1994

In the Maoist era, the concept of rights occupied a very marginal position in the discourse on labour of the Chinese Party-State. While state workers acquired considerable social and economic entitlements under Communist rule, these were framed not in terms of rights but rather as being due to the revolutionary social transformation steered by a regime that ruled in the name of the working class.[1] *As a result, China in the pre-reform era never adopted any substantial body of laws and regulations to regulate labour relations. As for the Chinese constitutions of 1954, 1975, 1978, and 1982, they granted people the right and duty to work, the right to labour protection and adequate working conditions, a right to be paid and to social security, a right to gender equality, and a right to rest. However, as Biddulph et al. have pointed out, constitutional labour rights in China do not confer on individuals a judicially enforceable entitlement against the state; they just impose a notional obligation on the state to create conditions under which individuals will enjoy those rights.*[2]

The creation of a body of labour laws in China began in the 1980s with a series of regulations aimed at managing labour relations in the newly established special economic zones. Then, as the decade unfolded, further regulations were adopted to handle labour relations in specific industries, locations, and companies of different types of ownership. Due to unclear and often contradictory provisions, in the early 1990s, China's labour laws had become so convoluted the authorities felt they were starting to become a hindrance to foreign investment. At the same time, worker unrest underlined the need for the Party to find new ways to boost its legitimacy among the working class. In such a context, the Chinese authorities drafted a series of national laws that for the first time covered all the companies on Chinese territory regardless of ownership type or industry, the most important of which was the Labour Law of 1994, at the centre of this essay.

One Law to Rule Them All: The First Labour Law of the People's Republic of China

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After thirty drafts and more than a decade of debate, in 1994, the Standing Committee of the National People's Congress finally passed the first Labour Law of the People's Republic of China (PRC), to take effect on 1 January 1995.[4] This law is more than just an ordinary piece of legislation. Not only was it an important element in the ongoing process of dismantling the planned economy, establishing a labour market, and unifying the increasingly fragmented and inconsistent regulatory treatment of work across different sectors—state-owned, foreign-owned, township and village enterprises, and the emerging private sector—it was also part of the regulatory framework designed to smash the 'iron rice bowl' (铁饭碗) of guaranteed lifetime employment and benefits enjoyed by core workers in state-run firms in urban areas.[5] By 1994, economic reform had progressed to the point that legislation was needed to bridge the increasingly untenable and undesirable divisions between regulation of foreign and domestic work and economic activities more generally. But the final impetus to pass the law—as has often been the case with work-related laws—came from increasing labour unrest and a series of workplace disasters that occurred in 1993.[6]

The Labour Law sets out a framework that has provided the scaffolding for employment relations and subsequent work legislation. Although the law was amended in 2009, 2012, and again in 2018 to strengthen labour protections and address gaps in the existing regulatory regime, its fundamental elements remain unvaried to this day. This essay sets out the debates surrounding the process of drafting and the passage of the law and then discusses the basic framework established by the legislation.

History and Policy Context

The Labour Law attempted to consolidate an array of fragmented and inconsistent work laws that had been passed throughout the 1980s. It was not, however, cut from entirely new cloth but selectively incorporated

regulatory choices made in Republican China in the 1929 Factory Law, which set basic labour standards for large industrial enterprises, and in the Maoist era before 1978.[7] The influence of the latter is particularly evident in the structurally weak position of unions to represent and protect workers and in the privileges accorded to urban industrial workers.[8] The Labour Law was not an organic development but the product of policy visions, heated debates, and decisions, which in the end privileged enterprise autonomy and established individual contracts as cornerstones of economic reform. On the losing side were advocates of strengthening the role of workers, industrial democracy, and collective decision-making through staff and workers' representative congresses (职工代表大会). Instead of collective participation in enterprise management, the Labour Law entrenched enterprise autonomy by empowering the firm manager under the enterprise responsibility system to manage labour relations through individual labour contracts.[9] Institutionally cemented in this law was the definition of economic reform, developed at the Fourteenth Congress of the Chinese Communist Party (CCP) in October 1992, as the construction of a 'socialist market economy' (社会主义市场经济).

By 1994, work-related laws had become complex, fragmented, and inconsistent. One of the ambitions of the Open Door Policy was to encourage foreign investment, and it was recognised that capitalist-friendly laws were needed to entice foreign enterprises into China. A bifurcated legal system emerged throughout the 1980s that regulated domestic and foreign-related economic activity differently. The distinction between the Economic Contract Law, which governed administrative contracts appropriate for use in the domestic planned economy, and the Foreign Economic Contract Law, aimed at regulating foreign-related contracts, was one example. Another was the division between economic law and civil law, with economic law covering the domain of economic activity in the vertically oriented planned economy and civil law carving out a narrower sphere of horizontal autonomous legal relations among and between citizens and entities, represented by the comparatively narrow scope of the 1986 General Principles of the Civil Law.

Legal regulation of work was divided between foreign-related and domestic sectors as well. Authorisation to pass the earliest foreign-related economic and labour regulations in advance of the rest of the country was given to the special economic zones (SEZs) established in Guangdong Province. Local regulations were passed in Shenzhen beginning in 1980 authorising the establishment of foreign-invested enterprises and

allowing management in those companies greater autonomy to employ workers on a contract basis, which would make workers easier to manage and dismiss.[10]

Starting with some pilot sites in 1983, in 1986, the labour contract system was extended nationwide with the passage by the State Council of four regulations.[11] The Provisional Regulations on the Implementation of the Employment Contract System in State-Run Enterprises (Article 2) made the contract system applicable to all new hires in the state sector. Before then, most urban workers in the state sector were subject to administrative management, being allocated to a workplace they were not free to leave, but which was also responsible for the provision of social benefits such as education, housing, medical care, and a retirement pension. These 1986 regulations marked a decisive shift away from administrative allocation and management of work to a labour market and system of contracting. Between 1987 and 1989, further labour regulations covering domestic private enterprises were passed, with rules for township and village enterprises following in 1990.[12] The Labour Law constituted the first major step to unifying the existing fragmented and divergent set of regulations.[13]

In addition to the distinction between foreign-related and domestic enterprises discussed above, at the beginning of the economic reform period, a second important divide existed between urban and rural sectors and workers. Adoption of Soviet-style, industrial-led models of development in the pre-reform period privileged an elite urban industrial workforce. Under this development model, substantial economic transfers were made from rural to urban production, and the provision of state benefits was confined to small numbers of urban workers. Rural people were excluded from seeking work in urban areas by the household registration system (户口; *hukou*) and the coercive detention and repatriation measures that underpinned its effectiveness (see Hayward's and Froissart's essays in the present volume). While the *hukou* system has subsequently been reformed to an extent to permit some rural-to-urban movement, to this day, these rural migrants continue to suffer unequal protection at law, which has in turn contributed to enduring problems of inequality. The passage of the Labour Law did nothing to alleviate the discriminatory treatment of rural migrant workers or to alter the privileging of a small urban elite in terms of work law and conditions.

The Labour Law was intended to provide an overarching structure to regulate employment relations, but at the same time it did not represent a radical break from pre-reform labour regulation. It continued to reflect

the existing distinctions, inequalities of opportunity, and differential protections that had previously been afforded to different categories of workers.

What the Labour Law Provided

The Labour Law sets out the basic legal framework for employment relations in the PRC. Its objectives were officially 'to protect [the] rights and interests of working people in the socialist market economy', and to use contracts as a way of improving flexibility in enterprise management and productivity.[14] It also unified labour standards across different forms of enterprise and industry and, as Cooney and others have noted, 'sought to give effect to those ILO [International Labour Organisation] Conventions that were compatible with [the] Chinese political system'.[15]

In this basic scheme, the individual labour contract is placed at the centre of regulation, supplemented by collective contracts. The law regulates labour rights in the realms of wages, working conditions, work health and safety, vocational training, and social insurance. Finally, it specifies how dispute-resolution mechanisms and enforcement by the labour bureaus and trade unions are supposed to work. However, since the Labour Law regulates basic labour standards in broad terms, the detailed interpretation required to implement it has relied heavily on subordinate rules and regulations issued by central agencies such as the Ministry of Labour—now the Ministry of Human Resources and Social Security—and local authorities. This form of regulation allows the law to set clear standards—for example, in terms of working hours and overtime—but also to create flexibility to enable these provisions to be both supplemented as needed and circumvented.[16]

Individual Labour Contracts

Even though there are precedents from the pre-1949 Republican era for the use of contracts as the primary legal form to regulate labour relations, in the early reform era, there were strong ideological and practical objections to this practice. The centrality of the individual labour contract in the law effectively individualised labour relations at the expense of any form of collective organised worker voice.[17] This policy decision was by no means uncontroversial and was debated extensively in the drafting process.

These objections reflected some of the key debates at that time about

how economic reforms were to be carried out and their relationship to socialist ideology. The first objection to using the individual contract form was that contracts were by nature exploitative, as they commodified labour and alienated workers from the value of their labour. The virtue of socialism was precisely that it created secure lifetime employment. Those arguing for universal adoption of an individual contract system of employment had to spend considerable energy to rebut these objections, grounded as they were in the socialist discourse that Chinese workers were 'masters of the enterprise'.[18]

This ideological problem also fed into practical problems. As a framework law, the Labour Law failed to regulate some key aspects of contracting, such as formation, effect, and variation of contracts.[19] One consequence was that labour contracts were characterised as being distinct from ordinary civil contracting processes. Even the unified Contract Law of 1999 excluded labour contracts from its scope, to the detriment of workers who were unable to take advantage of that law's protective provisions, such as those prohibiting undue influence, misrepresentation, and oppressive conduct.

Another problem was the false presumption of formal equality between contracting parties, insisting that labour contracts were based on the principles of 'equality, voluntariness, and agreement through consultation' enshrined at Article 17 of the Labour Law. There was strong evidence, even by 1986, to show that, apart from skilled male workers, who had strong bargaining power, many workers employed under contract were much worse off, facing inferior working conditions, wage arrears, and work insecurity. In the early 2000s, the duration of the labour contract decreased from the average of between three and five years in the mid-1990s to predominately one-year fixed-term contracts.[20] Contract workers were often treated as badly as temporary workers had been: disdained, discriminated against, and subjected to arbitrary dismissal and punitive disciplinary regimes.[21] The Labour Law embraced the individual labour contract as the cornerstone of the labour relationship in spite of widespread awareness of the fact that the individual contract form, without effective protective mechanisms, would entrench injustices and insecurities produced by power imbalances in the emerging labour market.

Rights and Interests

To mitigate the consequences of the presumption of formal equality in stipulating individual labour contracts, the Labour Law specifies a number

of labour rights that contracts may not derogate. These rights give specific legal form to general—and otherwise unenforceable—constitutional protections for labour. They include: the right to be paid the minimum wage; wage protections, such as the right to be paid periodically without unauthorised deductions, equal pay for equal work, and paid holidays; default rules on working hours, providing for an eight-hour day and forty-four-hour week; the right to rest and be paid overtime; leave, including annual holidays and parental leave; and gender-specific protections for women.[22]

In addition to individual labour contracts, collective contracts were designed to supplement labour contracts and specify baseline conditions. However, collective contracts are only subject to sketchy regulation in three articles of the Labour Law.[23] They provided that collective contracts should be concluded by the trade union acting on behalf of the staff and workers of the enterprise and the enterprise management and then reported to the local labour department. A collective contract can cover remuneration, working hours, rest, health and safety insurance, and welfare and, once stipulated, is binding for all staff and workers. While collective contracts were designed to provide a baseline of conditions below which individual contracts could not go, they were unequal to this task. First, collective contracts were initially conceived as operating only at the enterprise level as they were never intended to be a device to strengthen collective labour power. Second, the enterprise union that entered into these contracts, ostensibly on behalf of workers, lacked autonomy from the enterprise (often with management representation in the union) and was obliged to implement Party policies, including those that undermined workers' interests and emphasised increased productivity.[24]

In practice, the collective contract is the only mechanism in the Labour Law for the negotiation of interest claims about wages and working conditions. The rights set out in the concluded collective contract are enforceable through the same channels as the individual labour contract. Since the early 2000s, trade unions have sought to expand the use of collective contracts as a way to 'coordinate' and 'stabilise' the relationship between labour and capital.[25] However, for many years, collective contracts were effectively a dead letter. Before renewed policy attention to expand collective contracting at the turn of the millennium, the proportion of enterprises covered by these agreements was small. Even where an enterprise had entered into a collective contract, the benefit to workers was limited. Collective contracts were notoriously concluded in a top-down

manner without substantial input from workers—a formalistic exercise in fulfilling quotas set by higher-level unions that did not go beyond restating minimum legal standards.[26] To this day, despite intense policy pressure to expand the proportion of enterprises concluding collective contracts, these documents remain marred by formalism. To overcome the problem, in the 2000s, some local administrations tentatively introduced industry-level agreements, but these experiments have not expanded into a more efficient and widespread form of collective bargaining. In fact, until the problem of the structural weakness of trade unions is addressed, the prospects for the transformation of collective contracts into a tool of industrial democracy remain poor.[27]

Hierarchies of Protection

The hierarchy of protection directs our attention to two related questions: *who* is included in the scope of the Labour Law and who is excluded; and *how* are different categories of workers that fall within the scope of the law regulated?[28]

The first question relates to the scope of the Labour Law, which is defined in Article 2. For the law to apply, the following conditions must be met: there must be a 'labour relationship' (劳动关系) between a person who 'engages in labour' (劳动者) and an 'employing unit' (用人单位) (comprising enterprises and individually owned economic enterprises). Article 16 further requires that, where there is a labour relationship, there must be a (written) labour contract.

As Cooney et al. have pointed out, this is as important for its definition of who is excluded as it is for whom it includes within the Labour Law regime.[29] Enactment of the legal concept of 'labour relationship' has effectively excluded large swathes of the Chinese workforce, leaving aside migrant workers, rural labourers, members of the armed forces, government officials, domestic workers, students on training programs, independent contractors, and retirees. Those work relationships that are excluded from the scope of the Labour Law are treated as a civil law commercial relationship and so fall outside the protective scheme established under the law. People employed by an individual or an illegally registered firm—a category that includes a significant number of people employed, for instance, in the construction industry—also fall outside the scope of the law as the employer must be an enterprise.

A labour relationship is created by way of a labour contract—as opposed to a labour contract documenting an existing labour relationship—and, while the law does not explicitly negate a labour relationship without a labour contract, a worker without a written labour contract faces difficulties in proving that a labour relationship has been established.[30] In the 1990s and 2000s in sectors such as labour-intensive manufacturing, construction, and services, a large proportion of people were employed without written labour contracts, which created sometimes insurmountable barriers to their ability to access systems provided in the Labour Law for wage protection, working conditions, specialised labour dispute resolution, social security, and safety net provisions in cases where wages were not paid or workplace injury had occurred.[31]

Another weakness of the law was that it very quickly became outdated due to the proliferation of dispatch labour and other types of informal and non-standard or precarious working arrangements. For example, the law did not contemplate the need to distinguish between real and false independent contractors, and so left workers vulnerable to employer avoidance devices like false contracting.

Regarding the regulation of different categories of workers that fall within the scope of the law, the regulatory regime of the Labour Law imagines a standard or typical worker employed full-time in a fixed workplace such as a state-owned enterprise or a foreign-invested enterprise. In light of this, the Labour Law thus pays little attention to, and protects poorly, the rights of people in short-term, part-time, casual, or project-based work, or who are employed under arrangements such as labour dispatch, where labour is supplied to an end user by a third-party organisation. For these reasons, labour dispatch arrangements became a very common way for the end user of labour to avoid application of the Labour Law. The system was not subject to detailed regulation until 2007, with the passage of the Labour Contract Law.[32]

Enforcement and Dispute Resolution

Like many laws, the Labour Law enacts state-led enforcement supplemented by private dispute resolution, primarily for disputes related to legal rights. Law enforcement comprises three components: private enforcement through dispute-resolution processes, enforcement by state administrative agencies, and enforcement by the unions.[33] Enforcement

of the law has generally been weak, both because of structural power imbalances between workers and employers and because these enforcement mechanisms have not been effective. Poor law enforcement has gone hand in hand with poor compliance.

The Labour Law adopts the three-stage dispute-resolution system comprising mediation, labour arbitration, and litigation that was first established in the 1980s in foreign-invested and state-owned enterprises. Under this system, disputes are first to be mediated within the enterprise by a committee comprising representatives of the workers' congress, the enterprise union, and enterprise management. This form of mediation makes sense only where the enterprise has a union and a workers' congress, which were, at the time, primarily located in state enterprises. Labour arbitration is conducted by labour dispute arbitration committees—a tripartite committee comprising representatives of the local labour administration bureau, the district trade union, and enterprise management. As the process has in fact been dominated by local labour departments, this form of dispute resolution has been affected by conflicting policy incentives, corruption, and questions about competence.[34] Finally, an appeal can be made to a court if one is dissatisfied with the arbitration decision.[35]

Ultimately, this form of dispute resolution proved to be a time-consuming and costly process, which workers—especially if they had been dismissed from their employment—were less able to sustain than enterprises. Apart from time and cost, another limitation is that the labour dispute system is directed exclusively to breaches of labour rights, but not interest-based claims over wages and conditions. However, despite the cost and difficulty of pursuing claims, the number of claims heard by labour arbitration committees and courts continued to increase as labour dispute resolution was diverted away from mediation within the enterprise.[36] After some of the barriers and costs to accessing arbitration and litigation were reduced with the passage of the Labour Disputes Mediation and Arbitration Law in 2007, there was a further surge in the number of disputes filed, revealing large pent-up demand.[37]

But, in an economy now dominated by precarious work, the gig economy, and labour dispatch practices, an assertion of rights by a worker will commonly be preceded by an argument about the boundary issue of whether a 'labour relationship' exists. For workers, this threshold standard is often difficult to establish because of a lack of credible evidence in acceptable form and lack of resources to prosecute the argument. Those

in precarious work are also the least able to sustain the cost and time required to pursue their rights through official channels.[38]

Article 88 of the Labour Law provides that the trade union is also responsible for 'safeguarding the legitimate rights and interests of labourers, and supervising the implementation of laws, rules and regulations on labour by the employing units'. However, enterprise unions are in a structurally weak position to perform their responsibilities either in dispute resolution or in law enforcement, because of their upward responsibility and obligation to implement Party policy—which may be counter to workers' rights and interests—and because enterprise unions often include or are led by representatives of management.[39]

The weaknesses of private dispute-resolution mechanisms to resolve disputes in a timely and fair manner, coupled with the lack of effective penalties for enterprises breaching mandated labour standards, have exacerbated labour unrest. From the mid-1990s to the late 2000s, failure to pay wages on time and without unlawful deductions, punitive labour discipline, and poor working conditions became widespread and acute, particularly in small privately owned businesses and labour-intensive export sectors. Private enforcement was unequal to the task of addressing these problems, with collective disputes ending up being individualised by courts and the unions mostly absent from any role in protecting worker rights and interests. Both by design and as a result of limitations in private dispute resolution, the burden of enforcement has fallen on the labour administration department and its labour inspectorate. However, the capacity of the department and inspectorate to enforce the law has been limited by a range of institutional and legal factors, such as chronic understaffing, budgetary limitations, lack of clear policy support by local governments, and high law enforcement costs and risks.[40] Increasing labour unrest has placed greater pressure on the labour administration to enforce the law, but more importantly to defuse and minimise conflict as part of broader stability maintenance responsibilities.[41] It is therefore unsurprising that local labour departments are often the first agencies to which workers turn to express grievances.[42]

What Came After

When it was passed, the Labour Law was intended to be the first of a suite of labour-related regulations. However, because of the disruption to the labour market and massive layoffs resulting from the reform of

the state sector in the late 1990s (see Ching Kwan Lee's and William Hurst's essays in the present volume), this accompanying legislation was delayed.[43] Regulatory gaps and ambiguities in the law were addressed by implementing national or local regulations, often on an ad hoc basis and often ex post facto, in response to abusive practices. In some cases, local regulation was outside the scope of the Labour Law itself.

Widespread worker unrest galvanised the political will to address some of these deficiencies. The impetus for drafting new labour-related laws came alongside a three-year campaign to redress systemic problems of non-payment of migrant workers' wages between 2004 and 2007. In the wake of that campaign, more worker-friendly legislation—that is, the Labour Contract Law, the Labour Disputes Mediation and Arbitration Law (2007), and the Employment Promotion Law (2008)—was drafted and passed despite organised opposition from some employer groups (see Gallagher's essay in the present volume).[44]

But, as mentioned at the beginning of this essay, these reforms did not change the basic structure of or categories set out in the Labour Law. Despite the dramatic shifts in the nature of work and workplaces, the legislation passed in 2007 and 2008 did not adopt more creative ways of regulating work to address the challenges of precarious work, or even fundamentally reimagine the standard worker or the hierarchy of protection previously enshrined in the Labour Law.[45]