

2008

Under the administration of Hu Jintao and Wen Jiabao (2003–12), the process of codifying Chinese labour law continued as part of the Party-State's vision of a 'harmonious society'. In 2008, three new laws with momentous implications for Chinese workers were enforced: the Labour Contract Law (LCL), the Employment Promotion Law and the Labour Dispute Mediation and Arbitration Law. The LCL proved to be particularly contentious. After years of internal discussions among academic and government circles, in March 2006, the Chinese authorities released a first draft of the law, asking the public to comment on it. Within one month, they received more than 190,000 comments, 65 percent of which were from workers. Although the draft had already been at the centre of a heated debate among two factions of scholars and policymakers—one that argued for more state intervention in industrial relations to protect workers' rights and the other, which prioritised implementing the existing laws rather than introducing new ones—in the spring of 2006, the discussion started making headlines in the Chinese media. The decision of some business organisations, both Chinese and foreign, to publicly oppose the law fuelled public indignation but also alarmed the Chinese authorities, and the text was substantially revised before the law was finally passed. This essay reconstructs the heated debates that led to the adoption of the LCL and looks into the impact of the law on the Chinese workplace in the years since its adoption.

The Labour Contract Law and Its Discontents

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The 2008 Labour Contract Law (LCL) was the most hotly debated law since the 1954 Constitution of the People's Republic of China (PRC). It revealed the public's interest in workplace protection and their real fears that the reform and liberalisation of the 1980s and 1990s had gone too far in rolling back employment security and work-related social welfare. It was also an international debate, bringing together representatives of labour and capital to hash out the future of the Chinese workplace. Representation, however, was more diverse and inclusive than usual, with voices from the official union, the All-China Federation of Trade Unions (ACFTU), labour nongovernmental organisations (NGOs), social activists and academics taking a pro-labour stance, while foreign business associations, self-made Chinese entrepreneurs, government officials and academics spoke out for capital.¹

The process of drafting and legislating the LCL opened a window on to China's political institutions, its social cleavages and its dynamic but unstable economy in ways that were quite unprecedented and have not been seen since. It was an experiment in open legislating and public participation that far exceeded the goals of Hu Jintao's government, which had championed reforms that emphasised reducing inequality and expanding the coverage of social welfare. The publicity and media attention around the law also contributed to rising mobilisation by workers, legal activists and NGOs. Unfortunately, the implementation of the LCL occurred as the Global Financial Crisis wreaked havoc on China's export juggernaut. The year 2008 marked a secular shift in labour dispute trends, with numbers doubling from the previous year and continuing at that higher level in subsequent years. Some disputes were legal scandals over employers' attempts to weaken the law, such as the preemptive mass layoffs by Huawei, which tried to terminate thousands of long-term workers and then reemploy them on short-term contracts. Others were spillover strikes and demonstrations by workers emboldened by a central government that seemed sympathetic to their cause, such as the 2010 Honda Strike (see Chan and Hui's essay in the present volume).²

It is inaccurate to credit the law alone for these broader trends. The LCL was a consequence of broader social and economic changes in the 1990s and early 2000s, especially the gradual and then dramatic loss of employment security for urban workers that began with the use of labour contracts in the 1980s and was then codified in the 1995 Labour Law, and which peaked with the mass layoffs of the state-owned enterprise (SOE) restructuring at the end of the last century (see Biddulph's, Hurst's, Solinger's and Ching Kwan Lee's essays in the present volume).

In addition to enhancing employment security, the goals of the LCL included greater protection of informal workers, especially rural migrant workers. However, since its passage in 2007 and subsequent revision in 2012, labour market segmentation has not diminished in China. Instead, segmentation has shifted to reflect new inequalities from the growing divergence between the old economy of manufacturing and construction and the new gig economy.³ The strengthened employment security regulations of the LCL have enhanced the workplace conditions for formal standard workers while those caught in precarious and unstable employment are bereft of these protections.⁴ The expansion of the gig and platform economies means that more and more Chinese workers are employed in sectors where the LCL is either not applied or ignored in favour of more important goals like techno-nationalism, decoupling from the United States and the alleged need for flexible employment as a requirement for innovation.

The trials and tribulations of the LCL should be seen as part of a broader evolution of China's labour legislation. Each new law has created protections for some, while leaving others out.⁵ As Beijing now turns its sights to the problems of workers in the gig and platform economies, we may be on the cusp of a new drive to close gaps in protection. However, with the intense crackdowns on labour and legal activism since Xi Jinping took office, we are unlikely to see a return to the social mobilisation and debate that accompanied the passage of the LCL.

Prelude

The multiple-year debate over the LCL, from the law's first drafting in 2004 to its passage in the summer of 2007, was rooted in the growing backlash over the first labour law ever adopted by the PRC. The 1995 National Labour Law (discussed in this volume by Sarah Biddulph) was the foundational law for reform-era labour relations, but it pleased no-one.

Fundamentally, the 1995 Labour Law codified the regulatory and legal framework developed in the 1980s to structure labour relations in foreign-invested enterprises and extended it to the entire economy, including the public sector, which was still the dominant employer in China's cities.⁶ To China's socialist labour aristocracy, the 1995 law heralded the smashing of the iron rice bowl. It introduced labour contracts, it facilitated short-term employment and it only weakly specified the employers' responsibility to offer social insurance. To China's growing army of migrant workers, streaming by the hundreds of millions into China's cities, the 1995 law had little significance. Without formal contracts and 'labour relations' established de jure, most migrant workers were closed out of the protections offered by labour contracts.

Until the 1995 law, urban workers in the public sector were mostly insulated from the market reforms that began in 1978 with Deng Xiaoping's Reform and Opening-Up policies. SOE reform was gradual and mostly focused on changing the incentives of managers and workers without amending the general social contract that guaranteed urban formal workers lifetime employment and work-unit welfare. Labour contracts permitted short-term employment and mandated socialised welfare, both of which facilitated labour mobility. They were first introduced in the foreign-invested sector of the economy and then only very gradually into China's domestic public sector, and mostly were signed by young workers entering employment for the first time.⁷

All that changed with the 1995 Labour Law, which mandated labour contracts across the board and permitted companies to offer short-term contracts for the first time. The imposition of the law came just before the massive restructuring of the public sector in 1998–2001, which marked the turn of the century with millions of layoffs, bankruptcies and the privatisation of small and medium-sized state companies and nearly all collective enterprises. For many urban workers, the 1995 Labour Law brought not workplace protection and legal rights, but employment and social insecurity.

On the flipside of China's developing bifurcated labour market, rural migrant workers poured into China's construction and manufacturing sectors, but the law's emphasis on formal employment via the written labour contract excluded the vast majority. The restrictions of the *hukou* system made inclusion less valuable in any case because participation in social insurance almost always required local citizenship (see Hayward's, Froissart's and Friedman's essays in the present volume). The 1995 Labour

Law offered the promise of protection but for the most part did not achieve it. It did contribute to the marketisation goals of the Jiang Zemin administration and the SOE restructuring led by Premier Zhu Rongji. Labour mobility expanded dramatically as flexible employment became the norm for urban workers and informal employment became the norm for rural migrants.⁸

The period between the 1995 Labour Law and the drafting and passage of the LCL saw dramatic shifts in the Chinese economy. The public sector contracted, especially in terms of employment, while the private and foreign sectors expanded rapidly. China's accession to the World Trade Organization in 2001 facilitated integration into global supply chains and accelerated China's designation as the workshop of the world. Much of this boom was fuelled by waves of young rural migrant workers. In 2003, labour shortages were first noticed in the manufacturing hub of Guangdong Province as China's continuing restrictions on urban residency through the *hukou* system depressed labour mobility and urbanisation. There was also increasing consternation about the changing demographics of the workforce as it was ageing rapidly, undermining China's demographic advantage.

This period also saw rising labour contention, legal mobilisation and scandals over dangerous and exploitative workplace conditions. Pensioners and older state-sector workers protested the SOE restructurings of 1998–2001 with strikes, street demonstrations and traffic blockades.⁹ Labour-intensive manufacturing hubs in Jiangsu and Guangdong saw new waves of strikes and work action by emboldened young rural workers. The socialised insurance programs set up in the aftermath of the Labour Law were underfunded, undersubscribed and incomplete. Huge gaps in China's welfare state were revealed just as attention turned to the pressures of an ageing urban society and incomplete urbanisation that allowed rural workers to toil in the cities but never to settle permanently.¹⁰ There were increasing calls to draft new laws that enhanced employment protection, increased participation in social insurance funds and improved access to legal channels for dispute resolution. The LCL was the most important of several new laws passed in this period to address these goals.¹¹

Debate

The debate over the LCL was intense and very public. It was fed by widespread dissatisfaction with the current legal regime, which had under-

mined the security of urban formal workers while not really extending much protection to the growing legions of informal workers from the countryside. It was promoted by the Hu Jintao–Wen Jiabao government (2003–13), which prided itself on its attention to inequality and redistribution. It was facilitated by a panoply of new interest groups and activists, including labour advocacy NGOs, business associations representing foreign capital and labour lawyers and academics who served as advisors to the drafting process. The legislative debate also heightened internal bureaucratic competition between the official trade union, the ACFTU, the Ministry of Labour (later renamed the Ministry of Human Resources and Social Security) and the main drafting body, the Standing Committee of the National People's Congress.¹²

The LCL legislative process was also one of the first to enjoy public participation, with a public comment period opened in the spring of 2006. There was substantial interest in the law, with more than 190,000 comments submitted. The ACFTU mobilised grassroots trade union organisations to encourage comment submissions and was bolstered by the strong reaction to the draft law. Representatives for capital also spoke up, often drawing the ire of the Chinese public and external NGOs and academics who saw opposition to the law as thinly veiled attempts to keep Chinese labour standards low and Chinese labour cheap.¹³ There were dramatic statements by foreign business associations, sharp discussion among members of the Chinese Political Consultative Conference and countless academic workshops about the different drafts of the law.

The actual drafting process was still opaque and while public comments were numerous, their contents were never released to the public. Changes to each draft of the LCL were substantial, but the final version of the law scaled down some of the protections for employment security and collective labour rights, leaving loopholes in how the law would be interpreted by courts and implemented by localities. Controversy and drama continued into the implementation period as the LCL came into effect just as the global financial system imploded.

Implementation

From 2008 until its revision in 2013, the implementation period of the LCL was fraught with economic upheaval and social instability. China did not experience a financial crisis like the rest of the world, but instead experienced an export crisis because of the deep contractions in Western

economies. In late 2008 and early 2009, more than 30 million rural migrant workers were laid off amid widespread factory closures in coastal manufacturing hubs.¹⁴ Disputes of subsistence—especially wage arrears and severance compensation—challenged local governments, which in some cases stepped in to compensate workers directly as factories abruptly shuttered and owners fled. There were also preemptive attacks on the law by companies attempting to avoid the onerous requirements to sign open-ended labour contracts with current employees who had more than ten years' tenure. For instance, Huawei met vociferous criticism when it terminated 8,000 employees in order to re-sign short-term contracts with them after the passage of the law.¹⁵ In the first year of the LCL alone, labour disputes doubled in number nationally, with numbers tripling in some coastal manufacturing hotspots.

With the Chinese Government's generous stimulus package to fuel domestic recovery in the wake of the Global Financial Crisis, disputes over redistribution—such as demands for higher wages, social insurance payments and overtime pay—also increased. Workers still employed but seeking better conditions were emboldened by the upside pressure on wages, the increasingly apparent labour shortage in manufacturing and the Hu–Wen administration's overt focus on inequality and social welfare. The infrastructure boom and real estate building craze also drove many migrants to seek out jobs closer to home in inland Chinese cities where longer-term concerns, such as the right to participate in social insurance, became more important. Other laws that complemented the LCL's expansion of workers' rights—such as the 2010 Social Insurance Law, the 2008 Labour Dispute Mediation and Arbitration Law and the 2008 Employment Promotion Law—became part of the legislative legacy of the Hu–Wen administration. The legislative attention given to the workplace fuelled civil society's sense that change was happening and that social mobilisation was not only possible, but even encouraged by a sympathetic central government.

Social Mobilisation and Activism

A nascent labour movement had begun to take shape in the years following the restructuring of the SOE sector and China's accession to the World Trade Organization at the turn of the century. Though fragmented and divided by region and focus, in this period, several dozen labour NGOs

emerged nationally.¹⁶ Academics often ran legal aid clinics or centres within universities offering assistance to workers.¹⁷ Cause lawyering also exploded in this area,¹⁸ while international collaboration and assistance peaked during this period, as foreign NGOs, international institutions, universities and foreign governments supported Chinese civil society, legal advocacy and capacity-building within the government bureaucracies responsible for workplace protection, representation and dispute-resolution.

Many labour NGOs initially focused on the increased access to the legal system and the new protections codified in the LCL. Many also focused on special groups that were particularly marginalised in the Chinese economy, including women workers, rural migrants and workers affected by occupational injury or disease (see Howell's essay in the present volume). As social mobilisation increased, with large strikes in the Honda supply chain in 2010 and several massive strikes over social insurance in 2014 (see Chan and Hui's and Blecher's essays in the present volume), labour activists shifted towards collective labour issues, such as associational rights and collective bargaining (see Froissart and Franceschini's essay in the present volume).¹⁹ Some labour NGOs focused on empowering individual workers through collective training and coaching that was often done behind the scenes and masked the growing network of labour activism.²⁰

This burgeoning movement was squashed through a series of crack-downs on labour activism and on legal activism more generally soon after Xi Jinping took office in 2013.²¹ In July 2015, more than 200 legal activists and cause lawyers were detained on charges from state subversion to picking quarrels. While many of these lawyers focused on civil and political rights that are even more sensitive than labour rights, it sent a chilling message to the entire legal profession.²² This crackdown was quickly followed by a crackdown on dozens of labour activists in late 2015, with special condemnation of the foreign ties and financial support on which many labour NGOs relied.²³ The Foreign NGO Management Law passed in 2016 further complicated Chinese civil society's ability to rely on external funding for their activities. In 2018, after Marxist student groups assisted with union organising in a company in Guangdong, a new crackdown targeted these links between students and labour activists (see Elfstrom's essay in the present volume). Students at many prestigious universities were detained, questioned and urged to give up their activism.²⁴

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The crackdown on labour and legal activism nipped the nascent labour movement in the bud.²⁵ While strikes and demonstrations did not end with the crackdown, there is evidence that large, coordinated industrial actions declined precipitously after 2015.²⁶ Labour disputes through the administrative and legal systems have also plateaued, though they remain at high levels compared with the pre-2008 period. Despite these challenges, the LCL has improved some aspects of China's workplace conditions. It is, however, difficult to separate out the effects of the law itself from other structural or cyclical factors that may have also contributed to improvements.²⁷ For example, the demographic changes and the resulting labour shortages enhanced some workers' bargaining power, while the stimulus program led to more construction and infrastructure jobs, especially in inland China.

The LCL's main thrust was to emphasise employment security, particularly for workers with long tenure, by mandating a written labour contract. Employment security, in turn, would raise participation in social insurance. In terms of these two goals, the LCL was partially successful. The proportion of workers with labour contracts increased, though migrant workers still lag behind local workers.²⁸ The proportion of workers who participate in social insurance has also increased though participation remains rather low for non-local (migrant) workers.²⁹ The publicity over its drafting heightened public awareness of workplace rights and certainly has placed more pressure on employers, both from employee grievances and from the risk of more severe penalties for noncompliance.

However, as with other labour legislation in China, the LCL's stringency also unleashed a new search for loopholes and workarounds. It may also have contributed to unemployment, especially among older workers who were terminated rather than being offered an open-ended contract.³⁰ In the initial implementation period, the most important loophole was labour subcontracting (劳务派遣), which expanded rather dramatically in the aftermath of the LCL, especially in SOEs.³¹ Labour subcontracting allows for a third-party labour service company to employ workers who can be seconded out to firms for temporary positions. Employment security, wages and social insurance are all lower, but the real attraction of labour subcontracting after the LCL was the ability to avoid the open-term contract. After numerous reports surfaced on the use of labour contracting, especially targeting the expanded use of labour subcontracting by state

firms, the LCL was revised in 2013 to limit labour subcontracting to 10 percent of all positions, and only those that were temporary, auxiliary or replacement. This was one of the last legislative moves of the Hu administration.

The legislative achievements of the Hu–Wen era were not appreciated by everyone, especially officials in the Xi administration who were increasingly concerned about China’s ‘New Normal’ economy. The New Normal was a recognition of slower growth as a fundamental characteristic of China’s maturing economy with its debt-heavy local governments and SOEs and a rising middle class that demanded more attention to livelihood issues, such as air pollution, food safety, better schools and so on. The anticorruption campaign launched by Xi Jinping in 2013 also made local officials less enamoured with single-minded pursuit of economic growth and investment if opportunities for self-dealing and graft were diminishing, not to mention becoming far more dangerous politically. Finance Minister Lou Jiwei publicly denounced the LCL in 2015, castigating it for freezing up China’s labour markets and comparing it to the mistakes made in Western economies that empowered trade unions.³²

The Challenges of the Digital Economy

Despite announcements about plans to revise the LCL and restore greater flexibility to employers, the Xi administration has not gone forward with revisions. Indeed, the Xi administration has been slow to undertake major labour law reforms that could rile up workers, and has delayed the adoption of a later retirement age. Instead, it has allowed the economy to ‘grow out of the law’ by encouraging the new digital economy to expand rapidly, mostly outside the restrictions of the LCL. China’s e-commerce industry has experienced several years of quick growth. According to the International Labour Organization (ILO), China likely has the largest number of people employed in the e-commerce sector in both absolute and relative terms.³³ Most are employed indirectly as independent contractors or as dispatched workers. In 2019, there were only about 6.23 million workers directly employed in the digital platform economy, which the ILO estimates is less than 8 percent of the total workforce of nearly 80 million.³⁴ By some accounts, the size of the entire workforce in the digital economy is even larger—more than 180 million people—accounting for nearly one-quarter of the workforce.³⁵

The COVID-19 pandemic has further contributed to the growth of the new digital economy, as many more households became reliant on digital shopping during the long lockdown in the spring of 2020. The intensity of the work is locked in by the platform's use of algorithms to speed delivery, which increases control over the worker without encumbering the company with formal employment or social insurance burdens.³⁶ In recent months, with an explosion of stories about exploitation in the sector and new forms of labour organising and activism, the central government has started to pay more attention. During a tour of Guangxi Province in April 2021, Xi Jinping mentioned the importance of protecting the legitimate rights of 'truck drivers, couriers, and food delivery riders' and encouraged the development of new job policies for both rural migrants and college graduates.³⁷ However, these encouraging words were paired with greater repression of labour activism in this sector. In February 2021, the labour activist and platform worker Chen Guojiang was detained in Beijing for 'picking quarrels and provoking trouble'—a catch-all charge often lodged against civil society activists.³⁸

Alongside the complaints of platform workers in e-commerce, young, educated office workers in the tech companies that often run these platforms have also begun to voice opposition to the intense '996' work culture of the industry ('996' describes the working schedule in tech companies: 9am to 9pm six days a week). Celebrated by tech tycoons as something that workers should either endure on their way to wealthy entrepreneurship or even glorify as a badge of techno-nationalistic honour, the 996 work culture has been blamed for the 'overwork' deaths of young office workers and for contributing to a new pattern of 'involution' (内卷) among young college graduates—a dynamic of intense competition among an educated workforce. Philip Huang invoked the term 'involution' to describe China's stagnation during the Industrial Revolution of the eighteenth and nineteenth centuries, as caused by a large labour surplus that prevented innovation.³⁹ In the modern example, workers themselves—from e-commerce delivery drivers to cynical and bored office workers—invoke the term to describe lives full of endless competition with declining returns.⁴⁰

An Endless Cycle

From 2013, parts of the Chinese workforce enjoyed the boom of the digital economy, but they have been largely excluded from the protections in the 1995 Labour Law and the 2008 LCL. Each tightening of the legislative framework has been followed by the emergence of new loopholes and new unprotected sectors of the labour market. In the 1995 Labour Law, rural migrants were largely excluded from the benefits of labour contracts; the 2008 LCL expanded the scope of contracts and insurance coverage while also driving new employment into labour dispatch; finally, in the 2013 revision, labour dispatch was restricted but labour outsourcing and independent contracting expanded rapidly, especially in the new digital economy.

The 2008 LCL remains controversial. Employers blame it for ossifying China's labour market. Labour activists and workers blame it for not doing enough. As China's new digital economy flourishes, it does so largely outside the strictures of the law. The recent anti-996 movement and the organisation and mobilisation of e-delivery workers may lead to a new round of protective legislation. But with the crackdown on labour activism and organising continuing unabated since 2015, social mobilisation and the public's support for greater protection will be muted and constrained. Concern over innovation and technological independence may trump concerns about the plight of delivery workers and those protesting China's toxic tech workplaces.