MAKING CHINESE LABOR LAW WORK

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ABSTRACT

Labor abuses in China have drawn international condemnation and led to increasing domestic unrest. Government, business and unions in the United States have insisted that Chinese law needs to be reformed to deal with those abuses but they fail to identify precisely what reforms are required.

This article aims to shift debates about reforming Chinese labor law in the United States to a much greater level of specificity. The discussion focuses on two very prevalent abuses that are purportedly prohibited by existing labor regulation: underpayment

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1 Law School, University of Melbourne. I would like to thank Mark Barenberg, Sarah Biddulph, Charles Sabel, Ben Liebman, Lance Liebman, Richard Mitchell and Randall Peerenboom for their comments, as well as the Chinese scholars participating in labor law roundtables I attended at Peking University Law School and Wuhan University Law School.
of wages and excessive working hours. The article analyses in detail those aspects of China’s labor laws and labor institutions contributing to pervasive non-compliance. I find that the Chinese regulatory framework is undermined by a profusion of imprecise and sometimes contradictory legal rules, a bureaucratic ‘command and control’ approach to inspection and dispute resolution, and a narrow and ineffective range of tools for inducing compliance.

Drawing on successful international examples of regulatory innovation, as well as recent creative Chinese experiments in labor enforcement, I propose a range of regulatory initiatives that have realistic prospects of inducing greater adherence to the law in China’s current political and economic context.

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1. INTRODUCTION

China’s extraordinary economic success is marred by widespread labor abuses, epitomized by the manufacturing sweatshop staffed by ill-treated workers migrating from China’s hinterland. Many kinds of abuse occur in apparent defiance of Chinese labor law. Firms breach labor contracts and wage regulations by underpaying

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their employees for work performed, or not paying them at all. They violate legal provisions on working hours by requiring staff to work for extreme periods of time without rest. They ignore health and safety law by operating egregiously dangerous workplaces.

In the United States, the Congressional-Executive Commission on China, the United States Council for International Business (USCIB) and Human Rights Watch, among other organizations, have all highlighted China’s systemic inability to enforce its labor laws.

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3 The Congressional-Executive Commission on China (CECC) was established by Congress in the U.S.-China Relations Act 2000 (22 U.S.C. Chapter 77 Subchapter II). The CECC monitors human rights and the development of the rule of law in China. It consists of nine Senators, nine members of the House of Representatives and five Administration officials appointed by the President. See, e.g. the CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, ANNUAL REPORT 36-43 (2005).


law and the detrimental effect this has on Chinese workers. The
American labor movement has gone further. The movement’s
largest peak body, the AFL-CIO, has claimed that China is not only
failing to protect its own citizens, it is wrongfully causing major
economic damage to the United States. The AFL-CIO argues that
Chinese employers are undercutting competitors (including
American competitors) by reducing labor costs far below the level
that would prevail in China if the law was properly implemented.

On the basis of this argument, the AFL-CIO petitioned the United
States Trade Representative (USTR) in 2004 to initiate an
investigation under Section 301 of the Trade Act.6 The petition set
out in detail a range of labor abuses and then, using various

authorizes the United States Trade Representative to impose trade sanctions
against countries that ‘burden or restrict’ U.S. commerce by engaging in
unreasonable trade practices. Unreasonable trade practices are defined to
include ‘a persistent pattern of conduct that … fails to provide standards for
minimum wages, hours of work, and occupational safety and health of
economic models, claimed that China’s unfair cost advantage over US manufacturing had led to the displacement of some 727,000 jobs.\textsuperscript{7} The AFL-CIO sought remedies including the imposition of trade sanctions commensurate with the cost advantage caused by the labor abuses.

The AFL-CIO’s petition was opposed by USCIB\textsuperscript{8} and rejected by the USTR on the basis that the imposition of sanctions was counterproductive and would have disastrous domestic economic


consequences. Both maintained that the preferable path to improving labor conditions in China was, in the USCIB’s words, ‘increasing economic and non-economic engagement’. The merits of the AFL-CIO’s claims about the economic effects of Chinese labor abuses were not subject to rigorous investigation and the matter remains unresolved.

Irrespective of whether the United States should best respond to China’s labor abuses through engagement or through the imposition

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9 Rejected by the Office of the United States Trade Representative on Apr. 28th 2004: 69 Fed.Reg. 26204-5 (2004). The USTR stated that ‘the initiation of an investigation […] would not further Administration efforts to improve workers’ rights in China and, to the contrary, that initiation would instead hamper those efforts’: id at 26205.

10 Shortly after the AFL-CIO’s petition was rejected, the U.S. and China signed four Joint Letters of Understanding for cooperation between American and Chinese agencies in relation to labor issues, including enforcement of wage and hours regulation and workplace safety laws. US Department of Labor The U.S. Department of Labor and The People’s Republic of China Sign Four Joint Letters of Understanding (Press Release, Jun. 21, 2004).
of trade sanctions, a comprehensive analysis of the deficiencies of Chinese legal framework is a prerequisite to generating concrete reform proposals and demands. Unfortunately, advocates of both the engagement and sanctions approaches have operated at a level of generality that makes it difficult to implement or evaluate a practical strategy for improving labor conditions in China. It is not adequate to refer vaguely to improving human rights and the rule of law; if a co-operative approach is to be adopted, precisely which aspects of China’s labor law framework should be a priority for international collaboration? How do we assess whether the cooperation has yielded any tangible benefits? Alternatively, if sanctions are to be threatened, what precise demands are to be made of China? No legal system can achieve perfect compliance, let alone one in a developing country. What then is it reasonable to insist that China do?

Moreover, neither approach sufficiently acknowledges the extent of labor law reform now underway in China, perhaps because much of this reform is occurring at a decentralized level. The domestic
pressure for reform is powerful and increasing. Workers dissatisfied with the lack of remedies for their mistreatment are resorting ever more frequently to self-help measures such as spontaneous protests, many of which turn violent.11 These events are sufficiently serious to induce government officials and labor law scholars to develop an array of proposals for improving law enforcement. Some are ill-considered and makeshift. Others are carefully crafted and highly sophisticated. Having some potential to elicit broader compliance with the law, such proposals merit international recognition, examination and, where justified, support.

This article aims to shift debates about Chinese labor law in the United States and other developed countries to a much greater level of specificity. I undertake a detailed and systematic analysis of those aspects of China’s labor laws and labor institutions contributing to pervasive non-compliance. I find that the Chinese regulatory framework is undermined by a profusion of imprecise

and sometimes contradictory legal rules, a bureaucratic ‘command and control’ approach to inspection and dispute resolution, and a narrow and ineffective range of tools for inducing compliance.

The legal material relevant to China’s labor abuses is vast and the associated issues highly complex, so it is necessary to choose specific abuses to render the analysis manageable. This article focuses on two: underpayment of wages for work performed\textsuperscript{12} and prolonged periods of excessive working hours.\textsuperscript{13} These specific abuses have been selected for three reasons. First, they are among the most common labor abuses, affecting many millions of workers. Second, they are, at least at first glance, violations of


\textsuperscript{13} Prohibited by Labor Law arts. 36-45 and 90.
existing Chinese law.14 The National People’s Congress, the highest organ of the Chinese state, has purported to prohibit these abuses and has directed the official trade unions to act to prevent them.15 Thus there is political commitment to combat them. The abuses therefore directly raise the central question of this article: why, given this commitment, is the law not enforced?

Third, underpayment of wages and prolonged periods of excessive working hours are both practices which are generally agreed, within and outside China, to be unjustifiable. They are not technical or tolerable breaches of the law. True, there is much controversy among scholars and policy-makers about how far the

14 Of course, several other labor practices, particularly denial of the right to organize trade unions outside the official government structure, constitute labor abuses according to international labor standards, but not according to Chinese law.

15 See e.g., Zhonghua Renmin Gonghego Gonghui Fa [Trade Union Law of the People's Republic of China] (hereafter Trade Union Law), passed by the National People’s Congress on April 3, 1992 and revised October 27, 2001, with effect from that date, art. 22.
state should intervene, if at all, in setting wages and working hours. Some neo-liberal lawyers and economists, for example, believe that minimum wages are counter-productive, in which case their non-observance is unproblematic, even desirable. However, even on this neo-liberal view, the problem of wage arrears in China must be addressed, because it is not simply a case of payment below the minimum wage; frequently workers are not paid at all for work performed. The issue goes fundamentally to the enforceability of contracts, which neo-liberals, too, uphold. Likewise, some object to setting working hours at low levels unsupported by clear health and safety rationales. These objections lose their force, in the case

16 For a succinct outline of this argument, see, e.g. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 361-65 (5th ed. 1998). For a more positive evaluation of minimum wages, see, e.g. UNITED KINGDOM LOW PAY COMMISSION, NATIONAL MINIMUM WAGE: LOW PAY COMMISSION REPORT 2005 (2005).

17 POSNER, supra note 16 at 101-108.

18 As is well known, arguments against certain forms of hours regulation appear in the majority judgment in Lochner v. People of State of New York, 198 U.S. 45 (1905) (restrictions on working hours of bakers were an unconstitutional
of Chinese working hours violations, because in very many instances the violations are demonstrably injurious to health.

This article is structured as follows. Part II of the paper briefly describes the extent of underpayment of wages and working hours abuses in China. Part III concentrates on the internal structure of the legal rules and legal institutions that regulate work, especially with respect to remuneration and working hours. I analyze the production of legal rules, the enforcement work of the bureaucracy, the principal labor dispute resolution institutions, and the functions of the official trade union organization (which I treat as a quasi-regulatory agency). I conclude by discussing a promising regional initiative.

In Part IV, I sketch out several reform proposals. Drawing on successful international examples of regulatory innovation, as well as recent creative Chinese experiments in labor enforcement, I

interference on the right of contract between employer and employee and not justified by health considerations).
propose regulatory initiatives that have realistic prospects of
inducing greater adherence to the law in China’s current political
and economic context.

Of course, no legal reforms will definitively close the gap
between the letter of labor law and workplace practice. Deficient
implementation of, and compliance with, law is universal. Even in
developed countries, labor regulation\(^\text{19}\) frequently fails to induce

\(^\text{19}\) ‘Regulation’ has, to say the least, a variety of meanings: Julia Black,
Decentring Regulation: Understanding the Role of Regulation and Self-
Regulation in a Post-Regulating World, 54 CURRENT LEGAL PROBLEMS 103,
128-142 (2001). In this paper, I generally use the term to refer to state-based
law, unless I indicate that a broader sense of regulation is intended. Labor
regulation refers to regulation pertaining to work relations. It includes what
in common law countries would be considered ‘private law’. The distinction
between ‘regulation’ and ‘common law’ is not helpful in the context of this
paper for several reasons. First, ‘private law’ even in common law countries,
can be analysed as a form of regulation: see e.g., Hugh Collins, Regulating
Contract Law, in REGULATING LAW 13, 17-28 (Christine Parker et al. eds.,
2004), not least in the context of labor relations: Richard Johnstone &
Richard Mitchell, Regulating Work, in REGULATING LAW 101 (Christine
change in workplaces or has provoked unintended changes. This is unsurprising: work relations are characterized by diverse social systems or frames of reference. Workplace participants determine their actions not just with a view to legal validity, but also, or even more so, on the basis of matters such as cost-benefit calculations, concordance with organizational decision-making and politics, consistency with local ‘custom and practice’ and perspectives about appropriate gender roles. In light of this complexity, attempts to

Parker et al. eds., 2004). Second, as the discussion in this article makes clear, Chinese law pertaining to labor contracts has not emerged from the general law of contracts but has been created by the Labor Law simultaneously with the establishment of ‘regulatory’ labor standards. Third, the labor abuses we are concerned with here traverse both (in common law terms) ‘private law’ and state based regulation. Thus, failure to pay agreed wages is at the same time a breach of contract (viewed as an aspect of private law in Western systems) and a matter for administrative sanction.

20 See e.g., the studies in REFLEXIVE LABOR LAW (Roger Rogowski ed., 1994).
invoke law to achieve a change in work relations practices may be ineffective, counterproductive and/or incoherent.  

Nonetheless, there is now a rich literature, based on regulatory experience in the United States and other developed countries, that identifies which forms of legal interventions are more likely to achieve positive outcomes in a given context. This literature informs my discussion of reform in China. Regulatory scholars have suggested that, in many circumstances, ‘responsive’, ‘reflexive’ or ‘decentered’ forms of regulation have proved to be superior alternatives to traditional ‘command and control’ style rule-making, with its emphasis on state-based standard setting, coupled with the imposition of sanctions. Chinese labor law heavily emphasizes ‘command and control’ and so there is certainly a need

21 This is the ‘regulatory trilemma’: Christine Parker et al., Introduction, in REGULATING LAW 1 (Christine Parker et al. eds., 2004); Gunther Teubner, Juridification: Concepts, Aspects, Limits, Solutions, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW (Gunther Teubner ed., 1987); HUGH COLLINS, REGULATING CONTRACTS 68-9 (1999).
to consider alternative approaches. Unfortunately, the Chinese political and economic context — particularly the repression of independent civil society organizations, such as free labor unions, — is a major obstacle to some of the most responsive and participative forms of regulation.

II. ALL WORK AND NO PAY

Underpayment (or non-payment) of wages and the working of excessive hours are both widespread in China. Wage arrears are common in all parts of the economy.\textsuperscript{22} Even according to official Chinese estimates,\textsuperscript{23} nearly 100 billion yuan (USD 12 billion) is


owed to migrant workers. While arrears occur frequently in the state-owned parts of the economy, non-payment of wages in the private sector is an increasingly acute problem. This is because the private sector, with its vast numbers of business entities and manifold organizational forms, is now the most significant employer of labor in the Chinese economy. An International


25 The statistics on the relationship between firms and employment are confusing. For a thorough analysis of the available data from the State Administration for Industry and Commerce, see the 2004 Asian Development Bank Institute study: TOSHIKI KANAMORI & ZHIJUN ZHAO, ASIAN DEVELOPMENT BANK INSTITUTE, PRIVATE SECTOR DEVELOPMENT IN THE PEOPLE’S REPUBLIC OF CHINA (2004). The authors conclude that some 69 million people were employed in state owned enterprises in 2003 (down from a high of 113 million in 1995). This contrasts with around 90 million employed in domestic private enterprises (up from 2.5 million in 1981). It would seem from another set of (inconsistent) data cited by the authors, there are about 38 million employed in collective enterprises, 10 million in firms operated by Hong Kong, Macao or Taiwanese investors and 6.4 million in other foreign invested firms. The authors conclude that there are 30 million
Labor Organization (ILO) study reports that anywhere from 50% to 80% of private enterprises in Guangdong Province, China’s manufacturing powerhouse, illegally retain wages. The practice is so prevalent it is sometimes described as a ‘local custom’.

Most importantly, underpayments in the private sector occur not simply because firms are in economic difficulty (and therefore unable to comply with their legal obligations). In many cases it is simply fraudulent and manipulative conduct on the part of the business entities in China, some 90% of them private. It is not clear how many of these are also employers. For an analysis of the management structures of the different firm types from an industrial relations perspective, see Bill Taylor et al., Industrial Relations in China 47-76 (2003). See also Ying Zhu, Economic Reform and Labor Market Regulation in China, in Law and Labor Market Regulation in East Asia (Sean Cooney et al. eds., 2002).


Id.
debtor employer. For example, it is common for employers to demand that workers pay a bond prior to commencing work. This practice, together with the retention of wages, is used extensively in order to impose labor discipline and prevent staff turnover, especially during holiday periods.

Turning to long working hours, these occur most prominently in export-oriented manufacturing industry, where young female workers predominate. Some surveys suggest that at least half of

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29 Id. at 889-891; Anita Chan, Globalization, China's Free (Read Bonded) Labor Market and the Chinese Trade Unions, 6 (3-4) ASIA PACIFIC BUS. REV. 260, 261-268 (2000). In Chan’s 1996 survey of 54 private sector footwear factories, more than 58% of migrant workers on the production line paid bonds: id.

30 Greenfield & Pringle, supra note 26, at 35.

31 LANCE COMPA, AMERICAN CENTRE FOR INTERNATIONAL LABOR SOLIDARITY, JUSTICE FOR ALL: THE STRUGGLE FOR WORKER RIGHTS IN CHINA 38-44
private enterprises do not comply with working hour regulations. In many clothing industry firms in Guangdong Province, workers are required to work long hours every day for weeks during ‘peak’ season [wangji] in order to meet client orders. Some staff are required to work for 48 hours straight, and overtime (usually paid unlawfully at ordinary rates, if it is paid at all) reaches 150-200 hours per month. This latter figure translates to working weeks of (2005); Ching Kwan Lee, From Organized Dependence to Disorganized Despotism: Changing Labor Relations in Chinese Factories, 157 THE CHINA QUARTERLY 44, 50-55 (1999).

32 According to one set of All China Federation of Trade Union (ACFTU) statistics (not renowned for their reliability), only 15.8% of private enterprises obey working hour regulations, most workers are not paid overtime and workers have an average 50 hours per week: CHINA DAILY, August 14, 2003 <http://www.chinadaily.com.cn/en/doc/2003-08/14/content_254678.htm>.

33 The End of the MFA and the Rising Tide of Labor Disputes in China, 1 (11) CSR ASIA WEEKLY.

34 See e.g., KAI-MING LIU & SHEN TAN, KAIGUO GONGSI DE SHEHUI ZEREN YU ZHONGGUO SHEHUI [Corporate Social Responsibility in China] 83 85 (2003); see also Minghua Zhao & Jackie West, Rural Female Labor in Chinese State
seventy to ninety hours, well in excess of the legal maximum of around 50 hours. These practices (especially in firms with East Asian employers) are often accompanied by authoritarian management behaviors where staff activities during working time are closely controlled.

To be sure, some workers actively seek longer hours in order to maximize their earnings. However, the recorded stories of many

*Cotton Mills, in WOMEN AND WORK IN GLOBALISING ASIA 175-179 (Dong-Sook Gills & Nicola Piper eds., 2002). In the ‘off’ season [danji], on the other hand, workers are laid off in large numbers.

35 See infra Part III.A.4.

36 CHAN, supra note 2, at 46-81; Mary Gallagher, Time is Money, Efficiency is Life. The Transformation of Labor Relations in China, 39(2) STUDIES IN COMPARATIVE INTERNATIONAL DEVELOPMENT 11, 33-35 (2004).

37 Asian Labor News reports an instance of a mass worker protest because a firm, pressured by its US customers, attempted to reduce hours to 60 per week: Workers Riot for the Right to Work Overtime: <http://www.asianlabor.org/archives/001832.php>. Commenting on the report, Stephen Frost, editor of the news service, points out that the workers
other individual Chinese workers, as well as more general data, illustrate not only that long hours are widely resented, but that they frequently lead to poor physical and mental health and the erosion of personal and family life.\(^{38}\) This is consonant with the preponderance of international empirical studies on the effects of long working hours, those effects being increasingly significant once a person is consistently working more than 50 hours a week (depending on the nature of the job and other factors).\(^{39}\)

\(^{38}\) See e.g., the stories collected in Chan, supra note 2; Anita Chan, *Culture of Survival: Lives of Migrant Workers through the Prism of Private Letters*, in *Popular China* 163 (Perry Link et al. eds., 2002); at the China Working Women Network: <http://www.cwwn.org/chisimp/chisimp_main.html>.

\(^{39}\) For a comprehensive review of the international evidence on the link between extended hours of work, health and quality of family life, see the decision of the Full Bench of the Australian Industrial Relations Commission in the *Working Hours Case*, PR072002 available at
One group of Chinese workers is particularly vulnerable to wage arrears and long working hours: migrant laborers (that is, workers migrating from China’s rural areas or *nongmingong*). They are regularly accorded treatment inferior to their urban counterparts. It is they who bear the brunt of labor abuses, including underpayments and excessive working hours.40


40 The poor treatment of migrant workers has been widely chronicled: *see e.g., KAIMING LIU, BIANYUAN REN [The Marginalised People] English title: Migrant Labor in South China (2003); DOROTHY SOLINGER, CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE, AND THE LOGIC OF THE MARKET (1999); COMPA, supra note 31 at 44 -55. Individual accounts by women migrant workers telling of their poor conditions are regularly collected and published on the website of the Chinese Working Women’s Network: <www.cwwn.org>.
Estimates of migrant workers vary widely, but they number well in excess of 100 million. They provide the mass workforce necessary to carry out low skilled tasks in the innumerable factories (female migrant workers) and construction sites (male migrant workers) in China’s more prosperous cities and towns. Migrant workers are frequently young and have poor training and career prospects. They are often in poor health and remain dependent on their home communities for social security support. There is an entrenched view among firm managers that it is acceptable to

41 According to a Chinese National Bureau of Statistics report, there were 113.9 million workers from rural China in 2003. 69.9% of these traveled to Eastern provinces and 47.3% were under 25. *Migrant Workers Number 113.9 Million in 2003, XINHUA NEWS AGENCY, May 15, 2004.*

42 *See e.g.*, the 2001 survey of 1,043 workers by Chinese Working Women Network, 'The Health Survey Report of Migrant Women Workers' (Chinese Working Women Network, 2001). 37% of respondents experienced fainting spells.

accord migrant workers worse treatment. On the other hand, in comparison with migrant workers, the local residents are generally much better educated, much better connected politically and economically, and much more likely to occupy a skilled or managerial position in, or indeed to own, enterprises employing rural workers.

The distinction between urban and rural workers has been institutionalized by the household registration or hukou system, which has specified for every Chinese citizen their place of residence and classified them as either agricultural or non-

44 See e.g., the survey of managerial attitudes towards migrants in 118 enterprises in four major Chinese cities: John Knight et al., Chinese Rural Migrants in Urban Enterprises: Three Perspectives, 35(3) JOURNAL OF DEVELOPMENT STUDIES 73, Table 13 (1999). The most significant reason given for recruiting migrant workers is that they can ‘bear hardship’: 60% of respondents.

45 SALLY SARGENSON, REWORKING CHINA’S PROLETARIAT 67 (1999).
agricultural (or urban). Unskilled rural workers migrating to Chinese cities have not generally been able to acquire urban residency status, even if they remain for long periods in cities. Their ‘agricultural’ status has prevented them from accessing urban benefits and support services, and most importantly in the workplace context, representation by official trade unions.

Internal migration rules governing hukou are now being gradually dismantled, with eleven provinces (including Guangdong) moving

46 On the origins and evolution of the hukou system, see Tiejun Cheng & Mark Selden, *The Origins and Social Consequences of China’s Hukou System*, 139 THE CHINA QUARTERLY 644 (1994); Kam Wing Chan & Li Zhang, *The Hukou System and Rural-urban Migration: Processes and Changes*, 160 THE CHINA QUARTERLY 818 (1999). The effects of the hukou residency system are examined extensively in Liu, supra, note 40; on its effect on labor conditions, see especially at 139–67, 209–44.

47 *Id.* at 832.

48 See infra notes 349-352 and accompanying text.
toward their abolition. It is difficult to track the extent of the dismantling process or to determine its effects. The *hukou* rules are expressed in diverse administrative instruments at national and local level, much of it for internal bureaucratic use only. Reforms have so far been tentative and localized. If they take root generally, the pervasive discrimination against migrant workers may ease. For the moment, though, migrant workers continue to suffer seriously from the effects of the *hukou* system.

Notwithstanding the *hukou* system, urban and rural workers are entitled to the equal benefit of the protections of the Labor Law: the Law draws no formal distinction in the application of key norms on the basis of *hukou*. In particular, both are entitled to be paid for work performed and both are entitled to reasonable hours

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49 *See* Fei-ling Wang, *Reformed Migration Control and New Targeted People: China’s hukou System in the 2000s*, 177 *The China Quarterly* 115 (2004);


of work. Thus, while the hukou system might explain in part why there is widespread discrimination against migrant workers, it does not excuse contravention of the Labor Law.

III. NON-IMPLEMENTATION OF LABOR LAW: FACTORS INTERNAL TO THE LEGAL SYSTEM

Clearly, violations of core labor law principles are rife in China: millions of workers are not paid their due wages for their labor and/or are required to work hours injurious to health. While no legal system can entirely eradicate these abuses, we may well ask why the law does not do more to reduce their prevalence. This Part explores the facets of formal Chinese labor regulation that blunt and confuse its capacity to speak authoritatively to workplaces.

China’s legal system has been recreated in less than thirty years from the wreckage of the Cultural Revolution. Little wonder then

51 For comprehensive accounts of the Chinese legal system, see RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD THE RULE OF LAW (2002);
that it is fragile and inchoate. Interrelated internal shortcomings are the state of legal rules; flaws in the bureaucratic modes of enforcement; weakness in legal dispute institutions and the lack of independent civil society organizations that can invoke the law on behalf of individuals. While these shortcomings are characteristic of the legal system as a whole, they also manifest themselves in the specific context of labor relations.

A The State of Legal Rules

1 The General Legal System

Since the late 1970s, there has been a profusion of rule making in China as the country attempts to create a legal infrastructure for a society undergoing extraordinary transformation. Legal discourse

Stanley Lubman, Bird in a Cage: Legal Reform in China after Mao (1999); on implementation issues see also Neil Diamant et al., Engaging the Law in China: State, Society, and Possibilities for Justice (2005); Jianfu Chen et al., Implementation of Law in China - an Introduction (2002).
has come to permeate the major areas of state activity.\textsuperscript{52} This legislative activity has been impressive. Nonetheless, until very recently, law making has not been subject to a detailed overarching framework\textsuperscript{53} As Peerenboom writes:

\begin{footnotesize}

53 The Constitution sets out the roles of governmental organs, but only in very general terms. Major steps forward in systematizing the legal order have been taken with the passage of the Zhonghua Renmin Gongheguo Lifa Fa [Law of the People’s Republic on China on Legislation] (hereafter Legislation Law), passed by the National People’s Congress on March 15, 2000, with effect from July 1, 2000; the Xingzheng Fagui Zhiding Chengxu Tiaoli [Regulations on the Procedures for the Formulation of Administrative Regulations], promulgated by the State Council on November 16, 2001 with effect from January 1, 2002 and the Guizhang Zhiding Chengzu Tiaoli [Regulations on the Procedures for the Formulation of Rules], promulgated by the State Council on the same date.
\end{footnotesize}
A number of entities have been afforded the right to legislate, which has resulted in a bewildering array of laws, regulations, provisions, measures, directives, notices, decisions, explanations, and so forth, all claiming to be normatively binding and treated so by the creating entity.54

Legal rules are produced by, in hierarchical order,55 the National People’s Congress and its Standing Committee (enacting falü or ‘laws’56); the State Council (promulgating xingzheng fagui or ‘administrative regulations’),57 people’s congresses at the provincial and equivalent levels (enacting difangxing fagui or ‘local

54 PEERENBOOM, supra note 51, at 241.

55 See in particular, Legislation Law, arts. 78-83.


57 See PRC Constitution, art. 89; Legislation Law, Chapter 3.
and a large number of bodies including provincial governments, government ministries and commissions (issuing rules generically described as guizhang, but having a wide range of titles). Below this point in the hierarchy sit ‘normative documents’ (guifanxing wenjian) issued by governmental bodies; such documents include rules on the border of law, policy and interpretation.

The legal materials produced by these governmental bodies suffer from a variety of weaknesses. First, many legal instruments, including major laws, are overly vague, to the extent of containing very significant omissions (including reference to other non-existent instruments). They also confer broad discretions on implementing agencies. A ‘bare bones’ approach to statute making is not inherently unworkable; indeed it is characteristic of

58 See PRC Constitution, art. 100; Legislation Law, Chapter 4, Section 1.

59 See arts. 90, 107 PRC Constitution; Legislation Law Chapter 4, Section 2.

60 See e.g., PEERENBOOM, supra note 51; Biddulph, supra note 52, at 183-190.

61 PEERENBOOM, supra note 51, at 247-253.
many civil law jurisdictions. However, in contrast to societies where statutes sit alongside long standing complementary processes of subordinate rule-making and judicial interpretation, the elaboration of China’s key statutes is frequently either insufficient or confusing.

Second, some legal rules, especially lower-level rules, are unavailable to the public, either because they are intended for internal use only, or because the promulgating agency has failed to publish them properly.62 Although legislation now requires most forms of legal rules to be gazetted in the relevant official publication and reproduced in newspapers,63 this does not extend to normative documents. This problem is compounded by the fact that legal rules change very frequently; indeed many are introduced on a temporary or provisional basis only.64

62 Id. at 245-247.

63 Legislation Law, arts. 66, 70, 77.

64 PEERENBOOM, supra note 51, at 253-255.
Third, rules are often inconsistent with each other. This may be because, for example, lower level rules have not been amended despite the passage of inconsistent superior legislation, or because different agencies attempt to regulate the same matter, or because a superior law has proved unworkable and interim measures are needed.65

Fourth, Chinese courts do not have general authority to interpret rules, to resolve conflicts between rules, or to declare rules invalid, although they may refuse to enforce rules in a specific case if they are inconsistent with higher level laws.66 Generally speaking, the power to interpret laws is vested in the body that formulated

65 Id. at 256-259.

them,\textsuperscript{67} although this power is partially delegated to the Supreme People’s Court, which frequently issues interpretations of law.\textsuperscript{68}

The power to invalidate rules which conflict with superior instruments or with other rules of similar status lies with bodies exercising legislative or executive, rather than judicial power, such as the Standing Committee of the National People’s Congress and

\textsuperscript{67} The power to interpret laws is vested in the Standing Committee of the National People’s Congress, Legislation Law arts. 42-47. Administrative Regulations are interpreted by the State Council: Regulations on the Procedures for the Formulation of Administrative Regulations, \textit{supra} note 53, art. 31; Other rules are likewise interpreted by the formulating agency: Regulations on the Procedures for the Formulation of Rules, \textit{supra} note 53, art. 33. These provisions stipulate that interpretations have the same legal effect as the original instrument.

\textsuperscript{68} Zuigao Renmin Fayuan guanyu Shenli Laodong Zhengyi Anjian Shiyong Falli Ruogan Wenti de Jieshi [Interpretation of the Supreme People’s Court Concerning Several Issues Regarding the Application of Law to the Trial of Labor Disputes Cases] (hereafter Labor Dispute Interpretation) (\textit{Fashi 2001 No14}), issued by the Supreme People’s Court April 16, 2001 with effect from April 30, 2001. \textit{See also} PEERENBOOM, \textit{supra} note 51, at 317-318.
the State Council. 69 Citizens are able to petition the Standing Committee of the National People’s Congress to invalidate a rule that is contrary to the Constitution or a Law. 70 However, this is not very effective as the Standing Committee rarely invalidates rules. 71 Further, only governmental organs are able to request interpretations or rules, not individual citizens. 72 The overriding impression this system leaves is that the processes for clarifying the effect of rules are predominantly geared toward the internal ordering of state agencies. This is of course important, but it renders individual citizens seeking to ascertain the effect of legal rules dependent on the bureaucracy.

69 Legislation Law, arts. 85-88.

70 Legislation Law, art. 90.

71 PEERENBOOM, supra note 51, at 259. Citizens are also able to request the State Council and other organs address conflicts between certain rules:
Regulations on the Procedures for the Formulation of Rules art. 35.

72 Legislation Law, art. 43; Regulations on the Procedures for the Formulation of Administrative Regulations, art. 32; Regulations on the Procedures for the Formulation of Rules, art. 33.
In short, it can be very difficult to ascertain what one’s legal rights and obligations are. It should be emphasized that this situation does not reflect the determination of a unified party-state to stymie the legal system. On the contrary, it reflects compromises and battles between and within organs at different levels of policy-making; tensions may be based on conflicting ideology, bureaucratic self-interest, local-national friction, and so on.\textsuperscript{73} Indeed, there are many people at all levels of government attempting to provide greater order in the legal system. Real progress is illustrated by the enactment of the Legislation Law and complementary State Council regulations.\textsuperscript{74} These instruments set out a hierarchical ranking of legal instruments, establish clear processes for rule-making and interpretation, place limits on lower-level regulation making, and require publication of legislative instruments. However, it may take many years before these

\textsuperscript{73} See for example, the detailed analysis of the process of legal reform of administrative detention conducted by Biddulph, supra note 52.

\textsuperscript{74} See supra note 53 and accompanying text.
principles are entrenched, especially in lower-level and regional agencies.

2 Labor Law

Consider now how these system-wide problems manifest themselves in the context of labor regulation. At first glance, China appears to have built up a relatively comprehensive and logically ordered framework of labor regulation. The Labor Law of 1994 establishes a contract-based system of employment regulation based on ‘voluntary’ and ‘equal’ negotiation, and replaces the former communist system based on administrative allocation. The Law goes on to stipulate a number of minimum standards with which employment arrangements must comply.

75 See also Virginia Ho, Labor Dispute Resolution in China: Implications for Labor Rights and Legal Reform (2003), 196-200.

76 Labor Law, art. 17

These include the principles of non-discrimination\textsuperscript{78} and equal work for equal pay,\textsuperscript{79} a prohibition on child labor,\textsuperscript{80} protection against arbitrary dismissal,\textsuperscript{81} and a minimum wage.\textsuperscript{82} The Law also contains provisions on collective contracts,\textsuperscript{83} vocational training\textsuperscript{84} and social insurance benefits.\textsuperscript{85} Most relevantly for the purposes of this article, the Law prohibits unjustified arrears and excessive working hours.\textsuperscript{86} Additional major laws, in particularly the Trade Union Law of 1992 (extensively revised in 2001)\textsuperscript{87} and the Law on Work Safety of 2002)\textsuperscript{88} complement these provisions.

\textsuperscript{78} Labor Law arts. 12-14.
\textsuperscript{79} \textit{Id}, art. 46.
\textsuperscript{80} \textit{Id}. arts. 15, 64.
\textsuperscript{81} \textit{Id}. arts. 23-32.
\textsuperscript{82} \textit{Id}. arts. 48-49.
\textsuperscript{83} \textit{Id}. arts. 33-35.
\textsuperscript{84} \textit{Id}. arts. 66-69.
\textsuperscript{85} \textit{Id}. arts. 71-76.
\textsuperscript{86} \textit{See infra} Part III.A.4.
\textsuperscript{87} Trade Union Law, \textit{supra} note 15.
The Labor Law is a major legislative achievement. However, on closer examination, the Law has serious limitations. It provides only the skeleton of a regulatory framework, with its articles either supplemented by subordinate legal instruments (which number in the thousands)\(^89\) produced by various state agencies, or left unelaborated.

This point can be illustrated by considering the rules pertaining to the two labor abuses we are examining: wage arrears and excess working hours. In both cases, we see that bright line rules rendering


\(^{89}\) As of March 2005, there were some nine hundred and sixty such instruments listed on the Ministry of Labor and Social Security website: <http://www.molss.gov.cn:8080/trsweb_gov/mainframe.htm>. These do not include many provincial and local rules.
both these abuses unlawful become more complex and attenuated the more supplementary regulatory material is considered.

3 Underpayment of Wages

Looking firstly at wages, article 50 of the Law stipulates that:

Wages shall be paid monthly to workers in person in the form of cash. Wages shall not be misappropriated (kekou) nor shall the employer fall in arrears (tuoqian) without justification.

Provisions complementary to article 50 require parties to the employment relationship to abide by their contractual commitments\(^{90}\) (which must at least include payment at the level of the minimum wage)\(^{91}\)

\(^{90}\) Labor Law, arts. 17 and 48.

\(^{91}\) Minimum wages are set at the provincial government or equivalent level and are supposed to be adjusted at least once every two years: Labor Law arts. 48 and 49; Zuidi Gongzi Guiding [Regulations on the Minimum Wage], promulgated on January 20, 2004 with effect from January 1, 2004, arts 7, 10. These Regulations set out a detailed formula to be followed in setting
While these provisions appear to generate straightforward obligations to pay wages, they are very vague. They do not define wages. They do not spell out how they can be varied. They do not provide for wage records to be kept and given to employees. They do not explain what forms of labor service generate an entitlement to wages; for example, what happens if there is no work to be performed or an employee is sick or must perform a public duty. They do not explain how to deal with a situation where an employer-employee relationship is obscured by a network of contractual arrangements. They do not clarify what ‘misappropriation’ or ‘delay without justification’ means; whether, for example, an employer is permitted to deduct wages for losses allegedly sustained as a result of employee breach, or to pay minimum wages, with the wage set at approximately 40 to 60% of the average monthly wage in the relevant area: see id. Attachment: Method of Calculation of the Minimum Wage.

92 *kekou* means to withhold money for personal gain.
training expenses, or whether temporary economic difficulties might count as ‘justification’.

One great difficulty here is that the Chinese legal system creates a radical separation between employment contracts and other types of contractual relationships. This sharp delineation is apparently made for ideological reasons; it preserves in legal form the ideological position that Chinese workers are not commodified.

93 Zhonghua Renmin Gongheguo Hetong Fa [Contract Law of the People's Republic of China], passed by the National People’s Congress March 15, 1999 with effect from October 1, 1999. Art. 123 of the Contract Law provides that ‘where other laws stipulate otherwise on contracts, such provisions shall govern.’ Art 124 provides that ‘for contracts not explicitly regulated by the Specific Provisions of this Law or other laws, the General Provisions of this Law shall apply, and the most similar provisions in the Specific Provisions of this Law or other laws may concurrently be used as reference.’ [emphasis added]. Note that the Contract Law does regulate contracts for services (i.e. independent contractor arrangements): Chapter 15.

94 See Huai Guan, Laodong Faxue (Labor Law) 215 (5th ed, 2001); for a critique see Keith & Lin, supra note 77, at 110-111; see further Josephs,
In any case, as the national contract law does not apply to employment contracts, there is no contractual substratum such as that which underpins employment contracts in common law or other major civil law systems. It is thus a legal error to draw on general contractual principles to determine the legal rules applicable to, for example, central issues in wage disputes such as when, how, by whom and to whom wages must be paid; the circumstances in which non-payment may be justified; and, where wages are not paid in accordance with law, how compensation is to be determined.

This means that the Labor Law and related legislation ought to spell out comprehensively the major principles relating to labor contracting. However, while the Law does deal with individual labor contracts, its specific treatment is limited to only twenty-one

supra note 77, at 28-30 (commenting on the ideological debates in the lead-up to the introduction of the contract system).
articles,\textsuperscript{95} ten of which solely concern termination.\textsuperscript{96} The Law is silent on matters such as agency, variation, capacity, implication of terms, good faith, the effect of work performed under an invalid contract, transfer of business, and the principles for determining compensation for breach.\textsuperscript{97} Although there are proposals for a labor

\begin{center}
\footnotesize
\textsuperscript{95} Labor Law, arts. 16-32, 97-99, 102. These brief articles concern the negotiation of labor contracts (art. 17), invalidity (arts. 18, 97), mandatory content (art. 19), duration (arts. 20-21), business secrets (art. 22), termination (arts. 23-32), administrative punishments and compensation for breach by employer or employee (arts. 98 and 102), and inducing breach of contract (art. 99). By way of contrast, the general provisions of the Contract Law consist of 129 articles, which are supplemented by further provisions dealing with specific types of contracts.

\textsuperscript{96} Labor Law, arts. 23-32.

\textsuperscript{97} By contrast, most of these matters are generally dealt with in the Contract Law. Although strictly speaking Chinese courts do not have authority to make law, the Supreme People’s Court has provided some clarification of the consequences of breach of employment contracts: Labor Disputes Interpretation, \textit{supra} note 68, arts. 14 and 15.
\end{center}
contract law and/or a comprehensive law on wages, these laws are yet to be adopted at the national level.

The lacunae in the regulatory framework are filled to some extent by subordinate legal instruments, such as the Temporary Regulations on the Payment of Wages issued by the Ministry of Labor and Social Security (MOLSS).

98 I am aware from conversations with Chinese labor law scholars that drafts of such laws are being discussed. See also Gerard Greenfield & Tim Pringle, The Challenge of Wage Arrears in China, in Paying Attention to Wages (Manuel Simon Velasco ed., 2002).

99 See e.g., Gongzi Zhifu Zanxing Guiding [Temporary Regulation on the Payment of Wages], promulgated by the Ministry of Labor on December 6, 1994 with effect from January 1, 1995; Weifan he Jiechu Laodong Hetong de Jingji Buchong Banfa [Measures on Economic Compensation for Violation and Termination of Labor Contracts], promulgated by the Ministry of Labor on December 3, 1994 with effect from January 1, 1995 (stipulating the rate of compensation to be paid for termination, non-payment, underpayment or delay in payment of wages); see also discussions in Jingsen Li & Junling Jia, Laodong Faxue [Labor Law] 68-83 (2004); Guan, supra note 94, at 210-233. The Ministry of Labor is now the Ministry of Labor and Social Security (MOLSS).
Labor. However, these instruments are attended by the difficulties outlined above. Let us track through how these instruments elaborate at the national level the key terms ‘misappropriation’ and ‘fall into arrears without justification’ in Article 50, and in particular how they deal with the very common practice of retaining a bond.

The subordinate rules are mainly concerned with what does not constitute misappropriation and delay. First, the Temporary Regulations on the Payment of Wages address the question of misappropriation. They permit an employer to make deductions for tax and social security purposes, and in accordance with an employment contract, as compensation for economic loss caused by the employee. Further Supplementary Regulations issued by...

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100 Temporary Regulation on the Payment of Wages, supra note 99, art. 16. The amount deducted per month may not exceed 20% of the employee’s monthly wages, nor may the employee be paid less than the minimum wage. See Li & Jia, supra note 99, at 198; JIAN GUO ET AL, LAODONG FAXUE [Labor Law] 189 (2001); GUAN, supra note 94, at 292.
the Ministry extend the range of circumstances that do not constitute ‘misappropriation’ to include deductions authorized by work rules approved by workers’ congresses and reductions in accordance with performance pay schemes, provided remuneration does not fall below the minimum wage. The Supplementary Regulations also indicate that arrears in payment are justified where they result from a natural disaster and from a firm’s economic difficulty where authorized by the union (but only up to a maximum period specified by the local province). It is not until we come to low-level instruments, a 1995 Opinion issued by the

101 On the nature and declining effectiveness of workers’ congresses, which are formal structures for staff participation in firm decision-making, see TAYLOR ET AL, supra note 25, at 138-143.

102 Dui “Gongzi Zhifu Zhanxing Guiding” youguan Wenti de Buchong Guiding [Supplementary Regulation on Questions concerning the Temporary Regulation on the Payment of Wages] promulgated by the Ministry of Labor on December 5, 1995 with immediate effect, cl 3.

103 Id. cl 4. Of course, this is problematic if provinces fail to specify a maximum time limit.

104 These appear to fall into the category of ‘normative documents’.
Ministry of Labor,\textsuperscript{105} and two Notices issued jointly by the Ministry, the Ministry of Public Security and the All China Federation of Trade Unions (ACFTU) that we find explicit statements that employers are not permitted to require employees to furnish any kind of bond or security. The Notice directed at the private sector\textsuperscript{106} provides:

An enterprise must not collect currency, or other objects as ‘security upon entering the factory’ (\textit{ruchang diya}), and


\textsuperscript{106} Guanyu Jiaqiang Waishang Tuoz i Qiye he Siying Qiye Laodong Guanli Qieshi Baozhang Zhigong Hefa Quanyi de Tongzhi [Notice concerning Strengthening the Real Protection of Workers’ Lawful Rights and Interests in Foreign Invested and Private Enterprises], issued by the Ministry of Labor, the Ministry of Public Security and the All China Federation of Trade Unions on March 4, 1994.
must not detain an employee’s identity card or temporary resident card, or hold them as security. If any enterprise without authorization details or holds as security a worker’s residency card, the Ministry of Public Security and the Labor Department Inspectorate must order it to immediately return it to the worker in person. 107

So, after much searching, we find that while deductions and arrears are permissible in a variety of circumstances, these do not include the practice of retaining a bond. It is clear from this exercise that the important rules governing underpayment of wages are not readily ascertainable by those who wish to assert their rights. Indeed, one of the most significant rules - that against taking bonds - is buried in low-level notices. Furthermore, while the instruments themselves seem to be publicly available from the MOLSS website (although this is not always up to date),

107 Id. cl. 2.
availability is quite different from accessibility. The scattered location of the applicable rules defies easy retrieval.\footnote{HO, supra note 75, at 194-196.}

4 Working Hours

The second example illustrating the limitations of the labor law framework concerns working hours.\footnote{GUO ET AL, supra note 100, at 149-161.} The key principles seem straightforward and reflective of the ‘standard’ twentieth century regulatory approaches to working hours.\footnote{These are reflected in ILO Conventions, especially Hours of Work (Industry) Convention (ILO No 1), November 28, 1919 (entered into force 13\textsuperscript{th} June 1921). Newer regulatory approaches are emerging, especially in the European Union: see Deidre McCann, \textit{Regulating Working Time Needs and Preferences}, in \textit{WORKING TIME AND WORKERS' PREFERENCES IN INDUSTRIALIZED COUNTRIES} 10 (Jon Messenger ed., 2004).} On paper, they appear to ensure that employees do not work excessive hours. The Labor Law provides for an eight-hour day, and an average working week
of 44 hours. Workers are entitled to at least one day off per week to public holidays, and, if they have over one year’s service, to paid leave.

The Law also regulates overtime; generally this is limited to one hour per day. However, an extension of the working day by up to three hours is permitted for ‘special reasons’ (teshu yuanyin) on the conditions that workers’ health is protected and that the total monthly extension is no more than 36 hours. Any extension to working hours is subject to consultation with the unions and the workers concerned. Extensions of working hours in violation of

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111 Labor Law, art. 36. Firms using piece rates must adapt their quotas and remuneration to this system: art. 37.

112 Id. art 38.

113 Id. art 40.

114 Id. art 45.

115 Id. art. 41.

116 Id.

117 Id.
the law are expressly prohibited.\textsuperscript{118} Penalty rates apply to overtime work (150\%), to work arranged on leave days (200\%) and to work on public holidays (300\%).\textsuperscript{119}

This concise framework is, however, significantly modified both by the Law itself and by other legal instruments; these render the standards both more and less stringent.

As to making the standards more stringent, within months of the Law entering into effect, the State Council promulgated a short regulation stipulating ordinary working hours as \textit{forty} (not forty-four) hours per week.\textsuperscript{120} This created some confusion, since the

\begin{itemize}
  \item \textsuperscript{118} \textit{Id.} arts. 43, 90.
  \item \textsuperscript{119} \textit{Id.} art. 44.
  \item \textsuperscript{120} \textit{Guowuyuan guanyu Zhigong Gongzuozhan Shijian de Guiding} [State Council Regulation concerning Working Hours], promulgated by the State Council March 25, 1995, in effect from May 1, 1995, art. 3. This change was made apparently because it was believed that China was sufficiently advanced to permit lower working hours: (\textit{Li \& Jia}, \textit{supra} note 99, at 111). This conclusion appears to have been premature.
\end{itemize}
State Council’s regulation prescribed no penalties for failure to comply. The Labor Ministry (as it then was), having authority to interpret the State Council regulation, subsequently indicated that a firm operating between forty and forty-four hours per week could be ordered to ‘make corrections’ (gaizheng) but did not indicate whether such a firm could be fined.

Still, whether the working week is forty or forty-four hours, it seems plain that the long ‘peak season’ working periods described above are manifestly unlawful. At most, employees could be required to work for no more than nine eleven hours per month, and roughly 48 hours per week (on a forty hour base) or 52

121 State Council Regulation concerning Working Hours, supra note 120, art. 8.

122 This clarification, issued in 1997, was in response to a request from the Guangzhou Labor Bureau: Guanyu Zhigong Gongzuo Shijian youguan Wenti de Fuhan [Reply concerning Working Hours], issued by the Ministry of Labor on September 10, 1997.
hours per week (on a forty-four hour base). These hours would attract significant overtime payments.

However, the Law opens the door to allowing broad departures from the standards just stated. The two relevant provisions are articles 39 and 42. Article 39 provides that where, owing to the ‘special nature of production’ (yin shengchan tedian), an employee cannot follow the stipulations on the forty-four hour week and the one day of leave per week, it may, with the approval of the administrative department of labor, adopt other rules on working hours and rest (described below as ‘non-standard working hours systems’). Article 42 provides that working hours may be extended beyond the limits described in other articles in the event of an emergency threatening the health of workers or the safety of property, where urgent repairs are needed to production facilities and in ‘other circumstances stipulated by laws and administrative rules’ (falü, xingzheng fagui guiding de qita qingxing).

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123 These are based on various combinations of a forty, or forty-four, hour week and thirty-six hours overtime.
Both these provisions leave a large amount of discretion to administrative agencies to devise their own rules on working hours. This has been done both at the national level by the Ministry of Labor and Social Security (MOLSS) and locally by provincial and municipal labor departments. The MOLSS rules on non-standard working hours systems\textsuperscript{124} refer to two separate schemes of non-standard working hours: irregular hours and ‘accumulated hours’ (including annualized hours). Irregular hours schemes would seem to involve the complete exclusion of the Labor Law’s standards.\textsuperscript{125} Accumulated hours schemes permit employers to calculate hours on a weekly, monthly, seasonal or annualized basis in which only

\textsuperscript{124} Guanyu Qiye Shixing Buding Shigong Zhi he Zonghe Jisuan Gongshi Gongzuode Shenpi Banfa [Measures concerning the Approval of the Implementation in Enterprises of Systems of Non-standard Working Hours and of Accumulated Working Hours] (hereafter Working Hours Measures), promulgated by the Ministry of Labor on December 14, 1994, with effect from January 1, 1995, art. 4.

\textsuperscript{125} \textit{Id.} art. 4.
the average \( (\text{pingjun}) \) working day and working week must be ‘basically similar’ \( (\text{jiben xiangtong}) \) to the standards in the Law.\(^{126}\)

The MOLSS rules specify the categories of work to which these schemes may apply and the use of catchall phrases permits broad application of the opt-out provisions. Such phrases include ‘workers who, because of special nature of production, the special requirements of work, or the scope of job responsibilities, are suitable for non-standard working hours’, ‘other workers whose work cannot be measured in standard hours’\(^{127}\) and ‘other employees for whom accumulated hours schemes are suitable’.\(^{128}\)

It is essentially up to the local labor bureaus to determine whether employer proposed schemes should be approved. The MOLSS rules stipulate the considerations that bureaus are to take into account in approving the schemes only in general terms: they must

\(^{126}\) *Id.* art 5. Note that such systems can be used to reduce overtime payments.

\(^{127}\) *Id.* art. 4(1), (3) (in relation to irregular hours schemes).

\(^{128}\) *Id.* art 5.
ensure that employers protect employees’ health, listen to their opinions and protect their right to rest and leave – while also ensuring the completion of production tasks.\(^{129}\) Some local labor bureaus have issued rules tightening the circumstances in which these opt-out schemes can be used. Thus, in the Beijing area, irregular hours schemes cannot be used for production workers,\(^{130}\) and both non-standard hours schemes must be devised through consultation with the firm’s union, workers’ congress or with the workers directly\(^{131}\) and may be approved for a maximum of three

\(^{129}\) *Id.* art 6.

\(^{130}\) *Beijingshi Qiye Shishi Zonghe Jisuan Gongshi Gongzuozhi he Buding Shi Gongzuozhi de Banfa* [Beijing Municipality Measures on Enterprise Implementation of Systems of Accumulated Hours of Work and Non-Standard Working Hours], issued by Beijing Labor Department December 9, 2003 with effect from January 1, 2004, art. 11(5).

\(^{131}\) *Id.* art. 14. The application form in the Beijing area requires the inclusion of union or workers’ congress comments.
years.132 Other municipalities such as Shanghai and Shenzhen have not been so prescriptive.133

While a person with legal expertise might be able to develop an accurate understanding of the law in this area, many businesspeople, workers and local government officials are likely to struggle to determine the precise state of the law on working hours. Moreover, many workers risk seeing their entitlements to reasonable working hours eviscerated by bureaucrats partial to employer perspectives.

5 ‘Non-Standard Workers’

In addition to the shortcomings specific to remuneration and working hours, there is further limitation that underlies the

132 Id. art. 16.

133 Compare, for example, the Shenzhen Jingji Tequ Laowugong Tiaoli [Regulation of the Shenzhen Special Economic Zone on Migrant Workers], as amended by the Standing Committee of the Shenzhen Municipal People’s Congress, February 13 1998.
framework regulating labor law as a whole. As mentioned earlier, the Law creates a radical separation between employment contracts and other types of contractual relationships. This separation fails to recognize one of the dominant challenges for contemporary labor regulation. Increasingly, work relationships are no longer typified by the putative subject of traditional employment regulation: long-term employees engaged by a clearly identifiable employer. Around the world, as a result of technological changes in production processes, ever more elaborate and unstable global supply chains, employer strategies and many other factors, work in many countries is being increasingly performed by part-time or casual workers (very often female), or is being contracted out to firms with few or no regular workers. The traditional boundary

\[134 \text{ See supra notes 93-94 and accompanying text.} \]

\[135 \text{ I am referring to the mode of employment regulation that characterized much of the last century.} \]

\[136 \text{ See e.g., KATHERINE W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004); MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY (1996).} \]
between an employee and an ‘independent contractor’, fundamental to the conceptual structure of labor law, has become very blurred. This global trend is mirrored in China. As the vestiges of the command economy disappear, and global supply chains anchor their labor intensive manufacturing in a vast network of Chinese firms, new forms of work arrangements are proliferating, many of them short-term and precarious.137

Many societies have sought to adapt their regulatory framework in response to these changes in work arrangements, so as to avoid seeing increasing numbers of people working outside that framework. However, China’s labor law and labor institutions very much persist with the traditional approach and the complete legal uncoupling of labor contracting from general contracting accentuates this. While the Labor Law is broad in terms of the types of enterprise it covers,138 it applies only to certain categories of workers, namely to ‘workers (laodongzhe) who form a labor

137 See Gallagher, supra note 36, at 21-26.

138 GUAN, supra note 94, at 148-149.
relationship (laodong guanxi) with enterprises…’ ¹³⁹ This phrase sets the boundary between those workers to whom the Labor Law standards apply and those whose work relations are governed by the general contract law. However, the phrase is quite vague; it is not apparent how it should be applied to work relationships that could either be categorized as employer-employee or as two independent contractors. Such relationships include homeworkers (or outworkers) in the textile industry or individual trades people in the construction industry.

A second boundary question concerns the situation in which it is a worker is clearly an employee but it is difficult to identify who the employer is. Such a problem arises where workers are transferred between firms, when firms merge or divide, or in long-term labor hire arrangements. Again, we need to look to subordinate and local legislation to address this question and

¹³⁹ Labor Law, art. 2.
nowhere is it dealt with comprehensively. For example, while the MOLSS’s 1995 Opinion on the Labor Law seeks to delineate the category of workers to which the Law applies, it does so by listing certain exclusions. It does not address the ‘boundary’ question.

Guidance on how to decide whether a person is a worker for the purposes of the Law is crucial. Not only will it indicate whether labor standards apply to that person, it will also determine whether

140 This issue is dealt with in some of the provincial level contract regulations: see e.g., Shanghai Shi Laodong Hetong Tiaoli [Shanghai Municipality Labor Contract Regulations], passed by Shanghai Municipality People’s Congress, November 15, 2001, with effect from May 1, 2002, arts. 24 and 25.

141 1995 Opinion, supra note 105, art. 3. This states that the Labor Law does not apply to ‘government functionaries (gongwuyuan), agricultural laborers (nongcun laodongzhe, not including workers in town and village enterprises, or who work in cities), military personnel and domestic servants (jiating baomu).

142 Nor do major textbooks, see e.g., GUAN, supra note 94; LI & JIA, supra note 99; GUO ET AL, supra note 100.
the labor bureau and the labor disputes arbitration committees have jurisdiction, and whether the person is eligible to be a union member.

To be sure, it is not only in China that legal concepts, including those pertaining to the employment relationship, evolve in a piecemeal fashion. The Chinese can scarcely be criticized because the elaboration process has had to be compressed into a few years rather than centuries as in Western legal systems. What is distinctively problematic about the Chinese mode of elaboration, however, is that the pursuit of detail takes an inquirer ever further away from laws directed at the general public to often temporary legal instruments primarily designed for and directed at state agencies.\footnote{Thus, labor regulation is frequently addressed to labor bureaus in the various provinces and relevant ministries.} The people informed about the legal position are the labor bureaucracy rather than, at least in the first instance, employers, employees, or the courts.
Many legal experts in China are alert to the deficiencies of the labor law framework: one important response is that a Labor Contract Law is currently being drafted nationally.\textsuperscript{144} This may make it much easier for employers and employees to determine their rights and obligations in relation to the payment of wages, and indeed for bureaucrats to understand what rules they must implement. Several provincial level congresses have already enacted their own local regulations on labor contracts\textsuperscript{145} and/or wages.\textsuperscript{146} While these different initiatives lead to further

\textsuperscript{144} See supra note 98 and accompanying text.

\textsuperscript{145} E.g. Shanghai Shi Laodong Hetong Tiaoli [Shanghai Municipality Labor Contract Regulations], passed by Shanghai Municipality People’s Congress, November, 15 2001, with effect from May 1, 2002; Beijing Shi Laodong Hetong Guiding [Beijing Municipality Labor Contract Regulations], issued by the Beijing Labor Bureau with effect from February 1, 2002.

\textsuperscript{146} See e.g., Shanghai shi Qiye Gongzi Zhifu Banfa [Shanghai Municipality Enterprise Wage Payment Measures], issued by the Shanghai Labor and Social Security Department with effect from April 1, 2003; Guangdong sheng Gongzi Zhifu Tiaoli [Guangdong Province Regulations on the Payment of Wages], promulgated by the Standing Committee of the Guangdong
fragmentation and inconsistency, they may provide models for law at the national level. One promising attempt to create a comprehensive and comprehensible framework, responding not only to the need to specify clear norms but also to problems with enforcement, is examined at the end of this Part.

B ENFORCING THE RULES: BUREAUCRATIC IMPLEMENTATION

Notwithstanding the difficulties in identifying exactly what the relevant legal norms are, many of the more extreme instances of withholding wages and requiring long working hours (especially where no departure from the standard hours systems has been authorized) can be safely characterized as unlawful. The widespread nature of these abuses suggests that the means of securing compliance with the law have severe shortcomings. There are three main, interrelated, state vehicles for implementing labor law: enforcement by state agencies, dispute resolution processes

Provincial People’s Congress on February 19, 2005 with effect from May 1, 2005.
and monitoring by the official trade union organization. The function and structure of each body is summarized in Table 1.

Table 1: Function and Structure of Key Implementation Bodies

<table>
<thead>
<tr>
<th>Relevant function</th>
<th>Base level</th>
<th>‘Vertical’ relationships</th>
<th>‘Horizontal’ relationships</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Labor Department Inspectorates</strong></td>
<td>Enforce labor laws</td>
<td>Local departmental offices</td>
<td>Subordinate to MOLSS</td>
</tr>
<tr>
<td><strong>Labor Dispute Arbitration Committees (LDACs)</strong></td>
<td>Mediate and arbitrate labor disputes</td>
<td>Attached to local labor departments</td>
<td>Subordinate to MOLSS</td>
</tr>
<tr>
<td><strong>People’s Courts</strong></td>
<td>Hear appeals from LDACs; Enforce arbitrated awards and court orders</td>
<td>Basic People’s Courts</td>
<td>Court hierarchy culminating in Supreme People’s Court</td>
</tr>
<tr>
<td><strong>Trade Unions</strong></td>
<td>Supervise implementation of labor laws</td>
<td>Enterprise union</td>
<td>Subordinate to union federations on</td>
</tr>
</tbody>
</table>

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147 On the formal processes for enforcement of the labor law, see generally, GUAN, supra note 94, at 553-577.

148 On the significance of ‘vertical’ and ‘horizontal’ relationships, see infra note 200 and accompanying text.
This and the two following sectors examine these institutions in more detail, commencing with labor departments.

In China, the burden for ensuring that labor laws are enforced is placed even more heavily on administrative agencies than it is in many other countries. Most labor law norms (as with very many legal rules in China) take the form of ‘command and control’ regulation.\footnote{149} Legal instruments state rules, charge an agency with

implementing them and then set out a range of sanctions that that agency or another state agency can impose if the rules are violated.150

The main institutions responsible for implementing labor law are the ‘labor administration departments established under people’s governments above county level’ (xianji yishang geji renmin zhengfu laodong xingzheng bumen).151 These local labor departments,152 which operate both under the MOLSS and under

150  See e.g., ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 4, 245-256 (1994).


152  Although these are now formally labor and social security departments, I will use the briefer term ‘labor department’.
their local provincial or municipal government, have jurisdiction in relation to most aspects of labor law within their area, with the important exception of occupational health and safety. The Labor Law requires labor departments to ‘supervise and inspect’ (jinxing jiandu jiancha) employer compliance with labor

153 Each province, together with the autonomous regions and the four municipalities of provincial status (Beijing, Shanghai, Tianjin and Chongqing), has its own labor and social security ting (provincial department) or ju (bureau or office). Below these are branch offices attached to significant cities, or (in the case of Beijing and Shanghai) parts of major cities. Many of these in turn have sub-branch offices. For a listing of labor and social security departments and offices at provincial and regional levels, see <http://www.lm.gov.cn/links/links-bztj.htm>.

154 Labor Inspection Regulations, art. 35. In 1998, responsibility for workplace safety was transferred from the Ministry of Labor to the State Administration of Work Safety (Guojia Anquan Shengchan Jiandu Guanli Zongju, SAWS) and its sister agency, the State Administration of Coal Mine Safety. At the same time, responsibility for occupational illness was transferred to the Ministry of Health. These agencies have their own provincial and local level departments separate from the MOLSS: Work Safety Law art. 9, and Occupational Health Law art. 8..
regulation.\textsuperscript{155} They do so through inspectorates established in the principle provincial/municipal departmental offices and in local branch and sub-branch offices.

The precise responsibilities, procedural rules and enforcement powers of labor inspectors were until very recently governed mainly by a complex set of rules promulgated at various times by the MOLSS\textsuperscript{156} as well as by other governmental organs at the provincial and municipal level. Fortunately, the State Council’s 2004 \textit{Labor Inspection Regulations} have authoritatively updated and consolidated these rules.\textsuperscript{157}

The Labor Inspection Regulations, elaborated in supplementary rules promulgated by the MOLSS,\textsuperscript{158} establish a clear process for

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{155} Labor Law art. 85.
\item \textsuperscript{156} MOLSS had promulgated at least 8 separate instruments.
\item \textsuperscript{157} \textit{Supra} note 151.
\item \textsuperscript{158} Guanyu Shishi Laodong Baozhang Jiancha Tiaoli Ruogan Guiding [Certain Provisions concerning Implementation of the Regulations on Labor}
dealing with allegations that the labor law has been violated. Any person or organization may report a violation of the law to their local labor department, and any worker whose rights or interests have been violated by an employer may lodge a complaint within two years of becoming aware of the violation. These include complaints about unpaid wages and excessive overtime, and indeed in at least some areas, these are the most common complaints. A labor department must respond to the complaint within 5 working days either by accepting it, asking for further information, referring


159 A group of persons may jointly lodge a complaint, and appoint a representative: id. art. 12.

160 Labor Inspection Regulations, arts. 9, 20.

161 Isabelle Thireau & Linshan Hua, One Law, Two Interpretations: Mobilizing the Labor Law in Arbitration Committees and in Letters and Visits Offices, in Engaging the Law in China: State, Society and Possibilities for Justice 91 (Neil Diamant et al. eds., 2005).
the complainant to the correct jurisdiction162 or advising the complainant that the claim is unacceptable.163

If the complaint is accepted, departmental officers must investigate it; they may exercise wide powers to enter premises, interview people, engage accountants, collect data and preserve

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162 If cases fall within the jurisdiction of another agency, they must be sent to it, and if the labor department suspects that criminal conduct is involved, the case must be referred to the Procuratorate: Labor Inspection Regulations art. 18. Cases that have already been dealt with by the labor dispute procedures are not subject to further investigation by the labor department: id. art. 21.
163 Id. art. 14. Labor Inspection Implementing Provisions, art. 18. Some matters involving payment of compensation to employees for loss arising from unlawful conduct (such as payment arising from an invalid contract) must be referred to labor dispute resolution procedures: Labor Inspection Regulations art. 21; Labor Inspection Implementing Provisions arts. 15-16.
Cases must be completed within a maximum of 90 days from commencement.\textsuperscript{165}

If they find that breaches of the legislation and rules have occurred, the local labor departments can exercise a range of powers. They can order a firm to cease a wrongful act and ‘make corrections’ (\textit{zeling gaizheng})\textsuperscript{166} within a specified time period.\textsuperscript{167}

\begin{flushright}
\textsuperscript{164} Labor Law art. 86; Labor Inspection Regulations art. 15; Labor Inspection Implementing Provisions art. 26-29.
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\textsuperscript{165} Labor Inspection Regulations art. 17.
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\begin{flushright}
\textsuperscript{166} Labor Law arts. 85 (general power to stop and rectify illegal acts); 89 (work rules not in accordance with the law); 90 (working hours unlawfully extended); 92 (breach of occupational health and safety requirements); 94 (illegal recruitment of minors); 95 (violation of special protection provisions for women and minors); 98 (wrongful termination of, or delay in execution of, employment contracts).
\end{flushright}

\begin{flushright}
\textsuperscript{167} Zhonghua Renmin Gongheguo Xingzheng Chufa Fa [Administrative Punishments Law of the PRC], passed by the National People’s Congress 17\textsuperscript{th} March 1996 with effect from October 1, 1996, art. 23; Laodong Xingzheng Chufa Ruogan Guiding [Certain Regulations on Administrative Punishments
and order a firm to provide compensation for harm caused.\textsuperscript{168} They can also impose an administrative penalty (or sanction, \textit{chufa}). The administrative punishments are warnings (\textit{jinggao}), fines (\textit{fakuan}), confiscation of unlawful earnings (\textit{moshou weifa suode}), orders to cease business operations (\textit{zeling tingchan tingye}) and revocation of a permit (\textit{diaoxiao xukezheng}).\textsuperscript{169} An additional sanction

\textsuperscript{168} Labor Law art. 91 (arrears, embezzlement, non-payment of overtime, payment below the minimum wage, and non-payment of termination entitlements). A firm is liable for compensation to employees in many other instances, although there is no explicit power for the labor department to direct it to pay: arts. 89 (work rules not in accordance with law), 95 (violation of special protection provisions for women and minors); 97 (labor contract invalid through fault of the employer); 98 (wrongful termination of, or delay in execution of employment contracts).

\textsuperscript{169} \textit{Laodong Xingzheng Chufa Ruogan Guiding} [Certain Regulations concerning Administrative Punishments with respect to Labor], promulgated by the Ministry of Labor on 27\textsuperscript{th} September, 1996 with effect from 1\textsuperscript{st} October, 1996 art. 5). Fines can be imposed under the following provisions of the Labor Law: arts 90 (working hours unlawfully extended), 92 (breach of
provided for serious violations is publication of the conduct to society at large.\textsuperscript{170} Criminal conduct should be referred to the procuratorate.\textsuperscript{171}

The scope of these penalties, and the principles governing their imposition, are not spelt out in the Labor Law but in the Labor Inspection Regulations and subordinate legal instruments produced by the MOLSS. These clarify the amount of compensation that can be ordered, the various punishments for breaches of the labor law occupational health and safety requirements), 94 (illegal recruitment of minors), 95 (violation of special protection provisions for women and minors), 100 (failure to pay social insurance premiums), 101 (obstructing departmental officers or retaliating against informants).

\textsuperscript{170} Labor Inspection Regulations, art 22.

and the procedures for imposing those punishments. In cases of underpayment of wages (including payment below the minimum wage) and non-payment of overtime, labor officials can order a firm to pay the worker the full amount owed within a specified time, and, if the firm fails to comply, order it to pay an additional 50% to 100% of the outstanding amount. Where employers unlawfully extend working hours, departmental officers may warn the employer to comply with the law, order the employer to comply and/or impose a fine of between 100 and 500 Yuan per worker.

172 In relation to procedural requirements, see Labor Inspection Implementing Provisions Chapter 5. These reflect the requirements of the Administrative Punishments Law of the PRC, supra note 167.

173 Labor Inspection Regulations, art. 26. This expands on art. 91 of the Labor Law. The Minimum Wage Regulations stipulate that an employer can be ordered to pay compensation of up to five times the amount in arrears: supra note 91, art. 13.

174 Labor Inspection Regulations, art 25. This corresponds to art. 90 of the Labor Law.
If the employer refuses to comply with departmental orders, the fine escalates to between 2,000 and 20,000 Yuan.\textsuperscript{175}

The analysis so far suggests that Chinese labor departments have the authority and powers necessary to force employers to observe the law. However, there are many factors blunting their potential effectiveness.

Firstly, the disorderly state of legal rules means that local agencies may give greater weight to rules or policies devised by themselves or related agencies than to higher legal instruments, which formally have greater authority. Although greater consistency is being achieved, there is, as we have seen, still scope for inconsistency.

Secondly, and more significantly, the sanctions that labor departments can themselves deploy against egregious violators are actually quite weak. Firms clearly orient their actions not simply on

\textsuperscript{175} Labor Inspection Regulations, art. 30.
the basis of legality but, even more so, in accordance with cost-benefit calculations. Sanctions need to be sufficiently powerful to overcome incentives not to comply with the law. These incentives are extremely strong in many Chinese firms. They face constant pressure to lower their labor costs by illegal means, such as through breaching labor contracts or compelling unreasonable hours.

Evasion of labor law by some firms creates immense pressure on those others who might initially have a stronger disposition to abide by the law. This cascade effect is well illustrated in China’s export-oriented manufacturing sector. If a firm in that hypercompetitive environment is struggling to meet its supply deadlines, knows that its rivals will require staff to work unreasonable hours, and knows that they are very unlikely to be punished, it faces a choice between adhering to the law and survival.176 Most firms are likely to choose survival over a steadfast but suicidal commitment to the law. To be sure, the imposition of codes of conduct on subcontractors by enterprises at the top of global commodity chains, and other private

176 LIU & TAN, supra note 34, at 83–5.
sector initiatives, creates a counterweight of sorts to these incentives to evade the law, but evidence to date suggests that this has not yet proved particularly effective. 177

Firms using low-skilled migrant labor have been especially prone to violate the law because their workers have, at least until recently, been unable to use labor market pressures to compel the employer to act lawfully. Threats to exit the firm unless the law is obeyed have carried little weight because of China’s huge labor surplus, 178 although recent unskilled labor shortages in certain cities may

177 As I have pointed out previously, it would seem that until there is a fundamental change in the practice of MNEs, most factories in the sweatshop industries will be awarded supply chain contracts on the basis of price, quality and efficiency, not compliance with corporate social responsibility initiatives: Sean Cooney, A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?, 28 MELB. U. L. REV. 290, (2004), at. 318.

178 According to official estimates, there are 150 million surplus rural workers, in addition to the more than 100 million migrant rural workers: Migrant Workers Number 113.0 million in 2003, XINHUA NEWS AGENCY, May 15, 2004.
indicate that many rural workers have at last decided that the poor working conditions are unacceptable.\textsuperscript{179} Further, as discussed below, industrial action to force compliance has no legal status or protection and union officials (who are often also managers and/or party officials) discourage it.\textsuperscript{180}

In these circumstances, the economic incentives for non-compliance with the law need to be countered by credible legal sanctions. These are generally not available to labor departments. Where employers fail to heed formal warnings, or refuse to obey correction orders, labor departments in most instances are limited to imposing fines and compensation orders. The usefulness of these measures is attenuated by the labor department’s reliance on

\textsuperscript{179} See e.g., Brian Ho, \textit{Is there a Migrant Labor Shortage in China?} CSR ASIA WEEKLY VOL 2 (8) (2006). These include claims that Guangdong Province has a labor shortage of up to 1 million workers. The shortfall is partly attributed to the poor wages and conditions in the areas experiencing the shortfall and there is some evidence that market pressures are leading to improvements in wages and conditions: \textit{id}.

\textsuperscript{180} See \textit{infra} notes 324 and accompanying text.
judicial compulsory execution procedures to force unwilling firms to pay.\textsuperscript{181}

Consider their capacity to apply the following serious sanctions available to many Chinese governmental agencies: cessation of business, confiscation of earnings, revocation of license, administrative detention of an employer and prosecution. With one exception (revocation of a license to use non-standard working hours systems),\textsuperscript{182} it would seem that the labor departments would not be able to generally deploy these sanctions against cases of underpayment of wages and unhealthy working hours. Under nationally applicable regulations, explicit power to order business

\textsuperscript{181} Labor Inspection Implementing Provisions, art. 44.

\textsuperscript{182} As we have seen, the law permits enterprises to establish non-standard working hours systems, but these require permission of the labor department: Labor Law art. 39; Working Hours Measures, \textit{supra} note 124, arts. 4 and 5. Neither of these measures explicitly enables the labor departments to revoke such permits. However, MOLSS departments have a general power to suspend licenses: Certain Regulations on Administrative Punishments with respect to Labor, \textit{supra} note 167, art 5.
operations to cease or to confiscate earnings is given to the labor departments only in relation to job placement and training agencies. 183

The restriction on sanctions available to labor departments is partly a consequence of important administrative reforms directed at preventing bureaucratic agencies from arbitrarily inflicting a wide range of punishments on individuals. Viewed from an administrative law perspective, the restrictions seem appropriate in a system where arbitrary action has been notorious. On the other hand, an unfortunate by-product of these reforms in the labor context is limiting the scope of credible threats that can be made to

183 Labor Inspection Regulations art. 28. Further, labor departments cannot exercise the power to detain employers: Administrative Punishments Law art. 9. That power can be invoked where an employer’s failure to comply with the labor department constitutes an offence against public order but it must be exercised by the public security agencies: Labor Inspection Regulations art. 30. See also Labor Law art. 96, which applies where employers beat, intimidate or detail workers. Labor departments are also unable to initiate criminal prosecutions, as this is a matter for the procuratorate: id.
a recalcitrant employer. Relatively effective enforcement strategies often involve the ability to ‘escalate’ interventions.\footnote{184}{See infra note 408 and accompanying text.}

The Labor Law does set out circumstances (mostly connected with health and safety) in which a firm may be shut down or earnings confiscated by other authorities, such as the Department of Industry and Commerce, the State Administration of Work Safety or the Ministry of Health.\footnote{185}{See e.g., Labor Law art. 92 (People’s Government can order a firm to close down for work safety breaches) and art. 94 (Department of Industry and Commerce can close firm for employing minors). Administrative detention and criminal prosecutions are among the available sanctions for various offences under the Work Safety Law, supra note 88, Chapter 6. Zhonghua Renmin Gongheguo Zhiyebing Yuzhi Fa [Law of the People's Republic of China on the Prevention and Cure of Occupational Diseases], passed by the Standing Committee of the National People’s Congress, promulgated October 27, 2001, entered into effect May 1, 2002.} Labor departments can therefore refer serious cases to, or seek the assistance of, those other agencies. However, this renders the enforcement process much more

\textsuperscript{184} See infra note 408 and accompanying text.

\textsuperscript{185} See e.g., Labor Law art. 92 (People’s Government can order a firm to close down for work safety breaches) and art. 94 (Department of Industry and Commerce can close firm for employing minors). Administrative detention and criminal prosecutions are among the available sanctions for various offences under the Work Safety Law, supra note 88, Chapter 6. Zhonghua Renmin Gongheguo Zhiyebing Yuzhi Fa [Law of the People's Republic of China on the Prevention and Cure of Occupational Diseases], passed by the Standing Committee of the National People’s Congress, promulgated October 27, 2001, entered into effect May 1, 2002.
complex, as labor department officials need to secure the co-
operation of the agencies, and thereby lose control of the
enforcement process. The other agencies may well have different
internal priorities, lack expertise in labor matters, and/or be
unwilling to devote resources to labor enforcement issues. Further,
there may also be jurisdictional disputes in which agencies either
seek to intervene differently over the same issue or seek to pass the
buck to each other. For example, as we have seen, working hours is
an issue managed chiefly by labor departments but it can also be
constructed as a question of workplace safety and health; these are
matters that fall within the responsibility of the State
Administration for Workplace Safety and the Ministry of Health,
both of which have greater coercive powers.

Third, while, as we have also seen, employees individually and
collectively are entitled to lodge complaints with labor
departments, it is difficult for them to compel a department to
pursue a case where it is unwilling to devote resources to it.
Labor inspectors have considerable discretion to dismiss complaints if they consider them trivial or already remedied, or cannot substantiate them.\footnote{Labor Inspection Implementing Provisions art. 35.} They can also do so if the complaint is made more than two years after the violation, if the employees are unable to identify the correct employer (which may be difficult in the context of complex supply chains) or if labor department considers the matter is outside its jurisdiction.\footnote{Id. art. 18.}

The steady improvements in administrative law mean that employees can seek both administrative and judicial review of a decision not to pursue a labor complaint. Administrative review (\textit{xingzheng fuyi}) extends to review of both the lawfulness and appropriateness of matters pertaining to remuneration and hours of work.\footnote{Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa [Law of the People's Republic of China on Administrative Review] passed by the Standing Committee of the National People’s Congress and promulgated on April 29, 1997.} Review can either be sought from the local labor...
department concerned or – more usefully – the labor department at
the next higher level in the administrative hierarchy.\textsuperscript{189} Judicial
review of administrative action, or administrative litigation
\textit{(xingzheng susong)} against a labor department is also possible
where the department has failed to perform its duty under the labor
law to protect employee rights or has failed to respond to a
complaint.\textsuperscript{190}

\textsuperscript{189} \textit{Id.} art. 6.

\textsuperscript{190} The Administrative Litigation Law, \textit{supra} note 66, enables a citizen to
commence court proceedings where an agency has ‘refused to perform its
statutory duty’: art. 11(5) and a court can require an agency to perform its
duty within a stipulated time period: art. 54 (3).
Unfortunately, administrative review and administrative litigation are neither well-used to secure compliance with a statutory duty\(^{191}\) nor particularly effective.\(^{192}\) Administrative review is hampered by the unwillingness of agencies to accept complaints and to correct improper decisions, often as a result of local political or economic pressures, and lack of proper procedures. Administrative litigation is restricted by the inability of the courts to invalidate administrative rules, and by the generally conservative approach taken by courts to the scope of their review powers. Both processes are impeded by lack of public knowledge about, or fear of, legal

\(^{191}\) There was a total of 75,918 applications for administrative review in 2003: Zhongguo Falü Nianjian [China Legal Yearbook] 2004, 1071-1073. Only 3% of all cases (not just labor cases) related to failure to perform a statutory function (2,210 in the entire country) and in only 1% (659 cases) was an order made to perform a function: id. at 1072. These statistics also show that there were 44,587 cases of administrative litigation in 2003. Less than 2% of these cases (659) concerned failure to perform a statutory function and only 135 cases resulted in an order to perform.

\(^{192}\) See e.g., Biddulph, \textit{supra} note 52, at 226-256 (focusing on review of policing decisions); PEERENBOOM \textit{supra} note 51, at 399-424.
procedures, compounded by failure of agencies to inform citizens of their remedies (despite being legally obliged to do so).193

Moreover, in so far as administrative law reforms have some use, it is employers rather than employees who are best placed to take advantage of them. Unscrupulous employers may invoke them to stall and dissuade labor departments from implementing the law. Thus, where a labor department proposes to order a firm to cease operations, or revoke a license, or impose a large fine, it must, at its own expense, arrange for a hearing in which the parties enjoy extensive procedural rights, including a right to representation.194 Administrative penalties can be challenged either through

193 PEERENBOOM, supra note 51, at 418.

194 Laodong Xingzheng Chufa Tingzheng Chengyu Guiding [Regulation on Hearing Procedures for Administrative Punishments with respect to Labor], promulgated by the Ministry of Labor on September 27, 1996 with effect from October 1, 1996. ‘Large fines’ (jiào dà shū fǎkuǎn) are not defined in this instrument. However, it would not include a fine of 1,000 yuan or less, in respect of which ‘on the spot’ procedures can be used: id. arts. 33-34.
administrative review or administrative litigation;\textsuperscript{195} failure to comply with procedures even in less serious cases can lead to invalidation of the penalty,\textsuperscript{196} an obligation to compensate the firm\textsuperscript{197} and/or sanctions being imposed on labor department officers rather than the firm.\textsuperscript{198} It is understandable that inexperienced departmental officers, lacking legal qualifications and often lacking resources, may be reluctant to challenge an employer prepared to exhaust its legal options.

\textsuperscript{195}Almost half of all applications for administrative review related to administrative punishments: Zhongguo Falü Nianjian [China Legal Yearbook] 2004, 1072

\textsuperscript{196} Administrative Punishments Law, supra note 167, arts. 6 and 35. Note that the penalty is not suspended pending review and litigation: id art. 45; Labor Inspection Implementing Provisions, art. 42.

\textsuperscript{197} See Zhonghua Renmin Gongheguo Xingzheng Peichang Fa [Law of the People's Republic of China on State Compensation] (passed by the Standing Committee of the National People's Congress on May 12, 1994, with effect from January 1, 1995.

\textsuperscript{198} Id. art. 44.
Fourth, corruption and local protectionism can set the prevailing agenda for the bureaucracy. In accordance with Chinese administrative practice, local labor departments have ‘two masters’: they are subordinate both to higher level units of their ministry (the MOLSS) (the vertical or tiao relationship) and to the provincial congress and government of the area in which they operate (the horizontal or kuai relationship). Since labor departments are staffed and funded by local governments, it is often these that have the upper hand in directing the day-to-day work of


200 Benjamin van Rooij, China's System of Public Administration, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 323, 329-331, 341-2 (Jianfu Chen et al. eds., 2002).

201 Labor Inspection Regulations, supra note 151, art. 7.
departmental officers.\textsuperscript{202} Local governments often have close links to businesses under scrutiny or indeed manage those businesses.\textsuperscript{203} Admittedly, complainants are able to request that labor inspectors handling their case be replaced if they face a conflict of interest but the decision is an internal matter for the department.\textsuperscript{204}

Fifth, the quality and quantity of labor inspectors may well be inadequate to implement the law systematically across the

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\textsuperscript{202} Benjamin van Rooij, \textit{Implementing Chinese Environmental Law through Enforcement}, \textit{in} IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 164-8 (Jianfu Chen et al. eds., 2002), at 330.
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\textsuperscript{203} TAYLOR ET AL., supra note 25, at 43-45. Taylor et al comment that expansion of private businesses is a mark of a local government’s success, providing that social stability is maintained at a minimum level and no serious unrest occurs: \textit{id.} at 44; SARGENSON, \textit{supra} note 45, at 39-41. Compare Van Rooij, \textit{supra} note 202, at 162-163.
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\textsuperscript{204} Labor Inspection Implementing Provisions arts. 23-25. This decision could presumably be subject to administrative review or litigation.
\end{flushright}
country.\textsuperscript{205} As to quality, the qualifications for labor inspectors are minimal; the only substantive requirement is that an inspector must have engaged in labor administrative work for at least three years and must have undertaken a training program.\textsuperscript{206} As to quantity, while there are more than 3,000 inspecting agencies and 40,000 labor inspectors,\textsuperscript{207} this number is dwarfed by the number of business entities in China – around 30 million.\textsuperscript{208}

\begin{itemize}
\item \textsuperscript{205} Compare also van Rooij’s analysis of environmental protection officers, \textit{supra} note 202.
\item \textsuperscript{206} \textit{Laodong Jianchayuan GuanliBanfa} [Measures on the Management of Labor Inspectors], issued by the Ministry of Labor November 14, 1994 with effect from January 1, 1995, art. 7. Inspectors must undergo a re-qualification examination procedure every three years: \textit{id.} art 12.
\item \textsuperscript{207} \textit{Zhongguo Falü Nianjian} [Law Yearbook of China] 2003 at 45. These figures are from 2001; the exact number of agencies reported in that year is 3174. The 2004 Yearbook does not contain updated figures.
\item \textsuperscript{208} See \textit{KANAMORI, supra} note 25, at 24. More than 90\% of these are privately operated in one form or another; \textit{id.} Not all of these enterprises are employers – the statistics do not indicate which proportion of firms has employees.
\end{itemize}
Finally, despite the potential sanctions for so doing, firms adopt extensive strategies to frustrate inspection work. For example, in the event that bribes do not succeed, many firms keep false records and coach workers so that when an external inspection into working hours and other conditions takes place, the inspectors are deceived.209

C Enforcing the Rules: Dispute Resolution Procedures

The shortcomings in bureaucratic enforcement render it all the more important for workers to be able to enforce their rights through formal dispute resolution processes.210 This form of enforcement process enables workers to be directly engaged in

209 LIU & TAN, supra note 34, at 76-79; CHAN, supra note 2, at 123-125.

210 Two excellent studies on this topic are HO, supra note, 75 (in English), and SHANGYUAN ZHENG, LAODONG ZHENGYI CHULI CHENGXUFA DE XIANDAIHUA [The Modernisation of Labor Adjustment Procedure Law] (in Chinese).
seeking compliance. When a complaint is referred to a labor department, workers lose control of it, in the sense that as we have seen labor departments cannot be readily compelled to act in workers’ interests. On the other hand, dispute resolution procedures constitute workers as parties, with the ability to structure the claim and pursue the issue to conclusion.

The centerpiece of the Chinese labor dispute resolution process is labor arbitration. According to the Labor Law, all formal disputes that cannot be resolved by mediation within an enterprise\(^{211}\) should be channeled through arbitration. Arbitration is an essential precondition, not an alternative, to litigation.\(^{212}\) A worker cannot

\(^{211}\) Intra-firm mediation is rapidly declining as an effective mode of dispute resolution, especially in private firms: Mary Gallagher, “"Use the Law as Your Weapon" Institutional Change and Legal Mobilization in China' in ENGAGING THE LAW IN CHINA: STATE, SOCIETY AND POSSIBILITIES FOR JUSTICE (Neil Diamant, Stanley Lubman and Kevin O'Brien eds, 2005) at 67-70; Hualing Fu & D.W. Choy, From Mediation to Adjudication; Settling Labor Disputes in China, 3 CHINA RIGHTS FORUM 17, 18 (2004).

\(^{212}\) Labor Law art. 83.
directly file suit in a court, even for a claim for unpaid wages (a simple debt) without first going through arbitration.\textsuperscript{213}

Labor arbitration operates as follows. Where a labor dispute first occurs, a worker or an employer may apply for mediation within the enterprise.\textsuperscript{214} If mediation fails or if one of the parties is unwilling to have the dispute mediated, one or both of the parties may apply for labor arbitration.\textsuperscript{215} Labor arbitrations (which usually often involve their own mediation phase)\textsuperscript{216} are conducted

\textsuperscript{213} \textit{Guan}, supra note 94, at 531; \textit{Zheng}, supra note 210 at 146-149. Zheng regards this precondition as an incursion into a citizen’s right to litigate.

\textsuperscript{214} \textit{Labor Law} art. 79. \textit{Zhonghua Renmin Gongheguo Qiye Laodong Zhengyi Chuli Tiaoli} [Regulations of the People's Republic of China on Settlement of Labor Disputes in Enterprises], promulgated by the State Council on July 6, 1993, entered into effect August 1, 1993 [hereafter Dispute Regulations], art. 6.

\textsuperscript{215} \textit{Labor Law} art. 79; Dispute Regulations art. 6.

\textsuperscript{216} The proportion of cases settled by LDAC mediation has been in steep decline; less than 30\% of cases were resolved by mediation in 2002: \textit{Fu & Choy}, supra note 211, at 19.
by tripartite labor dispute arbitration committees (laodong zhengyi zhongcai weiyuanhui, ‘LDAC’s), established by the local labor departments.217

The LDACs (of which there are close to 3,000)218 have, on paper, very wide jurisdiction. This extends to disputes over wages by present and former employees and to disputes over working hours.219 The LDACs also have broad powers to rule on the

217 Labor Law arts. 81; Dispute Regulations art. 12. Individual cases are heard by arbitration tribunals (zhongcaiting) consisting of individual arbitrators or, in more complicated cases, three arbitrators. A major case may be referred to the entire committee for determination: Dispute Regulations art. 16. LDAC Rules art. 21

218 There were 2,934 in 2003 according to the Zhongguo Falü Nianjian [Law Yearbook of China] 2004, at 603.

219 Labor disputes are broadly defined to cover a range of matters in connection with an employment relationship. The scope of a labor dispute is set out in the Dispute Regulations. Art. 2 provides that the term ‘labor disputes’ includes disputes between enterprises and employees in China in relation to (1) terminations, lay-offs and resignations; (2) wages, insurance, welfare,
validity of a contract, order reinstatement of a terminated employee, order the payment of compensation and/or require employers to comply with labor contracts. 220

More and more labor disputes are being brought before LDACs. 221 According to statistics from the MOLSS, 222 the training and labor protection (including hours); (3) the performance of labor contracts; and (4) other disputes as defined in other laws or regulations. The labor dispute procedure applies to disputes where a labor relationship has existed, notwithstanding that no contract has been concluded: art.1, Supreme People’s Court Interpretation on Labor Disputes, supra note 68. See also Ho, supra note 75 at 77-78 (noting that disputes involving independent contractor and analogous arrangements fall outside the purview of the procedures).

220 The powers are not specifically set out in the Labor Law or in the Dispute Regulations but are implicit in the LDAC’s ability to resolve disputes through arbitration within its jurisdiction. On the kinds of orders that LDACs make, see JOSEPHS, supra note 77, at 90-95.

221 For a comprehensive analysis of labor dispute occurrence and types, see Ho, supra note 75 at 82-143. See also Gallagher, supra note 211; Thireau & Hua, supra note 161.
number of new cases has been rising yearly, from 47,951 in 1996 to 226,391 in 2003, an increase of more than 470% in just seven years.\textsuperscript{223} The vast majority of these cases are filed by employees rather than employers.\textsuperscript{224} The number of workers involved has also jumped from less than two hundred thousand to more than eight hundred thousand.\textsuperscript{225} In 2003, more than 60% of cases concerned disputes in the private sector.\textsuperscript{226} Further, more than one third of all

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\textsuperscript{222} Not entirely reliable (figures do not always tally with each other), although they probably do indicate general trends.
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\textsuperscript{223} Zhongguo Laodong Tongji Nianjian [Yearbook of Labor Statistics] 2004 Table 9-1. The number of collective disputes has risen from 3150 in 1996 to 10823 in 2003, an increase of 340%.

\textsuperscript{224} Id. 215,512 or 95%.

\textsuperscript{225} Id. In 1996, there were 189,120 workers involved. This increased more than 420% to 801,042 in 2003.

\textsuperscript{226} Id. Table 9-2. In 2003, there were 141,465 cases in various forms of non-state enterprise, 48,771 in state-owned enterprises and 30,218 in collectively-owned enterprises. Of the 801,042 workers involved in labor dispute cases in 2003, 416,472, or 52% were from the state sector. See Gallagher, \emph{supra} note
labor arbitrations concern remuneration.\textsuperscript{227} MOLSS figures show that just under half of cases in 2003 proceeded to arbitration, the remainder being settled either by mediation or ‘other means’ (\textit{qita fangshi}).\textsuperscript{228} In any case, MOLSS asserts that almost all matters (92\%) were resolved within a year,\textsuperscript{229} that around half of the matters were resolved solely in the employee’s favor and that in 35\% of cases both parties were partly successful.\textsuperscript{230}

These statistics suggest that, from an employee perspective, LDACs are operating very effectively. Yet something is seriously awry. Although the statistics are inconsistent, it would seem that a

\begin{itemize}
  \item \textsuperscript{211} at 63-65 on why there seem to be proportionately fewer disputes brought from state-owned enterprises.
  \item \textsuperscript{227} \textit{Zhongguo Laodong Tongji Nianjian} [Yearbook of Labor Statistics] 2004 Table 9-2. 76,774 cases in 2003 (34\%); of which 65\% were in the non-state sector.
  \item \textsuperscript{228} \textit{Id.} 95, 772 or 42\% went to arbitration.
  \item \textsuperscript{229} \textit{Id.} Only 19,164 of the cases were not settled by the end of 2003.
  \item \textsuperscript{230} \textit{Id.} 109,556 cases were won (\textit{shangsu}) by employees, 34,272 by employers and in 79, 475 cases both parties won (\textit{shuangfang bufen shangsu}).
\end{itemize}
majority of cases are appealed from arbitration.\textsuperscript{231} One reason for this appears to be that many LDACs reject cases because of an excessively narrow view of their jurisdiction – perhaps to lower their workload by shifting cases to the courts – but the courts then take them up.\textsuperscript{232} Another is that a very high proportion of arbitral judgments are appealed.\textsuperscript{233} A third reason is that litigants are seeking to have arbitral awards enforced by the courts.\textsuperscript{234}

\textsuperscript{231} Ho, \textit{supra} note 75 at 79. Some data suggests that statistics report that the number of labor disputes taken to the courts actually exceeds that taken to arbitration, which is impossible. According to the Zhongguo Falü Nianjian [Law Yearbook of China] 2004, at 125, there were almost one hundred thousand labor disputes litigated in 2003.

\textsuperscript{232} Gallagher, \textit{supra} note 211, at 62; Thireau & Hua, \textit{supra} note 161, at 87. Note that this practice is conflict with Supreme People’s Court Interpretation on Labor Disputes art. 1: \textit{see supra} note 68.

\textsuperscript{233} Gallagher reports officials in Beijing and Shanghai indicating that in 2003, nearly 70\% of all judgments were appealed, \textit{supra} note 211, at 73.

\textsuperscript{234} \textit{Id.} at 74.
The high rate of court applications suggests that Chinese labor arbitration has serious weaknesses. This impression is confirmed by the comprehensive critique of the system by Chinese labor law scholar, Zheng Shang-yuan.\textsuperscript{235} Professor Zheng firstly observes that the present labor dispute resolution processes were conceived in the era when the economy was much more centrally planned and dominated by the state sector than it is today. They remain highly bureaucratized (xingzhenghua), with the labor departments as the central actors.\textsuperscript{236} The LDACs, while formally separate entities which are authorized to ‘settle labor disputes independently according to law’,\textsuperscript{237} are chaired by a labor department representative,\textsuperscript{238} located within the labor dispute settlement

\begin{footnotesize}
\textsuperscript{235} ZHENG, supra note 210.

\textsuperscript{236} Id. 137-141.


\textsuperscript{238} Labor Law art. 81; Dispute Regulations art. 13.
\end{footnotesize}
section of the department, and dependent on the department for administrative work. Moreover, the LDACs do not have the status of legal persons, do not have their own assets or control over their financial operations, and cannot pay the wages and benefits of their members. This means in effect that the full-time arbitrators must be employees of the labor departments. This position may be contrasted with that of commercial arbitration bodies.

239 Dispute Regulations art. 13.

240 Id. LDAC Rules art. 3.

241 ZHENG, supra note 210, at 154. LDAC Rules art. 15. However, LDACs can charge arbitration fees: Dispute Regulations art. 34. The LDAC Rules provide that LDAC operating costs are to be met through arbitration fees and ‘financial supplements’: art. 24. This article also provides that LDACs are to have separate funds for their own use; in view of Professor Zheng’s comments, it is not clear that this occurs in practice.

242 See Zhonghua Renmin Gongheguo Zhongcai Fa [Arbitration Law of the People’s Republic of China] (hereafter Arbitration Law), passed by the Standing Committee of the National People’s Congress, August 31, 1994, with effect from September 1, 1995. Art 8 provides that ‘arbitration shall be carried out independently according to law and shall be free from interference
Further, although LDACs are ostensibly based on the principle of tripartism and should be comprised of state, employer and employee representatives, in practice state representatives dominate.\textsuperscript{243} We have just seen that the labor department representative is the chair of a LDAC. The ‘employer’ representative is nominated by government agencies responsible for administrating state owned enterprises;\textsuperscript{244} this means that despite the growing private sector of the economy, there is no engagement in the dispute resolution process by private employers. On the other hand, the ‘employee’ representative is drawn from the quasi-governmental official trade union organization.\textsuperscript{245} In any

\begin{quote}

of administrative organs, social organizations or individuals.’ Art 14 provides that ‘arbitration commissions shall be independent from administrative organs and there shall be no subordinate relationships between arbitration commissions and administrative organs.’

\textsuperscript{243} \textsc{Zheng}, \textit{supra} note 210, at 150-153.

\textsuperscript{244} LDAC Rules art. 7. \textit{See also} \textsc{Zheng}, \textit{supra} note 210, at 151-152.

\textsuperscript{245} LDAC Rules art 7. \textit{See also} \textsc{Zheng}, \textit{supra} note 210, at 153.
event, these ‘non-state’ representatives may not be present in many of these cases, which can be heard by individual arbitrators.246

Under these conditions, labor arbitration crosses over into bureaucratic implementation of the law, rather than constituting an autonomous dispute resolution procedure. Professor Zheng writes:

This model under which the administration is responsible for arbitration readily blurs the distinctions between bureaucrats and arbitrators, and between the formulation and implementation of policy. [ …] To a certain extent, administrative guidance, order-making, and unilateral compulsion are in conflict with detachment, fairness, balance and trust necessary for arbitration.247

246 Union representatives were involved in only 30,396 of the cases in 2003: Zhongguo Falü Nianjian [Law Yearbook of China] 2004, 603.

247 Zheng, supra note 210, at 139. See also at 204-205 (commenting that bureaucratic behaviors may intimidate parties and cause them to lose confidence in the process).
Associated with this bureaucratization of arbitration is the low competence of many of the arbitrators. The main qualification for arbitrators is that they have engaged in labor dispute resolution work for more than three years or in related work for more than five years. There is an exam but it is not difficult to pass. Although there is provision for scholars and lawyers to serve concurrently as arbitrators, full-time arbitrators must be nominated from staff of the labor dispute section of the labor department and many of these are transferees from other parts of the labor bureaucracy or retired army personnel.

248 Id. at 154-158.

249 LDAC Rules art. 16(4).

250 ZHENG, supra note 210, at 157.

251 Dispute Regulations art. 15

252 LDAC Rules art 15.

253 ZHENG, supra note 210, at 156.
A further problem is that, although the published statistics suggest that employees receive a fair hearing, LDAC arbitrators face strong incentives to be biased against them. The law provides that they must recuse themselves if they have a conflict of interest and are prohibited from taking bribes.\textsuperscript{254} However, LDACs are often predisposed to favor local government and local business interests (often intertwined) to the detriment of individual workers.\textsuperscript{255} This may be because of corrupt financial inducements, but the structural reason why LDACs would not wish to offend local governments is that, as we have seen, they are dependent on labor departments for their resources and personnel, and those departments are in turn dependent on local governments for their resources and personnel.

Finally, LDACs do not have jurisdiction where there is not an employer-employee relationship. As we have seen, Chinese labor law does not explain in detail how to identify such a relationship; this leaves scope for the LDACs to determine it for themselves. As

\begin{footnote}
\textsuperscript{254} Dispute Regulations arts. 35 and 38.
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\begin{footnote}
\textsuperscript{255} Gallagher, \textit{supra} note 211, at 74.
\end{footnote}
mentioned above, many LDACs take a very narrow view of their jurisdiction\textsuperscript{256} – perhaps to reduce their workload – and are therefore likely to dismiss cases from workers who do not have a clearly identifiable employer. These workers may be the most vulnerable to violation of their contractual entitlements or their rights to safe working conditions.

Turning from the status and composition of the LDACs to questions of process, a first problem is that a party (usually the employer) is able draw out a dispute until the other party is exhausted.\textsuperscript{257} The relevant procedural rules require an LDAC to determine whether to accept an application within seven days of receiving it.\textsuperscript{258} If the LDAC does accept the application, it has a

\textsuperscript{256} For example, through rejecting cases where there is a labor relationship without written contracts: see supra note 219.

\textsuperscript{257} ZHENG, supra note 210, at 201-204.

\textsuperscript{258} Dispute Regulations art. 25. If a LDAC declines to hear a matter on the basis that it does not constitute a labor dispute, a court can exercise jurisdiction over the matter if it determines either that it does constitute a labor dispute, or
maximum of 104 days within which to conclude the case. The arbitral award takes effect within fifteen days of service on the parties. Note at this point that, with respect to the two labor abuses which are the focus of the article, this kind of process is likely to be much more relevant to remuneration issues than to hours of work (which require prompt and direct intervention in the workplace when the breach is occurring).

However, even with respect to remuneration, the procedure is problematic. If one of the parties is dissatisfied with the arbitral award, it can elect to commence court proceedings. This immediately prevents the arbitrated award from taking effect. The court process involves a de novo hearing at first instance, and then, if there is an appeal of the first instance judgment, a second

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259 Dispute Regulations arts. 25 and 32.

260 Id. art. 30.

261 Supreme Court Interpretation on Labor Disputes, supra note 68, art. 17.
de novo hearing. Professor Zheng points out that this process places workers seeking to recover arrears in wages in a highly disadvantageous position; they not only face the prospect of maintaining legal proceedings without their primary source of income (especially if they have been wrongly terminated), they also run the risk of the employer absconding, or removing assets from the jurisdiction. In the case of court proceedings, it is possible to obtain preventative orders, such as orders to preserve property and evidence. Most usefully, a court can order interim relief, including, specifically, in cases involving labor remuneration. Such orders can not be made by LDACs.


263 ZHENG, supra note 210, at 167-170. See also the discussion in Ho, supra note 75 at 154-158 on fees and the availability of legal aid.

264 Civil Procedure Law, supra note 262, Chapters VI and IX.

265 Id. arts. 97 and 98.

266 ZHENG, supra note 210, at 166-170.
Not surprisingly, then, LDACs appear to be rarely used by migrant workers. Research by Thireau and Hua of data at the Shenzhen Labor Bureau suggests that LDACs are used to resolve disputes by wealthier, long-term, and frequently skilled workers.\(^{267}\) Other research suggests that these workers are overwhelmingly well-resourced males.\(^{268}\) On the other hand, poorer workers use oral or written complaints to the labor department as their principle means of trying to engage state institutions to deal with labor abuses.\(^{269}\)

\(^{267}\) Thireau & Hua, supra note 161, at 90. See also JOSEPHS, supra note 77, at 92-94. Thireau and Hua, based on Shenzhen data in the late 1990s, estimate the cost of arbitration proceedings at 2,361 yuan, or around four times the monthly wage of migrant workers lodging complaints with the labor departments:. Gallagher arrives at a much lower figure in Shanghai: 300 yuan: Gallagher, supra note 211, at 59.

\(^{268}\) Fu & Choy, supra note 211, at 19.

\(^{269}\) Thireau & Hua, supra note 161, at 90.
The LDAC procedures may be contrasted to commercial arbitration where courts can make interim relief orders while arbitration proceedings are on foot\textsuperscript{270} and where arbitral awards cannot be appealed against on substantive grounds.\textsuperscript{271} Judicial review of commercial arbitration is possible only on procedural grounds.\textsuperscript{272}

Even if a worker can sustain the expenses associated with an arbitration and/or court proceeding, and obtains an order in her or his favor,\textsuperscript{273} this may be of little avail. It is often very difficult in China to execute either arbitral awards or court judgments. As application for execution of arbitral awards involves court proceedings, in both cases the difficulty lies with the court compulsory execution process. It is well established that Chinese

\begin{itemize}
\item \textsuperscript{270} Arbitration Law art. 28.
\item \textsuperscript{271} Arbitration Law arts. 5 and 9.
\item \textsuperscript{272} Arbitration Law Chapter 5.
\item \textsuperscript{273} Employees win a majority of court cases in many significant provinces, such as Guangdong: Fu & Choy, \textit{supra} note 211, at 21.
\end{itemize}
courts are frequently unable to enforce their judgments.\textsuperscript{274} In an extensive study of the enforcement of civil judgments, Clarke identifies reluctance by courts to use coercive measures (especially where a defendant may not be seen as entirely at fault morally), lack of interest in execution, lack of finality in judgments, insolvency through enterprise restructuring, lack of cooperation by banks and reluctance by courts to execute against enterprises if it will lead to adverse consequences such as job losses as factors contributing to the problem.\textsuperscript{275} However, the factor that may be most serious is, again, local protectionism. This leads to courts deferring to the wishes of local elites and refusing to assist courts

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\textsuperscript{275} Clarke, \textit{supra} note 274, at 35-40, 52-68.
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from other parts of China enforce their judgments within the jurisdiction.276

A third problem is that the time limit within which claims may be brought to LDACs is unreasonably short. The Labor Law provides that a party must file with an LDAC within 60 days of the occurrence of a labor dispute.277 This is a very short period and many workers are likely to remain unaware of it until it has expired.278

A fourth procedural flaw is that labor arbitration is not subject to judicial supervision.279 As a court hears a labor dispute de novo as though it were an ordinary civil dispute, it does not concern itself with the conduct of the arbitration – that is irrelevant, so it is unable

276 Id. at 41-52. See also LUBMAN, supra note 51, at 266-268.

277 Labor Law art. 82; Supreme Court Interpretation on Labor Disputes, supra note 68, art. 3.

278 Fu & Choy, supra note 211, at 19-20.

279 ZHENG, supra note 210, at 175-178
to upbraid a LDAC for its poor adherence to process. Moreover, it would seem that administrative litigation proceedings cannot be invoked against a LADC. Thus, if members of a LADC refuse to recuse themselves despite a conflict of interest, or refuse to hear


281 ZHENG, *supra* note 210, at 233-234. It is not possible to commence administrative litigation against a LDAC on the basis that it has failed to make a decision or that it refuses to accept a case: Zuigao Renmin Fayuan guanyu Laodong Zhongcai Weiyuanhui Yuqi bu Zuochu Zhongcai Caijue huozhe bu Yu Shouli Tongzhi de Laodong Zhengyi Anjian Renmin Fayuan Yingfou Shouli de Pifu [Reply by the Supreme People’s Court concerning Whether the People’s Courts Can Accept Labor Dispute Cases Where the Labor Arbitration Committee Has Failed to Issue a Decision within Time or Has Failed to Accept a Case], *Fashi* 24 of 1998, issued September 9, 1998. While a party can commence a civil procedure if a LADC declines to hear a matter, it is not explicitly clear that a court can exercise jurisdiction if an LADC simply fails to make a decision within the required time period: see Supreme People’s Court Interpretation on Labor Disputes, *supra* note 68 art. 2.
important evidence, a party to the proceedings is unable to compel them to do so. They may be subject to administrative sanctions only.\textsuperscript{282}

Yet another procedural shortcoming is that the legal instruments regulating dispute resolution generally draw no procedural distinctions between individual and collective disputes. This is a legacy of central planning where industrial conflict did not take the same form as collective disputes in market-based economies.\textsuperscript{283} This means that the LDACs use the same procedures for a small individual dispute and a large-scale conflict that may involve considerable economic and social disruption, for instance where a factory suddenly closes, leaving thousands of workers unpaid.

To be sure, a distinction is made between collective disputes over vested rights and collective interest disputes, but it is of a negative

\textsuperscript{282} Dispute Regulations art. 38. LDAC Rules art. 26.

\textsuperscript{283} ZHENG, supra note 210, at 141-146, 207-216.
kind. Disputes arising out of collective negotiation\textsuperscript{284} are excluded from the jurisdiction of the LDAC\textsuperscript{285}. Where collective negotiations break down, disputes are referred to labor departments directly for assistance, not to the LDACs. The LDACs only handle collective disputes arising out of the performance of a collective contract (i.e. vested rights)\textsuperscript{286}.

As far as court proceedings are concerned,\textsuperscript{287} there is no special labor law court or procedure\textsuperscript{288} and so labor cases are frequently treated the same as other civil (or sometimes administrative) court cases.

\textsuperscript{284} This is not collective bargaining: see Simon Clarke et al., Collective Consultation and Industrial Relations in China, 42 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 235 (2004).


\textsuperscript{286} \textit{Id.} art. 55.

\textsuperscript{287} For more extensive accounts of the Chinese court system, see Peerboom, supra note 51, at 280-342; Lubman, supra note 51, at 250-297.

\textsuperscript{288} Labor cases are handled under the Civil Procedure Law, supra note 262.
disputes. While judges in the advanced coastal provinces may be familiar with the distinct nature of employment and industrial relations law, in other parts of the countries lack of specialization is problematic, especially when generalist judges encounter cases involving very serious industrial conflict. 289 Moreover, Professor Zheng points out that many courts treat labor cases with disdain because they are time consuming and, the employee litigants generate little income for the court from fees. 290

289 Judges, prosecutors and lawyers generally have a very low understanding of labor law, and especially those aspects concerning trade unions: LIU CHENG, LUN GONGHUI DE DAIBIAO SUSONGQUAN [A Discussion of the Trade Union’s Right to Representative Litigation], paper delivered to the International Seminar on Labor Dispute Settlement, Peking University, 19th-20th November, 2004 (on file with the author).

290 ZHENG, supra note 210, at 244-247; see also Fu & Choy, supra note 211, at 21.
Like LDACs, courts are plagued by problems of incompetence, although the quality of judges is improving in wake of moves to set higher qualifications and standards for judges on the part of the NPC and the Supreme People’s Court. On the other hand, corruption appears to be increasing. In a further manifestation of the ubiquitous institutional flaw - local protectionism - lower courts are financially dependent on their local governments, and the appointment and removal of their judges is controlled by local people’s congresses. As with the labor departments and the LDACs, courts are very vulnerable to local pressure. They may either find in favor of the local financial interest, regardless of the merits, or delay making a decision adverse to that interest.

291 PEERENBOOM, supra note 51, at 289-298, 320-323; Yuwen Li, Court Reform in China: Problems, Progress and Prospects, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA 69 (Jianfu Chen et al. eds., 2002).

292 Li, supra note 291, at 72-76, 82-83.

293 PEERENBOOM, supra note 51, at 307-312. Li, supra note 291, at 59.

294 Li, supra note 291, at 60-62.
Finally, court proceedings are expensive and there is inadequate legal aid for persons (such as individual workers) without means who wish to access lawyers, although more worker assistance organizations are gradually being established.

D ENFORCING THE RULES: UNIONS

Individual workers confront serious obstacles in attempting to enforce labor law through engaging state enforcement and dispute resolution processes. Shortcomings in labor bureaucracies and dispute procedures are, of course, observed in very many jurisdictions. Nonetheless, in many countries, the injurious effects such shortcomings have on workers are counteracted by workers’ capacity to pursue compliance issues collectively, through their

295 Peerenboom, supra note 51 at 362 -364. See also id. at 361-369 on access to competent and honest lawyers. Li, supra note 291, at 61-62.

296 See infra note 418.
unions. In China, however, the extent to which lawful trade unions are responsible for compelling compliance with the law is determined by the state, not by ordinary union members. The compliance function of Chinese unions is thus really another aspect of state bureaucratic enforcement of labor law. Let us examine how far this compliance function contributes to the implementation of labor law.

China’s official trade union organization, the All-China Federation of Trade Unions (ACFTU), is the largest ‘labor organization’ in the world, claiming a membership of over 130 million, more than 300,000 full time officials and more than one and a half million base-level (that is, enterprise) unions.\(^{297}\) However, the ACFTU is not an organization controlled by its membership. It is subordinate to the Chinese Communist Party

\(^{297}\) See ACFTU website <http://www.acftu.org.cn/about.htm>. This states that the membership is 134 million and that there are 1,713,000 primary trade unions.
(CCP) and the state.\textsuperscript{298} This arrangement is spelt out both in the Trade Union Law\textsuperscript{299} and in the ACFTU Charter.\textsuperscript{300} The preamble to the Charter provides that:

Chinese trade unions are mass organizations of the working class formed voluntary by workers under the leadership of the Chinese Communist Party. They are a bridge and bond linking the party to the working masses. They are an important social pillar of national political power and a representative of the interests of members and workers.\textsuperscript{301}

Furthermore, the principle of ‘democratic centralism’ ensures that lower level unions remain subordinate to higher-level entities,

\textsuperscript{298} See \textit{e.g.}, \textsc{Taylor et al}, \textit{supra} note 25, at 40-43, 102-123.

\textsuperscript{299} Trade Union Law art. 4.

\textsuperscript{300} \textit{Zhongguo Gonghui Guicheng} [Charter of Chinese Unions] (hereafter the Charter), passed by the 14\textsuperscript{th} National Congress of the ACFTU on September 26, 2003.

\textsuperscript{301} \textit{Id.}
culminating in the national ACFTU leadership.\textsuperscript{302} Although the Charter provides for enterprise-level union committees to be elected by members (and direct elections are apparently increasing)\textsuperscript{303} the elected candidates are subject to approval of higher-level union officials.\textsuperscript{304}

Despite the fact that the ACFTU is recognized as a trade union organization by the ILO,\textsuperscript{305} its subordination to the CCP has led

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\textsuperscript{302} Trade Union Law art. 9; Charter art. 9 Of course many unions in liberal democracies have rules that enable a national elected body to override a local constituent union, but they do not normally provide for control over local electoral processes.


\textsuperscript{304} Trade Union Charter art. 27.

\textsuperscript{305} A nominee of the ACFTU is currently a deputy member of the Workers’ Group in the ILO Governing Body: <http://www.ilo.org/public/english/standards/relm/gb/refs/pdf/gbmember.pdf>.
\end{flushleft}
the International Confederation of Free Trade Unions to conclude that it is not a free and democratic trade union:

A government created and controlled union that has to uphold policies adopted by the government cannot at the same time credibly represent workers’ interests.306

As is well known, China does not permit unions to be formed without ACFTU approval307 and has harshly punished labor activists who have attempted to do so.308 This is clearly in


307 Trade Union Law art. 11.

308 ICFTU, supra note 306, at Appendix 3.
violation of the key ILO conventions on freedom of association,\textsuperscript{309} as the ILO Committee on Freedom of Association has repeatedly found.\textsuperscript{310} Despite this, there is very little prospect that China will substantially alter its stance on freedom of association in the short to medium term as the party-state sees dominance of labor organizations as essential to its survival.\textsuperscript{311}

The law, then, binds Chinese trade unions to the CCP and the state through the ACFTU structure and treats worker representative bodies outside this structure as illegal. However, the law goes beyond simply ensuring that the CCP/state have ultimate authority


\textsuperscript{310} See \textit{e.g.}, ILO Committee on Freedom of Association Reports Vol. LXXXVI, 2003, Series B, No. 1 at 385-467, especially paragraph 465.

\textsuperscript{311} See \textit{Ann Kent, China, the United Nations and Human Rights} 128-45 (1999) on the interaction between China and the ILO on freedom of association.
over trade unions; it directs what functions the unions are to perform. It treats them essentially as state regulatory agencies.

Among these mandated functions, a major responsibility of the trade unions is to seek employer compliance with the labor law. While this function was formerly expressed in vague terms, the 2001 amendments to the Trade Union Law delineate specifically the areas in which unions are supposed to be particularly vigilant of employee rights and entitlements. Trade unions, for example, are obligated to (yingdang) take action ‘on behalf of employees’ where enterprises misappropriate wages or arbitrarily extend working hours. The obligation to supervise enforcement of the law is repeated in the Charter, other statutes and legislative instruments at both national and regional levels.

312 See art. 17 of the 1992 version of the Trade Union Law.
313 Trade Union Law art. 22.
314 Trade Union Law arts. 22(1) and (3).
315 Trade Union Charter art. 28(6).
316 See e.g., Labor Law art. 88; Work Safety Law arts. 7, 52.
These provisions suggest that, while Chinese trade unions may not be worker representative organizations as understood in liberal democratic societies, they are nevertheless well positioned to protect worker entitlements where these are set out in the law, indeed they are directed to do so. Importantly, seeing that labor law is properly implemented does not, on its face, put unions in tension with the party-state. In fact, state policy actively promotes close collaboration between labor inspectorates and trade unions on enforcement issues, including through the nomination and training by labor departments of labor compliance supervisors within corresponding levels of the trade union structures.\footnote{See Guanyu Jiaqiang Laodong Baozhang Jiancha yu Gonghui Laodong Baozhang Falü Jiandu Xianghu Gongzuode Tongzhi [Notice concerning Strengthening the Coordination of Labor Protection Inspection and Trade Union Labor Protection Supervision], issued jointly by the MOLSS and ACFTU, November 13, 2001, with immediate effect, cl 5.}

\footnote{See e.g., Labor Inspection Regulations art. 7.}
\footnote{See e.g., Guangdong Province Regulations on the Payment of Wages, supra note 146, arts. 45, 46.}
In principle, official Chinese trade unions could be a much more effective force for securing compliance than labor department inspectors. According to official data, union officials outnumber inspectors by more than seven to one\textsuperscript{320} and unlike labor inspectors, officials of base-level unions are located within enterprises and so can conduct ongoing monitoring. In particular, base-level unions are ideally placed to prevent unreasonable working hours.

Unfortunately, for many reasons, the compliance function of Chinese unions remains weak.

First, the legal powers available to a union to compel an employer to adhere to the law are inadequate. Where a union identifies a violation of the law, it has no direct remedy against the employer. Its power is essentially limited to raising the issue with the

\textsuperscript{320} Compare the statistics at, supra notes 207 and 297.
employer and seeking its response. It has no substantive legal or industrial weapon at its disposal and is dependent on other agencies to apply sanctions – in most cases either the labor inspectorate or a LDAC. As we have already seen, these agencies have problems of their own.

321 Art 22 of the Trade Union Law provides that on discovering a violation, the union shall (1) negotiate with the enterprise on behalf of the employees and (2) require the enterprise to adopt measures to correct the situation. (‘…daibiao zhigong yu qiye, shiye danwei jiaoshe, yaoqiu qiye, shiye danwei caiqu cuoshi yuyi gaizheng’): Trade Union Law art. 22. The employer is obliged to respond but there is no specific penalty for failing to do so. Compare, e.g. Labor Law art. 88: Work Safety Law art. 52; Guangdong Province Regulations on the Payment of Wages art 45.

322 If an employer refuses to respond to a union request to comply with the law: Trade Union Law art. 22.

323 Unions can invoke labor arbitration if the firm breaches a collective labor contract: Trade Union Law art. 20. If a firm breaches an individual contract, it is obliged to (yìngdāng) ‘support and give assistance to’ an individual who takes a case to a LDAC or to court: art. 21.
As for industrial sanctions, there is no right to strike in China, even where there is a life-endangering hazard in the enterprise.\textsuperscript{324} Strikes are not expressly prohibited by labor legislation – although they can easily fall foul of the many laws and regulations dealing with public order. However, the Trade Union Law in effect casts a duty on trade unions to prevent industrial action. Where industrial action occurs in an enterprise, the union is required to ‘express the employee’s views, negotiate with the employer and propose a resolution’. It cannot lead a stoppage but, on the contrary, is enjoined to help the enterprise ‘resume production as quickly as possible’ and ‘restore work discipline’.\textsuperscript{325} This is consistent with one of the other state-mandated functions of Chinese trade unions –

\textsuperscript{324} Trade Union Law art. 24. A union may only suggest to the employer that work cease.

\textsuperscript{325} Id. art. 27. Union officials frequently seek actively to prevent or defuse industrial action on the basis of the ‘national interest’: Feng Chen, \textit{Between the State and Labor: The Conflict of Chinese Trade Unions’ Double Identity in Market Reform}, 176 \textsc{The China Quarterly} 1006, 1018-1022 (2003).
to date the most prominent one – to mobilize employees to participate in economic construction.\textsuperscript{326}

Second, many enterprise level unions are dominated by management. Indeed, union officials may themselves be enterprise managers.\textsuperscript{327} This is clearly in conflict with the ILO principles on preventing interference with union autonomy\textsuperscript{328} as well as the

\textsuperscript{326} Trade Union Law art. 7.

\textsuperscript{327} Gallagher, \textit{supra} note 36, at 26-28, 32-33. Clarke et al, \textit{supra} note 284, at 241-244. They state that 'it is the dependence of the trade union on management, rather than its dependence on the Party, that is the main barrier to the development of an industrial relations system in China: \textit{id.} at 241.

\textsuperscript{328} Art 2 of the ILO's Right to Organize and Collective Bargaining Convention, \textit{supra} note 309, provides:

1. Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other
position in most industrialized countries where legislation and/or the internal rules of unions prevent management dominance of unions. The key role managers play in many Chinese enterprise-level unions is a legacy of an economy in which most enterprises were socialized and workplace relations were based on administrative arrangements rather than contract. According to CCP ideology, since firms were owned by the state and workers were the ‘masters of the state’, there could be no serious conflict of interest between the aspirations of the workers and the management of enterprises. Collective bargaining and strike action were foreign to unions, and it was not unusual for union officials to hold senior management positions. During this period, the primary roles of unions were to participate in allocating enterprise-based social welfare benefits, mediate labor-management disputes and maintain production order.\textsuperscript{329}

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\textsuperscript{329} See e.g., TAYLOR ET AL, supra note 25, at 103-107.

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Of course, economic arrangements in the Chinese labor market have been undergoing a process of radical change since the mid-1980s. Many state and collectively owned enterprises have been privatized, private firms now employ a majority of the workforce and workplace relations are now based on contract. In the private sector, at least, there can be no pretence that the interests of firm managers and workers are now entirely congruent. In such firms, the involvement of senior managers in the trade unions is especially inappropriate.\textsuperscript{330} In the context of enforcement of labor law, it is obvious that a manager in a firm that has breached obligations to its employees will be tempted to prevent a union taking action against the firm or assisting a worker to take such an action. If the firm manager is also the union secretary, then union support for enforcement proceedings is unlikely to be forthcoming. Observation confirms this: in many wage arrears cases, for

\textsuperscript{330} Taylor et al report from their fieldwork that in some localities, the ACFTU has agreed to allow private firm managers to appoint the union chairperson because of pressure applied by local government authorities: \textit{id.} at 127.
example, the union official has actively represented management in arbitration proceedings. 331

The 2001 revisions of the Trade Union Law make considerable progress in protecting union members from retaliation by a firm. 332 A firm which violates these protective provisions may face fines, 333 reinstatement and compensation orders 334 and, in some circumstances, criminal sanctions. 335 Moreover, the Law states that ‘close relatives of those chiefly responsible for running a firm’ (qiye zhuyao fuzeren) cannot be candidates for election to union


332 See Trade Union Law arts. 50-54.

333 See Labor Inspection Regulations arts. 29-30 (fines stipulated are between 2,000 and 20,000 yuan).

334 Trade Union Law arts. 51 and 52.

335 Id. art. 50 (obstructing employees by means of violence or intimidation from joining a trade union, or obstructing higher level trade unions assisting employees to establish a trade union).
committees at enterprise union level. It also provides for trade union officials to be democratically elected or recalled. However, crucially, the Law does not prevent managers themselves being elected.

Third, there are limited means through which members can compel their unions to protect their entitlements or to represent them, as the law requires. The Trade Union Law obliges unions to assist individual workers who commence proceedings in a LDAC or in the courts. One of the important revisions to the Trade Union Law made in 2001 was to confer an express right on trade unions to litigate directly where an employer violates a collective

336 Id. arts. 9 and 17.

337 Any person for whom wages are a major source of income is entitled to become a trade union members and to elect and be elected to office in a union: id. art. 3; Trade Union Charter arts. 2 and 3(1). This would presumably prevent an owner of a firm becoming a union member, but not a firm’s executive officers.

338 Trade Union Law art. 21.
The relevant union can take the employer to a LDAC and then to court.\textsuperscript{340}

There are many disputes in which unions do in fact assist workers.\textsuperscript{341} However, there are many other circumstances (apart from straightforward management domination) in which the unions decline to help, especially if facts are disputed or there is a large collective dispute. As Feng Chen has pointed out, where it occurs, the involvement of unions in compliance issues tends to be case-based rather than focusing on underlying structural issues which lead to abuses becoming endemic.\textsuperscript{342}

\textsuperscript{339} Trade Union Law art. 20. \textit{See also} art. 49.

\textsuperscript{340} \textit{Id.}

\textsuperscript{341} \textit{See e.g.}, those cited in Chen, \textit{supra} note 325, at 1012-1017.

\textsuperscript{342} \textit{Id.} at 1017. Chen writes that ‘representing workers in open protests creates an image of organized action, which is politically risky and, indeed, the last thing unions want to be part of. Organized action per se, no matter what the reason for it, its basis and its targets, is taboo’: \textit{id.} at 1016.
Where unions refuse to help workers, they cannot be legally required to exercise these powers. Although courts are beginning to entertain nonfeasance complaints by union members, there has not as yet been an unequivocal decision in which a union has been directed by a court to perform its statutory function of representing workers. At present, individual union members dissatisfied with their representation must essentially direct their complaints to the next level of the union hierarchy.

Even where a union does seek to represent workers in litigation, it encounters significant obstacles, as Professor Liu Cheng points out. For example, it is not clear what procedural rules apply, and union officials in the enterprise unions have a poor knowledge of labor law.


344 Id.

345 CHENG, supra note 325.

346 Id.
Fourth, where Chinese unions do attempt to assist workers, their efforts have not been directed to those workers who suffer from the most egregious violations of the law. Either unions are not present in those enterprises where the worst violations occur or they exclude from membership the worst affected workers. Despite the apparently large number of union members and union officials, at best only around 30% of private enterprises are unionized, and even in the unionized firms, the union structures often exist only on paper.

347 CHANG, supra note 343, at 4; see also Daniel Ding et al., The Impact of Economic Reform on the Role of Trade Unions in Chinese Enterprises, 13 INTERNATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT 431 (2002).

On the conduct of unions in various kinds of private sector firms see: Gallagher, supra note 36, at 26-31.

348 On the top-down approach to organizing taken by the ACFTU, see Chen, supra note 325, at 1025. On the ineffectiveness of unions in many private firms, see Ding et al, supra note 347, at 445-46; Ding et al comment that, in many of the private firms they surveyed, unions were operating more like ‘a
Of still more consequence, the ACFTU did not until very recently attempt to represent or act in the interests of migrant workers at all. Migrant workers, being from rural areas, were classified as agricultural workers (nongmingong) and therefore not part of the ‘working class’ participating in the union. Chinese unions have focused on representing urban workers with long-term contracts and we have seen that such workers generally enjoy much better working conditions than migrant workers.\(^349\)

The position has now changed, at least in a formal sense. In 2003, the ACFTU issued a circular stipulating that all migrant workers

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349 Local surveys indicated that very few migrant workers participated in unions prior to the 2003 policy change: Jiu Mingong Jiaru Gonghui, Laodong Bumen Ying Ti Mingong Shuohua (Only 3.6% of Rural Workers Join Unions; Labor Departments Should Speak Up For Them), March 14, 2003, Nanfang Dushi Bao (reporting survey commissioned by the firms in Shenzhen).
are entitled to join trade unions, irrespective of their hukou status or their work experience.\textsuperscript{350} Since then, the organization has issued further notices, actively encouraging its constituent unions to recruit migrant workers.\textsuperscript{351} According to some official reports, these efforts have been astonishingly successful, with massive increases in migrant worker membership.\textsuperscript{352} However, such claims should be treated with skepticism until more detailed empirical evidence confirms whether officials trade unions are now in fact more effective in protecting the legal entitlements of migrant workers.

\textsuperscript{350} *Union Accepts Migrant Workers, CHINA DAILY, September 3, 2003.*

\textsuperscript{351} *E.g. Guanyu Zuzhi Gezhong Suoyouzhi, Shiye Danwei Ji Jiguan de Laowugong Jiaru Gonghui de Tongzhi (Notice on Organizing Laborers to Join Unions in Business Enterprises with All Kinds of Ownership Structures, and Non-profit Enterprises Organs) issued on October 30, 2004.*

\textsuperscript{352} Chinese press reports make the astonishing claim that in the month after this notice was issued 34 million rural workers joined trade unions: *Migrant Workers Flock to Join China’s Trade Unions, XINHUA NEWS AGENCY September 21, 2003: [http://news.xinhuanet.com/english/2003-09/21/content_1091989.htm](http://news.xinhuanet.com/english/2003-09/21/content_1091989.htm).*
Towards a More Comprehensive Response to Underpayment of Wages?

Chinese labor law’s internal defects seem to provide little hope that it will steer workplaces away from abusive practices. However, an overly pessimistic conclusion is not justified: there is a high degree of dynamism in the process of legal reform in China. This opens up sites for progressive intervention, so that certain useful changes to the law may be feasible. Let me illustrate this by discussing a recent important legal initiative, one showing that, paradoxically, one of the apparent difficulties with the Chinese system of labor regulation – its jurisdictional fragmentation – can in fact lead to productive innovation.

Several provincial and municipal governments have been trying to improve the regulatory framework dealing with underpayment of wages. One of the most comprehensive efforts came into effect at the beginning of 2005. The *Guangdong Province Regulations on*
the Payment of Wages (the ‘Guangdong Wage Regulations’) brings together in one well-ordered document many of the principles on wage determination and wage enforcement scattered in various national and local legal materials. It also makes significant innovations.

The Guangdong Wage Regulations clarify how wages are defined, the form in which, and the person to whom, they must be paid and the relationship between wages and individual and collective contracts. They stipulate how the minimum wage and penalty rates are to be calculated, including in relation to piecework and accumulated hours schemes. The Regulations set out the

353 See supra note 146.
354 Id. art. 54
355 Id. arts. 10-11.
356 Id. arts. 8 - 9.
357 Id. arts. 4, 8, 18, 10, 20, 21, 22. The provisions do not apply to irregular hours schemes: art 23.
entitlement to wages where work stoppages occur,\textsuperscript{358} where there
has been a wrongful termination\textsuperscript{359} and when a worker takes sick
leave, holiday leave and other forms of leave.\textsuperscript{360} They also ensure
that workers will receive remuneration when they are engaged in
representational activities\textsuperscript{361} (such as work for the union or
workers congresses, and participation in the negotiation of
collective contracts).\textsuperscript{362}

\textsuperscript{358} Id. art. 35.
\textsuperscript{359} Id. arts. 13, 29.
\textsuperscript{360} Id. arts. 12, 19, 24, 25. They also stipulate when payment must be made.
\textsuperscript{361} Id. art. 26.
\textsuperscript{362} Some may find this overly prescriptive and consider that many of these
matters should be determined by individual arrangements. The prescription
is at least to some extent necessary because of (1) the absence of many
contract default rules; (2) the likelihood of disputes and abuses arising where
no clear legal rules exist.; and (3) the unsophisticated nature of much
workplace bargaining. On the latter point, see e.g., TAYLOR ET AL., supra note
25, at 192-195. It is also responding to the concrete experience of wage
conflicts over the last twenty years of labor market reforms. Note also that
employers can ‘opt-out’ of the rules pertaining to overtime and leave
In relation to the vague terms in the Labor Law we examined above (‘misappropriation’ and ‘payment in arrears without justification’), the Guangdong Regulations indicate what types of deductions are lawful and other types of deductions constituting misappropriation. They do not use the expression ‘without justification’; instead they detail how labor departments are to deal with degrees of employer tardiness and obstruction. Unfortunately, though, they do not state categorically that the payment of a bond on commencement of employment is unlawful.

While the systematic stipulation of key rules on remuneration is a very significant advance on the fragmentary state of the law at the payments where they engage staff that fall within the categories enabling irregular working hours schemes to be introduced: Guangdong Province Regulations on the Payment of Wages, supra note 146, art. 23.

363 Id. arts. 10, 14, 15. These reflect the Temporary Regulations on the Payment of Wages, supra note 99.

364 Guangdong Province Regulations on the Payment of Wages, supra note 146, Chapters 3 and 4.
national level, the most important aspect of the Guangdong Wage Regulations is their treatment of enforcement and compliance. In addition to the measures we have already seen, the Guangdong Wage Regulations include a number of provisions that strengthen the enforcement process.

First, firms are required to implement their own compliance systems. All firms must establish and make public to their workforce a wages scheme which indicates how wages are determined and varied, when they are to be paid, how overtime is to be paid, and which deductions may lawfully be made.\footnote{Id, art. 7.} Individual workers are entitled to be informed of the content of the scheme.\footnote{Id.} Firms must also keep detailed records on wages for two years. The records must indicate matters such as wages paid, how the wages are related to time worked and any deductions made.\footnote{Id. art. 16.} Individual workers receive their own pay slips that must be
consistent with the general firm records. In the event of any dispute, the onus is on the employer to show that it has produced these records; if the employer does not produce them, employees may be deemed to be unpaid.

Second, the Guangdong Wage Regulations broaden legal liability for wages where formal legal structures have been shown to prejudice employees, such as to individual partners of insolvent partnerships, to head contractors in building projects, and to successor firms following merger or division. This goes some way towards addressing the failure in the Labor Law to deal with ‘boundary’ issues.

368 Id. art. 17.
369 Id. arts. 17, 44
370 Id. art. 30
371 Id. art. 33
372 Id. art. 34.
373 See supra, Part III.A.5.
Third, the Regulations set up a public warning system for firms significantly in arrears. The labor department can notify the public of the firm’s poor record through the media, at employment agencies and by notices in the firm itself.

Fourth, a firm’s legal representative (such as the general manager or head of the board of directors) can be personally fined for a firm’s non-compliance with the regulations. This is the case, for example, where a wages scheme is not established, records are not kept or where industrial conflict breaks out and the manager fails to attend on the spot within 24 hours. If the conflict arises because a firm has attempted to relocate in order to avoid paying

374 Guangdong Province Regulations on the Payment of Wages, supra note 146, arts. 37, 41. Where firms are either two consecutive months in arrears or three months in total, they are to be recorded within the labor department for possible action. Firms with good compliance records are to be positively evaluated and recorded.

375 Id. art. 48.

376 Id. art. 51.
wages, the legal representative can be detained by the public security bureau or arrested.\textsuperscript{377}

The Guangdong Wage Regulations indicate that it is possible to develop clear substantive norms regulating remuneration in a systematic manner. They also deploy compliance strategies that are far more sophisticated than those in the national law. The critical question is of course how well this important initiative will operate in practice. It is too early to know.

\textbf{IV . PROSPECTS FOR BETTER IMPLEMENTATION}

Despite progressive initiatives such as the Guangdong Wage Regulations, the overall impression from this analysis is that there are very serious flaws in the law relating to payment of wages and working hours and the implementation of that law. Some of these problems are specific to labor law (such as the labor disputes

\textsuperscript{377} \textit{Id.}
system and the peculiar legal status of Chinese trade unions) while others concern the legal system as a whole (such as the disorderly state of legal norms, local bureaucratic corruption and the difficulties with enforcing court judgments).

One way in which researchers outside China might contribute to improving the formulation of and compliance with the labor law is to draw on our own societies’ experience of regulatory implementation, *to the extent that those experiences are relevant in the Chinese context*. I attempt to do that in this Part. I begin with a discussion of the relative strengths of different regulatory approaches in the Chinese context and then proceed from this to offer a number of reform proposals.

**A Alternative Regulatory Approaches**

China’s approach to formal (or state-based) regulation in general, and to labor regulation in particular, heavily favors ‘command and control’. For several decades now, command and control
approaches have been severely criticized in the regulatory literature of industrialized societies.\textsuperscript{378} Command and control is premised on the ability of a regulator to craft rules and enforcement mechanisms which both address in a comprehensive manner the social problem that prompted the regulatory intervention and foresee and avert the potential adverse effects of the intervention itself. The complexity of social relations and the scarce resources available to regulatory agencies make this frequently unachievable. Consequently, command and control regulation often tends towards excessive bureaucratization and legalism, and resistance by the regulatory target\textsuperscript{379} (although as I point out below, there are some circumstances in which it may still be the preferable strategy).

\textsuperscript{378} See e.g., Eugene Bardach & Robert Kagan, \textit{Going by the Book: The Problem of Regulatory Unreasonableness} (1982). Problems include ever more complex rule-making, rigidity, strategies of evasion and creative compliance on the part of the regulated, distortion of regulatory intent by implementing agencies, high enforcement costs and enforcement failures.

\textsuperscript{379} See e.g., Ian Ayres & John Braithwaite, \textit{Responsive Regulation: Transcending the Deregulation Debate} (1992).
Furthermore, many studies demonstrate that the ‘command’ is very often transformed when it is placed in the hands of officers in regulatory agencies. The agencies’ interpretation of the legal rules they enforce is refracted through their own systems of values and practices, which affect matters such as the priority accorded to remedying different kinds of violations, and the nature of the sanction deployed. It follows that the practical implementation of legal rules by regulatory agencies can depart far from what the original drafters of the legal rules intended.380

In response to these adverse effects, many scholars, including in the field of labor law, have described a range of complementary and alternative regulatory approaches. These approaches have frequently proved themselves superior to ‘command and control’ in

practice. They have involved efforts to make law more ‘responsive’ or ‘reflexive’, enlisting the co-operation of those subject to it through establishing connections with their own frames.


382 See e.g., Ayres & Braithwaite, supra note 379.

383 See e.g., Teubner (1983), supra note 381; Rogowski, supra note 20.
of reference,\textsuperscript{384} and/or radically reconfiguring legal institutions on democratic experimentalist lines.\textsuperscript{385} One common theme in these approaches is the coordinated ‘decentring’\textsuperscript{386} of responsibility for both the creation of regulatory norms and their implementation to multiple actors (including especially local non-state actors), albeit usually with oversight from and accountability to governmental institutions (‘metaregulation’). In some instances, the literature attempts to integrate ‘corporate social responsibility’ initiatives into regulatory frameworks, although these initiatives have also elicited considerable skepticism.\textsuperscript{387}


\textsuperscript{385} See Dorf & Sabel, supra note 381.


\textsuperscript{387} Cooney, supra note 177, at 308-314.
A second theme is the encouragement of local democratic deliberation – the participation of those most affected by the social problem that calls for a regulatory response. A third theme is an emphasis on local experimentation in the development of responses to social problems, which, when monitored and evaluated, yields a dynamic learning process that generates ongoing improvements in regulatory norms and mechanisms.

**B THE FEASIBILITY OF ALTERNATIVE REGULATORY APPROACHES IN CHINA**

While alternative regulatory approaches offer a way to escape the pitfalls of command and control, it is doubtful how far they can be applied in the Chinese context. After considering whether regulatory alternatives to command and control (and in particular democratic experimentalism) can be implemented in China, Randy Peerenboom concludes that:
both greater reliance on private actors and more bottom-up experimentalism rely on the infrastructure of a modern state, including a legal system that meets basic rule-of-law requirements, democratic elections and an active civil society. But that infrastructure is not yet in place in China. 388

He cites many serious obstacles to alternative regulatory approaches in China. The list is formidable: the adherence to democratic centralism; the absence of strong, autonomous, civil society organizations and the lack of independent vehicles for diffusing and critiquing information; low education and literacy levels; the likely hostility of the bureaucracy to alternative approaches; the likely resistance of local governmental institutions to requirements of information disclosure and external monitoring and evaluation (vital to the effectiveness of those approaches); the prevalence of corruption among both state and private actors;

388 PEERENBOOM, supra note 51, at 431.
widespread intolerance of diverse viewpoints, inhibiting reasoned deliberation; and weak judicial institutions. 389

While Peerenboom is writing in general terms about the Chinese regulatory environment, analysis in this article confirms that the obstacles he identifies are present in an acute form in the field of work relations. This suggests that reflexive strategies for regulating labor relations in Chinese firms will be difficult to implement. Take for example mandated social reporting. 390 This relies on the generation and distribution of accurate information, but agencies and employers frequently falsify information and obstruct monitoring and evaluation. Even where sophisticated systems of corporate responsibility codes and social audits have been implemented by foreign multinationals operating in China, they have often floundered in the workplaces operated by their Chinese,

389 Id. at 428-431.

390 See e.g., Hess, supra note 381; Cooney, supra note 177, at 334-337.
Taiwanese and Korean subcontractors. If major multinational corporations, motivated by strong consumer pressure and able to devote considerable resources to supplier monitoring, encounter great difficulties in securing compliance with labor standards, it is very unlikely that Chinese legislation requiring firms to disclose their social performance will be effective.

Even more significantly, the civil society organizations most relevant to more participatory forms of workplace regulation – organizations of working people – are either subordinate to the party-state, top-driven and frequently aligned with management, or actively suppressed. Moreover, as we have seen, the lawful worker organizations have, at least until very recently, done very little to give voice to migrant workers – the socially and economically marginalized people whom Chinese labor law is most deficient in

391 This is most clearly demonstrated in the extensive empirical work of LIU & TAN, supra note 34. See also NIKE, FY04 CORPORATE RESPONSIBILITY REPORT (Nike, 2005) Part II Section 4, which indicates a number of compliance problems in China.
assisting. Migrant workers’ low educational levels and social status often leave them unwilling and unable to articulate their concerns; unless they receive institutional support, they will not be able to contribute to local regulatory processes.

Overall, circumstances are not very promising for new approaches displacing the current command and control mode of regulation. Norm-setting and enforcement will continue to be focused on state agencies.\textsuperscript{392}

That said, there is still some scope for regulatory experimentation and decentralization. This scope is fairly wide \textit{within the state apparatus}. In the post-1978 period, China has frequently taken an incremental, localized and experimental approach to economic and social reform.\textsuperscript{393} This approach has extended to labor regulation: there have been rolling improvements in legal norms and

\textsuperscript{392} Peerenboom comes to a similar conclusion for the legal system as a whole, \textit{supra} note 51, at 431.

\textsuperscript{393} Id. at 427-428.
enforcement strategies, as the Guangdong Wage Regulations (themselves the product of experimentation at the local municipal level)\textsuperscript{394} illustrate. To be sure, these initiatives do not devolve regulatory power away from state entities (although they shift it from the central government). They do not involve affected citizens in collaborative problem-solving (other than through ‘their’ quasi-state organization, the ACFTU). They mainly consist of a series of commands coupled with punishments (although they try to prompt firms to build internal compliance systems). Their profusion also makes the Chinese legal landscape unstable and complex.

Despite all this, Chinese norm-making practice is a relatively nimble form of coordinated decentralization (especially when compared to law-making in major federal systems). It has enabled the ongoing revision of labor norms and processes and the simultaneous trialing of a diverse range of regulatory innovations.

It has given law some prospect of responding to the accelerating changes in, and the diversification of, Chinese work relations.

Moreover, even non-state initiatives experience some success. Many Chinese workplaces are affected by decentred forms of regulation, particular those associated with ‘corporate social responsibility’ initiatives in global supply chains. I have noted that many of these are plagued by disingenuous compliance and false information flows. But, as I discuss further below, not all of these initiatives fail.

In sum, labor reform proposals need to recognize that the basic ‘command and control’ orientation of labor regulation will persist in China. Within that orientation, there is some scope for experimenting and for integrating insights from alternative regulatory approaches in order to construct more sophisticated labor enforcement strategies. But wholesale adoption of decentralized, participative, approaches is not viable while
corruption is endemic and worker organizations are subverted by
democratic centralism and management interference.

C SOME SUGGESTIONS

The following suggestions aim to improve compliance with labor
law, particularly the entitlement of workers to be paid for their
service and to work reasonable hours. They assume that there is no
impending radical change to China’s regulatory practices. They
seek to recognize and respond to the limitations of those practices,
and to the wider political, economic and social contexts of Chinese
work relations.

1 Clarification of Key Norms

Basic labor laws norms need to be clarified through the
enactment of further legislation on labor contracts and wages, and a
review of the provisions on working hours, especially the ‘opt-out’
procedures. We can be optimistic in relation to wage issues. As we
have seen, the legislative amendment process is already well advanced at the provincial level. 395

On working hours, the position is more difficult. In many industrialized countries, there has been a shift away from setting absolute substantive standards on working hours to more procedural approaches, with direct employee involvement. For example, in the European Union, employees have a right to refuse to work more than 48 hours a week on average. 396

In contrast to these approaches, which seek (imperfectly) 397 to give effect to employee preferences, China mandates working

395 See supra Part III.E.


397 See e.g., Murray, supra note 396.
hours for firms, regardless of employee wishes, but gives wide discretion to labor bureau to enable employers to derogate from the mandated scheme. China may therefore need to revise the conceptual foundations of its approach at some point. Nonetheless, it seems to me preferable to remain with core aspects of the (ILO-inspired) substantive approach at present, at least with respect to unskilled and semi-skilled workers. Those workers do not have true representative organizations through which to inform themselves and express their preferences about working hours. Their low education and frequently tenuous residency status, together with remuneration difficulties arising from the arrears problems, suggest that the specification of a standard is still necessary. That standard should continue to be set at the points in excess of which prolonged periods of work give rise to serious health consequences, namely around the fifty hours per week mark and six consecutive working days.\textsuperscript{398} It is obviously also necessary to specify more carefully the circumstances in which employers can opt out of the norms.\textsuperscript{399}

\textsuperscript{398} See supra, Part III.A.4.

\textsuperscript{399} As the Beijing Working Hours Regulations do, supra note 130.
A further problem for the current hours regime is, however, that in some sectors of manufacturing industry, economic pressures on firms are so severe that there seems little immediate prospect of bringing hours into conformity with the law. Should then, a more realistic standard be specified? Rather than rewriting the law, eroding the standards, and altering existing entitlements (the law being reflected in individual and collective contracts), it would be better to factor the practicalities of compliance into a gradated enforcement strategy (as discussed in the following section). Those firms with working hours that are most injurious to health should be targeted by enforcement agencies and unions in a co-coordinated way.

Another challenging task for legal norm-creation is the need to address new forms of working relationships that cannot easily be accommodated within the labor contract/contract for services divide. The ideological insistence that a labor contract is radically different from other forms of contracting, although admirable in
seeking to avoid the commodification of labor, does not assist in practice. Decentralized legislative experiments are needed to develop ways of assisting dependent workers who do not fall clearly within the present definition of employee or where the identity of the employer is uncertain. Such experiments will also allow for greater responsiveness to local conditions (and industry structure).\textsuperscript{400} The provisions in the Guangdong Wage Regulations dealing with construction sites are an example of how innovation may be achieved.\textsuperscript{401}

2 \textit{More Effective Sanctions}

A number of fairly obvious changes to the institutions responsible for implementing the laws are needed. One line of reforms would be to increase the enforcement powers of the labor bureaucracy and

\textsuperscript{400} Of course, such experiments ought to involve participation from the people most affected by the regulation, but this is clearly not going to be feasible under present conditions.

\textsuperscript{401} Guangdong Province Regulations on the Payment of Wages, \textit{supra} note 146, arts 33 and 34.
the quasi-state agency that is the ACFTU. I noted above that these are quite weak and fail to outweigh economic incentives to flout the law. The suggestion is bound to be controversial. It is a classic ‘command and control’ response to a regulatory problem, and perpetuates the pathologies associated with the bureaucratic mentality. Worse, increasing sanctions available to Chinese state agencies, notorious for abuse of discretionary power (not least against labor activists), may be viewed by many as retrograde.

Nonetheless, at least in the context of the two abuses we have been examining, bolstering enforcement powers is defensible and indeed desirable. As many regulatory scholars acknowledge, despite the undoubted deficiencies of command and control approaches, there are circumstances in which the specification of a clear standard accompanied by an effective penalty is appropriate.\textsuperscript{402} This may be so where a regulated firm is persistently recalcitrant and failing to correct its deficiencies where

\textsuperscript{402} See e.g., Neil Gunningham & Peter Grabosky, Smart Regulation: Designing Environmental Policy 41-42 (1st ed, 1998).
it is clearly feasible for it do so. The case for a heavy-handed approach strengthens where a firm’s actions cause considerable suffering, as in occupational health and safety breaches.\textsuperscript{403} The persistent and willful failure to pay due wages, and the imposition of health-threatenning working hours, fall into this category.

At present, the strongest weapon in the labor department’s armory is the fine, and fines are often difficult to collect. These are not sufficient to make up for arrears or to curb excessive labor hours. True, labor departments can refer matters to other state agencies for tougher penalties, but those other state agencies will often not be familiar with the principles governing labor relations. One way to increase the powers of the unions and the labor bureaucracy would be to enable them to order the suspension of production or business for a specific period, until the law is complied with. As we have seen, this is a penalty wielded by other administrative agencies.\textsuperscript{404}


\textsuperscript{404} See Administrative Punishments Law, supra note 167 art. 8(4).
This power could be exercised in the more egregious circumstances of unpaid wages and excessive working hours, where command and control strategies are likely to be more effective.

A rule might specify that a labor department may order cessation of production in order to bring an enterprise into compliance with the law where staff have been working for more than eleven consecutive hours or six consecutive days. Similarly, a rule might specify that where staff had not been paid for more than two months, production would cease for a certain period.

A closure power would give inspectors much greater clout. Admittedly, conferral of increased powers poses the risk of arbitrary abuses and adverse consequences often associated with command and control measures. However, we have seen that

405 The maximum time that hours can be extended in any one day under the Labor Law; see supra note 116.

406 Labor Law art. 38.
administrative reforms leave employers well placed – perhaps too well placed – to challenge inappropriate administrative action.407

In any case, the best protection against abuse of increased powers – and the most effective way to deploy them – is for labor departments, led by the MOLSS, to integrate them into a comprehensive and systematic enforcement strategy. Ayres and Braithwaite’s concept of the ‘enforcement pyramid’ is relevant here.408 Low-cost enforcement strategies such as persuasion and warning are more easily deployed against non-compliant firms in the first instance, but where they are met with defiance; the enforcement agency can threaten sanctions of increasing severity. Firms, knowing that regulatory agencies can ultimately impose very severe punishments, may take their advice and warning more seriously. As Ayres and Braithwaite write:

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407 Supra notes 194-198 and accompanying text.

408 Ayres & Braithwaite, supra note 379, at 35-38.
Regulatory agencies have maximum capacity to lever cooperation when they can escalate deterrence in a way that is responsive to the degree of uncooperativeness of the firm, and to the moral and political acceptability of the response.409

Labor departments cannot at present escalate up the enforcement pyramid to closing a firm’s operations. This undermines the effective use of even those weak sanctions they already have.410

3 Improving Dispute Resolution

Labor dispute resolution institutions also need major revision, along the lines proposed by Professor Zheng411 and many other

409 Id. at 36.
410 Chinese state agencies might also consider financial incentives for good performance. Such measures, though, depend on the accuracy of information about firms, so it is dubious how far they can be implemented credibly in the Chinese context. OGUS, supra note 150, at 246-254; GUNNINGHAM & GRABOSKI, supra note 402, at 69-83.
411 ZHENG, supra note 210, at 179-222.
Chinese scholars.\textsuperscript{412} First, the requirement that arbitration always precede litigation should be abolished, especially when a worker simply wishes to recover outstanding wages. Second, LDACs would benefit from a greater institutional independence from the labor bureau and from better-trained personnel.

Third, more specific procedures for different kinds of labor dispute (rights/interest; collective/individual) seem appropriate, and greater powers to assist workers left without income as a result of lengthy dispute resolution proceedings. Such procedures should also, as Professor Liu argues, clarify how unions can exercise their representational rights in arbitration and court proceedings.\textsuperscript{413} They should also enable LDACs to grant interim relief.

\textsuperscript{412} The support for these ideas was evident from the participants (leading Chinese labor law scholars and labor officials) in the International Seminar on Labor Dispute Resolution, held at Peking University Law School, 19-21 November 2004. I was able to take part in the seminar.

\textsuperscript{413} \textit{Liu, supra} note 298.
Fourth, the scope of ‘labor dispute’ should be broadly interpreted to cover sub-contracting arrangements that involve dependent labor (who may not technically be employees). One possibility would be to enable LDACS to entertain disputes between independent contractors in certain circumstances, as occurs with ‘unfair contract’ legislation in several international jurisdictions.

4 Trade Union Reform

If China observed ILO conventions on the right to organize and to bargain collectively, compliance with labor law would almost certainly improve. Under present political circumstances, however, it is unrealistic to think that China is prepared to do this. However, if Chinese unions cannot lawfully become fully autonomous worker organizations, they can at least become more effective compliance agencies. There are several ways in which this could occur.

First, unions should have a power to direct workers to cease production analogous to that proposed above for labor department
inspectors. This would in effect confer a power on unions to call a
strike, albeit one that, formulated by reference to administrative
enforcement mechanisms, is linked to the enforcement of state law
and does not constitute a challenge to government policy on public
unrest. In any event, such strikes over existing entitlements occur
on an informal basis very frequently and at present appear to be
tolerated. This would provide a means of both legitimizing and
regulating them.

A further, crucial, move would be to render Chinese trade unions
more independent from firm management, especially in the private
sector. Ideally, the Trade Union Law would be amended to require
this. However, further amendment of the recently revised Law
would most likely be a cumbersome and contentious process.
Internal measures within the ACFTU, such as directives from
higher-level union bodies to grassroots unions located in firms may
be just as effective if done systematically. Democratic centralism,
while generally an obstacle to trade union autonomy, does have its
potential benefits. Higher-level unions, could, for example,
systematically refuse to affirm (pizhun) the election of firm managers to trade union offices at grass root level.

Such a move might arouse the ire of local governments in areas where they have particularly corrupt links with business.414 Strong central government support for greater union autonomy from firm managers would be required to successfully implement it. Union independence from management could also be encouraged by judicial recognition of the right of union members to take nonfeasance actions against their union officials where they have been unreasonably refused assistance.

Even if these measures were adopted, they will not assist the most vulnerable workers unless the ACFTU is able to mobilize its enterprise unions to take up the issues of migrant workers. We have seen that there is no longer a structural obstacle to this within the organization.415 Moreover, at a rhetorical level, the ACFTU

414 See supra note 199.

415 See supra note 350.
appears committed to renouncing its previous exclusionary practices. Yet it will take a considerable change in the mentality of local union cadres (overwhelmingly drawn from among the more privileged urban employees with their prejudices against migrant workers) to give practical effect to this.

The shortcomings of the ACFTU are so great as to suggest that substantial improvements to its compliance function, such as those proposed here, cannot be achieved. This is not necessarily so. There are certainly many within the organization attempting to make it more representative of worker interests and in some regions such as Shanghai, Shandong and Jiangsu, the municipal/provincial federations seem to be relatively effective.\(^{416}\) Furthermore, the Vietnam General Confederation of Labor (VGCL), the ACFTU’s socialist counterpart across the southern border, has been much more aggressive in forcing private firms to comply with labor

\(^{416}\) TAYLOR ET AL, supra note 25, at 129.
standards. The ACFTU could take a lead from its more active elements and from the VGCL and provide genuine assistance to workers in private firms. If, on the other hand, the organization fails to confront the reality of oppressive management treatment of workers in many private firms and persists with its ‘mediating’ approach to dispute resolution, it will be, at best, irrelevant to those workers.

5 Coordination between State and Private Sector Initiatives

In addition to improving individual state-based compliance mechanisms, there needs to be greater coordination between those mechanisms and private sector initiatives (self-regulatory measures). While Chinese civil society is tightly controlled, and firms resistant to notions of corporate social responsibility, there are nevertheless many significant private sector attempts to improve labor conditions, including ensuring that workers are paid

for work performed and do not work unreasonable hours.\footnote{See HILARY MURDOCH & DANIEL GOULD, CORPORATE SOCIAL RESPONSIBILITY IN CHINA: MAPPING THE ENVIRONMENT, GLOBAL ALLIANCE FOR WORKERS AND COMMUNITIES 63-71 (2004).} One major source of these private sector initiatives is multinational corporations whose supply chains are anchored in China. Under often intense consumer pressure, many multinational corporations have attempted to require their subcontractors to improve working conditions.\footnote{In any case, major international firms must take more responsibility for the pressure they place on their suppliers to cut costs. They must themselves bear some of the financial burden of improving working conditions: see LIU & TAN, supra note 34, at 81-82.} Many of these private sector initiatives fail in the face of perfunctory and disingenuous participation by subcontractors, lack of participation by the affected workers and an unwillingness and/or inability of multinational corporations to establish effective monitoring and compliance systems.\footnote{For example, Liu and Tan write of a company with over 6,000 employees which has adopted a code of conduct limiting working hours, as required by its major client, an international footwear company, and has stationed a}{
Nonetheless, multinational firms are continually reworking their initiatives in the face of criticism, and have occasionally come up with credible and creative compliance strategies, especially where they collaborate with multi-stakeholder groups such as the Ethical Trade Initiative or SA8000.421

It is not only multinational firms that are devising methods of raising compliance with labor law. There are an increasing number of actors outside the labor bureaucracy and the ACFTU that are attempting to improve Chinese working conditions.422 These include groups with links to non-government organizations (particularly in Hong Kong),423 free-standing research and training permanent auditor. However, the workers informed investigators outside the factory that they nevertheless worked twelve to fourteen hour days, id. at 75.

421 See MURDOCH & GOULD, supra note 418, at 72-76.

422 See the catalogue of groups in MURDOCH & GOULD, supra note 418, at 35-61.

423 See, e.g., the Chinese Working Women Network: see Ngai Pun & Wai Ling Chan, Community Based Labor Organizing, 11(4) INTERNATIONAL UNION RIGHTS 10 (2004); see <http://www.cwwn.org>.
institutes, advisory services associated with Chinese universities, some parts of the All China Women’s Federation and some individual Chinese firms. Even the Chinese government, at both the national and provincial levels, is now promoting ‘corporate social responsibility’.

The range of initiatives in labor regulation occurring in both the state and non-state spheres could be more productive if there were better channels for coordinating and evaluating them. If each measure is pursued in isolation, there is the potential for wasted


425 See e.g., the legal clinics operated by the Law School at Sun Yat-sen University in Guangzhou and at East China Normal University in Shanghai.


427 CSR in China’s Supply Chains, 1 (15) CSR ASIA WEEKLY (2005).

resources through the simultaneous and independent adoption of overlapping and even inconsistent strategies. To be sure, some private sector initiatives are implemented in consultation with state agencies and official trade unions. But this is too ad hoc and firm specific. For systematic evaluation of measures to occur, coordination must occur across a range of firms within an industry or geographic area. Moreover, when a measure is successful, there needs to be a way of diffusing it: that is, enabling knowledge of it to become widespread.

Is there space to establish institutions that could coordinate and evaluate new labor initiatives in China? Aside from the serious obstacles to implementing alternative regulatory approaches already mentioned, there are further problems with coordinating institutions. If an institution is concerned solely with private initiatives, then it will fail to coordinate with state and quasi-state regulatory measures and may even provoke bureaucratic hostility and obstruction. On the other hand, if the institution examines both private and state measures, it will need to involve state actors and
would therefore risk either being dominated by the state bureaucracy with its command and control mentality (at the national level) or being captured by corrupt state-business networks (at the local level). Nonetheless, I will sketch out how such institutions might work.

A locality in China (preferably one with a relatively efficient and progressive government and a relatively capable trade union organization) could support the establishment of a multi-party agency, or committee, which would collect, evaluate and diffuse information from various sources about methods used to improve compliance with labor law. Instead of simply working to coordinate the efforts of labor departments and official trade unions, which already occurs, the committee would include representatives from firms and from non-state actors. The agency could seek the cooperation of these actors on pilot studies.

429 See supra, note 319.
For example, a pilot study could be conducted on ways to reduce excessive working hours or reducing the problem of arrears. The pilot studies could focus on particular industries (such as textiles and clothing) or on particular kinds of firms (such as small and medium-sized domestic enterprises). It would seek to develop both an accurate picture of enforcement patterns in the locality and to assess which enforcement strategies were effective. Those strategies could include the command and control methods of the labor bureaucracy, the ‘supervision’ of trade unions, self-regulation by firms and initiatives from social actors.

Each of the constituents could contribute to the pilot study by drawing on its particular regulatory strengths. Local labor

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430 The Guangdong Province Regulations on the Payment of Wages currently provide for firms to be evaluated in relation to their payment systems, with some firms recorded (literally) in the ‘good books’ and others punished through publication in the media: supra note 146, art. 41. However, this evaluation is to be conducted by labor bureau alone.

431 The agency would not have enforcement powers as such since these are already wielded by the labor departments.
bureaus could map out their compliance strategies and use their investigation powers under the Labor Law and other legislation to gain data about firm enforcement, imposing sanctions for non-disclosure. Trade unions could invoke their own inspection and monitoring powers under the law. Local and, even more importantly, international, firms could indicate what new measures they had made to improve compliance. The social organizations could provide information (which may well be the most reliable data) to cross-check the other sources.

The co-coordinating committee would determine what initiatives were promising and successful. It could then:

- publicize the initiatives widely, including to other firms, to social organizations and to labor bureaus;
- use the initiatives to determine what is ‘best practice’ in the industry, advise firms to comply with best practice; and help the labor bureaus, unions and other social organizations to insist that

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432 For example, Labor Law arts. 85-87.

433 Id. art. 101.
firms adopt it;

- suggest to the labor bureaus that those firms which had developed successful initiatives be financially rewarded; and

- assist the labor bureaus to identify, criticize and (in cases of refusal to improve) punish poor performers.

This process would be dynamic. Evaluation of best practice would change from year to year (or according to another time frame) as firms develop new and better ways of improving conditions.

This proposal entails, in some industries at least, an acknowledgement that very many firms do not comply with the law. However, if firms are, in good faith, pursuing measures to improve their working conditions, the fact that they are at present in violation of the law need not attract a punitive response from labor departments unless they are engaging in practices involving imminent danger to workers or other severe illegality. If firms knew that they would be punished for less serious breaches, despite
taking serious steps to improve, they would have a powerful disincentive against disclosing the real situation in an enterprise.

Fortunately, the structure of labor law enforcement provisions is commonly to empower labor departments to give warnings or issue correction orders (zeling gaizheng) prior to imposing a fine.

I emphasize that this proposal is quite speculative. It is quite likely that the circumstances in China will severely limit the capacity of such a scheme to produce demonstrable and widespread changes in workplaces.434 It is admittedly very difficult to see the scheme flourishing in the face of the authoritarian political environment, bureaucratic institutional mindsets and the propensity of firms to evade, deceive and subvert regulatory agencies of whatever design. Nonetheless, as such a scheme has the potential to achieve practical improvements in addressing the arrears and excessive hours issue, it is worth keeping the idea in the public arena.

434 See supra, note 416.
6 More General Legal Reforms

The reforms proposed to date have all been specific to ‘protective’ labor law. Obviously, the prospects for success of those proposals are closely tied to wider reforms to legal institutions. Other writers have extensively canvassed such reforms and I will not examine them in depth here. The main areas where ongoing improvements are needed will be obvious to anyone reading this article. They include matters such as (in relation to broader labor law) further dismantling of the hukou system and (in relation to the legal system more generally) more effective anticorruption measures focusing on local government-business networks, better means of enforcing legal judgments and better judicial training to name but a few.435

435 See e.g., PEERENBOOM, supra note 51; Chen, supra note 51; Chan & Zhang, supra note 46; LUBMAN, supra note 51.
7 Campaigns and the media

While legal reforms may lead to better enforcement, there are of course non-legal means of addressing labor abuses. The Chinese state has often resorted to campaigns to target social problems such as criminal activity and environmental pollution. The campaigns involve the mobilization of party members and the coordinated concentration of state agency resources on the social problem. At times the campaigns have included resort to extra-legal measures, although more recently state action is likely to be in accordance with law.

A strong campaign against labor abuses initiated by government may induce labor departments, police and other relevant agencies to deal more firmly with recalcitrant firms. A major advantage of a campaign is that it leads departments to co-ordinate. Thus, while as we have seen, labor departments do not have effective enforcement

\[\text{supra note 52 at 62-86 on the ‘hard strike’ anti-crime campaigns;}
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\[\text{Van Rooij, supra note 202 at 169-177 on environmental pollution.}\]
powers on their own, the capacity to sanction is strengthened if they can credibly threaten police action in egregious cases. There is evidence that such co-ordination is beginning to occur. In early 2006, in what seems to have been a municipal government campaign, eight firm owners in Shenzhen were detained for economic crimes in connection with failure to pay wages – the first time such action has been taken in China.438

However, campaigns have a significant drawback – they are ephemeral. Once a campaign ceases, attention and resources may be directed to other issues. The problem may reemerge, unless there are institutional reforms which complement the campaign.439

Another powerful means of addressing labor abuses is the media. The Chinese media regularly highlights labor abuses440 whether as


440 Chan, *supra* note 2 at 4-7. The accounts in Chan’s study are based on media reports of incidents which Chan has often further investigated.
part of a campaign or as a result of the work of individual journalists. Media exposure of injustice can lead to swift governmental intervention redressing the wrong. Benjamin Liebman notes that many Chinese believe the media is more effective than the legal system for citizen redress.\textsuperscript{441} Nonetheless, as with campaigns, the media is not a substitute for legal reform. As Liebman also points out, the media is an unreliable ally and can create injustices through misrepresentation and sensationalism.\textsuperscript{442} Moreover, while the media can be extremely useful in bringing worker abuses to the public’s attention, it is not well placed to address systematically the deficiencies which produce them.

\section*{V. CONCLUSION}

Out of the wreck of the Cultural Revolution, China’s leaders have built an economy that is gaining an ever greater share of world

\textsuperscript{441} Benjamin Liebman, Watchdog or Demagogue? The Media in the Chinese Legal System, 105 Colum. L.J. 1, 127-130 (2005), 7.

\textsuperscript{442} Id.
manufacturing. They have thereby raised the living standards of hundreds of millions of citizens. Notoriously, this manufacturing success is marred by widespread labour abuses, epitomized by the sweatshop staffed by suffering migrant women workers. Domestically, rising labour disputes and evidence of emerging labour shortages stoke demands for policy reform.

Better regulatory strategies are needed to deal with widespread labour abuses. If we confine ourselves to what is feasible rather than what is ideal – accepting that radical change to China’s legal and political institutions is unlikely in the short term – then those strategies must be devised having regard to the existing institutional context. This entails a specific analysis of where those institutions are deficient and where there are openings for improvement.

The analysis undertaken here has focused on underpayment of wages and excessive working hours. The legal norms directed at preventing these abuses needs to be more coherently elaborated and
public accessible, although there are already considerable improvements being made at the provincial level.

Much more challenging is the problem of securing compliance. A fundamental difficulty here is that the key state enforcement institutions – labor departments, dispute resolution bodies and the official trade union – continue to employ bureaucratic methods increasingly anachronistic in China’s private-sector driven labor markets. They operate with little active participation from the persons most affected by labor abuses and with little connection to emerging private sector initiatives directed at creating better workplaces. Current thinking in regulatory theory suggests that this approach is misconceived but the scope for introducing alternative regulatory models remains limited.

Despite the limited room to maneuver, many improvements to enforcement institutions can be implemented under current conditions. I have sought to identify several; these are mainly extrapolations of processes already underway or based on internal
critiques from Chinese scholars and officials. In the face of a society governed by an illiberal regime, plagued by pervasive corruption and dysfunctional legal institutions and segregated by internal migration controls, the proposals may seem modest and peripheral. I do not pretend to suggest that they will radically alter working relations. Given the complexity of the social systems impacting on the workplace and the relative absence of empirical data on how law interrelates with those systems, the impact of the reform proposals cannot be predicted; they must be provisional and revisable. They are nonetheless worth implementing as a response to present flaws.

Finally, the development of feasible proposals to reduce labor abuses enables international actors concerned with poor working conditions – governments, businesses, unions and human rights organizations – to formulate strategies targeted at achieving specific reforms feasible in the Chinese context. It enables them to engage with sympathetic Chinese actors without *ipso facto* putting those actors at risk. It may also enable them to directly improve the
lives of the many exploited workers at the hub of world industrial production.