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Rebecca Lee

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MODERNIZING CHARITY LAW IN CHINA

Rebecca Lee[†]

Abstract: In recent years, the cultivation of domestic charities has been an important item on the development agenda of the Chinese government. In pursuit of this end, China has attempted to modernize its laws governing charitable organizations. Despite these welcome attempts and a rich tradition of philanthropy, China's existing legal framework still fails to support an effective charitable sector. The government, noting the crucial role of the charitable sector, has begun drafting a comprehensive statute that will govern charities. In light of these emergent trends, this paper critically examines the inadequacies of the existing legal structure, highlighting the need to devise a legal framework that both facilitates charity operation and regulates its governance.

I. INTRODUCTION

The charitable sector¹ is emerging in mainland China. Ironically, this expansion has come as a result of the remarkable economic growth in the urban cities, which has exacerbated the social and economic inequalities between rural and urban China.² Natural disasters (e.g., the snowstorm crisis and the Sichuan earthquake in the spring of 2008) that hit the poorer western part of the country have brought the shortcomings of the bureaucratic Chinese government starkly into focus, creating the opportunity, and indeed the necessity, for the charitable sector to thrive.³ The charitable sector thus

[†] Assistant Professor, Faculty of Law, The University of Hong Kong (email: rebecca.lee@hku.hk).

¹ The charitable sector is also known variously as the non-profit sector, the voluntary sector, the third sector, or the non-governmental sector. The organizations that operate in this sector are referred to with the same various terms. *See generally*, QIUSHA MA, NON-GOVERNMENTAL ORGANIZATIONS IN CONTEMPORARY CHINA: PAVING THE WAY TO CIVIL SOCIETY? (2006) (describing the evolution of a civil society in China); YIYI LU, NON-GOVERNMENTAL ORGANIZATIONS IN CHINA: THE RISE OF DEPENDENT AUTONOMY (2009) (describing the dependent relationship between NGOs and the State). This Article addresses the narrower issue of the regulation of the charitable sector, rather than the third sector generally.

² *See, e.g.*, Xuehui Luo, *Zhongguo ci shan: man chang min jian lu* [Charity in China: A Long Civic Path], ZHONGGUO XIN WEN ZHOU KAN [CHINA NEWSWEEK], Aug. 20, 2007, at 30-33. According to the Standing Committee of the National People's Congress, in 2007, the annual per-capita disposable income in the countryside was about RMB 4,000 (approximately USD 600). *Deeper Income Gap Calls for Reform to Solve Deeper Conflict in China*, XINHUA WANG [XINHUA NET], Sept. 12, 2008, http://news.xinhuanet.com/english/2008-09/12/content_9949998.htm (last visited Feb. 28, 2009). However, "the average city dwellers received an income that was 3.33 times larger than rural residents." *Id.* The income disparity amounted to 9,646 yuan (approximately USD 1,400), marking the largest urban-rural income gap since the opening up of China in 1978. *Id.*

³ For example, according to the Ministry of Civil Affairs, there were over 75 million rural residents who are low-income or living in a state of absolute poverty, and over 140 million elderly people in need of aid. *Zhongguo xu yao cong "shu ren ci shan" zou xiang "gong min ci shan"* [China Must Transition from "Acquaintance Charity" Towards "Citizen Charity"], XIN JING BAO [THE BEIJING NEWS], Nov. 29, 2005, Shi shi fang tan [Current Affairs Interviews], available at <http://china.eastview.com/kns50/Navigator.aspx?ID=CCND> (enter "中国需要从"熟人慈善"走向"公民慈善" into the search box,

plays a crucial role in mobilizing economic wealth to provide social relief, narrowing regional disparities, and, ultimately, catalyzing social and political changes.

However, despite the growth of charitable organizations and a rich tradition of philanthropy, China's existing legal framework fails to support an effective charitable sector. This failure has three primary causes. First, there is no comprehensive law governing charitable organizations in China; the existing laws remain disparate and obsolete, notwithstanding a few recent attempts at reform. Second, the existing legal rules often fail to facilitate the operation of the charitable sector or incentivize charitable giving. Third, the charitable sector is plagued by inefficient bureaucratic modes of operation and governance.

In light of these weaknesses, the Ministry of Civil Affairs (*Minzhengbu* 民政部) has been commissioned to draft China's first "Charity Law" (*Cishanfa* 慈善法) to facilitate and regulate the philanthropic movement.⁴ Although the details of this law have yet to be unveiled, it is expected to be promulgated in the near future.⁵ Therefore, now is a momentous time for the charitable sector in China. Part II of this Article argues that as new modes of funding, operation, and governance have evolved amongst charitable organizations, a new paradigm of charitable operation has emerged, giving rise to facilitative and regulatory issues of charity operation and governance. However, the current legal framework governing charitable organizations in China is under-developed and runs the

choose "Precise" in the "Matching" menu, and click "Search"). These figures suggested that the government could not shoulder the full responsibility for providing relief to the needy, and an improved and modernized charity regime had to be established. *Id.*

⁴ See, e.g., *Min zheng bu: ci shan fa yi jing qicao wanbi* [Ministry of Civil Affairs: Drafting of the Charity Law Has Been Completed], *DIYI CAIJING RIBAO* [FIRST FINANCIAL DAILY], Jan. 18, 2007, available at <http://business.sohu.com/20070118/n247681907.shtml> (stating that the law was to, *inter alia*, regulate charitable donations in China and improve charitable accountability). According to the Ministry of Civil Affairs, the drafting process of the Charity Law commenced in 2005. *Li fa jiang geng you li yu ci shan shi ye fa zhan* [Legislation Benefits Development of Charitable Activities], *ZHONGGUO WANG* [CHINA NET], Aug. 24, 2007, available at http://big5.china.com.cn/review/txt/2007-08/24/content_8743079.htm. Details of the draft Charity Law have not been made available to the general public, but the Ministry of Civil Affairs has invited comments on the draft from various expert bodies, including the International Centre for Civil Society Law. See, e.g., The International Center For Civil Society Law, *Comments on the Draft Charity Law For the People's Republic of China*, 5(1) INT'L J. CIV. SOC'Y L. 12 (2007).

⁵ According to the Ministry of Civil Affairs, an initial draft of the Charity Law had been completed, and upon further revisions, a draft bill would be submitted to the State Council. However, the government did not stipulate a timetable for the enactment of the law because of the complexities involved. See *Min zheng bu guan yuan jie xi ci shan fa li fa wei he mei you shi jian biao* [Official from Ministry of Civil Affairs Gives Analysis of Why Charity Law Legislation Does Not Have a Timetable], *ZHONGGUO XIN WEN WANG* [CHINA NEWS NET], Nov. 27, 2008, available at <http://www.law-star.com/cacnew/200811/215026898.htm>.

serious risk of hindering future developments in the charitable sector. Parts III and IV examine in detail the ways in which a full code of charity law may enhance the development of charitable activities: after reviewing the current legal framework, Part III provides suggestions for modernizing China's existing legal framework governing charitable operations; whereas Part IV outlines a possible regulatory regime for charitable governance. Hopefully, in drafting the Charity Law, the Ministry of Civil Affairs will respond to the needs of the modern charity paradigm, in particular the facilitative and regulatory rules that are needed to sustain it. Part V concludes by suggesting that the way that the government uses the law to shape the charitable sector will reflect, at least in part, how China will grapple with the issue of state-society relations in the face of political realities and interests.

II. THE PARADIGM OF A MODERN CHARITY REQUIRES MORE THAN THE CURRENT LEGAL FRAMEWORK GOVERNING CHARITABLE ORGANIZATIONS IN CHINA OFFERS

The emergence of a charitable sector is undeniably one of the most impressive social accomplishments in China in recent history.⁶ However, the working relationship between the charitable and the public/private sectors has created tensions.⁷ In order to understand how the charitable sector can be developed, one must first understand the modern charity paradigm, stakeholders' competing and intersecting demands upon charitable organizations, and the rules necessary to balance these demands. This paradigm exhibits two common elements necessary to an effectively supported charitable sector: facilitation and regulation.⁸ The recent attempts to reform the legal framework supporting China's charitable sector have not gone far enough to embody these two elements.

⁶ See, e.g., Pang Li, *China's Social Sector Set to Boom*, CHINA.ORG.CN, Nov. 14, 2008, available at http://www.china.org.cn/china/national/2008-11/14/content_16765423.htm (describing the reasons for rapid development of the charitable sector in China); QIUSHU MA, *supra* note 1, at 208.

⁷ See generally Peter C. Lloyd, *The Relationship Between Voluntary Associations and State Agencies in the Provision of Social Services at the Local Level*, in *THE THIRD SECTOR: COMPARATIVE STUDIES OF NONPROFIT ORGANIZATIONS* 241, 241, 253 (Helmut K Anheier & Wolfgang Seibel eds., 1990) (describing the different perspectives of voluntary associations and governments on the roles of the voluntary associations and also discussing the loss of independence that voluntary associations suffer when they work in close partnership with government).

⁸ Cf. Alison Dunn, *Introduction to THE VOLUNTARY SECTOR, THE STATE AND THE LAW* 1, 3 (Alison Dunn ed., 2000) (describing the difficulty of reconciling autonomy and regulation).

A. *Elements of Facilitation and Regulation Embodied in the Paradigm of a Modern Charity*

Charitable giving has expanded in size and scale all over the world,⁹ and an appreciation of the modern paradigm of charitable operations is necessary to understand the differing interests of the various charitable players. The *dramatis personae* of a typical charity in a modern Western society might be comprised of the following: donors;¹⁰ a management board; members; volunteers who donate their time and service rather than money; those who receive the benefit of the charity's work (whether in kind or in money); the general public, who contribute indirectly to the charity through tax exemptions; and the regulator.¹¹ An individual may fall within more than one of these categories, such as a donor who is also a member and a volunteer. Likewise, the government may be a donor (or the primary donor to subsidized charitable organizations, as the case may be), purchaser (when it contracts out social services to an agency),¹² and the representative of the public (by regulating charitable operations).¹³

All of these stakeholders impose competing demands on the charitable organization,¹⁴ and balancing stakeholder demands is an extremely arduous task. Nonetheless, different stakeholders' interests coincide in terms of needing a legal framework that embodies rules to facilitate charity operation,

⁹ For example, in recent years there has been considerable growth of the charitable sector in the United Kingdom and United States. Philanthropy UK, *The UK Charitable Sector: A Snapshot*, available at <http://www.philanthropyuk.org/Resources/UKcharitablesector>; National Council of Nonprofit Associations, *The United States Nonprofit Sector* (2003), available at http://www.tano.org/attachments/contentmanagers/115/us_sector_report_2003.pdf.

¹⁰ The donors may be those who have made substantial gifts to the charity and are therefore well known to the management board, or contributed through street collection boxes or sweepstakes and so are anonymous, or made standing monthly contributions and so are identifiable but rarely known.

¹¹ See CHARITY COMM'N FOR ENGLAND & WALES, NO. RS8, TRANSPARENCY AND ACCOUNTABILITY (June 2004), available at <http://www.charitycommission.gov.uk/publications/rs8.asp> (suggesting that stakeholders may include beneficiaries, donors and funders, volunteers, staff, interest groups, central, regional, and local government, suppliers, the media, and the public).

¹² See, e.g., Presentation by Hillary Norman, Deputy Director of Social Enterprise & Finance, Cabinet Office of the Third Sector, *Policy Commentary: The Government's Perspective* (Mar. 2008), www.londonfund.org.uk/Portals/0/Downloads/FMM%2028_03_08/1.%20Hilary%20Norman.ppt (last visited Feb. 28, 2009) (providing an example of the government's role as a funder).

¹³ The government may regulate charitable operations directly through enacting relevant laws, or indirectly through setting an independent regulator to oversee the sector. An example of the latter is the Charity Commission for England & Wales.

¹⁴ For example, donors, volunteers, and the general public (the "supply"-side stakeholders) may demand that their contributions are put to the designated charitable purposes rather than the personal benefits of the charity's executives or board members. Users (the "demand"-side stakeholders), while sharing the interest of these stakeholders in seeing that the charities devote their funds to designated charitable purposes, may, as recipients of the charitable benefits, have different views as to what their needs are and the type and quality of the services offered by the charitable organization.

such as eligibility requirements and fiscal privileges.¹⁵ On the other hand, the providers of the charity's resources—donors, volunteers, workers, purchasers, and even the general public—are entitled to know that the funds are put toward the organization's designated charitable purposes rather than used for the personal benefit of the charity's executives or board members. As a corollary, the providers of the charity's resources should be provided with an effective system of accounting and disclosure of information. The general public also has an interest in seeing that charitable organizations benefit significant sectors of the public. These countervailing stakeholders' interests raise various regulatory issues, but especially questions as to the extent of regulation required and what measures are appropriate to ensure accountability.¹⁶

B. Current Institutional Framework Governing Charitable Organizations in China Fails to Support a Modern Charity

A modern charity framework should embody both facilitative and regulatory rules. This paradigm will be used to evaluate the current legal framework governing charitable organizations in China.

While time-honored Confucian teachings emphasize compassion, benevolence, and altruism,¹⁷ in modern China the current institutional framework for charitable organizations fails to translate these virtues into philanthropic behaviors.¹⁸ Currently, charitable organizations in China are

¹⁵ From a legal perspective, these should be the minimum legal rules that are able to facilitate the charitable purpose. Such rules are justified on the basis that charitable organizations do not exist to make profits; rather, they are constrained by a non-profit distribution requirement, obligating them to apply any profits to their specified charitable purposes.

¹⁶ Cf. CHARITY COMM'N FOR ENGLAND & WALES, NO. RS8, TRANSPARENCY AND ACCOUNTABILITY (June 2004), available at <http://www.charitycommission.gov.uk/publications/rs8.asp> (describing the importance of accountability and discussing the Charity Commission's view that accountability is a charity's response to the legitimate information needs of its stakeholders and the standards of accountability required of charities).

¹⁷ See *Confucius*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/confucius> (describing Confucius life, his social philosophy, his political philosophy, and his approaches to education). See generally, BENJAMIN I. SCHWARTZ, THE WORLD OF THOUGHT IN ANCIENT CHINA 56-134 (1985) (providing an overview of Confucius' teachings, including Confucius' teachings on compassion and altruism).

¹⁸ It would seem that the relatively low amount of domestic charitable donations shows that public awareness of charitable behaviors remains weak. See *China's Philanthropic Industry Needs Improvement*, CHINA BUS. INTELLIGENCE, Jan. 28, 2008, http://www.marketavenue.cn/upload/articles/ARTICLES_1395.htm (last visited Apr. 3, 2009). The head of the Ministry of Civil Affairs Disaster Relief Department, Wang Zhenyao, estimated that "charitable donations in China reached [RMB] 10 billion ([approximately] USD 1.2 billion) in 2006, amounting to just 0.5% of its GDP (compared with donations in the USA worth more than 2% of GDP)." Nick Young, *Full Steam Ahead for 'Charity' Even as Brakes Are Applied to NGOs*, CHINA DEV. BRIEF, Oct. 19, 2007, <http://www.chinadevelopmentbrief.com/node/1222> (last visited Feb. 29, 2009).

established and registered as either “social organizations” (*shehui tuanti* 社会团体) or “civil non-enterprise institutions” (*minban feiqiye danwei* 民办非企业单位 or *minfei* 民非), both of which are voluntary organizations engaged in non-profit-making activities.¹⁹ The relevant governing laws are the “Regulation on the Registration and Administration of Social Organizations” (*Shehui tuanti dengji guanli tiaoli* 社会团体登记管理条例) and the Temporary Regulations for the Registration and Management of Civil Non-enterprise Institutions (*Minban fei qiye danwei dengji guanli zanxing tiaoli* 民办非企业单位登记管理暂行条例). Apart from these, a third type of charitable organization registered by the Ministry of Civil Affairs is a “foundation” (*jijinhui* 基金会), which is a civil, non-profit organization that uses donated assets to undertake public welfare activities.²⁰ Foundations are governed by the revised “Regulations for the Management of Foundations” (*Jijinhui guanli tiaoli* 基金会管理条例).

In addition to these three major pieces of legislation governing charitable organizations, the recent burgeoning of China’s civil society has also prompted the introduction of a number of laws to encourage the growth of charities in China. For example, in 1999, the “Public Welfare Donations Law” (*Gongyi shiye juanzengfa* 公益事业捐赠法)²¹ came into effect. This law authorizes tax breaks and stipulates rules on the management and protection of donated assets.²² With the introduction of the Trust Law (*Xintuofa* 信托法)²³ in 2001, which contains a chapter on charitable or

¹⁹ See *Shehui tuanti dengji guanli tiaoli* [Regulations on Registration and Administration of Social Organizations] [Social Organizations Regulations] art. 2 (promulgated by the State Council, Oct. 25, 1998, effective Oct. 25, 1998) LAWINFOCHINA (last visited Feb. 28, 2009) (P.R.C.); *Minban fei qiye danwei dengji guanli zanxing tiaoli* [Temporary Regulations on the Registration and Management of Non-Governmental, Non-Commercial Enterprises] [*Minfei* Regulations] art. 2 (promulgated by the State Council, Oct. 25, 1998, effective Oct. 25, 1998) LAWINFOCHINA (last visited Feb. 28, 2009) (P.R.C.).

²⁰ See *Jijinhui guanli tiaoli* [Regulation on Foundation Administration] [Foundations Regulations] art. 2. (promulgated by the State Council, Mar. 8, 2004, effective June 1, 2004) LAWINFOCHINA (last visited Feb. 28, 2009) (P.R.C.).

²¹ *Gongyi shiye juanzengfa* [Law on Donations for Public Welfare] [Public Welfare Donations Law] (promulgated by the Standing Comm. of the NPC June 28, 1999, effective Sept. 1, 1999) LAWINFOCHINA (last visited Feb. 28, 2009) (P.R.C.).

²² See Public Welfare Donations Law, ch. 3 (stipulating the requirements of provision of lawful receipts and use of the donated assets for specified purposes, among other things); *id.* ch. 4 (setting out preferential treatment on corporate income tax and on individual tax, among other things).

²³ *Xintuofa* [Trust Law] (promulgated by the Standing Comm. of the NPC, Apr. 28, 2001, effective Oct. 1, 2001) LAWINFOCHINA (last visited Feb. 28, 2009) (P.R.C.).

public welfare trusts (公益信托 *gongyi xintuo*), it is now possible to establish a charitable trust in China.²⁴

Despite these advances, the legal framework remains deficient in facilitating charity operation. This deficiency arises from four problems with the current regime. First, anyone familiar with the Chinese framework will notice that the government plays a crucial role in managing the charitable sector, which is in stark contrast with the appropriate role of government vis-à-vis the modern charity paradigm.²⁵ Second, there is not yet a coherent legal definition of charity.²⁶ Third, the legal framework regulating charitable organizations does not embody facilitative rules for small charitable organizations.²⁷ Fourth, the fiscal regime remains obsolete.²⁸ A closer examination of the existing legal framework and suggestions on how it can be modernized is in order.

III. MODERNIZING THE FACILITATIVE REGIME FOR CHARITY OPERATION

Given the need for a facilitative legal regime for charity operation, the Ministry of Civil Affairs must review the legal framework of the charitable sector in China and postulate ways to modernize it. In order to modernize the facilitative regime for charity operation, the forthcoming Charity Law should attempt to tackle the deficiencies mentioned above through: 1) minimizing government influence over the establishment and management of charitable organizations; 2) developing a coherent legal definition of charity to standardize charitable operation; 3) providing more support to small, grassroots charitable organizations so as to promote diversity in charity operation; and 4) enhancing fiscal incentives for charitable organizations to buttress development of the sector generally.

A. *Minimizing Government Influence*

One must first appreciate the distinctive features of a charitable organization before devising a legal regime that facilitates its operation. In the context of China, however, the peculiar political environment limits the autonomy of the charitable sector. Consequently, the current legal framework runs the risk of hindering the development of the sector. A

²⁴ See Trust Law, ch. 6. Chapter 6 stipulates the definition, creation, and termination of such a trust. *Id.* Art. 72 contains a *cy-pres* doctrine. *Id.* art. 72. However, there is still a lack of operational guidelines for the use of this structure.

²⁵ See *infra* Part III.A.

²⁶ See *infra* Part III.B.

²⁷ See *infra* Part III.C.

²⁸ See *infra* Part III.D.

facilitative legal regime, therefore, must recognize the proper role and status of the charitable sector and its relationship with other sectors in society.

A non-governmental organization (“NGO”) is a formal, private, self-governing, voluntary, non-profit-distributing institution.²⁹ Accordingly, a NGO (including a charitable organization) must be autonomous in its management and decision-making process. Thus, in the modern Western charity paradigm, the government does not play a direct role; rather it acts in other capacities, such as a donor, a purchaser, or a public representative. As a result, the government’s role is limited to indirect regulation through the legal framework.³⁰ In this regard, the paradigm of Chinese charities is significantly different: the Chinese government has a crucial role to play, both before and after the establishment of a charitable organization, as a direct participant and as a stakeholder.³¹ The Government’s role in the charitable sector flows from the nature of China’s political system.

While China’s economic reforms in the 1980s aimed to resolve the problem of a lack of private capital, the reforms also contained a clear agenda to redress the balance between the government’s role and society’s role.³² Realizing it could not carry out all necessary social services, the Chinese government unleashed society’s great potential for generating societal and human resources to respond to social needs.³³ The government legalized and promoted social organizations and civil non-enterprise institutions as tools to aid the pursuit of “socialism with Chinese characteristics.”³⁴ Yet, a burgeoning charitable sector might also suggest a power shift from the state to the people, a development not welcomed by the

²⁹ LESTER M SALAMON & HELMUT K ANHEIER, *DEFINING THE NONPROFIT SECTOR: A CROSS-NATIONAL ANALYSIS* 33-34 (1997) (describing the key features of an NGO as organized, private, non-profit-distributing, self-governing, and voluntary). There are difficulties inherent in forming a uniform definition of the non-profit sector. See generally Lester M Salamon & Helmut K Anheier, *In Search of the Nonprofit Sector. I: The Question of Definitions*, 3(2) *VOLUNTAS* 125 (1992).

³⁰ Accordingly, the government should enact laws and regulations to regulate the charitable sector. Indeed in England, the law establishes an independent regulator, the Charity Commission for England & Wales, which exists outside of the government hierarchy to regulate charities in order to increase their efficiency, their effectiveness, and the public confidence and trust in them. See Charity Commission, *About Us*, <http://www.charity-commission.gov.uk/tcc/ccabout.asp> (last visited Apr. 13, 2009); see also *infra* Part IV.C.

³¹ The reason this different paradigm exists for Chinese charities relative to other charities is the nature of the political atmosphere in China.

³² QIUSHU MA, *supra* note 1, at 47.

³³ For example, the Constitution grants freedom of association to its citizens for the first time. XIAN FA art. 35 (1982) (P.R.C.). Social welfare organizations also began to emerge in the 1980s to provide for education and disaster relief. LINDA WONG, *MARGINALIZATION AND SOCIAL WELFARE IN CHINA* 73 (1998).

³⁴ See QIUSHU MA, *supra* note 1, at 47-48 (suggesting that the Chinese government perceived that reliance on certain mass organizations could assist the ruling party’s political causes).

Chinese government.³⁵ To ensure that it remained a key stakeholder in the charitable sector, the Chinese government retained strong controls over the sector through various mechanisms and developed a charitable sector that would collaborate with it but never challenge its legitimacy.³⁶ The government welcomed charitable organizations (including international charitable organizations) if they worked with it on issues such as education, health, environment, and culture. Where these organizations crossed the line and became involved in other areas such as politics or religious policies,³⁷ however, the government saw those organizations as a source of political instability and suppressed them.³⁸

The current procedures and formalities for establishing charitable organizations exhibit the government's dominant role in two ways. First, the relevant laws governing social organizations, civil non-enterprise institutions, and foundations mainly contain provisions relating to the state's administration and management of charitable organizations. These provisions include: 1) registration and management of the relevant organization, including the administrative powers and duties of the relevant authority; 2) administrative duties of the organization, such as the duty to register the organization and the duty to inform the relevant authority of any changes in the registration details; and 3) administrative penalties for not complying with the administrative duties.³⁹

Second, and more significantly, the dual registration and management system of charitable organizations, whether they be social organizations, civil non-enterprise institutions, or foundations, illustrates the extensive

³⁵ *Id.* at 47. See also L. Susan Kaur, *The Third Sector: The Law in China and Non-Profit Organizations*, 4 INT'L J. CIV. SOC'Y L. 47, 48 (2006).

³⁶ Susan H Whiting, *The Politics of NGO Development in China*, 2(2) VOLUNTAS 16 (1991). The author further suggests that the development of charitable organizations, which offer an alternative means for articulating interests and expressing demands to the government, may create pressure for democratization. *Id.* at 17.

³⁷ In China, the State Administration for Religious Affairs governs religious affairs. See State Administration for Religious Affairs of P.R.C., <http://www.sara.gov.cn/GB> (last visited Apr. 3, 2009) (original in Chinese).

³⁸ For example, the Ministry of Civil Affairs issued a notice outlawing Falun Gong, a religious group, for non-compliance with government guidelines in 1999. See *Guan yu qu dif a lun da fa yan jiu hui de jue ding* [Decision Concerning Outlawing Falun Dafa Research Association] (promulgated by the Ministry of Civil Affairs, July 7, 1999, effective July 7, 1999) CHINALAWINFO (P.R.C.). There is also suggestion that NGOs in China tend to take a pragmatic approach by practicing "self-censored advocacy" in delivering their services in order to gain the support of government connections. Katherine Morton, *The Emergence of NGOs in China and Their Transnational Linkages: Implications for Domestic Reform*, 59(4) AUSTL. J. INT'L AFF. 519, 522 (2005).

³⁹ See JINLUO CHEN ET AL., *ZHONGGUO FEIYINGLI ZUZHI FA DE JIBEN WENTI* [FUNDAMENTAL PROBLEMS OF THE LAWS RELATING TO NON-PROFIT ORGANIZATIONS IN CHINA] 82 (2006).

power of the administrative organs.⁴⁰ For a proposed charity to become registered, the charity must obtain the support of a sponsor organization or a professional leading unit (*yewu zhuguan danwei* 业务主管单位), which is usually a government agency in charge of the subject matter of the proposed charity, and the charity must also gain the approval of the relevant Ministry of Civil Affairs or registration management agency (*dengji guanli jiguan* 登记管理机关).⁴¹ Registration is necessary to give legal status to charitable organizations.⁴² Unfortunately, “[w]hile there is no incentive for government departments to act as sponsors, there are significant disincentives in the additional administrative work entailed and the risk that sponsors may be liable for rogue organizations.”⁴³ Moreover, if there is already an identical or similar social organization in that field, the relevant approving authority may consider the proposed charity unsuitable for registration.⁴⁴ The law also places restrictions on establishing these social organizations’ branch or representative offices, and further stipulates that these offices do not have the separate status of a legal entity apart from the social organization.⁴⁵

These requirements create a number of problems. First, they make setting up a charity a very difficult and time-consuming process. Second, they restrain competition amongst charitable organizations, and as a result dampen the sector’s development. Third, the requirement that an organization have an institutional patron suppresses creativity and diversity in the charitable sector. To avoid the government rejecting an organization’s application for registration, existing charitable organizations in China tend to be conservative in their roles and missions, and they lack autonomy and the

⁴⁰ See Social Organizations Regulations art. 9; *Minfei* Regulations art. 8; Foundations Regulations art. 9. Note that some of the provisions of the Foundations Regulations apply to representative offices of overseas foundations established in China. See generally Foundations Regulations. In a similar vein, if a charity is established in the form of a charitable trust, the approval of the Charitable Cause Administrator is required. Trust Law art. 62.

⁴¹ See Social Organizations Regulations art. 9; *Minfei* Regulations art. 8; Foundations Regulations art. 9. All of these regulations require approval by an administrative organ in order to obtain registration as a charitable organization in China. See also *infra* text accompanying notes 42-44.

⁴² See *Minfatongze* 民法通则 [General Principles of Civil Law] art. 50 (promulgated by the NPC on Apr. 12, 1986, effective Jan. 1, 1987) (P.R.C.).

⁴³ Nick Young, *Philanthropy and Equity: The Case of China*, http://www.fas.harvard.edu/~acgei/PDFs/PhilanthropyPDFs/Phil_China_Case.pdf, at 22 (last visited Mar. 2, 2009).

⁴⁴ See Social Organizations Regulations art. 13; *Minfei* Regulations art. 11(3). Both the Social Organizations and the *Minfei* Regulations stipulate that if a social organization or civil non-enterprise institution engaged in the same or similar area of work already exists in the same administrative area, establishment of a new organization will not be approved. See Social Organizations Regulations art. 13; *Minfei* Regulations art. 11(3). Note that there is no similar restriction placed on foundations by the Foundations Regulations. See Foundations Regulations.

⁴⁵ Social Organizations Regulations art. 19.

ability to define their own agendas.⁴⁶ Not only does this dependency on government patronage subordinate the status of the social organizations, in extreme cases, this dependency may even turn these social organizations into government-organized charitable organizations (GONGOs) or merely administrative organs of the government, neither of which are autonomous.⁴⁷ The impression of government control and the fact that GONGOs are usually less efficient and transparent in their operation may also affect public confidence in the charitable sector.⁴⁸

In short, charitable organizations can never be autonomous or independent if the political approval of the government is required before they can legally exist. The strong official influence on charitable organizations and the close relationship between charitable organizations and the government compromises an essential aspect of the modern charity, namely its autonomous nature, and raises serious questions as to whether Chinese charitable organizations play independent roles that are different from that of the State. As explained above, based on the political background of the development of the charitable sector, the underlying philosophy of the existing legal structure is maintenance through government control. However, this structure fails to recognize that the charitable sector is one of the essential components of society, alongside the public sector and the private sector.⁴⁹ As such, healthy development of the charitable sector is also indispensable to a stable society; all three sectors—public, private, and non-government—complement each other by satisfying different societal needs. Thus, an interesting issue arising from the forthcoming Charity Law is whether China will merely expand its regulatory capacity, or whether it will transform its role from direct administrator to partner with the charitable sector.

⁴⁶ See *Blurred Law May Be Better than None*, CHINA DEV. BRIEF, June 10, 2004, <http://www.chinadevelopmentbrief.com/node/110> (last visited Mar. 2, 2009).

⁴⁷ QIUSHU MA, *supra* note 1, at 95 (commenting that reliance on state resources have threatened the independence of a large number of social organizations). See also YIYI LU, *supra* note 1, at 48-77 (analyzing the dependent relationship between charitable organizations and the state).

⁴⁸ See, e.g., *Juan kuan jian mian shui you wang da po ci shan shi ye kun ju* [Tax Exemptions On Charitable Donations May Enhance Charitable Activities], ZHONGGUO FUNÜBAO [CHINESE WOMEN DAILY], Mar. 10, 2007. This is because administrative organs of the state are usually perceived as more bureaucratic and less efficient in China. See generally Ping Li, *Thoughts on the Enhancement of China's Governmental Administrative Efficiency After the Entrance into WTO, With Views on Reform in China's Government Leadership System*, 1 CHINESE PUB. ADMIN. REV. 25 (Iss. 1) (2002) (describing the causes of government administrative inefficiency in China and suggestions for reforms).

⁴⁹ See MARK LYONS, *THIRD SECTOR: THE CONTRIBUTION OF NONPROFIT AND COOPERATIVE ENTERPRISES IN AUSTRALIA* xi (2001) (suggesting that the charitable (third) sector is very important and should not be overlooked).

If the charitable sector is to be afforded an independent legal identity, the new Charity Law should consider a number of measures to relax administrative constraints. For example, the institutional obstacles to forming a charity in China should be removed by simplifying the registration procedures, relaxing eligibility requirements (such as minimum capital requirements), and restricting the discretionary powers of the administrative authorities in order to minimize the influence of political considerations on the development of the charitable sector. Implementing these changes would help create a more stable legal environment for the development of charitable organizations, because the legitimacy of charitable organizations would no longer be dependent on their relations with the government. Ultimately, and more importantly, strong government influence reflects the Chinese government's fundamentally mistaken view of the role and the identity of the charitable sector. So far, the development of the charitable sector is merely seen as a useful tool in building socialism with Chinese characteristics. This instrumental understanding of the charitable sector amounts to subordination and it undermines the sector's identity within society. The failure to assign a proper societal role to the charitable sector leads to confusing government policies and deficient legal and regulatory regimes. The enactment of an overarching Charity Law would promote the view that long-term social stability can only be maintained if there is an institutional balance among the three different sectors.

B. Developing a Coherent Definition of Charity

It is essential that the relevant laws clearly define "charity" (*cishan* 慈善) and "charitable purposes (*cishan mudi* 慈善目的)." Although the heterogeneous nature of charitable organizations may make it difficult to allow one single form of organizational structure for charitable entities,⁵⁰ a unifying theme should underlie the definition of charitable organizations.

At the moment, several relevant laws governing the charitable sector adopt the concept of "public welfare" or "public interest" (*gongyi* 公益) in defining the scope of charitable sector activities. For example, Article Three of the Public Welfare Donations Law defines "public welfare activities" (*gongyi shiye* 公益事业) to include: 1) disaster relief, poverty relief, assistance to the disabled, et cetera; 2) education, scientific, cultural, public health and athletic activities; 3) environmental protection and construction of

⁵⁰ Indeed, in order to encourage the growth of charitable organizations, the organizational structures that a charity can adopt should be further diversified.

public facilities; and 4) other public welfare activities promoting social development.⁵¹ Similarly, according to Article Sixty of the Trust Law, a “charitable trust” (*gongyi xintuo* 公益信托) is one which is established for “public interest”⁵² or “public welfare”⁵³ (*gongyi* 公益). “Public interest” (*gonggong liyi* 公共利益) includes public welfare activities similar to those listed above.⁵⁴ Although the Foundations Regulations do not define “public welfare” (*gongyi* 公益), they do define a “foundation” as a civil non-profit organization that utilizes donated assets to work on “welfare undertakings” (*gongyi shiye* 公益事业).⁵⁵

It is unclear whether the definition of “charity” (*cishan*) is the same as the definition of “public welfare” or “public interest” (*gongyi*), or whether the Charity Law will refer to notions like “public welfare” or “public interest” in defining “charity.” The current trend in other jurisdictions is to adopt the notion of “public benefit” in defining charitable organizations.⁵⁶ For example, the English Charities Act 2006 clarifies the definition of “charity” by emphasizing that public benefit be created.⁵⁷ To be a charity, an organization must have purposes that: 1) fall within the descriptions of the range of purposes which are charitable in law, and 2) are for the public benefit.⁵⁸ The English Charities Act 2006 does not define what is meant by “public benefit,” which is governed by existing case law.⁵⁹ In order to encourage the growth of charitable organizations, the forthcoming Charity Law should be a basic law unifying the current laws governing social organizations, civil non-enterprise institutions, and other unregistered charitable organizations. Thus, an expansive definition of “charity” should be adopted. Moreover, if the term “charity” (*cishan*) is used without reference to the notions of “public welfare” or “public interest,” the definition of “charity” in the Charity Law may be narrower than other

⁵¹ Public Welfare Donations Law art. 3.

⁵² Trust Law art. 60.

⁵³ See National People’s Congress Official Translation of the Trust Law art. 60, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/10/content_1383444.htm (translating “公益信托” as one establishes in the interest of “public welfare”).

⁵⁴ Trust Law art. 60.

⁵⁵ Foundations Regulations art. 2.

⁵⁶ See, e.g., COMMONWEALTH OF AUSTRALIA, REPORT OF THE INQUIRY INTO THE DEFINITION OF CHARITIES AND RELATED ORGANISATIONS 343-76 (2001), available at <http://www.cdi.gov.au/html/report.htm> (describing in Appendix E on “Overseas Definitions” the legal definitions of charity in various jurisdictions, many of which have adopted the notion of “public benefit”).

⁵⁷ English Charities Act, 2006 (Eng.).

⁵⁸ English Charities Act, 2006, part 1(2) (Eng.).

⁵⁹ See *A Briefing on the Charities Act 2006*, NATIONAL COUNCIL FOR VOLUNTARY ORGANIZATIONS para. 2.5 (Jan. 2007), <http://www.ncvo-vol.org.uk/policy/index.asp?id=3928> (last visited Mar. 2, 2009).

existing laws and regulations provide. Because existing laws, including the long-standing Public Welfare Donations Law,⁶⁰ have utilized these notions, it would be preferable for the Charity Law to adopt these notions as well for consistency purposes.⁶¹ Therefore, broadly speaking, a charity should be regarded as an eligible charity so long as it: 1) is organized and operated exclusively for public benefit purposes by engaging in public welfare activities (including emergency relief, relief for the poor, education, health and social benefit, promotion of community development, et cetera); 2) contains restraints from distributing profits, dividends, or assets to its members (non-distribution constraints); and 3) is required to spend its remaining assets on charitable purposes after its termination.

C. *Providing Support for Small Charitable Organizations*

While all stakeholders are interested in demanding an enabling legal framework for charity operation, China's existing laws and regulations favor big charitable organizations over smaller entities. For example, the fifty person minimum membership requirement for social organizations is not conducive to the establishment of smaller grassroots organizations.⁶²

Besides, it seems that both the Public Welfare Donations Law and the Foundations Regulations tend to promote large-scale philanthropy, and to large extent exclude smaller charities. For example, by providing for donors' names to be placed on buildings they fund and reducing or exempting import duties,⁶³ the Public Welfare Donations Law focuses mainly on the funding potential of wealthy individuals and corporate donors, and in particular, wealthy overseas Chinese entrepreneurs.⁶⁴ The law does

⁶⁰ Although the Public Welfare Donations Law does not define "charity", it lists out four types of activities that can be regarded as "public welfare" activities (*gongyi shiye* 公益事业), including poverty relief and education. Public Welfare Donations art. 3.

⁶¹ In fact, the term "charity" (*cishan*) is rarely used in existing laws and regulations. It seems that it only appears in Article 10 of Public Welfare Donations Law in defining public welfare social organizations (*gongyi xing shehui tuanti* 公益性社会团体) to include foundations and charitable organizations (*cishan tuanti* 慈善组织) that promote public welfare activities. See Public Welfare Donations Law art. 10.

⁶² See Social Organizations Regulations art. 10; see generally Jillian S. Ashley & Pengyu He, *Opening One Eye and Closing the Other: The Legal and Regulatory Environment for "Grassroots" NGOs in China Today*, 26 B.U. INT'L L.J. 29, 38-42 (2008).

⁶³ See Public Welfare Donations Law arts. 14, 26.

⁶⁴ Seventy-five percent of the charitable donations to China came from overseas. *Ci shan shi ye cu jin fa zheng zai qi cao* [The Law on the Promotion of Charitable Undertakings is Currently Being Drafted], NAN FANG DU SHI BAO [SOUTHERN METROPOLIS DAILY], Mar. 15, 2007, at C15. Thus it is important to tap the funding potential of wealthy overseas Chinese entrepreneurs.

not mention the right of charitable organizations to solicit funds.⁶⁵ On the other hand, the Foundations Regulations impose stringent eligibility requirements for the establishment of both public foundations (that engage in public fundraising) and private foundations (that do not engage in public fundraising).⁶⁶ Public foundations are sub-divided further into national and provincial foundations.⁶⁷ The former must have an initial endowment of RMB eight million and the latter RMB four million.⁶⁸ For private foundations, the amount is RMB two million.⁶⁹ Unfortunately, these high start-up costs make it very difficult, if not impossible, for grassroots organizations to engage in public fundraising. Further, the Foundations Regulations also prescribe minimum spending requirements: public foundations must spend at least seventy percent of the funds they raise from the previous year on public welfare projects, whereas private foundations must spend at least eight percent of their total assets from the previous year; otherwise they may be de-registered.⁷⁰ These requirements may prevent small charitable organizations from setting up at all, or cause them to exhaust their funds after only a few years.

D. *Improving Fiscal Incentives*

Just like charitable organizations in any other jurisdiction, charitable organizations in China operate in a different fiscal environment than for-profit enterprises by virtue of the heavy public subsidization of charitable organizations through direct government funding and indirect tax benefits. Nonetheless, the current fiscal environment fails to provide an enabling legal framework to incentivize charitable giving. Payers of individual income tax can now deduct up to thirty percent of their taxable income for donations to approved charitable organizations.⁷¹ Previously, under the Provisional Regulations on Enterprises Income Tax (*Qiyeshuoshuizhanxing tiaoli* 企业

⁶⁵ On the contrary, the Public Welfare Donations Law stipulates that the purposes of the Law are to, *inter alia*, encourage donations and protect the rights and interests of donors. Public Welfare Donations Law art. 1.

⁶⁶ Foundations Regulations art. 3.

⁶⁷ *Id.*

⁶⁸ *Id.* art. 8.

⁶⁹ *Id.*

⁷⁰ *Id.* arts. 29, 42.

⁷¹ See Geren suodeshuifa [Individual Income Tax Law] art. 6 (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) LAWINFOCHINA (last visited Mar. 2, 2009) (P.R.C.); Geren suodeshuifa shishi tiaoli [Implementing Rules Concerning the Individual Income Tax Law] art. 24 (promulgated by the State Council, Dec. 19, 2005, effective Jan. 1, 2006) CHINALAWINFO (P.R.C.).

所得税暂行条例),⁷² the amount of tax-deductible donations that a company could make in any fiscal year was limited to three percent of its total profits.⁷³ This low threshold was too conservative and did not offer any real incentive. Thus, the revised Enterprise Income Tax Law (*Qiyeshuodeshuifa* 企业所得税法),⁷⁴ which came into effect recently, raised the threshold from three percent to twelve percent.⁷⁵ Tax deductions may be made for all donations to public welfare activities prescribed by the Public Welfare Donations Law.⁷⁶ The new Enterprise Income Tax Law also exempts qualified income made by non-profit organizations from income taxes.⁷⁷

Despite improved tax treatment for charitable deductions, the tax regime's effectiveness is limited by its operation and procedures, which currently fail to incentivize charitable giving in three ways: 1) creating bureaucratic obstacles for claiming tax exempt status; 2) creating bureaucratic obstacles for claiming tax deductions; and 3) failing to provide monetary tax relief to cater to new forms of donations. At the moment, enterprises and individuals receive tax deductions only if the charitable organization has obtained approval from the Ministry of Finance (*caizhengbu* 财政部) and the State Administration for Taxation (*guojia shuiwuzongju* 国家税务总局).⁷⁸ This means that charitable organizations are required to go through formalities for tax registration before receiving preferential tax treatment.⁷⁹ These procedures, in addition to the already cumbersome dual registration process, create additional burdens for charitable organizations. Only if the government provides a simplified tax

⁷² *Qiyeshuodeshui zanzheng tiaoli* [Provisional Regulations on Enterprises Income Tax] (promulgated by the State Council, effective Jan. 1, 1994, repealed by the *Qiyeshuodeshuifa* [Enterprise Income Tax Law] art. 60, Jan. 1, 2008) LAWINFOCHINA (last visited Apr. 2, 2009) (P.R.C.).

⁷³ *See id.* art. 6.

⁷⁴ *Qiyeshuodeshuifa* [Enterprise Income Tax Law] (promulgated by the Standing Comm. of the NPC, Mar. 16, 2007, effective Jan. 1, 2008) LAWINFOCHINA (last visited Mar. 2, 2009) (P.R.C.).

⁷⁵ *See id.* art. 9.

⁷⁶ *See Qiyeshuodeshuifa shishi tiaoli* [Implementing Rules Concerning the Enterprise Income Tax Law] arts. 51, 52 (promulgated by the State Council on Dec. 6, 2007, effective Jan. 1, 2008) LAWINFOCHINA (last visited Mar. 2, 2009) (P.R.C.) (stipulating that donations must qualify as donations for public welfare activities under the Public Welfare Donations Law in order to receive tax exemption).

⁷⁷ Enterprise Income Tax Law art. 26.

⁷⁸ *See Caizhengbu, Guojia shuiwuzongju guanyu gongyi jiujiuxing juanzengshuiqian kouchu zhengce ji xiangguan guanli wenti de tongzhi* [Notice of the Ministry of Finance and the State Administration of Taxation on the Policies and Relevant Management Issues Concerning the Pre-tax Deduction of Public Welfare Relief Donations] art. 1 (promulgated by the Ministry of Finance and the State Administration of Taxation, Jan. 8, 2007, effective Jan. 8, 2007) LAWINFOCHINA (last visited Mar. 2, 2009) (P.R.C.). Consequently, very often only government-supported charitable organizations (GONGOs) "are allowed to receive public donations and provide donors with tax-deductible official receipts." *A Surge In Donations Exposes Shortcomings In Charity Regulation*, CHINA ECON. REV., July 2008.

⁷⁹ This is in addition to the formalities required for establishing a charitable organization discussed above.

registration procedure (including streamlining the procedures for claiming tax deductions) can there be a facilitative fiscal regime. As widely reported, it took two months and ten administrative procedures for a senior official of the Ministry of Civil Affairs to successfully claim a tax deduction for his RMB 500 donation.⁸⁰ Finally, tax relief is only offered to charitable donations in the form of money.⁸¹ However, as the scope of charitable giving continues to expand, this may not be sufficient to cater to new forms of donations, such as donations in the form of securities.⁸² All these inadequacies expose China's need to simplify its tax system for charitable organizations and donors alike by improving existing tax relief and offering tax relief to new forms of donations.

Despite recent attempts to modernize the laws governing charitable organizations, China still lacks an enabling legal framework under which charitable organizations in China could flourish. The situation would be improved by implementing facilitative rules that reflect a modern charitable paradigm, including low threshold requirements and minimal formalities for setting up a charity; provision of facilitative and coherent legal rules (the most important rule being a well-defined scope of charity); and more favorable tax treatment to incentivize charitable giving.

IV. DEVELOPING A REGULATORY REGIME FOR CHARITY GOVERNANCE

Apart from a facilitative regime, as mentioned above, the modern charity paradigm also includes regulatory rules. As the Chinese government sees charitable organizations as merely objects of administration, detailed rules on charitable organizations' powers, duties, responsibilities, and governance structure hardly exist.⁸³ Consequently, the internal governance structure is still primitive, and the accountability mechanisms need to be strengthened.

⁸⁰ Ming Gao & Yanxin Jiang, *Zhonghua ci shan da hui qiu jie guan zhong min qing kun ju* [China Charity Conference Solves the Problem of Dominant Official Channels and Weak Informal Channels], XIN JING BAO [THE BEIJING NEWS], Nov. 24, 2005, at A24. The story was given by Mr. Wang of the Ministry of Civil Affairs at the China Charity Conference organized by the Ministry of Civil Affairs in November 2005. *Id.*

⁸¹ See *supra* text accompanying notes 71-74.

⁸² In the United Kingdom, for example, the government has "created a new form of tax relief on donations of certain shares and securities." James R. Michels, *UK Charity Law: Is it Creating a True Democracy of Giving?*, 34 VAND. J. TRANS. NAT'L L. 169, 187 (2001).

⁸³ This follows from the emphasis on the administration and management aspects in three main pieces of legislation governing charitable organizations in China. See *supra* text accompanying note 33.

A. *Fostering Internal Governance*

After creating a charitable organization, issues of internal governance will arise as to its establishment, its composition, the powers and procedures of the governing board, and its relationship with individual members.⁸⁴ Resolving these issues will help generate the governance structure of charitable organizations. This could, in turn, be used to address the competing demands of supply-side and demand-side stakeholders, and the distribution of power between the executives, the board, and the members. In addition, it would fill gaps in the legal documents of these organizations in relation to the administration of charitable funds.

Article 15 of the Social Organizations Regulations requires that a social organization set out the qualifications, powers, and duties of its members.⁸⁵ However, the Regulations give little additional guidance.⁸⁶ For example, the Regulations do provide that the highest authority rests with the members, but do not specify the scope of their authority.⁸⁷ The Regulations should clearly delineate the powers and authorities that members can exercise at their meetings, including the power to amend the organization's constitution, appoint or remove directors, and dissolve the organization. The Regulations should also include procedures for calling meetings and passing resolutions.⁸⁸

Good governance starts with the ability to recruit and retain an effective governing board.⁸⁹ This requires clear rules on the procedures for

⁸⁴ See generally, CHARITY COMM'N, NO. CC10—THE HALLMARKS OF AN EFFECTIVE CHARITY (2008).

⁸⁵ Social Organizations Regulations art. 15.

⁸⁶ Note, however, that Chapter 3 of the Sample Constitution for Social Organizations (*Shehui tuanti zhangcheng shifan wenben* 社会团体章程示范文本), which was promulgated by the Ministry of Civil Affairs and issued in accordance with the Social Organizations Regulations, does contain more detailed provisions relating to members' rights, such as the right to vote. Zhonghua Renmin Gongheguo Minzhengbu [Ministry of Civil Affairs of the People's Republic of China], *She hui tuan ti zhang cheng shi fan wen ben* [Sample Constitution for Social Organizations], <http://www.mca.gov.cn/article/ggfw/bgxz/200801/20080100009674.shtml> (last visited Mar. 2, 2009) [hereinafter Sample Constitution for Social Organizations].

⁸⁷ This is only specified in the Sample Constitution for Social Organizations. Sample Constitution for Social Organizations, *supra* note 86, art. 14. In a similar vein, the powers of the members' meetings (such as amending the constitution and electing and removing the governing board) are only set out in the Sample Constitution for Social Organizations. *Id.*

⁸⁸ Although social organizations generally follow the Sample Constitution for Social Organizations in applying for registration, the Sample Constitution has no legal force. See JINLUO CHEN ET AL., *supra* note 39, at 130-31. In any case, the Sample Constitution contains no concrete guidelines on certain important issues such as the procedures for calling a members' meeting and passing resolutions. Sample Constitution for Social Organizations, *supra* note 86.

⁸⁹ See generally CHARITIES, GOVERNANCE AND THE LAW: THE WAY FORWARD (Debra Morris & Jean Warburton eds., 2003).

the appointment and removal of directors, the qualifications and number of directors, the duration of their appointments, and the terms of remuneration.⁹⁰ The Regulations should also specify the duties and the potential liabilities of the board. While all laws currently governing the main types of charitable organizations prohibit misappropriation of the organization's funds, they fail to stipulate any duty of care for directors respecting their management duties.⁹¹ Regarding the duty of loyalty, only the Foundations Regulations prohibit a director and the director's associates from engaging in "self-dealings" with their foundation.⁹² This approach must be amended so that all senior officers and board members of a charitable organization are subject to duties of care and diligence, as well as a fiduciary duty of loyalty that prohibits them from having actual or potential conflicts of interest.⁹³ Guidelines on how to deal with board conflicts would help the management understand its responsibilities.⁹⁴ At the same time, because a voluntary board of trustees usually governs charitable organizations, the law should provide that they may be relieved of personal liability for breaches of certain duties if the court believes they acted honestly and reasonably or in "good faith."⁹⁵

B. *Promoting Accountability*

The most important yet often ignored aspect of charity law in China is determining how to hold charitable organizations accountable for their tasks.⁹⁶ First, this section addresses the significance of charitable accountability. Second, it discusses the accountability issues charitable organizations in China face.

⁹⁰ See JINLUO CHEN ET AL., *supra* note 39, at 132.

⁹¹ Foundations Regulations art. 43 (stipulating that directors are liable to the loss suffered by the Foundations as a result of their poor decision-making, but there is a lack of operational guidelines on what amounts to such mismanagement).

⁹² *Id.* art. 23.

⁹³ Cf. Gongsifa [Company Law] art. 148 (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) (P.R.C.) (imposing duties of care and loyalty on company directors).

⁹⁴ Cf. CHARITY COMM'N, A GUIDE TO CONFLICTS OF INTEREST FOR CHARITY TRUSTEES (2004) (providing guidelines to charities in England & Wales).

⁹⁵ This language ("honestly, reasonably, or in good faith") resembles the general provisions governing trustees in England and Hong Kong. See English Trustee Act, 1925, c. 19, § 61 (Eng.); Trustee Ordinance of Hong Kong sec. 60, (1997) Cap. 29, 60, (H.K.)

⁹⁶ Cf. Fan Junmei, *Accountability Critical to Philanthropy*, CHINA.ORG.CN, Nov. 4, 2008, available at http://www.china.org.cn/china/opinion/2008-11/04/content_16708704.htm (reporting a seminar on "Charity Trust and Accountability and Civil society" where views on how to promote charitable accountability were expressed).

“Charitable accountability is the process of ascertaining that assets devoted to charitable pursuits are put to their proper purpose and that information about their use is made available to the public or to governmental authorities.”⁹⁷ Charitable organizations can play an important role in the provision of public services on behalf of the government. Charitable organizations receive public benefits in the form of tax incentives, gifts, volunteer support, and other subsidies.⁹⁸ In particular, the tax-exempt status accords benefits to charitable organizations in two ways. First, the charity does not incur tax liabilities on any income earned.⁹⁹ Second, charitable donations are tax deductible.¹⁰⁰ This encourages donors to give money. It would be odd if these particular benefits and privileges were provided without accountability constraints. Tax exemptions for charitable organizations also generate a public interest in the efficient and accountable administration of charities because the exemptions represent lost tax revenue, which amounts to indirect public subsidy. As explained above, the interests of the supply-side and demand-side stakeholders overlap.¹⁰¹ Donors want information to assess the performance of charitable organizations, including the proportion of funds spent on the charities’ administrative costs.¹⁰² Likewise, users want to see the promises and objectives of the charity delivered.¹⁰³ The growing influence of the media, useful for publicity, information dissemination, and networking with domestic and international charitable organizations, plays a crucial role in indirectly promoting accountability.¹⁰⁴ The media’s frequent reports on mismanagement or misappropriation of donated funds also increase the

⁹⁷ James J. Fishman, *Charitable Accountability and Reform in Nineteenth Century England: The Case of the Charity Commission*, 80 CHL-KENT L. REV. 723, 723 (2005).

⁹⁸ See *supra* Part II.A.

⁹⁹ See generally THE TAX TREATMENT OF NGOS: LEGAL, FISCAL AND ETHICAL STANDARDS FOR PROMOTING NGOS AND THEIR ACTIVITIES (Paul Bater, Frits Hondius & Penina Kessler Lieber eds., 2003). For example, in Hong Kong, once qualified as a tax-exempt charity, profits tax is not chargeable under the Inland Revenue Ordinance. Inland Revenue Ordinance, Cap. 112, § 88 (H.K.).

¹⁰⁰ See generally THE TAX TREATMENT OF NGOS, *supra* note 99. For example, in Hong Kong, individuals and companies may claim tax deductions for approved charitable donations from their net assessable income/profits, subject to a maximum of 35% of their net assessable income/profits under the Inland Revenue Ordinance. Inland Revenue Ordinance, Cap. 112, §§ 16D & 26C (H.K.).

¹⁰¹ See *supra* Part II.A.

¹⁰² See China Foundation for Poverty Alleviation, *2007 Zhongguo gongmin juanzeng xingwei ji gongyi yishi diaocha baogao* [Survey on Donative Behaviors and Charitable Awareness of Chinese Citizens 2007] 8 (2007) (providing the data of a recent survey conducted by the China Foundation for Poverty Alleviation, where over 75% of the respondents responded that they were “very concerned” with how the donations were spent).

¹⁰³ This is because charitable organizations are established for the purpose of delivering services to benefit users.

¹⁰⁴ See, e.g., Guobin Yang, *Environmental NGOs and Institutional Dynamics in China*, 181 CHINA Q. 46 (2005).

demand for openness and accountability of charitable organizations.¹⁰⁵ For example, Project Hope, launched by the China Youth Development Foundation in 1989, a program that aims to raise money from the public to help poor children in rural China attend school, ended with widespread reports of misappropriation and misuse of donated funds.¹⁰⁶ Widely publicized scandals of misappropriation of charitable assets inevitably tarnish the charitable sector.

The most challenging accountability issue relates to corruption. China's rampant corruption makes it difficult (and sometimes politically sensitive when government employees are involved) to ensure that charitable donations reach the hands of the neediest. For example, since the devastating Sichuan earthquake in May 2008, local and international aid organizations have received extremely generous donations to assist the relief efforts.¹⁰⁷ There are, however, widespread fears of corruption or misappropriation of donated funds.¹⁰⁸ The efficient and responsible use of the funds is now a public concern.

Despite calls for greater accountability, the values of accountability, transparency, and performance evaluation are often not appreciated in China. Article 21 of the Public Welfare Donations Law provides for the donor's right to access information about the use and management of the donations.¹⁰⁹ The Foundations Regulations have similar provisions.¹¹⁰ All current laws contain regulations on submissions of annual reports to the relevant administrative authority.¹¹¹ However, only the Foundations Regulations contain a duty of disclosure of information, requiring foundations to make the relevant annual report public through media

¹⁰⁵ See, e.g., Jiang Yanxin, *Shan kuan zhi pei you wang li fa* [Hope of Legislation on Donation], XINJINGBAO [THE BEIJING NEWS], Nov. 22, 2005.

¹⁰⁶ *Xi wang gong chen wei gui tou zi, she kuan yu yi duo ge xiang mu kui sun* [Project Hope Pursues Investments Against the Law, More than A Hundred Million Involved, Deficit in Many Projects], MING PAO, Feb. 28, 2002, at A02. However, the China Youth Development Foundation issued a statement rejecting strenuously any allegation of misappropriation and mismanagement. See Peng Kailei, *Qingjihui hui ying Ming Pao bao dao, Xi wang gong chen ji jin an li tou zi zeng zhi, zhi you guan bao dao yu shi shi bu fu* [The China Youth Development Foundation's Respond to the Ming Pao Reports that Project Hope Invested Its Foundation Legally and the Report was Inconsistent with the Facts], WEN WEI PO, Mar. 1, 2002, at A07.

¹⁰⁷ *A Surge In Donations Exposes Shortcomings In Charity Regulation*, CHINA ECON. REV., July 2008. Within less than a month after the earthquake, according to the Ministry of Civil Affairs, "charitable donations for the earthquake as of May 30 amounted to USD 4.25 billion." *Id.*

¹⁰⁸ See *id.* See also Shang Qianming, *Quan chen jian du shan kuan shan yong* [Supervision Over Use of Donated Funds], LIAOWANG [XINHUA NEWS AGENCY OUTLOOK WEEKLY], Iss. 21 (2008).

¹⁰⁹ Public Welfare Donations Law art. 21.

¹¹⁰ Foundations Regulations art. 39.

¹¹¹ Social Organizations Regulations art. 31; *Minfei* Regulations art. 23; Foundations Regulations art. 36.

channels¹¹² to provide for public enforcement of accountability. Thus, compared to information disclosure requirements of for-profit listed companies, disclosure requirements for charitable organizations are still very primitive and under-developed.¹¹³

The misalignment of interests and information offers charity management great decision-making discretion. In order to prevent abuses, appropriate checks and balances must be put in place to protect charity assets and ensure the accountability of persons who control them. Appropriate use of checks and balances to improve governance would be beneficial to the charitable sector as a whole. Well-governed charitable organizations are more likely to enjoy greater public confidence,¹¹⁴ which is critical for fund-raising.¹¹⁵ Conversely, ineffective charitable governance may reduce the ability of the charitable organizations to carry out their missions.¹¹⁶ In China, ninety-nine percent of corporations did not engage in any form of charitable donations.¹¹⁷ While this may be explained partly by the fact that any concept of corporate social responsibility is still embryonic among Chinese corporations,¹¹⁸ it also partly reflects the lack of efficiency

¹¹² Foundations Regulations art. 38.

¹¹³ See, e.g., Shangshi gongsi xinxi beilu guanli banfa [Measures for Administering the Information Disclosure of Listed Companies] (promulgated by the China Sec. Regulatory Comm'n, Jan. 30, 2007, effective Jan. 30, 2007) LAWINFOCHINA (last visited Mar. 2, 2009) (P.R.C.). Under the Measures for Administering the Information Disclosure of Listed Companies (*Shangshi gongsi xinxi beilu guanli banfa* 上市公司信息披露管理办法 issued by the China Securities Regulatory Commission, listed companies must make timely disclosures of specified information, such as their prospectus and periodic reports, both of which must contain all information that might materially affect investors' decisions, and listing announcements. *Id.* See Grant Chen & Zhengyi Zhang, *New Disclosure Standards for PRC Listed Companies*, CHINA L. & PRAC. (Apr. 2007), available at <http://www.chinalawandpractice.com/Article/1690314/Channel/7576/New-Disclosure-Standards-for-PRC-Listed-Companies.html> (providing an overview of the Measures).

¹¹⁴ See generally IPSOS MORI SOCIAL RESEARCH INSTITUTE & CHARITY COMM'N FOR ENGLAND & WALES, 2008 CHARITY COMMISSION STUDY INTO PUBLIC TRUST AND CONFIDENCE IN CHARITIES (May 2008), available at http://www.charity-commission.gov.uk/Library/news_thumbs/pdfs/Charities%20survey.pdf (reporting the findings of factors affecting public confidence in charitable organizations).

¹¹⁵ See The Scottish Government, *Increasing Public Confidence in Charities*, Dec. 15, 2005, available at <https://www.scotland.gov.uk/News/Releases/2005/12/15093927> (discussing the importance of public confidence to fundraising).

¹¹⁶ This is because a higher proportion of donated funds may have to be spent on internal management of the charitable organization.

¹¹⁷ See, e.g., *99% of Chinese Firms Never Donate to Charity*, XINHUA NEWS, Nov. 21, 2005; *Ci shan juan kuan bu deng shi, deng qi ye ping heng* [The Inequality of Charitable Donations is Waiting for Enterprises], BEIJING QING NIAN BAO [BEIJING YOUTH POST], Nov. 20, 2005.

¹¹⁸ See *Qi ye jia you dai gai shan gong yi que wei xing xiang* [Entrepreneurs to Improve Charitable Image], XINHUA NET, Apr. 22, 2007, available at <http://big5.people.com.cn/gate/big5/finance.people.com.cn/GB/8215/80712/5647850.html>.

and accountability, and in turn, the lack of public confidence in the charitable sector.¹¹⁹

C. *Accountability and Proportionality*

Accordingly, even though there may be fears that exacting standards of accountability will have counter-productive results,¹²⁰ the Charity Law must call for enhanced accountability. A number of regulatory measures should be incorporated into the new Charity Law, including accountability mechanisms proportionate to the charity's size, an enforcement agency, and means to encourage the growth of international charitable organizations.

In the first place, there should be accountability mechanisms. Currently, the Chinese government supervises charitable organizations through strict entry barriers, namely the dual registration and management system.¹²¹ This is necessary partly because of the lack of proper mechanisms to evaluate charities' performance after registration.¹²² Accountability mechanisms may thus also alleviate the need for entry barriers. Such mechanisms should set out clearly the standards against which performance could be judged and provide incentives for good performance and sanctions for poor performance. A critical question then is whether the forthcoming Charity Law will draw from international experiences on how to establish performance indicators, both quantitatively and qualitatively.

Given that the Chinese charitable sector still is developing, the government should adopt a more flexible and proportionate approach. The accountability mechanisms should be proportional to the size of the charity.

¹¹⁹ For example, there was a surge in direct giving to the survivors of the Sichuan Earthquake to avoid potential corruption by government officials and relief organizations. Roxanne Clark, *Complex Giving Structures Reflect China's Turbulent Growth*, 33 PHILANTHROPY UK NEWSL. 18-19 (June 2008).

¹²⁰ See Debra Morris, *New Charity Regulations for England and Wales: Overdue or Overdone?*, 80 CHI.-KENT L. REV. 779 (2005) (explaining the need for greater accountability of charitable organizations, but at the same time stressing the importance of flexibility and proportionality and emphasizing the need to avoid over-regulation).

¹²¹ See *supra* Part III.A (discussing the dual registration and management system).

¹²² See Berthold Kuhn, *Evaluation and Regulation of Non-governmental Organizations in the People's Republic of China: Towards a Certification System Compatible with International Standards?*, available at <http://www.istr.org/conferences/barcelona/WPVolume/Kuhn.pdf> (describing the lack of evaluation mechanisms and suggesting certification mechanisms for charitable organizations in China). In contrast, other jurisdictions with a more developed and modern charitable sector usually have simplified and loosened registration formalities and procedures, while enhancing the supervision and evaluation of the performance of charitable organizations. Ming Wang & Shaoguang Wang, *Suggestions on Promoting the Charitable Sector in China*, 24 F. INT'L DEV. STUD. 53, 59 (2003). This creates the unfortunate consequence that charitable organizations in China that cannot be registered through lawful means turn to other expedient measures. *Id.* This ultimately makes it more difficult for the government to effectively supervise the charitable sectors' operation. *Id.*

Thus, whereas stringent record-keeping and filing requirements can promote financial accountability and enhance transparency, it is also necessary to differentiate between large and small charitable organizations in applying these requirements to them. This is because while large charitable organizations usually have little difficulty complying with additional requirements, compliance is usually relatively expensive for small charitable organizations, requiring them to divert their limited resources to compliance.¹²³ Accordingly, a proportionate approach to regulatory requirements should be adopted, such that, for example, only charitable organizations with gross income or expenditure exceeding a certain amount in the relevant financial year will need to have their accounts externally examined. This will help protect small charitable organizations from compliance with stringent regulatory requirements at the expense of their ability to accomplish their objectives. Since accountability mechanisms can be more or less intrusive, a proportionate approach balances accountability and autonomy; while the law must ensure that charitable organizations conform to certain standards of behavior, it must not impede their tasks by mandating an over-complicated web of accountability that stifles autonomy and creativity. On this point, non-binding codes of good governance may also be an appropriate tool to fine-tune the balance between government regulation and charity self-regulation.¹²⁴

Second, an enforcement agency ought to be established to provide for public enforcement of charity laws. Donors want to see charities accountable to both the donors and the users. The regulatory regime should strike an appropriate balance of power between charitable organizations and donors in order to ensure independence of the management and the charity. This oversight job is likely to be best executed by an autonomous regulatory

¹²³ Some even questioned whether the creation of more complex filing requirements will create greater accountability. James J. Fishman, *The Charitable Sector: Myths and Realities*, 9 N.Y. CITY L. REV. 303, 312 (2006).

¹²⁴ Cf. Panel on the Nonprofit Sector, *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations* (Oct. 2007), available at http://www.nonprofitpanel.org/report/principles/principles_guide.pdf (providing an example of a non-binding good governance code in the United States); National Council for Voluntary Organisations, *Good Governance: A Code of Governance for the Voluntary and Community Sector* (June 2005), available at http://www.ncvo-vol.org.uk/uploadedFiles/NCVO/What_we_do/Governance_and_Leadership/Good_Governance_Code%20_PDF.pdf (providing an example of a non-binding good governance code in England); Social Welfare Department, *Leading Your NGO: Corporate Governance, A Reference Guide for NGO Boards* (June 2002), available at <http://www.swd.gov.hk/doc/ngo/corp-gov-eng.pdf> (providing an example of a non-binding good governance code in Hong Kong).

body, such as one similar to the Charity Commission for England & Wales.¹²⁵

Third, accountability can also be indirectly promoted by encouraging the growth of international charitable organizations. Although the legal status of international charitable organizations in China is unclear,¹²⁶ they are usually perceived more favorably. Not only can international charitable organizations assist the development of the local charitable sector in terms of providing expertise in capacity building and training of management personnel, these international organizations also tend to have better governance structures, which local charitable organizations can model themselves after.

V. CONCLUSION

The expansion of the charitable sector is one of China's most remarkable developments in recent decades. In November 2005, the Ministry of Civil Affairs announced the "Synopsis for the Development of Charitable Activities in China (2006-2010)" (*Zhongguo cishan shiye fazhan zhidao gangyao* 中国慈善事业发展指导纲要 (2006-2010)),¹²⁷ which set out the future directions of the development of charitable organizations in China. These changes include three areas: 1) government mobilization; 2) public participation; and 3) charitable organizations execution.¹²⁸ Unfortunately, strong government influence has compromised the development of a truly autonomous charitable sector. The government has not yet created an enabling legal framework to mobilize the untapped resources of an emergent charitable sector. Public participation, both in

¹²⁵ Nuzhat Malik, *Defining "Charity" and "Charitable Purposes" in the United Kingdom*, 11 INT'L J. NOT-FOR-PROFIT L. 36, 47 (2008). The Charity Commission for England and Wales is the regulator and registrar of charities in England and Wales. See Charity Commission, *supra* note 30. Its aim is to increase charities' efficiency and effectiveness and public confidence and trust in them. *Id.*

¹²⁶ The legal status of international charitable organizations in China is unclear because of the lack of consistent registration policies for international charitable organizations that operate in China. See QIUSHU MA, *supra* note 1, at 176-77. Consequently, international charitable organizations usually establish headquarters in Hong Kong or representative offices in China in order to run programs within China. *Id.*

¹²⁷ This was announced by the Ministry of Civil Affairs at the China Charity Conference in Nov. 2005. See *Zhonghua ci shan da hui xin wen fa bu hui jin ri zhao kai* [The Press Conference of the China Charity Conference Was Held Today], <http://hnmz.gov.cn/articlite/data/1132284338.html> (last visited Apr. 13, 2009).

¹²⁸ See Ministry of Civil Affairs Website, *Zhongguo ci shan shi ye fa zhan zhi dao gang yao (2006-2010)* [Synopsis for the Development of Charitable Activities in China (2006-2010)], <http://cszh.mca.gov.cn/article/zcfg/200804/20080400013553.shtml> (last visited Apr. 13, 2009) (providing full details of the Synopsis). The phrase "charitable organizations execution" refers to how charitable organizations can improve their structure, improve their governance, and diversify their activities in order to execute their missions effectively. *Id.*

terms of supplying human resources and offering monetary donations, remains thin. Charitable organizations, suffering from inadequate internal governance and insufficient external accountability, cannot execute their missions effectively. The forthcoming Charity Law therefore provides an excellent opportunity to rectify some of these problems.

In the context of charity operation, it must be realized that charity laws should provide an enabling regime and that the role of government should be limited to providing an appropriate facilitative framework through clear legal rules and fiscal privileges. Such a limited role for the Chinese government will ensure that the charitable sector transforms from complete dependence on the government to partnership with it. It is also necessary to provide a regulatory regime that fosters charitable accountability without threatening charitable self-regulation, independence, and flexibility.

These prescriptions provide, in a way, a lofty ideal for China to pursue in developing its charitable sector. Even so, these prescriptions are important because the approach China takes in modernizing its charity law regime will demonstrate its willingness to empower civil society and its ability to regulate a newly emerging area of non-state activities. These reforms may also illustrate ways in which China's efforts to integrate charitable organizations with state activities differ significantly from the Western approach; this, in turn, may shed light on the similarities and differences between state-society relations in China and the West.