GOVERNMENT BEYOND LAW

EXPLORING CHARITY REGULATION AND SPACES OF ORDER IN CHINA

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ABSTRACT

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This thesis examines the regulatory landscape relating to private orphanages, both foreign and domestically run, in China, and the formal and informal relationships between such homes and government which structure this space of order. Part A introduces the contextual factors shaping the gradual socialisation and privatisation of charitable activity generally, and the child welfare-specific social, economic and cultural dynamics influencing the emergence of private orphanages. Parts B and C set out the ethnographic findings of field-work examining the practical operations of private orphanages, and a theoretical analysis of the various interactions occurring with government orphanages, and local and central officials. It is shown that the ostensible government monopoly on institutional care of orphans, established in law and policy and consistent with the objective of maintaining tight control over civic organisations and religious-based and foreign-led activities, is belied by a proliferation of private orphanages emerging to address gaps in state welfare provision. This has led to the emergence of a delicate balance between top-down official discourse, rhetoric and law, and bottom-up pragmatic considerations. Further, the *prima facie* 'missing role' of the state in law, regulation and policy-making is contradicted in practice by evidence of a complexity of highly paternalistic state-orphanage relationships occurring beyond the normative framework of official laws and policies. Such extra-legal state-society interaction is characterised by informal, flexible and paternalistic negotiations with local officials, and mediated by structures of power and capacity. 'Law beyond government' and 'government beyond law' are central features of the multidimensional maintenance of this space of order, and point to several defining points of distinction of law as a cultural notion in the Chinese context, including a marked preoccupation with legitimacy over legality and paternalistic discipline and discretion over impartial adjudication.

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This thesis is dedicated to the children of China resident in orphanages and welfare homes, both private and public, and to those who work with them to improve their quality of life. I am most grateful to the many individuals, and the organisations they represent, who agreed to be interviewed for this project.

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TABLE OF ABBREVIATIONS

CCPA	Chinese Catholic Patriotic Association
GONGO	Government-Operated NGO
NGO	Non-Government Organisation
MCA	Ministry of Civil Affairs [PRC/Central]
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
PNEU	Private Non-Enterprise Unit
PRC	People's Republic of China
PSU	Professional Supervising Unit
RO	Representative Office
SAIC	State Administration of Industry and Commerce
SC	State Council
SO	Social Organisation
SWI	Social Welfare Institution
WFOE	Wholly Foreign Owned Enterprise

TABLE OF LEGISLATION AND POLICY

1 Statutory Instruments

Translation / Name / Phonetic	*Promulgation Body and Date*	*Page Reference*
Adoption Law of the PRC 中华人民共和国收养法 *zhonghua renmin gongheguo shouyang fa*	NPCSC 4.11.1998	84, 93–4, 110
Control of Representative Offices of Foreign Enterprises Interim Rules of the PRC 中华人民共和国国务院关于管理外国企业常驻代表机构的暂行规定 *zhonghua renmin gongheguo guowuyuan guanyu guanli waiguo qiye changzhu daibiao jigou de zanxing guiding*	SC 30.10.1980	251
Enterprise Income Tax Law of the PRC 中华人民共和国企业所得税法 *zhonghua renmin gongheguo qiyesuo de shui fa*	NPC 15.3.2007	252
Labour Contract Law of the PRC 中华人民共和国劳动合同法 *zhonghua renmin gongheguo laodong hetong fa*	NPCSC 29.6.2007	249
Marriage Law of the PRC 中华人民共和国婚姻法 *zhonghua renmin gongheguo hunyin fa*	NPCSC 10.09.1980	84
Maternal and Infant Health Care Law of the PRC 中华人民共和国母婴保健法 *zhonghua renmin gongheguo muying baojian fa*	NPCSC 27.10.1994	98

Protection of Disabled Persons Law of the PRC 中华人民共和国残疾人保障法 *zhonghua renmin gongheguo canjiren baozhang fa*	NPCSC 24.04.2008	84, 110
Protection of Minors Law of the PRC 中华人民共和国未成年人保护法 *zhonghua renmin gongheguo weicheng nianren baohu fa*	NPCSC 29.12.2006	84, 106–7
Protection of Women's Rights and Interests Law of the PRC 中华人民共和国妇女权益保障法 *zhonghua renmin gongheguo funv quanyi baozhang fa*	NPC 3.04.1992	84
Provisional Regulations on Registration and Management of Private Non-Enterprise Units ('PNEU Regulation') 民办非企业单位登记管理暂行条例 *minban feiqiye danwei dengji guanli zanxing tiaoli*	SC 25.9.1998	56, 57, 63–4, 68, 70, 144, 174
Public Welfare Donations Law of the PRC 中华人民共和国公益事业捐赠法 *zhonghua renmin gongheguo gongyi shiye juanzeng fa*	NPCSC 2.6.1999	172, 253
Regulation on Foundation Administration ('Foundation Regulation') 基金会管理条例 *jijinhui guanli tiaoli*	SC 8.3.2004	50, 56, 57, 65–7, 71, 72, 215–7, 255
Regulation on Registration and Administration of Social Organisations ('SO Regulation') 社会团体登记管理条例 *shehui tuanti dengji guanli tiaoli*	SC 25.9.1998	50, 56, 61–3, 70, 109

2 Subordinate Measures, Policies and Guidelines

Translation / Name / Phonetic	*Promulgation Body and Date*	*Page Reference*
Administration of Name of Foundations Provisions 基金会名称管理规定 *jijinhui mingcheng guanli guiding*	MCA 23.6.2004	255
Annual Inspection of Foundations Measures 基金会年度检查办法 *jijinhui niandu jiancha banfa*	MCA 12.1.2006	255
Annual Inspection of PNEU Measures 民办非企业单位年度检查办法 *minban fei qiye danwei niandu jiancha banfa*	MCA 29.3.2005	175
Banning of Illegal NGOs Interim Measures 取缔非法民间组织暂行办法 *qudi feifa minjian zuzhi zanxing banfa*	MCA 10.4.2000	50, 63–4, 67, 72, 145
Beijing Municipal Government Administration of Employment of Chinese Citizens by Resident Representative Offices of Foreign Enterprises Regulations 北京市人民政府关于外国企业常驻代表机构聘用中国雇员的管理规定 *Beijingshi renmin zhengfu guanyu waiguo qiye changzhu daibiao jigou pinyong zhongguo guyuan de guanli guiding*	Beijing Municipal Government 15.6.1996	249
'Child Welfare Institute Blue Sky Construction Plan' Implementation Program "儿童福利机构建设蓝天计划"实施方案 *ertong fuli jigou jianshe lantian jihua shishi fang'an*	MCA 22.1.2007	107, 114–5, 151, 206, 218, 231
Family Foster Care Interim Measures 家庭寄养管理暂行办法 *jiating jiyang guanli zanxing banfa*	MCA 27.10.2003	108

Information Disclosure of Foundations Measures 基金会消息公布办法 *jijinhui xiaoxi gongbu banfa*	MCA 27.12.2005	255
Joint Ministerial Opinion on Strengthening Orphan Relief 关于加强孤儿救助工作的意见 *guanyu jiaqiang gu'er jiuzhu gongzuo de yijian*	MCA et al[1] 29.3.2006	83, 107
Social Welfare Institutions Interim Measures 社会福利机构管理暂行办法 *shehui fuli jigou guanli zanxing banfa*	MCA 30.12.1999	108–9, 143–4, 174, 216
State Administration of Taxation (SAT) Notice on Strengthening the Tax Management of Representative Offices of Foreign Enterprises 国家税务总局关于加强外国企业常驻代表机构税收征管有关问题的通知 *guojia shuiwu zongju guanyu jiaqiang waiguo qiye changzhu daibiao jigou shuishou zhengguan youguan wenti de tongzhi*	SAT 165 [1996]	252
State Administration of Taxation Reply on Tax Exemption of 33 Permanent Representative Offices of Foreign Enterprises, such as Beijing Representative Office of Ford Foundation 国家税务总局关于美国福特基金会北京办事处等 33 家外国企业常驻代表机构免税问题的批复 *guojia shuiwu zongju guanyu meiguo fute jijinhui Beijing banshi chudeng 33 jia waiguo qiye changzhu daibiao jigou mianshui wenti de pifu*	SAT 777 [2004]	252

1 Ministry of Civil Affairs, Supreme People's Court, Development and Reform Commission, Ministry of Education, Central Management Office, Ministry of Public Security, Ministry of Finance, Labour and Social security, Ministry of Agriculture, Ministry of Health, Population and Family Planning Commission, the Communist Youth League Central Committee, and the China Women's Federation.

CHAPTER ONE: INTRODUCTION

In a compound of ageing single-storey concrete and stucco buildings between two large cornfields on the outskirts of Hongmin,[1] a city in one of China's most impoverished provinces, Sister Chen has been caring for hundreds of severely disabled and terminally ill children for over fifteen years. Our Lady's Home for Handicapped Children is an unregistered non-government home for orphans and foundlings operated by a parish of the unofficial Chinese Catholic church. Until about three years ago, Our Lady's was the only provider of institutional care for orphans and abandoned children in its county. Despite central policy stipulating that only the government and government-operated NGOs[2] can run orphanages, local officials across China have for many years turned a blind eye to homes like Our Lady's. An unknown number of orphanages are caring for untold thousands of children in China today, taking children in directly from the street rather than surrendering them into the care of the state system. Many of these are run by underground Catholic congregations, while others are run by individuals without any institutional affiliations or support.

It was at Our Lady's that I met Lingling, a twelve-year-old girl with a gaping wound at the base of her spine and an enlarged head caused by spina bifida, who has slept, worked and played on the floor of her dormitory room all her life. She shares her room with her 'sisters', five other girls with various physical and mental disabilities. Lingling has never seen a map of the world, and had never met a *laowai* (foreigner) with whom she could speak in Chinese, so took great interest in questioning me about the world outside of China. I spent three weeks living in Lingling's dormitory, which was a

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1 All place, organisation and other names are fictional for reasons of confidentiality.

2 Government-operated NGOs or GONGOs are common in China – the term is explained further in Chapter Two at 52–3.

bright and girlishly decorated space, well supervised by volunteers of the Our Lady's community. In other rooms, the bleaker side of orphanage life was evident, with dedicated, cheerful but clearly exhausted volunteers and staff caring for many severely incapacitated and emaciated children. In the mornings at five, and in the evenings at seven, all the staff, and as many children as can walk or wheel their way to the chapel, gather for prayers and mass, which on Sundays are led by a visiting priest. After evening mass, the older children and young women who care for them bounce on the home's rusty trampoline or pick cucumbers and kumquats from the large kitchen garden to eat as the sun sets.

Sister Chen's home has no ties, formal or informal, with any of the state-run orphanages that are ostensibly the only homes for orphaned and abandoned children across China. However the evening courtyard scene at Our Lady's is very similar to one that plays out at Good News Training Centre, in a village the next province over, which is run not by Chinese Catholics but by French Protestants. The children at Good News are all blind or visually impaired. They are all formally in the guardianship of various state-run orphanages, but have been brought to Good News by Alain and Brigitte, a married couple who founded and direct Good News, to be provided with specialist care and education with the trust and consent of the state orphanage directors. Good News is one of dozens of such foster homes, most of which are run by foreigners who feel a spiritual calling to 'look after orphans in their distress',[3] by supporting the often overwhelmed and underfunded state orphanages in their care of disabled and special needs children. Children are fostered to these specialist homes in order to receive medical intervention, often for years at a time until adoption can be arranged. Funded

[3] James 1:27 – 'Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world' (The Bible, New International Version).

almost entirely by international donations channelled into China through personal bank accounts and via visiting volunteers, the foreign foster homes are an important facet of the provision of orphan services by unofficial, unregistered, and, for the most part, unrecognised indigenous and foreign homes. Good News, like Our Lady's, also has a large kitchen garden, but with raised beds designed to allow blind children to try their hand at sowing and growing. In addition, their grounds boast stables for the anticipated arrival, shortly, of horses, so that hippo-therapy can begin, a swimming pool and gymnasium, and large quarters for the steady stream of volunteers, some Chinese but most from overseas, arriving to spend time teaching and babysitting. The buildings here are not shabby concrete and stucco, but newly renovated or constructed; instead of dormitories, the children live in small, detached buildings designed to emulate family homes, with house parents and 'brothers and sisters'. The grounds are large and well tended, and while Good News is a modest establishment, the inflow of Euros and US dollars from loyal foreign supporters is evident in its facilities and in the care of its children.

The area that forms the focus of this study is the care of orphaned[4] and abandoned children by non-state actors. Since the Cultural Revolution, during which time foreign mission workers were ejected from the country and private orphanages either closed or appropriated by the state, presumptively only government organisations have the right to operate orphanages or foster homes in China. Today, however, there are a large number of non-government children's welfare institutes caring for orphans across China. The surveyed sector includes both Chinese-run orphanages, caring for children directly surrendered into their care, and foster homes, most of which are run

[4] The private orphanages studied generally care for orphaned and abandoned children, however one case study, Star Village, cares specifically for the children of long-term prisoners. Such children are not regarded as orphans under current welfare policy and therefore not entitled to government benefits or assistance.

by foreigners, caring for children fostered from state institutions for short or long term treatment and guardianship. The work of such non-government homes is situated in a broader orphan welfare network that includes an overwhelmed system of state services and protection.

The non-government homes are, for the most part, operating without formal registration as charitable organisations or welfare homes, often without legal status and without any kind of formal state regulation or oversight. An apparent dilemma thus arises. It is beyond the capability of local governments to take over the responsibility of caring for the children currently housed in private orphanages. However, the existence of such homes is legally and, at times, politically problematic. The passive approach of local government is to ignore the formal legal rules and allow private orphanages to play a role, often significant, in child welfare. Despite their lack of legal status, complex transactional relationships exist between local government and the operators of private orphanages and foster homes, and the expectations of such operators appear to be met fairly regularly, as legal rules are marginalised in favour of informal norms and processes. A combination of government oversight and back-turning exists in this regulatory space (widely spoken of in China as the 'one eye open, one eye closed' approach), which has both practical ramifications for those working in the sector and the children cared for therein. It also has theoretical implications for our understanding of the nature of state-society relations in modern China and the role of law in regulating such relations in this unique socio-political context.

1 Research Questions

This thesis begins with several ethnographic inquiries: what is the role of unregistered non-state institutional actors, both indigenous and foreign, in caring for orphans and

abandoned children in China? What is the nature of their interaction with local and central government, and how do government officials at the local level go about overseeing the operations of such actors? What are the norms and structures, institutions and processes, both formal and informal, which govern the interaction between state and society, and which impose and maintain order, in relation to this specific example of non-governmental activity? What are the legal, political, operational and social consequences of the prevailing approach to regulation and governance of the sector? And how are these relationships and norms themselves affected by factors such as culture, politics, and the operational models and practicalities of such orphan-related work?

To date, Dr Xiaoyuan Shang is the only author to have investigated the regulation of China's non-state orphanages in depth. Her study, also based on fieldwork, is primarily sociological in nature, examining the situation of Chinese-run private orphanages from a social policy and welfare perspective. Shang's conclusion is that social welfare policy reform is urgently needed in order to 'establish formal relations between the state and civil society and to define the regulatory role of the state in social welfare'.[5] The current study similarly aims to contribute to the limited existing knowledge of the private orphan welfare sector. However, Shang's conclusions are premised on an assumption that this is an area that ought to be formally regulated by government. In contrast, this thesis recognises the importance, in drawing an ethnographic picture, of questioning whether actors in the field share such law-centric assumptions. In addressing the aforementioned ethnographic questions, it seeks further to uncover local expectations about law, and asks if the notion of regulation makes

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5 Xiaoyuan Shang, Xiaoming Wu and Yue Wu, 'Welfare Provision for Vulnerable Children: The Missing Role of the State' (2005) *The China Quarterly* 122, p 122.

sense in this instance of Chinese state-society interaction. How do state and social actors understand the role, significance and place of law in relation to this area of activity? What are the local expectations and assumptions regarding how order will be maintained, expectations upheld and relationships regulated in this space, and what do those local assumptions add to our picture of the nature of law and legal institutions in China today?

In relation to both grassroots Chinese-run orphanages and foreign-run foster homes, this thesis presents findings and interpretations relating to the history, operations and regulation of the homes, with an emphasis on exploring the formal and informal norms[6] which structure the nature of their interaction with local authorities, and the meanings attributed to law, order and the state by the operators of such homes. The 'space of order' studied is the intersection of two social fields, private orphanages and local government, and the degree to which that interface is predictable, with state-society relations shaped and in that sense ordered by norms, legal and non-legal. As Portes argues,[7] norms are reproduced, adapted and affirmed through repeated interactions within relationships, by means of both affirmation and opprobrium for their contravention. This thesis examines such emergence of normative understandings in the context of state-society relations, and the degree to which such norms and relations result in an appearance of order and predictability. In describing and

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6 This thesis avoids the well-worn legal anthropological debate on what is properly termed 'law', suffice to say that the term is commonly used in the scholarship both narrowly, to refer to state-enforceable law, and more broadly, in reference to 'socially enforced binding rules', depending on 'what one is trying to emphasise for analysis' (Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) *Law and Society Review* 719, p 745). It is useful to think of law generally as referring to a certain type of social organisation, by explicit, generalisable rules, be they 'official', 'formal' and 'legal' rules (law in the narrow sense) or 'unofficial, 'informal' and 'extra-legal' rules (law in its wider sense). The question of defining the category which is the subject of study is returned to below (Chapter One 'Methodological Framework' at pp 30–1).

7 Alejandro Portes, 'Institutions and Development: A Conceptual Reanalysis' (2006) 32(2) *Population and Development Review* 233.

interpreting the private orphanage sector, the study moves beyond Shang's assumption that an absence of formal regulation necessarily means an absence of oversight and informal regulation by government. In fact, it is clear from the situation of both private orphanages and foster homes that although formal law is not necessarily penetrating these social fields to any great extent, informal laws and norms are extremely relevant – 'the legal rules are only a small piece of the complex'[8] – and there is in fact far more interaction with government than a focus on formal law alone would suggest. It is apparent from the data that a situation of 'law beyond government' has arisen, whereby private orphanages are operating according to informal, mostly unarticulated, but nevertheless relatively clear rules, beyond the legal framework. These norms compete with and at times contradict formal legislative rules. But further, government is itself participating in this field of social activity and by its interaction with private orphanages contributing to the development of the illegal and non-legal norms that exist in tension with the very legal norms the government ostensibly uses to govern. Thus it can be said that a situation of 'government beyond law' has also arisen. The demarcations between lawful and unlawful, and promotion as opposed to tolerance of social fields beyond the reach of the law, become shifting, blurry targets. This situation may be unfamiliar to the outsider, in part because of an image of an all-controlling Party-state apparatus, but is anecdotally common in China, where the government is popularly perceived as deliberately taking a 'one eye open one eye closed' approach to many areas of regulation. This raises a number of questions: descriptively, what are the outcomes of 'government beyond law' for the child welfare sector? Is the ambiguous legal landscape intentional or does it relate more to the cumbersome nature of government in China generally, and what light does it shed on the purported ongoing emergence of Chinese

8 Moore (1973) p 720.

civil society? Can generalisations be drawn from the case study to modes of governance in other sectors of modern Chinese society? Further, if formal law in this sector is not doing what one would expect it to do, that is regularising human behaviour, how are we to understand the role and functions of the formal Chinese legal system?

2 Theoretical Framework

The findings and interpretations relating to the specific example of private orphanages in China are intended, in addition to contributing to knowledge of that particular sector, to provide insight to more general questions commonly asked about modern China. This section introduces a number of related themes of modern socio-legal and Chinese scholarship, with which the current study engages and which contribute to the analytic framework in which it is situated. First, an empirical study of unregistered and quasi-legal orphanages, and the informal norms which govern their operation, would *prima facie* seem well suited to contribute to studies of order without law, illegal practices, and law/practice gaps, which follow in Pound's 'law in action' tradition[9] and abound in socio-legal literature. Seminal examples of such works include Ellickson's study of the 'order without law' of Shasta County rangers, in which he constructs a theory of 'how people manage to interact to mutual advantage without the help of a state or other hierarchical coordinator',[10] and Mnookin and Kornhauser's classic *Bargaining in the Shadow of the Law*.[11] Reisman's conceptual 'myth system/operational code' dichotomy, taken from his study of bribery, is particularly salient to the current question of

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9 Roscoe Pound, 'The Law and the People' (1910) 3(1) *The University of Chicago Magazine* 1.

10 Robert Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Harvard University Press, London 1991) 1.

11 Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

ostensible and actual norms of behaviour, the former referring to a clear expression of all the rules and prohibitions, 'the "rights" and "wrongs" of behaviour expressed without nuances and shadings', of a social process, the latter to rules governing 'when, by whom, and how certain "wrong" things may be done'.[12] Heyman's more recent treatise on states and illegal practices introduces a related body of scholarship on government tolerance of ostensibly prohibited activities, that 'inquire[s] after the conditions under which governments and illegal practices enjoy some variety of symbiosis and those which result in greater or lesser degrees of conflict',[13] observing that 'the modern state is not made up of law and order alone, but a complex web of the legal and illegal that justifies our enterprise':[14]

> The line between 'legal' and 'illegal' is held to be clear and definitive inside a given state, a hegemonic claim. Yet the actual practice is ambiguous and subject to resourceful manipulation. Legality and illegality are thus simultaneously black and white, and shades of gray. … If we think of repression and mutuality as two ends of a continuum, in a given historical and social context, what accounts for states coming to a particular place on this continuum with respect to a specific illegal practice?[15]

The current study is related to these popular socio-legal/political paradigms, as it begins from a starting point of seeking to understand, describe and analyse the nature of and reasons for the law/practice gap that exists in relation to private orphanages, and the norms and relations which order and define the sector apart from formal laws and policies. The study introduces a situation of 'law beyond government' which is occurring at the local interface between officials and the private orphanages and foster homes, in which unofficial norms are at times more effectual and salient in practice

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12 Michael Reisman, *Folded Lies: Bribery, Crusades and Reform* (Collier Macmillan Publishers, London 1979) 1.

13 Josiah Heyman (ed), *States and Illegal Practices* (Berg, Oxford 1999) 1.

14 Heyman (1999) p 9.

15 Heyman (1999) p 11.

than official rules and policy. The point has been made in relation to Chinese non-government organisations (NGOs) and charities generally by other researchers, most recently in Yuwen Li's 2011 treatise on Chinese NGOs,[16] and is described in detail as it occurs in the as-yet unexplored local interface between officials and private orphanages and foster homes. Following on from this, there are two important ways in which the present study builds upon and moves beyond existing ethnographies and studies of these themes. First, the study argues a situation of 'government beyond law' is observable in the field. That is, government officials, aware of and widely tolerating the often-wide gap between official law and practice, are themselves engaging with and contributing to the development of the non-legal 'law beyond government' rules. In fact, it will be shown that usually the coercive power of the informal norms is also governmental, an important feature which distinguishes the present study from many other 'order without law' examples.

Second, and more importantly, studies of state responses to illegal conduct are valuable for delving deeper into how the state itself deals with and partakes of the concept of illegality. However, the legal/illegal binary they presuppose, even allowing as Heyman and others do for a spectrum between the two, and acknowledging the important distinction between empirical legality (in the sense of rules observably regarded and treated as binding) and ideological legality (in the sense of rules claimed to be so regarded and treated),[17] is not apposite in the local Chinese context. It will quickly become apparent from the current ethnographic findings that there is

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16 'The researchers of NGOs and many others issues in China are always faced with a perplexing phenomenon: due to institutional reasons, many activities which should be carried out according to legally prescribed rules are instead carried out according to some underlying "hidden" rules': Peifeng Liu, 'Development of Charities in China Since the Reform and Opening Up' in Yuwen Li (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011) p 89.

17 Heyman (1999) p 14 – seeking not to separate empirical legality and ideological legality, but to seek to 'understand how the two processes interlock'.

commonly a noticeable lack of preoccupation, both on the part of local officials and civil society actors, with the legality of such NGOs in either an empirical or ideological sense. Indeed 'legality' is, empirically, a difficult notion to pin down in this area of activity, and, given the vague state of the legislative framework as introduced in Chapter Two, is much more problematic to define here than is often the case in many Western[18] contexts. It is equally difficult, given the state of formal NGO laws, for grassroots organisations to go about pursuing this vague target of 'legality'.

Further, ideologically, there is a far greater emphasis in the field, and also in the scholarship of Chinese NGO specialists,[19] on the attainment of legitimacy than legality. Legitimacy is defined by Gao Bingzhong, an influential Chinese NGO scholar, as 'being recognised or accepted because of being judged or believed to be in conformity with certain rules'. This definition accords with Suchman's, widely adopted in Western organisational theory scholarship: 'Legitimacy is a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions'.[20] Of course, semantically and conceptually the concepts of legitimacy and legality are closely related, with the former often being used in a particular sense to mean 'conformable to law' (the more general sense being 'conformable to rules or standards') – this is also the case when one considers the Chinese terms for legitimacy, *heli* and *hefa*, literally 'complying with

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18 In using terms such as 'Western' and 'Chinese', I am in agreement with Hoffman and Zhao, who argue that such usage can lead to 'unwarranted generalisation, leading to monolithic comparisons that erase internal differences', but that they might nevertheless be carefully used as 'heuristic devices to illustrate broad cultural contrasts' (Diane Hoffman and Guoping Zhao, 'Global Convergence and Divergence in Chidhood Ideologies and the Marginalisation of Children' in Joseph Zajda, Karen Biraimah and William Gaudelli (eds), *Education and Social Inequality in the Global Culture* (Springer, 2008) p 3).

19 Yuwen Li (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011) Chapters 2–7.

20 Mark Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *Academy of Management Review* 571, p 574.

truth/reason' and 'complying with law' respectively. However while compliance with legal rules is one aspect of legitimacy, as will be explored herein, legality (or what we might call 'legal legitimacy') is not of central importance vis-à-vis Chinese NGOs. It is thus useful to consider other aspects of legitimacy that may not be contingent on or related to an organisation's legal status. In this vein, Gao helpfully deconstructs legitimacy into four aspects: political legitimacy, social legitimacy, administrative legitimacy and legal legitimacy.[21] Political legitimacy depends on the political correctness of an organisation's agenda and actions. Social legitimacy refers to congruence with the expectations and norms of society, and accordingly being recognised and accepted socially. Administrative legitimacy involves being recognised and accepted by a bureaucratic system, while legal legitimacy denotes recognition and formalisation through legal institutions (such as, for example, legislation relating to NGO registration). These are influential interpretive concepts in Chinese NGO literature, which raises the question of how much value is placed on the various facets of legitimacy, including but not limited to legal legitimacy (or legality), by the various actors, both state and non-state, Chinese and Western, at the level of grassroots NGO activity. Examining different ideological emphases evident in the field in this way is relevant to broader themes of modern Chinese legal culture and practice, as explored further below.[22]

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21 Bingzhong Gao, 'The Question of Legitimacy of Social Organisations' (2000) *China Social Sciences* 2, translated in Junkui Han, 'International NGOs in China: Current Situation, Impacts and Response of the Chinese Government' in Li (2011) p 35. Organisational theory literature includes numerous different 'legitimacy typologies', such as resource/moral/cultural (David Ahlstrom and Gary Bruton, 'Learning from Successful Local Private Firms in China: Establishing Legitimacy' (2001) 15(4) *The Academy of Management Executive* 72) and pragmatic/moral/cognitive (Suchman (1995)). While organisational and business management scholarship has some relevance to NGO studies, and recognising the overlap of other legitimacy 'types' with Gao's four categories of legitimacy, Gao's model is adopted herein due to its proven aptness vis-à-vis the study of Chinese NGOs.

22 Chapter One 'Role of Law and Chinese Legal Culture' from p 20.

State-Society Theories

Consideration of how the state regards and deals with NGOs engaging in a sphere of quasi-illegal/illegitimate activity is relevant to the question of the nature of evolving state-society relations of modern China. To date, scholarly interest in Chinese state-society relations has led researchers in one of two general directions, the 'civil society'[23] and 'corporatist'[24] approaches. Both of these frameworks involve the application of 'macro' political theories to explain shifts in the nature and role of NGOs in China today. 'Civil society' and the 'public sphere' are notions rooted in Western tradition, but have been used by many historians to try to understand Chinese institutions, both modern and dating back to the late Qing Dynasty.[25] For example, the 1989 democratic movements were viewed by many as a sign of incipient civil society in China, and a landmark on a purported road to democracy.[26] This contrasts notably with the corporatist approach, which criticizes the use of the civil society concept in attempting

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23 See, for example, Gordon White, Jude Howell and Xiaoyuan Shang, *In Search of Civil Society: Market Reform and Social Change in Contemporary China* (IDS Development Studies Series, Clarendon Press, Oxford 1996); Li (2011).

24 See, for example, Jonathan Unger and Anita Chan, 'Corporatism in China: A Developmental State in East Asian Context' in McCormick, Barrett and Unger, Jonathan (eds), *China after Socialism: In the Footsteps of Eastern Europe or East Asia* (ME Sharpe, New York 1996); Renee Yuan-Jan Hsia and Lynn White, 'Working Amid Corporatism and Confusion: Foreign NGOs in China' (2002) 31(3) *Nonprofit and Voluntary Sector Quarterly* 329; Frederic Jr Wakeman, 'The Civil Society and Public Sphere Debate: Western Reflections on Chinese Political Culture' (1993) 19(2) *Modern China* 108; PC Huang, 'The Paradigmatic Crisis in Chinese Studies: Paradoxes in Social and Economic History' (1991) 17(3) *Modern China* 299; Dorothy Solinger, 'Urban Entrepreneurs and the State: The Merge of State and Society' in Arthur Lewis Rosenbaum (ed), *State and Society in China: The Consequences of Reform* (Westview, Oxford 1992) 121; Richard Baum and Alexei Shevchenko, 'The 'State of the State" in Merle Goldman and Roderick MacFarquhar (eds), *The Paradox of China's Post-Mao Reforms* (Harvard Contemporary China Series, Harvard University Press, Cambridge 1999) pp 346–351.

25 Qiusha Ma, 'The Governance of NGOs in China since 1978: How Much Autonomy?' (2002) 31 *Nonprofit and Voluntary Sector Quarterly* 305, p 316, introducing the literature of Chinese historians such as Rowe (1984), Rankin (1986) and Strand (1989).

26 See, for example, Thomas Gold, 'Tiananmen and Beyond, the Resurgence of Civil Society in China' (1990) 1 *Journal of Democracy* 18; Lawrence Sullivan, 'The Emergence of Civil Society in China, Spring 1989' in Tony Saich (ed), *The Chinese People's Movement, Perspective on Spring 1989* (East Gate Book, New York 1990).

to understand China because 'although the public realm has expanded continually since 1900, this has not led to the assertion of civic power against the state'.[27] Corporatism, a state-dominant theory, is characterized by 'tight political control by the state, which creates and controls vertical networks of power to pre-empt the growth of horizontally formed class interests',[28] and is defined by Unger and Chan as 'a situation in which the state legitimizes organizations at its discretion and exercises a disproportionate amount of power over such organisations'.[29] Saich, a leading scholar on 'Social Organisations' (the main type of NGO in China), argues that '[a]nalyses that rely on some variant of corporatism capture well the top-down nature of control in the system', but that 'such explanations risk both obscuring important elements of change and over-simplifying the complexities of the dynamics and interaction'.[30]

The civil society/corporatist debate is relevant to the current study, but a more nuanced approach is needed as neither is able to tell the full story of the changing complexity of Chinese NGOs, a story which, due to ongoing reforms, increasing regulatory complexity, and the quasi/semi-governmental status of many NGOs,[31] 'def[ies] easy categorisation'.[32] Thus Shue suggests approaching the problem with regard to 'a possible continuum of associational structures and experiences stretching from those relatively … state-dominated at one extreme, to those fairly … autonomous, at

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27 Ma (2002) p 317.

28 Hsia and White (2002) p 330.

29 Jonathan Unger and Anita Chan, 'China, Corporatism and the East Asian Model' (1995) 33(3) *Australian Journal of Chinese Affairs* 29. See also Philippe Schmitter, 'Still the Century of Corporatism?' (1974) 36 *The Review of Politics* 85, pp 93–94; Hsia and White (2002) p 338.

30 Tony Saich, 'Negotiating the State: The Development of Social Organisations in China' (2000) 161 *China Quarterly* 124, p 139.

31 Government-operated NGOs are discussed in Chapter Two at pp 52–3.

32 Saich (2000) p 138.

the other'.[33] This is usefully supplemented with a broader 'sociological' as opposed to 'political' conception of civil society, proposed by White, Howell and Shang:

> [T]he latter equates civil society with political society in the sense of a particular set of institutionalized relationships between state and society based on principles of citizenship, civil rights, representation and the rule of law. The sociological conception … involves an intermediate associational realm situated between the state on one side and the basic building blocks of society on the other (individuals, families and firms).[34]

As Schwartz and Shieh point out, the political definition of civil society, in emphasising autonomy from and opposition to the state, is 'more restrictive of the kinds of organisations that would qualify as an NGO', and thus inadequate to 'capture the reality of associational life in China'.[35] The sociological definition, on the other hand, 'includes consideration of organisations that over time may constitute both a challenge to the state and a supporter of shared goals with the state'.[36] This broader conception of civil society allows White and his colleagues to identify

> a strong and growing sphere of social association in China which exhibits, albeit to widely differing degrees, the organizational features of a civil society … voluntary participation and self-regulation in their activities, and autonomy and separation in their relationship with the state.[37]

More recently, Shieh has proposed a framework even further removed from the civil society/corporatist debate, as an alternative to that dichotomy which is so dominant throughout literature on Chinese NGOs. Shieh argues that 'state-NGO

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33 Vivienne Shue, 'State Power and Social Organisation in China' in Joel Migdal, Atul Kohli and Vivienne Shue (eds), *State Power and Social Forces: Domination and Transformation in the Third World* (Cambridge University Press, New York 1994), pp 77–84. See also Jonathan Schwartz and Shawn Shieh (eds), *State and Society: Responses to Social Welfare Needs in China* (Routledge, London 2009) pp 6–9.

34 Ma (2002) pp 317–318.

35 Schwartz and Shieh (2009) p 10.

36 Schwartz and Shieh (2009) p 10.

37 White, Howell and Shang (1996) p 208.

relations in China are becoming too complex and dynamic to be captured by any one of the [variant corporatism or civil society] frameworks'.[38] Such relations, Shieh argues, vary across sectors and regions, and cannot be reduced to one particular mode of interaction. The complexities of state-NGO relations are rather best investigated using a multidimensional framework that accommodates three main, but not mutually exclusive, modes of interaction: regulation, negotiation and societalisation. Regulation denotes 'formal state initiatives and mechanisms designed to control and manage [NGOs]'; negotiation refers to 'consensual, and generally more informal, interactions between state and social actors'; and societalisation refers to NGO activities in which the state is not a partner, but which may be recognised and tolerated by the state.[39]

These more nuanced approaches are better suited to avoiding the pitfall of trying to generalise about the nature of state-society relations in China (for example, whether in fact 'civil society' can be said to have emerged in China), generalisations that Saich argues over-simplify 'the complexities of the dynamics and interaction'.[40] Further, attempts at generalisations, and a preoccupation with the extent of Chinese NGO autonomy as an expression of 'civil society', are a distraction from the more interesting question that this research seeks to address: how do local NGOs interact with the state?[41] In addressing this question, Shue's continuum of autonomy, combined with White's broad understanding of the forms which civil society can take and Shieh's multidimensional framework of state/society interaction, are supplemented by an

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38 Shawn Shieh, 'Beyond Corporatism and Civil Society: Three Modes of State-NGO Interaction in China' in Schwartz and Shieh (2009) p 23.

39 Shieh (2009) p 23.

40 Saich (2000) p 139.

41 The point is used as the starting point of Schwartz and Shieh's volume on state and society responses to social welfare issues (2009, p 10).

awareness that any study of China's NGOs is necessarily 'an attempt to analyse a moving target, a state and society in transition'.[42] Moreover, it involves analysis of a state apparatus that is exceptionally complex and layered, to the point where the state-society divide is at times a problematic line to draw (as explored further in Chapter Two).[43]

A unifying feature of the state-society theories canvassed above is a focus on structures of power and how such structures mediate on-the-ground interactions between the state and society. This study aims to contribute to the meta-narrative of this 'growing sphere of social association' by providing detailed qualitative research on the nature of state-society relations at a local level, in relation to informal grassroots NGOs, including dynamics of power which impact thereupon. Further, it is recognised that structures of power are themselves a function of expectations regarding roles – for example, of officials, of citizens, and of organisations – and the shaping of those roles by norms, legal and non-legal. That is to say, this study aims to connect findings about state-society relationships with broader questions about expectations, held by actors on both sides of that relationship, regarding the role of law in regulating, shaping, maintaining or interrupting those relationships, at the local level, in the Chinese cultural context. This theme of cultural expectations about the role of law, explored further below, is well accommodated by Shieh, whose recognition of the modes of negotiation and societalisation, in addition to formal regulation, eschews law-centric assumptions about where the state-society interface is to be found.

The local perspective adopted herein is underrepresented in civil society

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42 Saich (2000) p 138.

43 See also Schwartz and Shieh (2009) p 10.

literature and NGO studies, which tend to focus on central, as opposed to local, political dynamics.[44] Existing studies also tend to favour registered, as opposed to unregistered, NGOs, which, given the verticalised nature of the NGO registration system, tend to be tightly supervised. This emphasis is understandable given their visibility and accessibility, but as the vast majority of NGOs in China today are unregistered, and operating beyond the legislative landscape that has been cautiously and carefully crafted since the Tiananmen Square events of 1989, the legitimacy of a state-society picture which excludes such NGOs from its scope is at best partial. Given that, as Saich notes, the 'shifting complexities of the current system and the institutional fluidity, ambiguity and messiness that operate at all levels in China' are 'most pronounced at the local level',[45] delving into an in-depth empirical study of that complex state-society interface at a local level will be an important contribution.

This is not to presume, however, that the emphasis in existing literature on registered NGOs at the state-dominated end of the spectrum has necessarily led to an overstatement of the corporatist characteristics of the state-society relationship. Existing literature tends rather simplistically to assume that 'grassroots NGOs … do not encounter too much interference from the government', and are not directly controlled in any way by the government in the absence of registration,[46] there being a supervision gap which allows for greater NGO freedom. It is here that in-depth empirical studies are wanting, as it will become apparent from the current study that, on the contrary, at the local interface between state and society, oversight and control are at

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44 See, for example, the most recent volume of Chinese authors on NGOs, Li (2011) Chapters 2–7.

45 Tony Saich, *Governance and Politics of China* (Palgrave MacMillan, Hampshire 2004) p 232.

46 Xiaoyuang Kang and Han Heng, 'Graduated Controls: The State-Society Relationship in Contemporary China' (2008) 34 *Modern China* 36, p 48.

times also very much evident, but in much more veiled, and less formal/policy-centric ways than we see centrally. This bottom-up picture of locally-negotiated space (that is, 'negotiation' in the sense used by Shieh's tripartite typology) usefully supplements the top-down perspective of NGO control and oversight; on the whole, gradual, cautious, yet clear, expansion and increasing tolerance are evident.

In addition to this local perspective, there is a second reason to suppose that the current study is well suited to provide unique insight and texture to state-society scholarship, namely the scope of activity of the case studies. The history of foreign and church-run orphanages in China, which is introduced in more detail in Chapter Three, is unique; both foreigners and religious groups have been traditionally regarded with suspicion by Chinese authorities and their charitable works closely monitored, and at times interrupted, for political reasons. The involvement of such groups in caring for vulnerable children is presumably yet more politically sensitive due to the fact that such activities draw attention to gaps in government provision of orphan welfare services. Moreover, the existence of private orphanages is seen by many in the field as a partial testament to the true extent of abandonment in China, a phenomenon the Chinese government has a vested interest in underemphasising due to its nexus with China's controversial birth planning policies. The complex intersection of these socio-political factors in this area of activity make it a valuable case study through which to revisit existing theories and scholarship on the Chinese state-society interface; the case study provides a useful counter-example to studies focused on the development of NGOs attending to themes and issues that more closely align with policy areas that are less politically controversial (such as women's rights or environmental movements).[47]

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[47] See Shen on the relatively warm reception of women's NGOs in modern China: Guoqin Shen, 'The Development of Women's NGOs in China' in Li (2011). The goal of gender equality

Role of Law and Chinese Legal Culture

What is the role of law in modern Chinese society? In 1996, Jiang Zemin adopted a new official policy of ruling the country in accordance with law, and establishing a socialist law-ruled state (*yifa zhiguo, jianshe shuhui zhuyi fazhiguo*), a policy that is now incorporated into the PRC Constitution. Such law-lauding ideology and rhetoric has been increasingly evident in China since the end of the Cultural Revolution, and in conjunction with decades of rapid and prolific legal institution-building, has provided rich data for ample scholarship and discourse on the trajectory of China's legal system, and the nature of rule and order in modern Chinese society. The main empirical issues addressed in this field include the retreat of the Party-state, the evolution of the legislature, judiciary, legal profession and administrative law regimes, and the nexus between rule of law and economic development, democracy and human rights. The 'law and order' meta-narrative is visibly played out in Party discourse, Five Year Plans, Constitutional evolution and the astounding pace of development of the formal legal system. The thickest descriptions and predictions of the story are those that also take into account trends and trajectories in popular and Party legal consciousness and ideology.[48]

The basic distinction made in studies of the role of law in maintaining order is between rule by, and rule of, law:

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pursued by such NGOs coincides with government policies on women's liberation and social development.

48 See, for example, Randall Peerenboom, *China's Long March Toward Rule of Law* (CUP, New York 2002) especially Chapters 2–3; Geor Hintzen, 'The Place of Law in the PRC's Culture' (1999) 11 *Cultural Dynamics* 167; Zhiping Liang, 'Tradition and Change: Law and Order in a Pluralist Landscape' (1999) 11 *Cultural Dynamics* 215; Karen Turner, 'The Criminal Body and the Body Politic: Punishments in Early China' (1999) 11 *Cultural Dynamics* 237; Thomas Stephens, *Order and Discipline in China: The Shanghai Mixed Court 1911–27* (Asian Law Series, University of Washington Press, Seattle 1992).

> Whereas the core of rule of law is the ability of law and legal system to impose meaningful restraints on the state and individual members of the ruling elite, rule by law refers to an instrumental conception of law in which law is merely a tool to be used as the state sees fit.[49]

In China, the distinction has proved difficult to make empirically (which is nicely reflected in the lack of a linguistic distinction, both concepts generally translated as *fazhi*, literally 'law-ruled'). While generally scholars are in agreement that the direction of legal reform over the last three decades has been away from rule by man and towards rule by law, the extent to which rule *of* law is in fact emerging, and its optimal nature and role in the Chinese context, are matters of much debate in the literature.

The current study, like the voluminous literature on rule by/of law in China, delves into the empirical question of the nexus between law and order in Chinese society. However it approaches the issue from an underutilised perspective. The focus of most studies of Chinese law and order has arguably been fixed on the most visible manifestation of the working out of that nexus, namely institution-building, rhetoric and policy at the central/top level of the Party-state. Chinese and foreign scholars alike have put forward a vast array of opinions and descriptions, from conservative to liberal, on how the macro legal culture of China continues to be shaped by these winds of change blowing from Beijing and (purportedly) throughout China. The rule of law question has been asked through the lenses of globalisation, modernisation and economic development. I begin not with these meta-narratives, but instead ask what expectations, meanings and traditions relating to law and order (which I will broadly term 'Chinese legal sensibility') are evident at the level of local relationships between officials and citizens? Traditional and historical cultural factors in which Chinese conceptions of law and order are grounded have been discussed in depth in the

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49 Peerenboom (2002) p 8.

literature,[50] but tend, like the rule of law debate generally, to be examined at the level of the elite rulers and power-holders. In my thesis, the focus shifts from official, state-endorsed conceptions of law and order, to the experiences and expectations of citizens in society. With regard to the former, opinions diverge in the literature on whether and to what extent the Chinese polity possess a notion of law that is consistent with that required by rule of law. Alford, for example, argues that 'the principal state architects of China's post-Cultural Revolution law reform project have a genuine ambivalence toward their undertaking';[51] Dowdle, on the other hand, argues that any such ambivalence 'manifests itself in practice, not conception. Normatively, the Chinese, including the leadership, are overwhelmingly consistent in proclaiming the supremacy of law over other forms of political authority and over private interests'.[52] The debate would benefit from greater attention to popular legal sensibility, as manifested in civil society and its engagement with low-level officials. At this local interface between state and society, ordinary citizens and government officials bring their own traditions and histories to their engagement with the legal system and the officials who represent it. Those traditions are usefully brought into focus by being presented herein side-by-side with those of the foreign interviewees, some of whom continue to bring Western, law-centric expectations and meanings to their engagement with local authorities, others of whom appear to be adapting to the uniquely Chinese nature of the regulatory environment in which they find themselves.

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50 The most notable works include Peerenboom (2002) and the 1999 special edition of *Cultural Dynamics,* with contributions from (inter alia) Alford, Hintzen, Turner, Dowdle, Defoort and Peerenboom, and Liang.

51 William Alford, 'A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction' (1999) 11 *Cultural Dynamics* 193, p 198.

52 Michael Dowdle, 'Heretical Laments: China and the Fallacies of 'Rule of Law' (1999) 11 *Cultural Dynamics* 287, p 301.

By moving in this way from the macro to the micro, texture and distinction is added to our understanding of the ideologies and traditions in which 'law and order' concepts in China continue to be grounded today, and a contribution will also, reflexively, be made to the bigger picture themes of rule of law and legal consciousness. Empirical grassroots studies have potential to shed much light on the extent to which Beijing's winds of change, including the state's 'verbal homage to the sanctity of law',[53] are penetrating the local sphere. In fact, the local picture painted herein is one in which law is not supreme, either in practice or rhetorically, and many features of even a thin conception of rule of law are missing. However, as it will be shown, even though the 'real' rules of engagement between private orphanages and the state have more to do with legitimacy, connections and face than with many of the features of even a thin conception of rule of law, the picture that emerges is not one of 'lawless chaos'.[54] The local snapshot presented herein is one imbued with themes of paternalism, game-playing, give-and-take, suspicion and subordination. Above all, it is one of order – not, admittedly, a type of order associated with rule of law and its threshold requirements such as predictability and certainty, but order nonetheless. My aim is not an ideological defence of, or policy recommendation regarding, this local picture, but a re-examination of the law-order nexus locally and what it tells us about notions and ideas about law and order in Chinese culture and society.

This approach to 'law and order' is closely tied to 'law as culture', which seeks a more meaningful construction of law that situates law in its total social context. In order to investigate a culture's dominant underlying beliefs about and meanings of law,

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53 Peerenboom (2002) p 217.

54 Compare with Hintzen (1999) p 169, arguing that the picture that emerges on examining the social realities behind 'China's vociferous legal aspirations' is 'one of lawless chaos, where status, connections and money set the 'real' rules'.

Geertz advocates a 'hermeneutic tacking between two fields', broadly, culture and law, allowing light to be shed on the mutually constitutive/dialectic relationship between the two.[55] Law is not studied as a semi-autonomous phenomenon, but is viewed as partaking of concepts that extend across many domains of social life, and analysed as 'an extremely characteristic part of the entire social fabric'.[56] In approaching this 'law as culture' nexus in the Chinese context, a common starting point is to examine Confucian and/or Socialist traditions, and to draw a connection with the emerging legal system of the past thirty years.[57] For example, scholars often draw attention to the Confucian emphasis on harmony, and its deeply embedded preference for *li* (rites or rituals) over *fa* (law) as the means of attaining political order, the latter far less exalted in status and only 'grudgingly accepted as a necessary evil' in the fact of the failure of ritual order.[58] Confucian political discourse is tied to a strong paternalistic tradition 'in which the ruled are expected to defer to mother and father officials (*fumuguan*) much as children defer to their parents'.[59] Paternalism, hierarchicalism, and a preference for customary or informal systems of dispute resolution are seen as hallmarks of Chinese culture, in addition to the very great importance placed by society on *guanxi* (personal networks) and *renqing* (human feelings, obligations or empathy), and particular/substantive justice over general/procedural.[60] The rise of Socialism in more recent history did little to interrupt the continuation of these themes, and 'further called into question the

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55 Clifford Geertz, *Interpretation of Cultures* (Basic Books, New York 1973).

56 Geertz (1973).

57 Peerenboom (2002).

58 Carine Defoort and Randall Peerenboom, 'Law and Order in China, I' (1999) 11(2) *Cultural Dynamics* 131, p 132.

59 Peerenboom (2002) p 9.

60 Peerenboom (2002) Chapters 2–3.

normative basis of law'.[61] Law under Mao was seen as 'an instrument to strengthen a paternalistic state', and continued to be 'held in low esteem as a means of achieving social order'.[62] Hintzen similarly presents three continuing and distinctive aspects of Chinese culture, namely the basic social relation between father and son and the persistent normative force of the family model in social life, the notion of power and its consolidation in the hands of individuals rather than in institutions, and an 'essentialist' view of reality that leads to 'concretisation' of general policies (that is, the working out of policy implementation details after the promulgation in formal law and policy of higher-level general principles). Hintzen argues that owing to these three aspects of Chinese culture, '[formal] law cannot fulfil the same abstract, general and directly binding role as it does on the basis of western scholasticism' and in fact never did play such a role in China.[63]

Such studies usefully demonstrate the by now well-canvassed point that if rule of law is to develop in China, it will be in a particularly Chinese context and so will have particularly Chinese characteristics. Having regard to the impact of historical and cultural factors on the modern Chinese legal system is an imperative aspect of a meaningful depiction of the role of law in ordering social relations, whether the role is labelled 'rule by law' or 'rule of law'. However, while I agree with Hintzen that 'cultural values are of determining influence for the way law is viewed in a society',[64] it is important that the question of how 'law is viewed' is approached without constraining theoretical preconceptions. A potential shortcoming of such a law/culture framework

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61 Defoort and Peerenboom (1999) p 132.

62 Peerenboom (2002) pp 47–8.

63 Hintzen (1999) p 178.

64 Hintzon (1999) p 167.

is that it presumes that, so long as the context is accounted for, it is possible to identify ideas, concepts and institutions comparable to those of the West, which we might term 'legal'.[65] With regard to the aforementioned meta-narrative of China's developing legal system, a narrative defined and coloured in recent decades by central state attention to the law and order nexus, this does not seem to be a problematic assumption. However, in looking at the *local* ideas, concepts and institutions of China, an approach is needed which allows for the possibility that a different type of system and ideology may also be relevant.

In this vein, Stephens, in his study of the Imperial Shanghai Mixed Court, questions whether a law-centric framework is apposite in the traditionally disciplinarian context of China. Stephens presents two contrasting modes of social control, the 'adjudicative/legal,' and the 'disciplinary/parental', arguing that traditional Chinese justice fits the latter mould more than the former. In a disciplinarian system, order excludes law, and is rather characterised as 'the harmony of pattern arising spontaneously from within. The idea of predetermined, rigid, universal imperatives governing conduct and imposing order from without is not there'.[66] This denotes more than just paternalism, but a uniquely Chinese presentation of self, both individually and collectively, as embedded in a 'group-hierarchical society' in which 'right conduct consists in doing what is commanded'.[67] Stephens argues that a disciplinary theory is necessary and appropriate when studying order in China because

> it provides an alternative framework of principles in terms of which a much more credible and convincing picture of Chinese processes of dispute

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65 Stephens (1992) p viii.

66 Stephens (1992) p 8.

67 Stephens (1992) p 18.

> resolution and the enforcement of order can be projected than any that is possible in terms of the principles, concepts, and vocabulary of familiar Western legal systems.[68]

Stephens' thesis is salient to the current study, as it demonstrates the important, and often overlooked, point that there are different ways of thinking about order in China, some of which do not coincide with the Western underpinnings of law, legality and rule of law. Dowdle similarly points out that 'rule of law … is not the only way through which social coordination can be secured'; in 'small-world' environments 'the disciplining force of reiterated transactions can sometimes be so strong as to eliminate any need for formal legal regulation'.[69] By having regard to alternative ideas about social coordination and the maintenance of order, such as presented by Stephens and Dowdle, and embarking on an in-depth ethnographic study of a particular sphere of activity and the ordered norms and relationships comprising it, this study will contribute to contemporary understanding of the context in which China's legal system is evolving, and the role of law in this transitioning society. Is formal law regarded by local actors in a way that is familiar to Western observers? To what extent have thirty years of intensive law institution building and legal reform influenced prevailing 'legal sensibility' in China as visible at the local state-society interface, and does Stephens' interpretation of 19th century imperial Shanghai institutions, with its themes of paternalism and discipline, resonate convincingly in 21st century China? An important advantage of this study in exploring these dominant Chinese notions and understandings of law is the juxtaposition of Chinese actors with Westerners engaged, contemporaneously, in the same field of activity. This provides an even more meaningful contrast between Chinese and Western cultural conceptions of law and order than comparisons between activities

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68 Stephens (1992) p xii.

69 Dowdle (1999) pp 302–3.

occurring in different national/regulatory contexts. Of further interest is the question of to what extent, if any, foreigners familiar with the Chinese 'legal culture' are themselves accommodating or appropriating such attitudes and beliefs about the role and nature of law on encountering an 'other' approach to law and legality.

Normative Questions: Social Policy and Children's Rights

Finally, it should be noted that this exploration of a particular type of social welfare activity contributes to existing literature on Chinese social policy. Two broad themes are identifiable in current scholarship on social welfare, namely the ongoing transition from 'welfare statism' to 'welfare pluralism' as the government becomes increasingly open to non-state provision of services, and aspects of regional/rural-urban inequality which continue to characterize both state and non-state social welfare efforts.[70] It is not my intention to comment on these broad social policy themes, nor to take a normative policy position on the state of child welfare services. However, the original qualitative findings on the private provision of the latter presented herein will be a useful contribution to sociology's overall picture of these broad themes. More specifically, a detailed depiction of the historical, social, political and legal factors which influence local state-civil society dynamics, both in relation to indigenous and foreign charity workers, will shed further light on what this ongoing transition to welfare pluralism looks like at the local level. Further, the ways in which non-state actors are spontaneously emerging to fill rural gaps in welfare provision are an important feature of the rural/urban welfare divide, to which little attention has been paid in existing literature. Similarly, the topic of child welfare organizations obviously raises questions

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70 Chak Kwan Chan, Lun Ngok King, and David Phillips, *Social Policy in China: Development and Well-Being* (Policy Press, Bristol 2008); Xiaoyuan Shang and Xiaoming Wu, 'Changing Approaches of Social Protection: Social Assistance Reform in Urban China' (2004) 3(3) *Social Policy and Society* 259; Liu (2011).

relating to the human rights of children, including the right to life, the right to know one's family and identity, the right not to be discriminated against on the basis of gender or disability, the rights of children deprived of their family environment, and corresponding duties of states and private actors.[71] While this perspective does not form part of the 'law and order' framework which I have adopted to evaluate the situation of non-state orphanages, questions of rights-based state duties in the sphere of orphan and foundling care are evidently of ongoing concern to commentators both inside and outside China.[72]

3 Methodological Framework

This research project is the culmination of numerous trips to various foster homes and orphanages in China carried out between 2005 and 2010. Using those homes as a starting point of contact, the subjects of study were approached based on personal introductions and snowball sampling. This eventually led to contacts with Chinese-run orphanages. The project is primarily based on interviews undertaken from July to October 2009 and July to September 2010 with representatives of orphanages and foster homes located in Hebei, Shandong, Henan, Shaanxi, Anhui, Shanxi and Jiangsu provinces and the Beijing and Shanghai municipalities. Appendix 2 briefly introduces the individuals interviewed and the organisations they represent. These interviews were all conducted on the condition of anonymity. Where referenced herein, organisations and place names are referred to by pseudonyms, and interviews are referred to by

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71 Convention on the Rights of the Child (adopted 12 December 1989) A/RES/44/25 (CROC) Articles 2(2), 6, 8, 20 and others.

72 See, for example, Human Rights Watch/Asia, *Death By Default: A Policy of Fatal Neglect in China's State Orphanages* (Human Rights Watch, London 1996); Kay Johnson, *Wanting a Daughter, Needing a Son* (Yeong & Yeong Book Company, St Paul 2004); Shang, Wu and Wu (2005).

number according to Appendix 2. I translated Chinese interviews to English freely rather than literally, with regard to linguistic nuance and emphasis.

Interviews were also conducted with a number of child-related NGOs, both foreign and Chinese, with primary content covering NGO laws, policies and practice, registration procedures, and issues relating to Chinese civil society more generally; a retired senior level Ministry of Civil Affairs[73] official; and the following government and government-owned departments and entities: the Ministry of Civil Affairs China Charity and Donation Information Centre;[74] the Shandong Charity Federation Office,[75] and the Ministry of Civil Affairs NGO Service Centre.[76] On both research trips, approximately half of my time was spent living at various orphanages and foster homes, helping out with child-care, administrative work and English lessons, in order to more closely observe their operations and daily living. Fieldwork was conducted with approval from the University of Oxford Social Sciences and Humanities Inter-divisional Research Ethics Committee (IDREC).[77]

The first methodological point to be addressed here is the issue of the scope of the study. When embarking on a study of order and legal regulation, attention must be paid to ensuring that relevant phenomena are not excluded from the study at the outset

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73 The Ministry of Civil Affairs (hereafter 'MCA') is the administrative authority responsible, inter alia, for welfare programmes, introduced in further detail below in Chapter Three at pp 102–3.

74 中华人民共和国民政部。中民慈善捐助消息中心 (*zhonghua renmin gongheguo minzhengbu – zhongmin cishan juanzhu xiaoxi zhongxin*) (Beijing September 2009 [by email]).

75 山东省慈善总会 *(shandongsheng cishan zhonghui)* (Jinan 21 September 2009).

76 中华人民共和国民政部。民间组织服务中心 (*zhonghua renmin gongheguo minzheng bu – minjian zuzhi fuwu zhongxin*) (Beijing 18 September 2009 [by telephone]).

77 Reference number: SSD/CUREC21/C1A 10-010.

due to pre-existing conceptions about where 'law' (in a broad sense) is to be found.[78] In the current instance, this translates to approaching the field with an open and flexible definition of concepts such as 'law', 'order', 'legality' and 'regulation', and eschewing law-centric assumptions about the control of social arrangements, in the tradition of legal anthropologists such as Malinowski and Sally Falk Moore. Thus Moore seeks to broaden the field of observation to include 'how legal, illegal and non-legal norms all intermesh',[79] by departing from a narrow formulation of 'law' that is 'abstracted from the social context in which it exists, and is spoken of as if it were an entity capable of controlling that context'.[80] Instead, she advocates returning to the broad approach of Malinowski, who sought in his studies to 'analyse all the rules conceived and acted upon as binding obligations, to find out the nature of the binding forces, and to classify the rules according to the manner in which they are made valid'.[81] The result is a broad formulation of 'law', which Moore advocates as being 'particularly appropriate to the study of law and social change in complex societies'.[82] Moore uses the notion of the 'semi-autonomous social field' to frame the study of social phenomena in terms of the fact that they are able to generate rules internally, but are also vulnerable to rules emanating from the social context in which the observed field is located. The aim is to reach a more meaningful interpretation of how players' actions are guided on a day-to-day basis. A further and important aspect of this approach is to pay high regard to the ways in which interviewees use words, and the meanings they appear to attribute to their language.

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78 Moore (1973) p 720.

79 Moore (1973) p 723.

80 Moore (1973) p 719.

81 Bronislaw Malinowski, *Crime and Custom in Savage Society* (Routledge, London 1926) p 23.

82 Moore (1973) p 720.

In light of this broad scope of study, attention was paid, in conducting interviews and undertaking data analysis, to the method for socio-legal studies set out by Galligan in *Law in Modern Society,* and in particular the first three of the four methodological principles, which are described as follows:

> [F]irst identifying and describing features of a legal order that can be identified as relevant to the actions of citizens and officials, … secondly, examining the meanings attributed to such features by citizens and officials, and the actions that follow … [thirdly] focusing on the character of social spheres and their interaction with law [fourthly] positioning law in a moral context [and connecting it to] its pragmatic foundations.[83]

When it comes to mapping the relevant features of the field of study, a number of issues were faced. First, using networks and word of mouth to contact interviewees leads to a set of case studies more likely to constitute a social network, and, from a positive science perspective, less representative of all actors involved in private orphan work. However, Small argues that, beyond the often overlooked point that even supposedly 'random' samples are almost inevitably characterised by bias problems, 'bias' is the wrong term or standard of assessment when it comes to in-depth interviews. The set of cases, as a result of being 'selected' based on personal contacts and informal introductions, will as a group have particular characteristics – the most obvious being their willingness to speak to me – but these are characteristics that, in the words of Small, 'rather than being 'controlled away', should be understood, developed and incorporated into [one's] understanding of the cases at hand'.[84]

The next set of factors are related. First, there are obvious difficulties faced by a visible 'outsider' seeking to observe and enquire about sensitive work being carried out

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83 Denis Galligan, *Law in Modern Society* (Clarendon Law Series, OUP, Oxford 2007) pp 34–38.

84 Mario Luis Small, 'How Many Cases Do I Need?: On Science and the Logic of Case Selection in Field-Based Research' (2009) 10(1) *Ethnography* 5, p 14.

on the margins of legality. Second, given the opacity of government policy and practice in relation to such a sphere of activity, the bulk of ethnographic data collected is necessarily derived from interviews with private operators in the field rather than informants from the government. In the course of six months in the field, I was able to interview just two government officials in person, both of whom only agreed to meet with me as a personal favour to a mutual friend, and three departments by telephone or email. Given the intersection of up to three politically controversial aspects to my case studies – quasi-legal/unregistered, church-associated, orphan-directed charities – attempts to speak to local officials, or requests for my informants to put me in touch with such officials, were largely fruitless. Thus the primary data presented herein emphasises the civil, as opposed to state, perspective of law, order and regulation in the field. Third, selecting which elements and observations to be used to construct a narrative of the field required 'mastering the elements of the drama'; as Bates et al note, narrative, like dramas, 'can be elusive; many possible explanations can exist, and many possible interpretations'. [85] These three factors are accommodated by the methodological framework within which the data was collected and analysed. Rooted in socio-legal analysis, the theoretical task of an interpretive/reflexive, as compared to positivist approach, is to seek to uncover meanings and patterns in the field of social activity by an exploratory interpretation of institutions and behaviours, rather than a descriptive measurement thereof. Thus a 'thick description'[86] or narrative of a field of activity can be constructed, and the questions of interest reflexively refined in the process. By seeking, in this way, to situate the field of social activity within its broader context, and having regard to the meanings constructed by those in the field itself, richer interpretations can be drawn, including in regard to government behaviour and

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85 Robert Bates and others, *Analytic Narratives* (Princeton University Press, Princeton 1998) p 14.

86 Geertz (1973) pp 5–6, 9–10.

intention, and regardless of, or rather, with regard to, the impact of my presence as an observer and outsider in the field. These theoretical extrapolations benefit from the two dimensions of comparison in my purposive selection of cases, foreign and Chinese homes, and registered and unregistered homes. They further benefit from a coping strategy I adopted very early on, when the opacity of activity in this realm became apparent, namely, to increase the number of field sites and thus reduce the impact of a lack of local bureaucratic cooperation in any particular site. Knowledge gained in particularly 'data-rich' locations, such as Dongjian (an area previously home to dozens of foreign foster homes, and the 'homeland' of China's foreign foster home movement since the 1980s), informed and contextualised behaviours, norms and relationships observable in other locations where informants were fewer or seemed to be less transparent about their work and experiences.[87]

This framework borrows extensively from the 'extended case method' approach espoused by Burawoy,[88] which has been a useful guide to formulating alternative approaches to problems with reliability, replicability and representativeness, and allows defensible generalised theories to be extracted from the complex materials of a specific case. Burawoy characterises his approach as a type of reflexive science, which 'takes as its premise the intersubjectivity of scientist and subject of study', as compared to positive science which 'works on the principle of the separation between scientists and the subjects they examine'.[89] The starting point of reflexive science is to admit that the impact of the researcher's presence in the field, the personal preferences and

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87 For a discussion of multi-site case studies, see Maria Heimer, 'Field Sites, Research Design and Type of Findings' in Heimer, Maria and Thøgersen, Stig (eds), *Doing Fieldwork in China* (Nias Press, Copenhagen 2006).

88 Michael Burawoy, 'The Extended Case Method' (1998) 16(1) *Sociological Theory* 4; Small (2009).

89 Burawoy (1998) p 4.

interpretations which she brings to bear when selecting data, and the resultant ambiguous nature of such data reporting decisions, all violate positive science prescriptive tenets of, respectively, the injunction against reactivity, reliability and replicability. However, rather than seeking to artificially mitigate against such processes resulting from the researcher's presence, Burawoy seeks a methodological framework more apposite: that of 'enjoin[ing] what positive science separates: participant and observer, knowledge and social situation, situation and its field of location, folk theory and academic theory'.[90] Thus throughout my fieldwork, I remained mindful of the perturbations created by my presence and by the knowledge, on the part of informants, of my agenda, and have paid close attention to 'nondiscursive … unexplicated, tacit knowledge'[91] underlying my interactions in the field. For example, one 'positive perturbation' existed on account of my having a religious background and beliefs in common with almost all interviewees, discussions about which would regularly led to noticeable openness on the part of my informants. Such discussions also often led to more expansive discourse about other 'laws' and normative forces, felt and acted upon by them, but which would not have been immediately obvious from a secular or rational-legal perspective. On the other hand, in some interviews I felt that I was received primarily as a Westerner and outsider, which resulted in a corresponding nondiscursive posture, on the part of Chinese interviewees, of defensiveness or impenetrability. By regarding and reflecting on the effect of such perturbations, I was better able to derive legitimate and defensible interpretations and analyses of my interviews and observations in the field.

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90 Burawoy (1998) p 14.

91 Burawoy (1998) p 15.

4 Outline of Thesis

The study begins in Part A with Chapters Two and Three which provide a contextual grounding for the project. Chapter Two surveys the history of, and laws and policies relating to, charitable NGOs in modern China. It explores the role and reception of such organisations in providing social services, and the cultural, social and political factors that have influenced the government's control of the sector since transformation of the Chinese welfare system began in the 1990s. The legislative framework for NGO registration is introduced, a framework characterised by tight vertical control of registered groups, and vast supervision gaps in relation to the estimated millions of unregistered grassroots NGOs across China. Finally, the special history of the Catholic church in China is considered, including the 'underground' church which runs many of the private orphanage case studies presented herein, and the changing nature of its engagement with the state. Chapter Three undertakes a historical and legal analysis of the care of orphaned and other vulnerable children[92] in China, beginning with an introduction to the demographics of the population cared for by orphanages and foster homes, and the forms of state institutional aid available to such children. Various factors that are relevant to the changing nature of China's orphan welfare services are explored, including socio-economic causes of abandonment, cultural norms relating to kinship, fostering and adoption, and the dominant Chinese human rights and equality framework as applied to children. In light of these background issues, the chapter then explores formal laws and policies relating

[92] Shang uses the term 'vulnerable children' generally to refer to 'true orphans' (meaning children whose parents are known to have passed away), as well as foundlings or abandoned children, street children not in the care of their parents, and the children of long-term prisoners, who are not in the care of extended family. These terms are used likewise herein.

to the care of orphaned and abandoned children, and the chequered history of China's state orphanage care system.

In Parts B and C, the empirical findings of fieldwork carried out in multiple provinces and city-municipalities across China are presented. Part B presents the group of orphanages run by Chinese individuals and churches, which constitute an alternative, and mostly unacknowledged, system of care to state-operated welfare institutions. Anecdotally prolific, little scholarly attention has been paid to the history and operations of the homes, which are not under the regulatory gaze of central authorities. Such homes mostly arise spontaneously in rural areas, where access to state orphanages is problematic, as abandoned children are left in the care of church members or private individuals who have gained a reputation for taking in foundlings. The study continues in Part C with findings relating to foreign-run orphan care services. The foster homes operate on a model pioneered by foreign mission workers, and are almost all run by foreigners (although the model is beginning to spread and two of the case foster homes are in fact run by local Chinese). The other important distinction between these homes, and those that are the subject of Part B, is that the foreign foster homes care for children who are fostered from state orphanage facilities on a semi-permanent basis, meaning they are registered in the state orphan welfare system. These findings and interpretations are brought together and situated within the theoretical framework in the concluding chapter of Part D.

PART A: HISTORY AND CONTEXT

CHAPTER TWO: NGOS – HISTORY, LAW AND POLICY

China's NGO sector has been steadily growing in size, visibility and power since 1978. This ongoing rapid emergence has been accompanied by both changes in social attitudes to non-state welfare and charitable efforts, and a dramatic increase of state oversight and ostensible regulation of the sector. This chapter contextualises the broader project by introducing the history of NGOs in China, and of state/non-state social welfare provision, concomitant developments in political and social engagement with the private charitable sector, and the development of laws and policies relating to welfare, charities, and NGOs (both indigenous and foreign). The special case of the Catholic churches[1] and their engagement with the state is also introduced.

1 Social Welfare Provision and NGOs

The relationship between government and civil society in providing social services has not always been an easy one in China. Legalisation and promotion of NGOs only began in earnest in the 1990s,[2] when the Chinese welfare system entered a transformative stage. "Small government and big society" became the slogan for 'a series of official efforts in generating social forces for social service and welfare',[3] as the welfare system began to move away from 'a total state monopoly accompanied by a high degree of secrecy' towards 'a somewhat more open, mixed system that, while

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1 The plural term may seem contradictory, but is used intentionally to refer to the state approved and 'underground' churches together.

2 For an overview of the role of NGOs in the PRC prior to 1978, see Ma (2002) p 308.

3 Ma (2002) p 306.

dominated by the state, sought support from a variety of private and charitable sources and encouraged greater local initiative and community involvement'.[4] This policy shift is known in China as a strategy of 'social welfare socialisation', a term which Wong, a leading scholar on social welfare and civil society in modern China, argues is a euphemism for 'social welfare privatisation'.[5] Shang describes the change as one from 'welfare statism' to 'welfare pluralism', referring to increasing interaction between state, civil society and citizens in the policy process, and more openness on the part of government to facilitating civic/private financial support of welfare programs and initiatives (including institutions).[6] As Wong elaborates:

> the retreat of the state has occurred in provision, funding and regulation … greater pluralism in welfare has undoubtedly emerged. … In the 1980s, privately run services were almost non-existent. In the current decade, amenities operated by individuals, like nurseries, old people's homes, facilities for the handicapped, have made their appearance. Many non-governmental organisations have likewise operated with overt state blessing. Even the old demons, missionary groups from the West, have joined in the fray. The case of the China Charity Federation is instructive. Under Mao, charity had a bad reputation. Now, the verdict on philanthropy is overturned.[7]

This passage is instructive regarding the complexity of socio-political processes and factors undergirding the current state of civil society, and its role in welfare provision. The gradual socialisation/privatisation of welfare is taking place in the context of Confucian and Socialist discourses on charity, and a historically-rooted aversion to the intervention of foreigners in matters of domestic welfare. Despite this, in recent decades the Party-state has evinced increased openness to NGOs and the

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4 Johnson (2004) p 188.

5 Linda Wong, *Marginalisation and Social Welfare in China* (LSE/Routledge, London 1998) p 155.

6 Xiaoyuan Shang, 'Looking for a Better Way to Care for Children: Cooperation between the State and Civil Society in China' (2002) 76(2) *Social Service Review* 203, p 204. See also Saich (2000) at pp 128–129; and Hsia and White (2002), referring to 'pluralism by default' due to government lacking the resources to support human services so much as in the past (p 334).

7 Wong (1998) p 155.

private sector playing a role in welfare provision. These policy shifts must also be considered in light of the dual state agendas of maintaining social and political stability – both vis-à-vis provision for the poor and tight oversight of the NGO sector which is being permitted to emerge for this end – and maintaining moral authority and supremacy as 'premised on their abiding commitment to equality'.[8]

(a) Welfare and Social/Political Stability

Chak Kwan Chan's comprehensive overview of current social policy in China depicts the challenges faced by government in establishing, in the decades of post-Mao reform, a new welfare system that is compatible with the newly emerging market economy.[9] The shift in economic policy, away from commune and work unit-based protection of vulnerable populations, towards an open labour market with household responsibility for economic productivity, has resulted in tremendous welfare pressures on the state. While vast progress has been made, social security in China today remains characterised by 'low levels of assistance and fragmented welfare administration'.[10] Unequal distribution of welfare support to rural and urban populations is caused in part by a system in which policy is promulgated centrally but implemented, in theory, locally, with inadequate financial arrangements to redress disparities in local economies.[11] As Chan explains, since the introduction, in 1994, of a new tax-sharing system aimed at

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8 Wong (1998) 1. See also Matthew Kohrman, *Bodies of Difference: Experiences of Disability and Institutional Advocacy in the Making of Modern China* (University of California Press, Berkeley 2005), discussing state approbation of the China Disabled Person's Federation as 'proof of the Communist leadership's ongoing moral commitment "to serve the people"' (p 70).

9 Chan (2008) p 40.

10 Chan (2008) p 198.

11 Chan (2008) p 203.

redressing the decreased central share of China's budgetary revenue, the financial capacity of local governments to provide social welfare has been eroded:

> China's policy process is characterised by the separation of policy making from budget making. That is to say, no financial resources are guaranteed for policy implementation. In most cases of social policy development, while central government is responsible for policy formulation (thereby centralizing financial resources), local government, which suffers from budget deficits, is responsible for policy implementation without direct money transfer from central government. The divide between centralized governmental revenue and decentralized and localized service provision further weakens the implementing of social policies. As a result, the fact that there is a disjunction between policy making and policy implementation has become a defining character of China's social policy process.[12]

Such implementation gaps and non-compliance, rooted in the structural problems of central-local administration, added to the disparity in provincial policies and financial endowments, lead Wong to characterise China's social policy regime 'one country, separate systems'.[13] This is compounded by a lack of comprehensive legislation defining citizen welfare rights and government welfare duties, or a means of holding local government officials accountable, with low civic participation in policy formulation and implementation.[14] A further difficulty faced by central bureaucracies is in effectively monitoring non-compliance at the local level,[15] as social service provision has become increasingly decentralised to local governments.[16] Another feature of the Chinese state bureaucracy of note here is its horizontal space – with so many different government departments, it is often the case that a welfare issue, such as the care of disabled orphans by a religious organisation, relates to various ministries, with ill-defined duties

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12 Chan (2008) p 56.

13 Wong (1998) p 2.

14 Chan (2008) pp 210–212.

15 Chan (2008) pp 212–214.

16 Schwartz and Shieh (2009) p 12.

and procedures for cooperation.[17] In all, Chan characterises China's 'new welfare system under "socialism with Chinese characteristics"' as 'unable to meet the welfare needs of poor people'.[18] However at the same time, Wong argues that while 'not much valued as a high-priority government task', social welfare work is valuable for its important contribution to social stability.[19] Management of marginal, impoverished populations is seen as a 'political necessity', related to the state's paramount concern with maintaining social stability:[20]

> To some extent, these actions [welfare improvements] are related to the necessity to maintain a stable society. As a Chinese government's welfare White Paper pointed out, social security is 'an important guarantee for the social stability and the long-term political stability of a country'. Judged from this perspective, the modern Chinese government is similar to that of capitalist welfare states in Europe and [North America] that attempt to use social welfare to achieve 'legitimation' and 'accumulation'. This means that a capitalist state will provide public services for economic development and, at the same time, give a minimal amount of assistance for poor people in order to maintain political stability. These limited welfare objectives partly explain the existing low levels of public assistance and the relatively poor social services in rural areas.[21]

(b) Discourses on Charity

The emergence and rapid growth of the private non-profit welfare sector is also taking place in the context of a government and culture generally suspicious of non-government charitable efforts. There are a number of historical layers to this apathetic discourse surrounding the concept of charity. Beneficence, philanthropy, and 'assistance

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17 Chan (2008) p 10. The point was raised in the field and is discussed in Part B at p 152–3.

18 Chan (2008) p 215.

19 Wong (1998) p 142.

20 Wong (1998) p 141.

21 Chan (2008) p 40.

of the weak'[22] are long-standing traditions of Confucian China.[23] However, as the introductory quote from Wong, above, noted, charity was a somewhat maligned concept in Maoist thought. Wong argues that in Chinese socialist thought, charity and philanthropy are seen as an affront to 'the dignity of the Chinese people'. An example of this ideology in practice is that from 1949 to 1978, the Communist Party subjected all private charities to dissolution or takeover, such organisations being considered 'tools used by the ruling class to cheat people and poison their minds'.[24] On the other hand, the rhetorical foundation of caring for the vulnerable in socialist thought is that

> social welfare supposedly manifests true humanitarian regard between equals. Citizens are now masters of their country. They have the right to work, a decent life, and assistance in old age, sickness, disability and in times of adversity. … [This] position gives social welfare an esteemed and secure place in China.[25]

In this ideology, direct programmes of poverty intervention and welfare relief are assigned a 'peripheral place', stemming from 'faith in structural transformation in laying the foundation of a welfare society'.[26] Since the 'clean-up' and suspension of charities from 1949 to 1978, when the state 'realised total control politically and economically, thereby establishing a "total society"',[27] provision for the marginalised has been seen in China as predominantly the purview of the state, and even in relation to state-provided

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22 '扶助弱小' (*fu zhu ruo xiao*) (Madam Leng, Star Village, Interview 6(ii)).

23 Alfred Lin, 'Warlord, Social Welfare and Philanthropy: The Case of Guangzhou Under Chen Jitang, 1929–1936' (2004) 30 *Modern China* 151, pp 152–153, outlining the cultural practice of alms-giving to widows, orphans, the childless and the poor in the imperial period, and the 'mixed economy' of welfare (voluntary and state action intertwined) which developed in the Ming and Qing dynasties. See also Liu (2011) pp 71–72 for a history of traditional charities in China.

24 Liu (2011) p 73.

25 Wong (1998) p 139.

26 Wong (1998) p 143.

27 Liu (2011) p 73.

social security, researchers report ongoing stigmatisation of welfare receipt.[28] As recently as 1991, the *Encyclopaedia of China* defined 'charity' as:

> The provision of monetary, material or other practical forms of assistance to the poor or the weak out of compassion, pity or religious considerations … It has a heavy religious and superstitious colour. Its purpose is to get rewards for good deeds … it is only a temporary and passive assistance to a minority of people … and its social effect is doubtful.[29]

Consistent with this background, the prevailing sense from interviewing on-the-ground charity workers was one of an at times uneasy relationship between charitable NGOs and both the government sector and the public, with apathy, suspicion, puzzlement and ridicule widely experienced by many in relation to philanthropic projects and efforts. This was especially the case with regard to foreign and church-based workers. The reasons for this suspect relationship are likely to be complex, and are explored further in the chapters that follow. Human Rights Watch/Asia note that in the early years of Chinese communism, '[o]fficial hostility to Christian mission work, as the most conspicuously "welfarist" component (in the pejorative sense …) of Western intervention in Chinese society, dominate[d] many … local histories'.[30] Hsia and White likewise note an 'entrenched … traditional official idea that the main needs of individuals should not be met by foreign relationships'.[31] The Section Chief of the Shandong Charity Federation Office (a sub-department of the Ministry of Civil Affairs) spoke more generally of the special history of charity in China, with *cishan (*charitable, benevolent) commonly understood in the socialist context as meaning a subterfuge for 'Western countries to make money from people'.

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28 Chan (2008) pp 76–77, 204.

29 Cited in Liu (2011) p 77.

30 Human Rights Watch/Asia (1996) p 24.

31 Hsia and White (2002) p 336.

More specifically to the current study, the special history of the at-times controversial orphanage work of foreign religious missionaries must also be noted.[32] The extent to which this pre-PRC narrative continues to shape contemporary attitudes is a matter of conjecture. However, modern discourse is at the very least a parallel, if not a continuance, of such historical controversy. Most of note in relation to the foreign foster homes, and explored further in Part C, is the repeated assertion by almost all interviewees, foreign and Chinese alike, that state officials do not want to admit the extent to which contemporary foreign mission workers are playing a role in orphan care. In more recent times, incidents such as Human Rights Watch/Asia's publication of *Death By Default*, a damning and inflammatory account of China's state orphanages which was based in part on information gathered by researchers who entered those premises under the guise of international charity workers, have prompted 'official defensiveness' and increased monitoring of foreign charity NGOs.[33]

The Chinese lawyer who advises New Grace Foundation, one of the foreign foster home case studies, expressed optimism when interviewed that the government is becoming more comfortable at least with the concept of certain foreign and/or religious NGOs operating in China. Many organisations interviewed expressed similar optimism that the traditional reluctance of society to engage with and support not-for-profit charities in China has been undermined since the Wenchuan earthquake relief effort began – due to the outpouring of domestic civil donations, and the willing receipt of international relief funds, in the aftermath of the disaster, 2008 is referred to

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32 For an introduction to this history, see John King Fairbank, 'Patterns Behind the Tientsin Massacre' (1957) 30(3/4) *Harvard Journal of Asiatic Studies* 480; Human Rights Watch/Asia, *Death By Default: A Policy of Fatal Neglect in China's State Orphanages* (Human Rights Watch, London 1996) Chapter Two, especially pp 25–26; and Henrietta Harrison, *China: Inventing the Nation* (Hodder Arnold, London 2001) pp 68–70.

33 Hsia and White (2002) 336. *Death By Default* is discussed in more detail below in Chapter Three at pp 111–4.

by many as *gongmin yuannian*, roughly translated as 'year of the emergence of civil society'. Shue noted a similar trend a decade earlier, observing that 'the society as a whole has lately witnessed a rather remarkable resurgence of charitable fundraising and of philanthropic giving'.[34] Liu Peifeng characterises the late 20th and early 21st centuries as a period of expansion of charities, in which charities have 'developed a more positive reputation' and expanded in scope and social influence.[35]

However traditional suspicion, particularly in relation to foreign NGOs, remains evident (for example in the fact that registration remains in practice very difficult for those organisations without impressive political connections). Even Liu's optimistic assessment of the expansion and development of charities in China admits that over 90 per cent of charitable donations are made out to government or government-operated organisations, meaning that 'a privileged class has emerged among charitable organisations in China [which] gains an advantaged position by relying on a monopoly and public power'.[36] Liu goes on to report that in the aftermath of the Wenchuan earthquake, and the attendant flow of funds from Chinese society, the government rejected NGOs and sought to monopolise both donations and media attention, evincing an ongoing distrust of civil society organisations.[37] He Zengke likewise describes a continuing distrust on the part of both state and citizens of civil organisations: 'People tend to trust the ruling party and government more than they trust civil organisations, and many people still think that because civil organisations are

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34 Vivienne Shue, 'State Power and the Philanthropic Impulse in China Today' in Warren Ilchman, Stanley Katz and Edward Queens (eds), *Philanthropy in the World's Traditions* (Indiana University Press, Bloomington 1998) p 332.

35 Liu (2011) pp 76–79.

36 Liu (2011) p 86.

37 Liu (2011) p 94.

non-governmental they could become anti-governmental'.[38] In fact, a distinguishing feature of Chinese NGOs as compared to Western NGOs is that legitimacy in the eyes of society is partly a function of their proximity to, as opposed to independence from, the state.[39] More generally, Hsia and White argue that 'the state seeks to foster certain types of foreign NGOs and to quell those with politically sensitive agendas', with 'only foreign groups whose interests coincide with those of the state [being] permitted to operate relatively freely within certain parameters'.[40] It must also be noted that the charitable agenda of the subjects of this study, orphans and abandoned foundlings, arguably makes such charities rather a special case, given the political sensitivity of the topic, and its implication of state birth control policies (see Chapter Three). This shifting social landscape is an important contextual aspect of the current study.

(c) Role of NGOs

The concept of a non-governmental organisation is, in China, loaded with meanings not necessarily apparent or obvious to outside observers. The literal translation of 'non-governmental organisation' is *fei zhengfu zuzhi,* which can also be taken to mean 'anti-government organisation' (*fei* meaning both 'non' and 'anti'), a linguistic nuance which aptly reflects the perceived tension between the emergence of civil society organisations and the preservation of China's communist political ideology. Through the promulgation, beginning in 1989 with the regulations on 'Social Organisations' (*shehui*

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38 Zengke He, 'Institutional Barriers to the Development of Civil Society in China' in Zheng Yongnian and Joseph Fewsmith (eds), *China's Opening Society: The Non-State Sector and Governance* (Routledge, Oxford 2008) p 171.

39 Han (2011) p 33; Shieh (2009) p 23. This feature of Chinese civil society, discussed further below, makes more sense when one considers that '[h]istorically, Chinese civil society organisations were very different from those in the West in that they never served as a check and balance to political power' (Xijin Jia, 'The Development and Institutional Environment of Non-Governmental Think Tanks in China' in Li (2011) p 58).

40 Hsia and White (2002) p 337.

tuanti), of a number of new laws relating to charities and NGOs, the Chinese government has evinced its concern with maintaining tight control over the newly emerging state-society relationship,[41] and, as explored below, both domestic and foreign NGOs continue to face significant practical obstacles to achieving recognized legal status despite a clear framework providing for their registration. In fact, given the tight control maintained by government over NGOs, whether 'civil society' can be said to have emerged in China is widely disputed by scholars. This is perhaps reflected in that there are no less than four different terms for civil society in Chinese – *shimin shehui* (city people's society); *minjian shehui* (people-based society); *gongmin shehui* (citizen's society); and *wenming shehui* (civilised society).[42] The discussion is complicated by disparate meanings of the [English] term, which is used generally to refer to 'self-governed associations through which citizens can participate in an organised way in public affairs',[43] and normatively to refer to the 'conditions of liberty', that is, of democratic citizenship.[44] In China, the development of the former as an accepted sphere of citizen association has been premised, in political rhetoric, on an avoidance of the latter, rendering that sphere a potential 'co-opted valuable ally'.[45]

Ashley and He characterize the regulation of NGOs in China as 'a roller coaster, beginning at ground level of near zero tolerance in 1978 and generally trending upward

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41 Ma (2002) p 306. See, also, Jillian Ashley and Pengyu He, 'Opening One Eye and Closing the Other: The Legal and Regulatory Environment for "Grassroots" NGOs in China Today' (2008) 26 *Boston University International Law Journal* 29; Saich (2000), in relation to Social Organisations in particular.

42 Richard Madsen, *China's Catholics: Tragedy and Hope in an Emerging Civil Society* (University of California Press, Berkeley 1998) pp 131–134.

43 Madsen (1998) p 11.

44 Ernest Gellner, *Conditions of Liberty: Civil Society and Its Rivals* (Penguin Books, New York 1993) cited in Madsen (1998) p 11. See the discussion above in Chapter One 'State-Society Theories' at pp 11–17.

45 Jeanne Wilson, 'Color Revolutions: The View from Moscow and Beijing' (2009) 25 (2 and 3) *Journal of Communist Studies and Transition Politics* 369, p 384.

in both level of permissibility and number and variety of organisations, punctuated by a few major plummets'.[46] This fluctuating nature of government engagement with the NGO sector over time, with its alternating policies of promotion and restraint, can be attributed in part to government's 'contradictory feelings' about NGOs. On this, Kohrman notes that

> [d]uring the Maoist era, of which the early 1980s were residually still a part, most Chinese elites remained publicly hostile to the formation of philanthropic … institutions because, according to the received Maoist wisdom, such structures were capitalist and/or "bourgeois liberalist" (*zichan jieji ziyou hua*) and thus politically unacceptable and dangerous.[47]

While NGOs are increasingly seen as indispensable to economic and social development, a way of offloading some of the burden of welfare provision, they are also seen as potentially threatening for the civic organisation and agendas they represent.[48] Yuwen Li, in the most recent and comprehensive English treatise on Chinese NGOs, summarises this quandary:

> The government has exhibited undeniably contradictory ideas about NGOs. On the one hand, there is some degree of recognition that NGOs provide social services that governmental bodies cannot do or cannot do well. … On the other hand, the fear and suspicion that some NGOs may challenge governmental policy and undermine political stability, has resulted in the government strictly controlling the establishment and operation of NGOs.[49]

In relation to the latter viewpoint, some suspicion is perhaps natural given the role of NGOs in the Colour Revolutions of Eastern Europe, which were perceived by China as 'chief catalyst[s] for inciting domestic subversion'.[50] As Austin, a Chinese lawyer and

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46 Ashley and He (2008) p 38.

47 Kohrman (2005) p 94.

48 Ma (2002) p 311. See also He (2008) p 171.

49 Li (2011) p 2. See also Wilson (2009) p 382.

50 Wilson (2009) p 370. Wilson's article provides a useful overview of the Chinese leadership's

legal advisor for two of the case study homes introduced below, argues, 'there is nothing wrong with being careful and ensuring the objectives of the NGOs are acceptable to your country'.[51] It could also be that NGOs in general represent a threat to government as they indicate organisation and solidarity with a cause. Taylor states that 'voluntary associations for all purposes are valuable. But their significance is that they give us the taste and habit of self-rule'.[52] Ashley and He note: 'The spectre of totalitarianism and authoritarianism often originates from the weakening of civil society, where its members are atomised and under-organised'.[53] It is arguable that something of the reverse is possible – that a strengthened civil society, with the concomitant organisation and solidarity it brings, poses a threat to authoritarian rule which government seeks to mitigate by retaining as tight a reign as possible on the NGO sector. Tellingly, the promulgation of new restrictions on NGOs in China has often occurred soon after, and apparently in reaction to, domestic and international political movements such as the Tiananmen Square student protests of 1989, the Falun Gong protests in 1999, and the Colour Revolutions in Eastern Europe between 2003 and 2005.[54] Saich, speaking to government attitudes towards Social Organisations, refers to a 'natural Leninist tendency to thwart organisational plurality' that is 'compounded by the fear of the potential for social unrest and opposition that the [control of Social Organisations] reforms have created' – '[t]o head off potential mass opposition, the

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perception of the instigating forces of the Rose (Georgia 2003), Orange (Ukraine 2004) and Tulip (Kyrgyzstan 2005) Revolutions.

51 Interview 14(ii).

52 Charles Taylor, 'Civil Society in the Western Tradition' in Ethel Groffier and Michael Paradis (eds), *The Notion of Tolerance and Human Rights* (Carleton University Press, Ottawa 1991), cited in Ma (2002) p 320.

53 Ashley and He (2008) p 35, citing Hannah Arendt, *The Origins of Totalitarianism* (Secker & Warburg, London 1951).

54 Noted in Ashley and He (2008). See the 1989 SO Regulation, the 2000 Banning of Illegal NGOs Interim Measures and the 2004 Foundation Regulation respectively, introduced below.

state will attempt to extend its organisation, coordination and supervision of as much of the population as possible'.[55] These concerns are evident in the legislative landscape pertaining to NGOs, introduced next.

2 Formal Laws and Policies

'Either there is a law with no effect, or there is no law'.[56]

(a) Nature of Chinese 'Government'

When studying topics such as official centrally promulgated laws and policies, the gap between law and practice, and government views on charity and the desirability of a strong civil society and welfare sector, it is important to consider the nature of 'government' in China. It should first be noted that 'state' and 'government' are ill-defined and essentially contestable concepts. This relates closely to the discussion introduced in Chapter One on whether 'civil society' is an apposite notion on which to premise an analysis of public life in China. The civil society/corporatist debate tends to presuppose dichotomous notions of 'state' and 'society' that Gupta, for example, argues were 'forged on the anvil of European history'.[57] In his ethnographic research on the Indian state, Gupta critiques the Eurocentric understanding of 'the state' as a 'monolithic and unitary entity', arguing that 'there is no reason to assume that there is, or should be, a unitary entity that stands apart from, and in opposition to, "the state",

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55 Saich (2000) p 127.

56 Madam Meng, director of Huiling, on laws and policies of NGOs in China today (Interview 30(iii)).

57 Akhil Gupta, 'Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State' (1995) 22(2) *American Ethnologist* 375, p 393.

one that is mutually exclusive and jointly exhaustive of the social space'.[58] Abrams similarly describes 'the state, conceived of as a substantial entity separate from society', as a 'remarkably elusive object of analysis'.[59]

The elusive and contested nature of the concept of the state is particularly to be heeded when analyzing legal and political spaces as experienced by Chinese NGOs. Chinese NGOs operate on a spectrum of autonomy from state bureaucracy, with government-organised NGOs functioning at one end of the spectrum and grassroots NGOs at the other. Government-organised NGOs (GONGOs, also known as 'officially organised NGOs' as compared to 'popular NGOs', or 'top-down NGOs' as compared to 'bottom-up NGOs') are 'citizen-led efforts from organisations that are nominally independent, but in fact are often established by and retain close ties with the state'.[60] Usually registered as Social Organisations under the NGO legislative system (explained below), GONGOs are commonly referred to as a type of NGO, but may not meet Salamon's internationally accepted definition of an NGO, in particular the requirements of voluntariness and self-government.[61] A great deal of 'cascading' oversight of bottom-up NGOs occurs using top-down NGOs as intermediaries. The demarcation and isolation of 'state' from 'society' is thus particularly problematic in China, where so many 'social' organisations (GONGOs) are in fact a creation of the state, and Gupta's exhortation for vigilance regarding the assumptions under which

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58 Gupta (1995) p 393.

59 Philip Abrams, 'Notes on the Difficulty of Studying the State' (1988) 1(1) *Journal of Historical Sociology* 58.

60 Ashley and He (2008) p 32.

61 Lester Salamon and Helmut Anheier, 'In Search of the Non-profit Sector I: The Question of Definitions' (1992) 3(2) *Voluntas* 125: '… the most useful definition [of the third sector] is the 'structural/operational' one, which includes in the non-profit sector organisations that share five basic characteristics. These are: formal, private, non-profit-distributing, self-governing and voluntary'.

state-society relations are approached and analysed is particularly salient. The terms 'state' and 'government' will be used interchangeably herein, noting from the outset that in China 'state' as a concept can broadly be taken to include both governmental and Party institutions and organisations (and indeed is often referred to by academics as the Party-state).[62]

There is a Chinese saying '*shan'gao huangdi yuan*' – the mountains are high and the emperor is far away – meaning that it has historically been difficult to ensure regional compliance with central bureaucratic orders and authority. In the modern context of NGO regulation, Saich notes that

> while the state appears to exert extensive formal control, its capacity to realise this control is increasingly limited. There is a significant gap between rhetoric and practice and between the expressed intent of the party-state authorities, a system that is itself deeply conflicted, and what can actually be enforced for any significant period throughout the entire country.[63]

'Government' in China is an exceptionally cumbersome entity, with vast internal political space. Vertically, such space often results in *de facto* devolution of central powers to provincial and local levels, with great variance in implementation of central policies, including, notably, in relation to regulation of the NGO sector (birth planning policy implementation is another pertinent example).[64] Madsen makes the observation in relation to regulation of churches: 'There is a centralised state, but it is highly inefficient, not in effective control of many regions of the country, and in many places not able to control the Party bosses who serve as "local emperors" at the village and

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62 For a detailed exploration of the Chinese party-state, see Saich (2004) Chapters 4–6.

63 Saich (2000) p 125.

64 See Johnson (2004) at p 163 (noting how fierce resistance to central birth planning policy at local level led to marked differences in implementation); and Haiyan Li, Xiaoyuan Shang and Jianpeng Cheng, 'An Analysis of Reasons Behind the Abandonment of Orphans and Disabled Children in Beijing (*Beijingshi Gucan Ertong Bei Yiqi De Yuanyin Fenxi*)' (2004) *Beijing Social Sciences* 4, pp 154–155.

township level'.[65] Saich puts it thus:

> This is … a country where multiple models of state-society relations may be operating at the same time. It is clear that the local state apparatus in Wenzhou, Zhejiang, with its privatised economy and multiple intermediary organisations, operates in quite a different way from a Neo-Maoist showcase on the North China plain that stresses collective and state organisation.[66]

Horizontally, the potential for inconsistency and confusion in relation to policy and responsibilities among departments and bureaus is great, and the effect of this confusion at the level of implementation is compounded by the power of central departments and Party offices to issue circulars with equivalent or superior status to codified laws.[67] In light of such multidimensional space, it is overly reductionist to construct 'the state' or 'government' as a monolithic and homogeneous entity, especially when drawing interpretations and conclusions about the intentions and policies thereof.

An important example of these factors is that of registration prospects for NGOs, which currently depend to a very large extent on the nature of an organisation's relationship with government; this in turn depends on with which government face it is that the organisation is dealing. The willingness or ability of local officials to process registrations can vary greatly according to location – for example, Huiling Disability Services, a training centre for youths and adults with intellectual impairments, has identical branches in both Beijing and Xi'an, but its branches in Beijing have been unable to register as an NGO with their provincial-level Ministry of Civil Affairs, despite many years of applications and appeals to various departments, whereas the Xi'an branch was able to obtain registration just one year after submitting its first

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65 Madsen (1998) p 130.

66 Saich (2000) p 138.

67 See Chan (2008) p 9; Li (1996) p 150.

application.[68] Home of Joy, based in a province considered to be very politically moderate, has likewise been unable to register as a PNEU despite formal legal channels existing for this purpose – their volunteer coordinator, a Western woman who has worked in China for a number of years, attributed this to the conservatism of provincial officials: 'China is such a huge country, so a lot of things are very localized. There is much central policy, but the interpretation and implementation of policy is very diverse. Every province and city has a huge difference in terms of how policy is applied'.[69]

The former director of China Orphan Relief, an American businessman with evident skill and experience with dealing with Chinese officials, spoke of this decentralisation as something which could be intentionally utilised to the advantage of his foster home: 'When you talk about the Chinese government, what does that mean? The government is a big huge statement … our tactic is to threaten to split the different bureaus against each other.'[70] He explained that the disparity within 'government' in terms of how policy is implemented and enforced, which occurs both horizontally and vertically, allows him to 'bluff' to officials from department X as to the permissions and agreements he has with officials from department Y: 'You can be in one office and say "they [another department] said I could do this" – you're deliberately setting up a rivalry'. Such spaces within government and the resultant gaps in oversight and enforcement of policy contribute to the general uncertainty and complexity which exists in relation to the regulation of charities and private foster homes in China. The problem of vertical and horizontal disparity is compounded by inconsistency over time

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68 Interviews 30(i), (ii) and (iii).

69 Volunteer coordinator, Home of Joy, Interview 4.

70 Interview 17(i).

even within governmental units in relation to their approaches to NGO policy implementation, widely experienced by interviewees. As Saich notes in relation to the regulation of Social Organisations, 'what appears in one place or at one time as a predatory local state may evolve into one of social partnership later'.[71]

(b) NGO Legal Structures

Terms such as 'law', 'lawful', 'legal', 'statutory' and 'policy' can be definitionally problematic, particularly in the Chinese context where the demarcations between the different types of government instruments, in terms of effect and binding nature, are often unclear. For the purpose of this chapter, 'law' can be taken as referring to official statutes (*fa*) and regulatory instruments (*tiaoli*) promulgated by legislative or quasi-legislative government bodies such as the National People's Congress and its Standing Committee, and the State Council; and 'policy' as referring to instruments such as notices (*tongzhi*), measures (*banfa*), opinions (*yijian*) and rules (*guiding*), promulgated by subordinate executive bodies such as the MCA.

Under the current Chinese NGO legislative framework, NGOs seeking legal recognition and status can do so as one of three types of registered civil society-type entities: Social Organisations (*shehui tuanti*),[72] Private Non-Enterprise Units (*minban feiqiye danwei,* hereafter 'PNEU')[73] and Foundations (*jijinhui*).[74] The former two types can

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71 Saich (2000) p 138.

72 See 社会团体登记管理条例 *(shehui tuanti dengji guanli tiaoli)* [Regulation on Registration and Administration of Social Organisations], SC, 25 September 1998 (hereafter 'SO Regulation').

73 See 民办非企业单位登记管理暂行条例 *(minban feiqiye danwei dengji guanli zanxing tiaoli)* [Provisional Regulation on Registration and Management of Private Non-Enterprise Units], SC, 25 September 1998 (hereafter 'PNEU Regulation').

74 See 基金会管理条例 *(jijinhui guanli tiaoli)* [Regulation on Foundation Administration], SC, 8 March 2004 (hereafter 'Foundation Regulation').

be registered only by Chinese nationals.[75] The Foundation Regulation is the only NGO statute that contemplates allowing foreign organisations to gain legal status as charities in China, there being a conspicuous lacuna in the law of NGOs in relation to non-foundation foreign-run organisations. Despite the regulatory framework, the vast majority of NGOs in China continue to operate as unregistered entities, which is technically illegal but widely tolerated.[76] Where used in this paper, references to NGOs should be taken not to include GONGOs, but to include non-registered organisations.[77]

(c) Existing Studies

A number of studies of the legal environment for charities and NGOs in China generally have been undertaken, most recently by Jillian Ashley and Pengyu He.[78] Ashley and He begin by introducing the history of the uneasy relationship of civil society with the state, and the growth of the NGO sector since 1978. They then comprehensively introduce the key NGO laws and regulations that exist in relation to the three types of officially-recognised NGOs, before exploring in a number of case studies (including both indigenous and foreign NGOs) the barriers to obtaining such formal recognition and legal status in practice, and the actual practices and methods used by NGOs to establish operations given those barriers. Their findings, which are consistent with the results of the current study, include that

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75 The PNEU Regulation is less clear than the SO Regulation on whether non-Chinese citizens can incorporate under the respective Regulations, but Ashley and He conclude that given the lack of express reference to foreigners in the PNEU Regulation (as compared with Foundation Regulation art 24), 'it is likely that the foreign staff of an NGO may not legally assume any management positions in a domestic registered entity' (2008) p 73.

76 Interview with retired central MCA official (Interview 42).

77 For an in-depth overview of the various types of organisations on a spectrum of autonomy from the state, see Schwartz and Shieh (2009) pp 6–9.

78 Ashley and He (2008).

> [t]he Chinese government's position toward grassroots NGOs is seldom outright prohibition; the law provides a path to legal status, and a proposed organisation merely needs to obtain the support of the relevant government agencies. But support is entirely at agencies' discretion and seldom granted in practice. Most independent NGOs thus operate outside the supervisory gazes of sponsoring agencies and the MCA in various quasi-legal states – a situation which the state is aware of and which it variously cracks down upon, tolerates or even encourages by partnering with these organisations, when useful to state ends.[79]

For example, of the six domestic NGOs Ashley and He interviewed, none had been successful in obtaining NGO status under the legislation relating to Social Organisations or PNEU. Rather, all were registered with the local-level Administration of Industry and Commerce as commercial enterprises. In relation to foreign-run NGOs, the two methods of establishing operations observed by Ashley and He were to remain unregistered and partner with a local organisation, or to register with the State Administration of Industry and Commerce (SAIC) as a representative office of a foreign business.

The Ashley and He study, it should be noted, took as its focus a slightly different subject of study to the current research project, namely the practical barriers to MCA registration faced by NGOs, with case studies drawn from mostly domestic NGOs, or foreign NGOs operating as registered Foundations or commercial entities. This leads Ashley and He to a generalised assessment of the degree of impact of the registration issue on the work of NGOs. They conclude that the difficulty of 'by the books' registration appears to be contributing to a 'chilling effect' on NGO activities:

> … the ambiguous legal status and resultant irregularities stemming from these organisations' ad hoc arrangements serves as an effective governmental tool to keep organisations in check in certain respects – namely, it keeps them in fear of the government's selective enforcement of registration, accounting, and other requirements that they are forced to bend. … Knowledge of their own

79 Ashley and He (2008) 32.

> vulnerability … in turn makes NGOs hesitant to wade into questionable political waters. Ambiguity creates a chilling effect – a cheap and powerful regulatory tool.[80]

Yuwen Li's edited comparison of NGOs in China and Europe similarly characterises the current Chinese NGO legislative framework as restrictive and controlling in nature,[81] and in this respect manifesting the contradictory feelings of the state towards NGO. Li summarises Chinese scholarly assessment of the framework as constituting 'the most serious and fundamental barrier to [NGO] development'.[82] In Li's volume, Liu Peifeng, speaking on the development of charitable NGOs in China, argues that the root cause of the many internal problems of Chinese NGOs, such as 'low levels of ability, lack of effective self-regulatory mechanisms, vagueness of the nature and ownership of their assets, and illegal organisations', is 'the unstable legal status of NGOs in China'.[83] Han Junkui's contribution to the volume, on international NGOs and in particular Chambers of Commerce, also makes the point that the situation which has emerged as a result of gaps in the law for foreign NGOs and a lack of meaningful registration prospects for NGOs generally, in which the Chinese NGO framework is in practice ineffectual and marginalised, is 'not conducive to the building of the rule of law in China'.[84]

Both these studies of Chinese NGOs, it will be apparent, focus to a large extent on the legislative landscape and regulatory framework relevant to NGOs; however as discussed in Chapter One above, it is problematic to rely on assumptions about the

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80 Ashley and He (2008) p 80.

81 Li (2011) p 2.

82 Li (2011) p 2.

83 Liu (2011) p 90.

84 Han (2011) p 49.

centrality of law in ordering state-society relations (either descriptively or normatively) in the Chinese context. Schwartz and Shieh's 2009 volume on social welfare NGOs in China is a seminal example of a theoretical approach to state-society interaction which better avoids such law-centric assumptions.[85] The editors bring together a number of empirical studies of civil organisations involved in a variety of crisis and non-crisis situations, from environmental NGOs to SARS and AIDS response charities. Adopting Shieh's multidimensional approach to state-society interaction, which includes formalised regulation but also recognises instances of negotiation and societalisation, and the overlapping and transitive nature of all three modes, Schwartz and Shieh argue that

> while the regulation of NGOs has grown more systematic and comprehensive over time, it is restrictive and has not been effective in regulating a rapidly growing NGO community. Instead, regulation has deterred many NGOs from registering and driven them into an informal sector where they operate as businesses or as unregistered NGOs. This trend has in turn made the other two modes – negotiation and societalisation – more important.[86]

This reminder of the importance of 'non-legal' types of oversight of NGOs should be borne in mind, although what follows is an introduction to the formal legal framework that aims to regulate all recognised Chinese NGOs today. Informal regulation, negotiation and societalisation are discussed in more detail in Parts B and C and Chapter Ten below.

It should also be noted that the current study differs somewhat to the above existing overviews of Chinese NGOs, because the charitable sector which forms its focus, privately-run orphanages, involves activity that is anecdotally viewed by

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85 Schwartz and Shieh (2009).

86 Schwartz and Shieh (2009) p 15.

government as presumptively illegal,[87] meaning many of the organisations interviewed are not in fact in a position to seek registration until formal law on the care of orphans is clarified and amended in such a way as to allow their operations to occur in a more visible way. Further, where Ashley and He, Li and Schwartz and Shieh focus on NGOs engaged in a very broad range of not-for-profit activities, the current study benefits from a focus on one particular sector within the philanthropic field. Given the political sensitivity associated with foreigners and non-state actors working with children, in addition to the ambiguity not only regarding the legal status of organisations involved in such work but also in relation to the legality of the work itself, it is hoped that the conclusions and interpretations to be drawn herein can go further than, and add to, the existing studies of NGOs more generally.

(d) SO Regulation

The first SO Regulation was promulgated in 1989, in the midst of and as a response to the democratic movements of that year, with the superseding revision enacted in 1998. Saich notes that while the SO Regulation was widely received with criticism due to the tight controls it placed on the sector, it also marked 'a significant step forward in terms of official recognition that the sector will play [a role] in China's future development'.[88] Social Organisations are defined as voluntary groups formed by Chinese citizens in order to realize a shared objective and to develop non-profit making activities.[89] Saich characterises the regulatory approach to Social Organisations as reflective of a state preference 'that the sector be developed within a highly restrictive legislative and

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87 Discussed below in Chapter Three 'Policy on Care of Orphans' from p 99 onwards.

88 Saich (2000) p 129.

89 SO Regulation (n 72) art 2.

organisational framework that ensures CCP and state control'.[90] A key feature of the SO Regulation is that it provides for a dual management system – to become established under the SO Regulation, an NGO must find a professional supervising unit (*yewu zhuguan danwei,* known colloquially as a 'mother-in-law' due to their day-to-day oversight of the SO in question, hereafter 'PSU').[91] The PSU can be a relevant State Council department or local government department, or an organ empowered by government to serve as a relevant supervising unit in a particular area of activity,[92] and can be held responsible for all activities of the organisation.[93] Other requirements are proof of lawful assets of at least RMB30 000 or RMB100 000 for local/provincial-level Social Organisations and central-level Social Organisations respectively,[94] and a Chinese legal representative who is not the legal representative of another Social Organisation.[95] The SO Regulation is also designed to preclude competition and branching out, features which Ashley and He characterise as representing 'the government's traditional view of the corporatist state-society relationship in China'.[96] First, Article 13(II) provides that a Social Organisation will not be approved for establishment if there is already a Social Organisation active in a similar area of work in the same administrative area. Second, the regions in which a Social Organisation is permitted to conduct activities are determined and limited by the administrative level at which it chooses to seek

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90 Saich (2000) p 126. See also He (2008): 'The institutional requirements for civil society are designed with the aim of controlling and restricting civil organisations, with a view to maintaining the political regime and political stability' (p 161).

91 SO Regulation (n 72) art 3.

92 SO Regulation (n 72) art 6.

93 Saich (2000) p 130.

94 SO Regulation (n 72) art 10.V.

95 SO Regulation (n 72) art 14.

96 Ashley and He (2008) p 44.

establishment[97] (Social Organisations can seek establishment at the central, provincial or local level, depending on the anticipated area of activity).[98] Overall, Saich concedes that 'the total intent of this legislation is clear: it is to mimic the compartmentalisation of government departments and limit horizontal linkage. This favours those groups with close government ties and discourages bottom-up initiatives'.[99]

(e) PNEU Regulation

PNEU are defined as social organisations carrying out social service activities of a non-profit nature.[100] Unlike Social Organisations, PNEU are not membership-based, but many other provisions of the PNEU Regulation and SO Regulation are similar, including the dual management system and provisions precluding competition or branching.[101] To apply for registration as a PNEU, an organisation must have been examined and approved by the PSU. Further, Article 8 of the PNEU Regulation provides that it is a condition of registration that the organisation has appropriate staff, assets and premises. However as the Banning of Illegal NGOs Interim Measures specifically prohibit PNEU activities from being carried on prior to registration,[102] and as the registration process is reported to be unpredictably lengthy (some interviewees have been waiting for PNEU approval for years, despite the stipulation that decisions are to be made within 60 days), it would seem difficult in practice for grassroots NGOs

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97 SO Regulation (n 72) art 19.

98 SO Regulation (n 72) art 7.

99 Saich (2000) p 132.

100 PNEU Regulation (n 73) art 2.

101 PNEU Regulation (n 73) arts 2, 5, 8, 13. For a more comprehensive overview of the SO and PNEU Regulations, see Ashley and He (2008) pp 46–47.

102 取缔非法民间组织暂行办法 *(minban fei qiye danwei niandu jiancha banfa)* [Banning of Illegal NGOs Interim Measures], MCA, 10 April 2000, art 2(2).

to comply with Article 8 without also contravening the Banning of Illegal NGOs Interim Measures. An advantage of the PNEU Regulation is that there are no minimum capital requirements to establish a PNEU, provided the organisation can comply with Article 8 by demonstrating that it has 'appropriate legitimate assets' for its activities as well as staff and premises.

Two organisations interviewed have successfully registered as domestic PNEU, both at the provincial level, and both outside of Beijing. Bethany Care is essentially a branch of New Grace Foundation, a Beijing-based foster home, which is run by a foreign couple and was only very recently registered as a charity (August 2011). In 2009, taking advantage of a long and amicable working relationship between a provincial state orphanage and the operators of one of its foster-home branches located in the same city, the directors of New Grace Foundation decided to register a provincial-level PNEU in Henan (Bethany Care). The PNEU legally has no connection to New Grace Foundation or its directors, and is 'owned' by the legal representative[103] (who is required to be a Chinese national) named on the Certificate of Registration (a trusted friend of the directors). While Bethany Care is technically Chinese-run, it relies entirely on New Grace Foundation for funding, technical support and direction, so remains effectively under the control of New Grace's foreign directors (albeit without a side memorandum of understanding or similar formal agreement to that effect). Huiling Disability Services, a disability training centre which was introduced above, has a Beijing branch which has been unsuccessful in registration attempts, and a Xi'an branch which did not encounter any difficulties. The examples of New Grace Foundation and Huiling clearly demonstrate the decentralised nature of policy implementation in China, and the importance of location with respect to barriers to registration.

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103 法定代表人 — *fading daibiao ren*.

(f) Foundation Regulation

The Foundation Regulation is the only law allowing foreign citizens to act as the legal representative of a registered NGO.[104] The Foundation Regulation covers the establishment of domestic Foundations, and representative offices of overseas Foundations; the former may be classed as national public offering foundations, regional public offering foundations, or non-public offering foundations. According to the MCA's NGO Service Centre, there are currently fourteen overseas Foundations that have registered representative offices in China,[105] although other sources put the figure as high as around fifty.[106] Foundations are defined as non-profit legal persons established in accordance with the Foundation Regulation with the purpose of pursuing welfare undertakings.[107] There are minimum capital requirements in respect of domestic Foundations (RMB8 million, 4 million and 2 million respectively).[108] The dual management system, whereby an NGO must find a PSU as a condition of registration, also applies to Foundations, but unlike in the case of Social Organisations, the PSU of a Foundation must be an agency of at least provincial level. In the case of representative offices of overseas Foundations, Foundations whose legal representative is a foreigner, and national public offering Foundations, the central MCA is the designated PSU.[109]

Despite the enactment of the Foundation Regulations in 2004, anecdotally there

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104 Foundation Regulation (n 74) art 24; SO Regulation (n 72) art 2; see n 75 above.

105 Interview 40.

106 Hsia and White (2002, p 334) citing personal correspondence with the editor of *Chinabrief* ('a journal that provides information on the development work of foreign NGOs in China').

107 Foundation Regulation (n 74) art 2.

108 Foundation Regulation (n 74) art 8.

109 Foundation Regulation (n 74) art 7.

was a window of only six months in that year during which foreign NGO registration applications were accepted by the central MCA, in which time some thirty-four organisations successfully registered as Foundations.[110] According to Keyser, 'the opening for registration soon closed as bureaucratic debate over what should be the registering and overseeing government unit heated up'.[111] While the Foundation Regulations provide that the central MCA is also the PSU for foreign Foundations, concerns arose about whether both roles should be carried out by the same bureaucratic body, due to the potential for corruption and fraud.[112] A number of interviewees for the current study reported hearing rumours from Beijing that the registration of foreign Foundations has recently recommenced.[113]

The Foundation Regulation is *prima facie* inapplicable to grassroots organisations wishing to carry out charitable work on the ground in China themselves (although significantly two such orphanages interviewed, Shooting Star and New Grace, were able to register as a Foundation in 2008 and 2011 respectively – the circumstances of these registrations are atypical, and introduced in detail in Chapter Seven below). In any case, and apart from the need for a PSU, a number of other restrictions on Foundations somewhat lessen the utility of this legal structure for grassroots NGOs. Branching out is not forbidden (unlike for Social Organisations), but does require provincial MCA

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110 One of these, the British government-funded charity Care for Children, collaborates with state-run orphanages to provide funding and training for the implementation of local foster-family programmes – Care for Children is introduced by Keyser, who describes it as a 'governmental cooperation' between the UK and China which heralded the initial blossoming of state-international NGO relations (Catherine Keyser, 'The Role of the State and NGOs in Caring for At-risk Children: The Case of Orphan Care' in Schwartz and Shieh (2009) 54).

111 Keyser (2009) p 54.

112 Keyser (2009) p 63.

113 Lawyer for New Grace Foundation (Interview 14(ii)); New Grace Foundation Director (Interview 14(iv)).

approval.[114] The capital requirements are very high, but further they represent minimums, meaning the approving body may in its discretion require larger amounts.[115] Most significantly for charities wishing to establish orphanages, a Foundation's staff wages and administrative expenses may not exceed 10% of annual expenditure,[116] and foreign Foundations are prohibited from soliciting or accepting donations within China.[117]

(g) 'Commercial' NGOs

A very common alternative to the narrow path of NGO registration, and a creative means of addressing some of the disadvantages of operating without any legal status, is for organisations to register as a business under the relevant SAIC bureau. Ma notes that 'registration as a business operation require[s] a minimal [external] management structure with a high degree of autonomy'.[118] Commercial registration of NGOs has been legally prohibited,[119] but remains common. As explored in Parts B and C below, a number of interviewees have utilised SAIC registration (either of indigenous, or representative offices of foreign, 'businesses'), including Star Village:

> To be registered as a business is definitely not our wish, because it means we still need to pay taxes. In reality, we have already been operating for many years – the current situation is that the MCA will not give us registration, and as the other option is dissolution, where would the children then go? So all we can do

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114 Foundation Regulation (n 74) art 12.

115 Ashley and He (2008) p 49.

116 Foundation Regulation (n 74) art 29.

117 Foundation Regulation (n 74) art 25.

118 Ma (2002) p 134.

119 Banning of Illegal NGOs Measures (n 102).

is be registered as a business.[120]

However periodic crackdowns on not-for-profit 'businesses', or representative offices of foreign charities, registered commercially with the SAIC often result in uncertainty and the risk of deregistration. For example, in 2005 the Beijing SAIC, 'in a bid to prompt NGOs sailing under a business flag of convenience to re-register with the [MCA]', issued new rules prohibiting the use of certain phrases (such as 'social development' and 'research centre', common epithets for charitable pseudo-businesses) by SAIC-registered businesses.[121] However due to the continuing pragmatic difficulties of registering as an NGO, many organisations are reportedly utilising creative ways of avoiding such SAIC crackdowns – for example, choosing innocuous commercial names which sound the same as banned (charitable) phrases, or operating not-for-profit organisations as subsidiaries of businesses.[122] Professor Wang, a leading Chinese scholar on NGOs, has argued that until the SO and PNEU regulations and procedures are refined, it will be 'difficult for NGOs to relinquish the business registration option'.[123]

(h) Unregistered NGOs: The Question of Legitimacy

The orphanages and foster homes studied herein are predominantly unregistered NGOs, that is groups which have not attained registration either as Social Organisations, PNEUs or Foundations. Although the laws outlined above provide for recognition and legal status for NGOs, in practice such registration is difficult to

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120 Madam Leng, founder and director, Interview 6(ii).

121 Tina Qian and Nick Young, 'Rule on Names Starts to Close Door to NGO 'Businesses" (China Development Brief, 15 April 2005) <http://www.chinadevelopmentbrief.com> accessed 14 January 2010. Star Village was directly affected by this and, like many 'businesses', rather than deregistering with SAIC and registering with the MCA (due to lack of PSU), they changed their name to 'Star Village Education Consultancy'.

122 See Qian and Young (2005) and case studies herein.

123 Qian and Young (2005) p 3.

obtain. The practical barriers to registration with the MCA in Beijing are comprehensively introduced by Ashley and He, who conclude that such barriers 'have made registration with the MCA a merely theoretical option for independent NGOs in Beijing'.[124] None of the grassroots NGOs interviewed in their study, domestic or foreign, had succeeded in achieving registration – in Beijing, at least, they found that 'such status is limited to GONGOs and similar organisations with continued close government ties'.[125] Of the restrictions and requirements contained in the NGO regulations introduced above, Ashley and He found that the most significant barrier for domestic NGOs is the dual management requirement, registration being contingent on gaining government support in the form of a PSU, which is rarely granted in practice.[126] This finding is affirmed by Yuwen Li, who explains that 'most governmental institutions are not willing to act as sponsors simply because they either cannot, or do not want to, take responsibility for a social organisation's acts, which when assessed positively do not add to the political reputation of a sponsor, and when assessed negatively will result in the sponsor being condemned'.[127]

Further, some grassroots NGOs are evidently uncomfortable with the possible lack of autonomy that such close association with government departments may bring (despite, on the other hand, the enhanced social legitimacy and influence that proximity to the state can also bring);[128] attempts to retain autonomy can lead to departments refusing to act as an NGO's mother-in-law, as explained by Madam Meng, the politically

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124 Ashley and He (2008) p 55.

125 Ashley and He (2008) p 55.

126 Ashley and He (2008) p 32; see further Qian and Young (2005).

127 Li (2011) pp 2–3.

128 Han (2011) p 33; Shieh (2009) p 23.

outspoken founder and director of Huiling Disability Services: 'In China, they don't register you based on the law, but based on whether they like you or not. If they don't like you, they won't register you. And whether they like you or not, if you criticise them, you will not be registered'. The same interviewee related to me a potential collaboration with the relevant GONGO in the field, the China Disabled Person's Federation, as such:

> They welcomed us. But to cooperate with them can easily lead to issues. One thing is their methods, which we did not agree with; the other was financial, the confusion of mixed finances. I also thought that I wanted to be able to tell them my own opinions. So I felt unwilling to use this channel/connection. It can be very difficult to do things by partnering with them. They want you to do what they tell you to do, and nothing else. This is not our ideology. And so speaking out, I damaged the relationship [so] … they were not willing to register us.[129]

Saich reports that the PSU requirement was a controversial inclusion in the SO Regulation, and that it appears to have been official intention that the PSU requirement would cause registration difficulties for potential SO and a decline of SO numbers.[130] Related to this is the illegal but common PSU practice of charging fees for sponsorship. However the experience of almost all of the Chinese NGOs interviewed for the current study was that even when an organisation can demonstrate satisfaction of the conditions laid down in the SO Regulation or PNEU Regulation, certain MCA bureaus (and in particular the Beijing and central bureaus) in practice do not comply with the timelines laid down by the legislative framework. Some applications remain on-going for many years, and there is no right of review under any of the legislative instruments. The non-competition provisions also effectively confer much discretion on MCA bureaus to refuse registration of organisations which are considered similar in

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129 Madam Meng, Interview 30(iii).

130 Saich (2000) p 131: 'Wu Zhongze, who as head of the newly created Bureau for the Management of Non-Government Managed Organisations (*minjian zuzhi guanliju*) oversaw the drafting of the Regulations, when questioned on this issue, stated that official intention was indeed fewer but better'.

scope of activity to existing registered charities, with GONGOs anecdotally often taking up the single slot allocated to a particular area of work in each administrative area. This is a phenomenon Ashley and He have also documented, and refer to as 'the problem of GONGO cooptation of NGO slots'.[131]

As for foreign NGOs other than foundations, the barrier to registration is more immediate, there being no laws or regulations (other than the Foundation Regulation) allowing foreigners to register NGOs in China. Chen Guangyao, Deputy Bureau Director of the NGO Administrative Bureau in the MCA, admitted in 2000 that '[w]hile there is an influx of international non-profit organisations coming into the Chinese market, there is not as yet a full set of laws and regulations to guide and standardise this activity'.[132] Ashley and He interviewed four such NGOs and found they used one of two methods to 'structure some operational form sufficient to conduct their activities': remaining a non-entity but forming a partnership with a domestic organisation (such partnerships can be written and/or registered with MCA authorities, or based on goodwill and oral arrangements), or registering a representative office of a foreign business.[133] There are obvious risks associated with the former option, such as loss of autonomy.[134] As for the latter option, anecdotally the SAIC has become stricter in recent years, due to the number of registered offices that in fact represent foreign

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131 Ashley and He (2008) p 56. See also Jean-Philippe Béja, 'The Changing Aspects of Civil Society in China' in Zheng and Fewsmith (2008): '[T]he State decides which social categories exist and can be represented, and it itself creates the NGOs which will represent them' (p 83).

132 Guangyao Chen, 'China's Nongovernmental Organisations: Status, Government Policies, and Prospects for Further Development' (2001) 3(3) *The International Journal of Not-for-Profit Law*.

133 Ashley and He (2008) p 67.

134 China Development Brief, 'Frequently Asked Questions on Registering an International NGO in China' (Beijing 8 October 2004) <http://www.chinadevelopmentbrief.com/node/296> accessed 21 December 2010.

NGOs, and this channel is beginning to be closed off.[135]

It thus remains the case that most NGOs in China today, and the majority of interviewees for the current study, are not registered with the MCA. According to the MCA, at the end of 2008 there were approximately 415 000 registered NGOs in China: 230 000 Social Organisations, 182 000 PNEUs and 1 597 Foundations;[136] in interview, one provincial Charity Federation Director told me that the numbers of unregistered charities in China are 'comparatively low'.[137] However, it is commonly estimated that there are between two and eight million NGOs in China, meaning the vast majority are operating outside of the formal legal structure.[138] Before turning below to the question of the legality of the substantive work carried out by such non-entity foster homes (which, it will be seen, is ambiguous vis-à-vis laws and policies on the care of orphans), the question of the legitimacy of unregistered NGOs and charitable organisations in general should be addressed, given that this would seem to potentially impact local state-NGO relations. On the one hand, the legal framework just introduced provides a theoretical path for NGO registration. Further, the government maintains tight, verticalised control over registered NGOs in China, and the Banning of Illegal NGO Measures prohibit unregistered NGOs from holding themselves out as one of the three registrable types.[139] On the other hand, as Li points out, to treat the millions of

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135 The experiences of the case study homes in relation to this are presented below in Part C Chapter Eight at pp 221–3.

136 China NPO Website <http://www.chinanpo.gov.cn/web/listTitle.do?dictionid=2201> accessed 30 November 2009. These figures represent a significant number of new registrations since 2006, when there were 186 000 SOs, 159 000 PNEUs and 1 138 foundations (Ashley and He (2008) p 41).

137 Shandong Charity Federation (Interview 41).

138 Interview 6 (estimates between 2 and 7 million actual NGOs in existence); Interview 8 (estimates between 6 and 8 million non-registered or commercially-registered NGOs).

139 Banning of Illegal NGO Measures (n 102) Article 2 (in relation to SO and PNEU); Foundation Regulations (n 74) Article 40 (in relation to Foundations).

unregistered NGOs in China as existing illegally is clearly unsustainable,[140] especially given that research shows many such NGOs are tolerated or even encouraged by local and/or central authorities. This law/practice gap clearly undermines the legitimacy of the SO/PNEU/Foundation Regulations in regulating NGOs.[141]

A more useful framework within which to consider the status of unregistered NGOs, including those which form the subject of the current study, is to move away from a legal/illegal dichotomy and instead to adopt the legitimacy framework of Gao Bingzhong. Professor Gao defines legitimacy generally as 'being recognised or accepted because of being judged or believed to be in conformity with certain rules', and deconstructs legitimacy into four operational concepts: political legitimacy, administrative legitimacy, legal legitimacy and social legitimacy:

> Being politically legitimate means that a social organisation or its activity is in conformity with certain political norms, namely is politically correct and therefore is acceptable … Socially legitimate means that an organisation is recognised, even participated in by some common people or groups of people because it conforms to certain social norms. There are three bases for the social legitimacy of an organisation: first, local tradition; second, local common interests; and third, commonly accepted rules or precepts. … Administrative legitimacy is a formal legitimacy based on the procedures and customs of a bureaucratic system. The key to administrative legitimacy is the recognition by the leader of a government department at certain level. … Legal legitimacy is the key to integrating the above three legitimacies in terms of institutional design.[142]

Han Junkui argues that for international NGOs, due to gaps in the current legal landscape, political legitimacy, which can be accrued through individual relationships and interactions, is the precondition to their existence in China; such interactions can

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140 Li (2011) p 3.

141 Li (2011) p 4.

142 Gao (2000) translated in Han (2011) p 35.

also lead to some measure of 'quasi-administrative legitimacy'.[143] The same might be said of indigenous unregistered NGOs. For all such organisations, a conspicuous degree of uncertainty arises due to the fact that attainment of such legitimacy relies on informal relationships[144] rather than rights set out and defended by a comprehensive and clear legislative system.[145] Social legitimacy, Han goes on to say, can be a means of bolstering administrative and/or political legitimacy, but, conversely, low social legitimacy can endanger the security of an NGO.[146] Xie Haiding similarly argues that where legislative provisions are vague, the norm in China is to allow 'political correctness' to be 'the guiding doctrine in selective law enforcement and selective administration of justice', the result being that 'in the process of transformation of law on paper to the law in reality, the nature of the legitimacy issue has partially transformed from legitimacy in legal norms to political legitimacy'.[147] All in all, Chinese NGO scholars seem to agree that the attainment of *legal* legitimacy, in the sense of belonging to a set of institutions regulated by law, remains a problematic and elusive goal for most Chinese NGOs. Accordingly, the legitimacy on which longevity and security is premised is necessarily a combination of administrative, social and political factors, characteristics which are seemingly less clear, durable and standardised than legalised status/personality. The interplay of these different modes of legitimacy, and the different weight placed on them by state and private actors alike, will be evident in

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143 Han (2011) p 35.

144 See also Zhou Shaoqing, 'A Review of the Development of Labour Organisations in China' in Yuwen Li (2011) p 154, discussing the problem of NGO reliance on the charisma of certain individuals for their operation.

145 The point is also made in organisational management literature focusing on the connection of *guanxi* (personal connections) with social capital and, in turn, legitimacy (see, for example, Ahlstrom and Bruton (2001); Elliot Carlisle and David Flynn, 'Small Business Survival in China: *Guanxi,* Legitimacy and Social Capital' (2005) 10(1) *Journal of Developmental Entrepreneurship* 79).

146 Han (2011) p 36.

147 Haiding Xie, 'Public Interest Legal Organisations in China' in Li (2011) p 136.

the case studies presented below.

3 Church-State Relations

A large number of Chinese private orphanages are run by the Catholic church, including many of the current case studies. In order to explore orphanage-government relationships, it is important to appreciate the unique social and political position of Catholic parishes and convents. There are an estimated ten to twelve million Catholics in China today,[148] most of whom live in the countryside, 'clustered together in villages that are almost entirely Catholic'.[149] Madsen, a leading scholar of the subject, presents a comprehensive historical ethnography of the Catholic church, including its underground and public/state-sanctioned components, as a case study for the emergence of 'civil society' in China more generally. Catholic missionaries have been active in China since the seventh century, although it was not until 1946 that the Vatican gave the Chinese church the status of a national church.[150] Madsen argues that the 'hierarchical vision' of the Catholic church was well suited to Chinese cultural norms, because 'the Catholic idea that the individual gains meaning through participation in a centralized hierarchical order resonates with a Confucian tradition'.[151] However, with the establishment of Communism in China, with a mirroring 'obsession with hierarchy', Catholicism came under threat:

> Precisely because it claimed for itself a quasi-religious status, the Maoist regime could not tolerate an independent Chinese Catholic church. An independent Catholic church posed not just practical political problems arising from its

148 Daniel Overmyer, 'Religion in China Today: Introduction' (2003) *The China Quarterly* 307, p 312.

149 Madsen (1998) p 17.

150 Madsen (1998) pp 29–33.

151 Madsen (1998) p 28.

> capacity to harbour political dissidents, but a fundamental symbolic challenge to the regime. By its independent existence, the Catholic church challenged the quasi-religious claims made by the Maoist state. The Chinese government could tolerate the church only if the church were subordinated to the government's own hierarchy. The leaders of the church could not accept such subordination.[152]

After the founding of the PRC, the Catholic church experienced decades of persecution and suppression under Mao's rule; the Vatican, during this time, called for the faithful in China to resist cooperation with the newly established Chinese Catholic Patriotic Association (CCPA) (the only state-approved meeting of Catholics, and the leaders of which denounced the Vatican), meeting in unapproved congregations in houses across China. In this way, as defiant Catholics set up illegal non-CCPA organisations, the underground church evolved.

In the decades of reform and opening which have followed the Cultural Revolution, some latitude has been given to the CCPA in theological matters, including recognition of papal spiritual primacy, but government oversight of the CCPA church, through the Religious Affairs Bureau, remains strict. Catholic congregations, like all other religious organizations in China, are not permitted to function independently of the government-controlled CCPA.[153] This ongoing heavy regulation of the religious sector has not, as might be anticipated, led to a reduction in religious participation. The collective 'underground church' continues to thrive, with the public/underground distinction which originated during Mao's rule continuing today, although in a

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152 Madsen (1998) p 34. For a discussion of the perception of Christianity as a threat to pre-PRC Chinese social order, see Harrison (2001) pp 78–80.

153 This is a good example of the corporatist tendencies of Chinese civil society organisation, as explored above (Chapter One 'State-Society Theories' from p 13). Hsia and White note, in relation to Protestant churches, that while 'religious organisations are considered nongovernmental in most of the West, such is not the case in China: all Christian churches must register with the Three-Self Patriotic Movement [a branch of the Religious Affairs Bureau], which supposedly represents all Christian interests in the country. … By such methods, a corporatist state claims control over every social organisation, on the premise that it is the ultimate guardian of the people and their good' (2002, p 332).

somewhat blurrier manner. Yang characterizes the religious market in China as tripartite, consisting of red (officially permitted – that is, the CCPA or 'public' church, in the case of Catholicism); black (officially banned religions, such as Falun Gong); and grey (religions of 'ambiguous legal/illegal status').[154] The red/grey distinction is a useful description of the Catholic public/underground church today. During my fieldwork, I stayed in a number of Catholic villages in Northern China, and was commonly told that the 'overground/underground' distinction is no longer an easy one to make. The 'underground' churches are clearly visible, and increasingly open to cooperation and collaboration with CCPA bishops and officials – 'conflict between official and unofficial Catholic communities is not general or inevitable'.[155] As one postulate at Guanghui (an unregistered Catholic orphanage) put it, 'It's as though we're not above, and not under [ground] – we are all [CCPA/non-CCPA congregations] co-factions'.

Apart from legal status, there are serious disputes among Chinese Catholics as to the spiritual legitimacy of the 'open' and 'underground'[156] churches respectively. Bishops and priests of the CCPA are regarded by many as collaborators with an oppressive state. The underground church, with the encouragement of some factions of the Vatican, has established an alternative bishops' conference – '[e]mboldened perhaps by the role played by Eastern European churches in the collapse of Communism, the underground church has become more confrontational than ever. And frightened by the same Eastern European events, the government has become more repressive'.[157]

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154 Fenggang Yang, 'The Red, Black and Grey Markets of Religion in China' (2006) 47 *The Sociological Quarterly* 93.

155 Madsen (1998) p 61.

156 By 'underground' one does not mean clandestine – although such churches have, by definition, not received approval from the Religious Affairs Bureau and carry out their work without permission or approval, local officials are as a rule aware of their activities. See Madsen (1998) p 60.

157 Madsen (1998) p 43.

Madsen believes that a 'climate of fear and culture of mistrust' is evident in the Catholic church, and continues to stymie the development of a civil society within the church due to eroded social trust.[158] Given the idiosyncratic nature of local state/church relations, it is difficult to generalize about the impact of the history of such relations with associated orphanages. What is most relevant to the current study, and must be borne in mind as an important contextual aspect when exploring regulation of church-associated orphanages, is the residual impact on meanings, attitudes and norms in the sector of over thirty years of experienced repression and antagonism vis-à-vis government authorities such as the Religious Affairs Bureau. Madsen describes many Catholic communities as characterised by 'belligerence and truculence', a legacy 'not just of traditional particularism and factionalism but of the harshness of Communist Party rule'.[159]

4 Conclusion

> One could argue that the Chinese government retains 'firm and effective' control over NGOs, in the sense that if it is determined to make a NGO disappear, it could do so without causing much trouble for itself. However, the Chinese government is not treating the majority of NGOs in such a drastic manner, and instead tolerates their existence in most cases. Such tolerance has left a space for the gradual expansion of Chinese NGOs over the past three decades. However, an enabling legal and political environment for NGOs as an independent social force has yet to be achieved. Consequently, the legal, political and, to a certain extent, even the social legitimacy of many NGOs remain problematic. This not only limits the ability of NGOs to fully utilise their potential to serve the diverse needs of the society, but also undermines their capacity for sustainable institution building and achieving long-term objectives.[160]

Charity and welfare are historically and ideologically loaded concepts in modern China.

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158 Madsen (1998) p 124.

159 Madsen (1998) p 141.

160 Li (2011) pp 19–20.

The 'civil society question', in relation to privatisation of welfare provision, is also coloured by the contesting considerations of the state, including issues of political and social stability, moral authority, welfare demands and the special issue of philanthropic ventures associated with foreigners and/or underground church movements. An equilibrium has emerged from this intersection of government and social interests vis-à-vis NGOs. The legal framework for registered NGOs is one which effectively absorbs and appropriates the work of these organisations into the penumbra of government bureaucracy, by ensuring that such organisations are supervised, and held to account, by a state supervising unit. That is, registered/recognised NGOs are appropriated as 'helping hands', ensuring their roles and goals remain aligned with government wishes, and politicised agendas are avoided.[161] However, this apparent tight control of NGOs is undermined by gaps in the law, most notably in relation to foreign NGOs doing on-the-ground charitable work in China, and the estimated millions of grassroots organisations which have either not sought, or not been successful in seeking, official recognition as registered entities. Development of the NGO sector, and expansion of their accepted and recognised realm of activity, has been cautious and gradual. This is linked back, by some scholars, to a continuing overreliance on the government to address welfare needs in China, and the 'extremely limited' role of private charity in poverty alleviation.[162]

As government tolerance of and engagement with independent organisations continues to grow, so also the legal and regulatory landscape relevant to grassroots NGOs, which for so many years have been able simply to exist apart from and without regard to central laws and policies, has become increasingly detailed and, at times,

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161 Yongnian Zheng and Joseph Fewsmith, *China's Opening Society: The Non-State Sector and Governance* (Routledge, Oxford 2008) p 3.

162 Joe Leung, 'The Emergence of Social Assistance in China' (2006) 15 *Journal of Social Welfare* 188, p 196.

confusing. Madam Meng, an outspoken failed Party candidate who runs grassroots disability centres across China, spoke passionately in interview about the prospects of further liberalisation and oversight of China's burgeoning NGO sector:

> Beginning with the Wenchuan earthquake in 2008, a large number of civil society organisations have come forward, and government has witnessed the power of civil society. … In that year, I believe NGOs fully demonstrated their vitality and function. So in recent years, Hu Jintao has expressed very strong support for NGOs – and as that support, in both rhetoric and practice, develops, there is development occurring centrally. But it's certainly not full liberalisation – the fear of full liberalisation is a loss of control, because NGOs are, after all, private, and 'anti/non-government' [*fei zhengfu*], and the power of the people must not be disregarded.[163]

This 'people power' has been increasingly visible, as China's reforms and opening continue, in the filling of gaps in state welfare programmes, including in the care of orphans and vulnerable children. However, the laws and policies regarding such NGOs, while significant for the increasing tolerance of the sector by government which they represent, remain problematic in practice and difficult (as will be seen from the case studies which follow) for grassroots NGOs to identify and comply with. The legal registration options for foreign-run NGOs remain ambiguous and restrictive. For welfare groups affiliated with churches that are themselves of dubious legality, the difficulties of obtaining a 'mother-in-law' are often compounded by the chequered history of 'underground' church-state relations. The complexity of the civil society question, in particular for foreigners and church workers, must be appreciated before exploring private orphanages and foster homes in the chapters that follow.

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163 Madam Meng, Founder of Huiling, Interview 30(iii).

CHAPTER THREE: CARE OF ORPHANS

> My name is Rose, I am from Henan and I am 18 years old. I lived in a village with my parents and older sister. We were very happy children. Our parents cared for us. But one day, when I was four years old, my older sister accidentally poured boiling water over my head. I was in so much pain. Baba took me to the doctor, who said to put toothpaste over the burns. My sister helped me apply the toothpaste, but it only helped a little. I had terrible wounds. Baba was so angry with my sister that he beat her. Not only was I scarred, my family were too poor to send me to school. So one day Baba brought me to the door of the local orphanage. A kind *ayi* took me in, and I started my life there. My *ayi* was really very kind to me. The other children were also good. But they could be so strong-willed and sometimes rough, sometimes bossy. We often had our differences. My scalp was burned, and it left such a scar emotionally. I didn't like to talk. From the time I arrived, I stopped talking much. The children started bullying me. The *ayis* were really kind to me, so the other kids bullied me. My life there was the same every day. After each meal, we played ballgames together – but I was just no good at these, and they started excluding me. I started playing on my own. I would watch the workers in the vegetable garden. I would spend time on the roof. It was so high. I was scared. Every day, my life was like this.[1]

I met Rose at her home near Beijing, a private foster home run by an American couple, which cares for children from state-run orphanages with brittle bone disease. She is one of many children who have been fostered from state orphanages across China into the informal care and guardianship of Compassion Family Life House, the history and work of which are introduced in Part C below. Rose's life story, including her disfigurement and subsequent abandonment, a childhood spent in a state orphanage, and her move as a teenager to a private foster home, must be considered in light of an understanding of the complex interaction of cultural, social and political factors relevant to orphan care in modern China. This chapter introduces the demographics of the children cared for in the sector, the discourse and attitudes associated with abandonment and orphans in China, existing studies of the sector, and the formal laws and policies broadly relevant to this sphere of activity.

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1 Testimony of resident at Compassion Family Life House.

1 Demographics of Vulnerability

Dr Xiaoyuan Shang is the leading Chinese researcher on vulnerable children in China, and helpfully categorises children requiring welfare provision into three groups: orphans, children of prisoners and street children.[2] The current study focuses on the provision of welfare services to the former two groups; the third group, which at times overlaps with the other two, includes victims of kidnapping and child trafficking. Most orphaned and abandoned children live in rural areas and many are also disabled. The term 'orphan' is used loosely herein, and by Shang, to refer to children who are no longer cared for by their parents. It should be noted that researchers believe the majority of children resident in state and private orphanages do in fact have one or both parents living, but have been abandoned, for reasons explored further below. The Chinese term for orphan, *gu'er*, accommodates these various life circumstances more than the English translation: *er* meaning 'child' and *gu* meaning 'solitary, isolated, alone'. According to the most recent government study on vulnerable children in China, carried out by Shang and commissioned by the Ministry of Civil Affairs, as of April 2005 there were 574 174 orphaned children in China (it may be that the total number of orphans is under-reported by the study, given that many orphaned and abandoned children, including those resident in certain private orphanages interviewed, do not possess *hukou* [residency permits][3] and are thus unlikely to be included in official statistics). The study rather ambiguously defines orphans as young people who have lost their parents (it is unclear if this would include, for example, children whose guardians

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2 Shang, Wu and Wu (2005) p 124.

3 *Hukou* refers to an individual's residency permit under the Chinese Household Registration System. Functioning primarily as a type of internal passport system, residents of China who are not registered under the *hukou* system do not possess legal personality, and face grave difficulties in obtaining access to civic entitlements such as health care, education and employment. The impact of a lack of *hukou* on orphans is considered in greater detail below in Chapter Six at pp 165–9.

are in prison, or who have been abandoned). The Joint Ministerial Opinion on Strengthening Orphan Relief[4] puts the figure at 573 000, using the same definition. Of these, around 69 000 are in the care of state welfare institutes, and 295 000 receive 'state institutional aid' of some description (54 000 from city-level government; 125 000 from *nongcun wubao*; [5] and 116 000 from the rural poverty household aid), meaning approximately one third of China's reported orphan population do not receive institutional aid relief, and only twelve percent reside in state facilities (not all of which are exclusively for children – see below).[6] Over 86% of the reported orphan population are registered as rural householders. Less than 0.1% are resident in the three model urban orphanage centres of Beijing, Shanghai and Meihua.

There are also a large number of children whose primary caregivers are serving long-term or life sentences. Due to discrimination experienced by children of prisoners in society and the consequent lack of community-based care and assistance, such children may face even greater risk of neglect than orphans.[7] Beijing Star Village is a non-government home caring for children from this group, and Madam Leng, its founder and director, has opened numerous other homes across six provinces with this mission. She describes the plight of many children of prisoners – 'On their own, the children would be left without shelter … They suffer like orphans, but are unqualified

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4 关于加强孤儿救助工作的意见 *(guanyu jiaqing gu'er jiuzhu gongzuo de yijian)* [Joint Ministerial Opinion on Strengthening Orphan Relief], MCA et al, 2006.

5 *Nongcun wubao zhidu,* also known as the 'Five Guarantees': Shang, Wu and Wu (2005) p 124. 'This is a rural community-based welfare system that provides the five guarantees of free food, clothes, fuel, health services, and education or funeral arrangements as appropriate for the elderly, sick and disabled as well as for orphans who are not only unable to look after themselves but also have no one legally responsible for their welfare' (Shang (2002) p 206). See further Chan (2008) 62, p 72; Wong (1998) p 143; and below at p 127–8.

6 Compare to Hui Lu, 'Children Without Parents' (1994) *China Today* September: 'There are 100,000 parentless children in China. About 20,000 of them have been taken in by China's 26 orphanages' (p 42).

7 Interviews with Star Village (Interviews 6(i) and 6(ii)); Shang, Wu and Wu (2005) pp 124–5.

to be taken in by a charity' – and estimates there are several hundred thousand children in this situation across China, although many of these are cared for by extended family or neighbours.

2 Abandonment in China: Discourse and Attitudes

(a) Abandonment as a Crime

Various Chinese statutes specify abandonment as a crime, including the Marriage Law,[8] the Adoption Law,[9] the Protection of Minors Law,[10] the Protection of the Disabled Law,[11] and the Law Protecting the Rights and Interests of Women and Children.[12] However Li points out that prosecution for offences under both laws are, in general, rare, given the lack of adequate enforcement mechanisms; further, sanctions when imposed are normally lenient, which Li argues renders the legislation largely

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8 中华人民共和国婚姻法 (*zhonghua renmin gongheguo hunyin fa)* [Marriage Law of the PRC], NPC, 10 September 1980 (amended 2001): Maltreatment or desertion of any family member shall be prohibited (Art 3); It shall be forbidden to drown or desert infants or commit any kind of infanticide (Art 21); Criminal liabilities shall be meted out to … those who have … maltreated or deserted any family member so seriously as to have constituted a crime (Art 45). Other articles specify that in the case of an underage child whose parents are deceased or unable to care for them, the grandparents or siblings are under the obligation of bringing up the child (Arts 28 and 29).

9 中华人民共和国收养法 (*zhonghua renmin gongheguo shouyang fa*) [Adoption Law of the PRC], NPC, 29 December 1991 (amended 1998): Whoever abandons an infant shall be fined by a public security organ; if the act constitutes a crime, the offender shall be investigated for criminal responsibility in accordance with law (Art 31).

10 中华人民共和国未成年人保护法(*zhonghua renmin gongheguo weicheng nianren baohu fa)* [Protection of Minors Law of the PRC], NPC, 29 December 2006: It is prohibited to commit family violence against minors, or to maltreat or forsake minors. Infanticide and other acts of cruelly killing infants shall be prohibited. Noone shall discriminate against female or handicapped minors (Art 10).

11 中华人民共和国残疾人保障法 (*zhonghua renmin gongheguo canjiren baozhang fa*) [Protection of Disabled Persons Law of the PRC], NPC, 28 December 1990 (amended 2008): Maltreatment and abandoning of disabled persons shall be prohibited (Art 9).

12 中华人民共和国妇女权益保障法 (*zhonghua renmin gongheguo funv quanyi baozhang fa*) [Protection of Women's Rights and Interests Law of the PRC], NPC, 3 April 1992: Women's right of life and health shall be inviolable. Drowning, abandoning or cruel infanticide in any manner of female babies shall be prohibited … (Art 35).

ineffectual.[13] Johnson's study similarly found that 'most people who abandoned children were not punished, even though most were unable to keep the act a secret',[14] and punishments, when imposed, consisted of fines, sometimes coupled with sterilization. These were almost always administered by birth planning authorities, rather than judicial institutions: 'What has been at stake in the government's concern over abandonment is not protecting the interests or legal rights of the children involved but maintaining a firm grip on birth planning and population control'.[15] However, it must be noted that a number of Chinese interviewees told me that one reason babies are commonly abandoned at private orphanages rather than state facilities is because of a fear on the part of the abandoning parent of incurring state sanctions. Thus it could be that while criminalisation is not necessarily a sufficiently strong deterrent to prevent abandonment generally, it is contributing to the incidence of abandonment of children into the care of non-state orphanages.

(b) Demographics of Abandonment

'I have seen a lot of fathers and mothers come not for rehabilitation, but just to know where to leave their children. I am frequently able to convince them that it is not a good idea, but it is quite a common idea. They say "Oh but it's better the child is taken in by a sister, because they know what to do, I don't know what to do with him". But is he is your *child*!'[16]

'This baby girl was born on – 1992 at 5:30 am and is now 100 days old … She is in good health and has never suffered any illness. Because of the current political situation and heavy pressures that are too difficult to explain, we, who were her parents for these

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13 Li, Shang and Cheng (2004) pp 167–168.

14 Kay Johnson, Banghan Huang and Liyao Wang, 'Infant Abandonment and Adoption in China' (1998) 24(3) *Population and Development Review* 469, p 479.

15 Johnson, Huang and Wang (1998) p 480.

16 Carlotta, an Italian nurse who works with Catholic private orphanages to improve medical standards, speaking with amazement of the numbers of Chinese parents bringing their disabled children to the Catholic rehabilitation centre (Interview 1(ii)).

first days, cannot continue taking care of her. We can only hope that in this world there is a kind-hearted person who will care for her. Thank you. In regret and shame, your father and mother.'[17]

Statistics on the rate of abandonment in China are scarce. There is an evident connection between birth control policies and abandonment rates, a connection that has in some areas been expressly acknowledged within the MCA – for example, Johnson reports that an investigative report of the Hunan MCA 'makes explicit the connection between abandonment and birth-planning campaigns' and 'even regards the province's welfare centres as barometers of birth-planning in particular areas: when birth-planning work is "grasped tightly," more foundlings are received in local welfare facilities'.[18] As such, birth-planning officials both locally and centrally have 'compelling reasons to obscure the problem [of abandonment] … [d]rawing attention to abandonment is seen as an implicit criticism of birth-planning policies, and birth-planning officials complain that such efforts make their work more difficult'.[19] Johnson's study provides evidence that an unknown, but large number of abandoned children are unaccounted for in official statistics and estimates of orphan numbers, due to the spontaneous emergence of adoptive parents 'to handle the crisis of abandonment … many of them defying government adoption law and policy to do so'.[20] Jimmerson points to a Chinese study, based on a sample area of Guangdong province, which estimates that infant abandonment for the entire province was in the region of 10 000 per year from 1987 to 1989. Ninety percent of those abandoned were female, and 22.6% were disabled or deformed.[21] The most recent report on China from the United

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17 Note accompanying an infant abandoned in Hunan, cited in Johnson (2004) p 75.

18 Johnson (2004) p 57.

19 Johnson (2004) pp 50, 187, 66.

20 Johnson, Huang and Wang (1998) p 502; Johnson (2004) Chapter One.

21 Xiaorong Bu, 'Guangdong Meinian Yiwan Qiying (Ten Thousand Abandoned Infants per Year

Nations Committee on the Rights of the Child notes concern under Article 44 of the Convention on the Rights of the Child at 'the significant number of children abandoned on the mainland and the large number of children living in institutions', and 'regrets the lack of precise statistical data on the number of children entering and leaving such institutions'.[22]

Rose's testimony bears witness to the complex intersection of disadvantages and socio-economic factors underlying the problem of abandonment in China today, including gender, prejudice against the disabled and rural poverty.[23] The issue of infant abandonment in China, and more particularly the impact of birth control policies and cultural constructions of gender on the demographics of *de facto* 'orphans', has received much scholarly and media attention, with the most comprehensive study probably being that of Johnson, Huang and Wang. In 'Infant Abandonment and Adoption in China',[24] Johnson and her colleagues present the results of a 1995–6 study of 392 families who had adopted children and 237 families who had abandoned children. The study introduces China's long history of infanticide and abandonment of female children,[25] including how despite improved rural living standards since the establishment of the PRC in 1949, 'birth planning efforts in the 1980s appeared to revive the twin problems of infanticide and abandonment, particularly the latter'[26] (given the strict penalties for

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in Guangdong Province)' (1989) *DongXiang* 20, cited in Julie Jimmerson, 'Female Infanticide in China: An Examination of Cultural and Legal Norms' (1990) 8 *UCLA Pacific Basin Law Journal* 47, p 73.

22 UN Committee on the Rights of the Child, 'Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)' (24 November 2005) CRC/C/CHN/CO/2.

23 Human Rights Watch/Asia (1996) p 14; Shang (2002) p 208.

24 Johnson, Huang and Wang (1998).

25 See, further, Li, Shang and Cheng (2004) p 170; Jimmerson (1990). The phenomena are not, of course, uniquely Chinese.

26 Johnson, Huang and Wang (1998) p 472. See also Human Rights Watch/Asia (1996) p 136.

over-quota births, combined with culturally and economically motivated preferences for healthy/male children). Johnson found that gender, birth order and the gender composition of siblings were the most important determinants of who was abandoned.[27] The vast majority of her cases of abandoning families were from agricultural- (as opposed to urban-) *hukou* families, but abandonment was not found to be related to relative impoverishment.

Other studies note the very high incidence of disability among children resident in state orphanages – for example, Shang, Wu and Li's 2005 study puts the figure at 80.5%.[28] However it must be noted that 'disabled' is very often broadly defined by both orphanages and government officials to include, for example, relatively minor conditions such as cleft lips or birthmarks. Johnson notes that the Chinese government, 'defensive after attacks by Western human rights groups, often refers only to "abandoned disabled children and orphans" when discussing its orphanage population, implying that healthy children are not abandoned in China today'.[29] Human Rights Watch claim that 'unfounded diagnoses of mental retardation and other disorders … have helped to disseminate the widespread belief – which appears to be quite inaccurate – that virtually all of China's abandoned children are physically or mentally handicapped'.[30] Certainly it is problematic to generalise from purported disability incidences among institutionalised orphans to the rate of disability among abandoned children more generally, especially in light of Johnson's study in which 86% of the

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27 Johnson, Huang and Wang (1998) p 475.

28 Xiaoyuan Shang, Xiaoming Wu and Haiyan Li, 'Social Policy, Social Gender and the Problem of Infant Abandonment in China (*Shehui Zhengce, Shehui Xingbie Yu Zhongguo De Ertong Yiqi Wenti*)' (2005) *Youth Studies* 4.

29 Johnson, Huang and Wang (1998) p 500.

30 Human Rights Watch/Asia (1996) p 5–6.

adopted abandoned children were reported to be healthy. Johnson postulates that the reason such a large proportion of children taken in by orphanages are disabled is due to the patterns of adoption she uncovered: 'It appears that many healthy abandoned children are found and quickly adopted without ever coming to the attention of the authorities.' Sick and disabled children, on the other hand, are unlikely to be informally adopted in this way, and thus more likely to be put in state care.[31] The intersection of disability and gender is important here – Johnson notes that moderately disabled or critically ill boys are more likely to be adopted quickly than girls in similar conditions.[32]

It should be noted that almost all of the children resident in the non-state orphanages and foster homes I visited were either disabled or in need of surgical intervention. 'Disabled' here is used narrowly – the most common conditions observed among the children were cerebral palsy, Downs syndrome, blindness, paraplegia, mental retardation, club feet or missing limbs, spina bifida, myelomeningocele, and congenital heart disorders. The intersection of disability and abandonment was a common thread in the current study, with most interviewees focusing on socio-cultural attitudes to disability, and a lack of state welfare support for parents of disabled children, as primary motivators behind abandonment. This is consistent with recent studies by Chinese scholars that have emphasised disability as a crucial factor in determining whether to abandon a child.[33] The language used often by Chinese interviewees was of such children being 'thrown away' (*rengdiao*), rather than 'abandoned/forsaken' (*yiqi*), language which echoes meanings behind a still-common colloquial term for social outcasts (including both orphans and disabled people), *feiren* (literally 'garbage people').

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31 Johnson, Huang and Wang (1998) p 500.

32 Johnson, Huang and Wang (1998) p 21.

33 Shang, Wu and Li (2005); Li, Shang and Cheng (2004).

Most orphanage workers spoke with sympathy of the plight of rural farmers whose only child is born with grave special needs, and for whom access to state aid is difficult:

> Why are they abandoned? The main thing is their bodily defects. Because you know, in the rural villages, if you have a disabled child like this, parents would have to spend a lot of money. And they're not able to go to work. So they have no choice. It's not that they are willing and content with throwing their child away, that's not the mentality. It causes them great hardship, but they are compelled by their circumstances. You know very often, we have clothes and money left at our door – the parents know that their children are here, but they do not dare to come and visit, and see their child themselves. In their hearts they must suffer greatly. We have had mothers who came back, because of the deep regret they have felt.[34]

Johnson argues that while policy changes might be ineffectual in increasing the rate of adoption of disabled children, abandonment, a 'practice clearly associated with great personal pain and shrouded in shameful collective silence',[35] could be reduced by supporting parents in their care of such children:

> People who abandon disabled children usually say they have no means to treat or raise the child, that the burden is too great. Furthermore the parents usually cannot place disabled children in state institutions without having to bear the financial burden, a burden too onerous for most families. If the state attempted to assume this financial burden for those who cannot afford the cost without undue hardship, these parents could place their children in state institutions but maintain ties with them. In some cases, providing financial support directly to families of disabled children might allow them to remain at home. The development of this sort of welfare policy is expensive, but housing abandoned disabled children is too. It is also destructive to the moral fabric of a society to have ordinary people pushed into abandoning their children.

This view was repeatedly echoed strongly by the interviewees in the current study. The UN Committee on the Rights of the Child has similarly recommended, in its latest report on China, that the state 'develop effective strategies to prevent the abandonment of children, which include early identification of families and children at risk and the

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34 Sister Qin (Interview 2(ii)). See also interviews 5 (Home of Hope) and 1(iv) (Guanghui).

35 Johnson (2004) p 61.

possibility for social workers to intervene and help families directly'.[36]

(c) Kinship, Fostering and Adopting

An important set of cultural norms to be briefly explored to contextualise the emergence of grass-root private orphanage homes are those related to kinship, the child's place in Chinese families, and adoption. As Johnson notes,

> A rudimentary knowledge of Confucianism and Chinese society might lead one to assume that adoption, especially adoption outside of close bloodlines, is likely to be unusual and closely proscribed by custom owing to the Confucian emphasis on blood ties. Traditional Chinese law prohibited adoption across surname lines, and normative texts argue against adoption.[37]

This view was echoed by some Chinese interviewees in the current study: 'It's harder to imagine taking in a stranger because family is so valued. It's much easier to take in your sister's child, or your brother's child – that's why adoption rates are very low in China';[38] Guanghui Home has experienced many problems with the use of informal foster care arrangements to supplement the provision of care at their central orphanage, due to the way in which such foster children are regarded by their foster families:

> They [foster children] are outsiders. They are not part of your family. This can be a problem, I think. Fostership is not considered permanent, because eventually everyone knows the family will get ill, or have family troubles, and the child will be returned [to the orphanage].[39]

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36 UN Committee on the Rights of the Child, 'Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)' (24 November 2005) CRC/C/CHN/CO/2, Article 51(b).

37 Johnson, Huang and Wang (1998) p 483. Compare Thurston, 'In a Chinese Orphanage' (1996) *Atlantic Monthly* 277(4); Nancy Riley, 'American Adoptions of Chinese Girls: The Socio-Political Matrices of Individual Decisions' (1997) *Women's Studies International Forum* 20(1); and Human Rights Watch/Asia (1996).

38 Interview 14(ii), Chinese lawyer for New Grace Foundation.

39 Interview 1(i) (Charles Kramer); see also Interview 38 (researcher at Beijing Normal University).

However, Johnson argues that certain strains of both Confucianism and modern culture 'support adoptive ties outside as well as inside bloodlines and support the use of adoption of both boys and girls to build family and kinship',[40] a competing ideology most evident in the notion of *mingling zi* [mulberry insect children]:

> The use of the term to refer to adopted children … derived from the belief that the wasp took the young of the mulberry insect and transformed them into young wasps, making them its "own children". According to folk belief, the wasp raps and taps outside its nest, in which it has put the mulberry insect's young, and prays, "Be like me, be like me." After a period of time, young wasps emerge. … Confucian emphasis on upbringing and cultivation as the key to character provides further support for ties built on nurture and social relationships rather than biology and heredity.[41]

One of Johnson's key findings was a pattern of informal adoption of abandoned children – 'people expressed few qualms about adopting children of unknown parentage as long as they were basically healthy, that is, without congenital disabilities'.[42] Further, a prevalent assertion among Johnson's sample of adoptive families was that feelings of love and obligation towards adopted children were at least as strong as those for birth-children, with the 'low status and fragility of adoptive ties that seemed to have characterised adoption practices in the past' only reflected in a small number of cases.[43] Importantly, the adoptive parents in her sample, despite almost all adoptions being informal and occurring outside the government adoption channels, viewed their new parental rights and duties as 'complete and permanent'.[44] While this contrasts to some interviewees in the current study, who spoke of extensive informal fostership networks around the private orphanages in which bringing in an

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40 Johnson, Huang and Wang (1998) p 483.

41 Johnson, Huang and Wang (1998) p 484.

42 Johnson, Huang and Wang (1998) p 490; Johnson (2004) Chapter 6.

43 Johnson, Huang and Wang (1998) p 495.

44 Johnson, Huang and Wang (1998) p 496.

unrelated child is viewed somewhat differently, for other interviewees, the foster relationship is viewed similarly to the informal adoptive relationship studied by Johnson:

> They [local foster families] really love the kids. It's more than just the money. We've got a few families who don't want to do it again, because they fostered a child who was adopted and it just broke their hearts to say goodbye. It's nice in a way, it shows how much love was being poured out.[45]

Johnson concludes that, unlike in other cultures such as Korea where negative attitudes towards extra-familial adoption means there are insufficient adoptive homes for homeless children, popular Chinese culture is supportive of the adoption of unrelated children, with the biggest obstacle to placing (healthy) homeless children in homes being government policy.[46] The rules and conditions for domestic adoption are restrictive, and in line with the population control objectives of the One Child Policy. Until recently, the Adoption Law restricted domestic adoption (except in the case of disabled children and 'true orphans') to parents who are childless and over the age of 35. This was amended in 1998 to allow 'orphans, disabled children, or abandoned infants and children whose parents cannot be ascertained or found and who are under the care of a social welfare institution' to be adopted irrespective of the condition that the adopter be childless, although the law retains an age-based criteria, as the adopter must in any case have reached the age of 30.[47] For those who adopt 'out-of-plan' children without permission, or in contravention of the Adoption Law, the same

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45 Interview 14(iv).

46 Johnson, Huang and Wang (1998) p 503. See also Johnson (2004) Chapter Six ('Chinese Adoptive Parents').

47 Adoption Law (n 9) Articles 6 and 8. Johnson notes that 'Despite top-level support to improve conditions for 'orphans,' this major obstacle to bettering the care of foundlings [restrictive conditions for their adoption] was not addressed for years out of concern that changes would impinge on higher-priority family-planning efforts to bolster the 'one-child policy' by strictly limiting adoption to childless couples' (2004, p 69).

penalties apply as to those who give birth to them.[48]

Johnson's study does not delve deeply into whether similar patterns of norms and cultural beliefs hold true also for disabled children, given that the overwhelming majority of adopted children in her sample were healthy. The anecdotal evidence from the current study, which due to the nature of the subjects dealt primarily with disabled or severely sick children, was that informal adoption is rarely an avenue for such children, given the economic and cultural factors that contribute to their abandonment in the first place. Zhou Xun, in a comprehensive study on the discourse of disability in modern China, notes the continuing low public visibility of the disabled, 'this discursive silence … in itself an indication of social prejudice'.[49] Many Chinese interviewees with years of experience working with disabled children spoke of the ridicule, shame and economic hardship experienced by families of special needs children,[50] all of which apparently count against an abandoned disabled child's chances of finding a new home, informally or through legal adoption channels. All in all, disability seems to be a key indicator of both abandonment and institutionalisation thereafter, with abandoned disabled children apparently ending up, for the most part, in state institutions with high mortality rates, or with grassroots private orphanages run without state support.

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48 Xiaorong Li, 'License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program' (1996) 8 *Yale Journal of Law and Feminism* 145, p 157; Johnson (2004) pp 164–167.

49 Zhou Xun, 'The Discourse of Disability in Modern China' (2002) 36 *Patterns of Prejudice* 1.

50 Interviews 1(i) –(iv), 6(i), 6(ii), 19, 26; see also Xun (2002).

(d) Status of the (Chinese) Child

'Zhe shi zhongguo, haizi shi shehui de.'
'This is China, children belong to society'.[51]

'They take an instrumental view of the value of a person. From a materialistic, family-centred social view, they lack this Christian perspective – that a person can have value beyond what he can do or has. You see this problem in families – if you are not male, or not 100% normal, the family goes through a very tough period – they either fail and break up [the family], or re-evaluate their life'.[52]

Relevant to a deeper understanding of formal and informal policies towards the care of orphaned and vulnerable children is the Chinese human rights and equality framework and discourse, and how such children are viewed therein. Despite extensive apparent engagement with the international rhetoric of universal human rights predicated on the intrinsic, unassailable and equal right to dignity of every human, the Chinese human rights discourse remains bound up in a local culture and tradition which tends to view children as valuable, first and foremost, for their instrumental role in the Confucian/Communist-constructed family/social hierarchy, rather than viewing rights as contingent on one's intrinsic worth as an individual prior to society. Given the emphasis of both Confucian and Communist ideologies on duty to society and the goal of social harmony, it is unsurprising that the individualistic/atomistic framework of Western human rights discourse is not the framework underlying rights conceptualisations in China. The individual is, rather, conceptually embedded in, rather than prior to, society, with duties in turn emphasised prior to rights. Wakeman puts it thus: 'Most Chinese citizens appear to conceive of social existence mainly in terms of

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51 Interview 12 (Friendship Outreach, Chinese manager).

52 Charles Kramer, Interview 1(i), on his view of the Chinese basis of human rights and value.

obligation and interdependence rather than rights and responsibilities'.[53] When one regards the 'most basic level of Confucian morality', that is, the strictly hierarchical relationships between father and son, husband and wife, and older/younger siblings,[54] it is clear that equality of children with other members of society is not a feature of the Confucian moral order. Rather, children are valued, above all, for their potential to fulfil familial, and concomitantly social, duties.

This duty-based human rights ideology is an important aspect of the treatment of disabled children in modern Chinese society. Studies focusing on gender as a cause of abandonment often point to the patrilineal culture, in which women move from their descent line into that of their husband on marriage and, as a result, economically 'females were seen as "temporary" children who required a far greater investment of scarce resources than they would ever be able to return to their parents'.[55] Analogous to the 'gender example' is the 'disability example', in which a child's right to care and concern is subsumed by a discourse which emphasises that child's inability to carry out his or her duties to family and society. This discourse is, of course, influenced not only by cultural meanings and attitudes to girls and disabled children, but the anticipated future social security needs of parents in a society which still largely relies on child-provided care of the elderly – the phrase 'filial piety', *yang'er fanglao,* can be translated literally as 'raising sons to prevent difficulties in old age'.[56] As Hu and Szente put it, '[i]t seems that the national emphasis on the Confucian acceptance of one's social role in a hierarchical society has placed people with disabilities on the bottom of that social

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53 Wakeman (1993) p 133. See also Peerenboom (2002) p 43.

54 Harrison (2001) pp 98, 172.

55 Jimmerson (1990) p 52. See also Johnson, Huang and Wang (1998) p 475: 'The main problem with daughters is that they "belong to other people"'.

56 Wang (2010) p 19.

hierarchy'.[57] Holroyd explores the influence of Confucian cultural influences on care-giving obligations towards children with disabilities, noting that 'the primary Confucian guidelines are a duty-bound set of obligations of what a "right and proper" person should and should not do. Being proper is central to the social role within Confucian-based Chinese society'.[58] Children, including disabled children, who are seen as unable to carry out their 'right and proper' obligations are cast as disturbances to family (and therefore social) harmony:

> … although a Confucian notion of a right and proper person is associated with taking a moral place in the world, it is also about how an imperfect or diseased body or mind is seen as incomplete and without moral standing. This has the effect of challenging foundational models of self and personhood and their translation into ancestry, on which obligations rest. These violations are most dramatically manifest in children with a handicap.[59] … Chinese children who have disabilities represent disruptions to the flow of exchanges, in that giving good things to ill children might not make life meaningful in the usual cultural sense understood by a Chinese parent. Thus the 'natural' progression of patterns of reciprocity that flow over into ancestry and birth is neither immediate, in the forms of gratitude, nor generalised, in the form of delayed care, with debts never able to be reclaimed.[60]

Further, and moving beyond this instrumental connection between disability and familial duty, Kohrman describes a deeper, more intrinsic nexus between disability and moral duty in traditional Chinese discourse. In his ethnographic study of disability in modern China, he argues that the emphasis placed on visible difference in modern

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57 Biying Hu and Judith Szente, 'The Care and Education of Orphan Children with Disabilities in China: Progress and Remaining Challenges' (2009) *Childhood Education*; see also Meng Deng, Kim Fong Poon-McBrayer and Elizabeth Farnsworth, 'The Development of Special Education in China: A Sociocultural Review' (2001) 22(5) *Remedial and Special Education* 288, p 289 discussing the social status of people with disabilities in Confucianism. See, also, Human Rights Watch (1996) 6: 'Official press reports indicate that the Chinese government may also have given serious consideration to allowing euthanasia for handicapped children, but has declined to do so for fear of the international repercussions'.

58 Eleanor Holroyd, 'Chinese Cultural Influences on Parental Caregiving Obligations Toward Children With Disabilities' (2003) 13(1) *Qualitative Health Research* 4, p 4.

59 Holroyd (2003) pp 10–11.

60 Holroyd (2003) p 18.

China 'can no doubt be linked to the emphasis that China's classical canon gives to the preservation of the human form':

> Possibly the most oft-invoked example, in this regard, one which has served as a moral axiom for centuries, is found in the *Book of Filial Piety*. There, Confucius is described as teaching that all children have the filial duty to preserve the body given them by their ancestors and to not allow even their hair or skin to be injured.[61]

Related cultural beliefs about and attitudes towards disability remain evident in aspects of modern Chinese society – for example eugenics campaigns 'stressing the need for "fewer but better" children',[62] and the Law on Maternal and Infant Health Care which requires doctors to advise termination of foetuses found to have genetic diseases or defects of a 'serious nature'.[63] Leslie Wang persuasively argues that modern Chinese political discourse, with its emphasis on the overall mental, moral and physical 'quality' (*suzhi*) of the population, has resulted in 'lines of stratification being drawn among offspring', with healthy children considered more worthy of state and parental investment, and sick or disabled children resident in orphanages constituting 'part of the "constitutive outside"[64] of state-sanctioned Chinese modernity, helping to define the centre of social belonging through the qualities that they are perceived to lack'.[65] On the other hand, social/cultural attitudes towards and meanings of 'disability' continue

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61 Kohrman (2005) p 62. In the same passage, Kohrman also provides an important warning to Chinese scholars against a simplistic vision of 'Chinese culture as equivalent to statements attributed to a famous sage', which should be borne in mind here and throughout.

62 Johnson (2004) p 27.

63 中华人民共和国母婴保健法 *(zhonghua renmin gongheguo muying baojian fa)* [Maternal and Infant Health Care Law of the PRC], NPCSC, 27 October 1994, art 18.

64 See also Yngvesson's concept of the 'hierarchy of belonging' entrenched in abandonment and adoption trends: Barbara Yngvesson, *Belonging in an Adopted World* (The University of Chicago Press, Chicago 2010) p 126.

65 Leslie Wang, 'Children on the Margins: The Global Politics of Orphanage Care in Contemporary China' (2010) DPhil (Sociology) Dissertation (University of California, Berkeley) p 6.

to evolve, and it is overly simplistic to characterise modern conceptions of disabled children as denigrative: '*[c]anji* [disability/disabled] has been emerging and metamorphosing in China as a social, political, and somatic sphere of existence in recent decades'.[66] While it is neither possible nor wise to speculate on the extent to which duty-based conceptualisations of children's rights has impacted on abandonment and the care of orphans in China today, an awareness of the different starting point to human rights discussions is necessary before considering orphan care in general.

3 Policy on Care of Orphans

Dr Shang usefully outlines the development of orphanages in China. Before 1949, orphanages across China had been established by a variety of operators, including local governments, individuals, churches and charities. With the founding of the PRC in 1949, a transitional period ensued, during which some orphanages were closed, and some were 'taken over by the new government and reorganised as state orphanages'.[67] Today, 'the government continues to monopolise the operation of children's welfare homes', and the state system of orphan care is 'characterised by its rural-urban duality'.[68] All orphaned and abandoned children in China's urban areas are eligible to be cared for by state orphanages, whereas those in rural areas, and children of long-term prisoners, are not entitled to the provision of state welfare.[69] Further, due to increasing abandonment rates which are not matched by concomitant expansion of state orphanage capacity, existing private orphanages are overwhelmed and facing heavy

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66 Kohrmann (2005) p xi.

67 Shang (2002) p 205.

68 Shang (2002) p 205.

69 Shang, Wu and Wu (2005) p 127.

pressure even in providing adequate care for urban orphans.[70] As a result, and because the government has an ostensible monopoly on the operation of children's welfare homes, the vast majority of orphans (that is those residing in rural areas) are looked after either by relatives, the customary practice of *nongcun wubao*, or in unregistered and unrecognized private orphanages. It is also clear from Johnson's study on abandonment and adoption that a very large number of orphans and foundlings are being informally adopted without registration (and usually, therefore, also without *hukou*),[71] an interesting phenomenon closely related to the emergence of private/informal orphanages. All in all, as Human Rights Watch note:

> [t]he whereabouts of the great majority of China's orphans [is] still … a complete mystery, leaving crucial questions about the country's child welfare system unanswered and suggesting that the real scope of the catastrophe that has befallen China's unwanted children may be far larger than the evidence … documents.[72]

Dr Shang's survey found 69 000 of an estimated 573 000 orphans are in state welfare institutes. The most recent government report puts the figure at 72 451, however only about 40% of those children are in specialised child welfare institutes (*ertong fuliyuan;* as of 2008, there were 290 child welfare institutes in China),[73] the remaining 60% residing indiscriminately alongside disabled, elderly, and mentally disturbed adults, in the more general social welfare institutes (*shehui fuliyuan*) (it is unclear what proportion of these children are themselves mentally or physically unwell). As Human Rights Watch/Asia pointed out in 1995, the 'segregated management

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70 Shang (2002) p 208.

71 Johnson, Huang and Wang (1998); Johnson (2004) Chapter Six.

72 Human Rights Watch/Asia (1996) p 3.

73 '2008 China Civil Affairs Statistical Yearbook' *Ministry of Civil Affairs* (Beijing 22 June 2009) <http://cws.mca.gov.cn/article/tjbg/200906/20090600031762.shtml> accessed 21 December 2010.

orphan-care policy which the government has claimed to pursue in 1956 … has only rarely [been] achieved in practice'.[74] Except when the distinction is relevant, both child welfare institutes and social welfare institutes will be referred to collectively herein as state orphanages.

The current project includes both unregistered Chinese-run private orphanages and previously unregistered Chinese orphanages that have secured partnerships or registration with government bureaus. Further, foster homes, both foreign and Chinese-run, are also included – these are almost exclusively located in urban areas, and seek children already in the care of state orphanages but requiring urgent medical care. The children are provided with medical intervention and rehabilitation, and then usually continue to reside at the foster home (or with local foster families, under the supervision of the foster home) until such time as adoption can be arranged through the central authorities. Except where the distinction is relevant, all private homes, both orphanages (taking children in directly) and foster homes (taking children from state institutions) are referred to herein as private orphanages.

(a) Government Departments

Before examining the various statutory instruments and policies relevant to private orphanages, it is useful to briefly outline the structure of government and introduce the various state authorities with an interest in this area of regulation. Party and government structures are organised in a roughly symmetrical fashion, under the National Party Congress and the National People's Congress (NPC) respectively, the

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74 Human Rights Watch/Asia (1996) p 120.

latter being China's 'putative legislature'.[75] More often, legislative functions and policy deliberation occur at the level of the NPC Standing Committee, and the State Council (*guowuyuan*), the chief administrative authority of the People's Republic of China (PRC). Subordinate to the State Council is the Ministry of Civil Affairs (*minzhengbu*) of the PRC. This central MCA is responsible for 'social and administrative affairs',[76] including welfare programmes for marginal groups, and is complemented by MCA bureaus at both provincial and local level. It should be noted that in addition to the regulations and policies, introduced below, promulgated by the central MCA, provincial and local MCA bureaus also issue their own implementing regulations, meaning the applicable regulatory framework may differ significantly depending on one's location. Linda Wong's study of the MCA, 'Marginalisation and Social Welfare in China', provides a useful overview of the issues confronting the MCA in fulfilling its goals, the first being 'role ambiguity. Its impossibly wide range of duties, their disparate nature, and lack of coherence are not conducive to the emergence of agency goals and mission'.[77] She further argues that the local agency structure is inadequate, because at the bureaucracy's weakest level, that of township and village, 'where the majority of the rural masses are administered … the whole range of civil affairs duty is usually handled by one to two civil affairs assistants', a manning structure Wong characterises as 'woefully deficient'.[78] Further, MCA bureaus face financial struggles that are 'unbroken tales in the long saga of a half-starved organisation'.[79] When the current study turns to issues of local MCA

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75 Kenneth Lieberthal, *Governing China: From Revolution through Reform* (W W Norton & Company, London 1992) p 176.

76 Taken from MCA website <mca.gov.cn> accessed 15 September 2009.

77 Wong (1998) p 153.

78 Wong (1998) p 153.

79 Wong (1998) p 153.

interaction and engagement with the private orphanages and foster homes, this institutional pressure is an important aspect thereof to be borne in mind.

Within the MCA bureaucracy are a number of departments and sub-bureaus, the most relevant here being the Civil Society Organisations Authority,[80] overseeing the Foreign NGO Management Office;[81] the NGO Service Centre;[82] the China Centre of Adoption Affairs;[83] the Social Welfare and Charity Promotion Division,[84] overseeing the Child Welfare Agency;[85] and the China Charity Federation,[86] overseeing provincial and local level Charity Federations.

The Civil Society Organisations Authority is responsible for the oversight of the three types of registrable NGOs in China (Social Organisations, Foundations, and Private Non-Enterprise Units), and is complemented in this task by the NGO Service Centre. According to the MCA website, this responsibility for NGOs involves 'commitment to NGOs' both foreign and Chinese; management of registration procedures; monitoring the work of NGOs through law enforcement agencies; and general guidance and supervision.[87] The mandate of the NGO Service Centre also

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80 民间组织管理局 (*minjian zuzhi guanli ju*).

81 涉外民间组织管理办公室 (*shewai minjian zuzhi guanli bangongshi*).

82 民间组织服务中心 (*minjian zuzhi fuwu zhongxin*).

83 中国收养中心 (*zhongguo shouyang zhongxin*).

84 社会福利和慈善事业促进司 (*shehui fuli he cishan shiye cujin si*).

85 儿童福利处 (*ertong fuli chu*).

86 中华慈善总会 (*zhonghua cishan zonghui*).

87 MCA website (n 76).

includes annual inspections and financial audits.[88]

The China Centre of Adoption Affairs is the exclusive governmental adoption agency. In addition to its responsibility for foreign adoption issues, the Centre is also involved with the oversight of state orphanages. It is important to note that there is no central organisation responsible for coordinated oversight of domestic adoption.[89] Similarly, the Social Welfare and Charity Promotion Division is mandated to develop social welfare policies and standards in relation to the protection of orphans, disabled children and other special groups.[90]

The China Charity Federation could be described as a GONGO, closely related to and supervised by the MCA, but with ostensible independence.[91] The main task of China Charity Federation bodies is to collect civil donations and pass these down to city-level federations to be used for charitable purposes.[92] The Federation is also able to assist with the registration of charities,[93] by acting as a professional supervising unit.[94]

(b) Law and Policy

When Alain and Brigitte established their foster home for blind and visually impaired orphans cared for in state orphanages, they named it (in English and Chinese) 'Good

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88 MCA website (n 76).

89 MCA website (n 76).

90 MCA website (n 76).

91 Interview 41 (Shandong Charity Federation).

92 Up to 30% of donations raised can be used for administrative/non-charitable purposes: Interview 41 (Shandong Charity Federation).

93 MCA website (n 76).

94 See Chapter Two above at p 62.

News Foster Home'. However over time, presumably uneasy at the attention that the use of this name drew to the Alain's vision and mission, various Chinese officials and authorities discouraged them from the use of the phrase 'foster home', because 'it's illegal for foreigners to foster Chinese children'.[95] I asked Alain to explain further this seemingly illogical emphasis on appearances/names rather than the work itself (of which authorities are aware, and have allowed to continue for many years):

> When we speak to officials, they don't give you the feeling that you're doing something illegal – actually they're pretty encouraging at that central level. They're quite visionary people at the top. But they tell us we need to speak to the guy downstairs, and that's where the problems start. The middle guys are not in it for the kids. So the top guys tell us to take it slowly, that it takes time. They don't want to tell us what to do – they wouldn't tell us to do something illegal – rather they keep it blurry. It's not clear. They don't tell you to leave, but they don't tell you how to stay.

The experience of Good News is typical of the foreign foster homes interviewed, which find themselves working in a field the legality of which is ambiguous at best. Dr Shang in 'Welfare Provision for Vulnerable Children' cites central policy as stipulating that only state-run welfare institutes may lawfully care for orphaned and abandoned children in China, based on an interview with an official from the MCA.[96] However, it is somewhat problematic to make such a broad statement – as discussed above, 'government' is a cumbersome entity in China that does not always present a unified front. Certainly the evidence of both Chinese nationals and foreigners running the orphanages interviewed was that local and provincial level officials frequently refer to their operations as 'illegal' or 'not allowed', usually on the basis of an assertion that only the government can care for Chinese orphans. The one state orphanage director who was willing to be interviewed denied knowledge of any

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95 Interview 13(ii).

96 Shang, Wu and Wu (2005) p 122.

foreign-run foster homes, despite other foster homes interviewed currently caring for dozens of children from his facility.[97]

The 'political engagement' and sensitivity of both the issue of abandonment and child welfare must be noted at this point in the discussion on orphanage policies. Shang argues that due to the government monopoly in residential orphan care, maintenance and development of the state orphanage sector was dependent on government appropriation, which was in turn dependent on national financial and political considerations rather than the interests of orphans:[98]

> During this time, the situation of orphans became a kind of political symbol: either it was regarded as a manifestation of so-called socialist advantages or as something that brought shame to the socialist society when things were going wrong. The interests of children themselves, however, were hidden from view by political considerations. Efforts to seek other financial resources, such as appealing to society for donations, were implicitly or explicitly banned for political reasons'.[99]

The issue of state/non-state orphan care is understandably a politically sensitive one; this is even more the case in relation to foreign and church-affiliated service providers. Consequently, opacity, ambiguity and inconsistency in government policies and laws regulating the area are expected and evident.

A review of current central-level statutory and subordinate instruments found one reference to the care of orphans in Article 43 of the Law on the Protection of Minors,[100] which provides (inter alia) that orphaned and abandoned children shall be

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97 Interview 25.

98 Shang (2002) p 206.

99 Shang (2002) p 206.

100 Protection of Minors Law of the PRC (n 9).

accepted by and cared for by orphanages established by the MCA departments.[101] This is the only legislative guidance on point, and could be read as a duty exclusively bestowed on government. However, a number of policy-type instruments also exist in relation to orphan welfare which, given the often blurry distinction in China between legislation/'hard' law and policy/'soft' law, may bear significantly on the 'legal' landscape. For example, the more recent Joint Ministerial Opinion on Strengthening Orphan Relief[102] appears to be more open to collaborative efforts with civil society with respect to the care of orphans. The Opinion is one of a number of policy documents that were issued in the flurry of bureaucratic activity that occurred in 2006–7 in conjunction with the Blue Sky Implementation Plan.[103] Part 2.3 of the Opinion stipulates that orphans in the guardianship of the MCA may be placed in community orphan welfare homes, orphan schools, SOS Children Villages[104] and other such organisations. The Opinion also refers more generally to the mobilization of social forces to assist orphans, and the need to encourage civil society and other social forces to support participation in child welfare and orphan assistance projects. The express reference to SOS Children Villages by name, and the absence of reference to other foreign foster homes, may be interpreted as meaning the Opinion only contemplates allowing this particular foreign-led effort to play a role in the sector.

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101 '民政部门设立的儿童福利机构' (*minzhenghumen sheli de ertong fuli jigou*). The Protection of Minors Law (n 10) also includes a general and idealised duty on the state, army, social organisations, enterprises and other adult citizens to 'protect minors' (Article 6).

102 Joint Ministerial Opinion on Strengthening Orphan Relief (n 4).

103 "儿童福利机构建设蓝天计划"实施方案 *(ertong fuli jigou jianshe lantian jihua shishi fang'an)* [Child Welfare Institute Blue Sky Construction Plan Implementation Program ('Blue Sky Implementation Plan')], MCA, 22 January 2007, introduced below from 114.

104 Information on SOS Children Villages available at <http://www.soschildrensvillages.org.uk> (accessed 13 February 2009). The villages are set up under a long-term MCA project, in cooperation with an Austrian charity, establishing privately funded foster homes.

More directly on point are the Family Foster Care Interim Measures[105] and Social Welfare Institutions Interim Measures.[106] The former allow for the placement of orphaned children with foster families,[107] to be coordinated through provincial-level MCA bureaus in conjunction with approved social welfare institutions (*shehui fuli jigou*) and child welfare institutions (*ertong fuli jigou*). However the measures do not appear to contemplate fostering from state orphanages to private foster homes, referring only to foster families, and although foreigners are not *prima facie* precluded from fostering in their individual capacity, anecdotally this would not meet with state approval.[108] A number of the private orphanages interviewed coordinate foster family programmes under which healthier children are sent to live with pre-approved local Chinese families. Chapter IV of the Measures refers to 'social welfare institutions engaged in foster family work',[109] however such institutions are to be approved by county level or above MCA bureaus.

The Social Welfare Institutions Interim Measures were promulgated by the central MCA in 1999, in order to 'strengthen the management of social welfare organisations and thereby promote the healthy development of social welfare'.[110] 'Social

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105 家庭寄养管理暂行办法 *(jiating jiyang guanli zanxing banfa)* [Family Foster Care Interim Measures], MCA, 27 October 2003.

106 社会福利机构管理暂行办法 *(shehui fuli jigou guanli zanxing banfa)* [Social Welfare Institutions Interim Measures], MCA, 30 December 1999.

107 For a discussion of the increased focus of MCA policy on foster families to supplement institutional care, see Shang (2002).

108 A number of interviewees, mainly volunteer coordinators working with state orphanages, have been able, after a number of years developing personal relationships with state orphanage directors, to foster babies or children in extenuating circumstances. These arrangements are always unofficial and 'off the books': see Interviews 7, 26, 27. Indeed this is usually how the larger, established foreign-run private orphanages begin operations (see Chapter Seven below).

109 Chapter IV Article 11: '从事家庭寄养工作的社会福利机构' (*congshi jiating jiyang gongzuo de shehui fuli jigou*).

110 Social Welfare Institutions Interim Measures (n 106) art I.

welfare organisation' is defined as including groups organised by state welfare agencies, social organisations (the term used is not exactly the same as that in the SO Regulations), and individuals, providing maintenance, rehabilitation and trustee-type services to (inter alia) orphans and abandoned children.[111] The Measures thus seem to allow for private homes to care for children, however this is on condition of being granted a Social Welfare Institution Certificate of Approval in accordance with the Measures.[112] Importantly, the Measures include a reference to foreigners making an application for permission to establish such an organisation.[113] The Measures also contain provisions relating to internal governance and MCA supervision of social welfare institutions,[114] and require standards to be set and implemented by local and provincial level government.[115] Of the private orphanages interviewed, only one was aware of any legislative or policy instruments allowing NGOs to obtain official permission to care for orphans, however as Red Thread rightly pointed out, the Measures are of little use for start-up foster homes, as they require an applicant to demonstrate adequate funding, facilities and premises (which impoverished domestic-run private orphanages are unable to do).[116] Further, as the Measures prohibit the operation of welfare organisations without an approval certificate,[117] it would probably be risky for long-established foreign-run private orphanages to attempt to seek approval following years of unauthorised operations.

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111 Social Welfare Institutions Interim Measures (n 106) art II.

112 Social Welfare Institutions Interim Measures (n 106) art IX.

113 Social Welfare Institutions Interim Measures (n 106) art VIII.

114 Social Welfare Institutions Interim Measures (n 106) art V.

115 Social Welfare Institutions Interim Measures (n 106) art XI; s III.

116 Social Welfare Institutions Interim Measures (n 106) art VIII. See also interview with retired MCA official (Interview 42).

117 Social Welfare Institutions Interim Measures (n 106) art XXVII.

The director of the state orphanage interviewed did allude to a government policy enabling private citizens to apply for governmental permission to establish foster homes, most likely in reference to the Social Welfare Institutions Interim Measures. However, he was also very clear that the government looks disfavourably on such enterprises, and the practice of orphans being cared for outside the state orphanage system is not encouraged. In any case, the language of the Measures seems to be permissive rather than imposing any duty on the MCA to approve applications for a Social Welfare Institution Certificate of Approval which meet the criteria laid down; further, it is doubtful whether such interim measures (*zanxing banfa*) have the status or force of legislation (*fa*).

Other policies and laws that are peripherally relevant to the care of orphans include the Adoption Law[118] and the Protection of Disabled Persons Law.[119] Article 5 of the former provides that the following citizens or institutions are entitled to place children into adoption: guardians of orphans, social welfare institutions or parents unable to rear their children due to unusual circumstances. 'Social welfare institution' (*shehui fuli jigou*) is not defined, but is used generally in MCA documents to refer only to state-run institutions. Article 16 provides that orphans or children whose parents are unable to rear them may be supported by relatives or friends of their parents, and the adoptive relationship shall not apply in this case. Article 20 provides that foreigners may adopt a child in China only in accordance with the Adoption Law of the PRC. Article 7 of the Protection of Disabled Persons Law provides that grassroots-level organisations (inter alia) 'shall do their work for the disabled well, as is within their responsibility'. Article 9 provides that legal fosterers of disabled persons

118 Adoption Law of the PRC (n 9).

119 Protection of Disabled Persons Law of the PRC (n 11).

must fulfil their duties toward their charge. Article 43 provides that governments at various levels, and society, shall establish welfare centres and other placement and foster institutions for disabled persons.

(c) State Orphanages

In 1995, Britain's Channel 4 broadcast a documentary on China's orphanages called *The Dying Rooms: China's Darkest Secret*, which was shortly followed by publication of Human Rights Watch/Asia's investigation, *Death by Default: A Policy of Fatal Neglect in China's State Orphanages*. The report was a stunning, and arguably sensationalised, indictment of the conditions in state orphanages across China, including of what was at the time touted as the country's model orphanage, the Shanghai Children's Welfare Institute (CWI). Johnson is rightly quick to point out that orphanages are disadvantageous places in general, and that institutionalised care for infants is linked with high mortality rates in many countries.[120] Yet the Human Rights Watch report went further – on the basis of documented evidence of systematic abuse in one orphanage, the Shanghai CWI, and orphanage mortality rates published by Chinese MCA authorities for several provinces in 1989–90 (of between 50 and 80%), the report concluded that a 'pattern of cruelty, abuse, and malign neglect … has dominated child welfare work in China since the early 1950s, and … now constitutes one of the country's gravest human rights problems'.[121]

Based largely on official MCA documents, as well as reports from a whistleblower and a former resident at the Shanghai CWI, *Death By Default* calculated that for a newly admitted orphan in China's welfare institutions nationwide, the

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120 Johnson, Huang and Wang (1998) p 469.

121 Human Rights Watch/Asia (1996) 1 (Summary and Recommendations).

likelihood of survival beyond one year was less than fifty percent in 1989. At the Shanghai CWI, the estimated total mortality in the late 1980s and early 1990s was put at ninety percent. The Human Rights Watch report also documents medical records and testimony evidencing a pervasive practice of 'summary resolution', that is, the selection of 'unwanted infants and children for death by intentional deprivation of food and water'.[122]

> On the basis of documents published by the Chinese authorities themselves, Human Rights Watch/Asia has established that the People's Republic has not, at any time since its foundation, attempted to provide adequate care for orphans and other dependent groups, such as the handicapped, the destitute elderly, and the mentally disabled. … For the majority of abandoned children in China today, the state's policy of malign neglect means an early and lingering death.[123]

> China's urban orphanages and other institutions for children serve a largely symbolic function, representing the state's public commitment to the humane treatment of abandoned infants but in practice making almost no effort to keep them alive.[124]

International response to the Human Rights Watch report was immediate and grave, however the report should be treated with caution, particularly given that inferences about deliberate, policy-based abuse and 'summary resolution' are drawn based on evidence from just one orphanage. Johnson rejects the 'sweeping thesis' of routine murder across China through deliberate starvation,[125] arguing that while the very high mortality rates experienced in orphanages across China in the early 1990s were well documented by local officials and Chinese government statistics (and suggested that up to half of the children brought into the orphanages died, higher in poorer

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122 Human Rights Watch/Asia (1996) pp 5, 147–148.

123 Human Rights Watch/Asia (1996) p 15.

124 Human Rights Watch/Asia (1996) p 77.

125 Johnson (2004) pp 41–48.

orphanages),[126] the explanation for these alarming rates involves many factors, 'most beyond the control of the orphanage staff'.[127]

In the years since the publication of *Death by Default,* many scholars and researchers have reported excellent progress in China's state orphanages, including increased funding from international NGOs and foreign adoption agencies.[128] Shang cites a number of MCA policies and documents promulgated since the 1990s which demonstrate that 'the Chinese government has been actively seeking proper ways to protect orphaned or abandoned children', a process that 'has clearly accelerated since 1998'.[129] Johnson's research suggests that 'by the end of the 1990s orphanage conditions had improved dramatically in many places thanks to increased government funding, funds generated by international adoption, and increasing participation by international charitable organisations'.[130] However comments made by the UN Committee on the Rights of the Child as recently as 2005 indicate progress is still required to ensure that all deaths of children in state institutions are 'properly documented and investigated, and that appropriate follow-up actions are taken when necessary', as well as ensuring that 'all forms of alternative care meet quality standards in conformity with the Convention'.[131] Interviewees in the current study with first-hand experience of conditions in state orphanages often told of dire conditions, inadequate care and medical treatment, and in some cases the continuance of 'summary resolution';

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126 Johnson, Huang and Wang (1998) p 469.

127 Johnson (2004) p 43.

128 Keyser (2009).

129 Shang (2002) p 211.

130 Johnson (2004) p 222.

131 UN Committee on the Rights of the Child, 'Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)' (24 November 2005) CRC/C/CHN/CO/2.

others emphasised that the institutions with which they cooperate are making genuine efforts to help their wards, and that much progress has been made. It is, of course, impossible to make generalised findings about the conditions in China's many state orphanages. At most it can be said that there appears to be great disparity in the conditions and level of care in orphanages across China, with much depending on the particular institution's director and financial position (most funding is local rather than central). Further, the legacy of the numerous Western 'exposés' of Chinese orphanage conditions in the mid-1990s, including *Death by Default,* has endured to the present day. In spite of any improvements across the various, diverse orphanages, 'the shocking images of "dying rooms" have not been replaced with more current representations of Chinese institutional care and thus remain entrenched in the international social imaginery'.[132]

Johnson points to policy measures put in place even before the Human Rights Watch report to improve orphanage conditions, including increased recourse to international adoption and cooperation with international charities.[133] More recently, in June 2006, President Hu Jintao, while visiting a state orphanage, called for all children to be able to develop equally under the same blue sky, with orphans benefiting from the same opportunities as other children.[134] In response and as a means of implementing Hu's call, the MCA soon after issued the Blue Sky Implementation Plan.[135] The five-year program, commencing in 2006, aimed to invest central and local government funding in the construction of new state orphanages and the improvement of existing state

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132 Wang (2010) p 9.

133 Johnson (2004) p 188.

134 'Nationwide Plan for Better Care of Orphans' *China Daily* (Beijing 29 December 2006) <http://china.org.cn/english/China/194282.htm> accessed 8 September 2009.

135 Blue Sky Implementation Plan (n 103).

orphanages across China. The program set per capita construction targets, and provided for corresponding government subsidization of state orphanages. The ministry allocated 200 million RMB annually to building welfare institutions in each prefecture-level city across China.[136] Four interviewees expressed scepticism about the value of the Blue Sky Plan, with its focus on institutional rather than family-based care, due to some children reportedly being removed from family foster care in order to fill up the newly built child welfare institutes.[137] A similar orphan-targeted central policy was the Tomorrow Plan, launched in 2004, which was intended to benefit orphans with disabilities by providing free treatment or surgical rehabilitation to 35 000 children in state institutions.[138]

4 Conclusion

> We hope the government will one day see the needs of these children, and see that we also, with sincere good faith, are sharing the government's responsibility. This is our country's issue. We are willing to sacrifice, in the spirit of our country, sacrifice our hearts, to build up China. We are willing to act in concert with them. We hope that one day what we are doing will be recognised by government. We have been doing this work for twenty two years, the first child we took in is now thirty years old. Their law says this – that orphanages are a governmental responsibility. But we are the ones implementing orphan protection.[139]

This brief introduction to China's orphan welfare sector demonstrates the intersection of factors that impact on outcomes for China's vulnerable children. Abandonment, as in other countries, has a long history in China, and insufficient information is available on its current incidence, particularly in relation to disabled children and infants.

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136 'Nationwide Plan for Better Care of Orphans' (n 134).

137 Interviews 10, 11, 12 and 38.

138 Hu and Szente (2009).

139 Sister Qin, manager and co-founder of Guanghui (Interview 1(iv), freely translated).

Researchers agree that top-down policy changes are required to support parents in the fulfilment of their parental duties, and to expand the scope and supervision of NGOs in child welfare provision,[140] but equally it is apparent that bottom-up shifts in cultural discourse on child rights, disability and adoption are both occurring and needed. The cultural context in turn influences notions of kinship and informal and formal adoption patterns. From this complex combination of norms and practices has grown, over the years, an equally complex web of welfare providers, both state and non-state, and insufficient attention has been paid to the possible influence of orphanages on cultural ideas about and incidences of abandonment. Government policy on non-state orphanages is ambiguous, inconsistent, and opaque, but as long as state institutions continue to be overwhelmed in their duty to care for China's orphans, the non-state sector will continue to organically grow in response to demand for more accessible orphan care. The empirical findings of the current study of this non-state sector are presented in the chapters that follow.

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140 See, also, UN Committee on the Rights of the Child, 'Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)' (24 November 2005) CRC/C/CHN/CO/2.

PART B: CHINESE PRIVATE ORPHANAGES

INTRODUCTION

Orphanages run by Chinese individuals and churches[1] constitute an alternative, parallel and often unacknowledged system of care to the state-operated welfare institutions. Although only a small proportion of China's orphans and foundlings are cared for in state orphanages, there are no official statistics or estimates on the number of non-government orphanages in existence in China today, by whom they are run, or for how many children they care. Yet these indigenous private orphanages are anecdotally prolific, and form an important aspect of orphan care to which little attention has been paid in existing scholarship. What follows is an introduction to the history, development and current shape of the private orphanage sector, as a preface for examining formal and informal recognition of the sector by government officials, both centrally and locally, and how the concepts of recognition and legality are devised and understood in the Chinese institutional and social context. It will be seen that a rigid legalistic distinction between 'legal' and 'not legal' is generally not made, either by the orphanages themselves or the local officials who deal with them at the grassroots level, and both sides are apparently more preoccupied with the issue of 'recognition' rather than 'registration'. The lack of government engagement with the private orphanages in an official, formal capacity is related to many operational outcomes for the homes and impacts directly on their resident children, but there is little evidence of momentum for change of the regulatory landscape on either side of the equation.

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1 Part C is devoted to the empirical findings relating to foreign-run homes, which operate on a 'foster home' model, in cooperation with state orphanages.

The situation of non-state orphanages is yet to be studied from a legal perspective. The most recent and comprehensive Chinese study is by Dr Xiaoyuan Shang, a senior research fellow in social policy at the University of New South Wales. In *Survival Children: The System of Social Protection for Vulnerable Children in China,*[2] Shang presents the main institutional arrangements for protecting vulnerable children, and a survey of state and private care provision for such children in both urban and rural areas. In *Welfare Provision for Vulnerable Children: The Missing Role of the State,* the one English study in the field, Shang and her colleagues examine the situation of private orphanages and foster homes based on field interviews in China, focusing exclusively on Chinese-run institutions. Using Guanghui as a case study, Shang explores the history of grassroots, non-state, Chinese-run welfare homes – such homes are typically established spontaneously and from necessity, without intention or planning, in rural areas, as children are abandoned into the care of known Christians or nuns due to the lack of accessible state orphanages. As these homes come to be viewed by local residents and police as *de facto* orphanages, gradual expansion occurs; however according to Shang's study, such grassroots orphanages are uniformly denied formal state recognition as welfare institutes. Shang explores the implications of the lack of state registration, regulation and oversight of the private orphanages as they relate to the inadequacy of welfare protection for orphans. She describes three ways in which the state is 'missing' in relation to such homes – as regulator, as fund provider, and as supervisor. Firstly, the private orphanages are unable to obtain registration or legal personality. In addition to causing operational difficulties for the homes, this also means that in most cases the children in their care are also not recognised as Chinese citizens (that is they lack *hukou,* and have no means of obtaining one). Second, this lack of

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2 Xiaoyuan Shang, *Survival Children: The System of Social Protection for Vulnerable Children in China* (Social Sciences Academic Press, China 2008).

registration means the homes are not eligible for government fiscal assistance or other benefits. Third, as non-entities operating outside the system of state care for orphans, such private orphanages are not subject to the regulation and standardisation of orphan services, nor are they provided with technical or policy support. Dr Shang concludes from the case studies that of most significance in relation to private orphanages is the state's failure to play a role as regulator, that is that 'its missing role in law, regulation and policy-making is more damaging' than its failure to assume financial responsibility for the welfare of all Chinese orphans. It is this purported 'missing role' that forms the starting point for the following chapters.

CHAPTER FOUR: CASE STUDIES

Private Chinese orphanages, and particularly those associated with underground churches, are, for reasons explored below, very often wary of associations which could attract the attention of local authorities, making access difficult, and largely dependent on *guanxi* (relationships, connections) with trusted, long-standing friends of the orphanage concerned. Following interviews with representatives of various private orphanages in 2009, in 2010 I spent several weeks each at Guanghui and Our Lady's Home for the Handicapped, both of which are homes for orphans and foundlings run by nuns of the unofficial Catholic church, in order to better understand day-to-day life and the experiences of resident children and sisters. In addition, in-depth interviews were carried out, on both field trips, with representatives of six other Chinese-run private orphanages. Home of Joy, Rainbow House and Good Shepherd Home are also associated with underground churches (Catholic in the case of the latter), although Good Shepherd is no longer in operation as its managers recently moved to Beijing to pursue the foster home model introduced in Part C. Rainbow House, located in a town very near to Guanghui, is an important case study, as the orphanage has succeeded in establishing a partnership with the MCA, following years of independent, unsupervised operations. The remaining homes are not connected with religious communities – Star Village is a home for the children of long-term prisoners, and its founder, Madam Leng, has actively sought government support and cooperation for many years since its founding; Chen Anhui and Yangtze Orphanage are independent orphanages, both supported by a network of expatriate volunteers.

Home	*Description*	*Children*
Guanghui	Catholic church-run private orphanage	90
Our Lady's	Catholic church-run private orphanage	113
Good Shepherd	Catholic church-run private orphanage (closed in 2008)	40
Home of Joy	Church-run private orphanage	75
Rainbow House	Previously church-run private orphanage, now recognized by MCA as official provider in area	79
Star Village	Part of national network of homes caring for children of long-term prisoners	130
Chen Anhui	Individual-run private orphanage	200
Yangtze Orphanage	Individual-run private orphanage	27

It is clear from the fieldwork that informal orphanage operations are abundant in the provinces visited, as actual or perceived gaps in the state's provision of welfare result in efforts to supplement the formal system with bottom-up, local initiatives.[3] All interviewees from the eight indigenous orphanage case studies could list at least three or four other private orphanages in their respective provinces of which they were aware, despite the fact that networks of mutual support among the homes appeared weak to non-existent (although it could be that a high level of activity is observable in certain provinces due to a correspondingly high Catholic or Protestant population). I also interviewed two Western individuals, Father Thomas and Charles Kramer, who have

[3] Whether the existence of such open and accessible local initiatives is itself impacting on the incidence of abandonment in rural areas is an important question, beyond the scope of this study. Hu and Szente refer to the concern of state orphanage directors that increased media attention has led to an increased in instances of abandonment within her district, a concern also reported by directors in Johnson's studies (2004, p 13). See, also, Holroyd (2003, p 18), discussing whether abandonment is more culturally acceptable in China where there exists 'the social certainty that one's kin are likely to feel morally obliged to take up this care'. Sister Qin reported lower abandonment rates once she had put posters up requesting no more children be brought to Guanghui – the fate of children who may otherwise have been abandoned at Guanghui is, of course, unknown.

taken up full-time advocacy for the Catholic private orphanages, working with such organisations to enhance their administrative capabilities and fundraising power. Both estimate there are dozens of private homes in the northern provinces surrounding Beijing alone, and probably hundreds across China. A very large number of such orphanages are operated by or in close affiliation with 'underground' or unofficial churches.

Guanghui Orphanage

'I do not have a father or mother, but the sisters are my family. I am very blessed!'[4]

'The children here are abandoned, because of their deformities. They are not wanted. So we take them in. They do not receive government assistance, and they are pushed out by society. The families do not want them, society also does not want them, and it seems as though government does not want them either. Only we can give them a home, and want to care for them.'[5]

Tian Lan Lan is twenty seven (she looks much younger) and has been blind since birth. She has lived at Guanghui, a home for orphaned and abandoned disabled children in rural Hebei, for as long as she can remember, in a small white-washed concrete room she shares with two other girls, off a corridor that runs the length of the orphanage's dusty central courtyard. There are over forty children and young adults currently living at Guanghui, many of whom have been here for many years, and fifty more staying with local village families as short or long-term foster children. They are cared for by about eight Catholic nuns, as well as a number of volunteers from neighbouring villages. Occasionally, in more recent years, foreign medical volunteers have visited for short stints to attempt to impart some child-care training to the sisters, most of whom

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4 Tian Lan Lan, resident of Guanghui House (9 July 2010).

5 Sister Qin, founder and manager of Guanghui House, Interview 1(iv).

have no qualifications. The older children spend much of their time looking after the younger children – it is common to see blind girls or girls with Downs Syndrome feeding their 'little sisters' and putting them to bed. There are not many toys or books in sight, other than some derelict swings in the courtyard. Early every morning, Lan Lan and the other children at Guanghui gather in a circle of rusty wheelchairs and wobbly wooden walking frames in the courtyard to say their morning prayers to *'wangfu Maliya'* (Holy Mary), as the sisters of Guanghui attend mass at the convent next door. After mass, the younger children attend 'class', which often consists of watching Chinese soap operas, while the teenagers work in an adjoining arts and craft factory making figurines and trinkets out of beads to sell to visitors.

Guanghui is set in a small town in a county that is officially designated as 'poverty stricken', and is over 90% Catholic. Immediately outside the gates of the convent-orphanage compound are two large quarries where the villagers throw their rubbish, left for wild dogs to scavenge. Nearby are a pharmacy and eye clinic, also run by the church, where villagers pay whatever they can afford for the services, and a large seminary and Sunday school. In a town of dirt lanes and crumbling buildings, the church buildings are an oasis from the otherwise prevailing sense of poverty, well tended and in relatively good repair. On my first morning at Guanghui, I was woken at half past five by the sisters singing morning prayers, and through the other window, the sound of a boy moaning softly. I went outside to be taken by one of the sisters on a tour. All of the children at Guanghui suffer from disabilities, physical and mental, or disfigurement. The first child we saw, three months old, had a hole the size of a golf ball between her eyes, and a misshapen, flattened skull with scarred skin stretched over it. She smiled and laughed, but it was a confronting sight nonetheless. The central courtyard of Guanghui is grey, dusty and dirty, and there are many children who

apparently spend all day every day simply sitting there, some of them tied to their chairs – the sisters, who lack any nursing or medical training, and appear generally exhausted after years of caring for the children in very basic facilities and with limited staff numbers, do not know how else to deal with cases of cerebral palsy. It is at least forty degrees in the midday summer heat, but the younger children in wheelchairs are unable to enter the relative cool of the buildings unassisted, or to reach the water taps themselves, often going without.

A sister took me across the courtyard and into Lan Lan's room. She excitedly introduced herself in rote-learned English – 'I'm fine, how are you? Please sit down. I will play for you' – and played a clumsy but earnest rendition of *Für Elise* on an old electric keyboard. Further down the corridor, sitting on a low wooden stool facing a wall, sat a girl who looked about three years old but has been at Guanghui for over twenty years and is of unknown age. She had an expressionless, old-woman face and the body of a small child. Nearby was the boy I'd heard crying earlier. His limbs were stick-thin, and I assumed he could not stand as he was always bound to a rickety wooden chair, apparently to prevent him throwing himself out of it, but I saw him standing unaided once, several days later. He was almost always crying during my stay, sometimes silently, sometimes loud wails, but very rarely comforted or attended to, other than at meal-times.

The history of Guanghui is tied up with the history of the local Catholic church that supports Guanghui financially. The sisters I spoke to at Guanghui characterised their church as 'unofficial', not associated with the China Catholic Patriotic Association, but enjoying in recent years a measure of stability with fewer arrests as compared to the 80s and 90s: 'Generally [the churches in] this area [are] quite

good, so the government has considerable confidence and does not interfere too much, just one eye on us and the other closed. They don't give us too much trouble'. The church buildings, including the convent from where the orphanage is run, have been in use since 1988, when property seized by the state in the 50s was returned. Before then, Catholic believers from the county met in house-gatherings for prayer and worship. In 1982, a baby was found abandoned at the door of one such house-church, and in the following years several more foundlings were left at various prayer homes in the county. The local bishop called on the parishioners to take in these children, and by 1988 there were over a dozen being cared for by Catholics in various villages in the vicinity. A decision was taken by the local church leaders to bring the children to a central facility, to be cared for by sisters of the Guanghui convent, and three run-down homes were rented as church buildings. Following the establishment of the orphanage, more and more disabled foundlings were brought to the home, until eventually its manager, Sister Qin, had to paste signs on telegraph poles in the surrounding county villages requesting that children no longer be abandoned at Guanghui's door.

Throughout the late 80s and into the 90s, the sisters struggled to find sufficient donated supplies with which to care for the scores of children in their care. Other than a token donation from local authorities of 5000RMB in 1988 (that is, about £500), they have received no government funding. The head of the local church would urge his parishioners, themselves low-income farmers, to donate some of their crops to the children:

> All of the children's needs were supplied by the faithful of the church, it's a mighty thing. Whenever we were without food and meals, the bishop would go to the village churches to speak reason with them, saying 'If you want to love Jesus, you must love these little children, and donate some of your produce'. And because we had just a few nuns here caring for the children, he would also invite the faithful to come and help. And in this way the custom was established,

> so since then the children have had food to eat. The nuns were here, and we had meals from the faithful. Sometime in the 90s, we began growing our own vegetables, and raising chickens. But in general we are dependent for our living on the support of the local church – food as well as labour, like building our houses. … So in this church district, under the exhortations of our bishop, we've formed this convention. Every year the faithful leave a portion of their goods for the good of the orphans.[6]

In this way, the work of Guanghui has continued and expanded in size, and since 1988 the nuns have accepted and cared for nearly 500 children. Many of these children have died, due to their serious medical conditions and, in some cases, due also to a lack of funding to provide for their medical treatment (as one sister explained, 'The mortality rate was quite high [in the 80s and 90s] because we didn't have the money to take the sick children to hospital'). Sister Qin, who has been at Guanghui since it began and is the head of the orphanage and convent, estimates around forty of their children have been reunited with their birth parents, close to one hundred have been informally adopted by local villagers, and fifty more are living with temporary foster families, who are paid a small monthly stipend by Guanghui to cover the associated costs.

Orphanages By Default

Guanghui's story is in many ways representative of the unknown number of unplanned homes for orphans and foundlings run by sympathetic individuals, and unofficial churches, across China. Where state orphanages admit their resident children through official channels, the private orphanages, with the exception of the few that have managed to secure cooperative arrangements with government organizations, are very often founded out of necessity following the discovery of one or more abandoned

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6 Madsen (1998, pp 51–52) notes, generally, the superb ability of Catholic villages to marshal collective resources: 'Catholic villages generally possess above average community solidarity, which is based on a spirit of "generalised reciprocity," the willingness of Catholics to come to each other's aid to work together on common projects'.

children in a particular region. This was the case for all three Catholic orphanages interviewed (Guanghui, Our Lady's and Good Shepherd) and is typical of such homes more generally – it is apparently very common for abandoning parents to choose to leave their children near church buildings, or for children found in public spaces such as bus stops or by the roadside to be brought by those who find them to known Christians in the area, in the absence of state-provided alternatives. Over time, large numbers of foundlings come to be cared for by overwhelmed parishioners, before being brought together under the supervision of church leaders for central care. Other orphanages are established as a planned response to a perceived need in one's community, becoming, over time and as word spreads, regular recipients of abandoned children (or, in the case of Star Village, children of prisoners who have no other caregivers).

There appear to be a number of reasons why the children at private orphanages do not end up being cared for in the state welfare system. As introduced in Chapter Three, many rural areas are prohibitively distant from the nearest state orphanage, most of which are in urban locations, and theoretically only service urban populations. Children of prisoners are in any case not eligible for upkeep in welfare institutes. Shang notes that while 'theoretically, the state is the sole welfare provider to vulnerable children in China', at the same time 'state policy in rural areas is not to take direct responsibility for supporting [vulnerable] children' where, again theoretically, such children are cared for by 'traditional family and kinship networks, and *wubao*'.[7] The actual experience in rural areas, however, does not always marry to the theory of central

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7 Shang, Wu and Wu (2005) p 126. *Nongcun wubao* or the 'Five Guarantees' is a 'rural community-based welfare system that provides the five guarantees of free food, clothes, fuel, health services, and education or funeral arrangements as appropriate for the elderly, sick and disabled as well as for orphans who are not only unable to look after themselves but also have no one legally responsible for their welfare (Shang (2002) p 206).

policies. Shang explains that although many rural orphaned children are protected by *wubao*, there are a number of deficiencies in the system that render it often ineffectual and inadequate as a means of care provision. First, as a community-based system, children who are moved away from their birthplace tend not to benefit from the networks necessary for access, and are disentitled to *wubao* – this includes abandoned children of unknown parentage and thus unknown identity and birthplace. Secondly, children in the care of their grandparents are similarly disentitled, however due to widespread impoverishment and attendant vulnerability of the rural elderly as a social group,[8] this lack of financial support for extended kinship networks caring for true orphans or abandoned children is gravely problematic, and likely contributes in turn to the incidence of abandonment. Thirdly, the children of long-term prisoners are not entitled to *wubao*.[9] Finally, Shang notes that

> [e]ven where the formal system is applicable, it may not work in poorer areas. Previous research suggests that the current system of child protection provided by the government has been placed under huge financial pressure during the economic reforms. The financial base of *wubao* has been weakened during the process of de-collectivisation and rural taxation reforms. The *wubao* system itself is becoming increasingly unreliable. Given the situation, even if children are entitled to social welfare benefits, they still may not be able to receive them owing to the financial difficulties facing local governments and communities.[10]

For these reasons, kinship and *wubao* networks are proving inadequate to protect rural vulnerable children; in the absence of state institutions, grassroots private orphanages have therefore evolved to address in part such inadequacies.

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8 On the issue of welfare of the elderly, see Ce Shen and John Williamson, 'Does a Universal Non-Contributory Pension Scheme Make Sense for Rural China?' (2006) 22(2) *Journal of Comparative Social Welfare* 143; see further Chan (2008, p 78) noting that the rural elderly are expected to rely on either farming income or support from their children, in the absence of a compulsory retirement scheme. Such traditional modes of old age protection are proving difficult to maintain.

9 Shang, Wu and Wu (2005).

10 Shang, Wu and Wu (2005) p 128.

A number of sisters interviewed believe that even where a state orphanage is within reach of an abandoning parent, some are reluctant to leave their children at such institutions due to a fear of being caught by the state and sanctioned for the crime of abandonment.[11] Although, as noted in Chapter Three, punishment for the crime of abandonment appears to be relatively rare, the fines potentially imposed in cases of prosecution are, at least anecdotally, sufficiently high to act as a deterrent for many rural would-be abandoning parents. In addition, there appears to be a perception among abandoning parents that children surrendered into the state's care will 'disappear into the system', whereas by leaving one's child at a local church or private orphanage, it is often possible to 'watch from afar' – for example, most orphanages could relate incidences of parents who had a change of heart and came back for their child; other abandoning parents will make a habit of leaving donations at the orphanage gates, though unwilling or unable to visit their children overtly.

Catholic Orphanages

The second Catholic home in the case study, Good Shepherd, is no longer in operation. Its previous managers, Zhangjie and Shuqin, now run a home using the foster home model pioneered by foreigners (the subject of Part C), but related a very similar story, with regard to the Good Shepherd home, to that of Guanghui:

> That place [location of home] was a Shanxi Catholic village. There were many people who, having given birth to disabled children, would leave them at the church gate, because at the church there was a convent, and the sisters would always pick up the child. This happened more and more, more and more, more and more [shaking head]. At our maximum, we had around forty children. Later, a priest lent us a building to use as the orphanage. … We had children young and old, some in their teens and twenties. The standard of local medicine was not good enough to cure sickness, and the death rate was quite high. The

[11] See Chapter Three at 2(a) 'Abandonment as a Crime' (pp 84–5).

illnesses were quite bad.

Our Lady's Home for the Handicapped, home to Lingling[12] and 112 other disabled and incapacitated foundlings, has a history and scope of operations nearly identical to that of Guanghui – the need for a church-run orphanage in the area became apparent as abandonment of foundlings at church premises increased, and eventually local Catholic leadership decided to establish a home to care for the children:

> This orphanage was founded in March 1993. It originated when I was working in a Catholic-run clinic, and some abandoned infants were discovered there. That is, children with disabilities who were abandoned by their parents at the clinic's gate. At the time, we [referring to the local church community] had adopted four children in total, who were being brought up in families, and a priest and a few church-members made an application to the local government. They consented to us using the buildings and land to care for children. The funds were to be provided by us ourselves.[13]

Both Guanghui and Our Lady's received token sums from local officials at the beginning of their operations, indicating that some cooperation with government was sought, however neither are registered or formally recognised. The conditions at both are basic, with few luxuries such as toys or books, and most children wearing the same clothes for up to a week before being changed. In Guanghui, there was an air of listlessness and a noticeable lack of staff or volunteers to engage with the children older than three or four, who generally looked after themselves. Due to its proximity to a large city with a university, Our Lady's benefits during the summer months from many dedicated student volunteers who cheerfully help the sisters with their work, and its manager, Sister Chen, spoke poignantly of the relief felt by her and her sisters when they are able to share their workload with the helpers: 'That's when we can relax. All year, I long for the holidays'. Our Lady's also enjoys relative financial security from its

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12 Above at p 1.

13 Sister Chen, founder and manager of Our Lady's, Interview 2(ii).

donors, which allows Sister Chen to hire young local girls to assist with bathing, feeding and supervising the children in her care, although due to the taxing nature of caring for such highly-dependent children with often visibly confronting disabilities or deformities, the staff turnover rate at Our Lady's is very high. While the living conditions and quality of care at Guanghui and Our Lady's were, at first, somewhat startling from the perspective of an outsider, both homes must be regarded in their context, a rural and relatively impoverished province of China. After years of building up their homes with insufficient funds and donations, years in which children and sisters alike were often underfed and exposed to frostbite, sickness and depression, the managing sisters at both homes expressed gratitude for increased stability in recent times:

> Speaking from the point of view of a person of faith, we believe that whatever we do, our heavenly father knows about it. And he will be able to provide people to support us as needed. Because…you see, very often we don't have anything. We may need to buy the children formula, and so don't have enough money for rice. When we first started, we were cooking on open fireplaces. We were starting from scratch. We had no money, so everything was borrowed. But afterwards, gradually everyone started to know, and give us donations.[14]

Star Village

In the case of four of the orphanages (Star Village, Home of Joy, Rainbow House and Chen Anhui) the decision to found a home for certain vulnerable children was a planned response to a religious or personal calling, with the acquisition of buildings and facilities preceding the arrival of resident children. For example, the first Star Village home (there are six across China, caring for over 400 children) was founded after a prison officer, Madam Leng, became aware from conversations with female inmates of their concern about the lack of support for their children, many of whom had been shunned by extended family and were living on the streets. Star Village has a

[14] Interview 2(i).

unique scope of vision compared to the other orphanages, but faces very similar issues in relation to government relations and regulation. The Beijing home is located in the agricultural outskirts of the municipal region, surrounded by peach orchards and cornfields. Like many of the other homes, the first building one encounters on entering Star Village is a small arts and craft factory, where older children draw, paint and cut artwork for visitors. On my first visit, one child was working on a series of paper cuttings depicting the central articles of the UN Convention on the Rights of the Child – a silhouette of a father reaching out to his daughter was accompanied by the words 'Every child has the right, as far as possible, to be cared for by his or her parents'.[15] In the reception building, it was immediately apparent that soliciting donations is an important aspect of Star Village's work, with many posters around the room depicting tearful reunions between jumpsuit-clad prison inmates and their children, and 'before and after' stories of children who came to Star Village having experienced tremendous trauma and hardship. Many were witnesses or accomplices in the crimes for which their parents were imprisoned, and many spent weeks or months living on the streets before being taken in by Star Village – one child's testimony displayed on the wall reads '*You yige kun le keyi shuijiao de difang*' ('I've finally a place where I can rest when I'm tired'). The children at Star Village of primary and high school age live in 'families', small, sparsely furnished cabins with bunk beds and a living area, where the older children are in charge of the younger ones; the pre-schoolers live together with the infants and two full-time caregivers in a larger building, and each took great pleasure in pointing out to me his or her place in a room lined with dozens of closely-packed beds. There is a central canteen, also used by the farmers who tend Star Village's crops, which are a vital part of the home's subsistence. Not being abandoned and of unknown birth, the issue

15 UN Committee on the Rights of the Child, 'Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)' (24 November 2005) CRC/C/CHN/CO/2, Article 7.

of *hukou* does not apply to Star Village's children, who are accordingly able to enrol in local schools; the younger children are taught by teachers in the Village itself. In addition to the costs of staff wages and schooling, Madam Leng tries to save enough funds for each child to visit his or her parent's gaol at least once every year or so. Star Village is in a unique position vis-à-vis the other case studies, as the home is part of a national movement to establish care for the children of prisoners, with other Star Village homes in six other provinces across China. This means, naturally, that Madam Leng enjoys access to the support of a greater section of the public, and favourable media publicity and coverage of her work, something not available to grassroots organisations. During my visits, Star Village had a steady stream of visitors from nearby Beijing arriving with second-hand goods to donate, and purchasing fruit and vegetables from the home's orphanages.

Other Planned Homes – Home of Joy and Rainbow House

Both Home of Joy and Rainbow House were established by church workers who, similarly to Madam Leng, felt a calling to help a vulnerable group of children in their area. Home of Joy was jointly established, thirteen years ago, by a foreign mission worker and a local underground Christian church who each felt 'the burden to help the orphans that are left behind and fell through the cracks'.[16] Rainbow House was established in 2000, and is located in a town not far from Guanghui's village. The history of Rainbow House, prior to registration, is very similar to that of Home of Joy and other church-run private orphanages – an elderly parishioner was aware of a number of parentless children living in the countryside, and eventually the local church provided him with a building in which to raise those children together. However,

[16] Interview 4.

Rainbow House is unique among the case studies in that it has since been afforded some measure of official state recognition. According to the manager of Rainbow, the house is 'registered with the MCA, recognized by the state' but is 'entirely church-run'. Less than two years after establishment, the church was able to secure recognition of its work by the provincial MCA, which consists of paperwork approving the continued operation of the home. The home continues to operate out of church-owned buildings, and all of its operating costs are covered by the church and private donations. There are 79 children resident at Rainbow House, from infants to university-age; the biggest concern Mrs Moses, the manager, expressed about the future of the home relates to rising educational costs as the children continue to grow older. The conditions at Rainbow House are of a conspicuously higher standard than the other case study homes. For example, the buildings are in good repair, and there is a high ratio of caregivers to infants. The older children attend a local school, and receive additional tutoring through Rainbow House to help them achieve the requisite grades to go on to higher education. Mrs Moses spoke with great pride of their first child to attend university, and of the diligence of her high-school-aged wards.

Individual-run Orphanages: Chen Anhui and Yangtze Orphanage

The final two case studies were started by individuals, without association with or support from church or other community groups. Chen Anhui was established by a sixty-eight-year-old man in one of China's poorest provinces, Anhui. The owner of a rural factory, Mr Zhou lost his stock and means of production in a particularly severe flood one year. At the time, he had four children of his own, one of whom was disabled, and he decided to start taking in other disabled children as a way of using the space. He now has over 200 children in his care, ranging from infants to youths, and is

assisted by local farmers from his village, most of whom are also over the age of sixty, in looking after the children. Chen Anhui is supported by Rice Rescue, a group of expatriate women based in Shanghai who spearhead a fundraising effort on Chen Anhui's behalf and travel to the remote village monthly to provide food to Chen Anhui.

Harriet Blake, volunteer coordinator for Chen Anhui, describes the very different motives behind the running of another case study orphanage, the Yangtze Orphanage. The home was established by a Chinese man who currently cares for 27 children. She related to me disturbing examples of his use of the children to fundraise from international donors, and the total lack of accountability and transparency regarding the use of such funds, which Harriet does not believe ever reach the children (she has since ended her association with the orphanage). Examples of such corrupt private orphanages were commonly related to me during the field-work, and raise worrying questions about the potential abuse and neglect occurring in the sector.

CHAPTER FIVE: GOVERNMENT REGULATION OF THE SECTOR

Before presenting the empirical evidence relating to government interaction with the Chinese private orphanages, the unwieldy and layered character of Chinese government, as explored earlier,[17] must be noted, as well as the fact that 'government' is itself a contentious and ill-defined notion due to the nature of its bureaucracy. Accordingly, it may be difficult to draw inferences about 'government' attitudes and intentions. In presenting evidence of discrepancies between law and practice, and the different experiences of the case studies in their interaction with state officials, account must be taken of this cumbersome nature of government in China and the concomitant potential for disconnect and confusion between different levels of government. This has been discussed above in relation to vertical and horizontal space in Chinese Party-state bureaucracy generally, and the impact thereof on policy implementation.[18] Turning to the nature of interactions between orphanages and government officials in particular, one must keep in mind the different priorities and preoccupations which dominate the different vertical layers of state institutions, as well as the different political cultures which operate in different localities across China. For example, Will Peters, an American businessman who founded one of the foreign foster home case studies, and has worked extensively with Catholic orphanages for many years, postulated that the overarching priority of central government is 'the extent to which they complete the theoretical plan – their laws, regulations and policies, even though

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17 Above at Chapter Two 2(a) 'Nature of Chinese 'Government'' (pp 51–6).

18 Ibid.

they are kind of a construct'.[19] It is arguable, and supported by the empirical findings about the nature of private orphanage relationships with officials and departments, that central government is generally more concerned with appearances, and the symbolism of a legal/regulatory landscape which ostensibly confines the care of orphans to state orphanages. We might speculate that such a concern with an appearance of control over orphanages relates to the potentially high political cost, in terms of the legitimacy of birth planning policies, that would be involved in acknowledging activities broadly associated with the problem of infant abandonment, such as private care of foundlings, or admitting that the problem is of such a scale that private homes are apparently needed to supplement state welfare.[20] The rhetoric of central control over all church and NGO activities would also appear to be in need of protection. Local officials, on the other hand, seem to be negotiating a delicate balance between on the one hand the top-down pressure to maintain at least the appearance of compliance with formal law and policy, and commitment to the ideas they symbolise, and on the other hand the bottom-up pressure of pragmatic considerations. The evidence from the field is that there is a broad correlation between formal registration (*dengji/zhuce*) of private orphanages and engagement with provincial/central level authorities; whereas informal recognition (*chengren/renke*) and oversight (which encompasses a spectrum of relations from supportive to hostile, including shutting homes down or heavily impinging their ability to continue functioning) occurs at the local level (these two ends of the spectrum relate respectively to Shieh's categories of 'regulation' and 'negotiation', as explored further below). The discussion below is arranged accordingly.

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19 Interview 17(i).

20 The connection between birth planning policies and infant abandonment was discussed in Chapter Three at pp 86.

1 Attitudes to Legality: Ideological and Functional

The recognition/registration distinction was prominent in the discourse of orphanage operators. It became apparent early on in the field that a legal/illegal distinction is very rarely drawn in the language used by interviewees. Questions about whether private orphanage work is regarded by those in the field as '*hefa*' (compliant with law), '*feifa*' (contrary to law) or having no relation to law would almost always elicit discussions about the various ways, formal and informal, in which government is willing to engage with the private orphanages. This appeared indicative of a general lack of preoccupation with 'legality' in an ideological or symbolic sense, and was a notable point of contrast with foreign interviewees, who seemed on the whole more articulate on the issue of legality of non-government orphanage work (see Part C). The idea of 'legality' as a source of enhanced legitimacy deriving from some measure of formal, documented interaction with and approval from state authorities was lacking among Chinese interviewees in the sector; that is to say (to return to Gao's legitimacy framework), legal legitimacy was not considered a necessary aspect of or precondition to attaining political, social or administrative legitimacy. On the other hand, many interviewees from both groups would raise the higher normative force of a felt moral calling to care for orphans, when the legality of their work was discussed – for example: 'Home of Joy is completely faith-based – we operate strongly based on what we believe in. We want to do what is best for the kids, we're not necessarily trying to get around the system'.[21] This perhaps indicates that legality is not wholly a matter of no concern, but rather is subordinated to this more pressing consideration. None of the interviewees appeared to regard their work as illegal, although all acknowledged their

[21] Interview 4.

lack of registration, and, in many cases, recognition, and were unwilling to state equivocally that their work is approved or permitted:

> I don't think they think about themselves as illegal. They are doing something because the government has not arrived to do it themselves. Society has this need, so somebody has to take over the care of the abandoned children, and this was not being done by government. Sure, the government says that only the state can care for orphans. But caring for people is not illegal.[22]

> [Sister Qin, founder, when asked if Guanghui's work is legal] So it is contradictory…we hope the Chinese government can soon replace this thought towards this group of people, we hope they can really understand that we are rescuing children. … We hope that the laws will improve and strengthen more and more. Their law says this – that orphanages are government's responsibility, but implementation is at the grassroots.[23]

> [Madam Meng, founder of Huiling Disability Services, on unregistered NGOs generally] It's like the red/green/yellow of traffic lights. We're in the yellow light zone.[24]

When the issue was framed in terms of relationships with state officials, on the other hand, there was evidence that all interviewees had contemplated the functional and instrumental consequences of legality/legal status or lack thereof, both advantageous and otherwise. Broadly, the three main areas in which increased government engagement with the private orphanages could potentially lead to changes in operational outcomes are funding, the problem of *hukou* [residency permits] for children of unknown parentage, and the regulation of standards of care. The language used by interviewees is most telling here – generally, the idea of *recognition* of their work (*chengren*) was spoken of as desirable; *registration* in a formal/legal sense (*dengji/zhuce*) generally was not, and questions about the latter were often treated as referring to the former. The preoccupation with recognition seemed to equate with a desire for

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22 Guanghui Project Manager, Interview 1(i).

23 Interview 1(iv).

24 Interview 30(iii).

acknowledgement of the charitable, benevolent and philanthropic intentions of the homes, the hard work of the volunteers who staff them, and the general legitimacy of their work despite a lack of 'papers' or formal association with government. More specifically, most operators expressed a belief that recognition by local authorities would lead to better financial support, and assistance in resolution of the *hukou* issue. 'Registration', on the other hand, seemed to be tied up with historically problematic relations with 'authority' and 'government', as explained by two foreigners with many years' experience with the Catholic orphanages:

> The sisters are not used to dealing with the people of government. History tells them that always they were abused by government [as Christians]. I tell them, but you are doing social work – you are taking care of children. You have to be stronger with them! You have to ask them for help. But they are afraid to go to the government, afraid to go to the [GONGO] Disability Federation – they're afraid to knock on doors. This story, this history, is on their shoulders. They're so afraid.[25]

> Government is an enemy, because of their control of religion, rather than a partner in their provision of services. They're not looking to engage with government. Leave me alone. You have nothing to give me except trouble. … From a church point of view, there's no going to the government asking for engagement. It's more 'We've identified a need, we will get on with it and it won't involve the government'.[26]

With two exceptions, the interviewees were noticeably unconcerned with their lack of legal status, other than insofar as it has an impact on the *hukou* and funding issues raised below – this ambivalence is exemplified in the following quote from Sister Chen at Our Lady's:

> Ah, being unregistered…it's not like they will say 'you're unregistered so we are going to trouble you'…it's just that sometimes, I feel that the children do not

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25 Visiting Italian physiotherapist, Guanghui, Interview 1(ii).

26 Father Thomas, Wagner Foundation, Interview 8.

enjoy the rights they should enjoy, it seems like they are lacking a little.[27]

Moreover, the language used by many of those homes indicated that increased government oversight is associated with the imposition of external, hard-to-meet standards, a disincentive to seeking legality. Father Thomas, speaking of unsupervised Catholic orphanages generally, explained that legality is viewed as unbeneficial because '[i]t would just be *mafan* [trouble]. It would give poor managers more trouble. I don't see how it would be onerous for good managers, though'. Home of Joy, for example, expressed concern about whether 'legalisation' would be in their best interests, as that would mean many state regulations would become applicable. Others similarly expressed concern that 'legalisation' could in fact hinder their ability to carry out their work free from government interference and regulation – 'Operating unregistered works well for us – if we were regulated, we couldn't do what is needed on the ground. We want to make things happen';[28] 'It is easier to do things if nobody knows you are doing it'.[29] The only time interviewees expressed concern about the lack of standards of care in their field of activity was, on occasion, in relation to other homes.

Only two of the homes, Star Village and Guanghui, expressed frustration regarding their inability to attain registration. Given that the other homes perceived a connection between registration and the imposition of external standards, it is relevant to note that both Star Village and Guanghui also expressed great confidence in their standards of care and transparency of operations. Star Village referred to this as a 'self-discipline' issue – given the organisational and administrative capacity of this national

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27 Interview 2(ii).

28 Chen Anhui, Volunteer Coordinator, Interview 7.

29 Good Shepherd, Interview 3.

movement, it is unsurprising that they did not believe registration would greatly impact on their work (other than perhaps by enhancing their social legitimacy – below).

2 Central and Provincial Regulation (Formal)

'Our government, they won't acknowledge us. We go and knock on doors, but not a single department will act for us. They will not pay us any attention. They say it would give them too much trouble'.[30]

Dr Shang uses Guanghui as an example of the difficulties faced by Chinese-run private orphanages in achieving formal registration. Although established in 1988, it was not until 1994 that an incoming director decided to address Guanghui's lack of legal status (and the attendant lack of *hukou* for resident children – below) by seeking registration:

> Since 1994, Nun Qin* has written more than 70 letters to several government departments: civil affairs (*minzheng*), religion *(zongjiao*), united front (*tong zhang*), public security (*gongan*), political consultative conference (*zhengxie*) and people's congresses (*renda*), at different levels. Most departments were friendly and sympathetic to her efforts. However, for various reasons, none of them had the power to give the home a formal registration within the current legal framework, which stipulates that only government organisations have the right to run children's homes and that it is illegal for private individuals and organisations to run such facilities. Children cared for by [Guanghui] have to grow up without formal registration. The oldest 'child' in the home is now 20, but he still cannot obtain a formal registration (*hukou*). Nun Qin has also tried to argue with the local civil affairs department that if it cannot give her home legal status, the government should take over the home and look after the children. This suggestion was ignored. Although both the local government and the church know that [Guanghui] has no legal status, the local government has no intention of closing it or taking over its administration. To assume responsibility the local government would have to provide caring services to 87 disabled children.[31]

Although the practical ramifications of operating as a non-entity are significant, among the eight Chinese private orphanages interviewed, six have no recognized legal personality in China. Father Thomas and Charles Kramer, familiar with the majority of

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30 Founder, Guanghui, Interview 1(iv).

31 Shang, Wu and Wu (2005) p 131.

church-based orphanages in Eastern China, both report that none of which they know have been able to attain registration. Only Rainbow House and Star Village have any formal legal status in China, and of the remaining homes, only Guanghui has actively sought registration, which is reflective of the generally ambivalent attitude to 'legality' observed in the sector. In none of the cases was government approval sought as a precursor to beginning orphanage operations. Rather, attention to formal permission and sanction of operations, if given, was always an afterthought, often given only after years of operation demonstrated the practical shortcomings of working outside of the state welfare system. Star Village, which has all but given up on NGO registration and is instead registered as a commercial enterprise, indicated that it was only after many years of operating as a non-entity that they turned their attention to 'legalising' operations by obtaining some sort of official status in China; Rainbow House, similarly, struck up a partnership with government after two years of operating as a non-entity.

Central policy on the establishment of private orphanages is, as introduced in Chapter Three, ambiguous at best, and complicated in the case of church-based orphanages, where in many cases the legal status of the associated church is itself questionable. Shang's statement that only state-run institutions may lawfully care for abandoned and orphaned children in China must be qualified, in light of the Social Welfare Institutions Interim Measures,[32] which appear to provide some mechanism for privately-run homes to be established.[33] Further, given the lack of a definitive, express prohibition on caring for orphans privately, it would appear that a second pathway to formal recognition for Chinese operators exists, namely that of registering as a Private

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32 Chapter Three (n 106).

33 Although it is difficult to state definitively whether, on obtaining a certificate of approval under the Measures, the home is then still considered to be independent, or effectively becomes appropriated into the state system, as the experience of Rainbow House demonstrates (below).

Non-Enterprise Unit (PNEU).[34] However, for the time being, registration following either pathway is not a realistic option for most private orphanages, with the obstacles to both types of formal approval being closely related. The first and most immediate barrier is that of securing the cooperation and assistance of a government department. At some point, an applicant orphanage must obtain the agreement of a government department to act as a professional supervising unit (PSU – colloquially known as a *'popo'* or mother-in-law) and to take on political, as well as some degree of financial, responsibility for the actions and work of the orphanage in question. As will be seen, this has proved impossible for the Catholic orphanages, and for many non-church institutions. Secondly, in addition to the PSU/supervising department problem, both the Social Welfare Institutions Interim Measures, and the PNEU Regulation, include what in practice amount to minimum capital requirements which must be met. In the case of the former, the home must demonstrate adequate funding, facilities and staff;[35] in the case of the latter, 'appropriate legitimate assets' for the intended non-profit work.[36] Other than Rainbow House, which appears to enjoy relative financial stability through reliance on its private donors, none of the interviewed orphanages are able to meet the financial criteria. A third barrier to registration is the lack of administrative capacity to comply with the procedures and conditions – indeed, many of the orphanages were unaware of official processes for registration, let alone of how they might go about demonstrating eligibility in an application (this is unsurprising given both the ambiguity of government policy in the sector, and the administrative isolation of the rural homes themselves). This last point is also made by Saich in relation to

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34 Chapter Two at 2(e) 'PNEU Regulation' (pp 63–4).

35 Social Welfare Institutions Interim Measures (Chapter Three n 106) art VIII. See also interview with retired MCA official (Interview 42).

36 PNEU Regulation (Chapter Two n 73) art 8.

Social Organisations, noting that bottom-up initiatives or those by 'poorer sectors of society' are hampered by the NGO laws, which make registration 'difficult for those groups that lack good connections and a relatively sophisticated organisational apparatus'.[37]

Finally, a further expected barrier to registration relates to the Banning of Illegal NGOs Interim Measures. It might be anticipated that even if a grassroots private orphanage is aware of the procedures available, able to comply with the capital requirements, and has found a willing PSU, to apply for registration after years of unregistered operations would presumably expose such orphanages to the risk of being found in contravention of the Measures. Interestingly, however, in practice this does not seem to be an issue. Based on the experience of Rainbow House and other non-orphanage NGOs interviewed, notably Huiling, it appears that while the purported illegality of unregistered operations is on occasion used as a tool for subordination and threats, in practice unregistered NGOs are generally not shut down for being unregistered *per se,* but rather an antagonistic local state-NGO relationship is usually linked to factors such as political outspokenness, religious activities or drawing unwanted attention internationally and domestically to China's orphan issues.

Although Rainbow's manager, Mrs Moses, was unclear about under which state policy or measure their approval was granted, given that the relationship is with the MCA, it is likely that it was formalised according to the Social Welfare Institutions Interim Measures or a related implementing regulation. This has led to their registration (*zhuce*), something none of the other homes have been offered or able to achieve. Mrs Moses relates the evolution of her orphanage's ties with government as eventually

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37 Saich (2000) p 132.

progressing from a relationship of suspicion and wariness, to one of support and trust:

> It is run by the church, but we have received very official government approval and recognition. They saw our good work, the rescue effort, that we help so many children, and our good operations, and now our relationship with the government is especially good. …
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> … At first, the government did not understand our work, because it was a Christian orphanage. So they had opinions about this, and were always calling on us [to ask questions], and when we started up it was very difficult, there was a lot of misunderstanding. It was very difficult to do our work in the face of this opposition. As a new orphanage, you couldn't yet see our achievements, we only had a few children. But slowly they came to feel that we were caring for the children very well. Step by step, they began to see that our work was of high quality, that we were helping to transform the children's lives, and so over time, the relationship improved. They currently are very supportive of us caring for even more children at the orphanage. They [local authorities] do not have any way of rescuing these stray children, they can only rely on our home. And they see that if these children were outside of our home, living as strays, this would be a very big problem for the community. Currently [our city] only has our orphanage, there is no government orphanage, so they support us a lot – the Public Security Bureau, the Civil Affairs Bureau, the government officials, they are all extremely supportive, and hope we can continue to help even more children.

Government support of Rainbow House appears to be limited in practice, and the significance of Rainbow House's state approval is better understood in light of the difficulties faced by the remaining homes, which do not have such formal and supportive relationships with government. Financially, government grants are nominal, and adequate only to cover the living costs of roughly one child per year. However a number of important local officials provide private donations to the work of Rainbow House, and photos of such officials posing with the children they sponsor are displayed prominently in Rainbow House's foyer. This is a telling indication of the most valuable aspect of Rainbow House's ties with government, the security and social capital/practical advantages the home derives from its personal relationships or *guanxi* with local authority figures, and their public endorsement of the home's work.[38] Mrs

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[38] The connection between proximity to the state and social legitimacy has been noted elsewhere

Moses spoke proudly of the visits Rainbow House receives from such officials, and the strings they will pull for the home (for example, calling local schools to ensure the children are admitted). The other major advantage of state approval is that the home itself has a *hukou* or household registration, and thus is itself, in effect, a legal entity. This means that when children arrive at Rainbow without *hukou,* they can be registered with the Bureau of Household Registration under the home's *hukou*. However, the home does not yet have ties with the China Centre for Adoption Affairs, meaning its resident children are not on the international adoption waiting list; domestic adoptions can be and have been arranged by the MCA from time to time.

Star Village, the home for children of prisoners (which is not affiliated with a church) has applied annually for fourteen years to its provincial MCA for registration as a charity, but has been unable to find a PSU willing to support its application. Guanghui faces the same obstacle, and Sister Qin, its manager, also expressed frustration and resignation at the government's unwillingness to act as PSU:

> We have been to them many times about this, but they just think it is too much trouble – they don't want to supervise us. So we are caring for so many children, and every day we have to contend with so many issues, and we just don't have the energy any more.[39]

The solution at Star Village has been to register as a commercial entity, something which is clearly incongruous but reportedly a very common creative alternative to achieving an operating structure conducive to the needs of a charitable organisation. In 2005, for example, the Tsinghua University NGO Research Centre estimated there were between 100 000 and 200 000 NGOs registered with the various State

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(Chapter Two (n 39) above).

39 Interview 1(iv).

Administration of Industry and Commerce (SAIC) bureaus nationwide.[40] Anecdotally, the Chinese government is well aware of the trend, and some interviewees consider commercial registration an advantage not only for practical reasons relating to banking, visas and finance, but also because business is 'a language the Chinese understand',[41] the implication being that philanthropy and charity is still widely regarded with suspicion in Chinese society. Commercial registration is often more convenient than acting as a non-entity, and provides at least a veneer of legitimacy to an organisation by vesting it with legal personality. However such organisations are clearly acting outside the mandate of their SAIC licenses, and possibly in violation of policies and laws relating to the care of orphans, meaning it is difficult to say whether such an approach renders the private orphanage in question any more 'lawful' than an orphanage operating as a non-entity.

Interviewees agreed that finding a PSU is difficult for private orphanages – for example 'Getting under the umbrella for many institutions is not hard, but for private orphanages, it has been very hard'[42] – but attributed the difficulty in finding a supervisor to different factors. Star Village's campus director, a retired Chinese army officer, believes their inability to find a PSU department relates to the fact that children of prisoners, unlike orphans, are not a recognized class of welfare recipients; however generally (with the exception of Rainbow House), the orphanages which *do* care for orphans and foundlings have had no more success than Star Village in securing registration. It appears that, apart from the fact that many orphanage operators themselves do not regard the pursuit of registration (or indeed informal recognition) as

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40 Qian and Young (2005).

41 Chinese lawyer for foreign foster homes, Interview 14(i).

42 Guanghui, Interview 1(i).

a priority, registration prospects depend on the *mafan* (trouble/burden/labour) which potential supervisory departments believe would result from formalizing their oversight of the sector.

A number of factors are relevant here: the case of Rainbow House demonstrates that where an orphanage is providing high-quality care for children in a transparent way, and provided that the home is demonstratively financially independent, and provided further that the department concerned is not threatened or wary of the home's operators for reasons relating to religious or political activities, it could in fact be politically favourable for such an orphanage to be formally recognized, and a partnership struck up, in response to needs left partially unaddressed by state-provided social welfare. The provincial MCA in Zhengmin, where Rainbow House is located, has effectively appropriated the work and outcomes of Rainbow House, and the political benefits thereof, without concomitantly incurring any additional financial burden, and very little supervisory responsibility or accountability.

The perceived standard of care being provided by various unregistered orphanages would thus seem to be a key factor in the registration prospects thereof, even beyond the obvious connection between care standards and the orphanage's ability to meet the capital requirements. Charles Kramer, an Italian charity worker with many years experience aiding church-based private orphanages in improving their care standards, believes such standards are central to understanding state-orphanage relations, or lack thereof:

> The government should somehow recognize the sector, but I can also see the fear of government in managing structures that are very poorly run. How can they present themselves to the outside world, and say 'this is recognised', but leave the children in these conditions? … You can understand government somehow now – if they register these private homes, they have to guarantee

> they are doing the right thing. So they have to find a way – to close, or to allow registration. Registration means more responsibility for government in terms of the practices in these homes.[43]
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> If the government register you, you become their responsibility. But if you're not registered, they can say "Oh it's fine, you can't blame me, it's not my responsibility that things have gone wrong".[44]

There is an obvious paradox or puzzle in a regulatory system in which those organizations providing the best quality care, and thus in less need of supervisory, technical and financial support, are 'legalised', and those in which standards are low, and mortality rates high, are permitted to continue operating 'under the radar', but this appears to be the state of the Chinese private orphanage system.[45] Of course, the religious proclivities and history of the associated church are also factors in the development of orphanage-state relations, however the experience of Rainbow House, also run by a church organization, demonstrates that this is not necessarily an insurmountable barrier to formal registration. What seems more pivotal is the balance of, on the one hand, the political 'face' to be gained by adding well-run, relatively good-quality institutions to a provincial MCA bureau's portfolio, and the administrative burden and political risk of taking on some degree of responsibility for the work thereof. Added to this is the potential for financial claims to be made upon a department which has granted approval to run an orphanage. Although Rainbow House, despite being registered for almost ten years, does not rely on government funds to continue its work, a number of other unsuccessful applicants attributed

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43 Guanghui, Interview 1(i).

44 BNU Researcher, Interview 38.

45 A recent study of 'black' (unregistered) schools for children of migrants in Beijing reports a similar conundrum faced by such schools. The vast majority are unable to be registered as private schools, due to sub-standard conditions, but are unable to access funding to improve those conditions due to their lack of registration: Charlotte Goodburn, 'Learning from Migrant Education: A Case Study of the Schooling of Rural Migrant Children in Beijing' (2009) 29 *International Journal of Educational Development* 415.

government's unwillingness to oversee their work in part to an unwillingness to incur potential financial liability for their resident children: 'One child's surgery, just one or two, can cost 70, 80, 100 000 RMB. Is a PSU going to be willing to bear those risks?'[46]

The political costs and benefits of registration are, of course, bound to vary greatly across and within provinces, depending on the combination of a number of factors. Regional emphasis on central policies is inconsistent across China, and appears to depend to a large extent on existing deficiencies in state provision of welfare at the provincial and local level, and the political and social pressure (or lack thereof) experienced by officials in relation to such shortcomings. Some provincial authorities were clearly much more willing than others to engage, in principle, with the private sector in the provision of orphan services. This willingness often relates back, in turn, to the 'flavour of the times' of central policy and aspects of local political culture that may impact on interpretation of these central policy shifts. For example, in the flurry of activity that occurred after the Blue Sky Plan[47] was promulgated, central policy was that state-run welfare institutions were to be increased in number, improved, expanded and, importantly, filled,[48] which in some provinces resulted in large numbers of orphans being removed from privately run institutions.[49] In other provinces, local officials apparently chose to maintain informal cooperation with and tolerance of non-state institutions, contrary to central policy. Most commonly raised by interviewees as relevant to their registration failures were religious freedom (including the history of

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46 Good Shepherd, Interview 3; see also interviews with Our Lady's, Will Peters and Mercy House (Interviews 2, 17 and 23) – although note that this factor would seem to be more relevant, in practice, at the local level, discussed below.

47 Chapter Three (n 103).

48 Interview 38.

49 The experiences of foreign foster homes in relation to this season are introduced in Part C below at p 206–7.

the local state's dealings with religious groups) and the related issue of the 'social capital' (that is, the value of one's various social relations and networks)[50] of the orphanage's founders, operators, supporters and associates (the director of the Shandong Charity Federation admitted in interview that registration prospects are essentially dependent on having a 'close relationship with government').[51] These factors are also highly relevant to interactions between local government and the orphanages, and are explored further below.

In addition to the cost/benefit evaluation of registration, it must also be added that it is possible that the continual refusal experienced by the applicant private orphanages is at least partly a result of the horizontal space within the Chinese government, and the intersection of different portfolio interests in the running of the orphanages. This is particularly the case for orphanages run by local Catholic factions that themselves have a problematic history of government relations. Sister Qin believes, for example, that the MCA is at least partly wary of taking on responsibility for Guanghui through registration because traditionally oversight of the underground Catholic church in their county is within the mandate of the Religious Affairs Bureau; the Religious Affairs Bureau, on the other hand, is reportedly unwilling to oversee child welfare work, which comes under the MCA's ambit:

> So this is a case of pushing the ball [shirking responsibility]: the Religion Department says it is a MCA matter, the MCA says 'it has nothing to do with us'. You also have the higher county leaders. And who knows what the attitude

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50 Huiling Disability Services is an NGO with separate branches in six provinces across China – five of these have successfully obtained formal registration, while its Beijing branch has remained unregistered for many years, something which both its founder and managing director attribute to the outspoken political views of its founder and her chequered, antagonistic history with central authorities.

51 Shandong Charity Federation, Interview 41.

at the highest level of government is?[52]

Whether it is genuinely unclear which department has responsibility to begin overseeing the operations of private orphanages, or whether this intersection of interests is a useful political tool for denying registration, is necessarily a matter of speculation; it seems likely that there could be some degree of truth in both assertions.

3 Local Oversight (Informal)

'They have courage. The nuns have built up their own way forward. They went against the current and now have some freedom.'[53]

Just as studies suggest that the majority of NGOs in China are operating outside of the supervisory framework of the MCA and PSU system,[54] so too examples of formal registration and oversight of private orphanages are rare. However, turning to the interface of local government and rural society/local operations, it is, of course, difficult to care for more than a handful of children without attracting some government attention. Of the Chinese private orphanages interviewed, while Rainbow House has successfully established a partnership with the MCA, the remainder are operating quasi-legally as either unregistered or, in the case of Star Village, commercially-registered NGOs.[55] While Shang cites central policy as prohibiting private institutional care of orphans, the evidence from the case studies was that all Chinese private orphanages have some dealings with local state officials and authorities. It is difficult to make generalisations about the nature of informal interactions between local

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52 Guanghui, Interview 1(iv).

53 Guanghui Project Manager, on Catholic private orphanages generally, Interview 1(i).

54 See above, Chapter Two at 2(h) 'Unregistered NGOs: The Question of Legitimacy' (p 68).

55 The latter is a path often taken by foreign foster homes, as will be seen in Part C.

authorities and unregistered private orphanages; the nature of these interactions varies dramatically from case to case and over time, and it would be unhelpful to attempt to mark definitively the line between formal and informal recognition by local government (a distinction interviewees were generally uninterested in making). Some interactions would seem to indicate approbation, at the local level, of the orphanages' self-directed and self-financed supplementation of state welfare. In other cases, homes are operating for many years in the face of regular threats from local officials to remove the children from their care due to such work being 'not allowed', threats which have been carried through in other cases.[56]

Guanghui, Our Lady's and Good Shepherd all expressly referred to their work as being 'recognised' (*chengren/renke*) in some way by local authorities; the remaining interviewees were generally equivocal, when asked, as to whether the home in question is recognised by local authorities. However, most also related stories during the course of interviews which would seem to indicate that their work is observed, and in some cases tacitly encouraged, by local authorities. Many placed great importance on examples of informal support from local officials, for example the giving of gifts at Chinese festivals, arranging for school admission or Bureau of Household Registration assistance with *hukous*, and the giving of small financial gifts. Most notable were cases where children were being placed into the private home's care by local police, township or MCA officials themselves. For example, Our Lady's was founded in 1993 by Sister Chen. Until three years ago, there was no state welfare institution in the city in which Our Lady's is located, and it was not uncommon for foundlings to be brought to Our Lady's by police and MCA officials alike. However, the home receives no funding from the MCA, and has never been subject to inspections. Sister Chen spoke of their work as

56 Interviews 1(i), 8 and 17(ii).

being given the 'green light' in 1993, in what appears to have been an informal understanding with the city's leadership that they would not object to the planned use of the church land, provided the orphanage agreed not to approach the officials for funding. However, she also acknowledged that the status of Our Lady's is not clear:

> In principle, I think the government recognizes us. If they did not, they would have the right to ban our work. Because they've accepted us, it amounts to them agreeing to let us carry on. It's just that right now they haven't given us registration. There are conditions imposed for registration, like having to partner with the MCA. I'm willing to do so, but there hasn't been any advancement on this, and the government hasn't told us how to move forward. … The government has always been very supportive, giving the green light, helping us to go through formalities [relating to land use], but lately it has been a little lacking.

The home was visited by government officials once, at the time of its founding, and according to Sister Chen has been able to continue operating with the 'trust of the government and the MCA' since that time – 'We're able to just look after the children'.

I was also made aware, through Father Thomas and Will Peters, of other orphanage operators who are exceptionally good at negotiating local state relations, and have, as a result, been able to enter into (unwritten) arrangements whereby their orphanage is recognised as a town's orphan care provider in the absence of state-run facilities:

> That deal was brokered by him agreeing to take on the burden of running and funding the orphanage, in exchange for them [town authorities] making him legal. He got the deal because he knows how to play ball. He became friends with the local officials, and they knew they could work with him – he would go out and drink and smoke with them. They knew he was not a risk to their promotion – if anything, he was a feather in their cap.[57]

Star Village, which is currently registered as a commercial enterprise, is another example of the blurry distinction between recognition and non-recognition. The

[57] Interview 17(ii).

organization was for some time registered as a not-for-profit 'research institute' under the umbrella of a GONGO, the China Charity Federation (CCF), although not registered with the MCA. A change in CCF leadership led to the Star Village project being cancelled by the CCF, and Star Village's leadership decided to register instead with the SAIC. However, they have maintained an arrangement with the CCF under which they are able to receive domestic donations tax-free. I expressed surprise that Star Village is, in this sense, recognized as not-for-profit by one branch of government but denied charitable status by the MCA. The managing director agreed the situation is 'puzzling and complex … but it's not surprising – in China there is a long distance between law and reality'.[58]

Interviewees from other orphanages reported little to no interaction with local authorities. For these homes, their relationships with the local state is most notable for its absence, and the most important gift from local officials is 'to be left alone'. This apathetic attitude on the part of local authorities was explained by the volunteer coordinator for Home of Joy:

> The local bureau are fully aware of us – but their first priority is always the economic development of [our city]. If anything can benefit that, they will do it. The work of Home of Joy is just not on their priority list, they don't have the mindset or time to care about such a minor problem. They know about Joy's existence, but they don't really exist on paper. So there are no checking or standards imposed.[59]

The experience of Good Shepherd and Chen Anhui was similar: 'They didn't give us any trouble, although they also didn't give us any help';[60] 'We try to get forgiveness rather than permission, to do things slowly and quietly rather than making a noise.

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58 Interview 6(i).

59 Interview 4.

60 Interview 3.

Politics is not our concern – just nice and gently, helping the children'.[61] Such homes are not beyond the sight of local authorities, and all report having at least one or two unannounced visits by town authorities, usually at the beginning of the home's history, apparently to ensure that the homes are not being used, for example, for child labour or trafficking: 'They came once, but after having seen it, we're not doing anything illegal, so since then they don't worry about us at all. As long as we're not adopting any children privately'.[62] For Home of Joy, Good Shepherd and Chen Anhui, such surprise inspections came to an end once a degree of certainty and predictability has been reached after some years of uneventful operations.

In other cases, approbation and tacit approval is absent, and the relationship is better described as one of hostility and antagonism. Given that the presence of a foreigner in the rural villages where most orphanages are located would be highly unlikely to go unnoticed, the orphanages which were willing to host me were naturally those with some measure of perceived security in terms of their dealings with local authorities. However, most interviewees were able to speak at length about the hostility experienced by many unregistered orphanages in their dealings with local authorities. Home of Joy experienced a number of police 'raids' when it began operating, which continued for many years. These would consist of unannounced inspections of their grounds, and threats to remove the children from their care; the orphanage's volunteer coordinator spoke of these raids as ceasing when the police 'realised we're just trying to help the kids'. The relationship has evolved into one of apparent approval, with many of Home of Joy's children being brought to their doors by local police themselves. Charles Kramer, who is familiar with many of China's Catholic orphanages, knows of

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61 Interview 7.

62 Our Lady's, Interview 2(ii).

two at which the threat to shut down operations has in fact been carried out, and believes in both cases this related to 'the religion factor'. In others, local officials simply make life difficult, for example an orphanage in a village not far from Guanghui has reportedly been 'under surveillance' for some months now, with authorities preventing visitors, including medical volunteers, from entering the home, a restriction which heavily impacts on the home's ability to provide quality care to its resident children.[63]

Given the *prima facie* power imbalance in favour of state officials over orphanage operators, it may seem surprising that more orphanages are not being shut down. However, a closer look must be taken at this presumed imbalance, keeping in mind the vertical space in Chinese government. On-the-ground interaction and informal oversight of the private orphanages is occurring at the interface of local government with society, and most often does not accord with central policies: as Sister Qin of Guanghui observes, 'Their law says this – that orphanages are government's responsibility; but implementation is at the grassroots'.[64] The difficulties of attaining formal provincial or central approval for the private provision of orphan services have been discussed above. However the incentives for allowing unregistered homes to continue, with varying degrees of recognition by and interaction with local officials, would seem to be most keenly felt at the local level. While low-level officials seem reluctant to formalise private operations for reasons congruent with those at higher levels of government (namely ambiguous policies, and the financial/political risks of endorsing non-state homes), Shang makes the point that in most rural areas it would also be 'beyond [their] capability … to take over the responsibility of supporting all the

63 Interview 1(ii).

64 Interview 1(iv).

children who need protection'[65] were the children to be removed from private care.[66] As the following quotes show, this view which was echoed by many interviewees:

> It's too costly to shut them down. In practice, I can't imagine a situation that would cause them to do so. Standard of care? They don't care about that…unless there was a public scandal of some kind.[67]
>
> The policy is to try to get private orphanages closed and to bring all children to state orphanages. But policy is one thing, and in the details this is impossible.[68]
>
> The future of society is rightly the government's burden. But if people like us are doing this work, government prefer to leave us doing it, saving them from having to do it.[69]
>
> Groups like us face hardship in doing this work, but we do it very well, and have persisted for a very long time … Society cannot do without these social service groups, because the government service organisations are unable to undertake the care of all such children as these, they depend on society … Society needs privately-run organisations to stand in for the gaps in government services, to assist the vulnerable groups'.[70]

This lack of local capacity is also, of course, what leads to the emergence of private orphanages, to fill gaps in government welfare provision.

A related factor at play at the local level is the importance of *guanxi* in Chinese culture; many of the homes appear to be very good at building connections with officials which potentially go some way in preventing trouble: 'Policy is one thing, and to live together is another thing. Local government is made up of people's parents and

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65 Shang, Wu and Wu (2005) p 132.

66 Will Peters, who previously ran a foster home and has actively sought takeover of under-resourced Catholic orphanages by government or well-funded foreign charities, believes that the idea of children being removed from their home is very foreign in China, which does not have a strong tradition of state intervention in custody decisions (Interview 17(ii)).

67 Father Thomas, Interview 8.

68 Charles Kramer, Interview 1(i).

69 Sister Qin, Interview 1(iv).

70 Founder and Manager, Star Village, Interview 6(i).

friends.'[71] Many report a steady improvement in relations with local authorities over years or decades of work, and the emergence of a relationship commonly described as 'one eye open, one eye closed':[72]

> The government in its speech and in its tone does not want to be as provocative as previously – 'Your work is illegal!' – at the very least they recognise that the work we do is charitable work, they are not using the same inhuman words of before. Now they recognise that we are doing charitable work, there is at least some verbal acceptance of it in their language.[73]

> Until two to three years ago, they [Guanghui and local officials] were enemies. The sisters were trying to make themselves heard – about *hukou*, about registration, about everything. But things are changing now. It looks like the government is more cooperative, they're trying to open their hands and reach out. At least now, in some places, they will visit the orphanage, and even bring gifts for the children. There is more openness [on the part of orphanages] and less fear [on the part of government]. And there is more freedom from the central government to tackle the problem in a different way, to find a way to cooperate instead of fighting.[74]

The nature of an orphanage's relationship with local authorities is also reflected in the willingness of orphanage operators to approach authorities for assistance, and appears largely dependent on the social capital of its founders (that is, in the case of homes such as Guanghui, Our Lady's and Good Shepherd, the associated church leaders) vis-à-vis the local state, which in turn is affected by a number of factors that vary with time and from place to place. These include, most notably, the political liberalism of the region, attitudes to/tolerance of 'grey market' religious organizations (themselves of questionable legal status), the expression of political views or advocacy activities of the orphanage and its associates, and association with foreigners.

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71 Interview 1(i).

72 Interviews 1(i), 1(iv), 2(i), 3 and 6(i).

73 Interview 1(iv).

74 Charles Kramer, Interview 1(i), on private Catholic orphanages generally.

A number of foreigners with long-standing associations with various Catholic private orphanages across China believe that the ability to 'play ball' with local authorities, and garner support and recognition of the orphanage's work, is out of reach for the majority of grassroots operators, due to a lack of administrative capability, it being self-evidently difficult to convince local officials that a decision to publicly support and endorse one's work is politically safe when the organization lacks transparency, internal standards, staff training programmes and adequate finances.[75] For homes such as Guanghui, where the associated local church has had a lengthy antagonistic relationship with local authorities, their political clout in terms of fighting for registration is low. This lack of social capital manifests in a sentiment of disempowerment evident in all interviews with homes that have sought recognition and/or registration:

> Every day we're chasing the government to their gate, and every day looking for their support, and really, we used to go to them all the time. And now we are simply exhausted. We don't want to go again. We don't have the energy to waste time on this relationship with government. And so we are just drifting along. If we have food to eat tomorrow, then that's fine.[76]

The quote shows the 'us/them' binary around which the Catholic nuns I met seem to have organised their lives, a binary which may be reinforced by the male-officials/female-caregivers dichotomy. Astute players are able to contrive ways of enhancing their bargaining power or social capital with authorities – for example, by displaying prominent pictures of officials who have visited or sponsored their

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75 Charles Kramer (Interview 1(i)) and Will Peters (Interview 17(ii)).

76 Guanghui, Interview 1(iv).

children,[77] or by having recourse to media and publicity to garner public support and avoid being shut down.[78]

Interestingly, it appears that the involvement of foreigners can, again depending on the local authorities, work either for or against the accrual of such social capital. One interviewee, who coordinates a large network of volunteers and donors to support the work of Chen Anhui, told me of how over the years of her involvement with the orphanage, she has seen the Anhui authorities give increasing regard, and [informal] support, to the home (albeit not in the form of registration or reliable financial contributions): 'If Westerners help, the government thinks "we should help too" – it's a kind of lever'.[79] On the other hand, other Catholic orphanages have experienced increased threats of closure from local officials when foreigners have begun visiting their homes; a number of foreign interviewees related anecdotes of being smuggled into Catholic orphanages down back alleys and with hooded clothes.

The Catholic interviewees all noted a correlation between the easing of religious restrictions over the years, and tolerance and informal support of their orphan work. Many stated that they believe religion is the 'main factor' in determining the nature of their relationship with government. This does not, as one might expect, mean adopting an irreligious approach to child care – the children at Rainbow House, the registered home, as well as the unregistered Guanghui, Our Lady's, and Good Shepherd, are all brought up in the Catholic faith, attending mass and prayers once or twice daily, and, in

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77 Home of Joy; Star Village.

78 Good Shepherd, Interview 3.

79 Interview 7. This view was echoed by Prince of Peace, a foreign-run foster home, in relation to their relationships with local hospitals, which they believed are improved when foreign medical volunteers come to China on Prince of Peace's request: 'Because this American doctor comes halfway round the world to take care of these kids – if it's that important, they think, maybe I should help them too, rather than saying there's no need to help that child' (Interview 9(ii)).

the case of older and capable children, Sunday school in their villages: 'Our children all know about prayer, they know their heavenly father can help them'.[80] Jiemin, a sister at Guanghui, noted that the tolerance experienced by Guanghui and its diocese in relation to their religious upbringing of the children, and outreach in the village, is not necessarily experienced in other provinces: 'You can't do this in other places – but here, the government has considerable confidence and does not interfere too much. They have one eye open and one closed, knowing we won't cause much trouble. So we don't have many restrictions imposed on us'.[81]

Interestingly, almost all Chinese interviewees spoke with a large measure of confidence in their continued ability to care for children outside the formal state welfare system, despite many having experienced threats and scoldings from local officials over the years. However, it would appear that such approbative, informal relationships are not necessarily entirely secure, and that despite the trouble and financial burden which would be incurred were local officials to decide to shut down private homes (some of which, it must be noted, are caring for many hundreds of children), this is a burden which has on occasion (albeit rarely) been willingly incurred – Father Thomas, after relating some examples of this to me, said of the Catholic orphanages generally, 'They get a fairly long leash, but will be reeled in if it comes to their attention as less than helpful'.[82] Certain patterns of behaviour in the sector are perhaps telling of a continued awareness of some degree of vulnerability. For example, most Catholic homes do not welcome foreign visitors, and none of the private orphanages are engaged in advocacy, activities which would presumably be sanctioned

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80 Rainbow House, Interview 5.

81 Interview 1(iii).

82 Father Thomas, Interview 8.

for the potential attention drawn to the gap in Chinese social welfare they fill which officially does not exist. Importantly, many Christian interviewees attributed any feelings of tenuousness regarding their home's security to a history of antagonism and, at times, persecution of the associated church by officials.

CHAPTER SIX: OPERATIONAL OUTCOMES

This section briefly canvasses the main practical ramifications of the lack of comprehensive government supervision and recognition of the Chinese-run private orphanage sector. It is not claimed that all these operational aspects are causally connected solely to a lack of government oversight and regulation, nor that increased supervision would necessarily lead to better policy outcomes in the following areas. However legality was generally only regarded by the interviewees as something to be desired in relation to the following instrumental/pragmatic outcomes. The principal concerns raised relate to *hukou* and adoption, finances, and quality of care.

1 *Hukou*

The gravest concern expressed by Chen Anhui, Good Shepherd and Home of Joy, which was shared by Dr Shang in relation to the children of Guanghui Home at the time of her study,[83] is the lack of *hukou* for children resident in unregistered private orphanages. China operates a residency permit system, under which all legally-recognised Chinese nationals are issued with a *hukou*. This registration records the area in which the holder is entitled to reside, as well as information such as birth date and parents. Without a *hukou* one does not have legal status and is, therefore, not able to access many of the basic entitlements of citizenship. The problem of unregistered children is not an unfamiliar one in China, where in 1988 it was estimated by the Public

[83] Shang, Wu and Wu (2005).

Security Bureau that there were approximately one million such children.[84] Johnson, Huang and Wang note, in relation to foundlings 'hidden' by informal adoptions, that

> the difficulties entailed in being a 'hidden child' are serious and widespread enough to constitute a new social problem, creating a class of mostly female children who lack the full protection of the law and equal access to various basic social entitlements.[85]

The UN Committee on the Rights of the Child has also expressed concern about the lack of registration of unknown numbers of Chinese children.[86]

The foreign-run foster homes studied all care for children who have been fostered into their care by the child's home (state) orphanage. As such, these registered orphans all have legal status and are entitled to state assistance, despite their parents and/or birth date usually being unknown. The situation is very different for children of unknown origin who are brought directly to the doors of unregistered Chinese-run private orphanages: 'They're abandoned. They don't know who they are, or who their parents are, or even what their birth-date is, unless they're one of the lucky ones who come with a scrap of paper'.[87] Such children do not have *hukou*, and if they grow up in an orphanage that itself lacks legal personality it is usually not possible to arrange for their registration.

The lack of redress for the non-registration of children resident in unregistered orphanages results in a further stratification of orphans, analogous to that noted above

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84 Johnson (2004) p 8.

85 Johnson, Huang and Wang (1998) p 498.

86 UN Committee on the Rights of the Child, 'Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)' (24 November 2005) CRC/C/CHN/CO/2, Articles 42, 52, 53(d), 63 et al.

87 Interview 4.

in relation to disability,[88] with *hukou*-less orphans subject to a numerous outcomes that are less favourable vis-à-vis registered orphans. Being without a *hukou* means an orphan is not entitled to state welfare (including *wubao*) or medical care. Government initiatives directed at orphans, such as the Tomorrow Plan,[89] have no way of reaching children with no legal identity. Such children are also not able to be listed for international adoption with the China Centre of Adoption Affairs ('We don't have any contact with the CCAA, because we don't have any identity to give them').[90] Although domestic adoptions for unregistered children have on occasion been arranged when a willing family has been located by the private orphanage itself, such arrangements are informal and not subject to state supervision, giving rise to the potential for misuse, and do not themselves solve the other problems stemming from a lack of *hukou*. Guanghui have found that the Bureau of Household Registration in their province has been increasingly strict in recent years, meaning informal/self-arranged adoption is no longer possible: 'To go through the adoption formalities is not easy to do – the reason for this is that the government does not recognise formally that we are an orphanage'. Further, villagers in Guanghui's village often told me that such informal adoptions were problematic to arrange because locals were reluctant to risk violating family planning policies by adopting Guanghui's children without approval, an issue explored more fully by Johnson in her study on such informal adoptive arrangements.[91] A *hukou* is also in theory required to attend schools, although some interviewees reported that they were able, in relation to at least primary school-aged children, to negotiate their admission to

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88 Chapter Three at 2(d) 'Status of the (Chinese) Child' (p 95).

89 'Nationwide Plan for Better Care of Orphans' (Chapter Three n 134), a government initiative intended to provide free treatment or surgical rehabilitation to 35 000 children in state institutions.

90 Guanghui, Interview 1(iv).

91 Johnson, Huang and Wang (1998).

local schools based on good relationships (*guanxi*) with local teachers. This is not a feasible option for education at the level of junior high school and above, which are typically not within the social network of local officials (in China, primary schools are sponsored by villages, but junior and senior high schools by townships and counties respectively),[92] with the *guanxi* previously relied upon by those case studies no longer effective.

The potential psychological consequences of living as a so-called 'black child' (*hei haizi*) have been noted in relation to children subject to informal adoptions. Johnson's study of such adoptions found that for some such children, 'the lack of legal status exacerbated [their] position as an outsider and created a gap between [them] and other children in the community …'.[93] One woman who had been an over-quota 'black child' had 'felt her entire childhood that she'd had to prove she "had a right to exist"'.[94] A lack of *hukou* also, on occasion, results in a lack of state protection in more immediate circumstances such as, for example, when a girl resident in Chen Anhui was taken by money-lenders who claimed to have known her deceased father, and that he owed them money. When Chen Anhui went to the local police to report her abduction and seek assistance, they were refused due to the girl's lack of *hukou*: 'You don't legally exist – that's why I call them the forgotten ones. They're not eligible for a lot of things that they're entitled to as citizens of China'.[95]

The only official way for a child of unknown origin to be issued a *hukou* is

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92 Chan (2008) p 150.

93 Johnson (2004) p 174.

94 Johnson (2004) p 177.

95 Interview 4.

through the government procedures established in relation to infants abandoned into the care of state orphanages. Good Shepherd, Chen Anhui and Home of Joy have, on a handful of occasions, been able to convince a state orphanage to 'fudge' paperwork and claim guardianship of a child resident in their care and lacking a *hukou,* in order to allow a *hukou* to be issued. All report that it is very difficult to find a state orphanage director willing to do this, and accordingly such 'back-door' *hukou* are generally only sought where the child in question has been matched to an adoptive family and *hukou* issuance would facilitate adoption formalisation, or where a *hukou* is needed for admission to hospital or international travel for medical purposes.

The *hukou* issue has been partly resolved in relation to the children at Guanghui and Our Lady's, where both sisters have, after years of petitioning, managed to convince local Bureau of Household Registration officials to record some of their children on a group *hukou* belonging to the orphanage, despite the home's lack of legal status. Sister Qin describes the government's position on *hukou* as contradictory: 'On the one hand, they don't recognise the orphanage here; but on the other hand, they eventually had no choice but to provide identity papers for the children.' This is a recent development, and has allowed Guanghui in turn to help other private orphanage children be registered as Guanghui children in order to facilitate adoptions. It also means that the children become eligible for a small government grant given to residents from the poorest of rural areas, the minimum living security benefits (about 50RMB a month).

2 Financial

Shang draws attention to the missing role of the state as a fund provider to the unregistered Chinese orphanages, finding that not only do such homes have to rely

almost entirely on non-government resources to carry out their work, but that, due to lack of not-for-profit status, it is illegal for the homes to organise public fundraising activities. Shang describes the self-sufficiency which Guanghui has developed over the years and how, when applying to various local government departments for legal status, its leadership has been able to argue that Guanghui could survive without financial support.[96] When I visited Guanghui, I saw first-hand how the sisters have creatively used their at-times meagre resources to attempt to provide basic necessities for the children. While the home received a token 'gift' of 5000RMB at the time of establishment from local officials, they have not received any fiscal government support since. It has not always been easy to make ends meet, particularly when children with grave medical needs have arrived at Guanghui's door:

> In the past we've had children requiring surgery. Before 2000, we had children sick enough to need hospitalization, but we didn't have the money to take them to be admitted. The mortality rate was quite high, because we didn't have the money to give them surgery. We had children dying, at their last gasp. Then from 2000, one after another, we've had a few international churches come to China, charitable people, non-officially, from foundations, and they are supporting our work.

Like Guanghui, Home of Joy is entirely run by local church members, and receives no government funding or assistance. They currently care for around 70 children, aged zero to ten years, and also operate a foster home programme working with local Christian families. Home of Joy is one of the fortunate Chinese-run orphanages which does receive some international support, due to ongoing ties with its founding foreign mission worker. This is not typical of the Chinese private orphanages, where the under-funding is often dire. Eleanor Anders, a Hong Kong doctor who volunteers at Catholic orphanages across Hebei, reports that most struggle during winter to pay for adequate heating, meaning that frostbite among the children is very

96 Shang Wu and Wu (2005) p 135.

common, often necessitating amputation. Most church-based orphanages survive simply because the majority of carers are full-time volunteers, who do not take a salary, but this itself is problematic as it leads to exhaustion after many years of work without pay or holidays: 'The sisters are killing themselves running the Catholic orphanages badly, because they're underfunded. They need more money or to shut down'.[97] Concerns were frequently voiced among interviewees about the lack of funding having an increasing impact as resident children grow older and living expenses also increase:

> In the past the children were still small, you could put four children in one bed. But now they are growing up, and the space is smaller and smaller. You've already seen that we don't have a dining room, and the kitchen is so small, and the children's bathroom…the entire environment needs to be improved. This is a real worry for us. And they are getting older and older, and when they're old they need to be found a place to settle down, but how can we do that? Right now, even the basic needs we're utterly unable to satisfy. We have forty children here, and almost fifty living in foster families, and every month we need to pay those families 250, 300RMB.[98]

> When we began this orphanage, the children were very young, only around one year old or in primary school. Now they are getting older and older, even beyond high school age. This year we have three sitting the university entrance exams. The older the children get, the greater the burden we feel. When they were small, basic expenses were quite low – you give them food, and the compulsory nine years of education. But now we have to spend money on university. As the children grow up, very many issues eventuate, very many unexpected expenditures materialise. And right now we have a lot of infant children who need surgery, and the demand for milk formula is also very great. The fees are high.[99]

The operators tread a fine line. Often desperation will lead them to return to knock again on closed government doors, seeking some small contribution towards their work, but this is always done with trepidation, knowing it brings unwanted attention to

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97 Charles Kramer, Guanghui Project Manager, Interview 1(i).

98 Guanghui, Interview 1(iv).

99 Rainbow House, Interview 5.

their work, and belies the claim of self-sufficiency which bolsters their appeals for registration:

> Every year as Spring Festival approached, we would spend five or six days writing applications to every department, and the government would pass it on through who knows what channels, finally giving us maybe 800 or 1000RMB, which is really just a symbolic/token amount; fundamentally it's not at all enough. It would be a lie to say they have never given us anything – but to say this amounts to government support, well we all feel this is a disgrace. We have so many children – to give us 1000RMB or 800RMB…[100]

All Chinese private homes expressed frustration at their lack of not-for-profit status, as most believed that having legal recognition as a child-related welfare institute would entitle them to government funding, or at least bolster the legitimacy of their repeated appeals to various departments for assistance. Star Village expressed the quandary faced by the unregistered homes: not only are they not entitled to government funding, but further, as either non-registered or commercially-registered entities, the domestic orphanages are all legally prohibited from publicly soliciting donations,[101] and are unable to issue official receipts (*fapiao*) to donors for tax-deductibility purposes:

> Not having the support of policy, we don't have any way of receiving social donations, we don't have fundraising support. The pressure we feel is extremely great. We have no way of exerting our main passion and energy on the care and education of our children, we can only work on maintaining their basic survival – this is our greatest pressure. … My greatest hope is that one day the state will give us some financial support, to enable our fundraising pressure to be lessened, so that we can spend even more energy on the education and upbringing of our children.[102]

What is needed is a framework in which they can engage in fundraising

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100 Guanghui, Interview 1(iv).

101 中华人民共和国公益事业捐赠法 *(zhonghua rnmin gongheguo gongyi shiye juanzeng fa)* [Public Welfare Donations Law of the PRC], NPCSC, 2 June 1999 (hereafter 'Donations Law'), arts 10–11.

102 Founder, Star Village, Interview 6(ii).

legally.[103]

Holly Chang, CEO and founder of an organisation working in Beijing to strengthen grassroots and international NGOs in China, believes that the lack of legal regulation of NGOs generally is contributing to a 'cycle of inefficiency' among grassroots NGOs, which have low visibility, and consequently low support, regulation and capacity.[104] Ashley and He also argue that a lack of NGO registration impacts on the ability of such NGOs to fundraise internationally, because 'foreign foundations often require that the programs to which they distribute funds be recognised as non-profit organisations under their home country's domestic laws'.[105] The situation means that grassroots, local private orphanages must rely entirely on petty cash donations from the local community (which is inevitably very poor due to the mostly rural locations of these foster homes), and are unable to solicit corporate sponsorship. Moreover, arguably the lack of official charitable status is also a hindrance to soliciting domestic donations, due to the fact that in China, the social legitimacy of NGOs is partly a function of proximity to, and recognition by, the state (as opposed to independence *from* the state, as is the case for Western NGOs):[106] 'Without money it's impossible to register and without a resolution to the registration problem, people are unwilling to donate money';[107] 'Expansion is hard in terms of credibility'.[108] Star Village, as a commercially-registered entity, has the additional burden of having to undergo annual inspections

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103 Father Thomas, Interview 8.

104 Interview 33.

105 Ashley and He (2008) p 62.

106 See Chapter Two (n 39) above.

107 Fan Zhang and Qilin Tian, 'The Predicament of China's NGOs' (7 February 2007) <www.sunvillage.com.cn/eng/article_main.php?sec=12&id=132> accessed 15 September 2009.

108 Home of Joy, Interview 4.

from the MCA to determine its tax liability, and has to date been unable to negotiate tax-free status due to its commercial identity.

3 Governance, Transparency and Standards of Care

'The orphanages need to learn to be able to account for what they do'.[109]

'The sisters have a good heart, they come here and receive spiritual training, but they have no professional training.'[110]

'If services for the orphans and elderly are needed, and if the government can't supply them, then they need to give permission to these NGOs to exist and to raise funds. And they need to regulate them. The absence of the equivalent of a Charities Commission to regulate this huge number of NGOs affects their standards.'[111]

'They see a fire burning down their community, a need – they're not going to stop and wait for somebody else to put it out. But fire-fighters aren't policy-makers, they don't have the guidelines to follow requiring transparency, or know how to achieve policy change.'[112]

Life at Guanghui in the twenty years since the orphanage opened has been hard. The home was founded, and continues to be run, by women who feel spiritually called to care for the orphans, but the obvious lack of any training in basic child-care, disability support or organisational management was strikingly obvious during my visit. Having lived with the sisters and seen their concern for the children in their care, it is difficult to doubt their good intentions, but the home remains under-staffed and under-financed, the sisters working themselves to exhaustion and stretched very thinly. While the contextual poverty of the rural setting in which Guanghui is located must be taken into account, and while it is difficult to know what standard of care could be provided

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109 Interview 1(i), on Catholic orphanages generally.

110 Interview 1(ii).

111 Interview 8.

112 Holly Chang, Founder and CEO of Golden Bridges, an organisation working to improve capacity of Chinese grassroots NGOs, Interview 33.

were a state-provided alternative available, the inadequate supervision and provision of basic health care, hygiene, education and child development opportunities was a glaring and uncomfortable aspect of life at Guanghui. Along with Eleanor, a Hong Kong doctor who introduced me to contacts at Guanghui and Our Lady's, Father Thomas expressed grave concerns about the quality of care in the Catholic orphanages with which he works. Guanghui and Our Lady's are, according to both Eleanor and Father Thomas, well ahead of almost all other Catholic and church-run private orphanages in their care practices and living standards.

While the PNEU Regulations and Social Welfare Institutions Interim Measures both provide for annual inspections and information disclosure,[113] and SWI policy documents have in recent years been introduced stipulating minimum training requirements and care standards for state-approved orphanages,[114] these safeguards against sub-standard provision of care for orphans are ineffectual in the case of most private orphanages in China, due to their lack of legal status, which results in a lack of formal supervision of internal governance, financial management and care practices. Worrying examples of each were common in the field. Ashley and He make the point in relation to NGOs more generally: '[the government's approach to regulation] creates a supervision gap that could lead to messy accounting and internal governance, further undermining both governmental and public trust in these organisations'.[115] This supervision/policy gap was not a concern raised by any of the Chinese interviewees (except on occasion in relation to other organisations). Rather, as already noted, most expressed concerns that increased regulation of the industry would impinge on the

113 PNEU Regulation (Chapter Two n 73) arts 19–23; Social Welfare Institutions Interim Measures (Chapter Three n 106) arts XVII, XXV.

114 Johnson (2004), responding to 'Death by Default' (Human Rights Watch/Asia, 1996).

115 Ashley and He (2008) p 86.

scope of their work. But while it may be true that 'it's easier to do things if nobody knows you're doing them',[116] this is equally true in relation to helpful and dangerous or harmful service of orphans. When the possibility of other, less benevolent, people taking advantage of the lack of supervision for selfish ends was raised, it was acknowledged but not treated with concern:

> Usually, the usual situation, is that every non-government place doing this sort of work, they're doing it for the sake of the children, they're always thinking about the children. Most commonly, that is. It would be very rare for people to be waving this sort of banner and wanting to do this work…well generally they are very much thinking about the children. Only a very few bad places would be waving the banner but doing whatever they like. Because the cost is very, very great. It's very hard work. It is a huge burden to take on.[117]

All in all, the Chinese operators seemed to regard self-regulation as optimal, and state regulation as superfluous, given the ostensibly inscrutable motives of those in the sector, with standards seen as something to be set independently:

> We are definitely doing this work with all of our heart and dedication, right? [Smiling] Whatever we can do for the children, we'll do it. Whatever means there are available, we'll use. So as for me…well, you can come and inspect us, but we'll be doing it with all our heart no matter what. If you don't come, we'll still be doing it that way. So I think it doesn't make a difference [laughing].[118]

> This is not only a regulation issue, but also a self-discipline issue – how do you yourself meet your stringent requirements? … We do not have any option other than registering commercially, it is really not our wish, so we try to do it transparently, to standards. We can be self-disciplined.[119]

Transparency was seen as something to be desired, if at all, because of the enhanced legitimacy it accords an orphanage in the eyes of donors:

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116 Good Shepherd, Interview 3.

117 Good Shepherd, Interview 3.

118 Good Shepherd, Interview 3.

119 Star Village, Interview 6(ii).

> We do not have any option other than registering commercially, it is really not our wish, so we try to do it transparently, to standards. We are self-disciplined. You could say that the loving people who support us are all putting their faith in us. It is certainly not the case that because we are commercially registered they do not trust us. We do things very transparently, they see us spend on the children, including the profits from our fruit trees.[120]

Shang writes of the 'missing role of the state as an organiser and a supervisor of services', referring to its lack of ability and/or interest in supervising the care practices of unregistered private orphanages, and the lack of technical and financial support for such work:

> It can be seen that the role of the state as a service organiser is absent in the case of [Guanghui]. New policies and trends in caring practices fail to reach the home directly. No regular supervision and technical support is provided and no-one checks if the conditions in [Guanghui] reach national standards. Nun Qin has to do things according to her own experience and goodwill. The risk here is that from experience in the West, the goodwill of Christians will not guarantee the safety of the children entrusted to the church. A lack of government supervision and regulations leaves the vulnerable children disadvantaged under Chinese law and services. … This situation leaves the real charity organisations and the children cared for by them, like the case of [Guanghui], outside the protection of the Chinese law and also makes illegal or criminal activities possible outside the supervision of the state.[121]

Father Thomas was one of many foreign interviewees who, in contrast to the Chinese interviewees, expressed concern about the lack of external standards and accountability measures in relation to the Chinese private orphanages:

> All of the projects are extra-legal – they have no place in the rule of law whatsoever. They have no organisational bank accounts. And this works against them on so many levels, but mostly in terms of standards. There are no external standards or demands for good practice. It's all '*cha bu duo'* [more or less]. So very often, they're extremely badly run. Generally the people are very highly motivated and honest, so the potential for that sort of corruption does not exist. But there is waste, and poor transparency, and no accountability, and misapplication of funds. … There is no independent generator of standards of care. … There's a large degree of naïveté present, and no legal imperative or

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120 Star Village, Interview 6(ii).

121 Shang, Wu and Wu (2005) p 135.

> financial imperative to change. … I'm assuming the people involved are all acting out of good will, so protection of the vulnerable from them is not the issue. But the absence of standards prohibits the development of a professional response [to orphan welfare needs]. It confirms them in their low-level engagement, without the possibility of participating in civil society on a larger scale. So the rural unregistered orphanages are of course not involved in advocacy, or lobbying for enforcement of better standards. They just do their own thing, on their own, without reference to the rapidity of change in this country. … The sisters are killing themselves running these orphanages badly.[122]

Thomas believes this is why so many of the private orphanages do not welcome foreign visitors:

> It's certainly true that too many foreigners would incur government disapproval. But it's been institutionalised as an excuse, this ostensible disapproval. Foreigners are more aware of good standards. So it's dangerous to the sisters if they visit, because they are more likely to shout loudly about out standards. How unfortunate that they 'can't' visit anyway! … There are no inspections. So you will deliver what you personally believe is a good standard. If you have no professional training, if you're cut off, and if you cut yourself off, you're only accountable to internally defined standards. But visitors judge by another yardstick.[123]

Will Peters, another expert in the field, was less equivocal about the standard of care provided by the private sector: 'I feel like the kids are being kept hostage, they're being used to perpetuate these inferior operations [due to religious convictions].'[124] The concerns of foreigners regarding the care practices of Chinese orphanages, as demonstrated in the above quotes, are an example of the oft-observed propensity for Western volunteers and collaborators to import their own universalistic beliefs about best practices and interests of the children, beliefs which often clash with those of local care-givers and orphanage operators. Even in light of such potential clashes, their concerns point to an important policy point. The presumption that those who are willing to take on the burdens and difficulties with establishing such homes are

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122 Interview 8.

123 Interview 8.

124 Interview 17(i).

necessarily acting out of benevolence rather than self-interest is, anecdotally, fallible. Further, given the lack of expertise of even the most benevolent orphanage operators, on the one hand, and the unknown fate of children were such orphanages not in operation, on the other, it would be exceedingly difficult, with regards to much of the work taking place in the field, for policy-makers to know whether to characterise it as helpful or harmful.

CONCLUSION

Madam Leng, director and founder of Star Village, gives a monthly lecture to all the children in the care of Star Village's many homes around China entitled '*lü zai hefang?*' – where is the road that should be taken? The children of Star Village are raised by loving carers concerned with teaching them to hope for a better future and to take steps to help themselves achieve independence and a fulfilling life. But the question – where is the way? – is being asked by many observers in relation to the unregulated Chinese private orphanages generally: is the current approach to law, policy, order and governance satisfactory? In the same way that networks of informal adoptive parents have emerged across China to take in unknown numbers of unregistered foundlings,[125] so more and more such children are being cared for collectively by private orphanages. In some, the quality of care is high, but in many cases, economic backwardness is evident, children suffer the effects of a lack of legal personality, and standards of care are set internally, with grave concerns expressed by observers about care practices and the necessities of life. Operators face significant obstacles, such as lack of financial resources, inadequate training, ageing residents, and the dilemma of planning a future for *hukou*-less children with no prospect of adoption or state support.

At first glance, the state would indeed appear to be missing from the field of activity. However the current study has presented evidence of a spectrum of regulation and oversight, from formal to informal, broadly correlating with central momentum toward acquisition and registration of homes, and local impetus for informal oversight and recognition. Over time, an equilibrium has been reached involving incongruity between central laws and policies, and daily life in the towns and villages in which the

125 Johnson (2004) p 161.

orphanages, and the local officials who deal with them, are located. Local officials continue to take a 'one eye open, one eye closed' approach to the sector. On the part of the operators of orphanages, there seems generally a lack of concern with legality, law and registration procedures, with some exceptions, and no expectation that interactions with officials will be guided by law or the principle of equality before the law. All in all, the state-orphanage dynamic across the case studies can be characterised as paternalistic and disciplinarian, involving 'game-playing' and cautious pushing of boundaries over time. The majority of the case orphanages prefer to seek recognition of the important charitable nature of their work when this is seen as a potential means of garnering legitimacy on which to base arguments for occasional or regular practical support, rather than legality as a means of checking local power or on which to base requests for assistance. There is little momentum for sector-wide advocacy, and no networks of mutual endeavours for standardisation, expansion or political prioritisation of orphan welfare. The homes are generally inward-focused, with an air of ambivalence or resignation vis-à-vis the current state of the sector.

Apart from theoretical questions of law and order, explored further below, China's current approach to the care of orphans by private institutions is pragmatically problematic. Those with higher standards of care are given some measure of endorsement, albeit without financial assistance, while those in which children languish in sub-standard conditions are, for the most part, ignored. While it cannot be said with certainty that increased regulation and oversight, in a formal and standardised way, of the sector would lead to improved orphanage conditions (indeed, whether taking responsibility for the supervision and registration of the homes is a viable option politically or economically is questionable), given that the Chinese government does itself make claims about its responsibility for orphans, and given further the nexus

between birth planning policies, abandonment and human rights obligations, Shang's calls for increased regulation of the sector are understandable.[126] Arguably the Chinese government has a duty to allow private orphanages to openly and freely engage in the welfare sector to improve quality of life for Chinese children. Yet due to a lack of formal oversight, this is not being done in a standardised or supervised manner. While admittedly there is much flexibility associated with the current mode of governance and back-turning, of which many workers are adept at taking advantage, this is not a satisfactory way to encourage growth in the charity sector or better care outcomes for children. The personal moral codes of many individuals are sustaining them in their work, but are not always an adequate safeguard against abuse and death within the homes, especially given the lack of training and finances. In other cases, of which Yangtze Orphanage is an example, the slogan 'it's for orphans' is evidently being used for self-serving purposes, to the disadvantage of resident children.

More generally, the plight of orphans and vulnerable children in China has received advantageous attention in recent years, largely due to Hu Jintao's 'blue sky' call and associated MCA activity. However, many workers in the field remain convinced that a general apathy towards orphans persists in society generally, which seems to relate to the conception of rights, discussed above, contingent on instrumental value to society rather than rights contingent on one's intrinsic worth as an individual prior to society.[127] The traditional focus on duties over rights, and society over the individual, remains evident in relation to the treatment of orphans generally, and policies and practices relating to institutions with a mission to care for these children. Continued government monopoly on charities is also not assisting in breaking down traditional

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126 Shang, Wu and Wu (2005).

127 Chapter Three at 2(d) 'Status of the (Chinese) Child' (pp 98–9).

social suspicion of charities in general. Madam Leng's question, therefore, seems very apposite – where is the way forward? How can government and the Chinese-run private orphanages co-exist in a mutually beneficial relationship, given the extremely high stakes for China's orphans?

PART C: FOREIGN FOSTER HOMES

INTRODUCTION

The co-existence of government and private homes for orphans comes into sharper focus as the study turns now to the orphan services currently provided by foreign workers in China. During the transitional period following the founding of the PRC, all foreign-run missionary orphanages across China were either closed or taken over as state orphanages.[1] Today, while the government continues to maintain an ostensible monopoly on orphanages, scores of foreigners have embraced a new, collaborative model of orphan care in response to a felt personal calling to assist the Chinese government and society in their care of vulnerable children. The foster home model, first pioneered in the 1990s by the founders of Prince of Peace (introduced below), has spread rapidly through major municipalities and their surrounding townships in the past decade. As introduced in Chapter Three, there is empirical evidence that extensive informal adoption and fostering practices exist in Chinese culture today.[2] This chapter is concerned with arrangements made by government orphanages to foster children out to more institutional-type foster homes, for the most part run by foreigners, and increasingly embraced also by Chinese. The term 'foster home' is used herein to describe organisations which provide family-style care to orphans previously resident in state orphanages, on a temporary or long-term basis, until such time as their adoption can be arranged. Such homes range from small-scale operations in which a small number of children are cared for by a 'mother and father', to large, institution-based foster care provided for hundreds of children with high caregiver to child ratios and an

1 Shang (2002) p 205.

2 Johnson, Huang and Wang (1998), discussed above at p 91–4.

emphasis on emulating a family environment. Many of the homes have expertise in providing care for a particular condition or surgery of a particular type. They can be contrasted with the grassroots private homes canvassed in Part B, which take in children who are not already resident in state orphanages.

This chapter introduces the development of the foster home field, and the engagement of this social sphere with the state both centrally and locally, including the rules and norms that mark and define foster care activities and state-sector interaction. Parallel with the situation of private orphanages, it will be seen that the nature of government engagement (or the lack thereof) with the foster homes impacts on the homes in various practical ways, with concomitant outcomes for their resident children. Extra-legal regulation and oversight of the sector has resulted in an experience of, at times, uncertainty and vulnerability on the part of foster home operators regarding the legality, permissibility and sustainability of their work; yet the sector continues to slowly expand in the shadow of fairly well defined informal rules. The most notable descriptive outcome of the tentative equilibrium that has emerged is a conspicuous absence of collaboration among the homes or (for the most part) between the homes and central authorities, meaning that the ability of this sector of civil society to promote reform and improve orphanage standards across China is apparently somewhat stilted.

While Chinese grassroots orphanages have received some attention in sociological studies, this is the first study to include an in-depth overview of the growth, development and scope of operations of foreign foster homes. Two previous studies have touched upon the role of foreign NGOs in caring for orphaned and abandoned children, and provide important contextual information and ethnographic insights into the social sphere of the foreign foster homes that form the focus of these chapters.

Keyser's bird's-eye overview of state and non-state actors caring for Chinese orphans briefly introduces three high-profile foreign NGOs working closely with the MCA and state orphanages. Two of these are included in the current study (Shooting Star and China Orphan Relief). The third, Care for Children, provides in-house training for state orphanage staff on how to implement foster programmes with local Chinese families. Keyser also makes reference to the lower-profile, unregistered foreign organisations providing foster care directly, which constitute the bulk of foreign charity organisations working with children in China.[3] Her work touches on the pragmatic difficulties faced by lower-profile foster homes due to their lack of registration, and the ongoing political tension over how such foreign NGOs should be registered and monitored.

Leslie Wang's doctoral thesis, 'The Global Politics of Orphanage Care in China', is a comprehensive analysis of the treatment of children in the state orphanage system, and focuses on the process of 'transnational negotiation' that she observes occurring where foreigners seek to collaborate with state orphanages, including through in-house services and foster home arrangements. Wang examines this process of negotiation as it occurs on-site in state orphanages, over the import of 'assumptions, ideologies and practices of childcare into local settings', and the social value of special needs children.[4] Her useful sociological account, which includes New Grace Foundation as one of its two ethnographic case studies, sets up these complex dynamics of negotiation, conflict and compromise as reflecting 'larger debates about globalisation, gender and human rights'.[5] Wang argues that partnerships between foreigners and state orphanages are 'taking place on constantly shifting political terrain

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3 Keyser (2009) p 55.

4 Wang (2010) p 152.

5 Wang (2010) p 3.

and often move forward with unchecked momentum or run up against unforeseen difficulties and collapse altogether', rendering them highly unstable and leading Wang to question the limits of such transnational collaboration as China continues to globalise.[6] This 'shifting political terrain' is likewise referred to by Keyser, who argues that 'political, bureaucratic, and financial constraints hamper the legalisation of both [international] NGOs and domestic NGOs as full players in welfare provision for orphans', the political constraint being 'tension over how, and under what circumstances, [international] NGOs can be registered'.[7] Importantly, Keyser also points out that while the resultant ambiguous legality of foreign NGOs causes difficulties, 'the very vagueness in the law on the protection of children as well as the ability to operate at the local level has also created opportunities',[8] thus apparently avoiding the pitfall of a Western, law-centric presumption that an ambiguous regulatory environment, resulting in difficulties for foreign NGOs seeking legal status, is inherently problematic or unstable.

On the issue of foster care more generally, Shang in 'Looking for a Better Way'[9] examines an emerging movement in China away from institutional care, a policy process said to have been largely influenced by both domestic and international NGOs. Formal, centrally-approved foster care projects, involving local Chinese families supervised by state orphanages, have emerged only in the last decade or so, and according to Shang have 'two contradictory characteristics' – such projects 'attempt … to put orphaned or abandoned children in unrelated families on a temporary basis,

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6 Wang (2010) p 210.

7 Keyser (2009) p 62.

8 Keyser (2009) p 62.

9 Shang (2002).

where relevant government agencies are their legal guardians' but also have 'the clear intention to create a permanent family environment for these children or, if this cannot be achieved, to maintain a family for as long as possible'.[10] In the case of foreign foster homes, the former characteristic is tied up with rehabilitative aims, as children are typically selected from state orphanages on the basis of surgical or medical needs which private foster homes aim to address for the duration of the child's stay. In many cases, this leads to better adoption outcomes. Where an adoption match is not made, children will often end up being cared for in the foster home on a permanent basis, even beyond the period of treatment – a pressing issue currently faced by many of the homes is how to avoid becoming hospices or aged-care homes as their unadoptable children begin to enter early adulthood. In the same article, Shang argues that the policy process of evolution towards foster care from state orphanages 'shows how a balance of power, as well as welfare responsibilities, gradually shifts from the state toward society during economic reforms'.[11] This purported shifting balance of power is a useful point of departure for these chapters, which demonstrate the gradual spread of the Western foster care model via years of informal and unapproved expansion of foreign-run foster homes. However, it will also be shown that the capacity of foreign actors to influence state law and policy through bottom-up initiatives is significantly constrained by the nature of the relationship between state and society, with practical implications for orphan care and NGO growth generally.

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10 Shang (2002) p 204.

11 Shang (2002) p 204.

CHAPTER SEVEN: CASE STUDIES

While foreign foster homes are less prolific than private orphanages, they are generally located in or near major municipalities, either in rented urban apartment complexes or more expansive properties in satellite villages and towns. Further, the histories of many of the homes are intertwined, with managers and staff commonly leaving one home to establish their own foster home targeting a different and particular group of special needs children, adding to the informal network among the various foreigners involved in orphan care in China and especially in the Beijing area. Given this, most home managers were contacted through introductions arranged by other foster homes, and it was possible to access a larger number of case studies than in the case of the Chinese private orphanages. In-depth interviews and follow-ups were carried out at sixteen foster homes over the summers of 2009 and 2010, including spending up to several weeks each living at a Dongjian housing compound (where three of the homes are currently located, and two more had their origins) and three of the foster homes (Good News, New Grace and Red Thread). I believe that I contacted the majority of the Beijing, Xi'an and Shanghai homes and almost all of those contacted agreed to be interviewed, although given the lack of reliable data on the numbers of foreign foster homes in China, it is difficult to be more definitive on this point. Two Chinese homes were included in the study – both are very new, having opened in the last three years, and both told me they are aware of a number of other Chinese friends in the early planning stages of copying the foster home model.

Home	*Specialisation*
Prince of Peace	Cerebral palsy
St Matthew's	Teenage boys
Compassion House	Brittle bones
Friendship Outreach	General surgical/medical intervention
Good News Training Centre	Visual impairments
New Grace Foundation	Birth defects, heart disease and palliative care
Mustard Seed Creations	Congenital heart defects
Beijing International China Relief (BICR)	General surgical/medical intervention
China Orphan Relief	General surgical/medical intervention
Lydia's House	Teenage girls
Loving Embrace	Surgery and home care
Bethany Care	Palliative care
Shooting Star	General surgical/medical intervention
Red Thread	Birth defects, especially cleft lip and palate
Mercy Home	Infants – Chinese-run foster home
Mothers' Arms	Infants – Chinese-run foster home

Prince of Peace and the Dongjian Homes

In the Meihua Special Economic Zone (SEZ), several hours outside of Beijing City, is a grand, gated entrance to the newest campus of Prince of Peace Children's Village. Built in 2002, and caring for children from dozens of state orphanages across China, Prince of Peace is a far cry from the run-down, tired buildings of Guanghui. All the buildings are newly constructed, clean and beautifully furnished. A double height entrance foyer

with granite flooring and wooden panelling is lined with framed black and white photos of the many hundreds of babies and children who have passed through the foster home in the course of its long history, both before and after the move to Meihua. Passing through this reception building, which also includes many offices, staff rooms and a library for visitors, and out the double French doors at its rear, all seven acres of the campus, with its many pristine buildings and play areas, can be admired. There are six children's homes, a clinic, a preschool and elementary school, an arts and craft workshop, a community outreach centre, and a hotel for visiting volunteers; the various buildings are connected by paved walkways that weave through landscaped ornamental gardens. At the rear of the property, construction workers are busy working on the final building, a 30 000 square foot vocational centre that will include dormitory spaces for older orphans, physical therapy and recreational facilities, and staff apartments.

There are over one hundred and fifty orphans living in the six homes at Prince of Peace, with one caregiver on duty for every two to three children. The children were brought here from state orphanages across China, to be treated for their special medical needs. As Prince of Peace's reputation for free, high quality health care and intervention has spread among orphanage directors, the waiting list has continued to grow, and new buildings have been built to expand capacity. More than six hundred children have been and gone, adopted as arranged by their home orphanages. Adoptive parents may never find out about this 'palace' where their children spent months or years of their early lives, as according to most adoption dossiers, the children at Prince of Peace remain in the care of the state orphanages from where they have been fostered.

Prince of Peace wasn't always located in the Meihua SEZ. Its founders, Robert and Lucy Gilbertson, an American couple living in China at the time, first began fostering children from the Meihua state orphanage in the 80s, using donations from

the USA received through an American charity founded to support them in their mission to assist Chinese orphans. In those early days, the foster children were brought to stay at the Gilbertson's family home in a housing estate in Dongjian, a city not far from Beijing in Hebei province, and very near also to Meihua. The relationship with Meihua Orphanage was facilitated by Mr Zhao, a wealthy Chinese businessman who also happened to own several houses on the Gilbertson's housing estate. In the late 90s, as the Gilbertsons began to bring more and more children home, Mr Zhao offered to let one of his vacant houses be used indefinitely by the Gilbertsons to provide a home for even more foster children from Tianjin, provided they covered the costs of its renovations. This house came to be known as St Matthew's, and today fifteen mostly teenage boys are cared for there by Jesse and Laura, old friends of the Gilbertsons who are also from the USA. As older foster children, these boys uniformly arrive with development and behavioural issues: 'They never had a birthday and they never had a gift. They don't know how to handle it, being here with "parents"'.[12] Jesse and Laura moved to Dongjian in 1999 to assist the Gilbertsons, after having tried for the previous two years to set up such a foster home 'above board', that is, with the pre-approval of government, before realising that this 'wasn't going to happen': 'In Taiyuan, we spent two years trying to get everything legal. Robert Gilbertson came along, and all he had was the Meihua director saying "you can take 70 babies if you want", and Mr Zhao saying "use my house"'.[13] Over the years, as the Gilbertsons took more children into their home, and St Matthew's likewise grew, their model of foster care spread, and other like-minded expatriates also began to open their homes to orphans in the same compound. By 2002, there were six foster homes in the area, including Compassion, Good News and Friendship Outreach.

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12 St Matthew's, Interview 10.

13 St Matthew's, Interview 10.

Around this time, Robert and Lucy felt that cracks had begun to show in their relationship with Mr Zhao, whose buildings were also being used by many of the other foster families, and began to feel uneasy being wholly dependent on his good will. So in 2002, the Gilbertsons began looking for an alternative location for their work, and were enticed to move to the Meihua SEZ. The government there, with evident regard to the enormous financial benefits of having such a large organisation move into its bounds, sold the Gilbertsons the land for one RMB (about ten pence – the translator dryly remarked at the time, 'I think you should take it, it's a good deal'). Following the purchase, the Gilbertsons began building the sprawling, custom-made campus that is today Prince of Peace Children's Village; the move there was completed in 2006. The home is currently one of the largest employers in the SEZ, and one of the conditions of the sale was that a certain minimum square footage of new buildings would be constructed on site, the construction of which has ensured many years of continued injection of investment into the local economy. Prince of Peace is now in a position of relative stability and security. The campus is evidently a source of pride for the SEZ. Police officers often visit with gifts and to 'see how we're doing', and the local state orphanage brings visitors to Prince of Peace as an example of a 'model foster home'.

Back in the Dongjian compound, and while the Gilbertsons were in the process of establishing more security by building their new campus, with the influx of 'under the table' foreign foster homes to Dongjian, the number of orphans being cared for by foreigners in the area was steadily increasing. The region began to experience increased notoriety and visibility, both domestically and internationally, and particularly online. Large numbers of visiting volunteers and prospective adoptive families were passing through the city, and all the homes were soliciting donations for their work through much-trafficked websites. During this time, Good News Foster Home was told by the

Dongjian MCA to change its name 'because there are only state-run orphanages in China'.[14] Around 2006–7, all of the homes began to experience unfavourable attention and escalating pressure from local officials, as described by Jesse of St Matthew's:

> At the beginning of 2007, Beijing started to really question the foreign foster care in Dongjian. At that time, if you googled Dongjian, you would get a whole long list of foster homes. So the government knew that when the press came to the Olympics, this would be picked up on. They panicked. The first question reporters would ask would be – why are you doing this? And they knew what the answer would be, and that it would be embarrassing to China. So the Dongjian government, under pressure from the Hebei capital, under pressure from Beijing, began harassing us – 'you gotta move!' They didn't tell us to close, they told us to move. At first it was friendly, then it become more pressured, with constant knocks on the door. In April 2007 they said 'That's it! Out! Now!' In May, we lost 19 kids in one day; at the end of June, we lost more [as Meihua called them back]. …
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> … That fall, of 2007, was really hard. We had the MCA in our faces. The guards [at the estate] would tell us that the police were coming and you better hide the kids. The government vehicles were regularly patrolling the area. 'Business people' would come to the compound to talk about 'business opportunities' with foreigners, then say 'Oh, by the way, do you know if there are any orphans around here? We'd love to help some orphans'. But by the end of 2007, it just stopped. They just decided 'it's shut enough'. We made sure we were never seen with the kids. Eventually they said, 'OK, no more harassment'. We were fine that winter.

It also appears that pressure may have been exerted 'upstream', with Meihua orphanage deciding to recall its children from the various foster homes in 2007, which some homes attributed to government pressure. Rebeccah, the Chinese manager of Friendship Outreach, euphemistically referred to these years as a 'hard time' (*'na shijian, kunnan shihou wan le'* – 'that time, the hard time, is over now'); Ellie of Compassion likewise said: 'Most everybody moved. [St Matthew's] lost almost all their kids. It felt like it was just a change of season. Some waited it out'. Interestingly, while it would appear that the state would have had the power to shut down the homes based on their lack of approval and/or registration (discussed below), this pressure was exerted

[14] Interview 13(i).

through visits, phone calls and surprise inspections, and was mostly framed in terms of moving on rather than returning the children to the state orphanages and ceasing operations. Alain, founder of Good News, who chose to move his foster home for blind children to another jurisdiction, says that the MCA 'freaked out to see so much expansion in one place'. However, based on sources inside the provincial MCA, he believes that the higher authorities were only concerned with ensuring evangelism was not occurring in the homes: 'But the local small potato MCA guys heard rumblings from above and went much further than this. It was a total crackdown because they're afraid of the guy upstairs. We had visit after visit, demanding to see our ID cards, and then wanting to 'borrow' our computers. … They were basically just saying: We don't want this to be our problem – go somewhere else'.

Compassion, St Matthew's and Friendship Outreach, all of a relatively small size and with no plans to build their own premises, each made the decision to 'lie low' and stay in Dongjian, minimising their visibility until the threats and visits abated, something which was made easier once Good News and Prince of Peace, the two largest homes, had both moved on. However many of their children, some of whom had been resident in the Dongjian homes for many years, were, during this time, forced to return to their home orphanages: 'That was heartbreaking – the older kids had been there all their lives. They were seven and eight and nine, this was all they knew, suddenly taken to an orphanage. It must have been like getting hit in the face with a two by four [plank of wood]';[15] (Mustard Seed, a foster home in a different province, also had their three Meihua children returned, of which their director said: 'We did the best we could to prepare them, but it wasn't easy on them').[16] The three homes continue to be careful to

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15 St Matthew's, Interview 10.

16 Interview 15.

avoid, wherever possible, interaction with the MCA, although local police appear to be aware that they have continued to operate in Dongjian. Today, Jesse and Laura speak with general security about the future of St Matthew's, which remains in Dongjian by the goodwill of the property owner, Mr Zhao. They have experienced numerous periods of conflict with Mr Zhao, including an incident involving alleged abuse of one of their foster children by his friend. The security with which they spoke of St Matthew's future appeared dependent on faith in God's protection, rather than in Mr Zhao:

> Some have said we should have a contract with him. But what's a contract supposed to say? That we stay here for free and he gets nothing? We just have a very delicate situation. Actually, he's already kicked us out three times [laughing]. … We have a delicate situation. We just pray. The original agreement was for five years, or until he sold the house. Now it's been eleven years. We just pray this through.

Compassion Family Life House also remained in the Dongjian compound, despite likewise experiencing heavy pressure from government officials to move. Their three buildings – one a dormitory, one a school house with therapy swimming pool, and one a bakery in which their older girls work and sleep – are also owned by Mr Zhao, and Compassion's managers, Tony and Ellie, expressed confidence in the protection he affords them: 'He is like our umbrella'. They chose not to move in 2007, and also attributed their continued existence in the face of mounting government pressure to God's protection: 'The government tried to force everyone to send their children back or to close down. Most everybody moved. St Matthew's lost all their kids. It felt like it was just a change of season. We waited it out. … We felt that was the Lord's protection'.[17] An important reason Tony and Ellie were able to 'wait it out' was that they had Chinese managers who persistently told all enquirers that the home was theirs and

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17 Interview 11(ii).

Mr Zhao's, and that Tony and Ellie were not involved. This reliance on Mr Zhao continues today in the case of Compassion – despite the difficulties other homes have experienced, Tony and Ellie have found Mr Zhao, a respected military official with significant local clout, a very useful front when dealing with government officials, and have on numerous occasions asked him to take the credit (or blame) for their unregistered operations when officials have come knocking with awkward questions. Tony himself refers to Compassion's work as 'legal' (by which he seemed to mean permitted and/or tolerated) because it is purportedly run by a Chinese local.

Today, Compassion is home to 23 children and young adults, and specialises in assisting orphans with *osteogenesis imperfecta* or brittle bones, having seen with concern the quality of rehabilitation and physical therapy provided in many underfunded state orphanages. The younger children are home-schooled by Ellie, volunteers and a paid tutor; the older girls, being beyond the age of possible adoption, are taught a trade in the bakery, and how to live independently. These girls speak poignantly of the love they have found in the family at Compassion:

> I have scoliosis. I was abandoned by my family to the roadside when I was little. It was a kind passerby who picked me up and took me to the local orphanage. And that's where I lived for the next 20 years. … Because I never had parents, I didn't know what family life was, I didn't know what love was. It was here [at Compassion] that I came to know what love is. It was here that I first had a dad and a mom. They treat me like they do their own kids. … They are willing to spend time on us, to stay beside us, so we know love again. They know we need family. I can really feel God's love for us. … I didn't just learn love here. I learned forgiveness. I have forgiven my biological dad and mom for abandoning me, because I know they knew not what they were doing. So I pray for them.[18]

The final foster home to remain in the Dongjian compound, Friendship Outreach, currently cares for 25 children. The home moved out in the face of the

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18 Testimony of Joanna, resident at Compassion (2010).

increased government pressure of 2007, but returned one year later, although is no longer under the 'umbrella' of Mr Zhao. Its manager, a Chinese woman who has studied for many years in America, was most unwilling to attribute intentions to those behind the eviction, and did not express any ill-will regarding the forced hiatus in their work. She spoke of not wanting to 'make things harder' for the local officials, and was evidently very keenly aware of the 'face' issues involved when so many foreigners were caring for Chinese children in one area. It became apparent during our interview that Linda was defensive of China's orphan welfare policies, and felt it was 'not right' to talk about government decisions regarding the foster homes: 'We love the children. The children are my work. Government is not my work'.[19] This accommodating perspective was shared by Clay and Jewel, the new managers at Prince of Peace, speaking of the events of 2007: 'Obviously all of us know that we mustn't break Chinese law. And we do respect Chinese government. And we won't do anything that might ruin the relationship between the Chinese orphanages and local government. We understand that'.[20]

Good News Training Centre

Good News Training Centre also had its origins in the Dongjian compound, and its owners decided to move when relations with Mr Zhao and local officials began to turn antagonistic. Their new campus is not as shiny as Prince of Peace, being centred around a renovated old motel, but is just as expansive. There are raised gardening beds, a swimming pool and stables for soon-to-be-arriving horses, all important aspects of Good News' holistic approach to aiding learning and development of the blind and

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19 Interview 12(ii).

20 Interview 9(ii).

visually impaired orphans for whom they care. The children, around 70 at any one time, attend crèche or school classes, and eat meals together, in the main building, and live with house parents in family-sized homes next door to one another. On my second stay at Good News, in 2010, I saw first-hand the importance of the family model to the children resident in foster homes. An adoption party was being held for Teresa, a congenitally-blind fourteen-year-old girl who had lived at Good News since being sent here by her home orphanage some six years earlier. Good News' director comes across as fairly confident and astute regarding his interaction with local and orphanage officials – this same director travelled to Meihua when orphans from that orphanage were required to return there in 2007 and successfully convinced the director to let 'his' children return to Good News – and has been able to negotiate with some state orphanages to allow 'gotcha days' (the term is used by international adoptive parents to refer to the day on which their child is handed into their care) to take place at Good News, rather than the usual practice of children returning to their home orphanages for several days or weeks prior to their new parents' arrival. I spoke to Teresa briefly over lunch before the farewell party began, just after she had met her new mother and father in person for the first time, and she confessed to feeling 'quite good but so nervous I can't speak. I'm so nervous I can't say anything to them'. After lunch, the party began. The children of Good News formed an honour guard at the doorway into the playroom, waving balloons, blowing whistles and banging toy drums to welcome Teresa and her parents. The new family entered, and sat in a place of honour squarely in front of a projector screen, on which a poignant slideshow of Teresa's six years at Good News was shown. Then came a video in which various children from Good News said their farewells – 'Goodbye my sister, don't forget about us. We will miss you'. Finally, when the emotions of meeting her parents and hearing the messages of love on the video seemed to begin to overwhelm Teresa, the children came one at a time to kneel in

front of her and say goodbye in person. The intensity of this rite of transition from one family to another could keenly be felt in the room.

New Grace Foundation

Teresa's adoption was a visible example of the significant role the foreign foster homes are playing in the lives of orphans across China. I was introduced to the work of Good News Training Centre by David and Carly Dale, who run a foster home on the other side of Beijing, on the outskirts of a small village in Shunyi. New Grace Foundation was established in 2000, when David and Carly felt called to open their home and use their skills (Carly is a doctor) and financial resources to help children living in state orphanages in urgent need of medical care. They established New Grace after visiting a state orphanage, the director of which they were introduced to by Robert Gilbertson, who had by then cultivated good relationships with many orphanages across China. While visiting the orphanage, David and Carly saw two baby girls in need of urgent surgical intervention to correct severe neurological defects, surgery to which the girls did not have access at this particular (rural) orphanage. They were given permission to take the girls back to their home, from where they arranged for surgery. One of these girls they later adopted; the other has since found a 'forever family' in America. Soon after opening their home to orphans, the Dales built a new 56-bed facility in the Shunyi village, which includes a physiotherapy unit and heart rehabilitation wing. The children in New Grace's care today come from state orphanages near and far, and on arrival at New Grace are given medical treatment aimed at enabling them to be placed on the mainstream adoption list. In most cases, the child is able to remain at New Grace indefinitely following treatment, until he or she is either adopted, or placed with local villagers under a foster family programme supervised by the Dales. As New Grace's

reputation as a provider of free, quality care for children has grown through state orphanages, more and more directors are sending their most difficult cases to the home.

Some years after opening, David and Carly became aware of a common practice of fatal neglect of children with acute medical needs, which was occurring in many of the state orphanages with which they worked. To address this, they have also established palliative care units within the grounds of three state orphanages in a neighbouring province, to provide hospice care to children with terminal conditions. They had been running these palliative care units for quite some time, when they decided to greatly expand the operations of one of the units, in Minjiao, Henan province. Bethany Care was opened in 2009 after years of planning and construction. The impressive hospice facility consists of a brand new, six-storey home, with 140 beds, dental clinic, operating theatre and trained medical staff paid by New Grace. The building was constructed on state orphanage land at New Grace's expense, and is, accordingly, apparently of ambiguous ownership. As Bethany Care's Chinese campus manager wryly put it, 'It's hard to say who it belongs to'.

David and Carly currently care for more than 300 babies and children across their various facilities (including Bethany Care), aged from a few weeks to five years old. In 2010, there were 405 new admissions in all units, 43 adoptions, 105 deaths and 146 hospitalisations and surgeries. New Grace is funded by the Dale's personal finances, and by donations from charities, corporations and individuals overseas, mainly in the USA. While their personal motivation is religious, the Dales are careful to ensure that their operations in China retain an appearance of neutrality and secularism, and all volunteers are strictly prohibited from evangelical activity within the orphanage and in the local area. The children at New Grace's homes are cared for by local Chinese women who have received training by David and Carly, with a caregiver-child ratio of

one to two. The Dales also employ a large number of support staff, such as cleaners, gardeners, cooks and launderers, meaning that the establishment of New Grace has brought a significant and stable increase in local employment.

The main foster home is located on a large rural plot surrounded by cornfields, on a road between two small villages. In summer the children walk with their nannies to the village's main square, play on the swings and slides in New Grace's front-yard or pick fruit in the neighbouring orchard. In winter, the home is well-heated and constant streams of volunteers teach the children English nursery rhymes and take kindergarten classes. Life in the palliative care units is very different. The children in those units are not expected to live long lives, and have very serious, often painful, medical conditions. The units have up to thirty beds, with nannies working twelve-hour shifts to ensure better continuity of care. Medically-trained volunteers live on-site to provide around-the-clock care and pain relief. While the special care units have a more clinical feel than the main home, even there the Dales ensure that children constantly receive individual attention, stimulation and love.

Other Case Studies

The history, operations and work of the homes introduced thus far are very typical of the remaining foreign-run foster homes interviewed. All are run by people who felt a religious calling to attend to the plight of China's orphans. All apparently maintain a very high quality of care as compared to most private and state Chinese orphanages, with excellent caregiver-child ratios, and most are funded almost exclusively by international donations. The number of orphans in their care ranges from a dozen to several hundred, and the primary goal is generally to provide medical and surgical intervention to prevent death and in order to allow sick or disabled children to have

some prospect of adoption.

The Prince of Peace model of high caregiver-child ratios and 'family'-style care in a central facility has been successfully used by Mustard Seed Creations, China Orphan Relief and Shooting Star (the former now taken over by the latter), in addition to the other homes introduced above. Some organisations are much smaller than others – BICR also takes children from state orphanages for surgery, but their pre- and post-operative care is provided in a small apartment, and their wards are almost all infants or toddlers. Two of the case studies, Mercy House and Mothers' Arms, are run by Chinese managers who were inspired by the work being done by China Orphan Relief and Loving Embrace respectively. Loving Embrace uses a related but slightly different model – after acquiring children from state orphanages and providing for their surgical needs, rather than being cared for by hired nannies in a central home with other babies, each child is fostered to a foreign expatriate family who is willing to care for the child indefinitely, knowing adoption could happen very soon or not for some time. This allows Loving Embrace to keep its operating costs very low, with its entire budget being directed to covering the costs of surgeries; it also means Loving Embrace must be more careful than most to ensure its operations remain below the radar, as such arrangements are extremely unorthodox.

Red Thread is a foster home that operates almost entirely on the same model as those introduced above. Alana Winterton, a South African teacher who came to China on her way around the world and never left, lives in two one-bedroom high-storey apartments in the middle of Xi'an with over 48 babies under the age of three. As with many of the other homes, the aim of Red Thread is to provide surgical intervention to enhance adoption prospects, and Alana has a very good success rate (being so young, such children's adoption chances, once their surgery is complete, are fairly high). In

addition to babies and toddlers, the crowded rooms of Red Thread are full of various volunteers coming and going, and paid nannies who assist Alana in caring for her charges (Alana is one of the only interviewees who herself lives with her fostered children). Most unusually, Red Thread has been able to secure two consecutive general, long-term agreements with the Xi'an state orphanage as opposed to the usual procedure of informal fostership or executing an individual care contract for each new child. More unusually, Alana was herself approached by the orphanage after she had spent some months there as a volunteer. Xi'an Orphanage has entered into a written contract, signed by Alana in her personal capacity, under which Alana operates the Red Thread foster home and arranges medical and surgical care for high-risk infants at Red Thread's expense. A plaque with the name of the state orphanage, and the city-level MCA, hangs outside Red Thread's door. Alana describes her relationship with the state orphanage as 'good … they kind of just leave me alone'. Lydia's House, in Shanghai, has a similar agreement with its associated state orphanage. Although it was Lydia's House's founders who approached the state orphanage to request children, it was the state orphanage who suggested the arrangement be contractualised, and identified a particular demographic within the institution in need of specialist care, teenage and over-18 girls. It should be noted that the orphanage here also insisted that Lydia's House pay them a significant annual fee (RMB30 000, around £3000) for the arrangement. The willingness of the two state orphanages involved with Red Thread and Lydia's House to formally and contractually collaborate with foreign foster homes is somewhat surprising, given the experience of the other cases. However in the case of Red Thread this would seem to be largely because of the home's location in a city far from Beijing, the MCA of which is widely acknowledged as being fairly relaxed in relation to NGOs. As for Lydia's House, likewise located in the jurisdiction of a reputedly liberal MCA, the agreement is perhaps less surprising because the girls living

at Lydia's are almost all over the age of 18, and are intellectually or physically disabled, meaning they would have been unable to leave their state orphanage without ongoing support. Given the lack of services for adult orphans with disabilities, Lydia's work is seen as far less controversial than that of organisations caring for under-age orphans.

Acquisition and Adoption of Children

Other than Shooting Star (since its registration as a foreign Foundation – below) and Red Thread and Lydia's House, the foster homes interviewed all care for children who officially remain in the guardianship of state orphanages, meaning there is extensive interaction with these government institutions (a point of contrast with the private orphanages of Part B). The process of striking up a relationship of trust with state orphanages appears to follow a fairly predictable pattern, and usually begins with a personal contact at a state orphanage, or after a foreigner has volunteered at the orphanage for some time. As trust is built up, often over the course of many years, there may come a point where an individual feels confident enough to request to take one or more infants or children home for prolonged, high quality specialist medical treatment or care that the state orphanage is unable to provide. The state orphanage director must be convinced to release the child to the care of a foreigner and, in many cases, to allow the child to remain with the fosterer after treatment and until adoption. Over time, as trust develops and the foster home's capacity is expanded, more and more children come to be resident in the private home. Small, short-term operations can expand to the point where (in the case of the largest of the case studies) several hundred children are being cared for outside of the state orphanage, which continues to receive government funding in respect of those children: 'They're still responsible – we

have a contract, but the kids still belong to them'.[21] It is not just a matter of children being relocated to a nearby facility under the close supervision of the state orphanage. Most foster homes are caring for children from distant provinces, with little to no ongoing interaction with the home orphanage. Children are frequently taken overseas for surgery, often for months or years at a time, or may receive surgery in Shanghai, Beijing or the foster home itself. Given the extreme health issues experienced by most new arrivals, deaths are very common.

Very often, the foster home will require a contract to be signed, stipulating that the child will not be called back to the state orphanage at any time; in other cases, the state orphanage director requires a contract stipulating that all living and treatment costs will be borne by the foster home. The binding nature of these contracts is generally questionable, given that they are often signed in the name of an organisation without any legal identity. In any case, given the sensitivity of foreign foster care, recourse to state dispute resolution procedures in the event of disagreement was not seen by any interviewees as a realistic avenue.

The relationship with state orphanages necessarily depends largely on personal ties between directors, as well as policy pressure on state orphanages, and is accordingly often unstable. For example, in 2007, Meihua orphanage, which had children in the care of five of the organisations interviewed, abruptly and without warning required all children to be returned to Meihua. This was reportedly as a result of a change in directorship, as well as a policy shift in Beijing in favour of improving institutional standards and away from Chinese and expatriate foster families. As Blue Sky Plan finances began to be distributed to state orphanages, directors with new but empty beds

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21 Compassion, Interview 11(i).

faced pressure to recall children resident in local foster families and foreign-run foster homes. This policy shift was apparently more keenly felt at Meihua that at more rural orphanages, and Meihua was also evidently experiencing more scrutiny than more remote institutions due to the proliferation of foreign foster homes in its vicinity (that is, in Dongjian): 'Those big, powerful orphanages are more aware of how things should be, so they are more careful'.[22] Interestingly, Alain, the French director of Good News, chose to challenge Meihua, and successfully visited the director to argue 'his' children should be returned to Good News. Prince of Peace, on the other hand, had a more passive response: 'We don't think it was personal at all – I don't think it was a confrontation. They're their kids. We're just kind of caregivers in the middle and we have to remember that'.[23] Overall, the security of the children resident in private foster homes is described as tenuous at best, and dependent on maintaining rapport with the associated state orphanages: 'The kids are not ours. At any moment, they can take the kids back, and they have done in the past'.[24]

The foster homes are all very careful to be, and to appear to be, uninvolved with adoption processes, although one of the indirect aims of most is to provide medical attention allowing a child to be moved from the special needs adoption register to the general adoption register, thus greatly increasing their chances of placement. On occasion, some organisations will use personal contacts within the China Centre of Adoption Affairs or a particularly foreigner-friendly state orphanage to match a difficult special needs case with a family willing to adopt that child, but this special channel is used only very rarely in order to maintain its efficacy.

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22 Good News, Interview 13(i).

23 Prince of Peace, Interview 9(ii).

24 BICR, Interview 16.

CHAPTER EIGHT: GOVERNMENT REGULATION OF THE SECTOR

'We are operating half under the table'.[25]

Where the Chinese private orphanages are somewhat homogenous vis-à-vis legal structures, the foreign foster homes use a variety of legal structures and strategies to facilitate their work and relationships in China. These include formal registration as a foreign Foundation Representative Office (hereafter 'RO'), commercial registration, and operating without legal personality, albeit often with 'umbrella arrangements' and partnerships with local individuals, hospitals or GONGOs. The degree to which any of these arrangements are compliant with the rules of formal law and policy is ambiguous. However, a key finding is that the sphere of social activity is best characterised as a spectrum of rules, from informal to formal, all of which are, at times, relevant to behaviour. Thus despite the varied legal structures and strategies used by the homes, very similar issues and constraints are encountered by all when it comes to engagement with the state, and the norms embedded in and ordering those relations with the state. After considering the ways in which legality and registration are spoken of and regarded in the field, this section examines the cases which have pursued 'on the books' approval and partnership with the state, before turning to the case of unregistered homes and the local dynamics impacting their existence.

[25] Loving Embrace, Interview 19.

1 Attitudes to Legality

'Foreign orphanages fly in the face of their sense of pride and control'.[26]

'We're not really that legal. We're legal as far as the state orphanage is concerned. We have papers. But as far as civil affairs – are we legal? No. Foreign foster care, it's such a vague thing. Anyway. So we just keep going. Well, what's "legal" anyway? [laughing]'[27]

'What's "legal" anyway?' may at first seem to be an obviously apposite question to be asked in relation to the foreign foster homes of China. However it is the wrong starting point when examining law and order, and the nature of government relationships with the foreigners, in the field. Due to the idiosyncratic nature of the forms that foreign foster homes take, generalisations about how local, provincial and central officials regard and engage with the sector are unhelpful and potentially misleading. Further, as the above quote shows, 'legal' is itself a vague, contestable concept, which can be defined differently depending on what it is that one wishes to emphasise.[28] It is clear from the field that operators of private foster homes regard all officials with whom they interact as concerned with certain unspoken, informal norms and rules. These rules broadly relate to two concerns of the state: first, to be assuaged of fears of subversive intentions on the part of foreigners, and second, to prevent a loss of face, domestically and internationally, resulting from a proliferation of foreigners conspicuously caring for Chinese babies. It appears that the security and sustainability of foreign foster homes, and the varying degrees of engagement occurring between different faces (central and local) of the state and society, are largely determined by such rules, rather than law and policy in a narrower sense.

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26 Lawyer for New Grace, Interview 14(ii).

27 St Matthew's, Interview 10.

28 Moore (1973) p 745.

However, formal legal rules in the narrower sense of the word are not completely disregarded in the field. All interviewees demonstrated a tacit understanding of the importance of formal *and* informal rules relevant to their work by the different ways in which the word 'legal' was used – both in a narrow sense, to mean activities which are expressly and formally permitted and approved of by state authorities, and in a broader sense, meaning activities that are permitted in practice, but without the protection of law (and subject to change) – for example: 'Everything is legal until you get caught';[29] 'You can do most anything here as long as you don't get out of control'.[30] With the notable exceptions of the registered homes, all of the interviewees were very clear that, regarding this former, narrow notion of legality, their work is considered at worst illegal and at best potentially embarrassing by higher-level Chinese authorities. Some explicitly referred to their work, and that of the other homes, as illegal ('Oh, we're all illegal!')[31], apparently in reference to their lack of formal approval and legal personality; others referred to registration as something which would render them legal, despite being presently impossible to achieve.[32] On the other hand, 'legality' was also spoken of, in other cases, as something broader, ambiguous and subject to change, reflecting an awareness that while most homes do not have legal standing or protection, their activities have been tolerated at the local level and, often, encouraged for many years, within certain boundaries:

> When we speak to officials, they don't give you the feeling that you're doing something illegal – actually they're pretty encouraging. They're quite visionary people at the top. But they tell us we need to speak to the guy downstairs, and

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29 Rice Rescue, Interview 7.

30 Compassion, Interview 11(i).

31 St Matthew's, Interview 10.

32 Mustard Seed, Lydia's House, China Orphan Relief, New Grace, Shooting Star (Interviews 14, 15, 17, 18 and 21).

> that's where the problems start. The middle guys are not in it for the kids. So the top guys tell us to take it slowly – thank you for encouraging China, and it takes time. They don't want to tell us what to do – they wouldn't tell us to do something illegal – but they keep it blurry. It's not clear. They don't tell you to leave, they don't tell you how to stay … But then at the very top level, the official policy line is that China does not need foreigners caring for its orphans. It would be better for them if we're not here.[33]

> We want to be registered if we can. We're trying to follow the laws of the land. It just looks good to the government … I guess we're as legal as we can be, with the contracts with the orphanage. The law thing is a little bit…well, not solid. If there would be an incident, they would pull the law in to use it. But as long as everything is ok, they turn their eyes. So it's a little outside of the law, but we try to be as legal as we can.[34]

Mercy Home (run by Chinese nuns) similarly referred to their work as *'fei fa'* (illegal, literally 'anti-law'), when discussing their lack of registration, but as permitted in practice, saying they would not expect to be in trouble if the MCA were to find out about their work because they are 'not bringing about any bad consequences for state or society'. When pressed, they gave the example of a child who recently died while in their care. The police were called and came to investigate, but only to ascertain that there were no suspicious circumstances surrounding the death. Provided this is the case, and that the children are cared for, the police do not ask other questions about their foster home work.

Overall, there was much more engagement in these interviews, than with the Chinese participants, with the question of legality. Further, a notable contrast with the Chinese interviewees was a trend among the foreign interviewees to seek 'legality', not only as something of instrumental value, for reasons outlined further below, but also as something ideologically valuable, of intrinsic or perhaps moral worth. Three of the homes spoke expressly of a desire to be registered simply for the sake of 'being legal',

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33 Good News, Interview 13(ii).

34 Mustard Seed Director, Interview 15(ii).

that is, in order to give the appearance of following [obsolete] legal norms as far as possible: 'We wanted to do it right, we want to be above board'[35]; 'We don't want to be stepping on anybody's toes or doing something wrong'[36] – although it should be noted that this sentiment may have been influenced by my presence as a legal scholar. More generally, many spoke of the enhanced legitimacy (in the eyes of donors and in the eyes of oneself) they perceived as deriving from 'being legal', although without being clear about how, for example, a charitable organisation operating under a commercial licence is any more legitimate than an unregistered organisation. The use of contracts with state orphanages, which would appear to have no legal validity, is perhaps a related phenomenon, and could be characterised as an attempt to add a veneer of legality to something clearly outside the legal framework. Overall, it seemed that Westerners working in China, despite being usually very used to the contradiction between formal and informal rules, and operating in the 'grey area'[37] between lawful and unlawful, tolerated and not tolerated, still regard 'legal' as a status to be aspired to, if not fully attainable due to the nature of their work with orphans. Alain of Good News related to me problems with staff wages, after Beijing regulations increased the minimum. He abided by the new regulations, despite this being seen as a sign of weakness among his staff, some of whom were bitter as the pay differentials were changed. Alain said that despite the backlash it caused him, he would not have changed his decision with hindsight 'because I believe it is the right thing to do. I prefer to take a stand that's difficult for me. According to the law … well, you have to be respectful of that [law]'.[38]

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35 Mustard Seed, Interview 15(i).

36 Lydia's House, Interview 18.

37 Prince of Peace, Good News, Mustard Seed, China Orphan Relief, Shooting Star (Interviews 9, 13, 15, 17 and 21).

38 Good News, Interview 13(ii).

It may be that the importance attributed to a veil of legality, as attained for example through the use of contracts or partnerships with GONGOs, is closely related to a Western concern with justice and a perceived connection between law and justice and morality, attitudes which are relevant to wider issues of legal sensibility and ideology.[39]

However, a certain incongruity was also observed here, because while most interviewees on the one hand demonstrated by such actions an attentiveness to attaining some perceived level of 'legality' in relation to details such as organisational capacity and the use of contracts, most were, at the same time, very frank in describing their work *in general* as 'illegal'; further, restrictions which, if complied with, would prove fatal to the work of a foster home were generally ignored (such as those to do with planning permission, banking and fundraising). One interviewee was scornful of attempts by other foster homes to obey rules relating to adoption, given the nature of foster home work overall: 'We're all illegal anyway – so don't try to wave your red flag and say "We're obeying all the rules"!'.[40] For example, the same manager who expressed belief in the importance of respect for the law regarding minimum wages was frank and open about the loopholes and back doors he uses to get past banking restrictions, action which he saw as foisted on him by the government: 'By putting all these stupid restrictions, they're forcing us to consider the illegal options'.[41] This observation does not, however, necessarily contradict the earlier claim that Westerners may be equating lawfulness with conceptions of moral righteousness, but rather that claim must be qualified: lawfulness is seen as something to be desired *insofar as* its pursuit does not give

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39 On this legal anthropological discourse, see Clifford Geertz, (1983) *Local Knowledge: Fact and Law in Comparative Perspective* (Basic Books, New York 1983); Lawrence Rosen (1989) 'Law and Culture: the Appeal to Analogy in Islam' in *The Anthropology of Justice: Law as Culture in Islam* (CUP, Cambridge 1989).

40 Interview 12(i).

41 Good News, Interview 13(ii).

rise to conflict with the higher moral norm that sick children must be cared for no matter the legal restrictions on doing so. That is, there was clearly an apparent higher normative force at play in the decision to pursue 'illegal' foster home work, namely an assumption that a difference could be made to orphan care, and a felt personal calling, usually spiritual, to contribute, as the following quotes show: 'We're all doing this work illegally. We can't think of legalities, because if we do, the children would have died … We do understand, we know we *can't* do this legally, but morally we *have* to do it';[42] 'We love the children. The children are my work. Government stuff is not my concern … Legal or not legal is fine for me';[43] 'Companies are different to NGOs. They don't want to cross government or ever act outside the letter of the law. But we know our cause is worthwhile, so we're willing to act illegally'.[44] This interpretation reconciles, on the one hand, the widely observed pursuit of 'legality' with respect to certain aspects of private orphanage work, with the equally ubiquitous unwillingness to allow illegality to interfere with the overall mission and agenda of such homes. Exploring these conceptualisations of legality and morality, it would seem that a point of equilibrium has emerged, in which both government and private orphanage operators are often more preoccupied with appearances than reality.[45]

In this context, it is not possible or helpful to say whether carrying on a foster home in the manner described in the case studies below is legal or not. Even allowing for the different definitions of the concept of 'legality', it will also be seen that the

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42 Interview 7.

43 Interview 12.

44 Will Peters, China Orphan Relief, Interview 17(i).

45 Such preoccupation points to a possible symbolic or aspirational function played by the formal legal rules existing in the sector, rules which *prima facie* restrict the care of orphans to government institutions (the point is explored further below in Chapter Ten at pp 284–5).

relevant rules at play are largely dependent on locality, and subject to change over time. Yet despite these dynamics, most operators expressed confidence in their ability to continue operating, albeit outside of the formal legal framework, provided regard was had to the informal rules (also being aware that formal rules, often marginalised or ignored, could be reverted to in the event of informal rules being breached). Confidence also came from understanding the burden and trouble, in terms of financial cost and political embarrassment, it would cause to local and central authorities to interfere with long-standing, high-quality orphan care services, as well as, most importantly, faith in God's protection.

2 Registration and Formal Policy

'In theory, unless you have Rep Office status, foreign charities cannot carry out any work in China'.[46]

As introduced in Chapter Two, despite estimates of thousands of foreign-run charities operating in China, only a handful have successfully achieved registration under the Foundation Regulations (currently the only legislative instrument which deals with formal recognition of foreign NGOs and their Representative Offices).[47] Those foundations that have achieved registration are conspicuous for their political and international visibility – they include, for example, the Ford Foundation, the Bill Clinton Foundation, and the Bill Gates Foundation. Until August 2011, when New Grace was granted registration, Shooting Star was the only foster home operator on the list, and is similarly well connected. Of course neither New Grace, Shooting Star nor the other private foster homes are merely 'foundations', given that in addition to

46 Lawyer for Shooting Star, Interview 21.

47 Foundation Regulation (Chapter Two n 74) art 24, although note that article 23 provides that where a Foundation's funds originate from China, the legal representative must be a Chinese resident.

fundraising they use donations to carry out charitable activities themselves. However it seems that due to the lacuna in the legislative scheme for non-foundation foreign-run NGOs, the central MCA was willing, unusually, to allow Shooting Star and New Grace to be registered under the Foundation Regulation. Generally, however, apart from the *prima facie* inapplicability of the Foundation Regulation to foreign-run private orphanages, registration under the Foundation Regulation is not currently a feasible option as anecdotally the MCA is continuing to stall almost all registration applications other than those involving high-profile organisations. Further, none of the interviewed organisations (other than Loving Embrace, which does not have premises or more than a handful of staff) would be able to comply with the Foundation Regulation rule on limiting administrative costs to 10%,[48] with staff wages alone generally far exceeding 10% of operating costs (although it should be noted here that Shooting Star's legal advisers, a top-tier UK law firm based in Beijing, were themselves unaware of the 10% rule in Article 29 of the Foundation Regulation, and it seems unlikely, given the scope of its operations, that Shooting Star is itself in compliance with this provision).

As for foreign NGOs engaged in foster care, in particular, legislation and written policies relating to private foster care were set out in Chapter Three above, from which it should be apparent that the formal/official approach to the sector is in some ways ambiguous.[49] There are legislative gaps, for example, in relation to the status of unregistered NGOs, the legality of commercial registration of charitable RO, and of such RO acting outside the scope of their licenses. While the Social Welfare Institutions Interim Measures appear to provide some mechanism for orphanages and foster homes

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48 Foundation Regulation (Chapter Two n 74) art 29.

49 See discussion at Chapter Three, at 3(b) 'Law and Policy' from p 104.

to be legally established,[50] the Measures are unclear as to whether it will ever be within the discretion of officials to grant approval to foreigners, meaning this is not a utilised avenue. Some aspects of foreign foster care are unambiguously prohibited, such as soliciting donations in China.[51] Of all the interviewees, only one Jesse and Laura from St Matthew's attempted to gain pre-approval from MCA authorities to begin a foster home. However after two years of trying for approval, they gave up and moved to the Dongjian compound to work beside the Gilbertsons.

Of the sixteen homes interviewed, around half have looked into the possibility of registration under the Foundation Regulations. At the time of field-work, only Shooting Star, after many years operating outside the formal legal framework for NGO registration, was eventually able to use accumulated political capital to become formally registered with the central MCA as a foreign Foundation, under the supervision of MCA's Social Workers Association (described by Keyser as a 'semi-governmental' organisation, 'emerging as a participant in facilitating a closer relationship between the state and international NGOs').[52] New Grace, for many years registered commercially with the State Administration of Industry and Commerce (SAIC), was, at the time of my last visit, in the final stages of such registration due to the assistance of an ex-MCA official and a high profile Chinese lawyer. Their registration was approved in August 2011. Given the experience of Shooting Star and New Grace, it is problematic to state definitively that foreign foster homes are *ipso facto* illegal in China. However it should be noted that both are recognised as foundations, not on-the-ground charities, and both have only gained registration after many years of unregistered operations and at times

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50 Chapter Three (n 106).

51 'It's illegal, but who cares?' (Good News, Interview 13(i)).

52 Keyser (2009) p 54.

antagonistic relations with local authorities. Red Thread and Lydia's House, likewise, with their contracts with state welfare institutes, have no approval or registration with the MCA, which is responsible for foreign charities.

Shooting Star was founded in 1998 and launched its Chinese programs in 2000. In 2005, Shooting Star opened the first of its foster homes for orphaned children whose disabilities precluded them from adoption. Although its operations clearly exceed those of a foundation, Shooting Star was in 2006 granted the status of Foundation RO in China. Their lawyer, an English solicitor with a top-tier UK firm, admitted in interview that Shooting Star's case is extremely atypical, with registration coming as a result of a unique collaboration with the MCA. Prior to registration, like all other foreign-run private orphanages, Shooting Star was operating without charitable status; unlike some other private orphanages, Shooting Star was also operating without any form of commercial registration, or other means of achieving legal personality in China. As operations expanded, this became problematic, especially in relation to banking and visas for foreign staff. Prior to 2006, Shooting Star had applied for registration as a foreign Foundation, but the application, like almost all others, had been stalled indefinitely. Throughout many years of lobbying and applications for registration, the MCA had, according to Shooting Star's lawyer, repeatedly ignored enquiries regarding the status of the application.

The change came when, following Hu Jin Tao's call in 2006 for orphans to be able to live under the 'same blue sky' as other children,[53] the MCA itself approached Shooting Star to enter into an agreement under which Shooting Star would partner with the MCA in certain 'Blue Sky Plan' projects, namely assisting the MCA in setting up

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53 Chapter Three at n 134.

provincial model centres to be used to train state orphanage caregivers: 'The order came from on high that the state welfare institutes would be fixed, and someone high up decided it would be good to partner with Shooting Star'.[54] The centres are run by Shooting Star, which expends time, human resources and expertise as well as most of the capital in the project, and in return has been able to increase the effectiveness of its mission to improve the standard of orphan care in China. Shooting Star agreed to the partnership on the condition that the MCA would guarantee its registration as a recognised charity RO, which registration was approved shortly after the agreement was concluded. Shooting Star's lawyer attributes this entirely to the 'impressive political connections' of its founder – a well-known American woman with excellent relationships with many high-level government officials – and characterises the registration process as 'basically a political process'.

The story of New Grace's recent registration as a Foundation RO is similarly political. Austin, New Grace's legal advisor, has been enquiring about their pending registration application for many years, but only recently has there been any movement. He attributes this to the string-pulling of a friend with impressive connections in Beijing, and an event that took place in 2010. A visiting dignitary from the country of origin of one of New Grace's founders came to Beijing on a state tour, and enquired with the Chinese organisers about visiting New Grace. The request was denied, according to Austin, because officially New Grace does not exist, and 'suddenly we [New Grace] were a little bit of an embarrassment to the local government'. The Dales and Austin both believe this was a significant factor behind the recent registration. Shooting Star and New Grace are the only operators of private orphanages of which I am aware which have such a formalised relationship with the MCA.

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54 Lawyer for Shooting Star, Interview 21.

For the time being, registration as a Foundation is not a viable option for the majority of foreign-run foster homes in China. However one option, utilised by the founders of New Grace in relation to Bethany Care, is to rely on a trusted Chinese friend to themselves register a PNEU (which, as explained in Chapter Two, can only be registered by Chinese nationals), and in this way obtain official status as an domestic NGO (thus bypassing the lacuna for foreign-run NGOs). In order to facilitate construction of the Bethany Care building, and to liaise with Minjiao State Orphanage from where all the resident children come and which owns the land, David and Carly asked a trusted Chinese employee from their Beijing home to register a new PNEU at the provincial level. The registration of the PNEU was apparently a smooth and rapid process, with the local state orphanage acting as professional supervising unit (PSU).[55] The clear benefit to the state orphanage in agreeing to act as PSU in this case was the construction of Bethany Care on their land – visiting officials are frequently brought to the home, which is evidently regarded as a 'jewel in the crown' for local MCA and orphanage officials. David and Carly, however, retain effective control over Bethany Care, because all costs are met by their overseas donors, and staff and management are recruited, hired and trained by them. However the risk of such an arrangement is that their 'ownership' of Bethany is not legally enforceable in the absence of a formal side memorandum of understanding, meaning that were the management to choose to exercise independence from the Dales' leadership, and rely on domestic fundraising efforts, the Dales would have no means of preventing this, and would lose their directorship and control over the home. The partnership has given Bethany Care the security of a legal right to exist and carry on work and, therefore, increased freedom to act with greater visibility and expand operations, but at the cost, to the Dales, of

55 The PSU system is introduced in Chapter Two at p 62.

uncertain retention of control: 'We don't have a high level of trust regarding using a local partner. … But we retain complete control in practice as we're their only source of income'.[56] David admitted that the arrangement with the Minjiao State Orphanage and Bethany Care could one day lead to an exercise of independence, but sagely stated that, in that case, he would simply have to 'walk away'. Even apart from these concerns, the PNEU model is not necessarily an option for other homes, as, due to restrictions on branching out, it confines the work of such a registered organization to the province in which the entity is registered. To avoid these restrictions, registration must be at the central level, which costs around eight million RMB and leads to problems with the competition restrictions. For these reasons, this option has been rejected by those of the other foster homes investigating registration pathways.[57]

Commercial Registration

A number of the remaining homes have pursued 'legality' in a slightly broader sense of the word by becoming registered as commercial entities with the SAIC, in order to benefit practically from having some recognised legal personality in China. As noted in Part B,[58] registration of an NGO as a commercial entity is clearly incongruous, but reportedly very common in China. This is also the case in relation to foreign-run charitable organisations, including many high profile international NGOs such as Save the Children (UK) and Right to Play.[59] The Chinese lawyer Austin put it thus: 'You come here to make money and they're happy, because they know what you're doing.

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56 New Grace, Interview 14(iii).

57 Mustard Seed, Interview 15(i).

58 See Chapter Four, 'Central and Provincial Regulation (Formal)' from p 142.

59 Interview 31.

They understand profit. But if you come to 'do good', you're viewed as either having an agenda, or being patronising'.[60]

Prince of Peace, Good News and New Grace have all registered representative offices (RO) of overseas entities with the SAIC. RO are supervised by the SAIC, and issued with licenses to allow them to carry out limited commercial activities in China. These three foster homes have licenses to 'encourage tourism, commerce and investment in China'; to carry on as 'consultants for visual impairment equipment'; and for 'market research relating to orphanage and rest home equipment' respectively. Commercial registration is often more convenient than acting as a non-entity, particularly in relation to issuing visas, and provides at least a veneer of legitimacy to an organisation by vesting it with legal personality. However, such organisations are clearly acting outside the mandate of their SAIC licenses, and possibly in violation of policies and laws relating to the care of orphans, meaning it is difficult to say whether such an approach renders the private orphanage in question any more 'legalised' than an orphanage operating as a non-entity.

The SAIC is aware of the trend for foreign NGOs to register as businesses in China, and at various times has issued new directives limiting the names which can be used by RO and businesses, 'in a bid to prompt NGOs sailing under a business flag of convenience to re-register with the [MCA]'.[61] Good News and New Grace have both been warned by their financial advisors of the impending change:

> Apparently they've closed the door at the start of the year on the commercial bureau thing. Although we know a guy, he was our auditor, who said he would keep the door open for us, if we signed a contract with him making him our

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60 Interview 14(i).

61 Qian and Young (2005).

auditor for life and paying him fifty thousand RMB a year. We thought he could go jump.[62]

Anecdotally, however, registration of the RO of an overseas charity with the MCA is all but impossible other than for foster homes with impressive political connections, and other than in the cases of Shooting Star and New Grace, not currently a feasible option for the other foster homes. The director of the Shandong Charity Federation admitted in interview that registration prospects are essentially dependent on having a 'close relationship with government'.[63] Name rules, therefore, rather than prompting deregistration with the SAIC (which would leave most foreign NGOs without a means of issuing visas, and facing other practical issues), have simply led to creative ways of circumventing the rules. New Grace's overseas charity name, in Chinese, includes the word '*jijinhui*' (foundation) – they changed this to *'fendashen',* an alliteration of the English equivalent, in order to avoid scrutiny by the SAIC when their RO license is renewed. Good News has removed 'foster home' from its name, becoming instead a 'training centre', and has opened both a business and a charity in Hong Kong (Good News China Ltd and Good News China Foundation Ltd respectively) in order to register the RO of the former with the SAIC, but use the existence of the latter to argue with the tax department that the China RO should not be taxed. Star Village, the home for prisoners presented in Part B, has also had numerous name changes to avoid deregistration by the SAIC, and is now called a 'Children's Education Consultancy'.

A related strategy utilised by three of the foreign-run foster homes is to commercially register a business that itself carries out genuine commercial activities in

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62 Interview 14(iv).

63 Shandong Charity Federation, Interview 41.

China. For Mustard Seed and Compassion, the establishment of the business operating from the same premises preceded orphanage operations, but has been maintained at least partly to provide an appearance of legitimacy to the resident foreigners. Prince of Peace, in addition to its RO, has also registered a Wholly Foreign-Owned Enterprise (WFOE)[64] with the SAIC, in order to facilitate purchase of their land in Meihua SEZ. The enterprise is a banner-making business, ostensibly the industry for which the land was to be used (Prince of Peace is located in an industrial zone). The campus director explained in interview that the WFOE model was chosen because it provides some protection, in the event of conflict with government regarding Prince of Peace's care for children, for the multi-million dollar investment in property, plant and equipment, the WFOE being the legal owner of all said PPE. However, he acknowledged that such protection is flimsy at best, given that the WFOE is in reality a simple banner-making manufacturer which employs only a handful of staff and is conspicuously not the actual user of Prince of Peace's impressive facilities (which, as introduced above, include a school and hotel): 'The reality is that if anybody decided they didn't want us to care for kids, that million dollar investment would be irrelevant'.[65]

3 Local Dynamics and Informal Rules

The remainder of the case study homes are unregistered, and lack legal personality in China. In relation to such quasi-legal NGOs more generally, Ashley and He claim this is a 'situation which the state is aware of and which it variously cracks down upon, tolerates, or even encourages by partnering with those organisations, when useful to

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64 Wholly Foreign Owned Enterprises, also known as Wholly-Owned Foreign Enterprise or WOFE, are a common investment vehicle in China, referring to companies in China with limited liability, wholly owned by foreign investors. WFOE can be distinguished from branches and representative offices of foreign enterprises.

65 Prince of Peace CEO, Interview 9(i).

state ends'.[66] While the majority of the case study foster homes intentionally seek to maintain low visibility in China, the evidence from the interviews certainly was that all foster homes have at least some dealings with state officials and local authorities (it is generally not possible for a home with more than a dozen or so children to operate completely under the radar vis-à-vis local, or indeed central, authorities), but not in a formal regulatory capacity (this includes Red Thread and Lydia's House, despite their more documented arrangements with state orphanages). Even the smallest of the homes have occasional visits from various government officials, although most report that the degree of government scrutiny tends to be event-based, that is heightened around the time of National People's Congress meetings and more recently the Olympics. Occasionally these visits involve subtle or clear threats in relation to foster home work, variously referred to by the recipients as 'awkward hints', 'being told off' or 'scoldings'. The level of interest and tolerance of the officials of a particular area also appear to depend largely on location, and on the number of private foster homes operating in the area (presumably because it would be easier for local officials to claim lack of knowledge, if called to account by their superiors, in relation to one or two foster homes than in relation to half a dozen). Rarely are there outright threats to completely shut down a home's operations, and rarely are threats followed through, whether because government tacitly approves of private orphanage work or for other reasons, such as being unwilling to draw attention to a previous pattern of tolerance, or the inability to care for the children themselves were the homes to be shut down. It is much more common for private orphanages to be asked to leave a particular administrative region (an observation which accords with the decentralised and

66 Ashley and He (2008) p 132.

fragmented nature of Chinese regulatory bureaucracy),[67] or for a period of scolding to result in no further action being taken.

Rules of the Game

All interviewees expressed a very clear understanding, whether tacitly or explicitly, of the informal socially-enforceable rules that govern their relationships with state orphanages and officials at this local level. Broadly, these informal norms seemed to be of two types, either relating to governmental suspicion of charities, or the issue of 'lost face'[68] in relation to non-state care of orphans. Firstly, operators spoke of the need to assuage 'government' fears of subversive intentions on the part of the private orphanages. The traditional suspicion in Chinese culture of charities, and the tight formal and informal control of NGOs which follows, was introduced in Chapter Two, and is somewhat explicable given the relatively short time Chinese civil society has had to develop. Many interviewees spoke of how poorly received their charitable efforts are in China, and of experiencing ridicule or even violent objections to the idea of helping strangers without personal benefit or hidden motives. For example, a common accusation levelled against males in the field is that they have illegitimately fathered the children in their care, or intend to sell the children to foreign friends. Transparency and openness was generally considered very important when dealing with local officials and village leaders, and many foreigners spoke of the need to have long conversations with state orphanage directors, and MCA officials, aimed at enhancing understanding of the scope of their operations and the nature of their motivation.

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67 Above at Chapter Two 2(a) 'Nature of Chinese 'Government'' from p 51.

68 For a useful outline of the place and importance of face in Chinese culture, see Hsien Chin Hu, 'The Chinese Concepts of "Face"' (1944) 46(1) *American Anthropologist* 45.

The foreign foster homes interviewed are all run by individuals with strong religious motivation, and domestic-run private orphanages are often associated with underground church groups. These religious affiliations and motivations represent another possible factor beneath the suspicion with which private orphanages are regarded by government. As a result of a general suspicion of their motives and intentions, almost all interviewees had very strict rules against proselytism by staff and volunteers in their neighbourhoods. On the other hand, the vast majority of homes were open, within their walls and with visitors, Chinese and foreign alike, about their religious motivations. For example, many had adorned their reception rooms with Chinese calligraphy of bible verses. The different approaches to religious education of resident children seemed largely dependent on perceived autonomy and security from local interference: 'We don't hide it [our faith], but we don't flaunt it – but this is dependent on where we are';[69] 'We're pretty open. We don't hide anything. We're Christians here. We don't shout it from the street corners but people know it's faith-based work';[70]

> We don't put it in people's faces, but if you go to our website it tells you why we're doing this. But we avoid religious language in our dealings with the MCA. They know we're Christians but it's not an issue because we're not evangelising.[71]

> We don't do anything religious with the children. We do pray. Meihua at first told us we couldn't pray for the kids. We said, well, take 'em back then! I think they were bluffing. We said Muslims pray, Buddhists pray, we're gonna pray too. Then they backed up. But we don't teach them grace or anything like that. [72]

Secondly, in relation to pride, the study showed a clear norm among all

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69 Prince of Peace CEO, Interview 9(i).

70 Prince of Peace, Interview 9(ii).

71 New Grace, Interview 14(iv).

72 Mustard Seed Director, Interview 15(ii).

operators of avoiding any behaviour which could potentially draw attention, domestically or internationally, to the disparity between official government policy on the care of orphans, and the reality of a wealth of foreigners caring for children still technically in the guardianship of the state:

> Orphanages are very emotive. Orphans are the most vulnerable people in China, and it's easy to see that public opinion could be very positive or negative. If something went wrong, it could be very, very negative – 'What's the Chinese government doing giving our kids to some foreigners? Why can't we take care of our own kids?' … Any self-respecting country may have a problem explaining to its people why we cannot take care of our own kids.[73]

While many were candid and forthcoming in interviews about their concerns over the quality of care in state orphanages, all interviewees were keenly aware of the risks associated with embarrassing China through publicity about their mission to improve state care for orphans: 'They worry that we're going to embarrass China by what we're doing, on an international basis, by showing the world that China is not doing its job, looking after its children'.[74] Despite the proliferation of private orphanages operating fairly openly across China, it remains important, in order to be able to stay in the game, to contribute to government face by helping maintain the impression, domestically and internationally, that Chinese state orphanages are not in need of such assistance: 'I live in a twilight zone between the reality of what it is, and what I have to portray it to be'.[75] In this vein, Mustard Seed Creations expressed great satisfaction that their reputation is now well enough established that they no longer need to approach state orphanages with offers of help: 'If they request help, it feels like they're more choosing to get help from us, not us helping them'.[76] Private foster home websites invariably refer to their

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73 Lawyer for New Grace, Interview 14(ii).

74 Will Peters, China Orphan Relief, Interview 17(i).

75 Red Thread, Interview 22.

76 Mustard Seed, Interview 15(ii).

'partnership with the Chinese government' or the 'best efforts' being made by China to care for its orphans, and fundraising efforts by volunteer groups are done 'quietly' – 'We don't want the community to think the orphanage is not caring for their children. We don't want to bring them any shame, only positive recognition'.[77] When the owner of Red Thread referred in her blog to a healthy former ward who had died on return to a state orphanage, she was immediately subjected to days of government visits and threats that her home would be shut down – 'I can understand why, I embarrassed them'.[78]

This issue of pride is an important motive behind the use of Chinese staff as primary caregivers in all of the homes. Other than Loving Embrace, all of the homes interviewed employ a large number of Chinese staff, with Western volunteers and staff restricted to assisting the Chinese staff, or visiting to provide specialised medical care:

> It's always a trust issue. We've been told by our officials here [in town] that they'll never trust foreigners. No matter what you do, they always think you have an ulterior motive. That you're using the children to make money – this is another reason why we're very clear that foreigners don't receive salary. … The Chinese staff have the ultimate say on decisions here, the final decisions. We get consensus, not majority decisions. The staff make a big point of that to visitors, and that we don't receive salaries.[79]

> Because of the no-no of having foreigners care for kids, using American house parents would raise all sorts of issues. But as it is, when the MCA come, they see that every face caring for kids is Chinese. … We're saving them from abandonment, not from being Chinese.[80]

Similarly, Eleanor, director of BICR, attributed her sense of stability as a foster home operator to being of Chinese descent: 'Part of the reason I can do this is because I'm

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77 Volunteer coordinator for state orphanage, Interview 25.

78 Red Thread, Interview 22.

79 Mustard Seed, Interview 15(ii).

80 Prince of Peace CEO, Interview 9(i).

Chinese, and because I've been here a long time' (she also attributes to this the fact that their Meihua children were not recalled in 2007: 'It didn't happen to us because we're Chinese'). Both Mustard Seed and Prince of Peace referred to their employment of Chinese caregivers as an intentional part of a broader strategy of localisation, which provides both current protection against the common complaint from society and government alike that 'China doesn't need foreigners to look after its children', and long-term protection for the continuity of the foster home work in the event that foreign managers and founders are asked or forced by circumstances to leave China: 'Our goal is that if we were kicked out, this could all continue. You have to hold everything lightly. Things change. You always keep in the back of your mind that we very well one day may not be here';[81] 'It's the way missions are going I think – looking for ministry to your own people. I think it's more effective'.[82] All of the interviewees were generally slow to criticise the quality of care in the state system. There was a conspicuously collaborative and supportive tenor to orphanage-foster home relationships, which is not to say that the interviewees were not genuine in their apparent sympathy for the underfunded, overworked state system, but rather to note that 'China-bashing' (in the tenor of *Death by Default*,[83] for example) was noticeably absent in the field, which some acknowledged to be an important reason why their work is allowed to continue: 'I'm really impressed by the state orphanages we work with. We try to put them in the best light possible. Our goal has to be to help *them* reach *their* goal, we don't see it as us using them to reach *our* goal'.[84]

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81 Mustard Seed Director, Interview 15(ii).

82 Prince of Peace, Interview 9(ii).

83 *Death by Default* was discussed above at pp 111–4.

84 Mustard Seed Director, Interview 15(ii).

State Orphanages

These rules of the game are just as relevant in the relationships cultivated between foster homes and orphanages. The majority of foster homes were very clear that the state orphanage directors with whom they work are potentially putting their own careers at risk by cooperating with private foster homes and allowing children to be cared for therein. Abiding by the rules is an important aspect of trust-building in this context:

> It's always a risk; the state orphanages are walking a fine line, a tightrope – because the MCA doesn't trust foreigners. So we sort of bow to the state orphanages, and how they want to do it – if they want us to come to dinners with officials, or if they want us to not be visible. It all depends on *their* relationship with the MCA.[85]

This risk is reflected in the care taken by many state orphanages to keep any cooperation or arrangements with private foster homes 'under the radar'. The recall of children by Meihua in the face of increased media and political attention contingent with the Blue Sky Plan is one example of this. A state orphanage director interviewed in Shandong province, who I know has children in the care of at least three of the private foster homes interviewed, denied knowing of any private foster homes in China, foreign-run or otherwise. More generally, children being adopted are usually not permitted to be picked up by their adoptive parents from private orphanages, as most state orphanage directors insist that children be returned to their facilities some time prior to the arrival of new parents. This is apparently partly to do with the paperwork and formalities which must be gone through prior to adoption. However, it is notable that it is also often not disclosed to new parents in whose care the child has been, which a number of interviewees believe is because 'they don't want to admit that they

85 Mustard Seed Director, Interview 15(ii).

sent their kids away to be dealt with by foreigners'.[86] Foster homes commonly try to include 'clues' in adoption dossier paperwork to help new parents to track them down after leaving China, and learn more of the people who cared for their children prior to adoption, with varying levels of success (the implications of this imposition of a truncated history on adopted children, for whom history and identity are very often repressed or compromised to a harmful extent anyway,[87] should not be overlooked).

Such informal fostering arrangements are only possible when the private orphanage has built up for itself a good reputation as a care-provider ('Our standard of work gives them a bit of safety'),[88] and has demonstrated to the state orphanage directors that it is able to abide by the unspoken rules of the relationship. Interviewees uniformly expressed a keen awareness of the need to assist the government and state orphanages in maintaining the fiction that 'China can care for its own babies' and that the standard of state care is very high. When attention is drawn to the reality of orphan care, such as through unfavourable comments in newsletters or blogs, a common response is for children to be taken back to their home state orphanages, often with tragic consequences – many times, when a child has been returned to a state orphanage, the previous caregivers have subsequently found out about that child's death.[89] Overall, interviewees expressed a keen awareness of the need to 'give face' to state orphanages and play the game with care: 'We don't want to tell the orphanages what to do – we try to do what they feel comfortable with'.[90]

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86 Prince of Peace CEO, Interview 9(i).

87 Yngvesson (2010) pp 174–6.

88 New Grace, Interview 14(iv).

89 Interviews with Good News, New Grace and China Orphan Relief (13(i), 14(iii) and 17(i)).

90 Mustard Seed, Interview 15(i).

Local Dynamics

Despite the 'friends in high places' that some foster homes have cultivated over the years, most of the homes still interact exclusively with local-level officials, and there remains a keen awareness among all case studies of the need to keep locals on side: 'It's a three-legged stool – we have to keep three parties happy or the whole thing collapses – the village authorities, the [GONGO partner], and our landlord';[91] 'It all depends on who is in charge of your county – if he doesn't care, then you'll have no problems'.[92] Evidently, significant power vis-à-vis the continuance of work in a particular locality is held at the local level, as demonstrated by the Dongjian incident. Good News explained their sense of being at the mercy of local leaders, given that their new orphanage buildings were constructed without formal approval:

> All we could do was ask the village chief for permission. He said yes, and scribbled something on a piece of paper, but legally he has no authority to approve this. If the government were to compulsorily acquire our land, well, we would need to rely on the village chief's connections with the provincial authorities for protection. But we've never paid bribes to him, unlike our landlord, who owns the main building. He'd be OK [in the event of needing protection], because he has cultivated good governance [through paying bribes]. So do we play his game, and get some protection, or risk losing everything? Some things are just culturally accepted here, they're part of the customs. But you don't want to do something you don't feel 100% comfortable with or cannot be morally accountable for. [pause] You can't win this war![93]

Many interviewees felt that, despite often being threatened by officials with closure or legal action because 'we don't need foreigners to look after our babies' and because such homes were 'illegal', the chances of such threats being carried through were slim, despite the loss of face sometimes associated with allowing foreign-run

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91 Good News, Interview 13(i).

92 Good News, Interview 13(ii).

93 Good News, Interview 13(ii).

orphanages to continue. In fact, the frequent threats or scoldings received by foster homes, although appearing genuine on the face of it, often in fact seem to be more a way for government to maintain face, by a display of power to counter-act the demonstrative impotence or unwillingness of officials to care fully for children for whom they are legally responsible, rather than any genuine attempt to have the 'law on the books' enforced. When I asked Compassion's manager, Ellie, if she felt concerned about their lack of legal protection, she responded with a story of how her family's passports and papers were once held by local police for a week 'just to prove that they could. It was just to prove that they really are in control … That was a real eye opener – we realised we're just this little bit of people, and they know *exactly* what we're doing. But they know what we're doing is good work, as long as we don't cross that line' (referring to publicity and fund-raising). Her husband told me on another occasion: 'Most [officials] know who we are, and what we're doing, and they respect it. It's the ones who don't understand what we're doing, and only know what the books say – they're the trouble-makers'.[94] This statement conveys an underlying expectation that generally local officials are more attentive to the value (or lack of harm) of orphan work, regardless of its legality, than the letter of the law, a sentiment that echoes that of many Chinese private orphanages.[95]

I witnessed a number of threatening but blustering incidents during my stays at New Grace Foundation. On one occasion, I was asked by David to come upstairs and translate an apparently very heated argument going on between a man from the town offices and the home's Chinese staff manager. He was irate that one of New Grace's

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94 Compassion, Interview 11(i).

95 See above at p 157: 'They came once, but after having seen it, we're not doing anything illegal, so since then they don't worry about us at all. As long as we're not adopting any children privately' (Our Lady's, Interview 2(ii)); Home of Joy on police raids ceasing when they 'realised we're just trying to help the kids' (Interview 4).

nannies had been fired for smacking a child, something which all staff are forbidden to do and which they are told on employment will result in their termination. He had come in to demand that she be reinstated. The staff managers listened to his tirade for quite some time, before eventually replying that these were the rules and sending the official to an office next door to drink *baijiu* (Chinese liquor) with the male chef and drivers. Austin, New Grace's lawyer, also related to me a story of a local government notice that the main foster home building at New Grace would be imminently demolished due to a lack of planning permission, the land on which the foster home was built being zoned as industrial. At the time of construction, there had been no way to apply for a zoning change without approval of the foster home they intended to carry out at the site, and so the buildings were built without planning permission. Some years later, the demolition notice arrived: 'We panicked, we thought the bulldozers were coming down the road'.[96] Austin noted that when he went to visit town officials to make an appeal, he was greeted with a barrage of threats and accusations of illegality (in relation to caring for orphans). However, he also claims he knew, so long as he humbly received the telling off, that the threats would not be carried out: 'I know enough about China to keep quiet and be humble'. Eventually, the whole issue about the land use 'just went away'.[97]

Conversely, visiting officials will often express approval of these non-legal operations, implicitly or expressly. 'They send us the message: "OK, we approve, we'll allow you to do this, as long as you do what you say you are doing" … They express approval of our work, and even want to learn from us';[98] 'We keep babies alive, meaning

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96 New Grace, Interview 14(iii).

97 New Grace, Interview 14(iii).

98 Mustard Seed, Interview 15(i).

they can be adopted, meaning the CCAA makes money and looks good'.[99] This can be implied (through not following through with threats) or express, even after having in the same visit expressed disapproval (in one notable example, from 'You're not allowed to do this' to 'Do you need volunteer chefs?' within the hour). New Grace benefited greatly from this approval when local officials arrived demanding that all nannies at the home pass an exam to become qualified caregivers. When David expressed scepticism that his employees, most of whom are also farmers when not at New Grace, would have time to study for the exam, he was given the answer sheet to distribute to the candidates. Mercy House's Chinese managers were very clear that they believe their work would not meet with disapproval were it to come to the attention of the MCA: 'We are not doing any bad things, and we're not bringing about any bad consequences for the state or for society. Further, we are helping the country and society to bring up these children well'.

The more astute and experienced foster home operators, who are extremely adept at playing by the rules and negotiating the 'game' at the local level, were at times even comfortable with calling the government's bluff when threatened, being more aware of the space within government. While Elva of Mustard Seed spoke of lines they should not cross, in order to avoid souring relationships with officials, she also believed there was no way the home could be shut down, because 'that would get nasty – we have so many employees and babies here'. In my interview with Will Peters of China Orphan Relief, he spoke extensively of the unspoken rules of the game and his strategies for winning: 'When you talk about the Chinese government, what does that mean? The government is a big, huge statement. You can be in one office and say "They [another department] said I could do this" – you're deliberately setting up a

99 China Orphan Relief, Interview 17(i).

rivalry. So our tactic is to threaten to split the different bureaus against each other'. This can be done horizontally, among bureaus, and vertically, among the different levels of government: 'It boils down to a very serious game of poker. I make threats, and they have to decide whether I am bluffing or not, and whether calling my bluff is worth the risk…it's not pleasant, but it's for a good cause, and even they know it'. For example, when China Orphan Relief began to experience similar pressure to the Dongjian homes to move, Will's response was neither to lie low nor move:

> They clearly didn't think they had the political might to shut us down, but they told us we had to move, listing a litany of violations. My response was this: 'Everything you said is true. You can decide to try to make me move. We all know that if you do that, your supervisors will find out. And you don't know who I know in the Beijing government. So there is a risk to you. For me to ignore you is also a risk. We have to work something out. I'm doing a good thing for China. How can we do this so none of us loses?'.[100]

Austin, New Grace's Chinese lawyer, expressed similar ideas, including the need to allow, but also create, opportunities for local officials to scold and berate, in order to accrue for oneself enough social capital, by adding face, for boundaries to be pushed further in the future. He explained the game as follows:

> It's an art, a very difficult art. It depends on a few factors in my view. First, it depends on who you know. Second, whatever you want to ask him to do must be permissible or encouraged. To ask someone to bend the rules for you is harder, because *they* have to expend *their* social or political capital. Third, there should be some benefit to them – can you do a favour to him in return, help out his family somehow. If it is something which can help him in his job, he'll be more likely to help. And the fourth factor is whether you are critical of the government, or in any way negative against the government.[101]

Some interviewees were clearly adept at taking advantage of opportunities to build on such trust and rapport with local officials, with beneficial outcomes for their

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100 China Orphan Relief, Interview 17(i).

101 Lawyer for New Grace, Interview 14(i).

children. For example, China Orphan Relief has been able over time to have *hukou* birth dates or places amended (to increase a child's chances of adoption): 'Over time, you play on this trust and ask them to take new risks – a new type of trust develops, and a tighter bond'.[102] However, another interviewee noted that playing on this trust is a delicate and risky move: 'It's a tightrope we walk. You don't want to be too bold, or too timid'.[103] Overall, areas in which the interviewees were willing to push the line related to the soliciting of donations in China (which is illegal for foreign Foundations, let alone unregistered charities), banking restrictions (discussed below), and administrative laws relating to land use. The unspoken rules relating to face, pride, and suspicion on the other hand, were uniformly regarded by all as not to be crossed.

Local Costs and Benefits

In the opinion of China Orphan Relief's director, Will Peters, the way to be aware of how far boundaries can be pushed with local officials is to sufficiently understand the risks and benefits of allowing private orphanages to operate, from the perspective of government. The pragmatic considerations which may be relevant to local officials and orphanage directors are generally well understood by the foster home operators, who have spent many years building relationships and assuring the former, through their work and behaviour, that the political risk of maintaining such relationships is outweighed by the potential associated benefits. Some interviewees, when asked to speculate on the benefits potentially motivating the officials with whom they deal, referred to the specialist care (for example, in neurological and cardiovascular disorders, vision impairment and gastro-intestinal defects) which foster homes are able to provide,

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102 China Orphan Relief, Interview 17(i).

103 Volunteer coordinator for state orphanage, Interview 25.

although many others were sceptical as to whether improved care of children is ever a significantly motivating consideration for government. Certainly there are clear financial incentives to state orphanages in maintaining informal foster care arrangements with private homes, as they continue to receive a per child governmental allowance when children are unofficially being cared for by private orphanages (in fact, Lydia's House itself pays the state orphanage an annual fee of 30 000RMB, that is around £2 600, to allow the care arrangements to continue). As Loving Embrace put it, 'Remember the state orphanages are still a business, it's a job to them'. Surgical intervention provided by private orphanages often results in children becoming 'adoptable' who were previously destined to live out their childhoods in state facilities at state expense – with orphanages paid $US5000 per child adopted, an increase in adoption rates is yet further fiscally desirable. Further, as Shang points out, were the theoretical laws confining orphans to state institutions actually implemented and private homes shut down, local government would bear the financial and political costs of trying to relocate hundreds of vulnerable, and often very sick, infants and children.[104] This echoes a general dilemma, noted by Ma, faced by government in relation to the NGO sector, which arises due to a central policy of restrictive control juxtaposed with the state's need for 'NGOs to take over the power and responsibilities it can no longer assume if the economy is to develop'.[105] Alain of Good News, when asked about the risks of operating 'in the grey', was fairly confident that local officials would never go so far as to remove children from his care, due to the costs to them involved in such action: 'We are playing on the fact that their system [of orphan care] is not working. And if they were to insist on doing things the 'legal' way, we couldn't do anything, and they know

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104 Shang, Wu and Wu (2005).

105 Ma (2002) 310.

it'.[106] On the other hand, local government stands to benefit from the influx of capital, and increased employment, often associated with the larger orphanages, and the associated political credit for such development: 'This all accrues to the unspoken economy in the Party'.[107]

However despite these factors, many interviewees emphasised that the political risks to local officials and state orphanage directors involved with 'closing one eye' to the 'illegal' work occurring in private orphanages are also very real and have a tangible effect on their security – 'They could lose their jobs'.[108] There are also clear political risks involved in turning a blind eye to private orphanages which could potentially later be accused of having subversive or evangelistic intentions, or embarrassing the Chinese government internationally through their work. David and Carly, of New Grace, mindful of this, took a different approach to Will, deliberately eschewing opportunities to play on these benefits and build a relationship of trust by cultivating social capital with local officials. Rather, they avoided pushing for meetings or giving traditional gifts on holidays (standard means of accruing *guanxi* in Chinese society), as they felt that by keeping their distance, local leaders were protecting themselves (in the first few years of operation) in case anything 'went wrong'.[109]

Friends in High Places

In this context of perceived vulnerability to local authorities, some of the case studies have actively procured higher-level political ties, such as with GONGOs, state

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106 Interview 13(i).

107 China Orphan Relief, Interview 17(i). See also Interview 19.

108 BICR, Interview 16.

109 Interview 14(iii).

orphanages, or central-level MCA officials, which are seen by those who have procured them as protection in the event of things 'getting nasty' with locals: 'You need somebody somewhere willing to say, "I know that guy – he won't give you any trouble"'.[110] For example, David and Carly of New Grace believe a major reason they have not been hassled more often by local officials is because of the prominent display, in their foyer, of a letter from CH Tong, former governor of Hong Kong, commending 'the people of [New Grace's township] for their work in caring for orphans'.

Similarly, the response of both Good News and Prince of Peace to escalating local pressure in the Dongjian compound prior to the Olympics, in contrast to the three other cases who 'laid low', was to relocate, as well as to seek the protection and security (in the case of future such incidents) of partnerships and *guanxi* with different GONGOs and MCA departments. Alain moved Good News to the safety of a town in a different province in which no other foreigners, let alone foster homes, are located,[111] and began to construct new facilities tailored to the needs of his vision-impaired wards. He has also struck up a relationship with a GONGO, the China Association for Social Work, which he describes as a type of insurance against lower-level interference in the new township: 'Sooner or later we will need to meet them [local MCA], or the higher authorities will say to them 'Who are these guys?'. Right now, it's only the police who really care about what we're doing. If we can get registration [with CASW] at the central MCA level, well we'll be above those guys'.

Prince of Peace also felt that 'lying low' was not a viable option, as it would hamper their plans and visions for expansion, so instead moved to the Meihua Special

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110 China Orphan Relief, Interview 17(i).

111 See also BICR (Interview 16), choosing a location with no other foster homes because in locations like Dongjian 'the local authorities know too much'.

Economic Zone, not far from Dongjian but under the control of a different MCA bureau. The Prince of Peace leadership were intentionally open with these MCA officials in the province to which they relocated about their foster care work, and were offered a sizeable incentive from the Meihua SEZ authorities (low-cost land) to relocate to that area. Michael Victor, previous CEO, believes the Meihua MCA was willing to partner with a foreign foster home, despite the obvious political sensitivity of such work, because of the obvious employment prospects for the area (with 120 local employees, Prince of Peace is one of the largest employers in the zone). He describes the Meihua MCA as being 'close enough to Beijing that we're dealing with a sophisticated, forward-thinking government, without being right under the nose of central government', and thus more liberal than others in their dealings with foreign ventures.

Both Shooting Star and New Grace have similarly sought friends in high places, pursuing registration of a foreign charity with the central MCA. Bethany Care likewise benefits from its partnership with a state orphanage – its newly-constructed building is on Minjiao Orphanage land, and by all appearances the work done within has been appropriated by the state orphanage itself (although David and Carly, as directors in absence, retain independence in practice), and credit for their work is often taken by the state orphanage bureaucracy: 'They get a pat on the back for it – it's a star in Director Pei's crown'. This is telling of the most obvious incentive to government agencies in such partnerships and *guanxi* with foreign foster homes – the appropriation of political credit for shiny new orphan palaces without any expenditure of time or money:

> The immediate reason why they're pushing to register us is we would be them, basically. They would get the glory of our project, we would be them, they would be us. We don't care [about glory]. Projects that are very outstanding…well the bad ones they shut down. China is not patient! It's the ones that survive and grow that will catch the attention of somebody, and be

able to get official foundation status.[112]

On the other hand, the clear risk for government departments, especially at the local and provincial level, in pursuing such arrangements is if something goes wrong: 'If it's done well, it's a big plus. … The risk is if they work with an organisation that doesn't do it well'. Such *guanxi* can, therefore, generally only be cultivated after years of problem-free operations, in line with the informal rules relating to pride and suspicion, and demonstrated excellence in foster care.

Other interviewees spoke of the potential costs of seeking closer associations with government and GONGO entities. Ellie at Compassion put it thus: 'We've never registered. We just don't want to be under the government's thumb, telling us as to what we can and can't do'; '[Registration would mean] they get to decide where the money is spent. We don't want to give them that control'.[113] China Orphan Relief took a similar tack. Until 2009, the foster home was operating as a non-entity in China. However, by that time, its operations were extensive, with around 400 children being cared for in seven locations. According to its former director, Will Peters, an American businessman now living in China, the inconvenience of China Orphan Relief's lack of registration became problematic: 'We reached a point where if we could clearly see long-term sustainability, we needed to change our operation'. Faced with a choice between seeking registration, or formalising COR's interaction with orphanage or MCA officials, Will decided instead to partner with an already-registered NGO, Shooting Star, believing that the benefits of registration would not have outweighed the burdens thereof. When pushed on what those burdens were, Will responded:

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112 Good News, Interview 13(ii).

113 Mustard Seed, Interview 15(ii).

> Burdens? You have to play ball, which costs money and eats resources, and you can't make decisions solely on what you think is best for the organisation. So you get caught up in government's planning and priorities. Like how the Blue Sky fad has faded, and been replaced by this 'community centre' policy – you get sucked into all the vicissitudes of the Chinese political system. I just want to be little [in size of operations] and take care of kids.

Although externally the arrangement is referred to as a partnership, in reality Shooting Star has taken over COR's operations, with COR's foster home projects closed down and the children either taken into Shooting Star's care or returned to their home state orphanage to partake in a foster-family programme overseen jointly by Shooting Star and orphanage officials.

Good News similarly shunned a proposed cooperative arrangement with their local MCA, which its director found ethically problematic due to many requests, in early talks, for gifts and other favours: 'Was I too stubborn? Perhaps this is the China way – but on the other hand, we have to hold ourselves to a higher standard, and they must understand this to work with us'. David of New Grace has been willing to risk this burden, because his mission and vision is well established, and, given this, he believes it would be difficult for the direction of New Grace to be diverted. The major benefit is that the annual question of whether the SAIC will choose to renew their RO license, and thus their means of obtaining visas, will no longer be hanging over their heads:

> It is the fact that we'll have official standing with the MCA, because we're not just looking after twelve babies anymore. Our operating costs are around half a million US dollars a year. We need to be clear and transparent. We're getting bigger. And we need to be able to employ our *ayis* [nannies] legally – at the moment we're not. And also, maybe in doing this, it will open doors for us to influence people at a much higher level in the MCA. We *will* have to enter partnership project with them – so we will push hard to make sure that those projects are [our planned projects]. We don't have a problem with partnership, as long as we're not distracted from our vision.
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> …
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> I think it [registration] will be good. We're a little bit of an embarrassment to

> the local guys at the moment. But at the same time, they don't want to upset us, because they know we're quite high profile. So it will please them for us to be registered. So when they're asked by their bosses, who are these guys, what are they doing here, they can say who we are. That letter in the foyer has without a doubt been an influence on the people who give us a hard time. Those sorts of things are unspoken…but there's a difference.[114]

Another common tactic among the unregistered entities is to invest in relationships with recognised, established entities such as an existing foreign foundation (China Orphan Relief, which was recently 'acquired' by Shooting Star), hospitals (Compassion and Loving Embrace), GONGO (Good News, above, using the China Association of Social Work as a 'big brother') or state orphanages (Red Thread and Lydia's House), which are seen as providing some measure of protection or justification against government charges of illegality or stepping out of line. Of interest is the way in which such partnerships are spoken of by those involved. For example, the founders and directors of Compassion, an American couple with no business or commercial experience, referred to an upcoming joint venture with a nearby hospital under which children at the hospital will be referred to Compassion for osteotherapy, as a 'registered partnership' but were very unclear, on questioning, on the details of the arrangement. There is no written documentation of the 'partnership', and the legal status of Compassion would apparently remain ambiguous despite the arrangement. This is quite congruous with the situation, discussed in further detail below, of blurred boundaries between law and policy, formal and informal status. Loving Embrace's relationship with City Medical Centre is similarly ambiguous – its directors have a Memorandum of Agreement with CMC under which CMC agrees to accept donations on Loving Embrace's behalf, to be used exclusively for surgical costs incurred at CMC. However, Loving Embrace's directors were vague about the value of this Memorandum. Although it was signed by the CMC, neither director remembers if they signed it

114 New Grace, Interview 14(iv).

personally, and Loving Embrace did not (lacking legal capacity). 'It lacks content – it just indicates the cooperative relationship we have'.[115]

[115] Loving Embrace, Interview 19.

CHAPTER NINE: OPERATIONAL OUTCOMES

The interviewees varied greatly in the level of concern expressed about the difficulties of operating orphanages without formal recognition and/or legal status. As noted above, only about half have investigated the possibility of formal registration as a foreign NGO in China. Some interviewees, echoing many of the Chinese private orphanages, expressed concern that 'legalisation' and government oversight could in fact hinder their ability to carry out their work and choose their direction. What follows is a brief introduction to various practical issues raised by the foreign foster homes as matters of concern directly related to their lack of charitable, or in some cases any, legal status in China. These principally relate to legal capacity and liability, employment, and financial issues, including banking, fundraising and taxation. One interviewee also expressed concern about the lack of minimum care standards imposed on the activities of the foster homes.

1 Capacity

A disadvantage of operating as a non-entity, raised by numerous interviewees, is that operators must transact leases, banking and employment in their personal capacity, rather than in the name of the foster home: 'Having our own identification would help'.[116] This often results in sub-standard banking and employment practices (see below), but also exposes signatories to legal liability in relation to such contracts, a situation about which many interviewees expressed unease – 'it is problematic, but what can we do? I have no idea how it might affect me'.[117] Mercy Home's Chinese founders

116 Mothers' Arms, Interview 24.

117 BICR, Interview 16. See also Good News, China Orphan Relief, New Grace and Loving Embrace (Interviews 13, 14, 17 and 19).

expressed similar concerns: 'Were an accident or something to happen, then we don't have any protection…we are just another civil-run organisation'.[118] Loving Embrace, which uses families as primary caregivers rather than hired staff, acknowledged that this vulnerability extends to these families, and has had many potential foster families decline to participate due to concerns about liability in the event of an accident – as one of Loving Embrace's co-founders explained, 'We have no idea what would happen if an accident happened'.[119] For foreigners, there is an associated risk of being asked to leave China.

Lack of capacity is of particular concern in relation to the contracts which many foster homes insist on being executed on arrival of each new child from state orphanages. These are co-signed by the relevant state orphanage, and are generally in a very basic form, stipulating that the private orphanage will take financial responsibility for the care of the child, including medical costs, but that the state orphanage retains legal guardianship and the right to call the child back to their facility at any time. Such contracts often appear to have no legal validity as they are purportedly signed in the name of a non-entity,[120] or by an RO that does not have license to undertake childcare activities in China.[121] Many interviewees expressed doubts over the validity and protective value of these contracts – 'It's got no legal force but it makes them [state orphanage] feel safe';[122] 'It's not worth the paper it's written on'[123] – and state orphanages have in the past reneged on contractual terms by calling back children,

118 Mercy House, Interview 23.

119 Loving Embrace, Interview 19.

120 Good News, Mustard Seed and China Orphan Relief (Interviews 13, 14 and 17).

121 New Grace, Interview 14(iii).

122 Good News, Interview 13(i).

123 Red Thread, Interview 22.

often with tragic results. Yet contracts continue to be carefully executed in relation to each new arrival.

2 Employment

According to the laws governing RO in Beijing Municipality, employment of Chinese nationals by RO of foreign enterprises must be arranged through a third party agency,[124] however Prince of Peace, Good News and New Grace, the three RO-model foster homes, ignore this stipulation as it would not be a pragmatic means of finding local rural villagers capable of being trained as nannies. Rather these homes, like the majority of interviewees, employ staff (in some cases up to several hundred employees) by way of verbal agreement, or a simple written contract signed by an individual as employer in his or her personal capacity.[125] This raises two major issues. First, according to Chinese labour law, employers are required to purchase social insurance for employees,[126] however there is no legal means of doing so when the employer is an individual (or an RO which is not using an agency, that is, which is acting illegally):[127] 'Nobody has said anything about that – it's a good thing to be able to provide insurance, it's just that I can't do it, there's no legal way'.[128] Some foster homes include an amount in their staff salaries nominally to cover social insurance. However this is unsatisfactory

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124 北京市人民政府关于外国企业常驻代表机构聘用中国雇员的管理规定 *(Beijingshi renmin zhengfu guanyu waiguo qiye changzhu daibiao jigou pinyong zhongguo guyuan de guanli guiding)* [Beijing Municipal Government Administration of Employment of Chinese Citizens by Resident Representative Offices of Foreign Enterprises Regulations], Beijing Municipality, 15 June 1996, arts 5–6, 8.

125 The exceptions are Shooting Star and Bethany Care, registered Foundation and PNEU respectively.

126 中华人民共和国劳动合同法 *(zhonghua renmin gonghguo laodong hetong fa)* [Labour Contract Law of the PRC], NPCSC, 29 June 2007, art 17(6).

127 Interviews 13(i) and 17(i). The Labour Contract Law (n 126) covers only employers that are 'enterprises, individual economic organisations and PNEU in the PRC' (art 2).

128 Red Thread, Interview 22.

as employees in rural areas are, in any event, unable to self-insure. Secondly, China Orphan Relief expressed concern about the potential for disputes with employees to arise in the event of workplace accidents. On one occasion, two of COR's nannies were injured in a car crash while transporting a baby to hospital. Although COR took care to pay compensation exceeding that which would have been required by the Labour Bureau had the incident been under the Bureau's supervision, there was nothing requiring COR to do so other than personal moral values and the desire to retain the trust of COR's staff: 'What made it all work was trust – they trusted me – that I would treat them well and do the right thing. This trust was built up over time, and especially through middle management. They trusted me, and this was passed down'.[129]

3 Financial

Banking restrictions cause significant obstacles for all of the foster homes interviewed. Those operating as non-entities are unable to open bank accounts in the name of the foster home, meaning unrelated Chinese bank accounts must be used to receive donations. This can cause transparency issues for international donors, who may feel uneasy about donating large sums of money to a personal account. For Shooting Star, this was the main concern of non-registration which prompted it to seek Foundation status. As Shooting Star's lawyer put it, the willingness of off-shore donors to support Shooting Star's work depended entirely on the degree of trust placed in its founder and director. Shooting Star was able to operate successfully due to the social capital of its owner, but 'it would be very difficult for new charities to do what [she] did'.[130] Those private orphanages using RO are able to open accounts, but these are of limited utility

129 Interview 17(i).

130 Shooting Star, Interview 21.

as RO bank accounts can only receive funds transferred from the bank account of the RO parent company (which, as explained above, must be a commercial rather than charitable foreign entity, although this rule has only recently begun to be enforced).[131] Donations received domestically, or from a donor unable to donate to the jurisdiction of the parent company, must be channelled through a personal bank account, raising the same issues as for non-entities.[132] Further, there is a limit on the amount that can be withdrawn from a personal bank account of US$50 000 per year,[133] far below the annual operating costs of all interviewees. Accordingly, most use multiple bank accounts, which volunteers or friends have been requested to open for the purpose of channelling operational budgets. Such sub-standard banking practices are a direct consequence of these problematic banking limitations. The use of personal accounts can also cause difficulties with the internal tax bureaus of charities in other countries being used to collect donations to be channelled to China.[134]

Regarding tax, the majority of interviewees had a poor general understanding of their liabilities under Chinese law. An obvious advantage to operating as a non-entity is that no taxes are payable, in other words 'it keeps us out of the tax spotlight'.[135] The same is true of registered NGOs, which under general tax laws are 'virtually tax exempt'.[136] Representative Offices in China are taxed on expenditure (that is, on withdrawals from the registered RO domestic bank account).[137] Good News and New

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131 Good News, New Grace and China Orphan Relief (Interviews 13(i), 14(iii) and 17(i)).

132 New Grace, Interview 14(iii).

133 Will Peters, Interview 17(i) and Wish Project, Interview 28.

134 Interview 17(i).

135 Compassion, Interview 11(i).

136 Ashley and He (2008) p 50.

137 中华人民共和国国务院关于管理外国企业常驻代表机构的暂行规定 *(zhonghua renmin gongheguo*

Grace have negotiated with their local tax offices to become tax-free based on the charitable status of the RO's parent company.[138] However both report that the ease of obtaining tax-free status is entirely dependent on the discretion of the office approached. Prince of Peace WFOE (the banner-making company) is taxed on its income,[139] and the RO pays some tax but on a negotiated reduced basis: 'right now the local government, because they know about us, we don't pay too much.'[140] Ashley and He point out that such negotiations entail risks, by '[drawing] into question the propriety of the organisation's registration as a commercial enterprise in the first place'.[141] Given the informal nature of these negotiations, New Grace also expressed concern that the SAIC could potentially decide in the future to demand payment of back-taxes (which, due to the large operating budget of New Grace, would amount to millions of Chinese RMB).

As for income, for foreign-run foster homes, the lack of government funding is

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guowuyuan guanyu guanli waiguo qiye changzhu daibiao jigou de zanxing guiding) [Control of Representative Offices of Foreign Enterprises Interim Regulations of the PRC], State Council, 30 October 1980, art 9 and Good News, New Grace and China Orphan Relief (Interviews 13(i), 14(iii) and 17(i)).

138 Good News and New Grace. The law relating to Representative Offices of foreign NGOs is complex, but according to a 1996 policy issued by the State Administration of Taxation, non-profit institutions may apply for duty-free treatment: 国家税务总局关于加强外国企业常驻代表机构税收征管有关问题的通知 *(guojia shuiwu zongju guanyu jiaqiang waiguo qiye changzhu daibiao jigou shuishou zhengguan youguan wenti de tongzhi)* [State Administration Notice of Taxation on Strengthening the Tax Management of Representative Offices of Foreign Enterprises], No. 165 [1996]. For example, in 2004 the (central) State Administration of Taxation approved exemption for 33 permanent RO of foreign enterprises, including the Ford Foundation and Save the Children UK following applications to the Beijing Local Taxation Bureau: 国家税务总局关于美国福特基金会北京办事处等 33 家外国企业常驻代表机构免税问题的批复 *(guojia shuiwu zongju guanyu meiguo fute jijinhui Beijing banshi chudeng 33 jia waiguo qiye changzhu daibiao jigou mianshui wenti de pifu)* [State Administration of Taxation Reply on Tax Exemption of 33 Permanent Representative Offices of Foreign Enterprises, such as Beijing Representative Office of Ford Foundation], No. 777 [2004]. Ashley and He describe the process of securing such tax exemption as 'opaque' (2008, p 75).

139 中华人民共和国企业所得税法 *(zhonghua renmin gongheguo qiyesuo de shui fa)* [Enterprise Income Tax Law of the PRC], NPC, 16 March 2007.

140 Prince of Peace, Interview 9(ii).

141 Ashley and He (2008) p 59.

less important than for the Chinese orphanages introduced above, because the lion's share of operating costs are met by international donors. Of the interviewees, only Mercy House, run by Chinese sisters, and Mustard Seed's Chinese manager, expressed a desire for government recognition as a means of securing financial support. Foreigners running orphanages in China will usually set up charitable entities in their home jurisdictions, to facilitate international donations and enhance their legitimacy in the eyes of donors (an option which is generally not feasible for Chinese-run orphanages due to the expense, and their geographical and technical isolation). However, apart from the difficulty of channelling such donations into China, fundraising restrictions preclude attempts to increase the proportion of domestic donations; and sub-standard banking practices are seen as damaging to legitimacy: 'We are operating way below the international financial ethics standards. So it's difficult to raise money in China. … We don't like it of course, but we don't have a choice'.[142]

Finally, all organisations interviewed, whether unregistered, commercially-registered or NGO-registered, face severe limitations in their fundraising efforts due to restrictions on the issue of tax-deductibility receipts, with many interviewees speculating that they have most likely missed out on significant sources of funding from local corporations interested in their work due to the inability to provide official *fapiao*.[143] Will Peters put it thus: 'The government is creating a monopoly on charitable organisations'.[144] The monopoly spoken of is that of the China Charity Federation. Tax deductibility is governed by the 1999 Public Welfare Donations Law,[145] which provides

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142 Good News, Interview 13(ii).

143 Interviews with BICR, Prince of Peace, Loving Embrace and Rice Rescue (16, 9(i), 19 and 7).

144 China Orphan Relief, Interview 17(i).

145 Donations Law (Chapter Six n 101). Note that a draft Charity Law, which would address the issue of tax deductibility of donations to NGOs, was circulated for comment in 2006 and is

that companies or individuals who donate to NGOs in accordance with the Donations Law will enjoy preferential tax treatment.[146] However such preferential treatment only follows approval of the NGO in question as a tax-deductible donee by the State Administration of Taxation, and currently only the China Charity Federation and a select group of related GONGOs are able to issue tax-deductible *fapiao* for charitable donations.[147] Accordingly, other NGOs, whether registered or not, must use a GONGO as a partner for this purpose if a donor requires tax-deductibility. This is avoided by many because of the large 'administration fees' (usually between 10 and 12%) charged by most GONGOs for this service. It can also be very difficult for an unregistered charity to find a GONGO willing to provide administrative support in relation to banking. For example, Mothers' Arms had to approach around twenty GONGOs before finding one willing to provide financial services.[148] Mustard Seed has used a GONGO, the Chinese Red Cross, on occasion to facilitate donations where *fapiao* are required, however funds so donated are unable to be used at their discretion, but only towards projects approved by the financial facilitator.

4 Transparency and Good Governance

'We've been told finances are the most important thing, our vulnerability – we are scrupulous about keeping receipts and books, as if we are ever in trouble, that would be the first thing requested'.[149]

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reportedly in the final stages of approval, anticipated to be promulgated sometime in 2012: MCA China Charity and Donation Information Centre, Interview 39 (8 September 2009 [by email]).

146 Donations Law (Chapter Six n 101), arts 24–25.

147 Shandong Charity Federation, Interview 41 (21 September 2009). See also Ashley and He (2008) p 51.

148 Mothers' Arms, Interview 24.

149 Loving Embrace, Interview 19.

'Most of what we've accomplished could never have been done in our home country. And ten years from now it may be impossible because the government is just beginning to understand its responsibility to control NGOs'.[150]

The Foundation Regulation, in Articles 20 to 24, provides for extensive internal governance and financial management standards, and subordinate policies provide for annual inspections by the MCA and information disclosure to the general public.[151] However despite these safeguards against sub-standard NGO practices, because of the lack of legal status of almost all of the foreign foster homes interviewed, there is also a lack of formal supervision of internal governance, financial management and care practices. As was the case for Chinese interviewees, this was not a concern raised by most of the foreign interviewees, whose views were well expressed by Lydia's House: 'If the Chinese government just gets out of our way, that's a big help'. Generally, the administrative capabilities of the latter group were far greater than the former, and all were able to explain detailed good governance practices aimed at fulfilling a self-imposed and self-regulated duty of accountability to donors and supporters. Many expressed concern that to change the status quo would impinge on the freedom they currently experience by operating outside of the legal framework.[152]

However David Dale, of New Grace, in discussing the work of both Chinese and foreigners in the field, was an exception:

> The danger is there's no defined system or standard of care, even in the state orphanages. So you end up with everyone doing what everyone thinks is right or best. And you have to ask yourself – are we really caring for the children well

150 Loving Embrace, Interview 19.

151 基金会年度检查办法 *(jijinhui niandu jiancha banfa)* [Annual Inspection of Foundations Measures], MCA, 12 January 2006; 基金会消息公布办法 *(jijinhui xiaoxi gongbu banfa)* [Information Disclosure of Foundations Measures], MCA, 27 December 2005; see also 基金会名称管理规定 *(jijinhui mingcheng guanli guiding)* [Administration of Name of Foundations Provisions], MCA, 23 June 2004.

152 Good News, New Grace, Red Thread (Interviews 13(i), 14(iii), 22).

> enough? I think we are. But that's just our judgment. That judgment should really be made by government, not us.[153]

As alluded to by the above quote, the potential for deviant cases is an unavoidable risk of allowing unregulated care to flourish (although not necessarily one that is easily mitigated by increased government supervision).

153 New Grace, Interview 14(iii).

CONCLUSION

'Ten, fifteen, twenty years ago, you could do nothing of this sort – now, they are opening up a little. They express approval of our work, and even want to learn from us. There is more dialogue and it is starting to open up. We are grateful for what we're able to do now'.[154]

Like the indigenous private orphanages, the foreign foster homes of China are playing a supplemental role in China's official, government-monopolised system of orphanages. By collaborating with state orphanages to improve the quality of medical care accessible even to a small proportion of the resident orphans, significant numbers of lives are being saved and transformed by the foreign provision of care which state orphanages are not always able to provide. The sector's growth can be characterised as soft and slow, with relationships with government and state orphanages alike built up gradually and usually tentatively over a long period of time, by players uniformly astute and sensitive to the different and often conflicting considerations at play on the part of the state. The events in Dongjian, and the experiences of other foster homes not included in the study which have been shut down, have demonstrated to those in the field the imperative of avoiding certain behaviour, most notably anything which could potentially raise concerns on the part of the state about evangelistic intentions or a loss of face. There is a clear understanding amongst those who have endured in the field of which lines must not be crossed, and which lines can be pushed and manipulated over time.

As formal laws and policies have continued to be relegated in favour of these informal rules, an equilibrium seems to have emerged out of the combination of top-down and bottom-up pressures on local authorities, located at the interface of the conflict between the two: 'Local attitudes to enforcement vary as suits their local

154 Mustard Seed, Interview 15(i).

needs'.[155] The nature of that equilibrium is, however, subject to change over time, and the interviewees were thus both confident in their ability to continue navigating state regulation and relations (and in the protection of a higher authority: 'We trust God. Sometimes there's not an earthly explanation, there just isn't'),[156] and also aware of their vulnerability to unforeseen changes and events. Foster home managers and directors are themselves negotiating an equilibrium, between the unspoken rules with which they feel a need to abide, and how far they are willing to restrict their vision and scope: 'I'll do this until you shut me down or don't let me do it the way I want to do it. … I want to look after children, and I'm happy to play by the rules, spoken and unspoken, as long as it suits me'.[157]

It is difficult to assess the impact on China's orphans of the regulation, or perhaps lack thereof, of the foreign foster home sector. Adoption prospects, and care standards, are greatly increased for those resident in the foster homes, or benefiting from collaborative projects with state institutions. On the other hand, momentum for political or social advocacy for improved orphanage conditions by foreign workers is nonexistent, given the risk this would presumably involve for their personal work in China. It would seem that keeping, on the one hand, laws and policies which restrict orphanage operations to state actors, but allowing a gap with unofficial policy to flourish so long as informal norms are followed, whether this regulatory landscape has been deliberately shaped and/or maintained by government or not, has allowed the government to maintain the fiction that only China cares for Chinese children, while also allowing private organisations to assist in orphan relief (a task in which local

155 Lawyer for Shooting Star, Interview 21.

156 Prince of Peace, Interview 9(ii).

157 China Orphan Relief, Interview 17(i).

governments are apparently overwhelmed). Further, such private charities can be unofficially but closely monitored, tightly controlled, and do not cause embarrassment by drawing attention to the disparity, being aware of the shadow of state power and formal law. The lawyer for Shooting Star described it thus: 'The government wants to have its cake and eat it too – it wants to let NGOs function in China, without legitimizing them, but while keeping control over them. They are walking a tight-rope'. Given the important symbolic function of laws which restrict the care of orphans to Chinese institutions, an ideology which seemed reflective of a more general cultural pride regarding foreign charity in China, it is arguable that the law/practice gap is a means of maintaining the fiction that 'China looks after its own children' while allowing beneficent foreigners to quietly play a significant role in helping China's orphanages provide better care for its children. Regulation of the sector, or reversion to the formal laws and policies, could, by drawing attention to the discrepancy between fact and fiction, a fiction in which much political and cultural pride seems to be invested, result in more restrictions on foreign foster homes than are currently imposed by the informal modes of interaction.

Of course a focus on possible symbolic functions of formal law in relation to face and pride requires caution, given that it necessarily involves exploring assumptions which are often held by members of a social field subconsciously, and are not easily articulated or challenged. Further, given the complex nature of 'government' in China generally, it may be particularly difficult here to draw conclusions about 'government' attitudes and intentions based on the fact of non-enforcement of certain laws. Interviewees disagreed on whether this 'government beyond law' is intentional, or simply a result of the unwieldy nature of central party rule in China. One interviewee described it as 'sort of part of the policy-making process in China – a new trend

emerges in practice, which is beyond the law – the government allows them to do it, to see how it goes. If it goes well, then they adopt it by writing it into law'.[158] Austin, of New Grace, was adamant in his belief that the approach is deliberate, at least at the local official level. He explained the government approach to private foster homes using the analogy of a parent adopting a curfew but consistently allowing her teenager to arrive home slightly past the set time according to an unspoken rule that the spoken rule is flexible, at least within reason. But 'it's very sensitive. They don't want to be *seen* as doing that'.[159] The director of Good News similarly speculated, in reference to local orphanage officials:

> They are ok with being in the grey – it gives them the control to go either way. So if there is a contract, they sometimes insist it is black/white and must be followed, but are equally free to say 'we're not going to apply it, it's not relevant' – they always get their way in the end.[160]

This viewpoint echoes (and goes slightly farther than) that of Liu, who in reference to the regulation of Chinese charities generally writes that:

> The researchers of NGOs and many others issues in China are always faced with a perplexing phenomenon: due to institutional reasons, many activities which should be carried out according to legally prescribed rules are instead carried out according to some underlying 'hidden' rules. Gradually these hidden rules replace the legally prescribed rules to become commonly accepted rules, thereby further twisting the already problematic system, and increasing the difficulties in institutional reform and standardization of social administration.[161]

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158 Lawyer for Shooting Star, Interview 21.

159 Lawyer for New Grace, Interview 14(i).

160 Good News, Interview 13(i).

161 Liu (2011) p 89.

A Chinese interviewee, the campus director of Star Village, simply chuckled when asked about the discrepancies between law and practice, describing law in China as being 'tempered by humanity'.

Whether or not ambiguity is a deliberate tool of governance, an inevitable side-effect of the cumbersome nature of government in China, or (most likely) a combination of the two, such 'government beyond law' has significant ramifications for the control and growth of the private orphanage sector, which ought to be explored more fully. Some in the field clearly regarded their relationships with local officials as, for the most part, relatively stable, and it would seem that the unspoken rules relating to pride and suspicion, if properly understood by an astute player, result in clear lines which foster homes know must not be crossed in order to allow this equilibrium to continue. It seems that so long as those lines are respected, much can be achieved outside the legal framework. The prevailing sense in the field was not one of fear, but of resignation, regarding this 'axe over the head', which seemed very much related to confidence in God's protection, and assurance that foster home work is providentially guided and guarded, rather than in confidence in the status quo continuing. Mothers' Arms, when they first started, was visited by the local MCA and told to either begin investigating registration or that they could only operate temporarily. Three years later, Mothers' Arms is still unregistered, being unable to find a PSU, but describe their relationship with the MCA as good. However, 'we were told to keep low public exposure, mainly because we are doing things that are not allowed'. Mothers' Arms' directors believe their work will continue, provided the MCA are comfortable it is not a profit-making venture, and can keep a close eye on things: 'They wanted to know our intentions…the government always wants to know in advance what is going to

happen'.[162] Yet the current restrictions and obstacles mean that while well-established private orphanages, whose operators are astute to the political climate in which they work and have built up a network of protective connections and experience over many years, may find it at times relatively easy to navigate the unpredictable political waters, it would be extremely difficult for start-up foster homes to successfully begin contributing to the provision of private welfare. Only the very astute and perceptive are able to discern the rules of the game quickly enough to avoid being shut down or moved on, and a strong personal motivation for persevering, despite issues of liability, legal threats and wasted investments, is needed: 'There's an intangible hassle factor – we have to dance around all these hoops. It's a quiet sucking away of energy'.[163]

As for the navigability of such vague and ill-defined relationships, many interviewees expressed frustration regarding the lack of clarity of the rules of the sector, being doubtful that the spectrum of rules is in fact easy to follow in practice: 'I live between lines that are moving constantly – it's a moving target. What is acceptable one day is not OK the next. You don't know where the line is so it's easy to cross it'.[164] Even Austin, who described the social rules as 'predictable to an extent. They're based on past practice', on the other hand also admitted that '… there is no guarantee that [practice] will continue like that'. 'It's grace and favour, it's not law'.[165] The interviewees were all very aware, when pushed on the sustainability of their work, of their overall vulnerability to being shut down at any time without notice should circumstances

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162 Mothers' Arms, Interview 24.

163 Prince of Peace CEO, Interview 9(i).

164 Red Thread, Interview 22.

165 Lawyer for New Grace, Interview 14(i).

change: 'All of us could be stopped at anytime from doing what we're doing';[166] 'Registration would mean we could work more smoothly, and feel safer if the officials we deal with are replaced by people with different ideas';[167]

> This is the most frustrating feeling in China – you're never 100% safe or on solid ground. This project, it's big, it's good, we've put so much into it. But in a week they could bring us down. But that's also the beauty of China! Nothing is radical here. There's always room for negotiating.[168]

Some have intentionally adopted a transient model of care with this in mind, and Prince of Peace and Mustard Seed are both pursuing a long-term strategy of handover to Chinese leadership. This sense of vulnerability is indicative of a belief that while foreign foster homes may be tolerated and permitted for the time being, within fairly narrow parameters, in contrast to formal but vague and generally marginalised laws and policies, the shadow of such laws and policies is neither vague nor ineffective.

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166 Loving Embrace, Interview 19.

167 Mothers' Arms, Interview 24.

168 Good News, Interview 13(i).

PART D: CONCLUSION

CHAPTER TEN: CHINA'S LOCAL NEGOTIATED ORDER

1 Contextual Considerations

The starting point for the field research on the private orphanage sector was to ask what roles unregistered non-state institutional actors, both indigenous and foreign, are playing in the care of orphaned and abandoned children in China today. These roles are shaped by the context in which they are emerging, namely an ongoing and gradual process of socialisation/privatisation of the Chinese welfare landscape. This process is in turn taking place in the context of dramatic shifts in economic policy, leading to tremendous welfare pressures that are exceeding the state's capacity. Welfare support continues to be unequally distributed geographically, and an ongoing challenge to China's development is glaring rural/urban inequality. Regional disparity in policy implementation is compounded by financial inequality among local authorities and a lack of comprehensive systems to define and coordinate the welfare duties of different branches of the state apparatus and ensure accountability. As 'small government big society' evolves nevertheless, and the previous government monopoly on charity and welfare is broken down, NGOs continue to encounter an apathetic discourse regarding the concept of charity, which can be traced, at least in part, to aspects of both Confucian and Socialist ideology. The confluence of these various economic, social and cultural factors is evident in the government's 'contradictory feelings' about NGOs, and the ongoing, shifting tension between promoting welfare pluralism on the one hand and guarding against the potential threats perceived as inherent in civic organisation on the other.

The balance currently rests in favour of officially strict regulation of NGOs, with legislation and policy providing a fairly clear path to registration for both Chinese and foreign-run organisations. However, in practice, full legalisation in accordance with the laws on Social Organisations, PNEU and Foundations is not an easily attainable goal, due to registration being contingent on gaining government support in the form of a professional supervising unit or 'mother-in-law'. Moreover, for many grassroots NGOs, the goal of formal legal status is either not in sight, or not regarded as a necessary aspect of legitimacy, and thus not pursued. A conspicuous gap in the NGO regime inhibits foreign non-foundation organisations from seeking registration in the absence of influential political ties and capital. The overwhelming majority of China-based NGOs continue to operate outside the regulatory framework, either registered as commercial entities (and subject to periodic, unforeseeable crackdowns on the use of this creative circumvention of MCA oversight) or without legal personality. Researchers point to the chilling effect of the ambiguous and irregular state of the sector, with the attendant sense of vulnerability and insecurity functioning in practice as a means of allowing civic organisations to play a role in social development but with checks and guards against the threat of the social solidarity and advocacy they potentially represent.

Overall the realm of Chinese civil society is best understood by reference to a spectrum of NGO autonomy and distance from government. The 'mothers-in-law' (often GONGOs or other groups with close government ties) of registered organisations provide the starting point of a system of cascading oversight, as less formal ties and relations among registered and unregistered groups with aligned interests develop. In this layered space, government itself becomes a definitionally problematic notion in terms of the boundaries between state and society. Vertical and horizontal space within 'the state' continues to result in inconsistency in NGO

oversight across localities (as devolved powers are interpreted and implemented de-centrally) and among bureaus and departments. Further, the entire regulatory system, with its balanced considerations and uncertainties and complexities, is constantly shifting in reaction to top-down and bottom-up events and policies, compounding ambiguity and uncertainty. Local officials are at the confluence of these factors, 'multiply positioned within different regimes of power' and thus 'subject to … varying discourses of accountability'[1] and influence.

This theme of transition and transformation is also evident in relation to the second set of factors influencing the role of private actors in caring for orphans, namely the characteristics of those working in the field and the recipients of their aid. The world of private orphan care is one in which issues of religious mission, foreign participation and child abandonment are fore-grounded, issues in relation to which social and political discourse has been gradually changing in the years since the founding of the PRC. In the case of the Catholic church, the transition has been away from a sharp approved/underground distinction, towards a less certain demarcation between the legally permitted and the illegal yet (mostly) tolerated. However the legacy of decades of well-remembered hostility and antagonism between officials and the church remains evident in the discourse and defensive posturing of many within the unofficial Catholic church, thereby impacting on the nature of current government-church interaction. The other main set of actors in the field are foreigners, many of whom see their work in China as an act of spiritual ministry or mission. Their reception and engagement with Chinese society and state must be considered in light of the special history of foreign mission orphanages, and China's more recent defence, expressed through policy and media, of contemporary state orphan care in response to

1 Gupta (1995) p 388.

perceived attacks and condemnation by predominantly Western sources. Finally, the demographics of the children cared for outside of state welfare institutions, prevailing social and cultural attitudes to their rights and entitlements, and the complex nexus between the politically high-stake issue of birth planning and the arguably consequent vulnerability of such children, are highly salient contextual features of the role played by non-state orphanages. As a predominantly disabled population, in a culture in which disability is a marked line of value stratification among children,[2] and in which informal adoption is, accordingly, rarely a feasible pathway after abandonment, the children resident in the case study homes constitute a socially problematic group. Disability is apparently a key indicator of abandonment and institutionalisation. Added to this is a dominant political rhetoric concerned with protecting the legitimacy of birth planning policies, rhetoric which functions as a disincentive to acknowledging and addressing the evident connection between disability, population control and abandonment, and the correspondingly large numbers of abandoned children who are not receiving the protection of state welfare measures.

2 The Role of Private Orphanages

These multiple contextual factors shape the role of non-state institutional actors, both Chinese and foreign, in caring for the 'lonely children' of China. The government continues to maintain an ostensible monopoly on institutional and short-term foster care of orphans, consistent with the objectives of maintaining tight control over civic organisation and religious-based and foreign-led activities. On the other hand, the inadequacy of state provision is demonstrable in two ways. First, a lack of rural facilities has resulted in an unknown number of *de facto* unregistered orphanages arising in areas

2 Refer to discussion above at pp 98 and p 166–7 ('further stratification').

inadequately served by state orphanages, many run by the underground church, and caring for unregistered 'black' children on an *ad hoc* basis. Secondly, the standard of care provided in urban welfare institutions is considered by many, both within China and in particular by foreigners importing their own standards and expectations regarding child care, inadequate or open to improvement with support and assistance, leading to the rise of foreign foster homes caring for registered welfare recipients in an informal and mostly undocumented and unrecognised manner.

As private orphanages continue to persevere, the cautious evolution of even a sector such as this in which multiple politically sensitive aspects intersect, is a clear example of the ongoing transition from 'welfare statism' to 'welfare pluralism', and an increasing openness on the part of government to non-state provision of services. In the current case, this bottom-up openness occurs when local confluences of historical, social, political and legal factors result in equilibriums emerging to suit those localities. Further, the spontaneous emergence of non-state actors to fill gaps in rural welfare provision is an important feature of the ongoing rural/urban divide that pervades modern Chinese welfare provision regimes. Beyond these implications for social policy research are broader social implications in terms of the outcomes for children resident in non-state institutions. Just as Wang demonstrates the drawing of a line of stratification among Chinese children in terms of their health and *suzhi* (quality),[3] the emergence of non-state orphanages, in which children generally lack *hukou*, has resulted in a line of stratification among orphans in terms of their access to basic citizenship entitlements. Similarly, those orphans and foundlings who are cared for by (urban) state institutions are increasingly likely to be cared for by foreign foster homes, resulting in access to higher adoption prospects and standard of living in the interim, compounding

[3] Wang (2010), above in Chapter Three at 2(d) 'Status of the (Chinese) Child' (p 95).

the rural-urban stratification among vulnerable children.

3 State-Home Interactions: Analysis, Reflections and Implications

The State-Society Interface

Building on the ethnographic overview of both types of home, this study sought to elucidate the nature of the interactions and relationships between such homes and the different layers of government they encounter, and the modes by which government officials oversee and regulate the sector. In relation to both Chinese private orphanages and foreign foster homes, a delicate balance has emerged between, on the one hand, top-down pressure to restrict private actors from caring for orphans, particularly in a way that could lead to subversion or embarrassment, and, on the other, bottom-up pragmatic considerations. It was shown in relation to the indigenous orphanages of Part B that the *prima facie* 'missing role' of the state in law, regulation and policy-making belied a complexity of highly paternalistic state-orphanage relationships. There was a notable lack of preoccupation on the part of Chinese orphanage operators with achieving formal registration as a means to legal protection and certainty. On the other hand, informal, flexible and paternalistic negotiations with local officials were seen, when needed, as an important determinant of social/political legitimacy, and the preferred means of ensuring adequate operational outcomes (a finding which closely accords with, and goes some way to explaining, the oft-observed tendency of Chinese grassroots NGOs to be 'dependent on the charisma of certain individuals for their operation').[4] Formalised relationships with the state were seldom sought; rather, the

[4] Xie (2011) p 154.

Chinese private orphanages generally evinced satisfaction with informal, *ad hoc* interaction or *guanxi* (connections) with local officials as and if necessary for instrumental/pragmatic reasons, such *guanxi* being very often premised on a historically rooted 'us/them' oppositional binary. Extra-legal regulation, also of a paternalistic tone, was equally a feature in relation to the foreign foster homes. However, the greater financial power, with potential for incidental benefit to local officials, and the administrative capability of the foreign homes, meant that the foreign foster homes generally evinced less of a sense of disempowerment vis-à-vis the state than those of Part B. Specifically, they were more eager to pursue, and were more capable of progressing towards, formalised, politically-leveraged relationships with state officials, including at higher levels of government, as a means to securing future operations and expansion. Legality was not only seen as instrumentally valuable, but was also more likely to be ideologically esteemed among the foreigners in the field, however only to the extent that legal restrictions did not preclude compliance with the higher normative force of one's felt moral duty to orphans.

Structures of power and capacity were a marked point of comparison between the Part B and C homes. The playing out of norms, relationships and processes is mediated by such structures, which likely have a significant impact on how local actors understand and describe their experiences of the state-society interface. As Gupta argues,

> [t]here is no obviously Archimedean point from which to visualise 'the state', only numerous situated knowledges. … Constructions of the state clearly vary according to the manner in which different actors are positioned. It is therefore important to situate a certain symbolic construction of the state with respect to the particular context in which it is realised.[5]

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5 Gupta (1995) p 392.

Given their lack of access to international sources of funding, and often humble beginnings as unplanned default homes for foundlings, the Chinese private orphanages were generally disadvantaged as compared to the foreign foster homes in terms of the 'social capital' brought to local negotiations. The burden and legacy of antagonistic interference of their church-based activities by officials, combined with their rural isolation and lack of access to capacity-building support, made the Chinese orphanages less likely to be able to engage in negotiation effectively and build up their social and political legitimacy by demonstrating care-giving and administrative capabilities.[6] The situation of such isolated, disempowered organisations gives rise to at-times ambivalent or antagonistic perceptions of the state, which can be compared with Schwartz and Shieh's more optimistic assessment of negotiated state-society relationships:

> As the state increasingly turns to social organisations to take on additional responsibilities … non-state actors search for opportunities to embed themselves within the state, and to influence it, while drawing on the state's resources. The state-civil relationship is a 'negotiated', symbiotic one, with non-state actors and the state benefiting from the interactions.[7]

Foreigners in the field, on the other hand, generally displayed a greater ability to marshal legal advice and professional and media support, and to use their significant contributions to the state welfare system (collectively, a contribution which is now, after over two decades of foreign foster home activity, widely relied upon and in some cases highly esteemed both socially and politically) as leverage in local and central interaction. Such structures of power are significant for how they impact particular state-society interactions and the perception of social actors thereof.

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6 Compare to Schwartz and Shieh's optimistic assessment of negotiated state-society relationships

7 Schwartz and Shieh (2009) 13–14.

This study has brought to light an interesting example of an oft-observed phenomenon in China, and elsewhere in socio-legal literature, the law/practice gap. However, moving beyond such a focus on the formal, law-centric mode of oversight (regulation, to return to Shieh's multidimensional tripartite framework), the study examined in greater depth the rules, norms, structures and processes that comprise other (non-legal) modes of state-society interaction. Examples of regulation, negotiation and societalisation were all seen in the case of both Chinese private orphanages and foreign foster homes. The playing out of the different factors on which legitimacy and certainty are contingent attests to the need for an approach to the China civil society/corporatist debate which allows for 'a possible continuum of associational structures and experiences' from 'state-dominated' to 'autonomous',[8] as argued for by scholars such as Shue, Ma, Saich and Shieh. Regulation, as used by Shieh to mean formalised oversight and control of organisations, is observable in the case of the minority of homes which have sought and obtained official recognition as NGOs, and are thus subject to reporting requirements, formal visits and government input regarding the scope and direction of their mission. Importantly, all of these homes began from a position of informal recognition, with negotiated relations with the state leading over time to more formal, regulation-type interaction.[9] Further, only those homes capable of demonstrating high quality care, and capable of negotiating the local state-society relationship astutely, were able to make this transition (a somewhat paradoxical feature of the sector, given that it is the lower quality, low-capability homes that would probably benefit most from greater support, oversight and recognition from government).

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8 Shue (1994) p 77.

9 The finding is consistent with Shieh's thesis that the modes of regulation, negotiation and societalisation are not mutually exclusive, but overlapping and interrelated, and evolve over time (2009, pp 23–24).

The line between regulation and negotiation (meaning consensual and generally informal interaction with the state) is not as defined as the tripartite model might imply. Those homes that have sought to formalise their legal status in China through registration (Rainbow House, Shooting Star, New Grace Foundation) also evinced confidence in their ability to negotiate the terms of such engagement and maintain financial and administrative independence from the state. The majority of homes in this area of charitable activity were developing evolving relationships with local officials lying somewhere on the spectrum from 'negotiation' to 'societalisation' (meaning tolerated by, but not partnering with, the state). However these various and overlapping modes of interaction do not uniformly describe symbiotic relationships of mutuality – there were, in addition, also examples of repression and antagonism. These processes, of circumventing or coping with state disapprobation, or negotiating state (passive) tolerance or (active) support, were overwhelmingly occurring with lower level officials, and usually evolving at a very gradual rate towards greater security and openness over long periods of time. Generally, to use an analogy raised by Madam Leng of Star Village, the homes were gradually but definitely trending, over the course of years of operation, from 'red' to 'amber' to 'green' in terms of the perceived state attitude to their permissibility. Currently, only a small number of homes have attained a formal 'green light', and all of these sought such formalisation only after many years of operating in the 'red' or 'amber' zones. Where such formal recognition was present, the state/society interface was generally occurring at a more senior level of government bureaucracy, and highly dependent on the balance of present and anticipated benefits to/burdens on state officials and departments (that is, primarily dependent on the demonstrated standard of care and *mafan* (trouble)-avoiding behaviour of the homes after years of informal operations).

In relation to homes operating without formal approval and registration, the legal rules purporting to restrict or prohibit such activities were for the main part relegated in favour of informal norms of behaviour and discretionary oversight (although the state's ability to invoke such formal rules in the event of unsatisfactory or undesirable behaviour on the part of those acting beyond the legislative framework was an evident factor in the balance of power undergirding negotiation processes, as neatly illustrated by Hope's planning law violation incident).[10] Relating mainly to activities of a religious nature, or with the effect of drawing attention to perceived shortcomings of the state orphan welfare system and the social issue of abandonment, such norms were widely understood by successful actors in the field. These extra-legal norms were frequently more effectual and salient in practice than official law and policy, and their contravention was expected to bring increased state scrutiny, pressure and restrictions. Provided these norms were observed, and provided the homes were not engaged in practices such as child trafficking or abuse/neglect, the expectation of operators was that they would ordinarily be permitted to continue helping orphans, under the exercise of favourable local discretion or 'blind eyes'. Such 'law beyond government' is a central feature of the maintenance of this space of order, and of the governance beyond [formal] law occurring therein. The establishment of a sense of security and confidence in one's continued ability to operate at the margins of legality was generally tied, whether explicitly or otherwise, to an understanding of those norms and an ability to gauge how far their boundaries could safely be pushed and manipulated. More astute players in the field grew more confident, over time, in their ability to negotiate the limits of acceptable behaviour; these players were willing to seek 'friends in higher places' and foster strategic partnerships, on the basis of their track record in China to date, with

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10 Discussed in Part C Chapter Eight at pp 234–5 above – 'We panicked, we thought the bulldozers were coming'.

politically influential players, thus strengthening their social and political legitimacy.

This situation of 'law beyond government' can equally be thought of as one of 'government beyond law'. That is to say, local officials were themselves engaging with and contributing to the development of those extra-legal norms and processes, including by bringing to bear the influence of their (formalised) coercive power in shaping state-society local interaction. This is an important point of distinction from other classic 'law beyond government' examples, such as Sally Falk Moore's seminal study of the internally generated rules of semi-autonomous social fields.[11] Moore conceptualises social fields, such as the world of New York garment traders, as arenas capable of generating rules and coercing or inducing compliance to them. These rules constitute the defining processual characteristic of social fields, and render them somewhat autonomous from government influence, but despite these (varying) degrees of autonomy, social fields are nevertheless subject to invasion or penetration by formal (external) government-legislated rules attempting to direct change (the success of which relates to the strength and penetrability of informal (internal) socially-enforced rules). In the present case, the social field in question is comprised of the activities of private orphanages. But what is striking about the informal 'laws beyond government', and is an important finding that goes to the expectations and attitudes of local officials regarding social control and the tools thereof, is that the 'semi-autonomous social field' in question is comprised of both civil *and* state actors.

There seemed to be no expectation, on either side of the state-society relationship, that the relationship would be shaped, constrained or governed by formal legal rules or law (except in cases where informal rules were pushed or broken, in which

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11 Moore (1973).

case a show of state power would be anticipated). In fact, looking at the general expectations, understandings and meanings held by actors in the field, the sector appears notably 'non-legal' in nature, with informal relationships trumping formal structures. While there was variance among interviewees as to whether law *should* be available as a standard to be invoked in dealings with officials, there was uniformly an expectation that law, rather than constraining and standardising both sides of the state-society equation, would instead only be used as a tool by local officials if needed to supplement informal processes of negotiation and paternalistic exercise of discretion. This finding challenges law-centric assumptions about the maintenance of state-society relationships and roles, but was not treated as at all unexpected by Chinese interviewees, who commonly evinced a perception of the government as deliberately taking a 'one eye open, one eye closed' approach to many areas of regulation. In the resultant, at-times ambiguous, regulatory landscape, demarcations between lawful and unlawful, tolerance and promotion of social fields beyond the reach of the law, become somewhat unclear. This seems to have resulted in, at times, very effective local government oversight of a supposedly non-legal sector, which is allowed to exist and grow, albeit cautiously and accompanied by a large degree of self-censorship. The extra-legal norms, relationships and processes were generally spoken of as affording players in this field some sense of security, certainty, and an ability to negotiate in a somewhat predictable and ordered manner. On the other hand there was a widespread acceptance that doing charitable work in China on the margins of an ambiguous legal landscape, at least for now, necessarily requires tolerance of an ongoing sense of vulnerability to the caprice of both local and central government, and subject to discipline if boundaries are pushed too far. This state of affairs, with aspects of security and insecurity, confidence and vulnerability, was widely accepted by both Chinese and foreign interviewees as an inevitable feature of doing such politically contentious work.

This study thus bears witness to the gradual, cautious yet steady growth of spheres of social association in modern China, and affirms the multidimensional nature of their modes of interaction with the state both locally and centrally, in line with Shieh's approach. The local perspective introduced herein has complemented the existing emphasis on formalised NGOs interacting (generally) with higher levels of the state bureaucracy, and added detail to our understanding of China's complex civil society landscape. By introducing the perspective of unregistered, rural and relatively inaccessible organisations, this study has drawn attention to certain underexplored features of the Chinese civil society landscape. The simplistic assumption that tight, corporatist-type approach to regulation has resulted in the majority of organisations acting beyond the state's control, and therefore that civil society can be said to have emerged, despite those corporatist features, has been challenged by examining the less obvious modes of control operative beyond the legal framework, and the impact of such control on the service-advocacy divide of NGO activities. The institutional ambiguity, fluidity and messiness that characterise NGO regulation generally/centrally are also pronounced locally, and particularly evident in the process of gradually building up trust, capacity, legitimacy and recognition, which in some cases culminates in effective appropriation of non-state operations by an increasingly supportive state, leading in turn to enhanced growth and standards. Thus the assumption often made in existing Chinese NGO literature that unregistered organisations do not experience too much government interference has been countered by an in-depth analysis of the different state-society experiences of homes at different places on spectrums of capability and autonomy. A related notable feature of the 'associational continuum' highlighted by that analysis is the connection between, on the one hand, an organisation's registration prospects, political and social legitimacy, security and longevity, and on the other hand, its proximity to, and recognition by, state officials at

various levels. As Schwartz and Shieh point out, for NGOs in China, 'autonomy from the state … often results in decreased influence',[12] a feature of civil society that is better captured by the sociological as opposed to political definition thereof (the proliferation of government-operated NGOs is a related feature of the Chinese NGO landscape). This further problematises the purported division of Chinese state from society that underpins much of the civil society/corporatist debate, and the elusive nature of 'the state, conceived of as a substantial entity separate from society'.[13] In a system in which stability appears largely dependent on an organisation's ability to negotiate government ties and support, Shieh points out that 'civil society' is less likely to constitute a political counter-force to the hegemonic state. Assumptions about the emergence of civil society in a normative sense, as a 'condition of liberty',[14] must be checked if, as Shieh argues, 'the majority of NGOs in China see their future as being not in opposition to, but in collaboration with, the state … they make up that "non-critical" part of civil society that is too dependent on the goodwill and resources of the state to challenge it openly'.[15]

Legitimacy, Legality and the Role of Law

> This is a system in which administrative resources and mechanisms and personal ties play a greater role than laws in shaping the negotiating environment. It is a system that on the one hand allows a great deal of flexibility in terms of how policies and laws are implemented, but on the other hand can be arbitrary and capricious. In other words, behaviour in this system is guided more by administrative rank and control over resources, and the fear of

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12 Schwartz and Shieh (2009) 10.

13 Abrams (1988) 58, discussed above at Chapter Two 2(a) 'Nature of Chinese 'Government" (from p 51).

14 Gellner (1993) in Madsen (1998).

15 Shieh (2009) 38.

state reprisal, than by [legal] rules.[16]

Given the dynamic and unclear state of the legal landscape, it is unsurprising that the touchstone for NGO security and capability in the case sector appears to be legitimacy and not legality. The longevity and success of actors in the field was dependent not on compliance with legal rules and duties, but rather on their ability to negotiate the state in a way which enhanced and maximised the political, social and administrative legitimacy[17] of their actions.[18] Legal legitimacy, in the sense of recognition and acceptance by formal law-based institutions (registration) was, when achieved, generally only attainable after years of building up recognition and acceptance in social, bureaucratic and political spheres. For many organisations, legal legitimacy was not considered necessary for operational security and capabilities, it being very often possible to attain acceptance by local officials and society without needing to be first in compliance with formal law. Legality was accordingly often not considered an important goal, and the 'legal' aspect of legitimacy was understood and treated in practice as subordinate in value to its other aspects. Rather than being dependent on compliance with formal law, the state-society relationship at this local level was essentially dependent on different competing considerations relevant to political/social/administrative acceptability, factors which governed the legitimacy and therefore longevity of 'illegal' activity but which also shifted over time and differed from case to case. For example, a general theme in NGO studies, highlighted by the corporatist perspective and echoed at the grassroots level of this study, is that the state-

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16 Shieh (2009) 27.

17 Gao's four-part legitimacy typology ((2000), translated in Han (2011) 35), discussed in Chapter Two above at 2(h) 'Unregistered NGOs: The Question of Legitimacy' (pp 68–74) and elsewhere.

18 This point relates closely to the many existing studies on the role of *guanxi* in Chinese business, and the use of one's *guanxiwang* (network of social connections) to acquire social capital and acceptance of an organisation in its environment: see Ahlstrom and Bruton (2001); Carlisle and Flynn (2005).

society relationship is such that officially recognized NGOs tend to be far more involved in service provision than advocacy: 'We can now hear the voice of civil society … However the voices do not have an institutional position in the process of decision making'.[19] Opportunities for such advocacy and participation are very much contingent on the sensitivity of an NGO's chosen field of action, or, we might say, the social and political legitimacy of the organization.[20]

Despite the divergence among the case study homes in terms of the positioning of actors, an interwoven theme across both the Part B and Part C findings was that of discipline and paternalism. Most notably at the local state/orphanage interface, and regardless of where a particular home was located on the spectrum of security and apparent permissibility, I repeatedly encountered incidents, discourse and interpretations which echoed Stephens' thesis of disciplinary/parental social control in imperial China. Interviewees spoke of scoldings, threats and beration, and of feeling at the mercy of local officials regardless of what (scant) protection they ought ostensibly be afforded by law, policy and procedure. Some homes, far from trying to avoid subordination in an authoritarian state-citizen relationship, were evidently relying on a paternalistic strategy by embracing connections, and the protection of, friends in high places.[21] These paternalistic state-society relationships, and the centrality of the concept of legitimacy to the state-society interface in China, are relevant to understandings and expectations relating to the concept and role of law in modern Chinese culture. The marked concern with legitimacy over legality on the part of both officials and Chinese

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19 Li (2011) p 66.

20 See further, for example, Shen (2011) on the relatively warm reception of women's NGOs in modern China, the goal of gender equality pursued by such NGOs coinciding with government policies on women's liberation and social development.

21 Compare with Kohrman's observation on the strategy of the China Disabled Person's Federation, seeking reliance on Deng Pufang (2005, p 95).

interviewees, vis-à-vis the nature of non-state orphan care, demonstrates that the legal/illegal binary presupposed by much socio-legal literature is not apposite in the Chinese context. The aptness of the distinction is further called into question by the degree to which the lawful/unlawful boundary is so thoroughly blurred in this area of regulation. As Gupta argues in a different context, such blurring can be evidence of the 'descriptive inadequacy of categories to the lived realities that they purport to represent'.[22] Rather than formal laws and policies determining the limits of NGO activity, this sphere of activity is characterised by a spectrum of informal norms, unspoken but widely understood by those successfully persevering in the face of ambiguity and uncertainty, described above as 'law beyond government'. Compliance with these rules is an important aspect of achieving and maintaining legitimacy in the eyes of officials, and therefore their tolerance or approbation. Moreover, the Part B homes evinced a preoccupation with (non-legal) legitimacy over legality as both functionally and intrinsically valuable; the Part C homes, on the other hand, were generally resonant with Western law-centric ideology in their esteem of legality, in the sense of an attempt to best comply with formal rules and policy, as both functionally and intrinsically important. An important conclusion to be drawn, therefore, is that the local 'legal culture' of China is best described as legitimacy-centric rather than law-centric, which manifests as an emphasis on negotiation and societalization over regulation – that is, the emergence of normative understandings, in the context of local state-society interaction, is predominantly taking place beyond formal law-based institutions, roles and rules, being more dependent on aspects of legitimacy than legality.

That is not to argue that the extra-legal nature of this sphere of activity is solely attributable to this type of legal culture. As Shieh points out, one important reason why

22 Gupta (1995) p 384.

the legal regulatory mode continues to be usurped by negotiation and societalisation is that 'the regulatory mode has been inadequate in keeping pace with changes in the NGO community', which has 'encouraged NGOs to engage in negotiation and societalisation to stay relevant and effective'.[23] However, it is argued that the peripheral role of law in this area of society (among others) is, at least to some extent, related to a Chinese tradition in which flexibility, *guanxi* (personal networks), *renqing* (human empathy and obligations) and individualised justice are generally esteemed over abstract, general and certain rules, despite central political rhetoric endorsing a move towards the rule of law. In this way, the Chinese legal sensibility just described can be seen as constitutive of Chinese culture, an 'extremely characteristic part of the entire social fabric',[24] and itself in part constituted by culture. This analytical perspective is an important corrective to the tendency in commentaries on Chinese law to attribute the notable reliance, in many areas of activity (such as business and NGO work), on *guanxi*, relationships and informal norms *solely* to a lack of adequate legal institutions and structures,[25] without also examining underlying culturally-entrenched values and expectations about how society is best ordered. Among Chinese interviewees, and some Westerners who had evidently adapted to the culture in which they found themselves, the dominant expectation regarding law was not that law would be impartially, consistently and unambiguously defined and applied, but rather that flexible norms would govern individualised, paternalistic relations with the state. This accords with Hintzen's description of China as a culture in which individualised moral decisions

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23 Shieh (2009) p 37.

24 Geertz (1973).

25 See, for example, Katherine Xin and Jone Pearce, 'Guanxi: Connections as Substitutes for Formal Institutional Support' (1996) 39(6) *The Academy of Management Journal* 1641, arguing that in China, 'managers cultivate personal connections to substitute for reliable government and an established rule of law' (p 1652); 'If laws and reliable government cannot provide protection to those wishing to conduct business, businesspeople will seek to create their own protection, drawing on the means available to them' (p 1655); Ahlstrom and Bruton (2001).

are traditionally emphasised above generalised legal rules, and law is viewed as subordinate to the 'dictates of morality', such morality being 'rooted in the very essence of reality and therefore constitut[ing] a more general and lasting truth than the more concrete stipulations of the law'.[26] Moreover, this was not widely regarded as problematic or, in fact, widely regarded at all, due to the emphasis in the field on legitimacy over legality, and discretionary, paternalistic relationships over law-governed, standardised interactions. While it may not be possible to speculate to what extent these features of a 'non-legal' local society are inherent in Chinese culture and a preferred alternative framework for structuring social order, and to what extent they are simply a 'fill-in' necessitated by a lack of adequate, standard and enforced legal institutions and norms, it is important to ensure that inquiries about the maintenance of an ordered and predictable state-society interface in China are approached with a degree of reflection and awareness of one's underlying culturally-shaped assumptions about the normative nexus between law and order. It is apparent from the case of this field of activity that Chinese expectations, meanings and experiences relating to law and order, as evident at the level of the local state-society interface, are vastly different to those evident in Western law-centric societies. This 'micro' picture adds distinction to existing 'macro' narratives of central law-lauding rhetoric and China's ongoing transition towards rule by/of law. It demonstrates an ongoing embedded cultural preference for non-legal order, for *li* over *fa,* and continued state-paternalism which resonates with Stephens' and Dowdle's construction of China as an arena in which 'small-world' environments can be and often are coordinated and ordered by a disciplinary, as opposed to legal, framework.

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26 Hintzen (1999) p 183.

Legal Fictions and Legal Sensibility

On the other hand, formal laws are not completely irrelevant, with the shadow of the threat of their enforcement being an important element in the power-balance of those relationships and games, by contributing to the perceived disciplinary power of the state. Further, in this (non-)legal culture which features 'government beyond law', a possible symbolic role of legislation and policies, law as a façade, has also been demonstrated, which should be investigated further in future studies on China's law/practice gaps. In the current study, formal laws, which ostensibly regulate orphanages in China, as an official mode of expression,[27] allow the maintenance of a certain 'presentation of self' – namely, that 'only government cares for orphans in China'. This points to a possible function of formal laws as a 'repository of aspirations',[28] symbolism, ideology and rhetoric, where such rhetoric is of great social and political importance, however ineffectual and irrelevant such laws might appear in practice. Another way to describe this hypothesis is that formal laws at times constitute a legal fiction with a stabilising function.[29] If that be the case in the field of orphan care, it is possible that attempts to legally codify and tighten the permissibility of non-state orphan care would in fact, by drawing attention to the gap between ideology and practice, and due to the importance

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27 In his ethnographic study based on formal and informal interviews with Chinese intellectuals, Link notes a common contrast between official and unofficial modes of expression in China (although this is of course not necessarily a uniquely Chinese contrast): Perry Link, *Evening Chats in Beijing: Probing China's Predicament* (W W Norton & Company, London 1992).

28 Cotterrell, referring to Durkheim's view of law as 'an expression of ideals. It has moral meaning. It is a repository of aspirations …': Roger Cotterrell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh University Press, Edinburgh 1999) 16. For other examples of legal texts, without direct effect but arguably serving symbolic functions, see Patrick Wormald, *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (Hambledon Press, London 1999) and Paul Dresch, *The Rules of Barat: Tribal Documents from Yemen* (Centre Francais D'Archaeologie et des Sciences Sociales, Sanaa 2006).

29 Yngvesson (2010, p 80) makes a similar claim in relation to other legal fictions associated with transnational adoption, arguing that '[a] key distinction in keeping adoptions clean is the legal fiction that money is never paid for the child but only for services performed in connection with the adoption. … baby-selling … threatens our very understanding of what it means to be (a person) and in this sense destabilizes not only the child who has been sold, but society itself'.

of this presentation of self, lead to the closure of socially-useful informal practices, a disincentive both on the part of officials and social actors to seeking more formalised structure of the field.[30] In other words, the gap between law and practice may itself be performing a function – and in this sense be a *productive* contradiction – by allowing controlled, cautious, experimental growth of the sector. Such a conclusion would challenge law-centric assumptions that ambiguous regulatory policies necessarily 'chill' the development of the sectors they purport to regulate.[31]

This theme of fiction and symbolism was paralleled in the finding that many Westerners in the field sought to add a veneer of legality to their work, despite it on the whole being clearly outside the legal framework, due to their evident regard for law-abidance as something intrinsically or morally valuable. The contrast among Chinese and foreign interviewees here points to different ideas about the value and meaning of law, demonstrating the dominant legal culture of China in juxtaposition with Western ideas. Following an encounter with another legal culture, many Westerners in the field had evidently adapted to the dominant Chinese discourse with its emphasis on flexibility, relationships, individualised justice and a paternalistic/disciplinarian state-society relationship. However attempts of some to add a veneer of legality as a means of achieving a sense of legal legitimacy seemed connected to a perceived nexus between law-abidance and justice or morality, a nexus not evident in the Part B interviews.[32] On the contrary, Chinese interviewees on the whole were more likely to appear comfortable within a state-society relationship premised on discretion, and in which law, when

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30 Johnson (2004, 164) makes the point in relation to informal adoption practices.

31 Ashley and He (2008), above at p 265.

32 As noted above, Hintzen (1999) argues that traditionally in China, moral outcomes are more associated with discretionary, individualised decisions than with the application of generalisable legal principles or rules.

relevant, could be anticipated to be used as one tool at the state's disposal for regulating social activity (which points to local expectations of 'rule by law' rather than 'rule of law'). Most players in the field demonstrated deftness at functioning in the absence of legally-defined relationships, with recurring reference in interviews and behaviour to game-playing, trust-building, and keeping up appearances. Thus we see that the role of law in the transitioning society of China is subordinate to other structures and processes, with law as a concept not constructed locally in the same way as it is in Western law-centric contexts. This is not to presume that thirty years of law institution building and legal reform has not begun to influence this prevailing 'legal sensibility', but as Peerenboom notes, 'the development of the legal system hinges on more than the ideas of the top leadership'.[33] The local state-society interface visible in the current snapshot demonstrates that the central law-lauding rhetoric has only begun to penetrate China locally, with themes of discipline and paternalism continuing to dominate trends of adjudication and equality in practice. If, as Peerenboom claims, rule of law is a function of both institution-building and the creation of a 'culture of legality',[34] studies such as the present are important for adding to the picture of to what extent such a culture of legality can really be said to be present locally.

4 Practical Implications

A number of practical operational and social outcomes and implications of the prevailing approach to governance of private orphanages and foster homes have been touched on in this study. It was shown in Parts B and C that both types of home presented therein face a number of practical obstacles in their establishment and

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33 Peerenboom (2002) p 223.

34 Peerenboom (2002) 221.

continued operation, most notably relating to banking, visa and employment restrictions in the case of foreign-run organisations, and *hukou*, finances and governance in relation to Chinese private orphanages. Feeding both into and out of these practical limitations is the over-arching issue of capacity building and growth prospects. A paradoxical feature of the current approach to formalising and legitimising unofficial orphanages is that it appears that only after many years of 'tried and tested', politically acceptable operations will a home have any prospect of gaining more formal recognition and perhaps registration, with its concomitant benefits such as enhanced certainty, sources of finances and political support. However, homes which are more rurally isolated, with less access to administrative and financial capabilities and support, or the ability to negotiate influential allies, are less able to demonstrate high-quality or high-value care provision, and thus unable to expand and grow. The foreign foster homes were notably more engaged with plans for future improvements and new projects, with a sense of disempowerment generally evident in relation to the Part B homes. However a point of commonality for both was what Ashley and He term the 'chilling effect' of ambiguous regulatory policy:

> … the ambiguous legal status and resultant irregularities stemming from these organisations' ad hoc arrangements serves as an effective governmental tool to keep organisations in check in certain respects – namely, it keeps them in fear of the government's selective enforcement of registration, accounting and other requirements that they are forced to bend. … Knowledge of their own vulnerability … in turn makes NGOs hesitant to wade into questionable political waters. Ambiguity creates a chilling effect – a cheap and powerful regulatory tool.[35]

In this sector of charitable activity, the 'questionable political waters' in which there is a notable absence of wading refers to mobilisation of orphan-care networks and civil solidarity in the sector, and advocacy for both reform to orphan provision and

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35 Ashley and He (2008) p 32.

'upstream' measures aimed at preventing abandonment in the first place. In accordance with the unspoken norms of the field, the success of homes which have managed to endure years of pressure and scrutiny from local and central officials appears at least to some degree contingent on their willingness to 'lie low' as needed and thus passively acquiesce to official fictional discourse that grants the state a monopolised, and successfully fulfilled, duty to care for orphans and foundlings.

Such low visibility further leads to the observation that this group of NGOs, despite being dominated by religiously motivated individuals and organisations, is on the whole an example of NGOs avoiding a *politicised* evangelical agenda. With respect to organisations engaged in proselytism generally, it seems that in recent years the Chinese Party-state has become more comfortable with Christian evangelism, and with organisations with openly Christian roots and motives. Hirono argues, based on three case studies of international religious agencies carrying out evangelical and social welfare projects in China today, that the Christian gospel, in certain forms, is increasingly viewed by the Party-state as complementary to the state's 'civilizing agenda', meaning it can no longer be assumed that Christian and government agendas necessarily conflict. Rather, based on Hirono's cases, it is only where the gospel becomes political that conflict arises. Hirono's example of a 'politicised evangelical agenda' is that of Oxfam, which has a notable agenda of community empowerment and rights-education.[36] In the current study, while almost all interviewees emphasised the importance of avoiding conspicuous proselytic activities in order to improve their security from official interference, it seems likely that it is the intersection of proselytism with politically contentious issues which would in fact arouse most

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36 Miwa Hirono, Civilizing Missions: International Religious Agencies in China (Palgrave Macmillan, New York 2008).

suspicion and sanction. Examples of such politically contentious issues would include inconspicuous intervention by foreigners in orphan care, highlighting shortcomings in state welfare provision and abandonment prevention, and the eschewal of submission to the Religious Affairs Bureau.

Whether or not this trend of self-censorship/self-presentation, and lack of momentum in the direction of calls on the part of private orphanages for reform and change is an intended or incidental effect of the (informal) norms and relationships of this field, the result is a social sphere in which any expansion, growth or impact on other spheres (such as policy, cultural attitudes to charity and the disabled, structures of power, and religious/foreign-driven mission) is cautious, soft and gradual at best. This feature is noted by researchers in relation to grassroots NGOs more generally. Lu's fieldwork on Chinese NGOs found 'widespread pessimism (or realism) about what they can achieve through their actions';[37] Ashley and He similarly argue that 'one defines one's goals within the limits of what seems possible' and that 'legal ambiguity combined with China's political climate seems to have shaped the overall agenda of China's grassroots NGOs to favour politically safe fields and politically prudent approaches'.[38] While it may be idealistic to presume that the reason central authorities have failed to take greater measures to prevent abandonment and improve orphanage standards is a lack of awareness or pressure from the third sector, there is an obvious contrast between this sector of charity and others, such as polio[39] or HIV activism,[40] in terms of

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37 Yiyi Lu, 'NGOs in China: Development Dynamics and Challenges' in Zheng and Fewsmith (2008) p 98.

38 Ashley and He (2008) p 83.

39 Kohrman (2005).

40 See, for example, China Development Brief, 'AIDS: Anger and Recrimination Block Progress in Henan' (Beijing 14 January 2008) <http://www.chinadevelopmentbrief.com/node/1276> accessed 3 June 2011.

the overwhelming emphasis on service rather than advocacy, and the lack of mutually supportive networks with defined policy agendas among orphan-aimed NGOs. Nevertheless, growth of services, however cautious, is evident, and arguably an important precondition to growth of advocacy and reform campaigns in the future as private orphanages consolidate the acceptable bounds of their role in China.

5 Concluding Remarks

Apart from its empirical and theoretical contributions to research and literature on the aforementioned themes of modern Chinese socio-legal scholarship, this study has sought to introduce stories of orphanages, foster homes, and those who live and reside therein. These stories contribute to a bigger picture of China's shifting social welfare landscape but are important in and of themselves, providing insight into the challenges and struggles experienced by charity workers as they operate in an uncertain and at times still hostile social sphere. Interviewees varied greatly in their degree of optimism regarding the rate of development of orphan care, and state-society cooperation in this area. While the advantage of 'government beyond law' is that it allows good work to be done for orphaned children despite the restrictions of formal law, if government is at all concerned with allowing more charitable individuals and groups to carry out life-saving work, the strategy or trend is not strong in the long-term. Children continue to languish in substandard state orphanages because it is so hard for organised, visible charities to intervene and assist in provision of care in a meaningful, large-scale way without attracting suspicion or causing the state to lose face. Some interviewees expressed hope that the informal, non-legal operations of private orphanages has contributed to a softening of the government's approach to the sector, and indirectly therefore to better care for orphans more generally. The sector is cautiously evolving,

and there is reason to presume it will continue to do so and to be hopeful such growth will lead to better outcomes for China's 'lonely children'.

> 怎么样的让孤儿很快乐？不管他们在私人的孤儿院还是在政府的孤儿院，最重要的就是他们心里的安全。私人的，政府的，各有各的益处–生活，心里的健康是最重要的。在他的心里，唯一的孩子就要自己的父母。法律应该让孤儿找到这种感觉。
>
> What will help orphans be happy? Whether they are being cared for by private institutions or government institutions, the most important thing is the safety of their hearts. Private, public, each has advantages – but the health of a child's life and heart is the most important thing. In her heart, every child simply wants her own parents. The law should be such as to allow orphans to realise this desire.[41]

[41] Interview with Deputy Secretary-General of the China Youth Care Foundation (Beijing, 28 August 2009).

APPENDICES

1 Glossary

China Centre of Adoption Affairs	中国收养中心	*zhongguo shouyang zhongxin*
China Charity Donation Information Centre	中民慈善捐助消息中心	*zhongmin cishan juanzhu xiaoxi zhongxin*
Foundation	基金会	*jijinhui*
Government-organised NGO (GONGO)	-	-
Non-Government Organisation (NGO)	非政府组织	*fei zhengfu zuzhi*
[PRC/Central] Ministry of Civil Affairs (MCA)	［中华人民共和国］民政部	*[zhonghua renmin gongheguo] min zheng bu*
Private Orphanage	非政府儿童福利院	*fei zhengfu ertong fuliyuan*
National People's Congress (NPC)	全国人民代表大会	*quanguo renmin daibiao dahui*
National People's Congress Standing Committee (NPCSC)	全国人民代表大会常务委员会	*quanguo renmin daibiao dahui changwu weiyuanhui*

Private Non-Enterprise Unit (PNEU)	民办非企业单位	*minban fei qiye danwei*
Professional Supervising Unit (PSU)	业务主管单位	*yewu zhuguan danwei*
State Administration of Industry and Commerce (SAIC)	国家工商行政管理总局	*guojia gongshang xingzheng guanli zongju*
State Child Welfare Institute	儿童福利机构 / 儿童福利院	*ertong fuli jigou/ ertong fuliyuan*
State Social Welfare Institute	社会福利院	*shehui fuliyuan*
Social Organisation (SO)	社会团体	*shehui tuanti*

2 Table of Interviews

	Name	*Type*	*Location*	*Interview Ref*	*Interviewee*	*Date*
1	Guanghui	Chinese-run orphanage (CO)	Beijing/Hebei	1(i) 1(ii) 1(iii) 1(iv)	Project Manager (Kramer) Visiting Physio Visiting Teacher Manager/Co-Founder (Sister Qin)	09.07.2010 10.07.2010 13.07.2010 13.07.2010
2	Our Lady's	CO	Beijing/Hebei	2(i) 2(ii)	Manager Co-Founder (Sister Chen)	20.07.2010 21.07.2010
3	Good Shepherd	CO	Shanxi	3	Co-Managers	25.07.2010
4	Home of Joy	CO	Shanxi	4	Volunteer Coordinator	13.10.2009
5	Rainbow House	CO	Beijing/Hebei	5	Manager/Co-Founder	12.07.2010
6	Star Village	CO	Beijing/Hebei	6(i) 6(ii)	Manager Founder/Director (Leng)	20.08.2009 09.08.2010
7	Chen Anhui/Rice Rescue	CO	Anhui	7	Volunteer Coordinator	04.10.2009
8	Wagner Foundation	CO Support Organisation	Beijing/Hebei	8	Project Manager (Father Thomas)	11.08.2010

9	Prince of Peace	Foreign-run foster home (FFH)	'Dongjian'	9(i) 9(ii)	CEO Co-Managers	01.09.2009 29.07.2010
10	St Matthew's	FFH	'Dongjian'	10	Co-Founders/Directors	29.07.2010
11	Compassion	FFH	'Dongjian'	11(i) 11(ii)	Co-Founder/Director Co-Founder	01.09.2009 28.07.2010
12	Friendship Outreach	FFH	'Dongjian'	12(i) 12(ii)	Founder Manager	28.08.2009 29.07.2010
13	Good News Training Centre	FFH	Beijing/Hebei	13(i) 13(ii)	Founders/CEO Founders/CEO	24.08.2009 20.08.2010
14	New Grace Foundation	FFH	Beijing/Hebei	14(i) 14(ii) 14(iii) 14(iv)	Legal Advisor Legal Advisor Founder/Director Founder/Director	05.09.2009 07.07.2010 17.09.2009 24.08.2010
15	Mustard Seed Creations	FFH	Beijing/Hebei	15(i) 15(ii)	PR Officer Manager	21.08.2009 11.08.2010

16	BICR	FFH	Beijing/Hebei	16	Founder/Director	27.08.2009
17	China Orphan Relief	FFH	Beijing/Hebei	17(i) 17(ii)	Founder/CEO Founder/CEO	25.08.2009 09.08.2010
18	Lydia's House	FFH	Shanghai/Jiangsu	18	Co-Founders/Directors	05.10.2009
19	Loving Embrace	FFH	Shanghai/Jiangsu	19	Co-Founders/Directors	08.10.2009
20	Bethany Care	FFH	Henan	20(i) 20(ii)	Director Head Doctor	24.09.2009 23.09.2009
21	Shooting Star	FFH	Beijing/Hebei	21	Legal Advisor	04.09.2009
22	Red Thread	FFH	Shaanxi	22	Founder/Director	27.09.2009
23	Mercy Home	Chinese-run foster home (CFH)	Beijing/Hebei	23	Co-Founders/Managers	25.07.2010
24	Mothers' Arms	CFH	Shanghai/Jiangsu	24	Co-Founders/Directors	08.10.2009
25	Hedong City	State welfare institute (SWI)	Shandong	25	Director	21.09.2009
26	Yellow Leaf	SWI	Shanghai/Jiangsu	26	Volunteer Coordinator	09.10.2009
27	Haihe	SWI	Shanghai/Jiangsu	27	Volunteer Coordinator	10.10.2009
28	Wish Project	NGO	Beijing/Hebei	28	Founder/Legal Advisor	25.08.2009

29	Care for Children	NGO	Beijing/Hebei	29	Founder	26.08.2009
30	Huiling	NGO	Beijing/Hebei Shaanxi Beijing/Hebei	30(i) 30(ii) 30(iii)	Public Relations Officer Public Affairs Director Founder (Meng)	26.08.2009 28.09.2009 05.08.2010
31	Right to Play	NGO	Beijing/Hebei	31	China Director	27.08.2009
32	CYCF	GONGO	Beijing/Hebei	32	Deputy Secretary-General	28.08.2009
33	Golden Bridges	NGO	Beijing/Hebei	33	Founder/Director	31.08.2009
34	Red Mountain	NGO	Shaanxi	34	Founder/Chairman	28.09.2009
35	CSR Pioneers	NGO	Shanghai/Jiangsu	35	Co-founder/Partner	7.10.2009
36	Home Sweet Home	NGO	Shanghai/Jiangsu	36	Co-director	12.10.2009
37	Shirley Zhao	General	Beijing Normal University	37	Researcher	05.09.2009
38	Yiwen Cao	General	Beijing Normal University	38	Researcher	05.08.2009
39	MCA China Charity and Donation Information Centre	Government organisation	Beijing/Hebei	39	[by email]	08.09.2009
40	NGO Service Centre	Government organisation	Beijing/Hebei	40	[by email]	21.09.2009

41	SD Charity Federation	Government organisation	Shandong	41	Director	21.09.2009
42	Retired Official	Government official	Beijing/Hebei	42	Ex-official	12.08.2010

BIBLIOGRAPHY

2008 China Civil Affairs Statistical Yearbook' *Ministry of Civil Affairs* (Beijing 22 June 2009) <http://cws.mca.gov.cn/article/tjbg/200906/20090600031762.shtml> accessed 21 December 2010

Abrams, Philip, 'Notes on the Difficulty of Studying the State' (1988) 1(1) *Journal of Historical Sociology* 58

Ahlstrom, David and Bruton, Gary, 'Learning from Successful Local Private Firms in China: Establishing Legitimacy' (2001) 15(4) *The Academy of Management Executive* 72

Alford, William, 'A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction' (1999) 11 *Cultural Dynamics* 193

Arendt, Hannah, *The Origins of Totalitarianism* (Secker & Warburg, London 1951)

Ashley, Jillian and He, Pengyu, 'Opening One Eye and Closing the Other: The Legal and Regulatory Environment for "Grassroots" NGOs in China Today' (2008) 26 *Boston University International Law Journal* 29

Bates, Robert and others, *Analytic Narratives* (Princeton University Press, Princeton 1998)

Baum, Richard and Shevchenko, Alexei, 'The 'State of the State" in Merle Goldman and Roderick MacFarquhar (eds), *The Paradox of China's Post-Mao Reforms* (Harvard Contemporary China Series, Harvard University Press, Cambridge 1999)

Béja, Jean-Philippe, 'The Changing Aspects of Civil Society in China' in Zheng, Yongnian and Fewsmith, Joseph (eds), *China's Opening Society: The Non-State Sector and Governance* (Routledge, Oxford 2008)

Bu, Xiaorong, 'Guangdong Meinian Yiwan Qiying (Ten Thousand Abandoned Infants per Year in Guangdong Province)' (1989) *DongXiang* 20

Burawoy, Michael, 'The Extended Case Method' (1998) 16(1) *Sociological Theory* 4

Carlisle, Elliot and Flynn, David, 'Small Business Survival in China: *Guanxi,* Legitimacy, and Social Capital' (2005) 10(1) *Journal of Developmental Entrepreneurship* 79

Chan, Chak Kwan, King, Lun Ngok and Phillips, David, *Social Policy in China: Development and Well-Being* (Policy Press, Bristol 2008)

Chen, Guangyao, 'China's Nongovernmental Organisations: Status, Government Policies, and Prospects for Further Development' (2001) 3(3) *The International Journal of Not-for-Profit Law*

China Development Brief, 'Frequently Asked Questions on Registering an International NGO in China' (Beijing 8 October 2004) <http://www.chinadevelopmentbrief.com/node/296> accessed 21 December 2010

China Development Brief, 'AIDS: Anger and Recrimination Block Progress in Henan' (Beijing 14 January 2008) <http://www.chinadevelopmentbrief.com/node/1276> accessed 3 June 2011

Convention on the Rights of the Child (adopted 12 December 1989) A/RES/44/25

Cotterrell, Roger, *Emile Durkheim: Law as a Moral Domain* (Edinburgh University Press, Edinburgh 1999)

Defoort, Carine and Peerenboom, Randall, 'Law and Order in China, I' (1999) 11(2) *Cultural Dynamics* 131

Deng, Meng, Poon-McBrayer, Kim Fong and Farnsworth, Elizabeth, 'The Development of Special Education in China: A Sociocultural Review' (2001) 22(5) *Remedial and Special Education* 288

Dowdle, Michael, 'Heretical Laments: China and the Fallacies of 'Rule of Law' (1999) 11 *Cultural Dynamics* 287

Dresch, Paul, *The Rules of Barat: Tribal Documents from Yemen* (Centre Francais D'Archaeologie et des Sciences Sociales, Sanaa 2006)

Ellickson, Robert, *Order Without Law: How Neighbours Settle Disputes* (Harvard University Press, London 1991)

Fairbank, John King, 'Patterns Behind the Tientsin Massacre' (1957) 20 (3/4) *Harvard Journal of Asiatic Studies* 480

Galligan, Denis, *Law in Modern Society* (Clarendon Law Series, OUP, Oxford 2007)

Gao, Bingzhong, 'The Question of Legitimacy of Social Organisations' (2000) *China Social Sciences* 2

Geertz, Clifford, *Interpretation of Cultures* (Basic Books, New York 1973)

Geertz, Clifford, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, New York 1983)

Gellner, Ernest, *Conditions of Liberty: Civil Society and Its Rivals* (Penguin Books, New York 1993)

Gold, Thomas, 'Tiananmen and Beyond, the Resurgence of Civil Society in China' (1990) 1 *Journal of Democracy* 18

Goodburn, Charlotte, 'Learning from Migrant Education: A Case Study of the Schooling of Rural Migrant Children in Beijing' (2009) 29 *International Journal of Educational Development* 495

Gupta, Akhil, 'Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State' (1995) 22(2) *American Ethnologist* 375

Han, Junkui, 'International NGOs in China: Current Situation, Impacts and Response of the Chinese Government' in Li, Yuwen (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011)

Harrison, Henrietta, *China: Inventing the Nation* (Hodder Arnold, London 2001)

He, Zengke, 'Institutional Barriers to the Development of Civil Society in China' in Zheng, Yongnian and Fewsmith, Joseph (eds), *China's Opening Society: The Non-State Sector and Governance* (Routledge, Oxford 2008)

Heilman, Sebastian, 'Maximum Tinkering under Uncertainty: Unorthodox Lessons from China' (2009) 35(4) *Modern China* 450

Heimer, Maria, 'Field Sites, Research Design and Type of Findings' in Heimer, Maria and Thøgersen, Stig (eds), *Doing Fieldwork in China* (Nias Press, Copenhagen 2006)

Heyman, Josiah (ed), *States and Illegal Practices* (Berg, Oxford 1999)

Hintzen, Geor, 'The Place of Law in the PRC's Culture' (1999) 11 *Cultural Dynamics* 167

Hirono, Miwa, *Civilizing Missions: International Religious Agencies in China* (Palgrave Macmillan, New York 2008)

Hoffman, Diane and Zhao, Guoping, 'Global Convergence and Divergence in Chidhood Ideologies and the Marginalisation of Children' in Zajda, Joseph, Biraimah, Karen and Gaudelli, William (eds), *Education and Social Inequality in the Global Culture* (Springer, 2008)

Holroyd, Eleanor, 'Chinese Cultural Influences on Parental Caregiving Obligations Toward Children With Disabilities' (2003) 13(1) *Qualitative Health Research* 4

Howell, Jude (ed), *Governance in China* (Rowman & Littlefield Publishers, Oxford 2004)

Hsia, Renee Yuan-Jan and White, Lynn, 'Working Amid Corporatism and Confusion: Foreign NGOs in China' (2002) 31(3) *Nonprofit and Voluntary Sector Quarterly* 329

Hu, Biying and Szente, Judith, 'The Care and Education of Orphan Children with Disabilities in China: Progress and Remaining Challenges' (2009) *Childhood Education*

Hu, Hsien Chin, 'The Chinese Concepts of "Face"' (1944) 46(1) *American Anthropologist* 45

Huang, PC, 'The Paradigmatic Crisis in Chinese Studies: Paradoxes in Social and Economic History' (1991) 17(3) *Modern China* 299

Human Rights Watch/Asia, *Death By Default: A Policy of Fatal Neglect in China's State Orphanages* (Human Rights Watch, London 1996)

Jeffreys, Elaine (ed), *China's Governmentalities: Governing Change, Changing Government* (Routledge Studies on China in Transition, Routledge, London 2009)

Jia, Xijin, 'The Development and Institutional Environment of Non-Governmental Think Tanks in China' in Yuwen Li (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011)

Jimmerson, Julie, 'Female Infanticide in China: An Examination of Cultural and Legal Norms' (1990) 8 *UCLA Pacific Basin Law Journal* 47

Johnson, Kay, Huang, Banghan and Wang, Liyao, 'Infant Abandonment and Adoption in China' (1998) 24(3) *Population and Development Review* 469

Johnson, Kay, *Wanting a Daughter, Needing a Son* (Yeong & Yeong Book Company, St Paul 2004)

Kang, Xiaoyuang and Heng, Han, 'Graduated Controls: The State-Society Relationship in Contemporary China' (2008) 34 *Modern China* 36

Keyser, Catherine, 'The Role of the State and NGOs in Caring for At-risk Children: The Case of Orphan Care' in Schwartz, Jonathan and Shieh, Shawn (eds), *State and Society: Responses to Social Welfare Needs in China* (Routledge, London 2009)

Kohrman, Matthew, *Bodies of Difference: Experiences of Disability and Institutional Advocacy in the Making of Modern China* (University of California Press, Berkeley 2005)

Leung, Joe, 'The Emergence of Social Assistance in China' (2006) 15 *Journal of Social Welfare* 188

Lieberthal, Kenneth, *Governing China: From Revolution through Reform* (2nd edn W W Norton & Company, London 2004)

Li, Haiyan, Shang, Xiaoyuan and Cheng, Jianpeng, 'An Analysis of Reasons Behind the Abandonment of Orphans and Disabled Children in Beijing (*Beijingshi Gucan Ertong Bei Yiqi De Yuanyin Fenxi*)' (2004) *Beijing Social Sciences* 4

Li, Xiaorong, 'License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program' (1996) 8 *Yale Journal of Law and Feminism* 145

Li, Yuwen (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011)

Liang, Zhiping, 'Tradition and Change: Law and Order in a Pluralist Landscape' (1999) 11 *Cultural Dynamics* 215

Lin, Alfred, 'Warlord, Social Welfare and Philanthropy: The Case of Guangzhou Under Chen Jitang, 1929-1936' (2004) 30 *Modern China* 151

Link, Perry, *Evening Chats in Beijing: Probing China's Predicament* (W W Norton & Company, London 1992)

Liu, Peifeng, 'Development of Charities in China Since the Reform and Opening Up' in Li, Yuwen (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011)

Lu, Hui, 'Children Without Parents' (1994) *China Today* September

Lu, Yiyi, 'NGOs in China: Development Dynamics and Challenges' in Zheng, Yongnian and Fewsmith, Joseph (eds), *China's Opening Society: The Non-State Sector and Governance* (Routledge, Oxford 2008)

Luhmann, Niklas, *Law as a Social System* (OUP, Oxford 2004)

Ma, Qiusha, 'The Governance of NGOs in China since 1978: How Much Autonomy?' (2002) 31 *Nonprofit and Voluntary Sector Quarterly* 305

Madsen, Richard, *China's Catholics: Tragedy and Hope in an Emerging Civil Society* (University of California Press, Berkeley 1998)

Malinowski, Bronislaw, *Crime and Custom in Savage Society* (Routledge, London 1926)

Ministry of Civil Affairs (2007) *The Annual Report on the Development of Civil Affairs*

Mnookin, Robert and Kornhauser, Lewis, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950

Moore, Sally Falk, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) *Law and Society Review* 719

'Nationwide Plan for Better Care of Orphans' *China Daily* (Beijing 29 December 2006) <http://china.org.cn/english/China/194282.htm> accessed 8 September 2009

Overmyer, Daniel, 'Religion in China Today: Introduction' (2003) *The China Quarterly* 307

Peerenboom, Randall, *China's Long March Toward Rule of Law* (CUP, New York 2002)

Pei, Minxin, 'Chinese Civic Associations: An Empirical Analysis' (1998) 24(3) *Modern China* 285

Pirie, Fernanda, 'Law Before Government: Ideology and Aspiration' (2010) 30(2) *Oxford Journal of Legal Studies* 207

Portes, Alejandro, 'Institutions and Development: A Conceptual Reanalysis' (2006) 32(2) *Population and Development Review* 233

Pound, Roscoe, 'The Law and the People' (1910) 3(1) *The University of Chicago Magazine* 1

Qian, Tina and Young, Nick, 'Rule on Names Starts to Close Door to NGO "Businesses"' (China Development Brief, 15 April 2005) <http://www.chinadevelopmentbrief.com/node/74> accessed 14 January 2010

Rankin, Mary Backus, *Elite Activism and Political Transformation in China* (Stanford University Press, Stanford 1986)

Reisman, Michael, *Folded Lies: Bribery, Crusades and Reform* (Collier Macmillan Publishers, London 1979)

Riley, Nancy, 'American Adoptions of Chinese Girls: The Socio-Political Matrices of Individual Decisions' (1997) *Women's Studies International Forum* 20(1)

Rosen, Lawrence, 'Law and Culture: the Appeal to Analogy in Islam' in *The Anthropology of Justice: Law as Culture in Islam* (CUP, Cambridge 1989)

Rowe, William, *Hankow: Commerce and Society in a Chinese City 1796-1889* (Stanford University Press, Stanford 1984)

Saich, Tony, 'Negotiating the State: The Development of Social Organisations in China' (2000) 161 *China Quarterly* 124

Saich, Tony, *Governance and Politics of China* (Palgrave MacMillan, Hampshire 2004)

Salamon, Lester and Anheier, Helmut, 'In Search of the Non-profit Sector I: The Question of Definitions' (1992) 3(2) *Voluntas* 125

Schmitter, Philippe, 'Still the Century of Corporatism?' (1974) 36 *The Review of Politics* 85

Schwartz, Jonathan and Shieh, Shawn (eds), *State and Society: Responses to Social Welfare Needs in China* (Routledge, London 2009)

Shambaugh, David (ed), *The Modern Chinese State* (Cambridge Modern China Series, CUP, Cambridge 2000)

Shang, Xiaoyuan, 'Looking for a Better Way to Care for Children: Cooperation between the State and Civil Society in China' (2002) 76(2) *Social Service Review* 203

Shang, Xiaoyuan and Wu, Xiaoming, 'Changing Approaches of Social Protection: Social Assistance Reform in Urban China' (2004) 3(3) *Social Policy and Society* 259

Shang, Xiaoyuan, Wu, Xiaoming and Li, Haiyan, 'Social Policy, Social Gender and the Problem of Infant Abandonment in China (*Shehui Zhengce, Shehui Xingbie Yu Zhongguo De Ertong Yiqi Wenti*)' (2005) *Youth Studies* 4

Shang, Xiaoyuan, Wu, Xiaoming and Wu, Yue, 'Welfare Provision for Vulnerable Children: The Missing Role of the State' (2005) *The China Quarterly* 122

Shang, Xiaoyuan, *Survival Children: The System of Social Protection for Vulnerable Children in China* (Social Sciences Academic Press, China 2008)

Shen, Ce and Williamson, John, 'Does a Universal Non-Contributory Pension Scheme Make Sense for Rural China?' (2006) 22(2) *Journal of Comparative Social Welfare* 143

Shen, Guoqin, 'The Development of Women's NGOs in China' in Yuwen Li (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011)

Shue, Vivienne, 'State Power and the Philanthropic Impulse in China Today' in Warren Ilchman, Stanley Katz and Edward Queen (eds), *Philanthropy in the World's Traditions* (Indiana University Press, Bloomington 1998)

Shieh, Shawn, 'Beyond Corporatism and Civil Society: Three Modes of State-NGO Interaction in China' in Schwartz, Jonathan and Shieh, Shawn (eds), *State and Society: Responses to Social Welfare Needs in China* (Routledge, London 2009)

Shue, Vivienne, 'State Power and Social Organisation in China' in Joel Migdal, Atul Kohli and Vivienne Shue (eds), *State Power and Social Forces: Domination and Transformation in the Third World* (Cambridge University Press, New York 1994)

Small, Mario Luis, 'How Many Cases Do I Need?: On Science and the Logic of Case Selection in Field-Based Research' (2009) 10(1) *Ethnography* 5

Solinger, Dorothy, 'Urban Entrepreneurs and the State: The Merge of State and Society' in Arthur Lewis Rosenbaum (ed), *State and Society in China: The Consequences of Reform* (Westview, Oxford 1992)

Stephens, Thomas, *Order and Discipline in China: The Shanghai Mixed Court 1911-27* (Asian Law Series, University of Washington Press, Seattle 1992)

Strand, David, *Rickshaw Beijing: City People and Politics in the 1920s* (University of California Press, Berkeley 1989)

Suchman, Mark, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *Academy of Management Review* 571

Sullivan, Lawrence, 'The Emergence of Civil Society in China, Spring 1989' in Tony Saich (ed), *The Chinese People's Movement, Perspective on Spring 1989* (East Gate Book, New York 1990)

Taylor, Charles, 'Civil Society in the Western Tradition' in Ethel Groffier and Michael Paradis (eds), *The Notion of Tolerance and Human Rights* (Carleton University Press, Ottawa 1991)

Thurston, Anne, 'In a Chinese Orphanage' (1996) *Atlantic Monthly* 277(4)

Turner, Karen, 'The Criminal Body and the Body Politic: Punishments in Early China' (1999) 11 *Cultural Dynamics* 237

UN Committee on the Rights of the Child, 'Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)' (24 November 2005) CRC/C/CHN/CO/2.

Unger, Jonathan and Chan, Anita, 'China, Corporatism and the East Asian Model' (1995) 33(3) *Australian Journal of Chinese Affairs* 29

Unger, Jonathan and Chan, Anita, 'Corporatism in China: A Developmental State in East Asian Context' in McCormick, Barrett and Unger, Jonathan (eds), *China after Socialism: In the Footsteps of Eastern Europe or East Asia* (ME Sharpe, New York 1996)

Wakeman, Frederic Jr, 'The Civil Society and Public Sphere Debate: Western Reflections on Chinese Political Culture' (1993) 19(2) *Modern China* 108

Walder, Andrew, *Communist Neo-Traditionalism: Work and Authority in Chinese Industry* (University of California Press, Berkeley 1988)

Wang, Leslie, 'Children on the Margins: The Global Politics of Orphanage Care in Contemporary China' (2010) DPhil (Sociology) Dissertation (University of California, Berkeley)

Wang, Shaoguang, 'Changing Models of China's Policy Agenda Setting' (2008) 34(1) *Modern China* 56

White, Gordon, Howell, Jude and Shang, Xiaoyuan, *In Search of Civil Society: Market Reform and Social Change in Contemporary China* (IDS Development Studies Series, Clarendon Press, Oxford 1996)

Wilson, Jeanne, 'Color Revolutions: The View from Moscow and Beijing' (2009) 25 (2 and 3) *Journal of Communist Studies and Transition Politics* 369

Wong, Linda, *Marginalisation and Social Welfare in China* (LSE/Routledge, London 1998)

Wormald, Patrick, *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (Hambledon Press, London 1999)

Xie, Haiding, 'Public Interest Legal Organisations in China' in Li, Yuwen (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011)

Xin, Katherine and Pearce, Jone, 'Guanxi: Connections as Substitutes for Formal Institutional Support' (1996) 39(6) *The Academy of Management Journal* 1641

Xun, Zhou, 'The Discourse of Disability in Modern China' (2002) 36 *Patterns of Prejudice* 1

Yang, Fenggang, 'The Red, Black and Grey Markets of Religion in China' (2006) 47 *The Sociological Quarterly* 93

Yang, Mayfair Meihui, *Gifts, Favors and Banquets: The Art of Social Relationships in China* (Cornell University Press, Ithaca 1994)

Yngvesson, Barbara, *Belonging in an Adopted World* (The University of Chicago Press, Chicago 2010)

Zhang, Fan and Tian, Qilin, 'The Predicament of China's NGOs' (7 February 2007) <www.sunvillage.com.cn/eng/article_main.php?sec=12&id=132> accessed 15 September 2009

Zheng, Yongnian and Fewsmith, Joseph (eds), *China's Opening Society: The Non-state Sector and Governance* (China Policy Series, LSE/Routledge, London 2008)

Zhou, Shaoqing, 'A Review of the Development of Labour Organisations in China' in Li, Yuwen (ed), *NGOs in China and Europe* (Ashgate, Farnham 2011)