

Law of the People's Republic of China on Employment Contracts

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Introduction

What workers should get but are not getting is something laws today have no way of determining. An epoch of betrayal is the time that lies between the end of ideological rule and the beginning of a constitutional system. Tens of millions of people are struggling in an order that no longer belongs to the one and has not yet arrived at the other. The former has abandoned them, while the latter is not yet even vaguely visible. Thus we really have no way to conceptuali[s]e their interests adequately, as they wander – through the ruins of social justice – between two vastly different property and social systems (Yi 2005, p.196).

In the context of China's dramatic and ongoing transition towards a new social and economic orientation, this paper seeks to identify and evaluate the main issues arising from China's most recent labour reform. The Law of the People's Republic of China on Employment Contracts was passed through China's parliament, the National People's Congress (NPC), in 2007 and subsequently implemented on the first of January this year. Aside from this, China's labour market is regulated by the labour law of 1994 and inconsistent local government rules, no longer adequate to address the employment problems associated with the country's shift to a labour market from the 1980s. A reduction in state enterprises and growth in the private sector and transnational employers has resulted in many workers lacking basic protections. While the 1994 law attempted to address this by its requirement for labour contracts, about 80 per cent of employers did not heed this and those contracts that were signed tended to be for only short periods (Cheng in Global Labor Strategies 2008). Additionally, issues relating to their termination took the focus of the law and accordingly, broader proscriptions pertaining to all aspects of labour contracts are now necessary. Increasing instances of precarious employment such as casual work and labour hire have also called for greater regulation.

While the extent to which the most recent law will be effective in its aim to better regulate employment remains to be seen, consultation with some of Australia's leading experts on the topic (whose views are included throughout this report) has nevertheless revealed recurring concerns. Principally, doubt arises in regards to successful opposition to the law, the role and agency of the All-China Federation of Trade Unions (ACFTU) and methods of enforcement, all of which are detailed in this report. It is important to acknowledge here, however, that it is difficult to anticipate the future success of a law within the context of China's rapid change and as such, judgments made on the sole basis of failed previous laws are inadequate. Moreover, without the ability to consult primary Chinese material, this analysis is limited in reporting on the issues already being faced on the ground by Chinese workers and may serve better to focus on what may be done in Australia to encourage compliance and support of the law.

Literature Review

Literature consulted in conducting this research may be split into three groups: that pertaining to China's socio-political context of the last two decades in which the reform in question has come about, commentary on the changing nature of the All China Federation of Trade Unions (ACFTU), whose agency is fundamental to the success and enforcement of this law, as well as academics' analyses of the law on employment contracts specifically. Among the former group, Wang's edited book provides us with a useful background for conceiving of the law;

that is, as a product of the 'second reform era' commencing from 1992 (Wang 2005). The first era, dating from 1978 onwards, inspired new ideas and hope while the second saw greater social divisions, the dissolution of dreams and the need to confront the problems of ordinary people rather than the grand scheme. From this angle, the law with which this paper is concerned emerges as a pertinent attempt to address some of China's biting labour force issues brought about by an increasing market prerogative that has pressured both state-based and private enterprises to reduce employee numbers and increase efficiency (Qinglian 2005; Yi 2005).

The Chinese writer Wang Hui provides further understanding of China's neoliberal transition by recognising that it was not a homogeneous movement. Rather, its focus was the cities, resulting in "...the advance of urban reform and the hobbling of reform in the countryside" (2006, p.55). For issues of labour regulation, the implications of a growing city-country divide are of foremost importance, as it has encouraged the mass movement of rural, poor and unemployed persons towards the city since the late 1980s (Qinglian 2005). Chris White, who last year visited China and discussed the labour law reform with key stakeholders (and has contributed to this report), writes that these 'floating people' become China's most exploited source of labour in the cities (2007). Numbering 113.9 million in 2003, according to a Chinese National Bureau of Statistics count (in Cooney 2007), these workers are often employed under dangerous sweatshop conditions, paid under the minimum wage, denied penalty rates or even withheld their entire pay for months on end.

Unfortunately for these workers, the ACFTU, due to its origin in China's pre-market economy, may not take up the adversarial role required to support the employment contract law. Long, whose work is useful on this topic, questions the role of a union that is historically attached to the establishment, however, is fundamentally positive about its future direction (2002-2003). Generally, despite Diana Beaumont (of the Asia Monitor Resource Centre in Hong Kong; 2008, pers. comm., 22 Apr.) and others' hesitation regarding the autonomy of the union, most nonetheless advocate that overseas labour movements find a common goal with the ACFTU rather than focus on an ideological division. Among this conviction are Anita Chan, Research Fellow of the Australian National University's Contemporary China Centre and the organisation Global Labor Strategies. Both are consulted here alongside the official line propagated by the ACTFU website.

With regards to the law itself, this report consults a translation of the law by legal firm Baker and McKenzie (2007) and commentary by Sean Cooney, Associate Professor Melbourne Law School, University of Melbourne. Additional journal articles and news from the Hong Kong Liaison Office of the international trade union movement (IHLO), China Labor News Translations (CLNT) and Global Labor Strategies are also used.

Implementation

Unlike prior laws drafted behind closed doors, the development of the employment contract law was made public, attracting almost 200,000 submissions (Global Labor Strategies 2008). Yet this also meant that its implementation did not occur free of opposition or compromise. Lobbying from American- and European-owned multinational corporations and other groups has been considered successful in diluting the proposed law (Global Labor Strategies 2007;

White 2007; Smith, Brecher & Costello 2006). Smith, et al cite corporations such as Google, Nike, Microsoft and Wal-Mart and groups including the American Chamber of Commerce in Shanghai, the US-China Business Council and the European Union Chamber of Commerce in China as some of the significant sources of resistance (2006). Corporate objections to the law concerned restrictions to the unilateral formation of contracts and conditions, including issues such as the increased difficulty to dismiss staff and resultant requirement for severance payments, the privileging of workers in the interpretation of contracts and the stipulation of union approval for changes made to contracts. In short, the American Chamber of Commerce summarises the resistance, arguing that the law's "...provisions are not consistent with the recruitment system of modern enterprises" (in Smith, Brecher & Costello 2006).

Consequently, the IHLO (2007) & International Trade Union Confederation (ITUC) (2008), along with White (2008, pers. comm., 21 Apr.) and Beaumont in conversation (2008, pers. comm., 22 Apr.), report attempts by companies to avoid the law's specifications by terminating the employment of large numbers of staff immediately preceding the implementation of the law. In one case, between 7,000 and 10,000 long-serving workers were fired at telecommunications company Huawei Technologies Co Ltd in southern China to avert imminent laws that would guarantee the job security of workers who had served ten years or more. While the media was eventually silenced on this issue, the IHLO considers at least initial coverage to "...have sent a clear message to other high profile companies not to try to shed jobs to avoid the new law" (2007, *Shedding workers in the run up to 1 January 2008* section, para.7).

Beaumont, on the other hand, said she was not certain that this type of behaviour would not continue (2008, pers. comm., 22 Apr.). Furthermore, the issue of capital flight is predicted to be significant. Some firms have already relocated their manufacturing chains from Guangdong province to other areas and even out of China; and the Federation of Hong Kong Industries foresees the closure of up to 14,000 factories under Hong Kong management in China this year as a result of the law (ITUC 2008).

Provisions

The content of the Law on Employment Contracts builds upon the labour law of 1994 to provide more comprehensive regulation of "...the establishment, performance, variation, and termination of labour contracts" (Cooney, et al 2007). Its central proscriptions, extracted from the translation by Baker and McKenzie (2007), are briefly listed below.

- Written contracts are compulsory for all workers, and may be individual or collective. Contracts should inform workers of their job description, work conditions and compensation.
- Contracts may be for a fixed term, open-ended term or until the completion of a specific job.
- Probationary periods are limited in relation to the length of contract and employers may only stipulate one for each worker. Payment during this period should be at no less than 80 per cent of that agreed in the employment contract.
- Payment should be made in full and on time. Where remuneration is withheld,

employees may seek an 'order to pay' from the Ministry of Labour and Social Security or the People's Court.

- Work quota standards will apply so that overtime is not disguised. When overtime is worked, payment should be according to the relevant state legislation.
- Occupational Health and Safety rules are tighter, allowing workers to refuse to perform dangerous tasks or bring hazards to authorities' attention.
- To tackle forced labour, the personal property of workers such as identification cards may no longer be withheld as 'security'.
- Sacking is only lawful on specific grounds or will incur penalties. The role of unions is augmented in cases of termination; all unilateral decisions should be referred to a union.
- Labour hire is regulated.
- Part-time work and its rights and restrictions are better defined.
- The role of union is enhanced in collective bargaining (the trend of which has been the provision of above minimum wages and conditions) and to demand corrective action where contracts are not honoured or an employee requests arbitration.

While such provisions would seem to foster fairness and protection, it must be acknowledged that standards for basic working conditions are not new in China and indeed, much of the law's content is 'rearticulated' from other regulations and laws. The idea is that by setting these out in contract form, however, rules pertaining to one's pay, holidays, period of service, penalties and so on may prove tougher for employers to alter and terminate.

Yet the IHLO reports that already companies have released updated standard contracts that it has deemed "worrying" and "regressive" (*Dongguan Draft Contract* section, 2007). With no regulation on the extent of involvement by the ACFTU in the drafting of contracts, there is no assurance that they will improve workers' rights and conditions at all. Many workers may not even wish to work under a contract for a specified period of service, particularly if they are not entirely satisfied with their respective working conditions.

Enforcement

The issue of enforcement reemerges in most material on the labour contract law as an area of concern, yet unsurprisingly so, since within a broader context, one must remember that labour law in Australia is not necessarily complied with. Indeed, for Cooney, "[d]eficient implementation of, and compliance with, labor law (and law in general) is universal" (2007, p.2).

However, the violation of previously established laws was acknowledged by every person who was consulted for this report; the Law on Employment Contracts will be subject to the same pressures. One key distinction is financial penalties for non-complying employers, likely to prove the greatest incentive to honour the new law: "The cost of violation is very important. The cost will compel the employers to abide by the labour laws" (Cheng in White 2007, p.7). Nevertheless, the corporatist nature of the ACFTU (an analysis of which follows in the succeeding section), laxity of state department inspections and inaccessibility of legal structures are all raised as impediments to enforcement. Moreover, the non-government organisations that exist are both few in number and under strong political constraints.

One issue that exemplifies the shortcomings of the law's modes of enforcement is unpaid wages, among the most pressing and common violations of labour rights in China (China Labor News Translations 2008; Cooney 2007). While exact statistics are difficult to ascertain, the government's Ministry of Labour and Social Security claims it has assisted in the recovery of over six billion US dollars of wage arrears during the last four years (in China Labor News Translations 2008), which is not surprising considering the ILO estimate that 50 to 80 per cent of private businesses in Guangdong Province, China's principal manufacturing zone, retain wages (in Cooney 2007). One Chinese newspaper reported that unpaid wages in Guangdong were a "custom" (in Chan 2003). A news article from the *Straits Metropolitan Daily* this January, that briefs workers on their rights on this topic, attests to enhanced attempts at the local government level to educate workers on how to use the judicial system (in China Labor News Translations 2008). Sadly, the improbability that workers who are not receiving their entitlements have the time, money or capacity required to seek legal representation renders the courts out of reach for many. Nevertheless, the introduction of the law has seen a dramatic increase in the registering of disputes. A Guangzhou newspaper reported that the number of arbitration cases for the area during the first two months of 2008 had been equal to that of 2001, with comparable trends in Shenzhen and Guangdong (ITUC 2008).

Government administrative agents are similarly problematic, especially since China relies on these to a greater extent than many other countries, according to Cooney (2007). He describes the process as 'command and control', by which one arm of the state establishes the rules and penalties for failing to honour them that another arm subsequently imposes. The emphasis on bureaucracy results in poorly regulated processes and procedures with regards to inspections, leaving some groups of workers unmonitored. Labour rights officials use their limited resources on inspections of permanent residents. For instance, Weiner cites a Beijing official's estimate that China offers one labour rights inspector for each 14,000 workers (contrasted with ratios of one to 1,000 in the United States and one to 500 in Western Europe). There may even be incidences of corruption, with Weiner writing that "...resource-strapped inspectors focus mostly on permanent residents (*hukou* 'residence permit' holders) in the towns whose leaders pay their salaries" (2005, *Labor Rights Laws* section, para. 3).

However, strong attempts are being made in the media and by academics to promote the enforcement of this law. It is a good law in itself, according to Beaumont, that just really requires that certain structures grow to ensure its implementation (2008, pers. comm., 22 Apr.). This may be underway: the labour contract law now accords greater powers to state agents for establishing supervision, inspections and compliance rules, involves the establishment of new legal centres and is focusing on educating workers on new labour standards. A smaller Labour Dispute Mediation and Arbitration Law has also come into effect on the first of May this year to better systematise workers' use of the courts for arbitration (China Labour Bulletin 2008). White believes that "the government really wants this law to be enforced" (2008, pers. comm., 21 Apr.). However, outside of official structures, part of the effectiveness of the law will depend on individual workers' confidence to assert rights for themselves.

The All China Federation of Trade Unions

Founded in 1925, the ACFTU is a state-governed body deeply rooted in its historical function as a governmental instrument for labour regulation. As China's sole union organisation, the ACFTU has a membership of 193 million workers, which makes it the world's largest, even after one takes into account the base of unwitting or indifferent members (Chan 2008). However, due to its attachment to the state and inability to have adapted to China's contemporary labour force needs, the union's effectiveness has been contested: "If the union does not detach itself from the establishment, its claim of being a representative of the workers' interest becomes empty talk, and its very survival is at stake, with a likely consequence of social chaos" (Long 2002-3, p.186). What is more, Chan points out that by its very nature as protector of the rights of workers, the ACFTU has the capacity to undermine China's economic aims; as a result the state exercises greater control over this apparatus than its others (2002).

Several areas of concern have been raised in relation to the ACFTU's organisation. Firstly, distinguishing between 'service' and 'action' unions, White considers that the ACFTU is characterized by the former due to its pro-market imperative, adequately assisting workers with non-monetary benefits such as discount holidays but struggling with the demands of the capitalist sector (2008, pers. comm., 21 Apr.). Secondly, the ACFTU works in close partnership with business (Long 2002; Weiner 2005). Beaumont discerns the same issues from her work at the grassroots level, stating that the ACFTU has not served as a "genuine workers' organisation" for years and may be considered "useless and blatantly corrupt" in many cases (2008, pers. comm., 22 Apr.). Importantly, for Beaumont, one must distinguish between the operational levels of the ACFTU, for there may indeed be genuinely good ideas at its heart in Beijing that are simply not translated to the provincial level (2008, pers. comm., 22 Apr.). Too often, in a local context, unions are inexperienced, "Human Resources tools" for businesses' management of workers, with a direct economic interest in the labour productivity of an area, said Beaumont (2008, pers. comm., 22 Apr.). She explained the relationship a union often has with the local mayor with regards direct quotas for productivity and investment. Accordingly, government officials or business managers may act as union leaders. The success of the directive coming from the top level therefore depends on unions locally. Third, the ACFTU lacks any legal sway and is confined to establishing violations and mediating between the employee and employer to resolve it. Finally, many Chinese people would not know the purpose of a trade union if asked, maintains Beaumont (2008, pers. comm., 22 Apr.). An employee would favour the government's Ministry of Labour and Social Security if they wished to raise a complaint, she said. In many cases, businesses establish partnerships with the union whereby all employees are automatically unionised, meaning that individuals are not necessarily politicised, informed union members.

Nevertheless, while the onus to address these issues lies on the ACFTU, criticism from American or other international groups does little to encourage what could prove useful dialogue with or direction from foreign unions (Chan 2008; Global Labor Strategies 2008). The ACFTU has enjoyed some recent success, including the aforementioned attack on Huawei Technologies Co Ltd (albeit after excessive media pressure). China Labor News Translations, an online repository of Chinese labour-related documents, as well as Chan, report on the active involvement of Wal-Mart workers in their store unions in an attempt to reappropriate power from local government or management (2008; 2006). While this has resulted from grassroots organising, the ACFTU was central to initiating the movement,

having objected to Wal-Mart's refusal to accept unions but lacking the legal means to do anything about it. A covert mobilisation of Wal-Mart employees to establish union branches ensued, involving the dissemination of information to them and nighttime meetings. Consequently, for 17 of over 100 Wal-Mart branches that now exist in China, the ACFTU instigated union representation by democratic election, while internet blogs attest to further victories and the commitment of workers to their own unions.

Similarly optimistic, Chan considers that recent partnerships symbolise a move away from past levels of skepticism that focus on the ACFTU as a "...state bureaucracy dominated by the Chinese Communist Party" (2008, p.2). Last year's China visit by the Change to Win Federation (a reformist coalition of American trade unions) and the decision by ITUC to negotiate with the ACFTU mark a period of increased engagement with foreign labour organisations. Global Labor Strategies also considers that "[t]his [recent] converge of interest could be a model for future cooperation" (2008, *Common employers/common interests section*, para. 5). Moreover, Chan has noted emerging signs of grassroots level "...spontaneous trade union activism..." (2008, p.5). At an official level, Chinese media has documented the commitment of the ACFTU to defend the new law, both in the face of opposition during its drafting phase and through increased labour disputes if employers attempt to dodge their new obligations (Global Labor Strategies 2008; IHLO 2007). The ACFTU's website itself champions workers as the 'master' of its Communist state and commits to upholding its 'legitimate' rights and interests. It urges all trade unions to

...intensify efforts in studying and propagandi[s]ing the law, educate and guide the vast numbers of workers to master and employ the legal weapons to protect their own rights and interests and co-operate with labor and administrative departments in strictly investigating and prosecuting according to law the employer units violating and evading labo[u]r laws (2007, para. 2).

The responsibility lies on the different jurisdictional levels covered by the ACFTU to enact this goal.

Conclusion and Recommendations

The Law of the People's Republic of China on Employment Contracts has taken effect at a pertinent time in China's economic development to provide Chinese workers with rights and benefits for which preceding labour law is proving increasingly inert. However, its potential to do so is yet to be played out. Both the People's Republic of China and the ACFTU appear determined to see its fruition and this report has demonstrated some of the provisions made to overcome the shortcomings of the 1994 labour law, including an emphasis on awareness campaigns, greater abilities for arbitration, supervision by the state's labour ministry and ACFTU involvement. Still, one must be realistic about the timeframe necessary to achieve the provisions of the law, reminds White; securing every worker's rights and obligations in a permanent contract could take years (2008, pers. comm., 21 Apr.). Even if compliance with the law proves difficult to ensure, the law may still be considered an achievement. In their analysis of the combative drafting process, Cooney, et al consider that the law's success lies more in its standardisation of employment regulations rather than ability to overcome the enforcement issues faced by prior legislation (2007).

An additional victory that this report has considered is the growing labour action at the grass-roots level. For the first time, workers' mobilisation is serving to defeat opposition from companies such as Wal-Mart and create unions that are genuinely representative of workers' rather than corporate interests, as reported by Chan and Global Labor Strategies (2008). This has been accompanied by a decisive move in Australia and abroad away from solely critical discourse on the ACFTU, resulting in an ideological shift that is likely to be more conducive to the possibility for international labour groups to enter into dialogue with China's unions. This provides inevitable opportunities for Australian unions to act by encouraging Australian investors that use Chinese suppliers or manufacturers to comply with the laws' stipulations or patronise Chinese companies that do. Given the jurisdictional discrepancies between unions that Beaumont has delineated, she predicts that relationships formed between foreign unions and the ACTFU might be best approached as 'sister' exchanges from the grassroots level where the problems lie (2008, pers. comm., 22 Apr.). Ultimately the law reform should be promoted as of relevance to Australian companies who participate in the global supply chain that demands lower prices and causes resultant effects on the conditions of workers on the ground in China.

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