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Review of 'Understanding Labor and Employment Law in China' by Ronald C. Brown

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Abstract

Review of Ronald C. Brown’s UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA (Cambridge University Press, 2010) which review describes an alternative way of describing and analyzing law and legal institutions in contemporary China generally, and labor law specifically.

UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA, by Ronald C. Brown. New York, NY: Cambridge University Press, 2009. 348pp. Hardback $90.00/£50.00. ISBN: 9780521191487. eBook format $72.00. ISBN: 9780511636813.

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Any attempt to analyze China's comprehensive labor reform over the past three decades faces at least two dilemmas. First, the analyst must confront the task of describing how the Chinese state has dismantled the "work unit" (or *danwei*)-based "iron rice bowl" employment and entitlements system, replacing that comforting but low-production employment and social security scheme with formally-proclaimed legal rights and institutions apparently designed to protect employees in a functioning labor market. Second, the analyst must track how the state's commitment (at all levels of government) to implementation of proclaimed legal and institutional protections has waxed and waned, based upon two China-specific factors: (i) the age-old dysfunction between formally-proclaimed legal norms and concrete application of those norms generally, or against superior political or economic power specifically; and (ii) the ongoing deference to a national development policy that puts accelerating economic growth before legal, civil and political rights (where achieved growth is meant to complement the appearance of rule of law in ensuring political stability and some measure of the "harmonious society") (Gallagher 2005; Lee 2007; Anderson 2010).

University of Hawaii law professor Ronald C. Brown's new volume, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA, is a diligent attempt to catalogue the abundant *formal* labor-related law and legal institutions established since the mid-1980s with a particular focus on the period 1992-2008. In assembling a work like UNDERSTANDING LABOR, the scholar has several options, which are not mutually exclusive: exposition of formal norms and institutions, implementation data collection, and analysis. Professor Brown has opted strongly for the first, and offers a wide-ranging exposition divided into major sections describing (i) formal labor regulation and government administration, (ii) employment relationships (focusing on individual labor contracts under the newly-promulgated Labor Contract Law, but with some attention to the notionally available "collective" labor contract (not to be confused with collective bargaining)), (iii) hiring and employment practices (focusing on discrimination in hiring), (iv) wages and occupational safety and health; (v) benefits; and (vi) labor discipline and dispute resolution. That exposition is accomplished in 186 pages of a 323 page book, with the remainder filled out by 11 pages of "case illustrations," 42 pages of a sample individual "Labor Contract" from 2008 and the "Model Collective Contract (for Trial Implementation)" issued in December 2007 by the Beijing

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Federation of Trade Unions, and then a final section of 69 pages reproducing translations of important statutes, including: the Labor Law of the PRC, the Labor Contract Law, Implementing Regulations for the Labor Contract Law, the Labor Dispute Mediation and Arbitration Law, and the Employment Promotion Law of the PRC. Thus, UNDERSTANDING LABOR is largely an assembled exposition of legal and regulatory structures applied to labor in the contemporary PRC to 2008, prefacing more than 100 pages of English language translations of model contracts and statutory material. The exposition and summary of norms is voluminous, and straightforward. For example, Chapter 4 ("Individual Labor Contracts – Formation and Content"), has a total of 62 footnotes, all but 10 of which refer to the specific articles of the Labor Contract Law which the text re-states; six pages (pp.55-61) of Chapter 5's Section 3 ("Current Law on Collective Negotiations") carry 77 footnotes in each case citing to the specific articles in the Provisions on Collective Contacts and the Trade Union Law reported in the text; Chapter 14 is a straight text presentation of the articles in the 2007 Labor Mediation Law.

A strategy of exposition, without much implementation data or real analysis, is not to be dismissed out of hand. A text reporting on a given area of law and practice could be intended as a kind of "desk book," or reference work for practicing lawyers or introductory-level investigators. Of course, the exposition provided should be up to date, relatively complete, accurate, and attempt to prioritize important (applied) structures over rhetorical or formal designs. Moreover, a book of straight exposition should strive to avoid becoming a law firm "client alert" memorandum describing a new regulatory enactment but devoid of current data, analysis of the system in place, or any report on actual implementation. It is with respect to these desired aspects that UNDERSTANDING LABOR fails to fully conform to its promise. A good deal of the data that is included: seems outdated (e.g., a World Bank study from 2004 reported by journalists, a 2004 report by Simon Clarke, Chang-Hee Lee and Li Qi ("Clarke Report"), a 2003 study by Bill Taylor, Chang Kai and Li Qi ("*Taylor Study*"), data on labor arbitration ending in 2007 (pp.169, 172)); is sourced only in English language materials (e.g., the *China Daily* or the now defunct *Far Eastern Economic Review*); or taken from "official" publications like the notoriously unreliable *China Daily* and the (English language text of) CHINA STATISTICAL YEARBOOK. (The YEARBOOK is regarded with some suspicion by China scholars, and is notable for substantive differences between the English and Chinese language text presentations of the same data.) In the places where there is a hint of analysis, UNDERSTANDING LABOR relies very heavily on older studies. For example, Chapter 5, entitled "Collective Labor Contracts and Collective Negotiations," is in one section (pp.49-53) a regurgitation of the Clarke Report and the Taylor Study. Moreover, the book is thin on any description or consideration of the significant – and very public – policy disputes over labor law, and in particular the Labor Contract Law, between well known figures like Professor Chang Kai of China People's University and East China University of Politics and Law's

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Dong Baohua. These debates, carried on in the popular press, academic monographs, and via labor arbitration and litigation, or public relations strategies, are largely in the Chinese language but also accessible in English translation (e.g., Blanpain, Bisom-Rapp, Corbett, Josephs and Zimmer 2007: 510-514 (excerpted interview with Professor Chang), and the Taylor Report referred to by Professor Brown (at least with respect to the views of Professor Chang Kai)). It is also an exercise in intellectual/legislative history commonly provided for other equally complex areas of legal development, such as: an earlier identity of labor law in the PRC (Josephs 1995), China's intellectual property law (Alford 1995: 56-82), U.S. securities regulation (Seligman 2003), U.S. anti-trust law (Urofsky 2009: 300-326, 342-351), corporate fiduciary duties in Japanese law (Kanda and Milhaupt 2003), PRC marriage law (Alford 2003) and even China's amended Company Law (Howson 2008: 200-206, 208-213). The straight exposition of China's labor laws and regulations – in most cases passed suddenly and with little transparency regarding drafting choices made inside the National People's Congress or the governing Ministry – would be greatly enhanced by some recitation of these important, and ongoing, debates. This is particularly true in the case of the Labor Contract Law, which was the subject of impassioned public debate inside the PRC, elite and popular. The book also regrettably omits any real discussion of the labor law and regulatory system applied first and exclusively in the foreign-invested enterprise ("FIE") context, which dates from more than 15 years before the promulgation of a PRC Labor Law in 1994. Without doubt, the PRC's experience with new labor markets and FIEs since the early 1980s has determined the shape and application of the labor regulatory system now applicable to purely domestically invested enterprises. The truth of this statement is made apparent in Professor Brown's brief treatment of "illustrative cases" noted below, all five of which seem to refer to employment disputes at such FIEs or foreign enterprises.

From a law and legal institutions perspective, UNDERSTANDING LABOR gives too little attention to the peculiarities governing the meaning and effect of Chinese law and regulation. Professor Brown starts in a promising way, asserting that "[the way in which] Chinese laws operate is surprising to many in the West" (p.5). He then deviates immediately to focus on the much discussed central-local issue in Chinese governance for a sentence or two, and never returns to how "Chinese laws operate." Instead, any complete evaluation of the formal legal order must show how its application is determined by the widely-accepted non-implementation and instrumentalism of the developing Chinese legal system, and the over-riding force of what Perry Keller calls "normative documents" (Keller 1994) or administrative regulation (Clarke 1997), over and above "law" or national regulation. (For instance, Professor Brown makes reference to the recently-issued Labor Contract Law Implementing Regulations, but fails to describe how – as is the case in almost any sector of regulation in the PRC – such apparently subordinate "implementing regulations" baldly contravene the provisions of what is supposed to be a superior norm, the "Law" itself.) The problem is

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exacerbated by the relative lack of data in UNDERSTANDING LABOR regarding concrete application of formal norms, whether by regulatory institutions, or private claims and/or dispute resolution proceedings. An approach which lays out in easy-to-digest form official norms and institutional structures risks engendering a misapprehension on the part of the uninformed reader: that rules are in fact applied as written or that institutions function as described. Even where data is provided, its real meaning can be obscured without the appropriate context. For example, in Chapter 14 ("Resolving Labor Disputes by Mediation, Arbitration and Litigation"), Professor Brown celebrates the "accessibility" (p.168) under statute of labor mediation (firm internal) and labor arbitration (firm external, but extra-legal), and reports the huge spike in, for example, labor arbitration cases in China (3000% between 1989 and 2007, and a 50% increase in case acceptances over the same period between 2007 and 2008). While the author also points out that arbitration is mandatory before legal action, he does not emphasize the way in which various PRC state institutions at all levels – *via* notices and regulatory measures – overwhelmingly push civil parties into mediation before arbitration, and explicitly so as to keep such provocative disputes away from formal legal institutions. This push into mediation results in a compromise settlement where employer (with significantly greater leverage) and employee both win a little and lose a little, and employees enjoy something much less than pure rights protection or adequate monitoring of oppressive employers. This is the reality of a state-guided labor rights protection regime, and is at variance with what formal norms seem to allow or provide "access" to. Knowing this, readers might comprehend with greater insight a passage like the following (p.172), and the meaning of such terms as "resolving cases," "settled," "withdrawal," "rejection," "workers prevailed," "split decisions" and "partial victories":

> "Labor arbitration has proven quite successful in resolving cases; the resolution rate is higher than 92 percent, including conciliation/mediation and arbitration awards, which in 2006 were 34 and 46 percent of the total settlements, respectively. Of a total of 310,780 cases filed and settled in the arbitration process, 104,435 cases were mediated, whereas 141,465 were settled by arbitration. The other 20 percent were dispensed with by withdrawals, rejections, and the like. Workers prevailed in 146,028 cases, employers in 39,251, and there were split decisions in 125,501 cases . . . . Statistics show workers win nearly four cases for every one by the employer and win partial victories in a majority of the split decisions."

Moreover, a recitation of statistics like this (in this case, drawn from the 2006 CHINA STATISTICAL YEARBOOK) says nothing about enforcement of the "settlements" or "awards," or the fate of employees who have lost or won alleged "partial" victories.

A related difficulty is the way in which UNDERSTANDING LABOR fails in addressing substantive matters of labor law and regulation. An example is the formalized treatment of employee benefits in Chapter 11 (pp.135-147), which lists what law or regulation describes as mandatory or elective benefits for labor, proclaiming "X law

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provides…" or "insurance is financed . . .", without any real indication of the truth, or record of non-implementation or lack of financing, which lies behind the formal edifice. And, as noted above, this information is available in the English language, with better data, a more honest sense of the difference between proclaimed and implemented norms, and remarkably fearless analysis (e.g., with respect to social security, see Gao 2008 (written by Gao Xiqing when still Vice Chairman of the National Council for Social Security Fund Council, before being appointed President and Chief Investment Officer of the China Investment Corporation, the PRC's most significant sovereign wealth fund)).

Also doubtful is the wisdom of including more than 50 pages of "illustrative contracts," which section includes (i) an "Individual Employment Contract" ("used in the manufacturing industry in 2008" per the notes before the form provided), and (ii) the Beijing Municipal Federation of Trade Unions December 2007 "Model Collective Contract (for Trial Implementation)." Of course, it is beneficial for the English language reader to have an idea of what modern PRC contracts look like in translation. However, the existence of promulgated form contracts in China, and their celebration, may be problematic. Very often such model forms are stilted, article-by-article, "contractual" elaborations of statutory or regulatory norms which work against the rights-enabling/self-ordering *ethos* which animate the very idea of a labor "contract." As seen in the "model" contracts foisted on apparently autonomous civil actors in land use rights transactions, corporate articles of association and capitalization structures, resource exploration and development, technology transfer and licensing, and numerous other fields of endeavor, the risk is that such model forms will be viewed – by contracting parties and approving government institutions alike – as mandatory, the very opposite of self-determined bargains between independent civil actors. It is appropriate for Professor Brown to allude to the proliferation of such "model" forms; it is a mistake however to dedicate a good part of his volume to translations of this material, especially with the risk that practitioners in China will look to such forms as the mandatory framework for memorialization of what are supposed to be negotiated arrangements.

UNDERSTANDING LABOR does contain 10 pages of "illustrations" (in the chapter called "Working Labor Law and Employment Law Illustrations" (with introductory material, pp.187-199)). This section is useful, if atrophied given the volume of data and reported decisions now available through public sources and academic or journalistic interviewing. In fact, only five cases are addressed, all appear to involve FIEs or foreigners working in China, and all come from law firm memoranda or foreign language press accounts or blogs (one case is not sourced, and appears to be a hypothetical – "… the legal issues of a foreign person working in China who is both under contract with a foreign-based, home country employer and under contract with a China-based corporation" (pp.194-5)). In only one of the cases is the ex post legal reasoning described (non-retroactive application of the Labor Contract Law); in one other case, the reasoning supporting the

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judgment (a court order by the Donghu District People's Court in Nanchang Municipality) is absent. This small section (at pp.196-7) also demonstrates a substantive misunderstanding of labor and employment relationships between foreign entity "representative offices" in the PRC, and China-domiciled FIEs. Representative offices are not permitted to enter into employment relationships with citizens of the PRC (instead such offices use individuals "seconded" to the representative office by the *de jure* employer, a PRC employment service company). Only FIEs, legal entities domiciled in the PRC, are permitted to enter into direct employment relationships with PRC citizens. Foreign-domiciled entities are not permitted to sign employment agreements with PRC citizens. This hypothetical illustration, and the invocation of applicable legal norms, should be restructured so as to clarify the important issues involved.

Finally, the book contains a number of spelling mistakes, and, more importantly, mis-steps in translation from Chinese or renderings of Chinese terms into indicative English. The English typos and inconsistencies (e.g., "Ministry of *uman* Resources and Society Security" (p.13 (emphasis added)) and "Labor Low of the People's Republic of China" (p.253 (emphasis added); "Corporation Law" (p.46) and "Company Law" (p.47) for the same statute) could be remedied by an attentive copy editor. Their prominence, and abundance, detracts from the overall authority of the volume. In many cases, Professor Brown or the translator uses PRC government-style translations of terms into English, which obscure in some measure the norm or institution described. For instance, the Ministry of Labor's "*xuanchuan zhongxin*" or "Propaganda Center" is translated as the Ministry's "Publicity Center" (p.16). The phenomenon "*laowu paiqian*" is rendered as the benign-sounding "worker dispatch service." The issue with the first translation is obvious. The issue with the second is more subtle. While "*laowu paiqian*" may literally be rendered "labor services dispatch," the term refers to one of the most controversial and oppression-ripe arrangements currently at work in the PRC: employee aggregation and provision pursuant to group (mass) contracted labor arrangements. Not only are these structures rife with opportunity for *individual* labor rights deprivation, but they skew or eliminate legal privity between "employer" and (real) "employee." Surely even the simple term "contract labor provider" is preferable to the anodyne "worker dispatch service"?

Most important in a work which aspires to be a reference book is the accuracy of the translations of Chinese laws and regulations. Here the problems identified in UNDERSTANDING LABOR can be significant, as the translations often prove unreliable or incomplete. By way of example, in this review I focus only on the English translation provided for the all-important "Labor Contract Law" effective January 1, 2008. Some of the translation choices indicate a lack of familiarity with the background of China's developing economic and political structures, and the supporting legal system. For instance, the Chinese characters "*minban*" modifying one kind of legal entity are translated as "private" (Article 2), where the far better English language

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concept is "non-state" to capture collectively-owned enterprises and their progeny (which are not "private"). Likewise, for the doctrinal term "*chengshi xinyong*" (Article 3) applied to the formation of labor contracts, the translation is simply "good faith" instead of "overwhelming good faith [and fair dealing]" derived from the long-standing Roman law concept of *uberima fides* transplanted into Article 4 of the PRC's General Principles of the Civil Law. This may seem a small lapse, but U.S. style "good faith" (as, for instance, required in partnership law) is quite different from *uberima fides*/overwhelming good faith as an instruction to any ex post arbitral or judicial decision-maker in his or her evaluation of labor contract formation. As shown in my own work with respect to corporate fiduciary litigation in China, this string of four Chinese characters taken from a rich civil law tradition is used by the Chinese People's Courts as a vehicle to apply extremely broad notions of fairness, transparency and loyalty to void oppressive contracts (Howson 2010), just as the broad notion of "rights infringement" (*qinquan*) does similar work in torts, contract, securities and fraud adjudication. Finally, there are significant omissions in the translated statute. For instance, Article 5 of the Labor Contract Law gives the local government authorities the power to "*investigate and solve*" (*yanjiu jiejue*) significant labor relations issues (emphasis added). The investigation power is of critical importance in determining the real facts of labor rights infringement in the PRC, especially in the face of all-powerful state or Party-owned employers. However, the UNDERSTANDING LABOR translation omits the authority for "investigation" and simply says that the government, along with the labor union and employer's representative, shall jointly seek "to solve the major problems related to employment relations" (p.271). (Perhaps this same omission accounts for the reference to a 2004 administrative regulation allowing investigation by local labor bureaus instead of the Law (see p.188, footnote 5).) A second example is more serious. Almost every law governing activity in and regarding the PRC contains a jurisdictional clause, proclaiming jurisdiction over activities, transactions, legal relationships, etc.: "in *the territory of* the PRC" (emphasis added). This term of art formulation "territory" is necessary so that PRC law does not cover activities and relationships in regions understood to be part of the PRC but not subject to PRC law, i.e., the Hong Kong and Macao Special Administrative Regions, and the "Province" of Taiwan. The Chinese form of Article 2 of the Labor Contract Law accordingly describes the application of the Law to "*zhonghua renmin gongheguo jingnei de*" employer entities – properly translated as "entities… within the territory of the PRC." The translation of Article 2 of the Law provided in UNDERSTANDING LABOR, however, renders this article as "This Law shall apply to the establishment of an employment relationship between employees and enterprises…" and completely drops the subsequent modifying verbiage "within the territory of the PRC." Thus, the non-Chinese-reading lawyer or scholar consulting the English translation of this critically important Law might come away believing that the Law governs employment relationships in Hong

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Kong, Macao or Taiwan! This is not correct, and as a threshold mistake could prove profoundly misleading.

How might a good first effort like UNDERSTANDING LABOR be restructured or expanded to offer a more useful and analytical work? First, an author would describe the *status quo ante* of pre-reform labor administration and "cradle to grave" security, where law and regulation, and legal institutions, had no role whatsoever. Second, readers require a stronger roadmap of the economic structural reforms implemented since 1980, in particular the way in which the "Socialist market economy" gave rise to something very close to real (and completely unregulated) labor markets in the PRC. Third, a similar, coherent, treatment of the general legal construction (called "legal reform" in English language writing) program implemented over three decades would be useful, with a special focus on the nature of law and regulation in modern China, its largely instrumental character, and the substitute governance norms and institutions that actually function. Fourth, the analyst would make an effort to describe the labor law and regulatory norms put in place with the advent of foreign direct investment and FIEs established in China – such initial norms being models for much of what followed in the purely domestic context. Fifth would be the exposition that Professor Brown engages in, but in a more pointed fashion, and without the large volume of writing which paraphrases English translations of proclaimed statutory and regulatory norms. Sixth, the author would attempt to introduce some of the now abundant data regarding labor markets, regulation, dispute resolution (mediation, arbitration, litigation), enforcement, and rights protection in the PRC (including exercise of private rights of action at law, and political resistance in the streets). Finally, and perhaps most importantly, the author would ask some very hard questions by way of analysis, such as: What purpose do formal legal and regulatory norms really serve in the modern PRC, especially in a highly sensitive, social control-related, and personal rights-oriented sphere like that of labor relations and labor rights? How are capital-labor relations really governed in today's China? Are there regional or sectoral or organizational variances in the way labor is governed throughout the large and diverse nation? What is the strength and effect of the alternative governance norms and institutions which actually work today? To what extent will disillusionment with formal structures offered for comfort and consumption by laborers fuel disillusionment with legal and regulatory systems generally, or fire ever-exploding "rights consciousness" among China's governed? Or, to what extent will governing elites be forced to deliver on the promise of proclaimed norms and institutions, lest they face political resistance born of private actors (laborers) seeking justice or simple remedies? What is the effect of labor regulation directed at export oriented FIEs established in coastal areas on purely domestic enterprises, export-oriented or not? Other analysts and scholars have accomplished precisely this with respect to various areas of inquiry, for instance with respect to the development of copyright law (Alford 1995), corporatization, commercial banking reform and regulation (Lardy 1998), corporate law and corporate governance (Tenev, Zhang and Brefort

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2002), China's stock exchanges and capital markets (Greene 2003; Walter and Howie 2003), and a slightly earlier generation of labor law reform (Josephs 2003). There is no reason why the same kind of exposition, introduction of data, analysis and forecast cannot be accomplished in the even more data-rich and well-observed contemporary labor sector of China. Professor Brown's book is a good faith first draft of the necessary effort to understand labor law and regulation in China. As such, it should and will inspire further work detailing concrete implementation (or not) of the formal system, and analysis of its meaning – for China's workers, for the nation's modern governance project, and for the fate of the PRC's thirty year struggle to establish rule of (not by) law.

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