

CHINESE LABOUR LAW AT A CRITICAL POINT IN HISTORY

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I. A historical overview of the Chinese labour law framework

Over the past three decades, the rapid and significant economic and social changes associated with China's move from a centrally planned, command economy to a market-oriented economy with 'Chinese characteristics' have transformed the foundations of its labour market and its institutional design. Such reforms gradually dismantled the paternalistic, state-organised labour administration system based on the 'three old irons' of lifetime employment, fixed wages and controlled appointments, towards a more flexible and competitive labour market that would meet the demands of foreign and domestic capital .

As the formerly shielded labour force became exposed to greater market pressures, the transition generated conflicting interests, growing inequalities and rising disputes between labour and management (Lee 2006). However, the institutions regulating the new labour market have been slow to evolve, generally providing employers with much more leverage over workers (Zenglein 2008). In its attempts to regulate the emergent labour market, the national government has introduced several major pieces of labour legislation, including the Labour Law 1994, Trade Union Law 2001 and the Labour Contracts Law 2007, as well as various regulations on issues ranging from minimum wage to collective bargaining.

While the most recent Labour Contracts Law 2007 is intended to provide enhanced rights and protection for workers, there are still significant shortcomings in the legislative framework – most notably, its institutional weaknesses that hinder effective implementation of, and compliance with the law (Cooney 2007). It remains to be seen whether the effect of the new legislation will achieve a more equitable balance between the interests of labour and capital, and contribute to the government's own social mandate of 'building a harmonious society'.

1950s - 1978: the 'three old irons'

Under the former planned economy, the Chinese employment relations system was characterised by the 'three old irons': the 'iron rice bowl' of lifetime employment and 'cradle-to-grave' social welfare provided by the state (*tie fanwan*), the 'iron wage' of centrally administered and fixed wages (*tie gongzi*), and the 'iron chair' of state-controlled appointments and promotion of managers (*tie jiaoyi*) (Ding & Warner 2001).

At the core of the 'three old irons', the organisation of labour was based on the work unit (*danwei*). Young workers would be assigned to a *danwei* by the local labour administration department, which would also form the basis of their social and individual life, even past retirement (Chun 2006). Members of a *danwei* and their families were provided with a wide range of social benefits including lifelong employment, housing, schooling, health care and pension. Wages were set according to a nationally standardised wage grid system, which was detached from any considerations of

individual or *danwei* performance. The state administered wage system sought to minimise disparities within and across enterprises through a low wage policy and very small wage differences between grades of employees. Promotions within a *danwei* were based on an employee's tenure as well as political orientation.

Almost all enterprises under the centrally planned system were state-owned, and a 'dual system' of Party and management control became the basis of enterprise leadership. The basic institutional structure at the enterprise level consisted of the Party committee, the Workers' Congress and the trade union. It was not uncommon that the general manager was also the Party Secretary and the union secretary (Clarke *et al.* 2004). All unions belonged to the sole state-sanctioned union body, the All-China Federation of Trade Unions (ACFTU). With a role as the 'transmission belt' between the Party-state and workers, unions were responsible for educating workers and dealing with their grievances. The *danwei* also represented the basic-level organisation that linked individuals to the Party, and enabled the Party to directly exert political control (Chun 2006).

Due to the absence of a genuine labour 'market' prior to 1978, the institutional framework for employment relations could be better described as a labour administration system.

1979 - 1990s: towards greater flexibility in an emerging labour market

The move towards a market-oriented economy from 1979 onwards led to greater decentralisation of state-owned enterprises (SOEs) in their personnel management, along with reforms to break the 'three old irons' that were seen to be associated with low labour flexibility and productivity (Ding & Warner 2001). A key goal was the reform of New policies were introduced to promote economic reform and efficiency, with the aim of making labour less 'rigid' to facilitate China's participation in global competition – thereby meeting 'a key demand of the foreign capital that led China's post-reform economic development' (Xu 2009: 433).

From the 1980s onwards, changes in government policy resulted in the significant downsizing of SOEs, removal of the 'cradle-to-grave' social welfare of the *danwei* system, introduction of fixed-term individual and collective labour contracts, and development of new wage systems to reflect performance and skills levels (Cooke 2005). The pace of labour market reforms accelerated during the 1990s in the lead-up to China's accession to the World Trade Organisation. A central feature of these reforms has been the creation of a labour contract system whereby workers are engaged on fixed-term written contracts, usually between half a year and three years. This fundamental abandonment of the 'iron rice bowl' has seen the rise and rise of temporary, contingent employment such as dispatch labour. Fixed-term contracts have become the dominant form of employment agreements over the past decade. This is the case for both the private sector and SOEs. Flexible employment has been encouraged by the government as a specific response to the problem of re-employing the masses of redundant workers from the state-owned sector (Xu 2009).

The growing emphasis on job creation in the burgeoning private sector generated new problems for labour relations as private employers gain increased autonomy in the workplace. While the economic transition brought about an increasingly flexible labour market, the pre-reform institutions became outdated and ineffectual in governing the

newly developing labour relations. Mounting inequalities and disputes between labour and management created the need for a new institutional framework that would cope with these changes. In this context, the Labour Law 1994 was enacted, laying the foundation for a national industrial relations system in China.

The Labour Law 1994 formally established the system of labour contracts as the primary means for regulating employment relationships. Its provisions covered a wide range of matters, including the conclusion, variation and termination of labour contracts, reasonable working hours, paid leave, anti-discrimination, equal pay, and a dispute resolution framework among others. Further regulations pertaining to the Labour Law were promulgated in relation to special labour issues such as minimum wages, labour inspectors and redundancies.

On paper, the standards presented by the Labour Law do not appear 'markedly inferior to those of comparable countries and indeed many developed nations' (Cooney 2007: 674). However, the legislative framework and institutions have significant shortcomings. In its institutional design, Cooney (2007: 675) notes that the disorderly internal structure of Chinese labour law is a 'major obstacle to its capacity to generate credible labour standards'. The complexity of the increasingly segmented, heterogenous Chinese labour market presented a major challenge to the drafters to frame a law in general terms. The Labour Law itself left out much of the details – for example, the law largely focuses on termination of employment yet does not address contract formation in any detail (Cooney *et al.* 2007). There have been subsequent attempts to fill in the numerous gaps, however the clarifying provisions are scattered throughout various legal instruments and their legal status are not always clear – rendering them hardly accessible by employers or employees (Cooney 2007).

Furthermore, there remain concerns over the systemic failure of Chinese institutions to regulate employment relations in a fair and balanced manner, generally neglecting the interests of labour. Acute competition among localities to attract and retain investment has often led to local authorities relaxing their enforcement of labour standards (Zhang-White 1999). As a result, there are still widespread 'sweatshop' exploitative practices, with employers often failing to comply with labour regulations and forcefully repressing any forms of industrial activity. As Zenglein (2009: 8) notes, the state's reliance on private employment as it was downsizing SOEs possibly provided management 'much leeway in establishing an industrial relation system best suiting their needs'. As numerous scholars (Chang 2004; Joseph 2009) have further observed, regulating labour relations was assigned secondary importance in developing a legal framework for a market economy, especially compared to the principal priority of attracting foreign investment.

Overall the new labour law framework has moved away from a state-organised administrative structure to a system where workers are 'reconceived and reorganised as individual subjects, selling their labour on a labour market' (Xu 2009: 450). If the primary object of labour law is to 'counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship' (Kahn-Freund, 1972), then Chinese workers must rely on laws that are based on the status of a legal individual who is party to a contract. The Labour Law 1994, in its presumption that employers and individual workers are equal in a contractual relationship (for example, art.17 stipulates that '[C]onclusion and alteration of labour contracts shall follow the principle of equality, voluntariness, and agreement through consultation'), is still based on a pre-reform

workplace mentality of Chinese enterprises that espoused common interests between management, workers and the Party (Cooney *et al.* 2007).

2001 - present

China's accession to the WTO further accelerated the pace of economic reform, bringing with it a diversified and segmented labour market. Employment relations have grown increasingly complex – with different wages and working conditions for a heterogeneous labour force. The deficiencies of the existing institutional framework in addressing the problems of labour market liberalisation became increasingly apparent. The continual prevalence of unpaid wages and violation of workers' rights is an indicator that the regulation of Chinese labour market remains highly problematic.

The rapidly escalating trend of labour disputes over the last decade reveals significant discontent and frustration among the labour force. Frequent incidences of spontaneous 'wildcat' strikes and workplace disturbances by unorganised workers (particularly in the private sector) have captured the attention of the Party leadership. In promoting a policy of a 'harmonious society' (*hexie shehui*) to address problems associated with the inequitable distribution of the benefits of growth, the Party has identified labour-related unrest as one of the most important threats to social stability and the government's political legitimacy (Sheehan, 2000).

It is in this context that the national government adopted further legislation with the intention of improving the protection of workers' rights and interests, and adding to and clarifying provisions of the existing Labour Law. Three major pieces of legislation were introduced in 2007: the Labour Contract Law, Employment Promotion Law, and the Labour Mediation and Arbitration Law. The most important among them is the Labour Contract Law (LCL), which according to the government, aims to improve labour rights at the enterprise, especially the rights of China's 225 million migrant workers, and to provide greater security for an increasingly 'flexible' labour force.

The government's intended goal of enhancing labour protection is reflected in new provisions to strengthen employment contracts, impose broad obligations on employers to prevent the underpayment of wages, increase the rights of unions and workers representatives at the enterprise, provide for the transmission of employee entitlements when a firm restructures, and regulate the use of dispatch labour. The LCL also seeks to address some of the gaps in the Labour Law 1994. For example there are clearer and more detailed provisions in relation to the formation of labour contracts. Employers are required to enter into a written contract with an employee within 30 days of full-time employment. Failure to have a signed contract after one year of employment would deem such a contract to be one of open-ended duration (i.e. without a fixed term). Furthermore, the LCL also imposes specific time limitations on probationary employment and provides for open-ended employment after two contract renewals. In addition, for the first time, the LCL provides for the regulation of dispatch labour, recognising the rapid expansion of this form of employment. The new legislation sets two years as the minimum employment period with a labour dispatching agency, and introduces a system of licensing and registration of such agencies.

The LCL represents an important step forward in the development of China's labour law. Notwithstanding the improvements in the substantive rules and clarification of legal

standards, there remain important shortcomings in the overall institutional framework that hinders its effective enforcement.

II. Challenges for the future of Chinese labour law

Barriers to effective legal enforcement

The effective implementation and enforcement of Chinese labour law reflects the broader challenge of the country's movement toward a legal system based on the rule of law. It has been widely recognised that pervasive corruption in government departments and in the courts is a significant impediment to China's economic and legal reforms. In general, the administrative resources for implementing labour laws are seriously deficient. Local governments, charged with the unfunded mandate of enforcement, may be reluctant to implement and enforce such laws at the expense of job creation and tax revenue from investment (Josephs 2009). This is particularly the case when local governments are under competitive pressures to attract foreign investment. With the decentralisation of government decision-making powers since 1979, the substantial authority attained by the local government has given rise to common occurrences of corruption at this level – thus affecting the proper implementation of the law.

Cooney (2007) identified four specific weaknesses in the legal structure used to implement labour law in China: gaps in the detail of the law, ineffective labour inspectorates, weaknesses in the dispute resolution mechanisms, and the limited ability of unions to engage in a monitoring and compliance role. This paper will focus on the role of trade unions – the only organisation officially assigned by the state with a mandate of protecting workers' rights under the Chinese labour law framework.

The ACFTU: still a 'transmission belt'?

It is questionable whether Chinese unions have truly seceded from their 'transmission belt' role and become more of a workers' representative organisation instead of 'an arm of state bureaucracy' (Cooney 2007, 681). Competing enterprise unions independent of the official trade union structure are still not tolerated by the law. The peak union body, the ACFTU, remains subordinate to the Chinese Communist Party. While the state may direct unions to act in the interests of workers, for example, in obliging unions to ensure employer compliance with the labour law (Trade Union Law 2001), this is not always translated into practice when local Party officials are more concerned with attracting investment and economic growth (Chen 2003). There is still a prevailing practice where grass-root union representatives are appointed by Party officials – with the tendency for managers to serve in union leadership positions. Since there is no longer the former alignment of enterprise interests under the new market economy, unions are placed in a situation which prejudices their ability to represent their actual constituency when bargaining with management and their capacity to monitor management decisions and enforce observance with the law.

Even if it is accepted that Chinese unions have become more representative, they have not yet utilised much of their legislative rights to influence workplace practices (Benson & Zhu 2000; Chan 2000; Cooke 2005). While the ACFTU has maintained a fairly visible presence in the legislative process, it has not been as effective in actually using its powers at the 'shop-floor' level. While collective bargaining has been officially promoted by the government and ACFTU as a mechanism to resolve workplace disputes, there is

little participation by workers in the process and collective agreements generally become carbon copies of statutory regulations (Clarke *et al.* 2004). Chinese unions' bargaining power is further limited by the constitutional and legislative absence of a right to strike. This constraint significantly affects their ability to 'use industrial pressure to secure (employer) compliance with the law' (Cooney 2007: 682). Unions have also in general provided little legal assistance to workers, far less than other legal aid organisations and labour NGOs (Xu 2009).

There appears to be some promising signs of change as the ACFTU, with the national government's support, have in recent times pursued an ambitious campaign to unionise and organise in multinational enterprises such as Wal-Mart and McDonald's. However, it is debatable whether the ACFTU's presence in Wal-Mart stores is mostly 'window-dressing' and a publicity exercise for Chinese unions and the government (Chan 2007; Josephs 2009). Furthermore, such high profile cases involving well-known U.S. multinationals only cover a very small proportion of the foreign-invested sector. The sector is dominated by smaller, less publicly visible Asian-owned companies that are more likely pursue the 'sweatshop' path of exploitative working practices (Chan & Wang 2005). Furthermore, as Anita Chan's (1997) research shows, less publicised, sweatshop conditions have also permeated SOEs. Since unions in these SOEs are more likely to be tied to a dual management-Party leadership structure, their true representativeness and organising autonomy are placed into question.

When evaluating Chinese trade unions, it is important to consider the institutional structure in which they are embedded in (Clarke 2005). It would be unreasonable to evaluate Chinese unions in the same light as their Western counterparts. Nevertheless, in order to develop into a more effective labour market institution to counter-balance management power, it will be necessary for unions to overcome their limited credibility among workers and further evolve beyond its current structure and operation. While their overall position is weak, trade unions may potentially be the only institutions able to improve the protection of workers' rights in an employer-dominated environment (Ge 2007).

Conclusion

Uneven institutional and regulatory development in the transformation of China's labour market has profound economic, social, and political consequences for the country. Dealing with the challenges of employment relations in an increasingly complex labour market is an essential task the Chinese government must address. In an increasingly precarious market economy with greater possibilities for social dislocation and instability, institutional mechanisms with 'Chinese characteristics' for regulating employment relations will continue to develop and evolve.

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