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Reform of China's Laws for NPOs - A Discussion of Issues Related to *Shiye Danwei* Reform

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I. Introduction

Reform of the laws in China governing not-for-profit organizations (NPOs)¹ is a matter that has been under discussion for some time among Chinese scholars and practitioners and with international experts. The author has, in fact, participated in several international gatherings of scholars and practitioners that have addressed this subject over the course of the last six years. The first public international conference was held in Beijing in 1999 under the auspices of Tsinghua University's then quite new NGO Research Center,² and it laid out the basic issues and international trends with regard to NPO regulation in various parts of the world.³ Later that year a second large gathering was held under the auspices of the China Youth Development

Foundation (CYDF) and the United Nations Development Programme (UNDP), with similarly varied attendance and foreign participation.⁴ These two early international events were preceded by many less formal consultations between various U.S.⁵ experts and Chinese practitioners and scholars, including staff members of the Ministry of Civil Affairs (MOCA); some of these were organized by the Ford Foundation⁶ and others by the National Committee on U.S.-China Relations.⁷ In addition, beginning in the mid-1990's several American and Chinese-American scholars discussed, from a social science perspective and in American publications,

⁴ See information about the conference on the CYDF website at <http://www.cydf.org.cn/gb/conference/program.html>; hereinafter CYDF conference.

⁵ This paper generally discusses informal contacts between Chinese and American experts, because the author has no knowledge that nationals of other countries participated in studying the legal framework for NPOs in China or in providing technical assistance until after the 1998 regulations on social organizations, etc., were promulgated. See *infra*, text at notes 84 ff, for a discussion of those regulations. One informal contact between the author (and co-founder of the International Center for Not-for-Profit Law (ICNL), on whose letterhead the paper appears) and officials of MOCA occurred in October, 1996, and resulted in the preparation by the author of a paper entitled *Social Organizations in China, Assistance for Drafting Regulations*; paper, dated December 12, 1996, on file with the author (hereinafter ICNL, *Social Organizations in China*).

The international conferences held in 1999, at which government officials participated and spoke on the record, were in effect a "coming out party" for those working on the legal framework for NPOs in China. Prior to 1999, all the contacts with foreigners were more informal, small gatherings, but once the regulations were promulgated in 1998, formal and broad consultations began. Although issues around citizen participation and freedom of association are very sensitive, it appears that the government permitted formal events with government and foreign participation beginning in 1999 because it wanted to develop a clearer and more transparent method of obtaining information about developments in foreign countries' regulatory systems for NPOs. In addition, official representation at international gatherings outside China was welcomed. After the 1999 conferences, for example, Chen Guangyao, the Deputy Director of the NPO Bureau traveled to Miami to speak at the World Congress of Association Executives in 2000. See CHEN Guangyao, *China's Nongovernmental Organizations: Status, Government Policies, and Prospects for Further Development*, 3 *International Journal of Not-for-Profit Law (IJNL)* 3, available at www.icnl.org.

Nonetheless, the timing of the Tsinghua conference turned out to be somewhat problematic due to the crack-down on Falun Gong on 19 July 1999, immediately preceding it. See <http://www.wsws.org/articles/1999/aug1999/gong-a03.shtml>. According to notes on file with the author, the public event allowed Chinese participants to express a certain amount of dissatisfaction about the way in which the government was reacting to an organized but not officially registered social movement.

⁶ For example, a delegation of Chinese government officials and NPO leaders visited the U.S. in 1994 under the auspices of the Ford Foundation; their visit resulted in the development of a close relationship between principals of ICNL, which the author and Dr. Leon Irish co-founded in 1992. The International Center for Civil Society Law (ICCSL) took over this relationship, when it was founded by the same two individuals in 2003.

⁷ See National Committee on U.S.-China Relations, *The Rise of Nongovernmental Organizations in China: Implications for Americans*, National Committee Policy Series, No. 8, May, 1994 (hereinafter U.S.-China Relations Report).

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¹ The terms used in the paper are *shiye danwei* and public institutions. Others who analyze these issues, such as the World Bank and the OECD refer to *shiye danwei* as "public service units" or PSUs. That term will be avoided in this paper except in references to work by those institutions. See, *infra*, note 31.

² The Tsinghua Center was begun in 1997, under the leadership of Dr. Wang Ming, who is currently its Director. The website is www.ngorc.net.cn. The Center has grown considerably since its early days and today undertakes a number of research projects in the field, many of which are relevant to regulatory issues.

³ See Zhao Liqing and Carolyn Iyoya Irving, *The Non-Profit Sector and Development*, The Proceedings of the International Conference in Beijing in July 1999, Hong Kong, 2001, hereinafter Tsinghua conference. The conference was sponsored by the Asia Foundation and the Asia-Pacific Philanthropy Consortium.

the development of Chinese NPOs, with some reference to and discussion of their legal status.⁸

Several subsequent meetings with foreign participation have been devoted to the serious endeavor of clarifying the understanding of structural problems with the legal framework for NPOs in China – for example, the conference hosted by MOCA in Shanghai in 2002 on the development and administration of NPOs,⁹ meetings on the freedom of association hosted by the Chinese Academy of Social Sciences (CASS) in 2003 and 2004¹¹ and by the Ministry of Science and Technology (MOST)¹² and the Ministry of Finance (MOF) in 2003¹³ were extremely useful events, which elucidated complex legal issues in a very clear and concrete way.¹⁴

⁸ See *Richard Estes*, *Emerging Chinese Foundations*, a paper presented at the 25th ARNOVA conference, 1996 (published in UNCRD, *Regional Development Studies*, vol.4, 1998); *Qiusha Ma*, *The Current Status of NGOs in China 1997*, available at <http://www.jhu.edu/%7Eistr/conferences/geneva/confpapers/qiusha.ma.html>; *Virginia Shue*, *State Power and Philanthropic Impulse in China Today*, in *Philanthropy in the World's Traditions*, (Ilchman, Katz, Queen eds.), Indiana 1998; and *Qiusha Ma*, *The Governance of NGOs in China since 1978: How Much Autonomy?*, 13 *Non Profit and Voluntary Sector Quarterly* 3, pp 305-328 (2002).

This paper cites the numerous papers published by Chinese scholars only as they relate directly to the topic at hand. A compilation of writings on NPO laws in China is being developed under the auspices of the NPO Law Center.

⁹ See Conference Pack, Shanghai International Seminar on the Development and Administration of NPOs, November 2002.

¹¹ A conference was held at CASS in August, 2003, and later ones in October 2003 and July 2004 (the latter two under the sponsorship of the Royal Netherlands Embassy). The August 2003 meeting featured American and Chinese speakers on freedom of association, while the latter involved European speakers. The first meeting is described in *International Journal of Civil Society Law Staff*, *China Update*, 2 *International Journal of Civil Society Law* 116 (October 2003), available at www.law.cua.edu/students/orgs/ijcsl/; the October 2003 meeting is described in *Rupert Graf Strachwitz*, *Versammlungsfreiheit als praktische Aufgabe der Politik – Eine Konferenz und ein Seminar in China mit Gästen aus Europa*, 3 *International Journal of Civil Society Law* (January 2004), available at www.law.cua.edu/students/orgs/ijcsl/.

¹² One interesting fact that should be mentioned is that Dr. Wu Zhongze, a prior Director General of the NPO Bureau in MOCA, was the Vice Minister of Science and Technology who welcomed the participants to the 2003 conference. See *WU Zhongze*, *Welcome Speech*, on file with the author. Dr. Wu's work while he was at MOCA is also frequently cited in current research papers.

¹³ See *International Symposium on Reform of China's Public Institutions and Development of China's Nonprofit Organizations*, November 2003; several of the papers delivered at this conference were published in 3 *International Journal of Civil Society Law* 1 (January 2004), available at www.law.cua.edu/students/orgs/ijcsl/ (hereinafter MOST/MOF conference).

¹⁴ In addition, there were two seminars on the tax issues affecting NPOs, held in Beijing and Shenzhen in May, 2004, which discussed in detail the ways in which the tax system should be changed to provide greater support for civil society. These events took place in the context of working out the details of the book-length study later published on the World Bank's website in early 2005, *Leon Irish, JIN Dongsheng & Karla Simon*, *China's Tax Rules for Not-for-Profit Organizations*, available at <http://www.worldbank.org.cn/English/content/NPO%20Tax%20Report-En.pdf> (hereinafter *Tax Report*).

More recent events, such as a very large meeting held in October 2004 under the auspices of the China Charity Federation to celebrate its 10th anniversary (see www.china.org.cn/English/China/109446.htm/ for a story about the conference) have not contributed very much to the critical legal thinking about issues that really need to be addressed in

Another important international event was held in December 2003, under the auspices of the Office of Legislative Affairs of the State Council, which looked specifically at the regulation of foundations.¹⁵

The "Beida Forum," at which this paper was originally presented, was in that same tradition – considered a set of research questions that had been posed by the NPO Law Research Center at Peking University Law School (PKU NPO Law Center), whose Director is Prof. Wei Dingren¹⁶ and whose Executive Director is Prof. Chen Jinluo.¹⁷ The forum was part of a larger research project by the PKU NPO Law Center, which was funded by the Ford Foundation and Oxfam, Hong Kong, and which involved not only the March forum and the Research Report presented there, but also study tours to various countries and several discussion fora held at Peking University Law School.¹⁸ The research that is being conducted at the PKU NPO Law Center

China in this regard. This is noted in comments to the author by foreign and Chinese participants at the conference, in notes on file with the author. Continuing large conferences with papers about the laws in other countries can have little or no impact on the type of legal analysis needed in China at this stage of its development. It is absolutely crucial that actual comparative work be done and "talking heads" conferences tend not to be very efficient at doing that.

¹⁵ See *John Edie*, *Seminar on Regulation of Foundations*, published in the January 2004 issue of *International Journal of Civil Society Law*, available at www.law.cua.edu/students/orgs/ijcsl/. A paper presented at the December 2003 event, by MOCA official *Yang Yue* (on file with the author), very much presages the development of the revised foundation regulations, which came out in spring 2004; see *infra*, text at notes 91-94.

¹⁶ Former head of the Constitutional Law Department of Peking University Law School.

¹⁷ Former Director of the NGO Management Bureau of the Ministry of Civil Affairs. The influence of these two men (Chen was a student of Wei at Beida) on the development of the modern legal framework for NPOs in China cannot be understated. In the 1990's they formed a Research Society on NPOs, which continues to exist, with Gu Jun Xian as Secretary General. The author is personally acquainted with both Prof. Wei and Prof. Chen and is deeply impressed by their knowledge of and contributions to this field.

The PKU NPO Law Center was founded as a result of discussions under the auspices of the Research Society; it gives NPO law research an institutional base in one of the finest law faculties in China. Although research conducted by the Non-governmental Organizations Research Center at Tsinghua University, *supra* note 2, is tremendously important to understanding and developing the legal framework for NPOs, that research is generally social science research. See, *Deng Gousheng*, *Report*, included in materials provided for the Beida Forum on the results of a survey in several provinces on legal and other problems faced by Chinese NPOs; notes of speech on file with the author.

It is also important to note the role played by PKU NPO Law Center in leading the research into the legal framework for NPOs in China and including researchers from other universities on the Research Team, which is led now by Assoc. Prof. Ge Yunsong. They include non-lawyers, Dr. Deng Guosheng and Dr. Jia Xijin, of Tsinghua University; and lawyers, Dr. Jin Jinping, post-doctoral student at CASS; Dr. Liu Peifeng, post-doctoral student at Tsinghua; and Dr. Qi Hong, Lecturer in Law at the University of Politics and Law ("*Fa Da*").

¹⁸ Notes of Chen Jinluo speech at Beida Forum, as well as conversations with the funders, on file with the author. The author and Dr. Irish participated in two of these.

is of principal importance in helping to address the restructuring of the legal framework for NPOs in China.¹⁹ Only through this type of well-thought-out and critical endeavor will current thinking in other countries be brought into the process of legal reform for NPOs in China.²⁰

Unlike the papers presented at the forum by my international colleagues,²¹ however, I contributed to the discussion of international responses to issues raised by the Chinese only by referring in the oral proceedings to developments in the U.S.²² My paper for the forum was intended to draw on my long-term association with and knowledge of the legal framework for NPOs in China.²³ It addresses

¹⁹ The Beida Forum would have benefited immensely from its international participants if the Research Team's "Report" presented by Dr. Jin Jinping, had been made available to them in English in advance of the meeting. The expectation is that it will now be revised, translated and circulated so that the international participants can send comments and suggestions on the proposals made by the research team.

²⁰ Foreign participants from Germany (Rupert Graf Strachwitz), India (Prof. P. Ishwara Bhat), Japan (Mr. Tatsuo Ohta), the Netherlands (Prof. Tymen van der Ploeg), and the Philippines (Prof. Ledivina Cariño) addressed pertinent issues about NPO laws in their own countries. Some of these papers will be published in an upcoming issue of *International Journal Of Civil Society Law*. Prof. Leon Irish, of Central European University, presented the Tax Report, *supra* note 14. Because of the small size of the conference, the foreign participants were also able readily to participate in discussions with their Chinese counterparts and to offer useful comparative perspectives on issues relevant to the Chinese participants.

²¹ It should also be noted in this context that European scholarship about or discussing, in part, the legal framework for NPOs in China is increasing. See, for example, *Markus Hippe and Knut B. Pissler* (Germany), *Einführung in das neue Stiftungsrecht der VR China*, 4 *Zeitschrift fuer Chinesisches Recht* 341 (2004); *Julia Greenwood Bentley* (Canada), *Survival Strategies for Civil Society Organizations in China*, in *IJNL*, available at www.icnl.org; and *CASIN* (Switzerland), *Non-governmental Organizations in China*, Second Draft, March 2005, available at <http://www.casin.ch/web/pdf/chinadraft2.pdf> (this last is based on secondary resources and is not up-to-date).

²² For a discussion of some of these, see *International Journal Of Civil Society Law* staff, *United States Update*, 2 *International Journal of Civil Society Law* 3, at 123 (October 2004), available at www.law.cua.edu/students/orgs/ijcsl/.

²³ Earlier papers of the author about China and/or placing the legal framework for Chinese NPOs in comparative perspective include: *ICNL*, *Social Organizations in China*, *supra* note 5; *Leon E. Irish & Karla W. Simon*, *Economic Growth, Transition, and Reform in China: The Role of the Legal and Regulatory Environment for NPOs*, presented at the Tsinghua conference, and published in the book of conference proceedings, *op. cit.*, *supra* note 3, at 101; *NPO Regulation in East and Southeast Asia*, presented at the Shanghai conference, *supra* note 9, and later published in *Thailand Law Forum*, available at <http://members.tripod.com/asialaw/articles/ngo.html>; *Karla W. Simon & Leon E. Irish*, *The Right to Freedom of Association and Its Application in China*, presented at CASS seminar, 2003; *Legal Relationships Between the State and Not-for-Profit Organizations: A Focus on Scientific Research Organizations in the United States in Symposium on China's Public Institutions: Retrospect and Prospects*, 2 *International Journal of Civil Society Law* 66 (January 2004); available at www.law.cua.edu/students/orgs/ijcsl/ (paper presented at the MOST/MOF conference, *supra* note 13); *Karla W. Simon & Qi Hong*, *Current Issues in the Regulation of Civil Society in China*, presented at the International Society for Third Sector Research (ISTR) Asia Pacific Regional Conference, held in Beijing in 2003 (on file with the author); *Creating an Enabling Legal Environment for Chinese NPOs*, Testimony before the Congressional-Executive Commission on

one of the most critical issues in China today – the way in which the “privatization”²⁵ of public institutions, such as schools, hospitals, museums, etc., should be integrated into the reform of the legal environment for NPOs in China. By “privatization” I do not mean that the public institutions will necessarily become profit-making bodies. What I mean, more generally, is that they will no longer be state institutions.²⁶

China (CECC), available at www.cecc.gov/pages/roundtables/032403/Simon.php; and Tax Report, *supra* note 14.

This paper does not address at all or in any detail various ancillary regulations concerning the NPO sector in China, such as the Public Welfare Donations Law (PWDL) of 1999, the Trust Law of 2001 (which includes provisions for charitable trusts), the regulations concerning foreign chambers of commerce, trade associations, farmers' associations, etc. Nor does it consider the Law on the Red Cross Society (<http://www.humanrights.cn/zt/Philanthropy/200312003123191914.htm>), the Law on Assemblies, Processions, and Demonstrations, promulgated on October 31, 1989 (<http://www.humanrights-china.org/zt/03102410/2003120031127111557.htm>), or the recent regulations on Religious Organizations (see *infra* note 65). The PWDL is analyzed in the Tax Report, *supra*, note 14.

A comprehensive analysis of all the legislation affecting Chinese civil society and placing it in historical and comparative perspective is underway by the author and co-researchers in connection with a book on the legal and fiscal framework for civil society organizations (CSOs) in China, of which this paper is a part.

²⁵ Earlier work was done on similar issues by the author and her colleague, Dr. Leon Irish, in other contexts. See, for example, *Karla W. Simon*, *Privatization of Social and Cultural Services in Central and Eastern Europe: Comparative Experiences*, 13 *Boston University International Law Journal* 383 (1995). Dr. Irish worked on the issues in connection with the World Bank's "Social Sector Privatization Project" for Mongolia in 1997. Documents developed for that project may be useful as the process of reform of China's public institutions proceeds, including the documentation for the model project for privatization of the Institute of Finance and Economics. These papers are on file with ICCSL.

As of 2003, however, the Institute remained a state-owned institution. See Mongolia entry of the Educational Advising a Resource Center, available at http://www.worldbank.org/wbi/governance/pdf/china1103_agenda.pdf. Evidently, however, the Government of Mongolia has proceeded with "social sector privatizations," and the Open Society Institute/Open Society Forum has conducted a study of the results, which was presented at a conference held in June 2004. See description of the meeting at http://www.soros.org/mn/show_events.php?what=detail&EID=88. An analysis of the legal process of reform of the cultural institutions in Mongolia that came out of this project can be found at http://www.opensocietyforum.mn/res_mat/Art%20&%20Culture_final_eng.pdf. The other case study, on reform of educational institutions, is only available in Russian and Mongolian and is available at <http://www.opensocietyforum.mn/index.php?tid=458&show=abstract&cid=97>.

²⁶ This has often been called China's "biggest reform challenge." See, e.g., *infra* note 31. It will certainly be a major milestone in the efforts to transform government and social service functions from the economic construction model of the past to a modern public service model.

This topic is of paramount concern as the processes of administrative and public service reform proceed in China. Unfortunately, however, it appears that the administrative and public service reforms are not being adequately linked to the process of legal reform for NPOs.²⁷ This paper aims to address that nexus, and it draws on earlier work on the legal issues done by the author, Prof. Ge Yunsong,²⁸ and others who presented papers at the International Symposium on Reform of China's Public Institutions and Development of China's Nonprofit Organizations, held in Beijing in November 2003.²⁹ It also draws on research conducted in an economics context by the World Bank,³⁰ the OECD, and the National Development and Reform Commission (NDRC).³¹

II. Concept of the Paper

This paper considers the relationship between the crucial reforms of the legal environment for public institutions and for NPOs in the hope that greater attention to the details concerning the process of transforming public institutions into NPOs will avoid some of the potential problems. There are four reasons why this topic is in need of critical attention at the present time.

First, it is clear that public institution reform may result in enormous social and economic dislocations with unforeseen consequences. Important public assets may be squandered, many public sector jobs will be lost,³² pensions may disap-

pear,³³ with the potential for wide social unrest.³⁴ Not only are these practical social issues, they also have a strong political component.

Second, without thinking through the manner in which the NPO sector is regulated as some of the public institutions become NPOs, there may be damage to the NPO sector as a whole because of possible corruption,³⁵ including favoritism and "parachuting" of public officials into NPOs,³⁶ growing confusion of NPOs with profit-making entities,³⁷ lack of accountability and transparency of NPO operations,³⁸ etc. Such outcomes could easily reduce the capacity of the sector to play needed social and economic roles in China, thus assisting the government to relieve some of the stresses caused by public institution reform.

The third reason these issues need to be addressed at this juncture is because of current developments in writing a modern Civil Code for China. China is a country whose legal system is based in the civil law;³⁹ it has been dominated by a

²⁷ See papers presented at the MOST/MOF conference and published in International Journal of Civil Society Law and referenced at note 13, *supra*.

²⁸ Associate Professor of Law, Peking University Law School and Member of the Faculty, NPO Law Center. See *Ge Yunsong*, Nonprofit Organizations and the Reform of China's Public Institutions, 2 International Journal of Civil Society Law 1, at 27 (January 2004), available at www.law.cua.edu/students/orgs/ijcs/. Prof. Ge and the author will be team-teaching (with the assistance of Prof. Leon Irish of Central European University) the first Comparative NPO Law course at Peking University in the fall of 2005 (this is, incidentally, the first course of its type ever to be taught in Asia!)

²⁹ MOST/MOF conference, referenced at note 13, *supra*.

³⁰ See unpublished World Bank papers, on file with the author. The World Bank expects to publish a formal report in June, 2005.

³¹ An International Seminar on International Experience with Public Service Reform and China's PSU Reform, was held in Beijing in March 2004, under the joint sponsorship of NDRC, the OECD and the World Bank. See *Lan Xinzhen*, China's Biggest Reform Challenge, in March 2004 Beijing Review, No. 18, available at [http://www.bjreview.com.cn/200418/Cover-200418\(A\).htm](http://www.bjreview.com.cn/200418/Cover-200418(A).htm). Attendees at the Beida Forum talked about the seminar, saying that the proceedings disclosed that the three agencies have differing view about how PSU reform should proceed. See notes on file with the author.

³² The *shiyue danwei* reforms announced in November 2004 and underway in Shenzhen, for example, will require the employees of public institutions to sign five-year employment contracts, and they will be eligible for retirement seven years earlier than when they were cadres with lifetime employment contracts. See People's Daily online at http://english.people.com.cn/200411/12/eng20041112_163712.html.

³³ This issue has been highlighted in the Chinese English language press; see People's Daily online at http://english.people.com.cn/200301/08/eng20030108_109712.shtml; http://english.people.com.cn/200301/06/eng20030106_109611.shtml.

³⁴ For China Daily's take on some of the issues see Public Institutions Need Reform, available at http://www.chinadaily.com.cn/chinagate/doc/2004-05/10/content_329354.htm.

³⁵ This aspect of public institution reform was stressed at the 2003 Conference on Public Service Reform and Good Governance, sponsored by the German Agency for Technical Cooperation (GTZ) and the China Institute for Reform and Development (CIRD); see synopsis at http://www.worldbank.org/wbi/governance/pdf/china1103_agenda.pdf.

³⁶ This is a real issue in China - when the author first visited NPOs in China in 1996, the large NPOs (e.g., the Foundation for Underdeveloped Regions, the China Youth Development Foundation, the China Charity Federation, and the Soong Qing Ling Foundation) had as directors only former public officials in related government agencies. Notes of meetings on file with the author. It is also a relevant issue in other Asian countries, such as Japan, where the separation between the NPO sector and the state is not as well-developed as in the United States, for example. See *Ken'ichi Komagata* and *Ayumi Kubo*, staff members of the Management Office, Ministry of Internal Affairs and Communications (MIC), Report to High Level Vietnamese Delegation to Japan, January 2005, on file with the author.

³⁷ This issue is discussed in detail in the Tax Report, *supra* note 14.

³⁸ The existing regulations for all NPOs are remarkably weak on public accountability and transparency; this is probably a result of history and can be expected to change as the regulations are modified to reflect the modern Chinese government's attitude toward public access to information (see *Jamie P. Horsley*, China's Pioneering Foray Into Open Government, posted at <http://www.freedominfo.org/news/guangzhou/> on July 14, 2003). Work is also being done by the China NPO Network, founded by Shan Yusheng, to develop a Code of Conduct for NPOs that stresses these issues. See the website at <http://www.npo.com.cn/EINDEX.HTM>.

³⁹ After the fall of the Qing Dynasty and during the warlord and Republic of China periods (1912-1949), the systematic development of legislation for the country placed China firmly in the civil law tradition. Since the establishment of the People's Republic of China in 1949, however, the socialist legal system, which abolished private property, made the traditional civil code only partially acceptable in China. With the advent of the constitutional acceptance of private property in 2004, it is expected that the new Civil Code of China will more fully conform to the common civil law structure.

socialist legal system since 1949, when the People's Republic of China was declared. Although the first draft of the new Civil Code was introduced in the National People's Congress in 2002, it is a long way from being complete. Work on it is progressing, and, as it does, definitions of the types of legal persons to be permitted under the Code will continue to be discussed. Rules to take account of the enormous changes in the social and economic conditions in China will be addressed in the Civil Code – what types of legal persons are provided for and what the relationships among them will be is only one of the many issues that need to be addressed. It is, however, a very important one. As the assets and personnel of China's public institutions are moved out of the government sector and into independent, private bodies, the effects on service delivery and human resources are difficult to predict. The new Civil Code should be able to take account of at least of some of these aspects of the reforms in the subchapter on "Legal Persons." Other aspects will need to be dealt with in administrative law, procurement law, and other legal reforms, which are discussed in Part III of the paper.

Fourth, the enormous size of the public institution sector in China, and the effects that may have on the structure of the NPO sector if a substantial portion of those organizations become NPOs, should be given attention. A paper published by the "Project Team on 'Reform of China's Public Institutions and Development of China's Non-profit Organizations' of the National Research Center for Science and Technology for Development (NRCSTD) of the Ministry of Science and Technology" in 2004 describes the size and importance of the public institution sector:

In the context of social functions, the public institution is a major organizational provider of China's public goods, playing a major role in sectors such as S&T, education, culture, health, and sports and becoming the major and sometimes the only provider of relevant public services in those areas. When looking at the scale of public institutions in China, the statistics published by the authorities of personnel affairs show that as of the end of 2001, there were more than 1,120,000 public institutions of different types in the country, with an employee population of 25.5 million. The employees of the public institutions who make their living from government financial appropriations have consti-

tuted the mainstream of the personnel working in public service provision.⁴⁰

At the present time – the first half of 2005 – the public service institution sector has grown to 1.3 million institutions, with over 34 million employees!⁴¹ This by far exceeds the size of the current NPO sector, which is estimated at some 260,000 institutions registered with the national office of the NPO Affairs Bureau of the Ministry of Civil Affairs, and some 600,000 to 800,000 NPOs registered nationwide.⁴² Making even a portion of the current public institutions into NPOs will vastly increase the number of NPOs that are subject to regulation by the NPO Bureau and its regional offices, including offices in provinces (*sheng*), semi-autonomous regions (*zizhiqu*), special administrative regions (*tebie xingzheng qu*), and directly administered municipalities (*zhixia shi*). And if public institution reform does not go hand in hand with NPO law reform, the success of the current regulatory scheme for NPOs will be placed in serious jeopardy.

III. The Legal Landscape for NPOs in China

1. Background of NPO regulation in civil law countries.

In civil law countries, the legal system has traditionally⁴³ recognized two types of private, voluntary NPOs, which are seen as being distinct from public institutions, on the one hand, and private commercial organizations (corporations of all types, partner-

⁴⁰ See Reform of China's Public Institutions – Retrospect and Prospects, 2 International Journal of Civil Society Law 1, at 7 (January 2004), available at www.law.cua.edu/students/orgs/ijcsl/ (paper presented at the MOST/MOF conference, *supra*, note 13).

⁴¹ Statistics mentioned at the Beida Forum by various speakers.

⁴² In her presentation at a Marco Polo Society/World Bank/IMF meeting in Washington, DC, on 25 April 2005, Dr. Zhuang Ailing, Executive Director of Shanghai's NPO Development Center, referred to the total number of NPOs registered nationally as being between 630,000 and 830,000. See www.marcopolosociety.org.

The number of registered versus unregistered NPOs was debated at the Beida Forum – Mr. Li Ximiao, a high-ranking official of MOCA in Gansu Province estimated that only 8 % to 13 % of NPOs operating in Gansu have been registered. See conference notes, on file with the author.

On the other hand, The Asian Times carried a story reporting that on 21 March 2005 the government stated that all NPOs registered with the Industrial and Commercial Bureaus (ICBs), must now register with MOCA. The extent to which this order will be effective remains to be seen. One prominent foreign foundation, the Ford Foundation, which is registered with the ICB, reported that it is having difficulty re-registering under the 2004 Foundation Regulations (see *infra* text at notes 91-94) because MOCA has simply not set up adequate processes for registration. Notes of interview with Andrew Watson, on file with the author.

⁴³The Code of Justinian, *Corpus Juris Civilis*, which began being published in April 529, is available online at <http://www.constitution.org/sps/sps.htm>. Despite these beginnings in Roman Law, the French Revolution was a serious set-back for "legal persons" organized within the tradition of the Code Napoléon. See note 49, *infra*.

ships, etc.), on the other. Some of the NPOs carry out activities for the benefit of their members, while others carry out activities for public benefit.⁴⁴ The two traditional types of NPO recognized in the civil law are:

- organizations of persons (individuals), typically called "associations;" and
- organizations involving the dedication of material resources, typically called "foundations."

In the civil codes of most civil law countries in the German tradition,⁴⁵ the chapter on persons or persons and family includes a subchapter on legal or juridical persons.⁴⁶ It is in this subchapter of a civil code where the division into two not-for-profit legal forms is found, although certain civil law countries now recognize additional forms in the not-for-profit sphere, such as public benefit or noncommercial companies.⁴⁷ In addition to setting

out the general rules on types of legal persons, the "legal persons" subchapter of a country's civil code also typically sets out specifics with respect to each type of organization provided for, such as the method of establishment, governance structures, and procedures for termination, etc.⁴⁸ As indicated above, the traditional typology of private juridical entities operating for noncommercial purposes has its roots in Roman Law – associations were called *universitas personarum* and foundations were called *universitas rerum* or *bonarum* -- and they have existed in many⁴⁹ civil law countries since the time of the Code of Justinian.

2. Influence of socialism on the development of NPO regulations in China – the early days.

In countries that have or have had a socialist legal system, the typology of legal persons is a bit more complicated than in other countries. Because of the ideology of strong state control of all forms of activity, evolving civil codes in socialist and post-socialist legal systems have had to pay considerable attention to properly delineating between the public and private spheres.⁵¹ In China the effort at

⁴⁴ The recognition in the Western legal traditions, including the Islamic tradition and the *wakf*, that there are institutions in the private sphere conducting activities for public benefit is in part related to the role of religion in the secular state. See generally, H. Patrick Glenn, *Legal traditions of the world* (Oxford, 2000). On the other hand, as recognition of these types of entities began under Roman law, it suggests even earlier origins of thinking on the subject of not-for-profit legal forms organized to provide public services. This is an under-researched area of legal scholarship. But see *JIA Xijin*, Property Rights in Public Goods and the Governance of Foundations, 2 *International Journal of Civil Society Law* 2, at 74 (April 2004), available at www.law.cua.edu/students/orgs/ijcsl/, which refers to Plato's Academy as a fore-runner of modern endowed foundations.

⁴⁵ Like other East Asian countries (e.g., Japan and the Republic of Korea), the Chinese civil law tradition appears to be more influenced by the German Civil Code than the French Civil Code. The pre-Revolution Civil Code of China, introduced during the late Qing Dynasty (which now is in force in Taiwan) was based on the German Civil Code of 1900. See generally, *Yin-Ching Chen*, Civil Law Development: China and Taiwan, 2 *Stanford Journal of East Asian Affairs* 8 (2002), available at <http://www.stanford.edu/group/sjeaa/journal2/china1.pdf>.

⁴⁶ In the German Civil Code, for example, the First or General Part includes a sub-chapter on juridical persons. See *Bürgerliches Gesetzbuch* (BGB), Erstes Buch: Allgemeiner Teil; Erster Abschnitt: Personen; Zweiter Titel: Juristische Personen.

⁴⁷ In countries of Central and Eastern Europe, for example, there may be one or more additional legal forms, such as public benefit companies (Czech Republic, Hungary, Slovakia); in Russia and other countries of the former Soviet Union, the number of legal forms has expanded dramatically. In Japan, there are currently eight forms of NPO related to the Civil Code, along with charitable trusts, which are provided for in separate legislation. The principal Civil Code provisions (Article 34) for not-for-profit, public benefit legal persons (*koeki hojin*) are undergoing revision at the present time. It is expected that the proposed reforms will establish a new form of "general nonprofit organization (GNPO)," which can be set up without permission from relevant government authorities. GNPOs will be divided into two forms – associations and foundations – and public benefit status will be decided by a "Public Benefit Commission." See December 24, 2004 Cabinet Decision, which addresses the *koeki hojin* reform process and establishes the agenda for law reform in 2005-06, published in 3 *International Journal of Civil Society Law* 1, at 90 (January 2005), and available at <http://www.law.cua.edu/students/orgs/International Journal of Civil Society Law/cabinet.pdf>.

It is also worth noting that in the Kingdom of Cambodia, where the Civil Code is also under revision at present (with technical assistance from Japan) the proposed subchapter on legal persons provides for both associations and foundations; within the class of associations, both

limited liability and unlimited liability associations will be permitted. This additional wrinkle on sub-classes of NPOs is not further explored in this paper, though it is interesting to note. See <http://www.iccl.or.jp/english/index.html> for the English text of the proposed Civil Code. See also, ICCSL, Briefing Note on Cambodia, April 2005, on file with the author.

⁴⁸ These details may also be provided in separate laws as in Germany, for example, where there is a separate national law on associations (*Vereinsgesetz*) and individual laws on foundations (*Stiftungen*) in the various states (*Länder*). A description of the legal framework for NPOs in Germany can be found in an article by *Michael Ernst-Pörksen*, Basic Conditions of Corporate Law & Tax Legislation Affecting the Third Sector in Germany, 2 *International Journal of Civil Society Law* 4, at 17 (October 2003), available at www.law.cua.edu/students/orgs/ijcsl/.

⁴⁹ In France the acceptance of this traditional typology of not-for-profit legal persons was swept away by the French Revolution, whose theory vested power in the people in a unified and majoritarian state. Thus, it was not until the *Loi d'Association* was promulgated in 1901 that France recognized the association form. And it was not until the late 20th century that the foundation form came back into general use. See *France Country Note*, available at www.usig.org. Many countries, including former French colonies, were influenced by these developments in France (e.g., Uruguay, whose lack of foundation legislation was noted at the time a draft bill was submitted to the Parliament in 1995; <http://icd.org.uy/philanthropy/stories/foundations1.html>).

⁵¹ In Viet Nam, for example, the current and proposed Civil Code provisions for legal persons differentiate among six different types, including state agencies, political organizations, economic organizations, and two types of NPOs that largely fit within the traditional civil law typology. See *Civil Code of Vietnam*, Article 110 and proposed *Civil Code*, Article 86. See ICCSL, *New Civil Code Rules for Viet Nam*, Rules for Not-for-Profit Legal Persons, in 3 *International Journal of Civil Society Law* 2, at 126 (April 2005), available at www.law.cua.edu/students/orgs/ijcsl/.

modernizing a socialist approach to legal forms has taken place against the backdrop of profound social and economic change, initiated by Deng Xiaoping in 1978. Like many socialist and formerly socialist countries,⁵² China has undertaken an exploration of how to fit its understanding of the role and purpose of private entities with public benefit purposes into a modern legal system, which recognizes private entities with both commercial and noncommercial purposes. The current discussion of the proper way to regulate NPOs takes place against a background of theoretical discussions of devolved versus delegated public service responsibilities. As Sun Weilin, the current Director General of the NPO Affairs Bureau said at the Beida Forum, separating NPOs from the government is difficult in China precisely because of China's history and the evolution of the Marxist-Leninist-Mao Zedong-Deng Xiaoping schools of thought about the role of the state.⁵³

Historically, the regulation of NPOs in post-Revolution China began in 1950, with the promulgation of the "Provisional Measures on the Registration of Social Organizations" (SOs) (*shetuan* or *shhui tuanti*), which was adopted by the Ministry of the Interior on October 19, 1950.⁵⁴ At that time, registered social organizations included the following:

- Mass organizations engaged in social activities, including the Trade Union, the Peasants' Union, the Federation of Industry and Commerce, the Women's Federation, and the Youth League;
- Organizations for public services, such as the China Welfare Association and the Red Cross;
- Art and literature groups, such as the Art and Literature Association and the Theater and Drama Association;
- Academic research organizations, including such professional organizations as the Medicine Association and the Social Sciences Workers' Association;

⁵² In formerly socialist countries in Central and Eastern Europe there has been considerable activity along these lines. For many of those countries reversion to the simple two type structure for NPOs that is found in the older civil code systems has seemed impractical and imprecise. See *supra*, note 47, and *Petr Jan Pajas, Reform of Public Institutions in the Czech Republic*, 2 *International Journal of Civil Society Law* 1, at 41 (January 2004), available at [www.law.cua.edu/students/orgs/International Journal of Civil Society Law/](http://www.law.cua.edu/students/orgs/International%20Journal%20of%20Civil%20Society%20Law/).

⁵³ See notes of Sun Weilin speech at the Beida Forum, on file with the author.

⁵⁴ This regulation was published by the State Council in 1982. See *infra* note 55. There also appear to be detailed rules on SOs promulgated by the State Council in 1951, which are referred to in the Report of the PKU NPO Law Research Team submitted to the Beida Forum, but these have not been located as of this writing. See notes on file with the author.

- Religious organizations, such as Christian and Buddhist groups; and
- All other social organizations recognized by law.⁵⁵

At that time, many former independent organizations were simply absorbed by the state and the party. An example of such an instance can be found in the 1994 Report of the Committee on U.S.-China Relations.⁵⁶ The Hwa Nan Women's College in Fujian Province, an independent institution from the early part of the 20th Century forward, was merged with several other educational institutions in 1951 to form the Fujian Teachers' University.⁵⁷

Between 1950, when the first rudimentary regulation on SOs was adopted, and the late 1980's when the General Principles of the Civil Law of the PRC (GPCL) (1986) and the first national regulations on foundations were promulgated (1988),⁵⁸ all NPOs were in reality entirely part of the state and the party, with varying degrees of development in the sector, depending on the political situation and the time period.⁵⁹ In other words, during the period between 1950 and the late 1980's there was a firm belief in China that social organizations simply "belonged to" the state and the party, and as such, they needed no independent existence or separate regulatory framework.

Nevertheless, some progress in making the legal differentiation between SOs, on the one hand, and public and party organs, on the other, began in the late 1970's. To accommodate the recognition of SOs as slightly separate from the public institutions and state and party organs, the Department of Social Organizations (*Shetuan Si*) was initiated in 1977-78

⁵⁵ Provisional Measures for the Registration of Social Organizations (*Shhui tuanti dengji zanzing banfa*) promulgated by the State Council on September 29, 1950, Chinese in: Legal System Commission of the Central People's Government (editor) (*Zhongyang Renmin Zhengfu Fazhi Weiyuanhui bian*), Collection of Laws and Orders of the Central People's Government 1949-1950 (*Zhongyang Renmin Zhengfu Fa Ling Huibian 1949-1950*), Beijing 1982, p.159-158 (hereinafter 1950 *Shetuan Regulations*). See also *Zhang Ye, China's Emerging Civil Society*, available at http://www.oycf.org/Perspectives/22_093003/2b.pdf.

⁵⁶ See U.S.-China Relations Report, *supra* note 7.

⁵⁷ *Id.*, at 17, citing "The written history of Hwa Nan provided [to] our delegation...." See also *Zhang Ye, supra* note 55, where she states that all the NPOs that had been not only independent, but also to some extent encouraged by Mao Zedong prior to the Revolution, were absorbed within the state and party structures beginning in 1949.

⁵⁸ The not-entirely-cynical explanation for the decision to first issue regulations on foundations and not associations can be sourced to the fact that the Chinese government saw foundations as a way to raise funds from the patriotic (and rich) overseas Chinese to support economic and social development projects in China. See *Richard Estes, op. cit.*, *supra* note 8.

⁵⁹ *Zhang Ye* describes the years of China's Cultural Revolution as ones in which there was no NPO development whatsoever. See *Zang Ye, op. cit.*, *supra* note 55.

within the Ministry of Civil Affairs.⁶⁰ Although significant state control of the sector persisted, that can be seen as the beginning of the differentiation between state organs and public institutions and NPOs in post-Cultural Revolution China.⁶¹ Similarly, although there were no new national-level regulations for NPOs in this period, Beijing, Guangzhou, and Shanghai all developed and implemented local regulations, which were seen as “experiments which are intended to guide the formation of national regulations.”⁶²

From a legal standpoint, the exploration of the relationship between public service-providing NPOs and the state began in earnest in the mid to late 1980's, shortly after the Deng Xiaoping era reforms of the for-profit sector were initiated. The first step was the adoption of the GPCL, which was enacted in 1986, effective beginning January 1, 1987.⁶³ The chapter on legal persons of the GPCL divided legal persons (or juridical entities) into four categories:

- enterprises,
- government organs (*jiguan*),
- public institutions (*shiyi danwei*), and
- social organizations (*shetuan* or *shehui tuanti*).

Section Two of the legal persons chapter sets out the rules applicable to enterprises (regarding establishment, governance, dissolution, etc.), and these general rules were originally applicable only to state-owned enterprises (SOEs). It was not until a constitutional amendment in 1988 that the idea of private enterprise by Chinese citizens was officially sanctioned.⁶⁴ The GPCL presages that development

in providing the first recognition of a legal scope for private activities – either commercial or non-commercial -- in socialist China.

Unlike commercial organizations, social organizations were not given a separate place in the GPCL. They are placed in Section Three, along with government organs and public institutions. The division between the commercial sphere, on the one hand, and the noncommercial sphere, on the other, in the GPCL was progressive, but it still neglected to address certain issues with respect to legal persons in the same manner as both ancient and modern civil codes of other countries. Because government organs, public institutions, and SOs were all grouped together by the GPCL to form a category of noncommercial organizations, they are all treated as part of the same noncommercial sphere, which provides “public” goods, as opposed to the “private” goods created in the commercial sphere. By naming them separately, the GPCL recognizes that there are differences inherent in the three types of entities, but it does not differentiate effectively among them in terms of how they should function in their provision of public goods.⁶⁵ The following discussion looks into the differences among them as they were described in the GPCL in 1986.

The term “government organs” in the GPCL is understood to refer to the national government and local governments, while “public institutions” (*shiyi danwei*) refers to organizations providing operational functions in all public service fields, including education, research, health, social welfare, sports, arts and culture, etc. “Public institutions” are thus public service agencies, such as public universities

⁶⁰ Id.

⁶¹ In 1979, a period of extensive legal reform began, which coincided with the economic reforms initiated by Deng Xiaoping. See generally, Donald C. Clarke, China, on the University of Washington, Asian Law Center website.

⁶² See U.S.-China Relations Report, supra note 7, at 12, quoting from Susan Whiting, The Nongovernmental Sector in China: A Preliminary Report (Ford Foundation Beijing, 1989), at 10.

⁶³ See generally, Yin-Ching Chen, op. cit., supra note 45.

⁶⁴ The First Session of the Seventh National People's Congress (NPC) in 1988 approved amendments to Article 11 of the Constitution, which state that “The state permits private economy to exist and grow within the limits prescribed by law;” and according to which a non-public economy is “a complement to the socialist public economy.” The amendments lifted the ban on leases of land-use rights and the revisions established the legal status of the private economy and the country's new land-use rights system.

⁶⁵ This is probably related to the historical developments in China after the revolution, as discussed by Sun Wei Lin in his speech at the Beida Forum, supra note 53. Disengaging SOs from state and party control was clearly not easy, and Susan Whiting noted in 1989 that even the regulators had no clear idea of the way to differentiate among them. “According to the State Council Legislative Affairs Bureau, there exists no agreed upon legal definition of social organizations, and debates continue on even the broad categories to be included [in the definition]. See Susan Whiting, op. cit., at 9, supra note 62.

It should also be noted that religious institutions, which also provide public goods, are regulated quite separately from SOs. The Religious Affairs Bureau, also known as the State Administration for Religious Affairs, reports directly to the State Council. See <http://english.people.com.cn/data/organs/statecouncil.shtml#Administration>. For an example of the “public goods” created by religious organizations in China, a recent People's Daily story says that Chinese religious communities contributed some US \$1.35 million to aid victims of the December 2004 tsunami in South Asia. http://english.people.com.cn/200502/08/eng20050208_173300.html.

For recent analysis of the 2004 Regulations on Religious Organizations, which describes them as “comprehensive and transparent,” see Carol Lee Hamrin, New State Regulations on Religion: The Bargaining Begins, testimony before the Congressional Executive Commission on China's panel on China's New Regulation on Religious Affairs: A Paradigm Shift?, held 14 March 2005 and available at <http://www.cecc.gov/pages/roundtables/031405/Hamrin.php>.

and public hospitals, as distinguished, for example, from the local education or health departments.⁶⁶ Public institutions in China have been said to be "the major organizational provider of the public services (*shehui shiye*)." ⁶⁷ Nevertheless, *shetuan* themselves began being established by the government and public institutions in the 1980's to carry out government purposes and activities, in particular by providing services to the public.⁶⁸ How the three types of entities were supposed to divide up their activities to meet similar responsibilities to the public did not receive much clarification until the later 1990's. In addition, both the GPCL and the current literature suggest that not only were *shiye danwei* delegated service-providing functions by the state during the period after the Cultural Revolution, they were also given administrative functions that would ordinarily be performed by state organs.⁶⁹ There is no evidence that SOs were asked to perform such functions, but it is clear that they worked alongside the *shiye danwei* in service provision.⁷⁰

After the adoption of the GPCL, regulations were promulgated by the State Council in 1988 and 1989, which dealt with the registration and management of two types of NPOs - associations (SOs) (1989) and foundations (*jijinhui*) (1988),⁷³ albeit with

rather stringent government control and oversight.⁷⁴ These regulations set out in great detail the manner in which the state could found SOs, but they did not permit citizens to come together on their own to found SOs - this innovation was not made until 1998.⁷⁵ At the time of the promulgation of the 1989 SO regulations, a "dual management" process was carried forward from the 1950 regulations,⁷⁶ with organizations being required to have a so-called "mother-in-law" or sponsor organization (*yewu zhuguan bumen*) to assist the Ministry of Civil Affairs in the establishment and oversight of all NPOs.⁷⁷ For foundations, the establishment and oversight process not only required dual management, but included a third agency -- the People's Bank of China played a significant role in establishing and overseeing foundations from 1988 to 1999.⁷⁸

At the same time as SOs and foundations were being set up by the state, and coming into being pursuant to the regulations of the late 1980's,⁷⁹ the

⁶⁶ The *shiye danwei* institutions are referred to as public service units (PSUs) by some authors, (see *supra*, note 1). Private or civil institutions (*minban fei qiye danwei*), such as private schools, have only been recognized since the 1990's; they should not be confused with *shiye danwei*. See text at notes 84-87, *supra*.

⁶⁷ See Reform of China's Public Service Institutions, *supra* note 13.

⁶⁸ Some organizations, such as the China Youth Development Foundation are direct offshoots of mass organizations (e.g., the All-China Youth Federation). Some of the organizations also received considerable non-government funding, including funding from ordinary Chinese citizens, overseas Chinese, and foreign donors. The 1994 Report of the Committee on U.S.-China Relations talks about entities existing prior to 1994 that were "dependent on funds collected from society." See U.S.-China Relations Report, *supra* note 7, at 8-9. Some organizations, on the other hand, had clear government support, including the carry-over of all "rice bowl" welfare systems from the ministries that founded them for all the employees of the NPO.

⁶⁹ See Reform of China's Public Institutions, *supra* note 13.

⁷⁰ There has been, for example, a tradition of appointing the retiring Vice Minister or Minister of Civil Affairs to be the Director General of the China Charity Federation (CCF). Yan Mingfu is the most notable recent example, and he became a strong advocate for civil society once he went to CCF. See, e.g., Yan Mingfu, Preface, *The Nonprofit Sector and Development*, *op. cit.*, *supra*, note 3, where he notes that "a substantial change will take place in the relationship between NPOs and the government in China, where the present dependent and supplementary relationship will gradually give way to cooperative partnership."

⁷³ Although no mention of this type of organization is made in the GPCL, it was well-accepted as a means to obtain contributions and other support from overseas Chinese. See Karla W. Simon and Qi Hong, *op. cit.*, *supra* note 23.

⁷⁴ A lengthy discussion of the 1988/89 regulations can be found in *Xin Chunying* and *Zhang Ye*, "China" in T. Silk (ed.), *Philanthropy and Law in Asia: A Comparative Study of the Nonprofit Legal Systems in Ten Asia Pacific Societies*, p.85 (San Francisco: Jossey-Bass Publishers, 1999); available at <http://www.asianphilanthropy.org/pdfs/j0318.pdf>.

⁷⁵ See Article 10 of the 1998 SO regulations, allowing 50 citizens to form an SO. Both Yan Mingfu and Ge Yunsong have criticized the high entry barrier created by this requirement. See Yan Mingfu, *op. cit.*, *supra* note 70, noting how few citizen-led organizations there were in China in 1999. See also Ge Yunsong, *On the Establishment of Social Organizations under Chinese Law*, http://www.icnl.org/journal/vol2iss3/ar_chinalaw.htm (2000). According to Prof. GE, "As to the reason why the Regulations require such a large number, officials of the departments of State Council who drafted the Regulations explained, 'if a social organization has too few members, it can't be representative.' In my point of view, social organizations are established voluntarily by individuals and organizations to fulfill their common desires. Apart from this, they need not represent anything. Only under some special circumstances may public policy require a social organization to have a representative membership, such as trade unions and chambers of commerce." (footnote omitted).

⁷⁶ See Article 6, 1950 *Shetuan* Regulations, *supra* note 55.

⁷⁷ Recent commentators complain that dual management is making it difficult to establish NPOs in China, because many line ministries or local agencies do not want to take on the responsibility for the NPOs. See comments of Li Xinmiao, MOCA official from Gansu province, *supra* note 41.

⁷⁸ See Circular of the Ministry of Civil Affairs, PRC and the People's Bank of China Concerning the Opening of Bank Accounts and Other Related Issues By Special Bodies, (No. 203, 1990). See ICNL, *Social Organizations in China*, *op. cit.*, *supra* note 5, at 5-6, recommending that the People's Bank not continue to be used for regulation of foundations. See also, Carl Minzner, *New Chinese Regulations on Foundations*, 2 *International Journal of Civil Society Law* 2, at 110 (April 2004), available at www.law.cua.edu/students/orgs/ijcsl. The People's Bank transferred its oversight power to MOCA on September 17, 1999. See YANG Yue paper, *supra* note 15.

⁷⁹ Some commentators refer to two periods of NPO growth and stages of development. For example, Deng Guosheng, refers to the "first generation" as beginning in 1995, with the fourth World Conference on Women held in Beijing, and the "second generation" coming into being after the Tsinghua conference in 1999. See Deng Guosheng, *China's NGOs: The 1st and 2nd Generations*, in *Oxfam Magazine*, 2004, No. 2, at 21. While this may be true from a sociological standpoint in reference to the NPO movements in the West, it is not as closely related to legal history in China as it should be. From a legal-historical standpoint, there are in fact four post-reform and opening up generations of NPOs,

government began to accept the notion that “private institutions” should also be permitted in China. This was a fairly radical development – it coupled the notion of private citizens forming their own legal entities with the notion that these legal entities could be outside the commercial sphere. The new “private” or “civil” institutions (*minban fei qiye danwei*) were not, however, structured as “foundations” as they might have been in Western civil law countries, even though the allowable purposes for “private institutions” are similar to those of operating foundations in the West: education, health, culture, science, etc. In contrast to German or Dutch or Japanese foundations that carry out public benefit activities (so-called “operating” foundations),⁸⁰ however, foundations in China were still not permitted to be formed by citizens or commercial entities, as they are in other civil law countries.

In the absence of any comprehensive legal guidelines in the GPCL that dealt with such hybrid entities, private institutions have until now been established by the approval of the competent government agency according to specific laws, by regulations promulgated by the State Council, by laws adopted by the NPC with respect to specific sectors, or by rules promulgated by the government oversight agency. For example, the Regulations on Private Educational Institutions (*shehui liliang banxue tiaoli*) were promulgated in 1997 by the State Council.⁸¹ They were followed in 2002 by the Law on Private Educational Institutions, which provides essentially the same rules for private schools.⁸² In addition, a crucial difference remains between certain types of institutions set up using this new legal form and similar not-for-profit legal entities in most civil law countries – a private school set up as a “private institution” in China may be owned by its founders/investors, who may be permitted to receive a “reasonable return” on their investment.⁸³

the first beginning in the late 1970's, with the establishment of the *Shetuan Si*, the second in the period of the 1986-1989 regulations, the third in the period of the 1998 regulations, and the fourth in the period of the 2004-2005 regulations, which is still in process.

⁸⁰ See *Richard Estes*, op. cit., supra note 8. In Western countries, the governance structure of private universities, schools, hospitals, museums, etc. makes them essentially institutional foundations or “operating foundations,” the entire resources of which are devoted to the activities of the foundation itself. This concept seems to be carried over into “institutions” in China.

⁸¹ This regulation does not prohibit private schools from distributing their endowments to founders or investors upon dissolution, undoubtedly on the theory that permitting private schools to have investors would raise the level of education in China. See *infra* text at note 127, for further discussion of this issue.

⁸² See Private Educational Institutions Law, 2002, downloadable in German and Chinese from www.dccjv.org; *Björn Ahl*, Das Gesetz zur Förderung privater Bildung, 6 China aktuell (2004).

⁸³ See Private Educational Institutions Law, art. 51.

More discussion of this issue can be found in Section IV of the paper.

3. Reform of the NPO regulations – moving toward more a modern legal framework

A new set of regulations aimed at distinguishing more clearly among various types of NPOs was promulgated in 1998. The government clearly intended to restructure the rules governing SOs, private institutions, and public institutions by borrowing concepts and terms used in the West to describe various kinds of NPOs⁸⁵ and by taking into account innovations in thinking about what types of legal forms would best accomplish the need for civil society involvement in social and economic development in China. Therefore, in drafting specific regulations on a broad range of private institutions (*minban fei qiye danwei*) that operate for public benefit, a new legal category of NPO, the “civil non-business institution” (CNI), was created.⁸⁶ The Temporary⁸⁷ Regulations on Registration and Administration of Civil Non-business Institutions (TRACNI) were issued by the State Council in 1998.⁸⁸ TRACNI defines CNIs as organizations providing social services in a voluntary (not-for-profit) manner. Typically known as *min fei* in China at the present time, these organizations are much like operating foundations in other civil law countries.

CNIs are not a sub-category of *shiye danwei* as that term is understood in the GPCL – they are private rather than public. This is confirmed by the Temporary Regulations on the Administration of

⁸⁵ Qiusha Ma, Associate Professor of Political Science at Oberlin College, alludes to this when she says that “The term nongovernmental organizations (NGOs) (*fei zhengfu zuzhi*) was introduced to China when Beijing prepared to host the 4th World Conference on Women of the United Nations in 1995.” See *Qiusha Ma*, The Governance of Nongovernmental Organizations in China since 1978, supra note 8.

⁸⁶ These are sometimes referred to as private non-enterprise units or PNU. See World Bank's use of the term in the 2004 conference on public institution reform, supra note 31.

⁸⁷ As can be seen from the different terminology, “regulations” are much more clearly rules that MOCA and the State Council are sure of, whereas “temporary” regulations are new and untried. It is also relevant to note that when the 2004 Foundation Regulations were under development, a set of “Draft” Regulations on the Administration of Foundations was published and widely discussed. See *YANG Yue*, op. cit., supra note 15.

⁸⁸ This is the first comprehensive regulation of “private” institutions. See *Qi Hong*, The Current Legal Framework for Voluntary and Not-for-profit Activity in China, a 2003 Update, 2 International Journal of Civil Society Law 3, at 93 (July 2003), available at www.law.cua.edu/students/orgs/ijcs1/.

Public Institutions (TRAPI), also promulgated by the State Council in 1998.⁸⁹ Those regulations define "public institutions" as owning public assets. - Therefore, the term *shiyey danwei* in the GPCL continues to mean only public bodies, while CNIs are neither public bodies nor social organizations and thus are not referred to in the GPCL. According to TRAPI and TRACNI, both CNIs and public institutions provide social services, but there are two key differences between CNIs and public institutions:

(1) "public" institutions can be established by government organs and other organizations, but cannot be established by private sector individuals or companies; CNIs, on the other hand, can be established by individuals and organizations rather than by government organs;

(2) assets of a public institution are state-owned assets, while most assets of a CNI are not.

The new Regulations on the Administration of Social Organizations (RASO) were also issued by the State Council in 1998.⁹⁰ They redefine SOs as not-for-profit associations, voluntarily consisting of Chinese citizens, and organized for common purposes.⁹¹ Since foundations are legally distinct from associations, foundations were excluded from the category of SOs after the promulgation of the 1998 regulations. Thus, the foundation legal form was in

legal limbo⁹² from the time of 1998 regulations on SOs, CNIs, and public institutions were issued until the 2004 Foundation Regulations were promulgated.⁹³

The Regulations on the Administration of Foundations (RAF)⁹⁴ were finally issued in 2004, after a long process of discussion within the government and with civil society organizations and academics.⁹⁵ These regulations complete the current legal framework for NPOs in China. Like the RASO and TRACNI rules, the RAF clearly accept the idea that organizations can be formed as a result of private initiative to carry out tasks that might once have been considered to be public tasks. Although the RAF maintain a dual control system for foundations, they nonetheless represent a big step toward greater independence of foundations from the state and the party.⁹⁶ The RAF differentiates between "private" foundations and "public" foundations, with the latter being organizations that raise funds from the public.⁹⁷ Each of these types of organizations may be founded by citizens or commercial entities. It appears from recent practice with regard to foundations that most are expected to become grant-making organizations.⁹⁸

⁹² In some sense the foundation legal form, like the CNI legal form, continues to remain in legal limbo because it is not provided for in the GPCL.

⁹³ Dr. Knut B. Pissler, a German legal scholar researching these issues (see note 1, supra), suggests that foundations continued to be registered during this period as "foundation social organization legal persons" (*jijin hui shetuan*), just as they had been before 1998. See email exchange with between the author and Dr. Pissler, April, 2005. Statistics that suggest this are available at <http://www.chinanpo.gov.cn/web/showBulletin.do?id=14703&dictionid+2202>.

⁹⁴ Chinese commentators refer to the 1988 regulations as "Measures" for the Management of Foundations (see YANG Yue, op. cit., supra note 15), while the new regulations are clearly referred to as such.

⁹⁵ The draft was put out for public comment by Chinese legal scholars and practitioners. At one of the public discussions it was noted that people in the sector were in favor of not requiring a sponsor institution for foundations; the final regulations, do, however, require a sponsor. See Carl Minzner, op. cit., supra note 77. For German speakers, the article by Markus Hippe and Knut B. Pissler cited in note 21, supra, is also excellent.

⁹⁶ A debate about the question of whether the RAF is a step forward continues to absorb legal scholars (see April 2005 email discussion between Knut B. Pissler and Lusina Ho, Associate Professor in the Law Faculty of the University of Hong Kong, in which the author participated).

⁹⁷ This usage of the terms "private" and "public" seems to be derived in part from American terminology. The term "private foundation" in the United States means an endowed, grant-making (as opposed to an operating) foundation. See Section 509 of the Internal Revenue Code. Such entities are distinguished from "public charities," which must have a certain amount of public support rather than being endowed by a single individual or members of a single family. As such, a public charity raises funds from the public, which is the distinction being drawn in China. The adoption of this terminology is, however, not entirely useful in the Chinese context and may create undue confusion.

⁹⁸ See, New regulations spur charity foundation reform, (available at www.humanrights.cn/zt/Philanthropy/20031220049295318.htm) in which it is noted that the Shanghai Charity Foundation "will change its role from project coordinator to fund manager."

⁸⁹ See Temporary Regulations on the Administration of Public Institutions (*shiyey danwei dengji guanli zanzheng tiaoli*) (TRAPI). They define "public institution" as "an organization whose nature consists of the provision of social services, established by governmental agencies or other organizations with the state-owned assets, working for public good activities, such as education, S&T, culture, and health." As a matter of fact, the current concept of "public institution" is broader than the definition in the 1998 TRAPI because it now embraces some organizations that are engaged in profitable economic activities in addition to performing public service and governmental administrative functions. TRAPI was also slightly amended on June 26, 2004, but not in any way relevant to this paper.

⁹⁰ See State Council, Regulations on the Management of Social Organizations (November 1998).

⁹¹ The revised RASO does not change the "dual management" system for SOs, which was adopted by the 1950 and 1989 regulations. Furthermore, it provides concrete requirements for the minimum capital (100,000 RMB for national associations and 30,000 RMB for local associations) and minimum membership (50 individuals or 30 juridical entities) for the establishment of an SO. All of this means that private social organizations cannot be easily established under the revised RASO. See GE Yunsong, op. cit., supra note 75.

Recent discussions with the NPO Bureau of the Ministry of Civil Affairs have disclosed that it has reduced, on a trial basis, the minimum capital requirement to 1,000 RMB, to permit community-based organizations to come more easily into existence. See notes of conversation with LI Yong, Deputy Secretary General of NPO Affairs Bureau, 2004, on file with the author. Others suggested at the Beida Forum, that it would be useful to relax these requirements. For example, Meng Guanghua, a retired cadre from Xinjiang, spoke eloquently at the Beida Forum about the fact that his NPO (which promotes rehabilitation for mentally disabled children) is not registered because the registration process is too arduous. Notes of comments at Beida Forum, on file with the author.

4. Basic Characteristics of NPO Types in China

After the restructuring of the NPO sector in 1998 and 2004, there are now three distinct types of NPOs in China: "CNIs," "SOs,"⁹⁹ and "foundations," though only the SO type is provided for in the GPCL. Within the foundation type, there are two sub-types: private foundations and public foundations. This means that there are now essentially four different legal forms that may be used to establish NPOs in China. The legal regime within which the NPOs operate defines and structures them and requires, in each case, a system of "dual management," with both MOCA and line ministries or agencies having establishment and oversight responsibilities.¹⁰⁰

SOs are established on a voluntary basis to pursue the common goals of their membership. All of their activities must be carried out in accordance with their charter. An SO may take the form of a charity organization, a federation, an industrial association, a research institute, an academic society, etc. They may be formed by 50 or more citizens or 30 or more legal entities.

CNIs are not-for-profit social service organizations that are established with non-state-owned assets "mobilized by" not-for-profit government institutions, social organizations, social entities, and individual citizens. They include privately-run schools, hospitals, museums, and scientific research institutes.

Foundations are non-government organizations that are set up with funds donated by either domestic or overseas organizations or individuals. They typically promote scientific research, cultural educa-

tion, social welfare, and other social development activities. The new regulations distinguish between public (fund-raising) and private (grant-making) foundations. The new regulations also apply to representative offices of foreign foundations, but such offices are clearly not going to be used as recipients of assets and personnel of public institutions and thus are not further considered in this paper.¹⁰¹

The typology of these legal forms makes it clear -- when considering what sort of private non-commercial organization should be used to transform the current public sector institutions (*shiyedanwei*), all three (four) legal forms must be reviewed.

IV. Public Institution Reform - what are the options for transformation of *shiyedanwei* into NPOs?

1. General possibilities

According to Li Shenglin, the Vice Minister in charge of the NDRC, "the aim of the reform of China's PSUs is to develop a streamlined, highly efficient public service system that fits into the market economy and satisfies the needs of the public. It will enable the Chinese Government to gradually shift its focus from the concept of economic construction to 'working for the interest of people' and to establishing a 'public service system.'"¹⁰² At a conference held in March 2004, and sponsored by NDRC, the OECD, and the World Bank, various options for public institution reform were considered in some detail. Experience in other countries suggests that a variety of approaches to public institution reform are appropriate and that the choices will depend on the particular situation involved.¹⁰⁴ The approaches include

⁹⁹ New regulations on social organizations have been proposed by MOCA to the State Council. They will retain the "dual management" requirement. See remarks of Minister of Civil Affairs Li Xueju, who was interviewed by the South China Morning Post (SCMP) during the March 2005 meeting of the National People's Congress. See NGOs to keep links to official agencies, SCMP, March 7, 2005. The new regulations are likely to permit foreign associations to register for the first time in China.

¹⁰⁰ Dual management for NPOs exists in other East Asian countries, but it is generally considered cumbersome and outmoded. In Japan "dual management" is called a "vertically structured and complex system of jurisdiction assumed by each competent ministry and agency supervising and managing activities in each field." See Expert Meeting on Reform of the Public Interest Corporation System, Report, November 19, 2004, at 8 (on file with the author). It is this system that the *koeki hojin* reforms, referred to in note 47 supra, want to do away with. Similar suggestions have been made in South Korea; see Park, *Tae-kyu*, Park Won-soon, Son, Won-ik, and Ha, *Seung-soo*, Present Global Standards and Suggestions for Improvement of Donation-Related Legislations in Korea, in *Global Standards and Rule of Law (Seung Wha Chang, ed., Seoul 2004)*. On the other hand, dual management is acceptable in Viet Nam, for both associations and foundations; see Vietnam Country Note (written by the author), at www.usig.org.

¹⁰¹ The creation of a "level playing field" between the domestic foundations and the foreign ones was widely viewed as something that the 2004 RRA had to achieve because of China's WTO commitments.

¹⁰² See LAN *Xinzheng*, op. cit., supra note 31.

¹⁰⁴ The MOST/MOF conference held in 2003 included papers from the Czech Republic and Japan, where the transformation of public institutions has taken place in the context of overall administrative reforms. See, e.g., Petr Jan Pajas, op. cit., supra note 5, and Masahiro Horie & Yuko Kaneko, Independent Administrative Institution: Innovation of Public Organizations in Japan, both papers presented at the MOST/MOF conference, supra note 13 and published in the January 2004 issue of *International Journal Of Civil Society Law*, available at www.law.cua.edu/students/orgs/ijcsl/. While the conference paper about Korea does not link the reform of the scientific research institutions to the more general administrative reforms in Korea (beginning in 1988), the link is surely there. See generally, Dayong Choi, A Radical Approach to Regulatory Reform in Korea, presented at the 2001 Annual Conference of the American Society for Public Administration, at Rutgers University, New Jersey (paper on file with the author).

- retaining public institutions as government agencies;¹⁰⁵
- turning them into hybrid organizations, with some degree of private sector participation in both funding and governance;
- making them fully private not-for-profit organizations; and
- making them into free-standing private enterprises.

The remainder of this section will not consider the first and fourth options, but will discuss the other two in detail.¹⁰⁶

It is important to note at the outset of this discussion that transformation of Chinese public institutions is already underway. For example, transformation of public scientific research institutions into NPOs began earlier in the decade, under Notice No. 38 of April 2000, which establishes several pilot projects.¹⁰⁷ This regulation distinguishes among different types of entities conducting scientific research, and states that "social" or "public interest" public institutions may become NPOs. However, the Notice requires the approval of four agencies in order for a public institution to become an NPO, and those that do transform are required to cut no less than 70% of their labor force when they do so.¹⁰⁸ This suggests that great care should be paid to assessing the success of the experimental or pilot transformations that have already occurred when plans for additional transformations are made. There are also some over-arching questions need to be addressed, which are discussed in the following section.

Similar developments with respect to the transformation of medical service institutions are

discussed in a recent State Council publication, which states:

Legal, administrative and economic measures should be introduced for health regulation. Secondly, classified regulation is to be carried out for medical institutions; social sectors are encouraged to run medical institutions; and fair competition for quality and efficiency is promoted among medical institutions. The medical institutions are to be classified in profitable and unprofitable ones. The unprofitable ones occupy the leading position in the medical service system, enjoy the preferential tax policy and follow the guiding prices of the Government in their medical service. The profitable ones have a free hand in medical service prices, do their business according to the laws and pay taxes as required.¹¹⁰

There is, of course, little or no clarity in the State Council's statement about the process by which the "unprofitable" medical institutions are supposed to become NPOs and what sort of NPOs they are to become.

Both these sectoral developments indicate the extent to which the thinking in China with respect to transformation of *shiyue danwei* into NPOs needs further discussion and consideration. Some aspects of the issue are discussed in the following sections of the paper.

2. Structural changes in NPO legal framework to facilitate the transformation of public institutions into NPOs

Looking at this issue purely from a legal standpoint, it is appropriate to consider what type of organizational vehicle – what legal form -- should be used for transformation of a public institution into an NPO. At present the four kinds of noncommercial entities working for public benefit – SOs, CNIs, and both public and private foundations – are all possible forms to use for the transformation of public institutions. It is thus important to consider changes to the NPO legal regime that would accommodate the transformation process.

a) Differentiating between NPOs and PBOs

In a related paper the author and others have suggested that China's NPOs be divided between NPOs, which may be formed for mutual benefit, and PBOs, which may only be formed for public benefit purposes.¹¹¹ This paper also makes the same recommendation because it is clear that only PBOs

¹⁰⁵ It has been suggested that those *shiyue danwei* that perform administrative functions for the government should become state entities. That makes sense. Transformation of the publishing system, which was heretofore operated as a *shiyue danwei*, is also underway – these institutions are set to become enterprises, according to the English language press. See People's Daily, April 7, 2004, available at http://english.people.com.cn/200404/07/eng20040407_139705.shtml.

¹⁰⁶ I also do not discuss the option of making them into enterprise organizations because I am focused on NPO law reform. Some public institutions will be able to make adequate money from conducting their activities as business entities, but they are very few and outside the scope of this paper. Nonetheless, an appropriate privatization process for those entities will consider many of the issues raised here.

¹⁰⁷ See World Bank, unpublished PSU reform papers, *supra*, note 31.

¹⁰⁸ See Reform of China's Public Institutions, *supra* note 40, which discusses in detail the reform structures suggested for its *shiyue danwei* by the Ministry of Science and Technology.

¹¹⁰ See, *The Reform of China's Medical Care System in Cities and Towns, Materials for the News Conference Held by the Information Office of the State Council*, available at <http://www.china.org.cn/efabuhui/download/news/English/PressConferences/200525/01.htm>

¹¹¹ See Tax Report, *supra* note 14.

are the proper kinds of NPOs to participate in the transformation of public institutions. Accordingly, the legal forms that are described in the new Civil Code might simply be the three current forms (SOs, foundations, and CNIs),¹¹² with ancillary legislation or regulations differentiating between organizations that serve the interests of the members (private associations or social clubs¹¹³) or founders (special private foundations¹¹⁴) and those that serve the public; only the latter can be used to transform public institutions. Without this crucial differentiation, it is likely that some public assets may end up in the wrong hands. In addition, it is important that the determination of public benefit status should be made separately, and by a different agency, after the legal person has been formed. Developing such a bifurcated regulatory regime would be consistent with recent legal developments in Japan, New Zealand, Northern Ireland, and Scotland.¹¹⁵

¹¹² This suggestion is similar to the proposal made by the NPO Law Center Research Team in March 2005. See Research Team Report, On Legal Framework of NPOs in China, presented at the Beida Forum (not currently available in English); notes of oral presentation by Dr. Jin Jinping on file with the author.

¹¹³ See *Leon Irish, Robert Kushen, & Karla Simon, Guidelines for laws affecting civic organizations*, Chapter 1 (Open Society Institute, 1997, 2004) (hereinafter OSI Guidelines). The protection of the right to freedom of association requires that individuals not have to register an organization in order to exercise the right. Although Chinese law appears to require organizations to register in order to operate, the de facto situation is quite different, as numerous speakers at the Beida Forum made clear. On the other hand, maintaining the dual management requirement does reduce the ability of those organizations that want to register to do so.

¹¹⁴ Under the current RAF, "private" foundations must serve a public purpose. This is consistent with American legal terminology, but not with that of Germany, on whose traditions the Chinese civil law is based. German law permits both private purpose and public benefit *Stiftungen* (foundations).

¹¹⁵ See discussion of the changes in Japan in note 47 supra; the plan is to create a public benefit commission to oversee the establishment and activities of public benefit NPOs. New Zealand, Northern Ireland, and Scotland are all adopting legislation to create "charity commissions." As to New Zealand, see Charities Commission Preparatory Unit, at <http://www.charities.govt.nz/>. As to Scotland, see Office of the Scottish Charity Regulator, at <http://www.oscr.org.uk/>. As to Northern Ireland, see text at note 128, infra.

While it may well be impossible in a country as large as China to have a single, national public benefit commission, the way in which the current system of regulation of NPOs works, there is considerable delegation of power from the center to the provinces. Thus, there is no reason why there could not be provincial level public benefit commissions to determine PBO status. In a sense, that is what is happening in the UK, where regulation of these issues is devolved to Scotland and Northern Ireland, each of which is developing a charity commission separate from the long-standing Charity Commission of England and Wales.

Another Asian country, Singapore, has long had this sort of bifurcated system. See *Corinna Lim, Dipa Swaminathan & Nicole Tan Siew Ping*, Singapore, in *Philanthropy & Law in Asia*, supra note 74, at 276, available at <http://www.asianphilanthropy.org/pdfs/j0318.pdf>. This of course reflects the British influence in making a distinction between mutual benefit NPOs and those that serve a public interest ("charities" in the UK).

b) Reinforcing the non-distribution constraint

The second thing to consider would be a clearer delineation of the differences between commercial sector entities and noncommercial sector entities and between NPOs and PBOs in the new Civil Code. This could result from careful research about the way in which other civil codes or ancillary legislation enforce the "non-distribution constraint," which characterizes the NPO sector and differentiates it from the commercial sector in most countries. This has been called "the single most important feature" distinguishing NPOs, generally, and PBOs, most of all, from private commercial entities.¹¹⁶

For example, a "noncommercial association" in Germany is not a profit-distributing organization, while "commercial" associations that may distribute profits, are described in an altogether different section of the German Civil Code.¹¹⁷ If this suggestion to reinforce the non-distribution constraint as the defining characteristic for NPOs is followed, the new Civil Code or ancillary legislation should carefully ensure that all forms of Chinese NPOs, including CNIs,¹¹⁸ SOs, and foundations may not distribute income or assets, either currently or in dissolution, to private persons if they operate in the public interest.¹¹⁹

In this connection, it is interesting to consider experience in various countries. In Japan, for example, the Civil Code imposes rules that prevent both current and dissolution distributions of assets from PBOs except to other public interest entities.¹²⁰ In Germany, on the other hand, once the differentiation is made between commercial and noncommercial associations, it is the ancillary legislation that imposes the non-distribution constraint (the *Vereinsgesetz*; foundation laws of the *Länder*).¹²¹ The latter structure – with ancillary legislation enforcing non-distribution of income and assets -- seems to be well-accepted in Asia. In Mongolia, for example, the Civil Code is descriptive of types of organizations,

¹¹⁶ See OSI Guidelines, supra note 109, Chapter 5.

¹¹⁷ See BGB §§ 21 and 22.

¹¹⁸ This issue now seems to be resolved for CNIs, at least in practice, because the "Model Articles of Association" for CNIs promulgated in February 2005, require the application of the non-distribution constraint to these organizations. See Art. 27 of the Model Articles for CNIs, available shortly on the website of the International Center for Civil Society Law. It remains important to clarify the existing vague language in the TRACNI to give this the force and effect of law.

¹¹⁹ Some NPOs, those that do not benefit from direct or indirect state subsidies, are permitted to distribute assets to members upon dissolution. In no case, however, should any NPOs be allowed to distribute earnings to members, founders, etc.

¹²⁰ See Article 34, Civil Code of Japan.

¹²¹ See *Michael Ernst-Pörksen*, op. cit., supra note 48.

leaving it to ancillary legislation¹²² to enforce the non-distribution constraint. In Korea, Civil Code Article 32 only permits the formation of PBOs,¹²³ and the 1975 Act Concerning Incorporation and Operation of a Nonprofit Corporation imposes additional non-distribution requirements that assets be distributed in dissolution of an NPO only to the nation or a local autonomous entity. They may then be "loaned to a nonprofit corporation that has a similar [public benefit] purpose."¹²⁴

c) Making NPOs more "private"

Another consideration to be taken into account in the reform of the Civil Code as it affects NPOs is reducing the links between the legal forms of NPOs in China and the state, to make them fully private entities, organized by citizens to carry out their own aims and to meet needs they perceive to exist. Having now recognized both private property and the need for protection of human rights, it is probably time for SOs in China to have a more relaxed administrative structure, which will enable them to operate more independently.¹²⁵

¹²² See Mongolia's Law on Non-profit Legal Entities of 1997, Article 4, available at [http://www.opensocietyforum.mn/index.php?cid=171&See Mongolia, http://www.opensocietyforum.mn/res_mat/Art%20&%20Culture_final_eng.pdf](http://www.opensocietyforum.mn/index.php?cid=171&See%20Mongolia,%20http://www.opensocietyforum.mn/res_mat/Art%20&%20Culture_final_eng.pdf).

¹²³ See Article 32, Civil Code of Korea. Exactly this problem existed in Japan before the enactment of the "*chukan hojin*" law in 2001, which permitted mutual benefit NPOs to be registered. The proposed *koeki hojin* reforms, discussed in note 47, *supra*, will make more sense of this structure by bringing all NPOs under umbrella legislation for GNPOs.

¹²⁴ See Republic of Korea, Law No. 2814, Article 13, Reversion of Surplus Assets.

¹²⁵ The debate about "dual management" that occurred at the Beida Forum suggests that the resolution of this issue will take some time. Clearly the policy-makers are unwilling to loosen the constraints imposed by "dual management," even though officials complain the entry barriers are too high and result in lots of NPOs being unregistered. *Li Xinmiao*, *supra* note 42. On the other hand, at least one scholar has warned that the "filing system" proposed by Prof. Yang Tuan of CASS may well be more subject to abuse of administrative discretion because the rules would be more opaque. See talk of Xie Haiding of CASS at the Beida Forum and discussion between Prof. Yang and Dr. Xie, notes on file with the author.

The relationship of "dual management" to political control is, of course, clear, and this factor should not be ignored in any technical analysis of legal reform. Zhu Weiguo, Director of the Legal Affairs Office of the State Council, alluded to this in his remarks at the Beida Forum, when he stated that NPO movements had led to the overthrow of governments in Serbia, Georgia, and Ukraine. He went further to criticize the report of the PKU NPO Law Center Research Team, by stating that it does not address such possible problems. See notes on file with the author.

Distinguishing between permitted and non-permitted political activities for NPOs is an issue in many countries (see OSI Guidelines, *supra* note 109, para 6.2), but it takes on special significance in China in these days of local and national protests. Falun Gong scared the Chinese government, and it has not yet recovered from that scare. For an early reaction, see National People's Congress, Legislative Resolution Banning Cults, October 30, 1999.

d) Reforming the structure of CNIs

The new Civil Code should include CNIs as not-for-profit sector legal entities, but it should eliminate any suggestion that there may be private "ownership" of them.¹²⁶ In that way, transformation of public institutions into any one of three types of noncommercial entities would be possible. Included among them would be "private" institutions, which are private not because they are owned by private persons who can receive financial rewards from them but because they are separate from the state. This would entail fully developing the CNI as a third legal form of noncommercial entity (in addition to foundations and associations). That may not be strictly necessary in China, because most Chinese foundations have traditionally behaved more like "operating" foundations than like grant-making foundations, such as the Ford and Rockefeller Foundations.¹²⁷ Indeed, many Chinese foundations are currently hybrid organizations in any case – they receive a substantial portion of their revenues from the government, but they also raise funds from private sources, including US grant-making foundations. The effect of the 2004 RAF on this situation remains to be seen – as previously indicated, those regulations do differentiate between "public" fund raising organizations, and "private" ones, but they both must have endowments, as will be seen below, and this may mean that there is a continuing need for a reformed CNI.¹²⁸

Although having a third legal form in a civil law country is not absolutely necessary, legal scholars in post-socialist countries in Europe find having such a "hybrid" legal form to be helpful in regularizing differences in governance structures and activities as well as in modernizing views about what NPOs do with regard to public benefit activities. For example, "public benefit corporations" in the Czech Republic were originally conceived as the legal form for

¹²⁶ This issue is not entirely clarified in the TRACNI, which is vague about the application of the non-distribution constraint to CNIs. This has been cleared up to a great extent, as a result of rules promulgated in February 2005. See note 118, *supra*. In addition, the new accounting regulations, which went into effect on January 1, 2005, require that the people who give funds to NPOs "do not have ownership of such organizations." See Ministry of Finance, Accounting System of NPOs, September 2004, Article 2 (unofficial English translation on file with the author).

¹²⁷ Richard Estes, writing in 1996, said that all Chinese foundations are operating foundations. *Richard Estes*, *op. cit.*, *supra* note 8. However, recent developments in Shanghai suggest that the role of foundations in China may be changing, as they become grant-makers rather than operating organizations. See discussion of developments in Shanghai in note 94, *supra*.

¹²⁸ Further research is necessary to determine what is happening with respect to the two different types of foundations under the 2004 regulations.

transformation of public institutions into NPOs.¹³⁰ These PBCs differ from Czech foundations, and they have five significant characteristics:

- they have a non-membership governance structure;
- they are operating entities, carrying out activities in the public interest;
- they do not have an endowment, as a foundation must;
- they are permitted to carry out economic activities for their support, and
- they are not permitted to distribute earnings and assets to private persons.¹³¹

The last characteristic is important because it ensures that PBCs are not set up for private benefit.¹³²

There should be adequate flexibility in the legal forms provided for in the new Civil Code to allow for the existence of an un-endowed public-service-providing NPO without a membership governance structure.¹³³ The CNI already exists as an accepted legal form in China even if not provided for in the GPCL; nonetheless, it will still be necessary to ensure that the CNI form is a real public benefit not-for-profit legal form by making all CNIs subject to the non-distribution. If this is done, CNIs will be proper recipients of assets and personnel of the current public institutions when they are transformed.

Another relevant recent development from a common law country should also be taken into account in the process of adopting legal reforms for the NPO sector in China. In Northern Ireland, where

reform of the "charity" sector is currently under discussion, the consultation document proposes to differentiate between "charitable incorporated institutions" (CIOs) and "community interest companies" (CICs).¹³⁴ The latter form will be permitted in England and Wales from 1 July 2005, and it might be the model for a fourth legal form for China -- CICs are described as being "designed for social enterprises," and they "operate in a business environment but for socially useful purposes."¹³⁵ On the other hand, they are not PBOs (they are not "charities" in the way that term is used in the U.K.). However, their assets are subject to an "asset lock," which means that they must remain within the social sector and may not be distributed to investors. Further, investors in CICs are only permitted a limited rate of return, which will be set by the new independent regulator of CICs.¹³⁶

e) Dealing with the requirement of high endowments for foundations

In addition to the issues raised above in connection with the discussion of reforming CNIs, it is important to note that the new foundation regulations (RAF) clearly require all foundations in China to have very large endowments.¹³⁷ Some *shiyue danwei* could be transformed into foundations, with the assets that are currently state-owned becoming the property of the foundation and providing its initial endowment.¹³⁸ But there is real question

¹³⁰ A similar legal form has been created in Hungary and for the same purpose. See <http://www.usig.org/countrycodes/hungary.asp#Types>.

¹³¹ See Petr Pajas, Czech Republic Country Report, at <http://www.icnl.org/IRNL/czechrepublic.htm>. PBCs are now used to found NPOs, not only for transformation of public institutions.

¹³² In his speech at the Beida Forum, Zhao Yong, Division Chief in the NPO Bureau, stated that after careful study the authorities have determined that "reasonable return" as used in the Private Educational Institution Law is an equity return and should not be permitted even for this favored type of *min fei*. See ZHAO Yong speech, notes on file with the author. Some legal scholars believe, however, that it will be difficult to change this policy because of the need to promote private education in China. Interview of Prof. Ge Yunsong, notes on file with the author.

¹³³ This would also argue in favor of reducing the minimum capital requirement for SOs from the current RMB 100,000 for national ones and 30,000 for local ones to a more nominal amount. The entry barriers created by large initial capital requirements are essentially superfluous, at least under normal circumstances. See OSI Guidelines, supra note 109, para 3.1. G. On the other hand, Andrew Watson of the Ford Foundation has suggested that desire to avoid confusion between mutual funds and public benefit foundations may be behind the high initial endowment requirements in the RAF; see note 137 infra.

¹³⁴ See Consultation on Review of the Charities Administration and Legislation in Northern Ireland in 2005, published by the Charities Branch of the Voluntary & Community Unit of the Department for Social Development.

¹³⁵ Id.

¹³⁶ For more information on these and other details of the new British CICs, see <http://www.dti.gov.uk/cics/pdfs/cicfactsheet1.pdf>.

¹³⁷ The RAF require foundations to have an endowment of as high as RMB 8 million (national foundations) in order to be established (the initial endowment must be RMB 4 million for provincially-based foundations and RMB 2 million for those that do not raise money from the public). Further, the regulations do not permit that the value of that registered initial endowment to be reduced at any time. See Article 28 of the RAF, see also Piffler/von Hippel, *Stiftungsrecht in China*, on file with the author, sub. C IV, arguing that the interpretation of Article 28 of the RAF is unclear, however that there are good arguments to conclude that there exist such a prohibition). The desire to establish high entry requirements for public benefit foundations and to require the maintenance of the permanent endowment amount throughout the foundation's life, may be due in part to the fact that the Chinese language term for foundations (*jijin*) is the same as the term for investment funds. An effort to avoid the setting up of investment funds as foundations may be behind the strict rules, according to Andrew Watson, the Ford Foundation Representative in Beijing. See notes of conversation with Andrew Watson, on file with author. Some commentators are questioning the use of this term in a confusing way in the RAF and suggest that the term for foundation used in the Civil Code of Taiwan -- *caituan faren* -- might help to avoid the confusion.

¹³⁸ The RAF preclude the endowment of foundations from consisting of assets other than cash also (see Piffler/von Hippel, *Stiftungsrecht in China*, on file with the author, sub. B I 1). This may seem rational to regulators in China, who are focused on tax fraud and money laundering, but it makes no sense in the long run.

whether foundations should be required to have anything greater than a nominal endowment. One way in which this issue is resolved in Central and Eastern Europe at the present time is to differentiate between foundations (which are endowed), on the one hand, and funds (which are not endowed), on the other.¹⁴⁰ A viable solution to the public institution transformation process might be to lease the public assets to an un-endowed foundation instead of simply transferring outright ownership to them. The RAF at the present time precludes the existence of an un-endowed foundation, and future developments toward a more flexible set of requirements for foundations will undoubtedly have to wait for the full application of the RAF later this year. Without more experience under the RAF, it is doubtful that any loosening of the requirements can be expected, but this needs to be considered.¹⁴¹

3. Practical considerations of the transformation process

There are several issues to consider in deciding what sort of legal form will be used for transformation of public institutions. These include:

- the type of governance structure to be chosen (whether elected by membership, as in SOs, or self-perpetuating, as in foundations and CNIs¹⁴²);

- who appoints the governing board if it is an appointed one (to what extent does the government remain involved in the governance structure?);¹⁴³

- whether a multi-level governance structure might be needed to provide adequate checks and balances if there is a transformation of a public institution into a foundation;¹⁴⁴

- whether the institution will actually receive state-owned assets or be required to lease them;¹⁴⁵

- what process will be applied to asset valuation and who will manage the process;

- whether there will need to be a tender for NPOs to respond to or whether the transformations will occur without a public bidding process;¹⁴⁶

- whether all of the employees of the old public institution will carry over to the private one, and, if not, as is most likely the case, how the ones to be transferred will be chosen;

- how the newly private institution will be financed, if not 100% from government funds;

- whether the institution that receives public assets will be permitted to conduct economic or business activities for its support;¹⁴⁷ and

- how the newly private institution will remain accountable to the public.

All varieties of solutions should be considered. It is possible, for example, for a hybrid institution to have a board comprised of both government officials and private persons, and it is possible for such an institution (unlike a government agency) to raise significant funds from the public. It may well be that such an institution could charge fees for services, as long as the fees are set in a manner that serves the public interest.

Those thinking about the transformation of Chinese public institutions also need to consider how to make the transformations actually occur in a fair and transparent manner – there are both physical

It might, however, prove tricky from a practical standpoint to use a foundation for transformation given that the physical assets transferred might be buildings, laboratories, artworks, etc., which would not only require valuation, but might also later be sold in order the streamline activities of the NPO and gain cash for operations. From the wording of the RAF, it appears that these possibilities were not contemplated, but as public institution reform proceeds, it would be well to deal with the issues it raises in this context.

¹⁴⁰ One way to avoid the high endowment problem in China that is not available in Central and Eastern Europe is to set up an organization as a charitable trust under the Trust Law of 2001. That issue is being explored by the trust law scholar Assoc. Prof *Lusina Ho* of the University of Hong Kong in a paper she wrote for the December 2004 conference Community Foundations – Symposium on a Global Movement, entitled China: Breaking New Ground for Community Foundations; Powerpoint slides available at www.cfsymposium.org. International Journal Of Civil Society Law expects to publish the paper in an upcoming issue.

¹⁴¹ One additional issue to consider would be to permit non-cash assets to form the initial endowment of a foundation, which would simplify the transformation process when using the foundation form. See note 138, *supra*.

¹⁴² From this point on I am going to assume that the proposed changes to strengthen the non-distribution constraint will be made to the CNI structure.

¹⁴³ Some critical issues about the governance of public-service-providing institutions are discussed in a booklet recently published by the U.K.'s Office of the Prime Minister, Good Governance Standard for Public Services, which can be accessed at http://www.opm.co.uk/ICGGPS/download_upload/Standard.pdf.

¹⁴⁴ The Japanese reform proposals include the requirement of multiple oversight structures -- a board, a council, and an auditor -- for public benefit foundations. See discussion of the *koeki hojin* reforms at note 47, *supra*.

¹⁴⁵ In Mongolia, for example, the current regulations for transformation of cultural organizations require that the property be retained by the state and leased to the NPO; see note 151, *infra*.

¹⁴⁶ See *Karla W. Simon*, *op. cit.*, *supra* note 25.

¹⁴⁷ Note that the PBCs in the Czech Republic are permitted to carry out economic activities for their support. See text at notes 130 ff, *supra*.

and human resources that will need to be transferred to an NPO, and the government ministries that oversee the particular *shiye danwei* will want to retain some aspects of control over the process as this occurs. Thus, clear rules must be set under which a transformation may take place, and it might make a lot of sense to have them set out in a law passed by the NPC.

With respect to human resources, the manner in which Chinese foundations developed in the early years points to a possible solution. According to scholars writing in the mid to late 1990's, regulations permitted government officials to move to NPOs (and vice versa) without losing their salary rank and status.¹⁴⁸ But that would undoubtedly create intolerable continuing costs for the state (which appears to be why, in the experimental transformations of S & T organizations occurring at present, the staff must be reduced by 70%!) and is thus probably not a viable option.¹⁴⁹ Having said that, however, it is nevertheless clear that forcing huge redundancies in the transformation process can lead to social unrest. Thus, managing the human resources factor in any transformations will be of crucial significance for China's short-term development and political and social stability.

Physical assets (such as buildings, laboratories, libraries, collections of cultural objects, etc.) may be equally problematic. These were obtained with public funds and as such are public assets. Transferring such assets into an NPO – even one to which the non-distribution constraint applies – has political consequences. And it raises accountability issues as well: how can the private institution be made accountable to the public for the assets it receives?¹⁵⁰ This may well be why the Amendments to the Law on State and Local Property of July 4, 2002, in Mongolia, require that the state-owned cultural property merely be leased to the NPO that carries of the cultural activities previously performed by a public institution.¹⁵¹ A good argument can also be made that the NPC should enact a law to create an "Office of the Transformation Ombudsman," with the power to intervene in any questionable ministry-run transformations.

V. Conclusion -- Looking to the future

The legal and practical dimensions discussed here suggest that transformation of many Chinese public institutions is not only warranted but probably is necessary for the future of Chinese society. In addition, since China set the target of building a modern socialist market economy, the nation has desperately needed a Civil Code that can play a fundamental role in safeguarding the rights of individuals and corporations as the economic and social reforms proceed. As these developments proceed against the back-drop of other equally fundamental legal, social, and economic reforms they are already having a profound impact on the Chinese society and the delivery of social services. No one doubts that Civil Code and public institution reforms are tremendously important. Nor does anyone doubt that reforms that will make NPOs more independent of the state are equally significant. This paper suggests, however, that more research about how the reforms work together is absolutely essential for a modernizing China in the middle of the first decade of the 21st Century.

As an outsider, it is difficult to recommend exactly how to proceed to rationalize all of this, but some things are clear.

1. The first is that process is important, and having the right process can reduce unwanted and detrimental effects resulting from botched transformations. Thus, it is essential to study what exactly has happened with the *shiye danwei* transformations that have occurred to date. These are not issues with respect to only one sector of public services – they apply to them all, even though the specifics (such as the number of jobs to be eliminated) may differ from sector to sector. Such a study will illuminate the extent to which the administrative process of transformation is working and whether corrections are needed. The valuable studies undertaken in Japan and Korea as each country has worked on reform of its administrative and public service institutions could provide useful examples to China's scholars, which could, in turn, assist the State Council or the NPC in providing guidance for future transformation processes.¹⁵²

2. It is probably better, though difficult, to have uniform rules for transformations of public institu-

¹⁴⁸ See *Zhang Ye*, Chinese NGOs A Survey Report in Emerging Civil Society In The Asia Pacific Community (Appc, 1995).

¹⁴⁹ See, Reform of China's Public Institutions, *supra* note 40.

¹⁵⁰ A lengthy analysis of some of these issues with respect to the transformation of public social welfare institutions in the United States can be found at <http://aspe.hhs.gov/hsp/privatization02/>.

¹⁵¹ See Article 65.1.1, of the law, available at <http://www.worldbank.org.cn/English/content/NPO%20Tax%20Report-En.pdf>.

¹⁵² A new resource that has recently come online should be consulted – the website of the Japan Committee for the Study of New Public Management, which discusses the Asia-Pacific Panel for Public Administration, available at <http://www1.biz.biglobe.ne.jp/~iam/httpdocs/about/faq.html>.

tions in all sectors. This could be accomplished by having a law in this field, which could be patterned after "social sector privatization" legislation in other countries (e.g., Mongolia). It is also crucial to recognize that all employees of the current public institutions will need the same type of pensions they currently have, to be fair and to rationalize and equalize state burdens and commitments in the future. It may be useful to set up an Office of the Transformation Ombudsman, as suggested above, in order to readily accomplish this.

3. Additional consideration should be given to the idea of not immediately (or ever) actually transferring state-owned assets into new or existing NPOs that are used for the transformation of public institutions. Although hybrid organizations with mixed governance may well exercise adequate oversight over state-owned assets in the hands of NPOs, perhaps leasing them to the NPOs, at least in the short run, makes the most sense. Because the transformation of so many public institutions will greatly increase the size of the NPO sector regulated by MOCA, a "go slow" approach to asset transfers might be warranted. The specter of corruption is a real one, and it would be important to avoid it to the greatest extent possible.

4. The development of the legislation/regulations for NPOs that will facilitate public institution transformations should proceed without delay – the Civil Code can catch up, if need be. In this regard, the following recommendations are particularly relevant:

a. Because of the lack of clear applicability of the non-distribution constraint in the TRACNI rules, the current CNI structure may not be relevant for transformation of public institutions. Therefore organizations that are not subject to the non-distribution constraint should not be permitted to receive or even lease public assets. The non-distribution constraint must clearly apply to all CNIs, if this form is to be consistently recognized as an NPO legal form.

b. It may be useful to develop a type of organization in China that is like the charitable incorporated company in the UK.¹⁵³

c. The creation of an un-endowed foundation structure would also be desirable – thus the foundation form in China would include foundations that look more like the "operating foundations" in Europe today. The attributes of the form recommended is that it is i.) not required to have a

membership governance structure; ii.) it is un-endowed; and iii.) but it is subject to the non-distribution constraint.

d. Consideration should be given to reducing the number of persons (currently 50) required to form SOs so that they can more easily become legal possibilities for the transformation of public institutions. For example, an association of 10 residents of a small town might be a permissible recipient of a medical clinic located in that town – the physical building that houses the clinic might be leased to the association, which would be set up like any other association for public benefit.

This paper has addressed one of the most critical problems facing the Chinese government today – the way in which the "privatization" of public institutions, such as schools, hospitals, museums, etc., should be integrated into the reform of the legal environment for NPOs in China. As the processes of administrative and public service reform proceed in China it is hoped that the concerns raised and the recommendations made in the paper will provide some helpful theoretical analysis for all involved in the reforms.

¹⁵³ See text at notes 128-130, *supra*.