By the early 2000s, the number of funders, both public and private, active in China numbered in the hundreds.⁽⁶⁾ According to one estimate, international donor support for work in China surpassed \$100 million in 2000.⁽⁷⁾

Today, close to 20 years after President Clinton’s shift, many of the rule of law and civil society development programs that began in the mid-1990s remain a key element of both American and European approaches to reform in China. Yet, in the aftermath of the 2008 global economic crisis, which left many Western countries slashing their foreign aid budgets, and with China increasingly seen as economically strong enough to be a donor rather than a recipient of aid, some donors are pulling out of China.⁽⁸⁾ It may be the case that this phase of more intensive engagement with China on legal reform is coming to an end.

In the late 1980s and early 1990s, partnering primarily with either government or university-based actors could be more easily justified: at that time, there were few truly functional non-governmental organisations to partner with. In addition, it was believed that university-based actors had particularly good access to government decision-makers, thus giving them the ability to have an almost unique form of influence over legislative drafting and policymaking processes.

Much has changed in China since that time. First and foremost, China’s civil society movement has expanded dramatically: the official tally puts the total number of NGOs at roughly 450,000, and unofficial estimates climb as high as 8 million.⁽⁹⁾ The sophistication and political savvy of the best of the best of Chinese grassroots organisations are truly impressive, allowing at least some NGOs to achieve a level of impact that would have been unthinkable five or ten years ago. For many Western organisations working in China, this means more options in terms of potential partnerships than in years past.

At the same time, the past several years have also seen a diminishing commitment by the state to pursue wide-ranging legal reforms. As two Chinese scholars put it in a recent article, “There is no convincing evidence that the Party is now engaging in meaningful reforms, although in some areas positive improvements have been made.”⁽¹⁰⁾ In particular, the state has been unable or unwilling to address shortcomings in implementation and enforcement of laws; the development of stronger and more independent legal institutions has also been an area in which progress has been frustratingly slow.⁽¹¹⁾ The optimism that surrounded small but meaningful steps toward reform in 2003–2004 has long since given way to deep-seated pessimism

in many circles, with many declaring the government-led reform process dead in its tracks.⁽¹²⁾ In February 2010, prominent law scholar Jiang Ping told an elite legal academic audience, “Looking at China’s current situation, I think we are in a period where the rule of law is in retreat. Or perhaps, building the rule of law, judicial reform, and political reform are all moving backwards.”⁽¹³⁾ Many observers have concluded that the lack of momentum on the government side means that initiatives for reform will come from the grassroots rather than from inside the walls of Zhongnanhai. In other words, perhaps somewhat surprisingly for an authoritarian state such as China, change will more often be a bottom-up rather than a top-down process.

In many ways, the party-state has been quite open about its movement away from legal reforms in line with international standards related to the rule of law, including independent legal institutions, an emphasis on procedural justice, and fair and transparent adjudication. Senior Party officials with responsibility for the legal system have repeatedly remarked on the inappropriateness to the Chinese context of “Western” legal norms and in-

- Ann Kent, “China and the International Human Rights Regime: A case study of multilateral monitoring, 1989–1994,” *Human Rights Quarterly*, vol. 17, no. 1, 1995, pp. 1–47. For an excellent journalistic history of the Clinton Administration’s approach to China, see James Mann, *About Face*, New York, Vintage Books, 1998, pp. 292–314.
- Paul Gewirtz, “The US-China Rule of Law Initiative,” *William and Mary Bill of Rights Journal*, vol. 11, 2003, p. 603.
- Sophia Woodman, “Driving Without a Map: Implementing Legal Projects in China Aimed at Improving Human Rights,” Bell and Coicaud, (eds.), *Ethics in Action: The ethical challenges of international human rights non-governmental organizations*, Cambridge University Press, 2007, p. 132.
- For a summary of international donor engagement on the rule of law and civil society development in China, see Human Rights in China, “Funding the Rule of Law and Civil Society,” HRIC Issues Paper, *China Rights Forum*, no. 3, 2003.
- Nancy Yuan, “To Serve the People: NGOs and the development of civil society in China,” testimony to the Congressional-Executive Commission on China, 24 March 2003.
- Ibid.*
- The United Kingdom’s Department for International Development (DFID), for example, ended its decades-long bilateral aid program in China in 2011. “Charity Begins Abroad: Big developing countries are shaking up the world of aid,” *The Economist*, 13 August 2011. The Canadian International Development Agency (CIDA) has announced that all of its bilateral aid work in China will end by March 2014; see Canadian International Development Agency China Overview, www.acdi-cida.gc.ca/china (consulted on 22 August 2012). Germany, once a leading foreign donor to China, also ended its bilateral aid to China in 2010; other donors have maintained their engagement in China, however. The US government remains an active donor in China, as does the European Union. For an overview of US government-funded programs in China, see Thomas Lum, “US Assistance Programs in China,” Congressional Research Service, 11 May 2012. For an overview of European Union engagement with China, see *European Union China Strategy Paper 2007–2013*, http://eeas.europa.eu/china/csp/07_13_en.pdf (consulted on 22 August 2012).
- See CECC 2011 Annual Report, p. 156. Getting a sense of the number of NGOs in China is difficult. Many, though by no means all, of the organisations that have been able to register as non-profit organisations under Chinese law are believed to be GONGOS, some of which may serve purposes other than service to a particular group or cause. Many NGOs choose either to register as for-profit companies or not to register at all. For an excellent recent study of the strategic considerations that grassroots NGOs face when deciding whether to register, see Timothy Hildebrandt, “The Political Economy of Social Organization Registration in China,” *China Quarterly*, no. 208, December 2011, pp. 970–989.
- Yu Liu and Dingding Chen, “Why China Will Democratize,” *The Washington Quarterly*, vol. 35, no. 1, Winter 2012, pp. 41–63, 53. After acknowledging some limited progress in electoral reform, the authors go on to note, “In many other areas, however, political reform not only has not progressed, it has in fact backslid.”
- In a recent interview, prominent legal scholar and public intellectual He Weifang noted the problem of lack of enforcement of laws in China, and tied that problem to shortcomings in the development of legal institutions during the reform era. As insufficiently independent courts, for example, failed to deliver fair verdicts, the public lost faith in those institutions. As a result, He notes, “the initiative for reform by institutions of power grew weaker.” The interview with Prof He is available in translation online at: www.duihuahrjournal.org/2012/06/he-weifang-legal-reform-resolve-and.html (consulted on 22 August 2012).
- Thomas E. Kellogg and Keith J. Hand, “The NPCSC: the Vanguard of China’s Constitution?,” *China Brief*, vol. 8, issue no. 2, February 2008. See also Thomas E. Kellogg, “The Death of Constitutional Litigation in China?,” *China Brief*, April 2009.
- Jiang Ping’s remarks were translated and posted online at the Chinese Law Profs Blog. See also Chen Baocheng, “Recurring Dreams for the Rule of Law,” *Caixin*, 11 June 2012.

stitutional arrangements, and have emphasised the key political role of the courts in maintaining social stability.⁽¹⁴⁾

The Chinese government's reduced interest in legal reform raises difficult questions for international actors working in China. When new, seemingly conservative policies begin to emerge, is it better for Western actors to decline to participate in the implementation of a policy that, at least in some ways, may represent a retreat from rule of law values? Or is it better to try to have a positive – and perhaps in some small way, ameliorating – influence over the introduction of a new policy that is already a *fait accompli*? As Beijing made known its preference for mediation, for example, legal academics and others who advise the government on court reform were called upon to provide intellectual guidance for the courts as they implemented the new policy. Some of these legal academics turned to their Western partners for information and advice on the use of mediation in Western legal systems.⁽¹⁵⁾ To be sure, mediation can be a valuable part of any dispute resolution system. But the political motivations behind its embrace in China in recent years are such that the benefits of the new policy to legal development and the rule of law are in doubt, making it more difficult for Western rule of law advocates to justify engagement on this topic.

The conservative shift by Beijing on legal reform also has broader, more holistic implications for Western rule of law initiatives. Direct engagement with the Chinese government on legal reform has often been justified in part by reference to the Chinese government's own self-interest in legal reform.⁽¹⁶⁾ And, one could argue, there have been moments when an identifiable reformist faction existed within the upper reaches of the party-state. In the 1980s, for example, reform-minded officials worked quite closely with liberal intellectuals, some of whom in turn worked with Western donors, who supplied them with much-needed comparative rule of law models.⁽¹⁷⁾ As noted above, in the late 1990s and early 2000s, significant progress was made on strengthening the court system; no doubt the introduction of comparative models was helpful to that process.

No such reformist faction can be identified in Chinese politics today, and state policy has turned away from even the modest technocratic reform approach of ten to 15 years ago. To be sure, individual government officials may well form common cause with civil society activists to push specific reforms. But they do so against a backdrop of a much more conservative state policy toward legal reform in general. This conservative shift by the party-state should trigger a strategic re-think by those Western actors who have focused their collaboration on government and government-affiliated entities.

And yet, despite this shift in the overall political environment, and despite many troubling signals that the party-state has lost interest in progressive legal reform, all too many Western actors working in China in 2012 are pursuing similar strategies and working with similar or even the same Chinese partners that they were working with in 2002. A recent article analysing US foundation funding in China noted that the lion's share of US foundation dollars goes not to grassroots NGOs, but rather to government bureaus and government-affiliated entities, including academic institutions.⁽¹⁸⁾ According to this analysis, a small handful of government bureaus, government-affiliated think tanks, and university-based research centres accounted for a very high percentage of the overall funding picture, suggesting that many Western donors are concentrating their funding streams in a very small number of Chinese institutional hands.⁽¹⁹⁾

In some ways, 2012 would be good time to take a fresh look at the forms of engagement by Western actors on rule of law and civil society development. Increased attention to rights-based civil society organisations is now

possible as a result of the emergence of a small but growing number of such organisations over the past several years. While many of the best advocacy organisations that have been created over the past few years have been environmental groups, groups focusing on other issues, including anti-discrimination, women's rights, disability rights, and the rights of persons with HIV, have also emerged. What makes these groups different from the much larger number of service-based entities that make up the vast majority of civil society organisations in China is their willingness to experiment with advocacy tools that are, as yet, not yet widely used in the Chinese context, including media strategies, public mobilisation strategies, strategic litigation, research and reporting, use of the reporting mechanisms of international treaty bodies, public protest (which the groups themselves usually refer to as *xingwei yishu*, or performance art), and, in some cases, direct advocacy with government officials. Their ability to deploy these tools, often in creative and innovative ways, sometimes allows these groups to be more effective than other potential partner organisations that don't use these tools.

Perhaps even more than service-based NGOs, which themselves often have difficulties with the government, advocacy-based NGOs have to be experts in the art of risk management. They regularly have to make difficult decisions on when to push the envelope and when to hold back. They also have to be extremely flexible: often unable to register as civil society organisations, they more commonly register as companies or decline to register at all. Only through regular engagement with the relevant authorities, including not just health, environment, and civil affairs officials, but also bank clerks, tax collectors, and even state security agents, are they able to keep their doors open.

To be sure, in the conservative climate of China in recent years, not all of these organisations have survived. In 2009, one of the most innovative organisations in China, the Beijing-based *Gongmeng*, or Open Constitution Initiative, was forced to close its doors after one of its founders was temporarily detained on tax charges that were widely seen as politically motivated.⁽²⁰⁾ Although the pathbreaking HIV/AIDS group Aizhixing remains open, its founder, Wan Yanhai, fled China in May 2010 after months of harassment by the authorities.⁽²¹⁾

And yet, despite the very real political difficulties they face, not only do the vast majority of these groups continue to operate, but many of them

14. Benjamin L. Liebman, "A Return to Populist Legality? Historical Legacies and Legal Reform," in Sebastian Heilmann and Elizabeth J. Perry (eds.), *Mao's Invisible Hand: The Political Foundations of Adaptive Governance in China*, Cambridge (MA), Harvard University Press, 2011, p. 178. See also Carl F. Minzner, "China's Turn Against Law," *American Journal of Comparative Law*, vol. 59, no. 4, 2011 p. 935-984; and Fu Hualing and Richard Cullen, "From Mediator to Adjudicatory Justice: The Limits of Civil Justice Reform in China," in Woo and Gallagher (eds.), *Civil Dispute Resolution in Contemporary China*, Cambridge University Press, 2011.

15. Author interview.

16. Paul Gewirtz, "The U.S.-China Rule of Law Initiative," *art. cit.*

17. "Communist Party reformers and intellectuals were very close, for the Party was very tolerant during the 1980s. It was absolutely necessary for them to work together." Jean-Philippe Béja, "The changing aspects of civil society in China," in Zheng Yongnian and Joseph Fewsmith (eds.), *China's Opening Society – The Non-State Sector and Governance*, Abingdon, Routledge, 2008, p. 75.

18. Anthony J. Spire, "Organizational Homophily in International Grantmaking: US-Based Foundations and their Grantees in China," *Journal of Civil Society*, vol. 7, no. 3, September 2011, pp. 305-331.

19. *Ibid.*, p. 317. According to Spire, grants to academic, government, or GONGO entities constituted roughly 86% of overall grants made by US foundations in China from 2002-2009; the top ten recipients accounted for nearly 37% of all grants made. While certain aspects of Spire's study should be questioned – not all US donors operating in China report their grantmaking to the Foundation database, for example – his findings should nonetheless be taken seriously as a key indicator of the need for a more diversified approach by Western donors.

20. Andrew Jacobs, "Arrest in China Rattles Backers of Legal Rights," *The New York Times*, 9 August 2009.

21. Peter Ford, "Another AIDS Activist, Wan Yanhai, Flees China," *Christian Science Monitor*, 10 May 2010.

have grown in size, sophistication, and impact, and new organisations have been formed.⁽²²⁾ The emergence of these organisations – non-governmental, grassroots, and focused on rights-based advocacy – has as yet received little attention from scholars both inside and outside of China.

At the risk of stating the obvious, the situation in China in 2012 is complex. Many different actors, both inside and outside of the state structure, are pushing for progressive change. There is also a benefit to the pursuit of contrasting, complementary strategies by different funders. It cannot be said, and this article does not argue, that support for state-led reform projects does not make sense; nor do I argue that all civil society-based projects are productive. Certain reforms in recent years – including important advances in open government information⁽²³⁾ and the recent reform of the criminal law – were more state-led, often with the help of senior Chinese and Western academic experts; to ignore these important reforms would be to fail to understand the full picture of how progressive legal change happens in China.

That said, many of the Chinese organisations that are engaged in innovative and path-breaking advocacy work have yet to come onto the radar screen of international organisations working in China. This needs to change. A growing number of observers, both Chinese and Western, believe that change in China is more likely to be bottom-up than top-down. If so, international support should increase for truly grassroots civil society organisations that work within the system for meaningful, if incremental, reform.⁽²⁴⁾

Why rights-based advocacy?

In many other parts of the world in which Western donors are active, the question may be self-evident: support for rights-based advocacy organisations is the preferred mode for donors looking to have an impact on human rights and the rule of law.⁽²⁵⁾ For better or worse, grassroots organisations in many countries working on a range of issues have chosen to articulate their goals in the language of rights. These groups often work closely with local and national governments to achieve legislative change, and they also attempt to use litigation tools to achieve their goals. They maintain regular contact with international human rights groups working on similar issues, and often act in coordination with those groups to pursue advocacy opportunities within the UN human rights system, taking advantage of the various country review mechanisms created by various international human rights treaties.

While these approaches, and the formation and development of NGOs that can pursue them, have been central to the strategies of both domestic activists and international donors working in many different countries, China has been a latecomer to many of these approaches, and some of these tools remain of limited utility in the Chinese context.

Instead, international actors working in China have relied more heavily on partnerships with official actors, including university-based research centres, government-affiliated think tanks, and government bureaus such as the Ministry of Health. Even with the emergence of new organisations that embrace a rights-based advocacy approach, many donors remain committed to a more state-centric model.⁽²⁶⁾ The argument for doing so is not without merit: the state remains omnipresent in China, and little meaningful change can be achieved without the party-state's consent. Working directly with state actors, or with academics whose voices are influential inside the walls of Zhongnanhai, may seem like the most direct path to reform.

And yet, there is reason to believe that this approach may be less effective

than it was in the past. The decision to work directly with state actors or with academics on the creation of new laws and policies implies a view of how and why legal change happens in China: the government, benefiting from the technocratic expertise of Western advisors, drafts a law that solves a legal problem, and then implements that law nationwide.

Yet it remains open to question whether this model accurately represents how progressive legal reform happens in China. As noted above, the party-state's appetite for reform may now be at the lowest it has been in decades, which means that projects seeking to work directly with the state to achieve change may founder on the rocks of political inertia.

In a number of cases in recent years – including key advances in anti-discrimination law,⁽²⁷⁾ reforms to China's mental health system,⁽²⁸⁾ increased emphasis on due process in the courts,⁽²⁹⁾ and the elimination of a particular form of arbitrary detention known as Custody and Repatriation (*shourong qiansong*),⁽³⁰⁾ to name but a few examples – legal change was triggered by different combinations of social activism, non-governmental advocacy, public interest litigation, media attention, and mobilisation of public opinion, all of which put pressure on the state – or gave reformists within the state structure the opportunity – to take action. Given this growing list of progressive reforms that have been pushed forward by bottom-up grassroots activism, Western donors should consider whether they should place a higher priority on getting resources to the NGOs, lawyers, and others who have helped spark these bottom-up reform movements. At the very least, for those who view collaboration with civil society as less impactful – and therefore less desirable – than collaboration with the government, these and other examples of meaningful bottom-up change should provide food

22. For an analysis of why the Chinese government has allowed truly non-governmental organisations to exist, and even to continue to proliferate, see Anthony J. Spires, "Contingent Symbiosis and Civil Society in an Authoritarian State: Understanding the Survival of China's Grassroots NGOs," *American Journal of Sociology*, vol. 117, no. 1, July 2011, pp. 1-45. Spires argues that many grassroots NGOs focus on meeting social needs, usually in ways that are consistent with local government interests (p. 12). According to Spires, many grassroots groups recognise the divergence of interests that exists at different levels of government, and attempt to exploit those divergent interests in their work to both achieve their own work-related goals and shelter themselves from political attack by those government agencies whose interests are implicated by the achievement of those goals (pp. 14-15).
23. For an excellent summary of China's progress on adopting a system for Open Government Information, see Jamie P. Horsley, *China Adopts First Nationwide Open Government Information Regulations*, www.law.yale.edu/documents/pdf/Intellectual_Life/Ch_China_Adopts_1st_OGI_Regulations.pdf (consulted on 22 August 2012).
24. See, e.g., Minxin Pei, *China's Trapped Transition: The Limits of Developmental Autocracy*, Harvard University Press, 2008. Many Chinese grassroots activists also believe that Western rule of law efforts may focus too much on the state, and suggest a greater focus on bottom-up strategies. In an interview with a Western journalist soon after his arrival in New York, self-trained lawyer and rights activist Chen Guangcheng noted, "Westerners like to train local officials, to improve their understanding of the law. But when there's been an improvement, it's not because of improving the quality of officials; it's because ordinary people grasp the law and push. ... the decisive pressure for change is at the grassroots level." Ian Johnson, "Pressure for Change is at the Grassroots: An Interview with Chen Guangcheng," *New York Review of Books Blog*, 26 June 2012.
25. This support is often considered controversial in a number of different countries. In Russia, for example, the state has often highlighted the fact that most human rights groups are supported by Western donors as a means of undercutting the credibility of those local groups. See Human Rights Watch, "Russia: Reject Proposed Changes to Rules on Foreign-Funded NGOs," 5 July 2012.
26. Spires, "Organizational Homophily," *art. cit.*
27. Thomas E. Kellogg, "Constitutionalism with Chinese Characteristics," *International Journal of Constitutional Law*, vol. 7, no. 2, 2009.
28. Huang Xuetao, Liu Xiaohu, and Liu Jijia, *Zhongguo jinshenbing shouzhi zhidu falu fenxi baogao* (A Legal Analysis of China's Mental Health Treatment System), Equity and Justice Initiative, June 2011. On file with author. Equity and Justice Initiative is a Shenzhen-based NGO; see also Sharon LaFraniere, "Assertive Chinese Held in Mental Wards," *The New York Times*, 11 November 2010.
29. Thomas E. Kellogg, "Courageous Explorers? Education Litigation and Judicial Innovation in China," *The Harvard Human Rights Journal*, vol. 20, 2007, p. 141.
30. Keith J. Hand, "Using the Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China," *Columbia Journal of Transnational Law*, vol. 45, 2006-2007, p. 114.

for thought as to whether prior strategic decisions on how to make a difference in China remain as valid as they once were.

One particular area of interest for Western actors looking to have an impact on civil society development in China has been the regulatory framework governing NGOs.⁽³¹⁾ Over the years, various international actors have collaborated with Chinese governmental and academic partners, particularly Chinese university-based NGO study centres, to produce various studies that offer recommendations on how to reform Chinese NGO law. While the regulatory framework for civil society organisations in China is important, a decision to focus on the legal framework also may elide the fact that the state views the legal framework for civil society as a mechanism for control.⁽³²⁾ It is certainly true that, in recent years, the party-state has been willing to adopt more flexible approaches to oversight of the civil society sector, but it is possible that this flexibility is not part of a paradigm shift by the government, but rather part of a more sophisticated approach to social management.⁽³³⁾

An emphasis on NGO law also elides the fact that in China, legal change often follows, rather than leads, changes to the situation on the ground. Therefore direct support for civil society organisations, particularly new and up-and-coming groups, may have a more significant – if admittedly more indirect and difficult to quantify – impact on government policy and law over the long term.

Even if legal reforms lead to a more liberal regulatory framework for civil society organisations, those reforms will be subject to politics. As one scholar has noted, “Although contemporary CCP policy may be much more legalistic, implementation of these policies is still very political.”⁽³⁴⁾

In other words, the success of any legal reforms that do emerge over the coming years will depend in significant part on the ability and willingness of civil society organisations to push the envelope and insist on recognition for rights-based advocacy activities. If only service-based organisations can register, then any changes to the legal framework governing NGO activity must be judged a mixed success at best.

Western donors focused on the overall infrastructure of civil society in China should also ask whether the infrastructure they are helping to create is largely geared toward the creation and development of service-based NGOs. To be sure, the growing number of service-based NGOs in China is a positive development: many such organisations provide much-needed services to the communities they work with, and their work may make many local governments more comfortable with the general notion of civil society. However, Western donors need to ask whether they are making the assumption – explicit or implicit – that service organisations will eventually evolve into rights-based advocacy organisations.

While this assumption seems, on its face, quite reasonable, there are also good reasons to doubt it. Many service-provision organisations, if they are successful at delivering services to marginalised communities, may – quite reasonably – decide not to rock the boat and stick with service provision.

An excessive focus on service provision, however, presents both benefits and potential costs for grassroots organisations. First, in some ways, service provision may be bad for the long-term sustainability of some groups. If the state decides that a certain service is no longer needed, or if it is willing to provide that service on its own, then what role will service provision NGOs have left to them?⁽³⁵⁾

In many cases, there are also limits to what a service provision approach can achieve. An excessive focus on services can inculcate a mentality that marginalised groups should be dependent on government for the provision

of services, rather than mobilising to vindicate their own rights. Even more importantly, a focus on service provision may put a number of key problems almost entirely beyond reach.

In the area of disability, for example, there are many issues on which improvement is impossible without first changing government policy, as well as deeply-entrenched state practice. Despite a formal legal prohibition on discrimination against persons with disabilities, many disabled persons find it difficult to access regular schools, and are either placed in special schools or, all too often, left at home. While it is true that education is a “service,” civil society organisations in China looking to have an impact on improved access to education for disabled persons will inevitably have to confront very severe shortcomings in government policy and practice. In order to do so effectively, such organisations would have to formulate and implement advocacy strategies that are geared toward changing current policies and laws.

One of the key reasons that many civil society organisations choose to stick with service provision is that they find it easier to raise funds to engage in service provision, and much more difficult – if not impossible – to raise funds to engage in advocacy. As in many countries, the Chinese government is a key funder of civil society organisations, either on its own or often acting in tandem with international donors. Yet these funds often come with strings attached, including very clear limits on the nature and scope of the work that the organisation should engage in.⁽³⁶⁾ A number of grassroots activists, working in various subject areas, have told this author that state funds are often reserved for organisations that don’t cause trouble.

In light of these very real restrictions, the need for Western donors to support organisations that are willing to experiment with advocacy-based approaches becomes all the more apparent. Those advocacy-based organisations that have already emerged have begun to serve as informal models for other organisations looking to both better understand what kinds of NGO activity are possible in the Chinese context, and to expand their own skill set.

At the very least, Western donors choosing to focus on the state infrastructure for regulating civil society organisations should have an articulated

31. See, e.g., Nancy Yuan, CECC testimony, supra note 6. In addition to direct support to civil society organisations, Yuan notes, “International organizations can help to improve the enabling environment for NGOs... this includes providing support for NGO law and improving the overall regulatory environment, as well as support for research and interaction with like-minded organizations.”
32. The party-state’s desire to use civil society law as a means of management and control has been noted from the beginning of the Chinese government’s experimentation with a more explicitly “legal” approach, with the issuance of new regulations on social organisations in 1998. See, e.g., Tony Saich, “Negotiating the State: The Development of Social Organizations in China,” *China Quarterly*, no. 161, 2000, p. 124.
33. For example, recent reforms to the registration system for NGOs in Guangdong Province in early 2012 were followed very soon thereafter by very serious pressure on various grassroots labour rights groups in Shenzhen, leading some to question the extent of the government’s commitment to its own reforms. Fiona Tam, “Guangdong Shuts Down At Least Seven Labour NGOs,” *South China Morning Post*, 27 July 2012; Bob Davis, “Labor NGOs in Guangdong Claim Repression,” *China Realtime Report*, WSJ.com, 28 July 2012.
34. Nara Dillon, “Governing Civil Society: Adapting Revolutionary Methods to Serve Post-Communist Goals,” in *Mao’s Invisible Hand*, op. cit., p. 151.
35. Timothy Hildebrandt, “Development and Division: the effect of transnational linkages and local politics on LGBT activism in China,” *Journal of Contemporary China*, vol. 21, no. 77, 2012, p. 17. As Hildebrandt puts it, “Because gay organizations primarily exist as service providers, they operate, in essence, at the pleasure of the state. What happens when the state decides these services are no longer needed?”
36. The Chinese government is of course by no means the only government funder willing to put strong conditions in its support. For decades, the US government has placed severe restrictions on both domestic and international recipients of funding for women’s reproductive health, limiting the ability of those groups to provide, or even in some cases discuss, abortion. Some of these restrictions were removed by the Obama administration in 2009.

strategy for how the evolution of that infrastructure, and of the service-based groups being sheltered within it, will take place, and what specific steps need to be taken to facilitate this evolution. In the absence of this strategy, Western donors may end up contributing less to the development of a more vibrant civil society in China and more to the creation of the kind of well-managed, service-based social sector that many observers believe is the Chinese government's overall goal.

Benefits of advocacy-based approaches

There are many ancillary benefits to working with civil society organisations that have too often been overlooked: when Western actors collaborate with non-governmental groups in China, they have the opportunity to engage in extremely valuable forms of skills transfer, and to assist in the institutional development that is crucial to the overall development of civil society in China.⁽³⁷⁾ Increasing collaboration by international actors with Chinese civil society groups may also raise their stature in the eyes of the government, which is still very wary of non-governmental groups, and often sceptical of the notion that they should be consulted on key law and policy issues.

Those ancillary benefits are important, but they are not as important as the fact that, on a number of issues, civil society organisations are often more impactful than governmental or academic actors. By virtue of their willingness to make use of advocacy tools that state-affiliated actors are less able or less willing to use, advocacy-based NGOs may be more effective at pursuing change. In some cases, their work may serve as a useful complement to the work of reformists working within the system itself.

In addition, grassroots organisations often possess a number of unique assets that may make them more effective than government-affiliated organisations. First and foremost among these would be a higher degree of legitimacy, often by virtue of the fact that many organisations have been created and run by members of the community they serve. Whether it be in the area of HIV/AIDS, LGBT rights, women's rights, migrants' rights, or other issues, drawing primarily or even exclusively from the community itself can be a key component of creating legitimacy for any organisation and also of creating pathways for knowledge.

If grassroots organisations are well networked within the community, then they may be able to effectively engage in social mobilisation strategies in order to achieve their goals. Very much aware of the state's obsession with social stability,⁽³⁸⁾ civil society activists can use the mobilisation of constituent communities to focus both public and governmental attention on a particular issue, and to generate political will for reform. At the very least, this kind of social mobilisation can increase the costs to the government of inaction, changing the cost-benefit analysis that the state must engage in when considering whether and how to respond to calls for change. Given the lack of progress on establishing transparent and independent legal channels for redress of grievances,⁽³⁹⁾ social mobilisation may be one of the most potentially effective tools for change in China today.

Strategies for grassroots NGO grantmaking

Given the many differences between grassroots civil society organisations and larger, more bureaucratically stable GONGOs, academic centres, and think tanks, grantmaking to grassroots entities can be quite difficult, and can require a somewhat different approach by Western donors. In particular,

grantmaking to grassroots civil society organisations requires a greater degree of flexibility and a bit more patience on the part of the donor.

Perhaps the most important element of working with grassroots civil society organisations is a willingness to give small grants. Some organisations have expressed reservations about giving small grants, not least because doing so often increases the bureaucratic burden on the donor, which in most cases has to engage in the same amount of paperwork, and cover the same transaction costs, for a \$20,000 grant as it does for a \$200,000 grant.⁽⁴⁰⁾ And yet, the vast majority of grassroots organisations can only handle funding in small amounts, as they lack the capacity to make use of larger grants. In other words, an ability to give small grants is a crucial component of a civil society-based strategy.

Western funders also must put aside their own notions of what a grassroots NGO "looks like," and be willing to embrace the various forms that Chinese civil society organisations adopt, especially in the early years of their existence. Many grassroots groups are unable to register for years after they are first established,⁽⁴¹⁾ while others choose to register as private companies rather than as non-profit entities. A number of grassroots groups lack many of the components that are considered crucial elements of an NGO in the West, including independent boards, separate, dedicated finance and administration staff, or even, in some cases, a fixed office.⁽⁴²⁾ While working with less fully established organisations does present very real logistical difficulties for Western donors, it is nonetheless a key aspect of deeper engagement with grassroots civil society in China.

It must be acknowledged that grassroots NGOs, often lacking in bureaucratic capacity, can be more difficult to work with than other, more established entities. In order to work effectively with grassroots organisations, donors must embrace that lack of capacity, and respond to it with a greater degree of flexibility in terms of grant applications, reporting, and other donor-imposed requirements.

Also important – as well as difficult and very labour-intensive for Western grantmaking organisations – is a willingness to seek out and engage with start-up organisations. At the risk of stating the obvious, the only way to "grow" a field is to ensure that there are new entrants into it, particularly in parts of China that up to this point have seen less civil society formation, which includes almost anywhere outside of Guangdong, Yunnan, and Beijing.

37. Western actors need to be careful to tailor any capacity-building efforts that they offer to grassroots Chinese partners to the Chinese context and to local needs; failure to do so can be counterproductive or even outright harmful to the development of grassroots groups. For one account of the problems that can emerge when Western donors fail to sufficiently assess local partners' needs, see Anthony J. Spires, "Lessons From Abroad: Foreign Influences on China's Emerging Civil Society," *The China Journal*, no. 68, July 2012, pp. 125-146.

38. The increasing use of social mobilisation tactics by civil society activists has by no means gone unnoticed by the party-state, which has, in response, continued to increase its spending on so-called *weiwen*, or social stability tools, including the public security apparatus. François Godement et al., *Control at the Grassroots: China's New Toolbox*, European Council on Foreign Relations China Analysis, June 2012.

39. Recent public protests against the construction of a copper smelting plant in the city of Shifang, Sichuan Province, serve as yet another illustration of the effectiveness of large-scale protest. Only after thousands of demonstrators took to the streets to protest the planned construction of the plant did the government back down and announce that the project had been shelved. Keith Bradsher, "Bolder Protests Against Pollution Win Project's Defeat in China," *The New York Times*, 4 July 2012. It is difficult to imagine the use of formal legal channels achieving a similar result.

40. Spires, "Organizational Homophily," *art. cit.*, p. 318. Spires notes that many Western donors consider it more "efficient" to give a small number of large grants rather than giving more small grants to a range of grassroots organisations.

41. Tianxia Gong, *Ting tamen de shengyin: Huadong NGO fangtan li* (Hear Their Voices: East China NGO Conversation Record), Nanjing, November 2011. On file with author. Tianxia Gong is a Nanjing-based NGO.

42. Spires, "Lessons From Abroad," *art. cit.*

In some cases, support for small projects by individual activists who may then go on to form new organisations can be an effective tool for generating new civil society activity.

There is another reason why support for start-ups is important. In some key thematic areas of NGO work in China, a “usual suspects” problem has emerged, in which a number of Western organisations, both donors and those looking to implement projects, all approach the same two or three civil society organisations working in that field. While it can be beneficial for Chinese organisations to have contact with a number of different Western partners, it is also important that Western actors coordinate among themselves so as to avoid overloading any particular organisation, and to ensure that resources are spread across a thematic sector rather than concentrated in the hands of a small number of civil society groups.

A willingness to support new and recently-formed organisations also requires a certain degree of patience. In my experience, many start-up organisations make mistakes in their first year or two, often learning and improving through a process of trial and error. Perhaps surprisingly, one common mistake is for organisations to be over-ambitious in terms of what they can accomplish, and to take on more work than they can handle, thus causing them to fall behind on their commitments to their initial slate of projects. If a start-up organisation fails to deliver on its initial set of “deliverables,” donor organisations should work with the grassroots group to improve its own strategic decision-making, rather than ending the funding relationship.

A decision to focus on civil society also requires a willingness to have one's thematic areas of focus determined at least in part by which areas are more receptive to civil society engagement. Given the political sensitivity of issues related to criminal justice reform, and the continued use, when needed, of the criminal justice system as a tool for silencing political dissent, for example, it seems unlikely at present that civil society organisations would be able to meaningfully engage in criminal justice reform. Media reform, and free expression more generally, would be another area in which civil society engagement would seem almost impossible.

A small number of such issues aside, the areas in which Chinese advocacy groups can and do have an impact are many and varied, including disability rights, women's rights, labour rights, and LGBT rights.

Some have argued for a greater focus on institutional reforms, suggesting that improvements in China's judiciary, for example, will have a cross-cutting impact on the entire Chinese legal system.⁴³ While opportunities to engage with Chinese officials on wide-ranging structural reforms can indeed be valuable, work with civil society organisations can also have a broader institutional impact. Advocacy-based civil society organisations engage with government agencies and legal institutions in a number of ways, whether through policy advocacy with health officials, for example, or through public interest litigation in China's courts, or through working with National People's Congress delegates to push specific legislative changes to better protect the rights of disadvantaged groups. Their repeated and sustained engagement can have a positive impact on the professionalism, responsiveness, transparency, and level of knowledge of these bureaucratic actors, and in and of itself represent a form of institutional reform work.

Finally, international donors have an additional tool at their disposal: they can encourage the international NGOs and academic entities that they work with to increase their partnerships with Chinese civil society organisations. While some international organisations may be initially reluctant to embrace collaborative work with Chinese civil society groups,

especially if they have a limited track record of doing so in the past, many groups that have expanded their work in this area have found it hugely rewarding. For funders, nudging international grantees in this direction will likely have a positive impact on the quality of project implementation as a whole.

Conclusion

Working on legal reform in China is a challenging business, the rewards of which are often evident only months or even years later. Only those with an appropriately modest view of how outsiders can be helpful should take part in what is, in the end, a domestic reform process in which Chinese citizens and the Chinese state will engage in dialogue and debate over what kind of legal system China should have. Working on legal reform in China is also fantastically difficult – it can be incredibly daunting to decide what the right strategies and who the “right” partners are. I myself have repeatedly gone against all of the suggestions put forth in the above pages, sometimes to good effect, other times less so.

In fact, in writing this article, I have feared that putting forward arguments in favour of increased collaboration with advocacy-based civil society organisations would lead some readers to conclude that I believe collaboration with grassroots civil society organisations, in China or even in more fully open societies, is easy. It is not. Working with grassroots Chinese civil society organisations presents a number of difficulties, many of which are virtually absent when working with Chinese universities and government agencies. Those difficulties, some of which were noted above, include a lack of bureaucratic capacity; structural barriers to engagement with, for example, unregistered groups or groups registered as for-profit companies; and state repression against domestic activists who are perceived to have crossed the line.

None of these difficulties should be taken lightly. Yet, if Western actors can increase their outreach to nascent civil society groups, particularly those engaged in policy advocacy, they may be able, over a five to ten-year period, to significantly increase the number of domestic groups that are doing creative, innovative, and impactful rights-based advocacy work at the grassroots level. Given the crucial role that civil society groups have played in legal development and reform in other parts of the world, it may be the case that Western support for such groups may one day be seen as one of the most meaningful aspects of Western engagement with legal reform in China.

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43. Jonathan Hecht, “Can Legal Reform Foster Respect for Human Rights in China?”, Remarks to the Congressional-Executive Commission on China, 11 April 2002.