

LABOUR LAW FRAMEWORK IN CHINA

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When we talk about China's rapid economic development, most scholars will agree that one of the reasons for it is Chinese labour's competitiveness: big in number and small in salary. There are wide-spread labour abuses in China; although China adopted its Labour Act in 1994, nobody believes that it provides enough protection for Chinese worker from paper to practice. The number of mass demonstrations in China has risen from 8,700 in 1993 to 200,000 a year by some estimates.¹⁸² Among cases, labour abuse figures prominently. Underpayment (and sometimes total non-payment) of wages is widespread in China¹⁸³. China would, therefore, need to take care of her huge labour recourses with its labour law.

1. Background of China Labour law Framework

In this part, we will discuss two themes: one is a brief history of the country's labour law legislation. The other is labour law's enforcement and its instruments.

1.1 A brief history of legislation on labour Law

Now it is very easy to separate People's Republic of China's history into two stages: Before and after reform in the later 1970's.

1.1.1 Before China's reform at the end of the 1970s.

During this period, State Owned Enterprises-SOEs were the major player in business. So no need was felt for a formal labour law, and in fact, there were only regulations and directions from the government.

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

182 Randall Peerenboom, Law and Development in MICs: Conclusion, pp. 1

183 Sean Cooney, Making Chinese Labour Law Work: The Prospects for Regulatory Innovation in the People's Republic of China, Fordham International Law Journal [Vol.30:401], pp. 404

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 the 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).¹⁸⁴

1.1.2 Since China's reform, the country's economy is becoming market-driven and there are different economic entities, not only SOEs, there are also more and more private undertakings and FIEs. Only administrative regulations could not solve the labour issues arising in this context. Labour law legislation thus entered a new stage:

China Labour Law (1994): In 1994, the Standing Committee of the National People's Congress enacted the first law on labour and employment relations, the People's Republic of China Labour Law (hereinafter referred to as CLL. Adopted on July 5, 1994 and effective as of January 1, 1995). Although the legislation's name is Labour Law, the content includes almost the full realm of labour relations, employment relations, individual employment contract and collective contract. Although the content is rather broad, the law has only 117 articles, or 8000 words. In China, the individual employment contract is called labour contract, and the relationship between the individual and the employer is called labour relationship. The contract between the employer and the group employee is called collective contract, and their relationship is called collective labour relationship. Now China's labour contract system began in the mid-1980s. With China's economic development, the state enterprise shifted the system from the "iron rice bowl" to relationship with the enterprise by contract; this innovation was confirmed in the 1994 legislation. More and more rural immigrants into the urban areas came to work for all sorts of employers.¹⁸⁵

184 Mimi Zhou, University of Sydney, China Labour law in a critical point in History

185 Yujuan Zhai and Han Li, Background of China Labour Contract Law

Three major labour laws were introduced in 2007, they were China Labour Contract Law (LCL), the Employment Promotion Law (EPL) and the Law on Labour Mediation and Arbitration.

Of these, China Labour Contract Law, has inspired so many fierce disputes from scholars to business chambers in the whole of China. The draft of the Labour Contract law elicited nearly 200, 0000 responses.

In 2008, The State Council adopted The Interpretation of China Labour Contract Act.

1.2 Enforcement instruments of labour law in China

1.2.1 Administrative system

At Central government level, China set up the Ministry of labour and Social Security (MOLSS), it took over the functions of the Ministry of labour and Social Security and the Ministry of Personnel in 2008. It also supervise the local levels agencies, although the later are controlled more by local governments.

According to Labour Inspection Regulations (2004), any person or organization could report any violation of the law to their local labour department.

1.2.2 Labour disputes Resolution

Labour Arbitration is the centerpiece of Chinese labour dispute resolution. Labour Disputes Arbitration Committees (LDACs) are established by local labour departments. Although more and more labour disputes are brought before LDACs, the latter frequently fail to resolve disputes. Majority of cases are appealed from arbitration.

So, the Judicial system also plays a key role in Chinese labour dispute resolution. The court process involves a *de novo* hearing at first instance, and if there is an appeal, it would need a second *de novo* hearing. Even though one party wins in an arbitration or litigation, sometimes it is very difficult to enforce the judgment.

1.2.3 Unions

China's official trade union organization, the All-China Federation of Trade Union (ACFTU), is probably the largest labour organization in the world. Its main function is to seek employer compliance with labour law.

2. Main issues in China Labour Law

2.1 The definition of employer

In Chinese labour law, the "employer" could feature in entities from enterprises to public organizations, although it still needs to be made clear case by case.

2.2 Mandatory written contract

According to the LCL, a labour contract must be in written form and signed within one month of the first day of work. Where no written contract is signed within one year after employment, indefinite labour contracts are deemed to be concluded.

2.3 New rules on probation period

The LCL contains a large number of regulations on probationary period. For example, about time limits on the term, one work unit can only be required one probationary period on the same labourer; short-term labour contracts cannot include probationary period; probationary period is invalid in labour contract, which contains only probationary period. This law for the first time clearly states minimum wage standard for trial-period labourers. Wage standard during probation period: firstly, it should not be lower than the minimum wage paid for the same position in the same work unit, or 80% of the wage agreed upon by the labour contract; secondly, it should not be lower than the standard minimum wage of the region where the work unit is. During the probationary period, the unit can dismiss the worker only in accordance with the law.

2.4 Criminal Liabilities for violating labour law

In 2011, refusal to pay wages became a new criminal liability and it is reported that more than one hundred persons were put in prison in 2012 according to the new legislation.¹⁸⁶

2.5 Labour Dispatch

Labour dispatch is a way of employing labour for temporary work through a dispatch company. It is a short-term way to engage labour. Labour dispatch had its emergence first in developed countries, aiming to meet the requirement of flexible and elastic employment, just like leased work in America. The system has appeared lately in China, but the development is quick (Wang, quanxin.2006).¹⁸⁷

Labour dispatch has a positive function in regard to flexible employment in China; at the same time, it has become an important way in which to infringe workers' rights and interests. Some dispatch companies combined with employing enterprises evade legal responsibility and social security obligations. Dispatched worker cannot claim equal treatment with the formal employee in respect of signing the labour contract, obtaining social security, getting adequate pay every month, and occupational safety and health. Some employers recruit all their employees through one dispatch Company. These employees do the same work as they have done before their dispatch. Through dispatch, they come to have no relationship with their employer as such. In some cases, workers' wages are lower than before they signed the dispatch contract while doing much the same work: same work, some enterprises dismiss many current employees from their positions and use the dispatched worker, in their place, thus escaping the responsibility as employers.

Operation of some dispatch companies have created disorder, as they tend to extract high management fees even as they skimp on wage and do not contribute to the social security fund. Because of the complicated relationship under the labour, dispatched workers find it difficult to protect themselves when their right and interests are infringed by the employer. When a conflict occurs, neither the actual employer nor the dispatch company would take the responsibility, the dispatch

¹⁸⁶ <http://news.163.com/13/0123/18/8LU4AEUR00014JB5.html>

¹⁸⁷ Yujian Zhai and Han Li, Background of China Labour Contract Law

system, therefore, constitutes one of the principal infringements of workers' rights. Owing to there being no provision on it in the Chinese labour law, the labour dispatch system has been operating outside the law.

The LCL clarifies the labour-dispatching company as a work unit. It also regulates details such as registration capital, content of labour dispatch agreement, wage of the dispatched labourers and labour contract term.

2.6 Termination of labour contract

2.6.1 Termination by employee

An employee may terminate the contract, subject to a notice period of 30 days or 3 days during probation, where his or her employer has failed to provide safety measures or working conditions stipulated in the employment contract or failed to pay remuneration on time or in full or failed to contribute social security premia or followed unlawful policies or entered an employment contract through fraud, coercion or exploitation of the employee's unfavourable position, or forced the employee to work by means of violence, threats or unlawful restriction of personal freedom or instructed employees to violate the law or engage in reckless work that endangers his personal safety.

2.6.2 Termination by employer

Basic principles found in Article 39 in which an employer may initiate the immediate termination of a contract with cause, where an employee has proved to be unqualified during the probation period (The employer must explain reasons to employee); or, committed "serious" violation of labour regulations or employer's rules; or, been found guilty of "serious", dereliction of duty or graft, causing serious financial losses to the employer; or established concurrent employment relationship with another entity, seriously affecting his capacity to complete work tasks, and refuses requests from employer to rectify the situation; or, if an employee is pursued for criminal liabilities; or if the employment contract was concluded or modified against parties' true intentions through fraud, coercion or exploitation.

An employer may terminate the employment contract with 30 days' prior written notice or payment in lieu, if after taking medical leave and recuperating from an

illness or a non-work-related injury, the employee remains unable to return to his/her original position and is also unfit for reassignment to other duties or, if the employee is unable to fulfil the duties of his/her position, despite undergoing training or a transfer to another position or, there has been a substantial change in the objective circumstances under which the employment contract was executed, thereby rendering its performance impossible and, after consultation, the parties fail to agree on an amendment to the contract or economic retrenchment is found necessary.

2.7 Administrative and criminal liabilities

Based on Article 88 of the LCL, which provides: “Where an employer has engaged in any of the following activities, administrative penalties shall be imposed. Where such actions constitute a crime, criminal liabilities shall be pursued, and where the violation causes the employee to incur damages, the employer shall be liable for compensation: (1) compelling labour by means of violence, intimidation, or other unlawful restrictions on individual freedom; (2) issuing illegal instructions or ordering reckless work that endangers the individual safety of an employee; (3) insulting, physically punishing, beating, or unlawfully searching or restraining employees; or (4) subjecting an employee to odious working conditions or a severely polluted environment, thereby gravely harming his personal health.

2.8 New functions of the union

According to LCL, unions will have more rights in signing and carrying the labour contracts and additional types of collective contracts.

The right to assembly for Chinese workers and to establish independent unions by them have been a sensitive topic with Chinese labour relations. Although there are no regulations on collective contract in the LCL draft, considering that the LCL is a systematic law on labour relationships, regulations on collective contracts were added later. Two types of collective contracts were added: regional labour contract and trade labour contract. But there is still no revision on labourer’s right to strike or assembly.

The LCL enlarged the function of the union, but it does not regulate workers in establishing individual unions. The Chinese's national trade union is the one with the largest number of members in the world. (ACFTU. 2005). Chinese Union Law clearly states that it is under the leadership of the Chinese Communist Party and that Chinese workers cannot organize unions of their own. This has drawn criticism from foreign nations. In recent years, the All-China Federation of Trade Unions has been continuously extending the union function, based on the framework of the current legal system. In 2001 the revised Union Law emphasized the function of the union to protect employees' rights. For example, Wal-Mart resisted establishing union in their Chinese branches (Liu, sheng.2006). At present in Labour Contract Law there are special articles that emphasize the functions of union in labour relations. Firstly, in individual labour relationships, it provides help for workers in signing and applying labour contract, and provides supervision. When an employee appeals for labour arbitration or litigation, the union should give support and help. Secondly, in collective labour relationships, the union establishes collective negotiation mechanism with the work unit and represents workers in signing a collective labour contract with the work unit and can also apply for arbitration and litigation. Thirdly, it assists the employer in carrying out the labour contract and the collective agreement. Fourthly, as part of the government's supervision and management of labour contract, it listens to the opinions of the union.¹⁸⁸

3. Future Trends in China Labour Law

Like other law in China, the labour law still represents China's real social situation. There are already many legislations, but the key points are how clear they are and how to enforce them fairly. Another issue is whether, with the rapid change of society, is it suitable for the real needs of the society? To answer this question, we need to discuss the major challenges China will face in the future.

To understand China's Labour Law Framework, the following issues are to be kept in mind:

- Middle income country trap

¹⁸⁸ Yujuan Zhai and Han Li, Background of China Labour Contract Law

- The advent of an aging society. China's aging population is growing rapidly. The latest projection is that in 2050 one out of three Chinese will be over 60 years old!
- Innovation in nation building
- Social stability

After more than thirty years of rapid economic development, China is already a middle income country according to the World Bank's standard. The Chinese realize that China could not develop as quickly as before, especially after the global financial crisis in 2008. What will it take for China's policy makers to deal with the middle income country trap; the advent of an aging society before China become a rich country; building an innovating country and not merely the world's factory and keep social stability, all of which at the same time?

One famous economist in Hong Kong said that the China LCL will slow down China's economic development and should be got rid of. From the employer's side, they argue that Chinese labour laws are a big burden for them. From the employee's side, China should have more strict labour law to protect their rights.

My short conclusion about the trend of China Labour Law is: it will keep a balance between employer and employee, economic development and social stability.
