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# **“Social Governance vs. Social Management: Towards a New Regulatory Role for Social Organizations in China?”**

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## **Abstract:**

On November 12 2013 the Central Committee of the Communist Party of the People’s Republic of China approved the “Decision of the CCCP on Some Major Issues Concerning Comprehensively Deepening the Reform”. The document – the first major policy statement of President Xi Jinping’s new administration – was well received for its calls for greater liberalization of the economy and a greater governance role for the market, private sector, and non-state players, including social organizations. The most important signal of this new (and more positive) attitude towards NGOs seemed to be a lexical one: since then, the expression “*shehui guanli*” (社会管理, *social management*) has been replaced in official discourse by “*shehui zhili*” (社会治理, *social governance*) a notion that recognizes social players’ role in governance, alongside government and businesses.

Concretely, what has this change meant for NGOs and their participation in the regulatory process? And how have the role and responsibility of government(s) and social organizations been clarified and enforced at the central and local levels?

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In this paper, I will analyze the impact of this new way of understanding the relationship between State and Society with regard to social organizations, considering the ways in which the relationship between state and non-state actors has been shaped in the past few years. I will concentrate especially on the experiments that have been going on at the local level, and on the rise (and decline?) of NGOs' potential influence on the regulatory process through legal actions, through "public interest litigation".

Keywords: Chinese Law, Social Organizations, Regulatory Governance, Environmental Public Interest Litigation

## I. INTRODUCTION

On November 12, 2013, the Central Committee of the Communist Party of the People's Republic of China approved the "Decision of the CCCP on Some Major Issues Concerning Comprehensively Deepening the Reform"<sup>1</sup>. The document – the first major policy statement of President Xi Jinping's new administration – was well received for its calls for greater liberalization of the economy and a greater governance role for the market, private sector, and non-state players, including social organizations. The most important signal of this new (and more positive) attitude towards NGOs seemed to be a lexical one: since then, the expression "*shehui guanli*" (社会管理, *social management*) has been replaced in official discourse by "*shehui zhili*" (社会治理, *social governance*)<sup>2</sup> a notion that recognizes social players' role in governance, alongside government and businesses.

According to section 13 of the "Decision", improving methods of "social governance" will "*strengthen leadership by the Party committee*" and "*give full play to the leading role of the government,*" but – at the same time – "*encourage and support the participation of all sectors of the society*", and "*establish an open and orderly mechanism under which people can express their grievance*", in order to achieve "*positive interaction between the government management on the one hand, and social self-management and residents self-management on the other*".

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<sup>1</sup> The original text of the Decision (in Chinese) can be found at: <http://cpc.people.com.cn/n/2013/1115/c64094-23559163-13.html> (last accessed: January 31, 2017). The official translation (in English) of the Decision can be found at: [http://www.china.org.cn/china/third\\_plenary\\_session/2014-01/16/content\\_31212602.htm](http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm) (last accessed: January 31, 2017).

<sup>2</sup> 孙涛, "从社会管理到社会治理", 金陵科技学院学报(社会科学版), 第29卷, 第4期, 2015年12月, Sun Tao, "Cong shehui guanli dao shehui zhili" (From Social Management to Social Governance), Jinling kezhi xueyuan bao (shehui kexue ban), vol. 29, no. 4, December 2015, p. 37.

Concretely, what has this change meant for NGOs and their participation in the regulatory process? And how have the role and responsibility of government(s) and social organizations been clarified and enforced at the central and local levels?

In this paper, I will analyze the impact of this new way of understanding the relationship between State and Society with regard to social organizations, considering the ways in which the relationship between state and non-state actors has been shaped in the past few years. I will concentrate especially on the experiments that have been going on at the local level, and on the rise (and decline?) of NGOs' potential influence on the regulatory process through legal actions, through "public interest litigation".

## II. SOCIAL GOVERNANCE VS. SOCIAL MANAGEMENT

Although not new, the term "social governance" (*shehui zhili*) has been used almost exclusively under Xi Jinping's administration instead of "social management" (*shehui guanli*), which was more frequently employed during the Hu Jintao period<sup>3</sup>.

The expression "*shehui guanli*" has been part of Chinese political discourse for over twenty years: introduced by the CCP Central Committee in 1993<sup>4</sup>, it was listed in the 1998 "Proposal to Restructure the State Council" as one of the basic government functions, together with "macro-economic control" and "public service"<sup>5</sup>. With the beginning of the new century, the concept began to gain prominence in the agendas of both the Party and the government: it was further elaborated on in the 16<sup>th</sup> and 17<sup>th</sup> Party Congresses, and became a focus at the Fifth Plenary Session of the 17<sup>th</sup> Central Committee in 2010. According to the "Resolution" of this session:

*"the general principle of social management is party leadership, government responsibility, social coordination and public participation"*<sup>6</sup>.

The notion – almost impossible to translate in English because it is one of many political terms that are difficult to define outside the Chinese context<sup>7</sup> – was

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<sup>3</sup> Samantha Hoffman and Peter Mattis, "China's Proposed 'State Security Council': Social Governance under Xi Jinping", in China Policy Institute Blog, November 21, 2013, available at: <https://blogs.nottingham.ac.uk/chinapolicyinstitute/2013/11/21/chinas-proposed-state-security-council-social-governance-under-xi-jinping/> (last accessed: January 31, 2017).

<sup>4</sup> As noted by Prof. Xiang Chunling, of the Social Science Department of the Central Party School, in March 2014. See: "创新社会治理应'放权于民'", 中国人大杂志, 2014年第5期, Chuangxin shehui zhili ying "fangquan yu min" (for making innovation in social governance it is necessary to "transfer power to the people), Zhongguo renda zazhi (Chinese People's Congress Review), no. 5, 2014, available at: [http://www.npc.gov.cn/npc/zgrdzz/2014-03/31/content\\_1858216.htm](http://www.npc.gov.cn/npc/zgrdzz/2014-03/31/content_1858216.htm) (last accessed: January 31, 2017). According to other scholars, however, the concept is deeply rooted in Chinese culture, having inspired state administration since the Xia dynasty (c. 2070 – c. 1600 BC). See 窦玉沛, "从社会管理到社会治理: 理论和实践的重大创新", 行政管理改革, 第4期, 2014年, Dou Yupei, "Cong shehui guanli dao shehui zhili: lilun he shixian de zhongda chuangxin", (From social management to social governance: major innovations in theory and practice", no. 4, 2014, p. 21.

<sup>5</sup> Yu Keping, "A Shift Towards Social Governance in China", Eastasiaforum, September 9, 2011, available at: <http://www.eastasiaforum.org/2011/09/09/a-shift-towards-social-governance-in-china/> (last accessed: January 31, 2017)

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* For a more recent and deeper analysis of the concept and of its impact on social policies, see: 毛寿龙, 李锐 "社会治理与社会政策的秩序维度", 中国行政管理, 第4期, 总第382期, 2017 Mao Shoulong, Li rui, "Shehui zhili yu

eventually elevated to a key target by the 12<sup>th</sup> Five-Year Plan for National and Social Development in March 2011<sup>8</sup>.

In the Plan, the goal of “*innovate(ing) social management institution*” is considered to be twofold: involving the “*improvement of the social management structure*”, on the one hand, and pushing “*innovation of the social management system*”, on the other<sup>9</sup>.

However, while the first aspect includes – among other things – playing a coordination role between social players, and improving the standardization, professionalization, socialization and legalization of social management, the second aims at strengthening the management of the origin of social problems, focusing on the “dynamic management” of social conflicts and developing a crisis response system<sup>10</sup>.

It is precisely this last coercive aspect that, according to many Chinese and Western observers, had overshadowed the more “cooperative” aspects, at least in the late Hu Jintao era (2002 – 2012)<sup>11</sup>, not only undermining the possibility of reaching one of the main goals of the period (the “improvement of people’s livelihood”) and jeopardizing the most important of the leader’s objectives (the creation of a “harmonious society”), but also threatening the Communist Party’s long-term legitimacy<sup>12</sup>.

Certainly, as Samantha Hoffman pointed out in an article published in August 2012, Beijing at the time was implementing

*“a strategy of improving control through social management”, “building a service-oriented government to prevent and reduce the number of social problems; [...] and*

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shehui zhengce de zhixu weidu” (Order Dimensions of Social Governance and Zhongguo Xingzheng guanli, no. 4, vol. 382, 2017, pp. 72 – 75.

<sup>8</sup> See 中华人民共和国国民经济和社会发展第十二个五年规划纲要 (Zhonghua renmin gongheguo jingji he shehui fazhan di shier ge wu nian guihua gangyao), online: [http://news.xinhuanet.com/politics/2011-03/16/c\\_121193916.htm](http://news.xinhuanet.com/politics/2011-03/16/c_121193916.htm) (last accessed: January 31, 2017); an English translation of the Plan can be found at: <http://www.britishchamber.cn/content/chinas-twelfth-five-year-plan-2011-2015-full-english-version> (last accessed: January 31, 2017). For an academic analysis of the concept, with reference to the implementation of the “rule of law” in social governance, see: 刘旺洪, “社会管理创新与社会治理的法治化”, 法学, 第 10 期, 2011 年, Liu Wanghong, “Shehui guanli chuangxin yu shehui zhili de fazhihua” (Innovation in social management and the implementation of the “rule of law” in social governance), Faxue, no. 10, 2011, pp. 42-46.

<sup>9</sup> See *ibid.* chapter 37.

<sup>10</sup> *Ibid.*

<sup>11</sup> Samantha Hoffman and Peter Mattis, “China’s Proposed “State Security Council: Social Governance under Xi Jinping”, in China Policy Institute Blog, November 21, 2013, available at: <https://blogs.nottingham.ac.uk/chinapolicyinstitute/2013/11/21/chinas-proposed-state-security-council-social-governance-under-xi-jinping/> (last accessed: January 31, 2017) For a similar analysis of the interpretation (and implementation) of “social management” by the Chinese leader, see also: David Cohen, “Decoding ‘Social Management’”, The Diplomat, September 21, 2011, available at: <http://thediplomat.com/2011/09/decoding-social-management> (last accessed: January 31, 2017).. For an analysis (in Italian) of the complex relationship between government and civil society in China see: Renzo Cavalieri, Ivan Franceschini, “Introduzione. L’emergere di nuovi spazi di pluralismo e partecipazione nella Cina di oggi” in Renzo Cavalieri e Ivan Franceschini, “Germogli di società civile in Cina”, Milano, Francesco Brioschi Editore, 2010, pp. 1- 24.

<sup>12</sup> Samantha Hoffman and Peter Mattis, cit..

*strengthening the party-state ability to manage the sudden outbreak of public incidents*<sup>13</sup>.

The new “contradictions among the people”, caused by economic growth, and the challenges of increasing social complexity generated by the so-called “five-izations” (五化, wuhua: industrialization, urbanization, marketization, informatization and globalization)<sup>14</sup>, however, could not be resolved only through targeted coercion and domestic intelligence<sup>15</sup>.

Therefore, the growing number of the aforementioned public incidents, and the increasingly violent and large-scale nature of protests over the past several years, immediately revealed the limits of the implementation of social management, and the need, for Chinese leadership to change its attitude towards civil society’s involvement in public choices, in order to maintain social stability and avoid putting its political power at risk.

While this recognition seems to have been driven as much by the causes of civil unrest themselves as by the Chinese Communist Party’s internal problems<sup>16</sup>, it is a fact that – especially after July 2012, when Premier Hu Jintao used the expression “social governance” in an official speech for the first time<sup>17</sup> – many authors have called for a shift from the “social management” model to one in which all social players could regulate and manage social affairs “*as equal cooperative partners according to law, in order to maximize eventually the public interest*”<sup>18</sup>.

In this sense, the change in terminology certainly reflects the (slight) change in Chinese government policies that leans towards civil society and coincided with seizure of power of the new leadership. Indeed, in recent years, “Social governance” has replaced “social management” as China’s “*strategic intention*” and “*major objective*”<sup>19</sup>, to the point that the 13<sup>th</sup> Five-Year Plan for Economic and Social

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<sup>13</sup> See Joseph Fewsmith, “Social Management as a Way of Coping with Heightened Social Tensions,” China Leadership Monitor, No. 36, cited by Samantha Hoffman, “Portents of change in china’s social management”, China Brief Volume 12, Issue: 15, August 3, 2012, available at: [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews\[tt\\_news\]=39727#.U1Fa4Vew6ZJ](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=39727#.U1Fa4Vew6ZJ) (last accessed: January 31, 2017).

<sup>14</sup> 麻宝斌, 任晓春: “从社会管理到社会治理 - 挑战与变革”, 学习与探索, 2011年3期总第194期, Ma Baobin, Ren Xiaochun, “Cong shehui guanli dao shehui zhili – Tiaozhan yu biange” (From social management to social governance – Challenge and transformation), Xuexi yu tansuo, no.2 (serial number 194), 2011, p. 95, available at: <http://www.doc88.com/p-907565190301.html> (last accessed: January 31, 2017).

<sup>15</sup> Peter Mattis: “Resolving Contradictions in Social Management, China Brief, Volume 12 Issue 18, September 21, 2012, available at: [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews\[tt\\_news\]=39865#.U1FY9Few6ZJ](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=39865#.U1FY9Few6ZJ) (last accessed: January 31, 2017). On the topic, see also: “创新社会治理应“放权于民””, cit.

<sup>16</sup> Samantha Hoffmann, *ibid*.

<sup>17</sup> 陈家刚, 从社会管理走向社会治理, 《学习时报》2012年10月22日. Chen Jiagang, Cong shehui guanli zou xian shehui zhili” (From social management to social governance), Xuexi shibao, 22 Oct. 2012

<sup>18</sup> 陈家刚, Chen Jiagang, op. cit. An English translation of the main contents of the article can be found in Chen Jiagang, “Governance not management”, available at: [http://www.china.org.cn/opinion/2012-11/20/content\\_27168301.htm](http://www.china.org.cn/opinion/2012-11/20/content_27168301.htm) (last accessed: January 31, 2017).

<sup>19</sup> See 中华人民共和国国民经济和社会发展第十三个五年规划纲要 (Zhonghua renmin gongheguo jingji he shehui fazhan di shisan ge wu nian guihua gangyao, 13th Five Year Plan for Economic and Social Development of the People’s Republic of China), online: [http://www.china.com.cn/lianghui/news/2016-03/17/content\\_38053101.htm](http://www.china.com.cn/lianghui/news/2016-03/17/content_38053101.htm) (last accessed: January 31, 2017). The official translation (in English) of the Plan can be found at: <http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf> (last accessed: January 31, 2017). On “social

Development of the People's Republic of China (2016 – 2020) dedicates all of part XVII<sup>20</sup> to “*better and more innovative social governance*”, and considers “social governance” as a way “*to promote social vitality, stability and harmony*”<sup>21</sup>.

But, in a nutshell, what are the differences between “social management” and “social governance”?

In an article published on October 22, 2012 in the Central Party School's review “*Xuexi shibao*” (学习时报, Study time), Chen Jiagang of the China Center for Comparative Politics and Economics explained how the two concepts, despite sharing the same goals, differ in four aspects, and in particular:

- (1) Social management, although inclusive of both government and social organizations, is government-centered management of society, while social governance is diversified, and no single body can monopolize the practical process of regulation and management;
- (2) Social management tends to place the government above the rest of society, while social governance incorporates the role of social organizations and the private sector in governance, considering effective management a cooperative process between different bodies;
- (3) Social management is a subjective and top-down control method, while social governance aims to encourage social participants to reach consensus through self-expression, negotiation and dialog, in order to ensure public policies meet the interests of the whole society;
- (4) Social management relies mainly on government authority and dictation of orders; on the contrary, social governance means the government guides more and controls less, while civil organizations and civil society take on more responsibilities<sup>22</sup>.

As Zhu Guangyuan, vice-secretary of the Committee of Political and Legal Affairs of Jiangsu Province Committee of the Communist Party of China, pointed out in 2013:

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governance” as a model that can “break government chauvinism and eliminate administrative arrogance” in order to adapt to the actual needs of a pluralistic society, see 张康之, “社会治理创新与服务型政府建设——论主体多元化条件下的社会治理”, 中国人民大学学报, 第 2 期, 2014 年, Zhang Kangzhi, “Shehui zhili chuangxin yu fuwu xing zhengfu jianshe – lun zhuti duyuanyhua tiaojian xia de shehui zhili” (Innovation in social governance and construction of service-oriented government – on social governance under the “pluralization” of subjects), Zhongguo renmin daxue xuebao, no. 2, 2014, pp. 1 -13.

<sup>20</sup> *Ibid.*

<sup>21</sup> See “Thirteenth Five-Year Plan, part XVII.

<sup>22</sup> 陈家刚, Chen Jiagang, op. cit.. On the same topic, with particular reference to the role of social organizations in social governance see also: 马金芳, “社会组织多元社会治理中的自治与法治”, 法学, 第 11 期, 2014 年, Ma Jingsong, “Shehui zuzhi duoyuan shehui zhili zhong de zizhi yu fazhi” (Autonomy and rule of law of social organizations in the governance of a pluralistic society), Faxue, no. 11, 2014, pp. pp. 87- 94.

*“social management and social governance differ only in one word, but this diversity mirrors a new, further leap forward in our Party’s acknowledgment and comprehension of laws and regulations regarding social development”*<sup>23</sup>.

In the following sections we will see how Chinese leaders’ new “acknowledgement” and “comprehension” of the role of social players in governance is transforming the legal environment in which social organization has to operate, in the PRC. In order to better understand this development, it is important to know something about the evolution of civil society in China. So, a brief history of such associations and a short description of the current legal framework will precede the discussion.

### **III. STATE AND CIVIL SOCIETY ORGANIZATIONS IN CHINA: A RECURRING CONFLICT?**

Section 13 of the “Decision of the CCCP on Some Major Issues Concerning Comprehensively Deepening the Reform” is devoted – as already noted – to “Making Innovations in Social Governance”. Paragraph 48 of the same section talks about stimulating the vigor of social organizations by intensifying efforts to separate government administration from social organizations, commissioning the latter to provide public services that supply and facilitate registration for some social organizations<sup>24</sup>. The Decision also mentions social organizations in other sections, calling for them to become involved in cultural and educational activities (par. 41-42), and to be consulted – together with community-level organizations – on policy decisions and their implementation (par. 28 – 29)<sup>25</sup>.

All of these statements may seem difficult to interpret if we take into account not only the increased political repression and the constant harassment of social activists in the last ten years (in particular from 2006, and with even more impetus since Xi Jinping became party chief)<sup>26</sup>, but also – in a broader sense – the suspicion with which the power in China has regarded social organizations since ancient times, and the involvement of civil society in policy-making.

Indeed, it could not have been otherwise in a (neo)Confucianist country, as China was for centuries. In this context, the general attitude of distrust, if not outright hostility, towards this form of association (defined as 党 *dang*, “faction, party”, in a

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<sup>23</sup> 任松筠, 陈旭, “推动社会管理走向社会治理”, 新华日报/2013年/12月/19日/第A01版, Ren Songyun, Chen Xu, “Tuidong shehui guanli zou xian shehui zhili” (Pushing social management towards social governance), Xinhua ribao, 19 Dec. 2013, first ed., p. 1.

<sup>24</sup> In particular: trade associations and chambers of commerce, scientific and technological associations, charity and philanthropic associations and urban and rural community service organizations. See Decision, cit., par. 48.

<sup>25</sup> See Decision, cit. at note 1. On the subject, see also Administrator: “Policy brief. no. 14 (January 2014): The Third Plenum Brings a Chilly Spring for China’s Civil Society”, posted on February 7, 2014 China Development Brief website, and available at: <http://www.chinadevelopmentbrief.cn/?p=3173> (last accessed: January 31, 2017). For an analysis of the same Decision, but from the point of view of Marxist theory, see: 徐汉明, “推进国家与社会治理法治化”, 法学, 第11期, 2014年, Xu Hanmin, “Tuijin guojia yu shehui zhili fazhigua” (Promote the rule of law in state and social governance), Faxue, no. 11, 2014, pp. 14 – 19.

<sup>26</sup> Editor, “Chinese Civil Society. Beneath the Glacier”, The Economist, April 12, 2014, available at: [http://www.economist.com/news/china/21600747-spice-political-clampdown-flourishing-civil-society-taking-hold-beneath-glacier?fsrc=scn%2Ftw\\_ec%2Fbeneath\\_the\\_glacier](http://www.economist.com/news/china/21600747-spice-political-clampdown-flourishing-civil-society-taking-hold-beneath-glacier?fsrc=scn%2Ftw_ec%2Fbeneath_the_glacier) (last accessed: January 31, 2017).



mildly negative sense<sup>27</sup>) was based on the same metaphysical premises as blame for any “individualistic” claim: in no case would the greater public interest (da gong, 大公) – by definition coinciding with the interest of the sovereign – be subordinate to any fraction thereof<sup>28</sup>.

During the Imperial era, the repression of certain forms of social and civic organizations was therefore quite frequent, while the disdain for groups<sup>29</sup> was such that – as, for example, in a regulation of the Kaiyuan period of the Tang Dynasty (713 – 741) – the people who were organizing societies were referred to as “*living the lives of beast*”<sup>30</sup>.

Nevertheless, as noted by Karla Simon, there is also evidence that charities and associations involved in serving society were, at that time, fairly common<sup>31</sup>.

As a matter of fact, from the earliest days of imperial China through to the end of the Qing dynasty and into the Nationalist era that followed:

*“[o]ften local government and charitable associations worked hand in hand to provide relief at time of famine, drought, floods or disease,*

*to the point that*

*[...] in some cases, local government simply delegated activities to organized charities, from charitable disaster relief to public works, such as road building”*<sup>32</sup>.

But while it is true that the imperial state frequently co-opted social organizations for its own purposes, supporting civil society through direct and indirect means, it is also important to note that it did so only as long as it approved of what these organizations were doing<sup>33</sup>. This is an attitude quite comparable with the way in which Chinese leadership has dealt with CSOs (Civil Society Organizations, generally indicated in Chinese as 社会组织, shehui zuzhi), in recent years.

We will return to this later. For the time being, we will briefly refer to how the traditional distrust of associations composed of citizens (which grew during the Ming and Qing dynasties<sup>34</sup>) and the “dual-management” system<sup>35</sup> of CSOs’ registration (borrowed from Japan during the Republic era to channel public activism in ways that enabled the power to direct and control the modernization process without opening political challenge from below<sup>36</sup>) were to be combined in

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<sup>27</sup> On the topic, see Timothy Brooks, “Auto-organization in Chinese Society”, in Timothy Brooks, B. Michael Frolic, “Civil Society in China”, 1997p. 29 – 30.

<sup>28</sup> Simona Novaretti, “Le ragioni del pubblico. Le azioni nel pubblico interesse in Cina” [The rationale of the public: “public interest litigation” in China], Napoli, ESI, 2011, p. 23. On the evolution in China of the concept of public interest, and its relationship with private/collective interest see *ibid.*, pp. 18 – 27.

<sup>29</sup> In particular, when the group was not organized in a hierarchical form, such as the clan, but formed by peers. On the topic, see Simona Novaretti, *op. cit.* p. 23.

<sup>30</sup> Liu Peifeng, “Expansion of the Civil Right of Association”, in Wang Ming (ed.), “Emerging Civil Society in China, 1978 – 2008, Leiden, Brill, 2011, p. 62, note 2.

<sup>31</sup> Karla Simon, “Civil Society in China. The legal framework from Ancient Times to the “New Reform Era”, Oxford, Oxford University Press, 2013, p. 52 and 54.

<sup>32</sup> *Ibid.*, pp. 53 and 54.

<sup>33</sup> *Ibid.*, p. 54.

<sup>34</sup> See Timothy Brooks, *cit.*, p. 30.

<sup>35</sup> See *infra*.

<sup>36</sup> *Ibid.*, p. 32. For a brief description of the “dual-management” system as it works today, see *infra*, in this paragraph.

modern China to create a controlling state system that not only flourished during the Nationalist period but also continued after the revolution<sup>37</sup>.

Indeed, from the very beginning, the PCC's attitude towards social organizations was clearly driven by pragmatism. In the 1930s and 1940s, it encouraged the organization and development of NGOs<sup>38</sup>, most of which supported the anti-Japanese war and the war against the Guomindang as part of the United Front. Following the foundation of the People's Republic in 1949, however, the Party tried to eliminate anything that stood between the state and the individual<sup>39</sup> in order to extend its control over the country. To this purpose, associational rights were restricted, and civil society organizations were required to register with the Ministry of the Interior.

Concretely, from 1950 (when the first rudimentary regulation on CSOs was adopted) to the late 1980s (when the General Principles of Civil Law and the national regulations on NGOs were promulgated), there was a firm belief in China that social organizations simply "belonged to" the state and the party<sup>40</sup>. Not surprisingly, therefore, former independent organizations were outlawed or absorbed into the party-state system starting in the early 1950s, being merged into mass organizations (群众组织 *qunzhong zuzhi*)<sup>41</sup>, or part of the post-revolution United Front<sup>42</sup>. Moreover, beginning with the anti-rightist campaign in 1957 and until the end of the Cultural Revolution in 1976,

*"under the total control of a coercitive state, trust, civic engagement and associations became fragmented"*<sup>43</sup>,

so that *"civil society virtually disappeared"*<sup>44</sup>.

It was only after Deng Xiaoping seized power in 1978 that CSOs were considered as playing a part in economic reform and opening up, and were (once again) given an important role in the restructuring of the state bureaucracy<sup>45</sup>.

First, in 1986, the GPCL recognized social organizations as (at least slightly) separate from the state party apparatus. They were listed among legal entities, together with enterprises, independently founded official organs and public institutions. Then, in 1988, the State Council transferred regulatory power over CSOs from the Ministry of the Interior to the Ministry of Civil Affairs, and finally it issued the first set of regulations concerning foundations (基金会 *jinjihui*, 1988, amended in 2004) and social organizations (社会团体 *shehui tuanti*, 1989, amended in 1998 and 2016). The (provisional) regulations concerning the third type of social

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<sup>37</sup> Karla Simon, *op cit.*, Introduction, p. xxxvii.

<sup>38</sup> Zhang Ye, "Chinese NGOs: A Survey Report", in Tadashi Yamamoto (ed.), "Emerging Civil Society in the Asia Pacific Community", Tokyo: Institute of Southeast Asian Studies and Japan Center for International Exchange, 1995.

<sup>39</sup> On the topic, see also Editor, "Chinese Civil Society. Beneath the Glacier", *cit.*

<sup>40</sup> *Ibid.*, p. 156.

<sup>41</sup> Such as the All-China Women Federation, the All-China Federation of Trade Unions and so on. These organizations, as Karla Simon pointed out, "have been used as a means to penetrate the society at large, encouraging popular participation, mobilizing the masses, and integrating them into political life, as seen appropriate by the party. They were considered, in practice, as "transmission belts" between the CCP and the people. On the point, see Karla Simon, *op. cit.*, pp. 169 -183.

<sup>42</sup> *Ibid.*, p. 146.

<sup>43</sup> Ma Qiusha, "Non-governmental Organizations in Contemporary China. Paving the Way to Civil Society?", London and New York, Routledge, 2006, p. 111.

<sup>44</sup> Karla Simon, *op. cit.*, p. 183.

<sup>45</sup> *Ibid.*, p. 187.

organization recognized in China, private non-commercial institutions (*minban fei qiye danwei* 民办非企业单位, or *minfei* 民非) were enacted only in 1998.

It is interesting to note that - while controlled by different regulations - both SOs and *minfei* have been (at least until now) subject to the so-called “dual management” system, a scheme with a long history in China, provided not only for the 1950 regulations but also - as seen before - in the KMT Civil Code<sup>46</sup>.

Indeed - focusing only on social organizations - according to articles 3, 7 and 9 of 1998’s Regulations (revised in 2016), to be founded a *shehui tuanti* was required to:

a) be examined and approved by a sponsor organization (业务主管部门, *yewu zhuguan bumen*, affectionately known as “mother-in-law”, 婆婆, *popo*);

b) register with the Ministry of Civil Affairs (MCA) or local civil affairs department at the county level and above<sup>47</sup>.

Moreover, in addition to the aforementioned requirements, the SO’s regulations specifically provide that the MCA may deny registration:

*“if in the same administrative area there is already a social organization active in the same or similar area of work”*<sup>48</sup>.

The rationale for this system of registration was (and is), obviously, to create institutional dependency and control, and to allow the government to manipulate the number of organizations that can be registered in any given locality.

Undoubtedly, Chinese leaders have often considered this strict oversight on SOs more than appropriate. For example, in 1989, after the Tiananmen Square events; or in the early 1990s, during the period following the collapse of the Soviet Bloc, which were also precipitated by trade unions, churches and other groups in Poland, Czechoslovakia and elsewhere; or, again, in 2005, at the time of “colored” revolutions in Ukraine, Georgia and Kyrgyzstan<sup>49</sup>.

In recent years, however, the party has come to see NGOs in a different light, and to consider “dual management” as one of the main obstacles to the growth of the NGOs sector.

Currently, the sponsor organization has the duty to assist the Ministry of Civil Affairs not only in establishing, but also supervising the “sponsored” organizations, taking full responsibility for their activities<sup>50</sup>. As a consequence, many SOs remain unregistered or are registered as commercial entities, sometimes by choice, but more often because they cannot obtain the support of local authorities which – preferring to reduce political risk and avoid liability – refuse to oversee them.

To understand the extent of this phenomenon it is worth considering some data. According to official statistics, about 460 000 social organizations were registered

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<sup>46</sup> See *supra*. Sect. 45 of the KMT Civil Code required that associations seek permission to register. On the topic, see also Karla Simon, *op. cit.* pp. 118-122.

<sup>47</sup> See “Regulations on the Registration and Management of Social Organizations”, published by the State Council at the 8<sup>th</sup> ordinary session on October 25, 1998 and revised on February 6, 2016, articles 3, 7 and 9.

<sup>48</sup> See Regulations (2016), cited, art. 13, point 2.

<sup>49</sup> See Editor, “Beneath the Glacier”, *cit.*

<sup>50</sup> See Regulations (2016), art. 25 (2).

with the MCA at the end of 2011<sup>51</sup>, but there were perhaps ten times as many unregistered organizations, including ones registered as businesses<sup>52</sup>.

Although registering as a commercial entity might seem a better choice for an NGO than being unregistered – making it easier, for example, to receive grants or donations – it implies a more onerous tax regime, and exposes the organization to significant risks, since it violates provisions that specifically forbid an organization registered as a business entity to act as an SO or *minfei*<sup>53</sup>.

The party-state turns a blind eye<sup>54</sup>, as long as it likes (or needs) what an organization is doing, but it can (and, in practice, often does) use the grounds of tax evasion to de-register it (i.e.: shut it down), when such an organization steps out of line, and engages in activities deemed undesirable. This is exactly what happened to Gongmeng (公盟, better known by its English name, Open Constitution Initiative, OIC) and its founder, lawyer Xu Zhiyong, in the summer of 2009, or – one year later – to Ai Yuan (爱源, also commonly known by the English name "Loving Source"<sup>55</sup>). In January 2014 Xu Zhiyong was sentenced to four years imprisonment for “*gathering crowds to disturb order in a public place*” – an accusation frequently used against activists and dissidents under the new leadership, instead of more “politicized” charges, i.e. “*endangering state security*”<sup>56</sup>.

But if, on the one hand, PRC’s leaders have been undoubtedly far from relaxing control over civil society’s activities in the last several years, on the other – notably after the 2008 earthquake, when thousands of volunteers converged on Sichuan to lend a hand to the rescue, showing that social organizations can be much more effective than the government<sup>57</sup> – they have begun to realize that co-opting such

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<sup>51</sup> According to MCA data, at the end of 2013 there were 541 000 registered social organizations in China, 19 000 of which were registered through the new direct registration procedure. See MCA’s website, at: <http://www.chinanpo.gov.cn/1938/77052/index.html> (last accessed: January 31, 2017). On the subject, see also *infra*, in the following section.

<sup>52</sup> See Karla Simon, cit., p. xxxiv. On the topic, see also Yu Keping, cit.

<sup>53</sup> See Art. 69, “Regulations of the People’s Republic of China on the Administration of Company Registration”, issued by the State Council on June 24, 2005 and “Temporary Measure Banning Illegal Organizations”, issued by the Ministry of Civil Affairs on April 10, 2000.

<sup>54</sup> According to the so-called “no banning, no recognition, no intervention” rule. On the subject, see Deng Guosheng, “The Hidden Rules Governing China’s Unregistered NGO’s: Management and Consequences”, 10 *The China Rev.* 183 (2010).

<sup>55</sup> The Ai Yuan – an NGO registered as a commercial enterprise since 2004, and that has been subject to constant tax inspections by the authorities since September 2010 - announced through its legal representative on November 11, 2010, its decision to cease its activities benefitting AIDS patients and orphans. The decision was taken following increasing pressure from tax authorities, and – in particular – after having received a notification of an extensive audit by the same office of the Beijing Tax Bureau that had inspected the Gongmeng. On the issue affecting the Gongmeng, see, among others: “China v. Civil Society”, *The Wall Street Journal*, July 21, 2009, “Chinese Public Interest Lawyer Charged Amid Crackdown” *The New York Times*, August 18, 2009. More details on the closure of Ai Yuan are available at: <http://zengjinyan.wordpress.com/> (last accessed: January 31, 2017). On the topic, see also Simona Novaretti, “La riforma della procedura civile della RPC e le ‘azioni nel pubblico interesse’: un balzo in avanti? Diritto con caratteristiche cinesi e società civile” [The reform of civil procedure in China and “public interest litigation”: a step forward? Law with Chinese Characteristics and Civil Society], in *Rivista di Diritto Civile*, no. 2, marzo – aprile 2013, pp. 363.

<sup>56</sup> On the subject, see Josh Chin, “China’s New Strategy in Prosecuting Critics”, *The Wall Street Journal*, March 13, 2014, available at: <http://blogs.wsj.com/chinarealtime/2014/03/13/chinas-new-strategy-in-prosecuting-critics/?mod=chinablog> (last accessed: January 31, 2017). For an English translation of Xu Zhiyong’s verdict, see: <http://chinalawtranslate.com/en/xu-zhiyong-opinion/> (last accessed: January 31, 2017).

<sup>57</sup> Karla Simon, cit., p. XXXIV. Editor, “Chinese Civil Society. Beneath the Glacier”. For a study on the post-disaster NGO development in China using cases from a city in Sichuan that was severely struck by the Wenchuan earthquake see Yi Kang, “The Development of Grassroots Chinese NGOs Following the Wenchuan Earthquake of 2008: Three Case Studies, Four Modi Vivendi”, *Voluntas* (online), February 6, 2017, pp. 1-25.

activist citizens can be much more beneficial than suppressing them. Indeed, in a complex society like China as a result of the reforms, the party can no longer provide everything for its citizen as once it did (or pretended to do), while the people's anger over inadequate social services could threaten social stability (and, ultimately, the power of the CCP itself). Moreover, as a consequence of decentralization, localities have been given the freedom to develop certain social services in their jurisdictions, but at the same time, they have been given responsibility for financing and managing them<sup>58</sup>.

In this perspective, NGOs could become a useful tool in the hands of the state-party, being involved – under its direction – in providing some of the social support that the central (or local) government itself is unwilling or unable to supply on its own.

We must place the recent reforms in this context. I will now discuss them in more detail, with a particular focus on two of the points recalled by the Decision: the simplification of NGO registration procedures and the creation of a social service procurement system. The last section of this paper will be dedicated to the participation of civil society to policy decision.

### **1. The simplification of the NGO registration procedure**

As we have already pointed out, although notable, the change in terminology and the introduction of the notion of “social governance” has not led to a fundamental change in the goals pursued by Chinese leaders via the reform of the social sector. On the contrary, it seems to have accelerated the process carried out in recent years mostly through local experiments<sup>59</sup>.

Indeed, as Karla Simon pointed out:

*“By the time the twenty-first century dawned, the party-state was developing policy with regard to the role of CSOs in service provision and experimenting with new solutions to social problems by giving more powers to favored CSOs”<sup>60</sup>.*

First of all, that has meant relaxing the dual management system in order to recognize the existence of certain smaller, community-based CSOs<sup>61</sup>.

The pioneer of this reform was the General Office of Qingdao Municipality, which adopted a “documentation system” (备案, *bei'an*) in 2002, allowing for the quasi-legal existence of those civil society organizations not qualifying for actual registration because of their size, lack of funds, or because they are not for the public benefit<sup>62</sup>.

Concretely, according to article 2 of the “Opinions for Strengthening the Development and Management of Civil Community Organizations” (关于加强社区民

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<sup>58</sup> “Reform Will Promote NGOs – To Serve Beijing Agenda”, The Oxford Analytica Daily Brief, Friday, May 16, 2014.

<sup>59</sup> For a study on the different resource environments available for NGOs in different cities in China see Jennifer Y. J. Hsu, Carolyn L. Hsu, Reza Hasmath, “NGO Strategies in an Authoritarian Context, and Their Implications for Citizenship: The Case of the People’s Republic of China”, Volume 28, Issue 3, June 2017, pp 1157–1179.

<sup>60</sup> Karla Simon, cit. p. 236.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, p. 264.

间组织培育与管理的意见, *Guanyu jiaqiang shequ minjian zuzhi peiyu yu guanli de yijian*)<sup>63</sup>, “objectively existing community civic organizations that are not eligible for legal registration” can obtain a certificate of “quasi-SO” or “quasi-*minfei*” upon registering with the residents’ committee, the sub-district office and the district department of civil affairs<sup>64</sup>. Obviously, this certificate does not grant the preferences accorded to properly registered SO or *minfei* (i.e.: tax preferences, limited liability and so on)<sup>65</sup>, but – at least- it gives such organizations the right to carry out activities within the community.

Although the model of Qingdao’s documentation system has been adopted – with a few nuances in characterization - by many provinces (i.e.: Jiansu, or Guizhou) and districts of large cities (i.e.: Shanghai Hongkou district, or Beijing Xicheng district)<sup>66</sup>, it is undoubtedly in Guangdong province, and more particularly in the Special Economic Zone of Shenzhen, that the most innovative solutions for the development of civil society have been drawn in the last several years.

In fact, Shenzhen signed a “Cooperative Agreement on Pushing Forward to Integrated Reforms to Civil Affairs Undertakings” (民政部于深圳签订民政事业改革合作协议, *Minzhengbu yu Shenzhen qianding minzheng shiye gaige hezuo xieyi*) with MCA in 2009<sup>67</sup> becoming an “experimental site” for reforms in a wide range of civil affairs issues. These include the possibility for trade associations and public benefit organizations to register directly with the Shenzhen Civil Affairs Bureau, the outsourcing of public services to NGOs and the provision of coaching assistance to organizations involved in social services such as those concerning the disabled, senior citizens, developmentally challenged children, environmental protection and health<sup>68</sup>.

It is worth noting that other cities like Tianjin signed similar agreements in those years, and that all of these contracts also contained clauses for experimenting with a reduction in requirements for the registration of SOs and *minfei*<sup>69</sup>. By the end of 2011, at least four municipalities (Beijing, Changsha, Guangzhou and Foshan), in addition to Shenzhen, had already adopted new norms on direct registration, while the same kind of provisions, approved in November 2011, would have been extended to the whole Guangdong Province on July 1, 2012.

These last regulations are, in particular, relevant; although the amendments to the State Council’s Regulations on SOs and *minfei*, expected for the end of 2013, at the time of writing this paper (February 2017) are still under discussion, there is little doubt that the new national rules will resemble very closely those currently implemented in Guangzhou and Guangdong, and that - as the then Minister of Civil Affairs Li Ligu called for in November 2011 - “the Guangdong model will [soon] be used throughout China”<sup>70</sup>.

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<sup>63</sup> The opinions are available at: <http://hk.lexiscn.com/law/law-chinese-1-391703.html> (last accessed: January 31, 2017).

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> On the topic, see Karla Simon, cit. pp. 265-267.

<sup>67</sup> For the content of the agreement, see the Ministry of Civil Affairs website, at: <http://www.mca.gov.cn/article/zwgk/mzyw/200907/20090700033466.shtml> (last accessed: January 31, 2017).

<sup>68</sup> On the subject, see more in the detail: “No challenges too big for ‘city of courage’”, Global Times, August 26, 2010, available at: <http://www.globaltimes.cn/content/567294.shtml> (last accessed: January 31, 2017).

<sup>69</sup> See Karla Simon, cit., p. 277, note 86.

<sup>70</sup> Quoted by Karla Simon in Karla Simon, op. cit., p. xliii.

According to Guangdong Regulations, eight types of civil society organizations should benefit from legal relaxation: industrial associations, trade associations registered in other provinces, organizations serving the living of the mass, charity organizations, social service organizations, rural-urban grassroots organizations, organizations related/affiliated with foreign organizations, and nexus organizations<sup>71</sup>. These NGOs can register directly with the Civil Affairs Bureau while the role of the former “mother-in-law” agency is lessened to management focusing on the work, administration and capacity building of the CSO in question. Furthermore, in these cases, the restriction on having only one entity performing a service in any given locality is eliminated<sup>72</sup>.

I would like to briefly point out that the types of NGOs set out by the above Regulations are not only the same ones listed in paragraph 48 of the CCCP’s Decision<sup>73</sup>, but are also very similar to the ones cited in the “Blueprint on the Reform and Transformation of Civil Service Institutions and their Functions”, adopted by the 12<sup>th</sup> National Peoples’ Congress in March 2013<sup>74</sup>.

The Blueprint’s 23<sup>rd</sup> clause states that:

*“trade associations, chambers of commerce, scientific and technological organizations, charitable (or public benefit) organizations and urban-rural community service organizations will carry out MCA’s direct registration system”*<sup>75</sup>.

In this sense, we can state that – even in the absence of a national framework – what was only a hope for Li Liguo in 2011, became a reality in 2014 for almost all of the PRC’s territory.

By the end of 2013, in fact, following the guidelines provided by both the NPC and CCCP, every province (except Tibet and Xinjiang) and every self-governing municipality had adopted “direct registration” rules shaped on the Guangdong’s model<sup>76</sup>.

The removal of the dual management requirement has undoubtedly had a greater impact on the growth of the NGO sector. In an article published in the China Daily in 2014, He Dan stated that 221 social organizations registered directly with civil affairs departments in Beijing alone in 2013, accounting for about 34%

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<sup>71</sup> The definition of nexus organizations is not clear. According to the Hong Kong Liaison Office of the international trade union movement, the more comprehensive (and official) explanation defines these organizations as federations of organizations that liaise, administer and provide service to social organizations of the same nature, in the same sector or the same area of work/services. On the subject, see: IHLO, Guangdong Government Implements New Scheme to Promote Civil Society Organizations and Outsourcing of Social Services, Nov. 2011, available at: <http://www.ihlo.org/LRC/Laws/011111.html> (last accessed: January 31, 2017).

<sup>72</sup> *Ibid.*

<sup>73</sup> See Decision, cit., paragraph 48.

<sup>74</sup> Matt Perrement (transl.): “Beijing University Civil Society Center’s Ten Major Events in China’s Social Sector for 2013”, January 16, 2014, available at: <http://www.chinadevelopmentbrief.cn/?p=3435> (last accessed: January 31, 2017). The original document (in Chinese) is available at: <http://www.ccsspku.org/archives/3914> (last accessed: January 31, 2017). The Ministry of Civil Affairs also listed the Blueprint among the “Top Ten Major Events for Social Organizations in 2013”. See Matt Perrement (transl.), “The Ministry of Civil Affairs’ ‘Top Ten Major Events for Social Organizations in 2013’”, available at: <http://www.chinadevelopmentbrief.cn/?p=3411> (last accessed: January 31, 2017). The original document (in Chinese) can be found at: <http://www.chinanpo.gov.cn/1938/76760/index.html> (last accessed: January 31, 2017).

<sup>75</sup> Matt Perrement (transl.): “Beijing University Civil Society Center’s Ten Major Events in China’s Social Sector for 2013”, cit.

<sup>76</sup> Karla Simon, “Charity and Social Enterprise in China”, cit.

of the social organizations that obtained legal status in that year<sup>77</sup> while, according to the Ministry of Civil Affairs, the overall growth of the sector was 8.4% in the same period<sup>78</sup>. In its early stages, the new system of direct registration helped more than 19 000 SOs to register with the Civil Affairs authorities at all levels. In December 2013, over 500 000 registered NGOs were operating in China<sup>79</sup>, an achievement that would have seemed unattainable until a short time before: as noticed by John Tai in 2015, the number of registered NGOs had increased over one hundredfold between 1988 and 2013, from just under 4 500 in 1988 to over 4 540 000 in 2013<sup>80</sup>.

It is worth noting that the experiments on “making innovations in social governance” conducted from 2009 to 2013 by local governments across China - in particular by lowering barriers to the registration of Civil Society Organizations - recently led to important changes in national legislation.

This is, for example, the case for the new “Charity Law”, adopted at the 4<sup>th</sup> Session of the 12<sup>th</sup> National People's Congress of the People's Republic of China on March 16, 2016, after a legislative process lasting over eleven years<sup>81</sup>.

Since the entry into force of the new law on September 1, 2016, dual registration is no longer required for organizations conducting “charitable activities”<sup>82</sup>. Public welfare activities considered “charitable activities” under the law are listed in article 3. They include: providing services such as poverty alleviation, emergency assistance, elder care, assistance to persons with disabilities, disaster relief, health care, and education<sup>83</sup>. The law also allows “urban and rural community service organizations” to carry out “mass mutual aid and relief activities within their communities and entities”<sup>84</sup>.

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<sup>77</sup> He Dan, “Reforms give NGOs a level playing field”, China Daily, 2014-03-31, available at: [http://usa.chinadaily.com.cn/china/2014-03/31/content\\_17390892\\_2.htm](http://usa.chinadaily.com.cn/china/2014-03/31/content_17390892_2.htm) (last accessed: January 31, 2017).

<sup>78</sup> On the subject see, on Ministry of Civil Affairs website: “中国慈善发展报告：社会组织总量达 54.1 万个 同比增长 8.4%”，新华社，2014-05-19，“Zhongguo cishan fazhan baogao: Shehui zuzhi zongliang da 54.1 wan ge tong bi zengzhang 8.4%” (China Charity Development Report: total social organization are 541 000, with an 8.4% increase), available at: <http://www.mca.gov.cn/article/mxht/mtgz/201405/20140500639535.shtml> (last accessed: January 31, 2017). See also Matt Perrement (transl.): “Beijing University Civil Society Center’s “Ten Major Events in China’s Social Sector for 2013”, cit., and “The Ministry of Civil Affairs’ “Top Ten Major Events for Social Organizations in 2013”, cit.; Karla Simon, “Charity and Social Enterprises in China”, Latest from Alliance, May 24, 2014, available at: <http://philanthropynews.alliancemagazine.org/2014/05/24/charity-and-social-enterprise-in-china/> (last accessed: January 31, 2017).

<sup>79</sup> See *supra*, prev. note.

<sup>80</sup> John W. Tai, “Building Civil Society in Authoritarian China: Importance of Leadership Connection for Effective Non-governmental Organizations in a Non-Democracy” Cham Heidelberg New York Dordrecht London, Springer, 2015, p. 20.

<sup>81</sup> On the long and difficult drafting process of this law, see Rebecca Lee, “Modernizing Charity Law in China”, *Pacific Rim Law & Policy Journal*, vol. 18, no. 2, (2009) pp. 347-372. For more details on the Law, see The International Center for Not-For-Profit Law, “Civic Freedom Monitor: China”, December 5, 2016, online: <http://www.icnl.org/research/monitor/china.html> (last accessed: January 31, 2017)). On the challenges that come with the abolition of the dual management system see: Yang Yongjiao, Mick Wilkinson, “Beyond the Abolition of Dual Administration: The Challenges to NGO Governance in 21st Century China”, *Voluntas*, Vol. 27, Issue 5, October 2016, pp. 2292-2310; Yang Yongjiao, Zhang Xiongxiang, Tang Delong, and Mick Wilkinson, “The Abolition of Dual Administration of NGOs in China: Imperatives and Challenges”, *International Journal of Social Science and Humanity*, Vol. 5, No. 6, June 2015, pp. 546-551.

<sup>82</sup> See art. 10, “Charity Law” (2016).

<sup>83</sup> See art. 3, “Charity Law” (2016).

<sup>84</sup> See art. 110, “Charity Law” (2016).



## 2. Outsourcing services to civil society organizations

The reforms aiming to reduce the threshold for NGOs registration in recent decades have gone hand in hand with attempt to encourage the outsourcing of services to civil society organizations. This seems quite obvious, since for the government(s), the growth of the sector may also mean an increase in the number of partners to whom the provision of certain social services can be entrusted. Not surprisingly, therefore, the “Decision of the CCCP on some Major Issues Concerning Comprehensively Deepening the Reform”, besides “*making it easier for some social organization to register*”, has also called for “*commissioning social organizations the public services that are able to supply*”.

However, with regard to this aspect as well, the shift from “social management” to “social government” has only given a further boost to the objectives pursued through the local trials of the past few years.

Indeed, as we have already pointed out, the involvement of civil society in the provision of public services has been inevitable for Chinese leaders, ever since the beginning of the Deng Xiaoping era.

While, the post-1978 marketization reforms considerably undermined the state’s direct service delivery capacity<sup>85</sup>, the administrative and fiscal reorganizations of the 1990s shifted responsibility for certain types of services from central and provincial governments to local level governments<sup>86</sup>.

In this situation:

*“Local official were forced to cope with rising social demands. In-house production, either through governmental agencies or public service units, was not a feasible option because of consistent pressure of administrative downsizing. Contracting with for-profit organizations was also infeasible as a profit margin was prohibited for government-funded social service. In response, local governments began to systematically sponsor non-profits to provide services like home care, mental health services, job training, legal aid and social relief”<sup>87</sup>.*

In the beginning, the government at all levels delegated certain functions only to CSOs closely related to it, so-called “government operated non-government organizations” (GONGO, in Chinese: 由政府运行的非政府组织, *you zhengfu unxing de fei zhengfu zuzhi*), while funding for outsourcing originally came from revenues generated by the social welfare lottery<sup>88</sup>.

As the reforms proceeded, however, the needs for government-nonprofit collaboration increased dramatically together with the concern for transparency and the urgency to find a number of high quality CSOs able to provide adequate services to marginal and other needy citizens.

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<sup>85</sup> Jing Yijia, Bin Chen, “Is competitive contracting really competitive? A case study of Restructuring Government-Non profit relations in Shanghai”, Baruch College Center for Nonprofit Strategy and Management Working Paper Series, 2010, p. 12, available at: [http://www.baruch.cuny.edu/spa/researchcenters/nonprofitstrategy/documents/JingChen\\_IsCompetitiveContractingReallyCompetitive-ACaseStudyofRestructuringGovernment-Nonpr.pdf](http://www.baruch.cuny.edu/spa/researchcenters/nonprofitstrategy/documents/JingChen_IsCompetitiveContractingReallyCompetitive-ACaseStudyofRestructuringGovernment-Nonpr.pdf) (last accessed: January 31, 2017).

<sup>86</sup> Karla Simon, “Civil Society in China”, cit., pp. 291-292.

<sup>87</sup> Jing Yijia, Bin Chen, *ibid*.

<sup>88</sup> Karla Simon, last work cited, p. 292

Once again, Guangdong served as a reference. The enactment of the “Shenzhen Special Economic Zone Regulation on Public Procurement” in October 1998 was followed by the PRC Standing Committee’s adoption of the “Competitive Bidding Law” (1999) a year later, and then by the Government Procurement Law in 2002.

These two pieces of legislation marked the beginning of the transformation of a highly informal system into a more formalized one<sup>89</sup>, while during the same period, government funding of CSO services started at the municipal level<sup>90</sup>.

The Shanghai Department of Civil Affairs (DoCA) took the lead in 2000, when it established an office providing funding for social organizations serving the elderly in six districts and twelve street offices<sup>91</sup>. Then, in 2006, Shanghai’s new Pudong district began providing funding for charity and for the education of migrant workers’ children, while the Shenzhen municipal government has been fostering social work organizations since 2007, and the Beijing municipal government provided 100 million RMB in July 2010 to support 300 welfare projects<sup>92</sup>. Local experiments were, eventually, scaled up to the national level when the Ministry of Finance allocated 200 million RMB to support social service delivery CSOs in 2012<sup>93</sup>.

It is worth noting that the trend has only grown since then. In a conference in Beijing in mid-May 2014, the MCA announced that social service purchase funds rose to the remarkable amount of 150 billion yuan in 2013<sup>94</sup>.

Undoubtedly, as Zhao Yong, Vice Director of the Institute of Public Market and Government Procurement, pointed out:

*“government procurement in China is still in its early stages, but its power and its rate of development is incredibly fast”*<sup>95</sup>.

According to Zhao, the “acceleration” of the reforms in this sense were fostered, in particular, by the enactment of the “Guiding opinions regarding government purchasing of social work services”<sup>96</sup>, jointly issued by the Ministry of Finance and the Ministry of Civil Affairs on November 14, 2012.

In that document, however, outsourcing to social organizations is still confined to purchasing social work. On the contrary, the “Guiding Opinions on Government

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<sup>89</sup> Karla Simon, p. 293.

<sup>90</sup> Andreas Fulda, “Government procurement of CSO services in the PR China: Doing the party’s work?”, China Policy Institute Policy Paper 2013: No. 4, available at: <http://www.nottingham.ac.uk/cpi/documents/policy-papers/cpi-policy-paper-2013-no-4-dr-andreas-fulda-government-procurement-of-cso-services-in-the-prc.pdf> (last accessed: January 31, 2017)

<sup>91</sup> *Ibid.* On the subject, see also Jing Yijia, Bin Chen, op. cit.

<sup>92</sup> Andreas Fulda, *ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Karla Simon, “Charity and Social Enterprise in China”, cit.

<sup>95</sup> 吴建华, 政府买服务造千亿大市场 – 民政部财政部连续发文推动, 华夏时报, 2014-02-14, Wu Jianhua, “Zhenggu mai fuwu zao qianyi da shicang - Minzheng bu cai zheng bu lianxu fawen tuidong” (Government service procurement creates a big market – The Ministry of Civil Affairs and the Ministry of Finance continuously issue and promote) available at: <http://www.chinatimes.cc/hxsb/news/zhengce/140214/1402142258-133577.html> (last accessed: January 31, 2017).

<sup>96</sup> *Ibid.* The original text (in Chinese) of the “Guiding Opinions” can be found at <http://www.mca.gov.cn/article/zwgk/tzl/201211/20121100383464.shtml> (last accessed: January 31, 2017).

Purchasing Services from Social Actors” (国务院办公厅关于政府向社会力量购买服务的指导意见), released by the State Council General Office on September 26, 2013, refer more generally to government procurement of “public” services, expanding the tasks which can be delegated to civil society, and “*marking a milestone in the field of decentralization and reform of government functions*”<sup>97</sup>.

It is for this reason that the latter Guiding Opinions – considered as “*filling a void in the government’s current procurement policy*” and representing “*an important step in the strategy to transform government functions, by enhancing the environment in which SOs develop and helping to realize the positive role they play in the improvement of public service*”<sup>98</sup> – has been listed among the MCA’s “Top Ten Major Events for Social Organizations in 2013”<sup>99</sup>. Following the directions contained in them, many provinces (i.e.: Shandong, Hebei, Hubei, Anhui, plus Beijing, Shanghai and the Guangdong province, which are, as always, at the forefront when it comes to the NGO sector<sup>100</sup>) have started issuing provisions to promote government procurement of public services<sup>101</sup>.

The remarkably fast development described above must obviously also (and above all) be linked to the statements contained in the CCCP’s Decision. As noted in an article published in China Development Brief in February 2014, the Decision:

*“not only gives a green light to the reform and experiments that have been going on [...] at the local level in the past few years, but also provides a macro framework decided by the top leadership for envisioning how those reforms should proceed”*<sup>102</sup>.

Many problems, however, remain unsolved. For example, it is still not clear how, concretely, government contracting will be implemented, or how the distribution of functions between governments and social organizations will work. Moreover, there are doubts regarding the type of social organizations that will be eligible to apply, since government-affiliated organizations currently already provide up to 80-90% of public services in China, blurring the boundaries between funding provision and service production<sup>103</sup>.

Precisely with reference to the resources that can be used for the purpose, the Ministry of Finance clarified that the purchasing of social services must understood only as a pattern of public service delivery and a way of employing the existing government resources, and that it does not imply, in any possible way, an increase in funds available to local governments<sup>104</sup>.

In fact, as pointed out by Zhao Yong:

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<sup>97</sup> 吴建华, Wu Jianhua, cit.

<sup>98</sup> Matt Perrement (transl.), “The Ministry of Civil Affairs’ Top Ten Major Events for Social Organizations in 2013”, cit.

<sup>99</sup> Ibid.

<sup>100</sup> 吴建华, Wu Jianhua, op. cit.

<sup>101</sup> Ibid.

<sup>102</sup> Administrator: “Policy brief. no. 14 (January 2014): The Third Plenum Brings a Chilly Spring for China’s Civil Society”, cit.

<sup>103</sup> Andreas Fulda, op. cit.

<sup>104</sup> 吴建华, Wu Jianhua, op. cit.

*“Government purchasing is not a step forward to the creation of a “big government”, but, instead, a transformation into “small government, big society””*<sup>105</sup>.

It seems evident, however, that not all organizations will benefit from the emerging trend in the same way. In particular, as remarked by Andreas Fulda and confirmed by the provisions of the new Charity Law, social service CSOs focusing on community services, health services, children, the elderly or the disabled will be the main beneficiaries of the new government policies while CSOs promoting democracy, human rights or labor issues will be fairly unlikely to receive financial aid. This could also have an impact on such organizations’ ability to sustain their operations autonomously in the face of the recent dwindling of international support<sup>106</sup>.

Notwithstanding these concerns – and despite the “chilly wind” for activists that has been blowing since Xi Jinping seized power<sup>107</sup>, some members of non-government organizations say that the outlook has never been sunnier<sup>108</sup>.

Indeed, they hope that the creation of access channels that are, at present, operating merely in one direction may in the future allow organizations to participate in relevant policy areas. In their perspective, contracting public services might potentially have significant effects by increasing pluralism in local public policy and generating more demand for transparency and accountability in government services<sup>109</sup>.

This could undoubtedly be true, in the long term, at least for NGOs not engaging in advocacy or other sensitive areas<sup>110</sup>. In fact, as Shawn Shieh, editor of China Development Brief, a newsletter focused on social development and civil society, explained:

*“The government wants people to have an input into governance, but it wants it to occur in an orderly manner [...] It wants to depoliticize acceptable NGOs, and bring them into the fold so they can be regulated properly”*<sup>111</sup>.

But is there any evidence that the new focus on “social governance” is currently opening a novel space, (at least) for “acceptable” social organizations involvement in public choice?

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<sup>105</sup> *Ibid.* It is worth noting that the principle of “small government – big society” (*xiao zhengfu – da shehui*) was incorporated by CCP into its platform at the Fifteen Party Congress, with reference to the decision to privatize some state-owned enterprises. On the subject, see Mary Gallagher, “Time is Money, Efficiency is Life: The Transformation of Labor Relations in China”, 39 *Stud. In Comp. Int’l Dev.* 11, 22 (2004), cited by Karla Simon, *cit.* p. 236, note 10.

<sup>106</sup> See Andreas Fulda, *op. cit.*

<sup>107</sup> Many authors have commented on the concept. See, among others, Editor, “Policy Brief no.14”, *cit.*; Tom Miller, Warren Lu, “Better Governance Through Kung-Fu”, *Gravekal Dragonomics*, February 14, 2014, available at: <http://research.gavekal.com/content.php/9689-China-Better-Governance-Through-Kung-Fu-by-Tom-Miller> (last accessed: January 31, 2017).

<sup>108</sup> Tom Miller, Warren Lu, *ibid.*

<sup>109</sup> Jessica C. Teets, “Reforming Service Delivery in China: The Emergence of a Social Innovation Model”, *Journal of Chinese Political Science*, March 2012, Volume 17, Issue 1, p. 15.

<sup>110</sup> *Ibid.*

<sup>111</sup> Tom Miller, Warren Lu, *cit.*

## IV. CIVIL SOCIETY'S INVOLVEMENT IN POLICY DECISION-MAKING

In an interview published in the National People's Congress review, Prof. Xiang Chunling of the Central Party School stated that:

*“for a long time, the neglect and disregard for social cooperation meant that the government took any decision independently, without seeking the opinion of the masses”*<sup>112</sup>.

This way of interpreting the concept of “social management” though, has been quite costly from both a political and an economic point of view since, as remarked by Prof. Xiang, very often, as soon as a new policy was launched, citizens immediately filed petitions, or even organized protests to stop its implementation<sup>113</sup>.

This occurred, for example, in Qidong (Jiansu) and Shifang (Sichuan) in the spring of 2012<sup>114</sup>. In both incidents, thousands of protesters demanded the end of construction projects considered environmentally destructive and harmful to local interests. The protests reached a point of limited violence, and were resolved quickly when the local governments suspended the disputed project<sup>115</sup>. But while some authors consider this way of handling civil unrest a positive indication of the government's move towards some conciliatory changes<sup>116</sup>, there is no doubt that such a policy can be extremely harmful for the construction of a “harmonious society”.

As pointed out in an article published after the Qidong incidents in Global Times, a newspaper known for its highly nationalist bent<sup>117</sup>:

*“The two protests have together left the impression that the quickest way to change a government policy is to hold a violent demonstration. If this model is copied widely, it would be disastrous for social stability”*<sup>118</sup>.

It is (also) to avoid this risk, as I have already pointed out, that the CCCP's Decision calls for “making innovation in social governance”, a model implying a bi-directional relationship between local governments and social actors, focusing on

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<sup>112</sup> 张学文(责任编辑), Zhang Xuewen (ed.), cit.

<sup>113</sup> *Ibid.* For an analysis (in Italian) of the role played by environmental NGOs in popular mobilization against public projects that could (potentially) harm local communities' interests, see: Simona Grano, “Attivismo verde: un'analisi delle organizzazioni ambientaliste nella Cina di oggi”, in Renzo Cavalieri, Ivan Franceschini, cit., pp. 185-196.

<sup>114</sup> On the subject, see Samantha Hoffman, “Portents of Change in China's Social Management”, cit.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Donald Clarke, “Dumb Arguments about Human Rights in China”, Chinese Law Prof Blog, June 6, 2014, available at: [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2014/06/dumb-arguments-about-human-rights-in-china.html](http://lawprofessors.typepad.com/china_law_prof_blog/2014/06/dumb-arguments-about-human-rights-in-china.html) (last accessed: January 31, 2017)

<sup>118</sup> Global Times, July 30 2012, cited by Samantha Hoffman, last work cited.

the involvement of civil society in public choice in order to “*solve problems at the source*”<sup>119</sup>.

In this respect, and for some scholars, this change of attitude is already evident, as shown by the outcome of the protests against the Anning PX project, one year later.

On April 18, 2013, two local environmental organizations, Green Kunming and Green Watershed, conducted an on-the-spot investigation of Yunnan Petrochemical’s one billion ton oil refining project in Anning City, approved by the Yunnan Provincial Government at the end of March 2013. The announcement of the plan had caused panic and worry in the Kunming public, owing to the omission of certain details, which resulted in a peaceful protest by almost 3 000 citizens on May 4, 2013. On the morning of May 10, the Kunming city government held a press conference to publically respond to rumors about PX, inviting citizen representatives to meet informally with chemical engineering experts. Towards the end of June, China Petrochemical Company finally bowed to public pressure, and published an “Environmental Impact Assessment of the Yunnan PX Project”, bringing closure to this incident.

This incident was considered one of the “Ten Major Events in China’s Social Sector for 2013” by the Beijing University Civil Society Center<sup>120</sup>, which remarked that:

*“when compared to PX projects in Xiamen, Dalian, Ningbo and other places that ‘stopped as soon as they hit problems’, the handling of the Yunnan Px incident promotes and highlights both the management capability of local government and growing public maturity”*<sup>121</sup>.

It is a manner of “*making innovation in social governance*” endorsed by Prof. Xiang who, in the previously mentioned interview, pointed out how “*the major change of direction inflicted by ‘make innovation in social governance’ imply the correct handling of the relationship between the government and the masses or, rather, the construction of a new relationship between the government and the masses*”.

In my opinion, however, events like the one reported above are not representative (or, at least, not representative *enough*) of a real change in Chinese leaders’ attitude towards civil society. In fact, if social organizations’ involvement in public choice were to be judged on that basis only, there would be very little novelty in it.

First of all, the call to “*improve the public hearing and expert consultation system of public decision-making process*” was already mentioned in the 12<sup>th</sup> Five Year Plan

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<sup>119</sup>张学文 (责任编辑), Zhang Xuwen (ed.), cit.

<sup>120</sup> Matt Perrement (transl.): “Beijing University Civil Society Center’s “Ten Major Events in China’s Social Sector for 2013”, cit.

<sup>121</sup> *Ibid.*

for National and Social Development of March 2011<sup>122</sup>. This suggestion is included in the chapter regarding the invitation to “*actively and proactively respond to social concerns*”; a recommendation that is not new at all, but - as the recent clampdown on bloggers and the arrest or detention of well-known activists, scholars and businessmen demonstrated - has been taken quite seriously by Chinese leaders in the past several years.

It seems to me that the outcome of the Anning PX plan (and of others like it) is more the result of the government(s) success in tearing down the consensus of the general public on decisions already taken at the highest levels, than a genuine attempt to mediate between the demands of the citizens and local governments. In each of these incidents, in fact, the masses - once properly informed - agreed to what had already been established, and no change was made to the original project.

So, should we conclude that the concept of “social governance” is just an empty slogan, a new lexical tool used by Chinese leaders to co-opt social organizations while maintaining a monopoly on political choices?

Possibly not. There is at least one development that leads us to be (moderately) optimistic about the possibility, for civil society, to gain some space of action regarding policy-making. I am referring to the amendment of the Law of the People’s Republic of China on Environment Protection, in a sense (unexpectedly) more favorable to public interest litigation filed by social organizations.

### ***1 Environmental public interest litigation: a first real step towards “making innovation in social governance”?***

Public interest litigation (公益诉讼, *gongyi susong*), is a new sort of lawsuit for China<sup>123</sup>, but has grown rapidly over recent decades to become a significant and influential form of legal action.

Since 1996, when Qiu Jiandong sued the Post and Telecommunication Office of Xinluo district (Loyan city, Fujian) for failing to implement discounts on holiday and nighttime telephone calls, an increasing number of NGOs, law firms, and individual lawyers have used this judicial tool to remind the government of what it means, in practice, to be “*a country of Rule of Law*”<sup>124</sup>, asking Chinese leaders to follow through on their promises and apply the laws they have approved. For a short time, the latter has been one of the few instruments of political participation allowed to Chinese citizens, and the only way they can make their voices heard.

A few years ago, however, this trend began to slow.

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<sup>122</sup> See 中华人民共和国国民经济和社会发展第十二个五年规划纲要 (*Zhonghua renmin gongheguo jingji he shehui fazhan di shier ge wu nian guihua gangyao*), cit., chapter 40, point 1.

<sup>123</sup> Chinese scholars, in fact, often refer to “gongyi susong” using expressions like 现代型诉讼, (*xiandaixing susong*, litt. “litigation of modern type”) or 新型诉讼, (*xinxing susong*: litt. “litigation of new type”). Regarding this topic, see S. Novaretti, “Le ragioni del pubblico: le “azioni nel pubblico interesse” in Cina”, Edizioni Scientifiche Italiane, Napoli, 2011, p. 40, note 7.

<sup>124</sup> See PRC Constitution, art. 5.1: “People’s Republic of China implements the Rule of Law”.

NGOs and lawyers dealing with public interest litigation have always been considered moderate, as they choose cases having both a direct impact on the livelihood of ordinary citizen and lesser political ramifications (i.e.: consumer, environmental or educational rights protection, anti-discrimination protection etc.). Despite this, they have been victims of harassment, intimidation and abuse by the PRC's government in the past several years, as a result of what Carl Minzner described as the "Chinese leaders' *turn against law*".<sup>125</sup>.

The government's skepticism and distrust towards civil society involvement in public choices - and its concern for anything that might even remotely threaten social stability - have become even more evident after the approval of the "Amendment of the PRC's Civil Procedure Law", in force since August 31, 2012.

Article 55 of the Law contained the first provision dedicated to Public Interest Litigation (PIL) in the history of Chinese legislation. Although it was received with great enthusiasm, welcomed as a big step forward in the development of PIL, it immediately became clear that that this "development" would not be in the direction hoped for by public interest lawyers and grassroots social organizations.

Article 55 states that:

*"For conduct that pollutes the environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court"*<sup>126</sup>.

Until that time, activists and organizations had been able to take advantage of the absence of specific provisions to file lawsuits in defense of the public interest. Although, most of the time, the rigidity of the rules relating to the right of standing had provided an excuse for the People's Courts to refuse such cases, other times they had been successful, or - at least - had been able to attract the public's attention on specific violations of the common good.

Ironically (or perhaps intentionally), the amendment that was supposed to open the doors to public interest litigation ended up excluding many potential "players". In the new legal environment, not only individual citizens, but - in practice - also NGOs were not permitted to file lawsuits in the public interest, since at the approval of the new Civil Procedure Law, there was no mention of such a right for any social organization in all Chinese legislation.

Moreover, it seemed very likely that, even if the laws regulating the areas specifically listed in article 55 (i.e. environment and consumer protection) had been amended, the right of standing in case of violation of the public interest would be

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<sup>125</sup> Carl Minzner, "Chinese State Council White Papers and the "Turn against Law"", August 29, 2012, available at: [http://sinolaw.typepad.com/chinese\\_law\\_and\\_politics\\_/2012/08/chinese-state-council-white-papers-and-the-turn-against-law.html](http://sinolaw.typepad.com/chinese_law_and_politics_/2012/08/chinese-state-council-white-papers-and-the-turn-against-law.html) (last accessed: January 31, 2017).

<sup>126</sup> It is worth noting that the Law was revised for the third time on June 27, 2017, adding a second paragraph to article 55, allowing People's Procuratorates to file lawsuits "in the public interest" in case of inaction by the authorities or social organizations prescribed by paragraph one.



attributed merely to association(s) more closely linked to (or controlled by) the government.

These predictions came true in October 2013, when the new Law of the People's Republic of China on the Protection of Consumer Rights and Interests was approved. The Law allows only one government-sponsored NGO (i.e.: the China consumers' Association) to file lawsuits in cases of “*infringement upon the lawful rights and interests of vast consumers*”<sup>127</sup>.

So, no one would have been surprised if the revision of the Law of the People's Republic of China on Environment Protection had also followed this path, and this actually was the case, at least until its final approval.

It is interesting to note that under the 1989 Law on Environmental Protection, any natural person, legal entity, or social organization, regardless of whether they were personally affected, could technically engage in environmental public interest litigation by filing a lawsuit against an alleged polluter<sup>128</sup>. In reality, however, NGOs that tried to initiate such lawsuits often faced challenges to their standing. That is why experts and activists have followed the process of revision of the Law with much apprehension, especially after the publication<sup>129</sup> of the second draft of the “Environment Protection Law”, which assigned the “Chinese Federation for Environment Protection” (中华环保联合会, *Zhonghua huanbao lianhehui*, also known through its English acronym, ACEF) – an association founded (and financed) by the Minister for Environment Protection itself – the monopoly of standing in cases of environmental pollution<sup>130</sup>.

For this very reason, the final version of the Environment Protection Law passed by the Standing Committee of the 12<sup>th</sup> People's National Congress on April 24, 2014 was a real game changer.

Article 58 of the Law states that:

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<sup>127</sup> “For infringement upon the lawful rights and interests of vast consumers, the China consumers' Association and the consumer associations formed in provinces, autonomous regions, and municipalities directly under the Central Government may file lawsuits in the people's court”. See Law of the People's Republic of China on the Protection of Consumer Rights (amended), amended for the second time in accordance with the Decision on Amending the Law of the People's Republic of China on the Protection of consumer Rights and Interests adopted at the 5<sup>th</sup> Session of the Standing Committee of the 12<sup>th</sup> National People's Congress on October 25, 2013, art. 47.

<sup>128</sup> “All units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment”. See “Law of the People's Republic of China on Environment Protection”, art. 6.

<sup>129</sup> By that time, the publication “to raise the opinions of all sectors of society and that of the people” had become common practice for more important laws. For more on the subject, with special reference to the task of drafting Law on contracts, see M. Timoteo, “Il contratto in Cina e Giappone nello specchio dei diritti occidentali” (The contract in China and Japan reflecting Western rights), Cedam, Padua, 2004, p. 310.

<sup>130</sup> For further information, see Du Jiabao, “Experts, Activists Call Proposed Amendment to China's Environment Law “Monopolization of Litigation”, Tealeafnation, July 15 2013, available at: <http://www.tealeafnation.com/2013/07/amending-the-environmental-law-will-environmental-public-interest-litigation-be-monopolized/#sthash.JLvqlwi1.dpuf> (last accessed: January 31, 2017).

*‘For an act polluting the environment or causing ecological damage in violation of public interest, a social organization which satisfies the following conditions may institute an action in a people’s court:*

- (1) It has been legally registered with the civil affairs department of the people’s government at or above the level of a district city.*
- (2) It has specially engaged in environmental protection for the public good for five consecutive years or more without any recorded violation of law.*

*A people’s court shall, according to the law, accept an action instituted by a social organization that satisfies the provision of the preceding paragraph.*

*A social organization may not seek any economic benefit from an action instituted by it*<sup>131</sup>.

It was, as can easily be understood, a regulation that was liable to have a huge impact on the ability of civil society to intervene on environmental matters.

The provision did extend the opportunity to take action in public interest from the single case of “pollution” provided by the CPL to any “violation of social public interest, including ecological damage”<sup>132</sup>. Moreover, it conferred the right to file *huanjing gongyi susong* for a surprising number of environmental organizations and NGOs, not only exceptional for the PRC but for any other Civil Law Country, notoriously resistant to class actions: according to the experts, there are between three hundred and seven hundred NGOs in China that satisfy the criteria required by Article 58<sup>133</sup>.

But did Article 58 really expand the opportunity for NGOs to fight for a healthier environment?

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<sup>131</sup> 中华人民共和国环境保护法(2014 修订), *Zhonghua renmin gonghe guo huanjing baohu fa* (2015 xiuding), (Environment Protection Law, 2014), passed by the 8<sup>th</sup> session of the Standing Committee of the People’s National Congress, April 24, article 58.

<sup>132</sup> 侯书平, 新环境保护法下环境公益的新思考, 天中学刊, 第 30 卷 第 5 期 2015 年 10 月, Hou Shuping, *Xin huanjing baohu fa xia huanjing gongyi susong de xin sikao* (New reflections on public interest litigation in light of the new environment protection law’) *Tianzhong Xuekan*, vol. 30, no. 5, October 2010, p. 24.

<sup>133</sup> The number changes according to different sources. For more see D. Pettit, *A Step Forward For Public Interest Litigation In China*, Switchboard (Natural Resources Defense Council Blog), April 28, 2014, available online at: [http://switchboard.nrdc.org/blogs/dpettit/a\\_step\\_forward\\_for\\_public\\_inte.html](http://switchboard.nrdc.org/blogs/dpettit/a_step_forward_for_public_inte.html) (last accessed: January 31, 2017); B. Finamore, *New Weapons in the War on Pollution: China’s Environmental Protection Law Amendments*, Switchboard (Natural Resources Defense Council Blog), April 24, 2014, available at: [http://switchboard.nrdc.org/blogs/bfinamore/new\\_weapons\\_in\\_the\\_war\\_on\\_poll.html](http://switchboard.nrdc.org/blogs/bfinamore/new_weapons_in_the_war_on_poll.html) (last accessed: January 31, 2017); United Nations Development Program, “Rule of Law and Access to Justice. Environmental Public Interest Litigation in China, May, 2015, available online at: [http://www.cn.undp.org/content/china/en/home/library/democratic\\_governance/-html](http://www.cn.undp.org/content/china/en/home/library/democratic_governance/-html) (last accessed: January 31, 2017); 刘琴, 环保组织索赔空气污染企业3000万, 中外对话 2015年3月25日, Liu Qin, *Huanbao zushi subei qiwaran qiye 3000 wan* (Organizations for environment protection request 300 million yuan from a company for air pollution damages), *Zhongwai duihua*, March 25, 2015, available online at: <https://www.chinadialogue.net/article/show/single/ch/7790-China-court-to-hear-3-m-yuan-air-pollution-lawsuit> (last accessed: January 31, 2017).

## **2. NGOs and “Environmental public interest litigation”: latest developments**

Almost two years after it came into force in January 2015, the Environment Protection Law does not seem to have brought about the transformative effect that its contents had promised.

According to data supplied by the Supreme People’s Court, as of June 2016, the people’s courts had accepted 93 public interest litigation cases brought by non-governmental organizations nationwide, compared to a total of 195 141 civil cases of trial of first instance involving the resource ownership, environmental infringement, and contract disputes and 57 738 administrative cases of trial of first instance concerning the environment and resources concluded between January 2014 and June 2016<sup>134</sup>.

There are many reasons adopted on principle to justify the (still) limited use of this tool. One of the major factors is certainly the weakness of Chinese NGOs.

It is interesting to note that, at least in this case, this weakness does not stem as much from the stern control the government exercises in civil society<sup>135</sup> as from practical reasons. According to the experts, only a few dozen of the almost seven hundred NGOs meeting the criteria set out in Article 58 of the EPL currently have the technical, financial, organizational and human resources needed to file public interest cases<sup>136</sup>. It is not surprising, therefore, that only six Chinese NGOs brought environmental cases in 2016<sup>137</sup>.

Although the impact of the new law continues to be rather small in terms of quantity (number of cases and NGOs involved), there were some improvements in 2016 from a qualitative point of view: this includes the “size” of the polluters brought to court by NGOs and the amount of damages awarded against the defendants. As noted by Dimitri de Boer and Douglas Whitehead in a recent article, more and more environmental public interest litigation cases were brought against “big polluters” (multinationals and Chinese state-owned enterprises in 2016<sup>138</sup>, instead of individuals and small enterprises as was the case in 2015<sup>139</sup>), and in many environmental public interest lawsuits the courts awarded major damages against the defendants, as in the case of All-China Environment Federation (ACEF) vs. Jinghua Group Zhenhua Decoration Glass Limited Company, in which the

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<sup>134</sup> See PRC Ministry of Environmental Protection, “Supreme People’s Court Releasing White Paper on China’s Environmental Resource Trial”, August 1, 2016, online: [http://english.mep.gov.cn/News\\_service/media\\_news/201608/t20160801\\_361517.shtml](http://english.mep.gov.cn/News_service/media_news/201608/t20160801_361517.shtml) (last accessed: January 31, 2017).

<sup>135</sup> See *supra*, paragraph 2.

<sup>136</sup> For more, see once again, United Nations Development Program, *cit. p. 2*; 刘琴, Liu Qin, *op. cit.*

<sup>137</sup> Dimitri de Boer, Douglas Whitehead, “Opinion: The future of public interest litigation in China”, *Chinadialogue*, 8.11. 2016, online: <https://www.chinadialogue.net/article/show/single/en/9356-Opinion-The-future-of-public-interest-litigation-in-China> (last accessed: January 31, 2017).

<sup>138</sup> See, for example, the lawsuit filed by China Biodiversity Conservation and Green Development Foundation (CBCGDF) against Volkswagen and Hami Coal Power Co., or the ones filed by Friends of Nature vs. Hyundai, Jilin Petrochemical and Anshan Iron and Steel. On the topic, see Dimitri de Boer, Douglas Whitehead, *cit., ibid.*

<sup>139</sup> *Ibid.*

company was ordered to pay nearly 22 million yuan (approximately US\$3.3 million) for its excessive emission of pollutants <sup>140</sup>.

The Chinese government and the Supreme People's Court (SPC) seem to be actively promoting NGOs participation in environmental public interest litigation, both through regulations and policy documents. In July 2015, the Ministry for Environment Protection enacted the Measures of Public Participation in Environment Protection (环境保护公众参与办法, *huanjing baohu gongzhong canyu banfa*)<sup>141</sup>, while in December 2014, the Supreme People's Court's adopted the "Supreme People's Court's Interpretation on Several Issues Regarding the Application of Law in Environmental Civil Public Interest Litigation", giving a broad definition of «social organization» (art. 2- 5) and making it possible to file PIL for "any action that have significant risk of harming the public interest" (art. 1)<sup>142</sup>. The Supreme People's Court also included the first environmental public interest litigation case decided on the basis of the new Environment Protection Law (i.e.: Friends of Nature vs. Xie Zhijin and others)<sup>143</sup> as a model case which Chinese courts are asked to implement in rulings of environmental disputes<sup>144</sup>. Moreover, in July 2016, the SPC issued a "White Paper on Environmental and Natural Resources Adjudication" (中国环境资源审判白皮书 *Zhongguo huanjing ziyuan shenpan baipishu*), in which it elaborated and displayed the progress on environmental resource trials, including environmental public interest litigation<sup>145</sup>.

With such active encouragement from the top court, it is likely that lower level courts' ability to accept and effectively rule on environmental public interest cases will continue to improve, allowing civil society to play a more active (and perhaps less controlled) role, at least in this area.

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<sup>140</sup> 山东省德州市中级人民法院, (2015) 德中环公民初字第 1 号, Shandong sheng Dezhou shi zhongji renmin fayuan, 2015 Dezhong huan gongminchuzi di 1 hao. The full text of the judgment (in Chinese) is available online at: <http://wenshu.court.gov.cn/content/content?DocID=8904ca93-89c1-4c6b-bfb8-d21e15c91931&KeyWord=%E4%B8%AD%E5%8D%8E%E7%8E%AF%E4%BF%9D%E8%81%94%E5%90%88%E4%BC%9A%7C%E5%BE%B7%E5%B7%9E%E6%99%B6%E5%8D%8E%E9%9B%86%E5%9B%A2%E6%8C%AF%E5%8D%8E%E6%9C%89%E9%99%90%E5%85%AC%E5%8F%B8> (last accessed: January 31, 2017). For more details on this case (in English), see "China Firm Fined For Pollution In Landmark Case", NDTV, July 21, 2016, online: <http://www.ndtv.com/world-news/china-firm-fined-for-pollution-in-landmark-case-1434289> (last accessed: January 31, 2017).

<sup>141</sup> Decreed by the Ministry of Environment Protection, order no. 35, July 13, 2015.

<sup>142</sup> See "Supreme People's Court Interpretation on Several Issues Regarding the Application of Law in Environmental Civil Public Interest Litigation", adopted by the 1631<sup>st</sup> meeting of the Adjudication Committee of the Supreme People's Court on December 8, 2014, and effective on January 7, 2015.

<sup>143</sup> For more, see 崔箏, 新环保法实施后 NGO 打赢首例公益诉讼, 财新网, 2015 年 10 月 30 日, Cui Zheng, *Xin huanjing baofa shishi hou NGO daying shouli gongyi susong* (Following the entry into force of the Environment Protection Law, an NGO wins an exemplary case in public interest, Caixin wang, 30 October 2015, available online at: <http://china.caixin.com/2015-10-30/100868387.html> (last accessed: January 31, 2017); 小田, 环境诉讼第一案, NGO 赢了!, 自然之友, 2015 年 10 月 30 日, Xiao Tian, *Huanjing susong diyi'an, NGO ying le!* (First case of environment litigation where an NGO wins! Ziran zhiyou, 30 October 2015, available online at: <http://ngocn.blog.caixin.com/archives/135981> (last accessed: January 31, 2017); Lin Yanmei, *China's First Environmental Public Interest Litigation: Green NGOs win*, Asia Environmental Governance Blog, October 30, 2015, Available online at: <http://asia-environment.vermontlaw.edu/2015/10/30/chinas-first-environmental-public-interest-litigation-green-ngos-win/> (last accessed: January 31, 2017).

<sup>144</sup> 最高法: 今年法院共受理 45 件环境公益诉讼案件, *Zuigaofa: Jinnina fayuan gong shouli 45jian huanjing gongyi susong jian*, (Supreme Court: This year the court has admitted in total 45 environmental public interest lawsuits.) cited.

<sup>145</sup> See "Supreme People's Court Releasing White Paper on China's Environmental Resource Trial", cit.

## V. CONCLUSIONS

When I began my research on this topic, I was definitely not optimistic about the possibility for Chinese civil society organizations to increase their role in policy-making.

In particular, I considered the 2013 CCCP Third Plenum's new focus on "social governance" more of an attempt by the Chinese government to relieve social pressure and maintain social stability using NGOs as a tool, rather than genuine recognition by Chinese leaders of the importance of involving social forces in the decisions affecting them.

Indeed, the transition from "*social management*" to "*social governance*" has occurred at a time of increased political repression. Since Xi Jinping seized power in 2012, the state has cracked down on freethinkers<sup>146</sup>. News of disappearances, intimidations and arrests of activists, widely reported by the international press, show how even those who in recent years have tried a less confrontational approach by simply calling on the government to respect the Constitution and the laws - like many of the lawyers arrested in July 2015 during the so-called "709 crackdown"<sup>147</sup> - are no longer tolerated in China.

In this context, the recent loosening of restraints on certain types of NGOs can easily be interpreted as the Party's latest clever brainwave to adapt to the new environment created by the reforms. By outsourcing the public services they can no longer provide to NGOs, Chinese leaders can maintain social harmony threatened by growing social demand without relaxing their political grip.

Curiously, this attitude reminds me of the role social organizations played during the Qing dynasty when, as we have seen, the emperors delegated power to the CSOs of the time, allowing them to manage various social issues on their behalf. During the imperial era, the government ended up supporting only the organizations it approved of or whose agenda was useful to it: recent developments do not seem far from this scenario.

In the past several years, enormous progress has been made for party-approved organizations, such as those providing public services and publicly desired good for the Chinese people. However, the government's attitude towards overtly political or human rights organizations has become even more aggressive, to the point where no one is expecting them to be allowed registration in the near future<sup>148</sup>.

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<sup>146</sup> See Editor, "Chinese Civil Society. Beneath the Glacier", cit.

<sup>147</sup> The name refers to the unprecedented crackdown on human rights lawyers and defenders which began on July 9, 2015, targeting 248 human rights lawyers and activists. A full list of all individuals Amnesty International has documented as targeted in the crackdown can be found at: <https://www.amnesty.org/en/latest/campaigns/2016/07/one-year-since-chinas-crackdown-on-human-rights-lawyers/> (last accessed: January 31, 2017). On the topic, see also: Human Rights in China, "Mass Crackdown on Chinese Lawyers and Defenders", at: <http://www.hrichina.org/en/mass-crackdown-chinese-lawyers-and-defenders> (last accessed: January 31, 2017).

<sup>148</sup> See Karla Simon, "Civil Society in China", cit., p. 340.

Despite this, many who work for NGOs feel that allowing new freedoms for civil society groups will transform the party from within, eroding the distinction between service provision and advocacy<sup>149</sup>.

Only time will tell whether this “peaceful evolution” will ever take place. A recent incident, though, has changed in a positive way my perception of the Chinese government’s interpretation of the concept of social governance: the amendment of the Law on Environmental Protection, on April 24, 2014.

As we have seen, article 58 of the new Law gives environmental NGOs more ability to supervise social affairs, expanding the right of standing in cases of pollution or ecological damage to a number of environmental social organizations incredibly high not only for China, but also for any Civil law country, notoriously cautious when it comes to group litigation<sup>150</sup>.

The amended Law on Environmental Protection took effect only on January 1, 2015, and it is obviously too early to evaluate how successful the provision on NGOs’ standing will be in promoting meaningful environmental litigation<sup>151</sup>.

Nonetheless, I believe it is an important sign of change in the relationship between government and society, and – perhaps – a first real step towards “*making innovation in social governance*”.

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<sup>149</sup> See Editor, “Chinese Civil Society. Beneath the Glacier”, cit.

<sup>150</sup> On the topic, with reference to the Italian legal system, see Edoardo Ferrante, “L’azione di classe nel diritto italiano” [Class action in the Italian legal system], Cedam, 2012.

<sup>151</sup> See David Pettit, cit.