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Law and Fair Work in China

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Ying Zhu



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Ying Zhu**



First published 2013
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Cooney, Sean, 1963-

Law and fair work in China/Sean Cooney, Sarah Biddulph, 'Ying Zhu'.

p. cm. – (Routledge contemporary china series)

Includes bibliographical references and index.

1. Labor laws and legislation—China. 2. Labor disputes—China.

3. Arbitration, Industrial—Law and legislation—China. 4. Law reform—

China. I. Biddulph, Sarah. II. Zhu, Ying, Ph. D. III. Title.

KNQ1270.C459 2013

344.5101—dc23

2012027484

ISBN: 978-0-415-67407-2 (hbk)

ISBN: 978-0-203-07300-1 (ebk)

Typeset in Times New Roman
by Wearset Ltd, Boldon, Tyne and Wear



Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Law and Fair Work in China

China's economic reforms have brought the country both major international clout and widespread domestic prosperity. At the same time, the reforms have led to significant social upheaval, particularly manifest in labour relations. Each year, several hundred thousand disputes break out over working conditions, many of them violent, and the Chinese state has responded with both legal and political strategies.

This book investigates how Chinese governments have used law, and other forms of regulation, to govern working conditions and combat labour disputes. Starting from its beginnings in the Republican period the book traces the evolution of the law of work in modern China right up to the reforms of the present day. It goes on to consider the structure of Chinese work law, drawing on both Chinese and Western scholarship to provide new insights into its unique features and assess where the law is innovative and where it is stagnant and unresponsive. Finally, the authors explore the various legal and extra-legal techniques successive Chinese governments have adopted to enforce employment law and the responses of firms, workers and organizations to these practices.

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Preface

This book is a collaboration between two lawyers and an industrial relations/human resources scholar, all with a long-standing research interest in the law of work in China. It emerged from our study of China's regulatory responses to disputes over wage arrears. We regarded this as an important question not only because it touched on the relationship between law and social stability – a key preoccupation for the Chinese state – but also because it concerned one of the earliest and most basic functions of work law: ensuring that workers are paid for their labour. Our study was funded by an Australian Research Council Discovery Grant (DP0771091) which commenced in 2007. The timing proved to be propitious as that year saw the enactment of major reforms to Chinese work law following heated national and international debate.

While those reforms contain many important innovations, we were struck by the degree to which they emerged from, and are shaped by, ideas and regulatory practices that have their roots in the events of the twentieth century. We decided to explore this history, and to locate the 2007 reforms within a broader story of legal change over the last century.

This book has been possible only because of the extraordinary generosity of many colleagues. We would particularly like to thank the scholars, practitioners and activists who collaborated with us on the empirical research and who helped us formulate our ideas. These include, from the PRC, Professors Feng Tongqing, Zhao Wei, Su Hainan, Liu Jichen, Li Kungang, Ye Jingyi, Zhou Chengzheng, Gao Dahui, Shen Tongxian, Wang Jianxi, Huang Xiumei, and Liu Cheng. We would also like to thank Brian Campbell and Manfred Elfstrom, Chang-Hee Lee, Sangheon Lee, Deirdre McCann, Jimmy Mao, Richard Mitchell and Fan Youqing, as well as our outstanding colleagues at the Asian Law Centre and the Centre for Employment and Labour Relations Law at the University of Melbourne Law School. Financial support from the Australia-China Council and the International Labor Rights Fund enabled us to conduct a key workshop in Melbourne in 2009.

Finally, we express our gratitude to our excellent research assistants Shuang Ren, Jessica Dawson-Field, Michael Keks and Hao Zhang for help in what proved to be quite an intricate undertaking. And of course to our partners and families for their patience, support and encouragement.

Abbreviations

ACFTU	All China Federation of Trade Unions
CCP	Chinese Communist Party
DPE	domestic private enterprises
FDE	foreign direct investment
FIE	foreign-invested enterprise
HR	Human Resources
KMT	Kuomintang (Chinese Nationalist Party)
ILO	International Labour Organization
LDA	Labour Dispute Arbitration Committees
LDMAL	Labour Disputes Mediation and Arbitration Law
MOHRSS	Ministry of Human Resources and Social Security
NPC	National People's Congress
PRC	People's Republic of China
SAIC	State Administration for Industry and Commerce
SEZ	Special Economic Zone
SOE	state-owned enterprise
SPC	Supreme People's Court
TVE	township and village enterprise

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1 Introduction

The immense transformation of China's economy over the last 30 years has generated complex social, political and institutional challenges that would test even the most robust system of government, let alone one emerging from many years of chaos. These challenges include severe water and air pollution, threats to public health from communicable diseases, disputes over appropriate land use, and concerns about food safety.

One challenge which has generated particular controversy – both domestically and internationally – has been to provide a workable system of basic labour standards. Where once Chinese industrial workers were employed overwhelmingly in entities operated on socialist lines, they are now engaged in a wide range of market-oriented enterprises and work forms, no less diverse than those in advanced economies. As work has been marketized, worker protests have proliferated (Lee 2007), often erupting in violence. These protests are frequently the result of abuses such as the underpayment of wages and excessive working hours. They are dealt with in a variety of ways, ranging from suppression to placation. China's leaders have realized, however, that such ad hoc measures do not substitute for systemic responses to the problem. Thus, over the last decade, they have been very active in creating new norms and enforcement methods directed at resolving labour problems in an orderly way.

The stakes are high. Escalating labour violence could undermine rapid growth, shake the Chinese Communist Party's hold over the country and lead to a repeat of the events of 1989. On the other hand, a sophisticated response to the negative consequences of economic transformation may assist the country to continue its trajectory toward widespread prosperity and a 'harmonious society'. Little wonder then that initiatives in labour regulation are frequent, hotly debated and closely scrutinized by the Chinese authorities.

This study investigates how Chinese governments have used law, and related forms of regulation, to govern working conditions. We examine three themes closely. First, we explore the *evolution* of the modern law of work in China from its beginnings in the Republican period (1912–1949) to the most recent reforms. We consider what has prompted legal change and what circumstances and ideas have shaped it. Second, we consider the *structure* of Chinese work law. We look at the scope of the law – who is included and who is excluded – and how work

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law creates different classes of workers. We also examine the nature of labour standards and identify areas where legal rules have become more sophisticated and innovative, and areas where law has become stagnant and unresponsive. Third, we explore how Chinese governments have sought to *enforce* the law, whether through formal legal and labour relations institutions or through supra-legal and extra-legal means.

China is large enough, and powerful enough, to devise its own approach to dealing with social problems and this is certainly the case with regard to work law. It is portrayed in Western media variously as a villain in the global struggle for decent work or as an outstanding example of economic success, creating millions of jobs that have radically lowered the incidence of poverty. These broad-brush depictions typically fail to reflect the complex, dynamic and sometimes contradictory processes of creating and implementing work law in the country. This book aims to provide a nuanced account of these processes. Further, while we aim to identify the distinctive features of China's work regulation, we will also note the ways in which it resembles other systems. Notwithstanding the authoritarian nature of its government, China has much in common with other major nations in relation both to the problems it confronts, and the way it deals with them.

In order to examine our three themes, we draw on textual material, field research and the contributions of Chinese and international scholars. We trace the history of fair work law over the last 100 years, giving particular emphasis to the development of the current legal framework, and especially the major reforms introduced in 1994 (the Labour Law) and in 2007–2008 (the Labour Contract Law and related legislation). The current framework has been developed in a period of very great change in the labour market and policies governing it, but not fundamentally in the nature of the regime. This in part accounts for the presence of both continuity and innovation in China's regulatory approach.

The scope and originality of inquiry is encapsulated in the expression 'fair work law' used in our title. We will therefore explain what we mean by 'law' and 'fair work'.

'Law'

This study takes a broad view of what constitutes law; such an approach is particularly important in China where the distinction between legal and policy norms has often been difficult to draw. We examine not only the formal legal system regulating work but how it interacts with other forms of regulation. By 'regulation' we mean, as Julia Black has put it, 'the intentional activity of attempting to control, order or influence the behaviour of others' (Black 2001; Parker *et al.* 2004: 1–5). So, while we will certainly examine key statutes adopted by the Chinese legislative organs, such as the Labour Law and the Labour Contract Law, this will by no means exhaust our inquiry. We will consider a broad array of regulatory actors and regulatory measures.

Considering first the role of actors, there are many entities which have issued rules addressing labour issues. These entities include central governmental ministries, as well as provincial and local government legislative organs. They also include firms and unions. Other actors, while generally not empowered to make rules, have been active in interpreting and applying them. This latter group includes, in particular, those concerned with implementation and dispute resolution, such as labour inspectors, mediation committees, arbitrators and judges.

The regulatory measures produced by these actors include those which are legal in orientation, such as statutes setting workplace standards, local government rules on pay and time, and the orders of administrative agencies. However, they also extend to strategies deployed by the state which arguably conflict with – as well as shape – the legal order; for example, mass enforcement campaigns (运动式治理) and ‘grand mediation’ (大调解).

It is important to stress that Chinese labour regulation is in many ways dispersed and fragmentary. While it is possible to identify a formal hierarchy of legal institutions and legal norms in China by reference to the People’s Republic of China (PRC) Constitution and the Legislation Law, many actors compete and collaborate within the ‘regulatory space’ (Scott 2001) pertaining to Chinese work relations and the extent of their influence is not merely determined by the formal hierarchy. Thus, it is often not clear in practical terms which measures are of greater applicability. We will encounter this issue of conflicting measures on many occasions in this study.

In analysing work law in China, we have drawn upon the literature of regulation theory. This literature is useful in several ways. First, it assists us in providing a fuller descriptive account of PRC work law. Regulation theory draws attention to sources of norms and compliance processes that are often overlooked by traditional legal analysis.

Second, the regulation literature provides considerable methodological assistance in observing how law operates in practice. The recent rapid development of China’s legal framework, coupled with the transformation of China from a planned to a market economy, has resulted in a significant divergence between the letter of the law and its implementation. A study of fair work law in China would be incomplete without an empirical analysis of enforcement practice and some explanation of why enforcement at times diverges so greatly from the text of the law.

Many leading scholars of regulation are empirically oriented; they seek to understand how laws and rules operate in practice. They adopt socio-legal research methods, such as quantitative analysis of empirical data, qualitative interviewing and direct observation of actors (see, e.g. Hawkins 1987; Parker 2002; Haines 1997; Parker and Nielsen 2011). In this book, as explained below, we also draw on empirical research – both our own qualitative interviews as well as a number of other empirical studies – in order to see how regulatory initiatives have been implemented on the ground.

Third, the literature helps us to assess key features of Chinese labour regulation. Much regulatory scholarship is concerned not simply with how regulatory

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processes work, but how they might be evaluated (see, e.g. Ayres and Braithwaite 1992; Gunningham and Grabosky 1998; Bercusson and Estlund 2008; Lobel 2003: 2146; Estlund 2010). We likewise point to limitations and benefits associated with certain types of regulation deployed in Chinese labour law. However, this is not a normative study, and we do not, except in the broadest of terms, propose ways in which Chinese work law should be reformed.

Despite the usefulness and richness of the literature on regulation, there are some limitations in drawing on it to analyse the phenomena we are focusing on in this study. One concerns the relative lack of regulatory analysis about the implementation of fair work standards (as distinct from their social and economic effects).¹ For example, there have been surprisingly few detailed empirical studies specifically focusing on the enforcement of pay and time rules (contrast the very extensive literature on occupational health and safety: see, e.g. Gunningham and Johnstone 1999). Fortunately for our project, such studies have recently started to appear (see, e.g. Weil 2008; Pires 2008).

Moreover, until recently, there have been few studies attempting to adapt regulatory theory to the Chinese context. This has meant that the analysis of the distinctive characteristics of Chinese regulatory approaches has been underdeveloped. Again, this has begun to change over the last decade, as we discuss below.

A second limitation is that there are several features of regulation in China without exact analogues in the advanced economies where regulatory scholarship has been developed.² For example, Chinese administration is characterized by its *tiao-kuai* (条块) structure, according to which local officials (including labour inspectors, arbitrators and judges) are responsible ‘vertically’ to the relevant central government ministry and ‘horizontally’ to the local people’s congress and local people’s government (van Rooij 2002a). This arrangement creates a number of implementation tensions which are explored throughout this book.

Despite the challenges in applying the regulatory approaches used in the advanced economies, insightful studies have shown that the regulation literature still provides guidance on how to describe, observe and evaluate Chinese law. For example, in a groundbreaking socio-legal study on the enforcement of Chinese environmental law in Yunnan, Benjamin van Rooij has mapped the complex motivations of actors, including local governments and local businesses, and their interactions with legal norms (van Rooij 2006b). We have benefited from this work in conceptualizing this study, although we have opted for a broad historical account rather than the detailed case-study approach van Rooij employs.

Other scholars, both Chinese and international, are now conducting empirical work on labour relations. Several studies have documented the widespread non-compliance with Chinese work law (see, e.g. Chan 2001; Sargenson 1999; Lee 2007). Others have cast light on labour relations within Chinese firms, providing an understanding of the interaction between external and intra-firm regulation (see, e.g. Cooke 2005; Zhu *et al.* 2010; Taylor *et al.* 2003; Chen and Hou 2008: