

Working Conditions in an Integrating World: Regulating Time, Money and Family Life:

CHINA

Summary

This report commences by noting the distinctive features of Chinese regulation, a grasp of which helps shed light on how labour standards operate in China. In particular, it is necessary to appreciate the diverse forms of legal instruments, the importance of local rule-making, and the limited role of courts.

The discussion then turns to national policy debates in China and the sometimes conflicting discourses of labour protection and liberalisation. The controversy surrounding the Labour Contract Law is highlighted in order to show how labour protection appears to be accorded greater emphasis now than was the case in the late 1990s and early 2000s.

The third section of the report examines the scope of labour regulation and identifies excluded groups, as well as those for whom special provisions have been devised. Readers from other jurisdictions should find the issues familiar.

The remainder of the report looks at the three sets of standards. The section on wages points to the considerable recent innovations in the area of wage protection. In contrast, the section on working time draws attention to the many loopholes that seem to exist. Family arrangements are the most complex of the standards and here we see many provisions which are peculiar to the Chinese context. The work/family section concludes with a short consideration of reform proposals for 'women's protection' laws, laws which have become quite outdated in several respects.

The report then sets out a number of structural problems and reforms relating to labour standard enforcement in China. It concludes by suggesting that some revision of the Labour Law is needed in the light of major legal and economic changes that have occurred since its enactment.

1. Characteristics of legal norms in China

1.1. In order to gain a better understanding of the regulation of working conditions in China, certain features of rule making need to be highlighted.

- 1.2. China is formally structured as a unitary one-party state. The policy and law making functions of the central government are of course very important. However, the reach of central government is not as great as might be expected. In practice, very significant regulation making occurs at the sub-national level. Moreover, the *implementation* of the law is frequently effected at local levels. This is certainly the case with working conditions
- 1.3. The quite large scope for local decision-making means that there is considerable diversity in the content and enforcement of legal rules on working conditions across the country. Occasionally, the national government will decide to ‘rein in’ this local autonomy, especially where it has counterproductive social and economic effects.
- 1.4. Accordingly, while this report will analyse national level policy and law-making, it will look at important examples of local regulation.
- 1.5. Legal material, including material pertaining to working conditions, can issue from a large range of governmental bodies, and have a bewildering range of titles. When attempting to assess the authority and application of the rules, the following principles need to be borne in mind:¹
 - The highest level of legal norms is a ‘law’ passed by the National People’s Congress or its Standing Committee. The Constitution is the supreme law, but it is not judiciable. In this report, the two most important laws referred to are the Labour Law of 1994,² and the Labour Contract Law of 2007.³ The Labour Law is the fundamental law regulating the labour relationship, and sets out the main labour standards. The Labour Contract Law indicates which forms of contracting are permissible. Many laws tend to set out broad principles, leaving detail to be set out in subordinate legislation. This is generally the case with the Labour Law, but the Labour Contract Law is relatively specific.
 - The State Council, or the Central People’s Government, is the highest administrative organ of the State. It passes administrative regulations (行政法规) with binding national effect. Examples are the Working Time Regulations and the Regulations on Employee Annual Leave.⁴
 - Various national ministries can also issue legal rules (规章). As far as working conditions are concerned, the most important ministry is the Ministry of Human Resources and Social Security (MOHRSS). This includes what was previously the Ministry of Labour and Social Security, which in turn incorporated the former Ministry of Labour. Legal rules

¹ The issue is partly regulated by the Legislation Law: 中华人民共和国立法法, passed by the National People’s Congress on 15th March 2000, with effect from 1st July 2000. For an extensive and helpful account of law making in the PRC, see Randall Peerenboom, *China’s Long march Toward Rule of Law*, Cambridge UP, Cambridge, 2002, 343-393.

² 中华人民共和国劳动法, passed by the Standing Committee of the National People’s Congress on 5th July, 1994 with effect from the 1st January 1995.

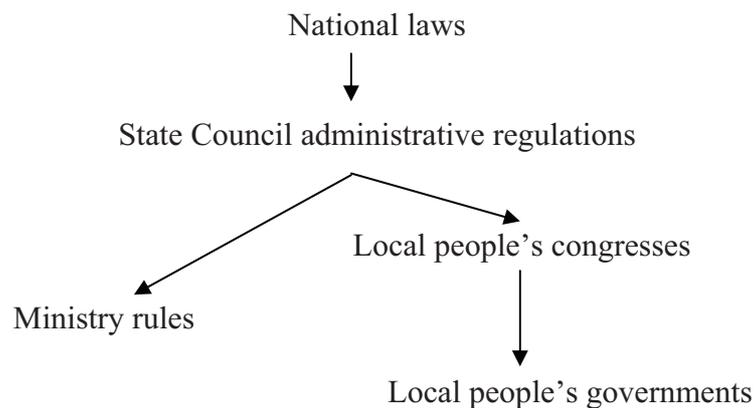
³ 中华人民共和国劳动合同法, passed by the Standing Committee of the National People’s Congress on 29th June, 2007 with effect from 1st January 2008.

⁴ See section 5

regulating working conditions made by the MOHRSS or its predecessors include the rules on non-standards working hours.⁵

- People's congresses at the provincial level as well as four major municipalities,⁶ can issue local regulations (地方性法规) which are binding within their areas of jurisdiction. The executive arms of provincial governments can issue legal rules (地方性规章). There are frequent references to such local regulations and rules in this report. . There are also levels of government below the provincial/major municipal level which can issue rules.

1.6. The hierarchy of legal norms can be illustrated as follows:



1.7. A problematic feature of this arrangement is that there is not a clear hierarchical relationship between Ministry rules and legal instruments passed by provincial-level people's congresses and people's governments.⁷ This means that in the event of a contradiction between legal rules, it will be unclear (in the absence of a ruling by the State Council) which norm should be followed. Empirical investigations⁸ suggest that in practice, many judges, labour arbitrators and labour inspectors tend to follow the local legal instruments. The reasons why this may be the case are explained further below.

1.8. Generally speaking, courts cannot issue binding interpretations of law and regulations other than in an individual case. Interpretation is the responsibility of the body that made the law or regulation. In the event of contradiction between legal norms, a definitive interpretation can be made by the National People's Congress Standing Committee or (with lower level norms) the State Council. However, the Supreme People's Court can issue interpretations of law which are required to be followed nationally.

⁵ See section 5.

⁶ The four cities which have equivalent rank to provinces are Beijing, Shanghai, Tianjin and Chongqing

⁷ See art 86 of the Legislation Law.

⁸ Including one conducted by the author and a number of Australian and Chinese colleagues: *Enforcing China's New Labour Laws. An Empirical Study*. We are currently preparing this research for publication. .

- 1.9. As most judges are unable to make precedents, there is not, in contrast with common law countries, a large body of binding case law pertaining to labour standards, although increasingly previous judgements are referred to for guidance in courts, and in legal texts.
- 1.10. Another important feature of Chinese regulation is the occasional blurring between law and policy. At certain points in China's modern history, especially in the early 1970s, the distinction almost disappeared. It is now increasingly sharp, especially at the national level, but there is much material which may or may not be binding, or may be binding only on certain actors. For example, some working conditions documents issued by national or local labour departments are entitled 'Opinion' (意见) and are couched in a mixture of exhortative and legal language. It is sometimes difficult to determine whether they are legal rules or simply 'normative documents' (规范性文件). Moreover, they may be directed only at, say, labour inspectors and arbitrators, rather than the general public.
- 1.11. Lastly, many legal norms may be located in unexpected places. In the case of working conditions, this means that some rules are found in legal instruments dealing primarily with non-labour matters. An example in this report concerns parental leave. Some of the norms are located in labour law and regulations, but others – such as those dealing with paternity leave – can be found in the legal instruments governing family planning.

2. Working conditions law and national policies debates

- 2.1. The key statement of national policies on working conditions is to be found in the Constitution. The PRC Constitution not only functions as a fundamental law, but also sets out key national policy parameters. Many of these pertain to working conditions. They are couched in the language of 'rights' but the term is not equivalent to that in many liberal democratic societies.⁹ A constitution labour right in China does not confer on individuals a judicially enforceable entitlement against the State; rather it imposes a notional obligation on the State to create conditions under which individuals will enjoy the right (which is seen as an emanation of broader rights to subsistence (*shengcunquan*) and development (*fazhanquan*)). That might entail the state legislating to give those individuals legal enforceable rights, but those rights will arise by virtue of a specific law, rather than because of the Constitution.
- 2.2. The Constitution, then, is important not because it is a constraint on the State, or because it generates justiciable rights, but because it declares what the State is supposed to deliver to the people. This is not an empty declaration, because it is a reference point for state policy and shapes the structure of the law. This means that, at least at the level of national law making, working

⁹ See Liu Cheng and Sean Cooney, 'China's Approach to the Legal Protection of Workers' Human Rights', in Colin Fenwick and Tania Novitz (eds), *Legal Protection of Workers' Human Rights: regulatory changes and challenges* Oxford, Hart, (forthcoming). In 2004, Article 33, which commences Chapter II, was amended to include the sentence '[t]he State respects and preserves human rights'

conditions must receive some form of legislative protection. The most relevant provisions of the constitution are:

- Article 42, which provides for a right and duty to work.¹⁰ This article stipulates that ‘the state... strengthens labour protection, improves working conditions and, on the basis of expanded production, increases remuneration for work and social benefits’;
- Article 43, which provides that ‘the state expands facilities for rest and recuperation of working people, and prescribes working hours and vacations for workers and staff; and
- Article 48, which provides that the ‘state protects the rights and interests of women [and] applies the principle of equal pay for equal work for men and women alike.

2.3. These articles reveal that the adoption of a *laissez-faire* approach to working conditions would be radically inconsistent with the Constitution since it is the *state* which is charged with ‘protecting’ and ‘improving’ working conditions and ‘prescribing’ working hours and leave arrangements.¹¹

2.4. Chinese scholars, union officials and political figures have drawn on the Constitution, and more broadly on the socialist ideology which the Constitution still reflects, to insist on the need for protection of these rights (understood in Chinese terms) in the face of globalisation. For example, Chang Kai, one of China’s most senior labour scholars, has commented that, after China’s accession to the WTO:

*‘we must strengthen the enactment and implementation of labour standards; indeed improving labour standards is one of the characteristics of socialism. ... China’s labour issues are one aspect of international labour issues. ... However, this does not means that China should simply copy international standards, but should proceed from China’s national conditions and legal environment.’*¹²

2.5. However, alongside this well entrenched view supporting labour standards, there is a discourse of economic productivity that sometimes sits uncomfortably with that of a protective state.¹³ A tension has been particularly evident since the 1990s, when the marketisation of the economy became very extensive. This involved the diversification of enterprise forms (and especially the expansion of private businesses), the removal of many

¹⁰ The complete provision reads: Using various channels, the state creates conditions for employment, strengthens labour protection, *improves working conditions* and, on the basis of expanded production, *increases remuneration for work and social benefits*. Work is the glorious duty of every able-bodied citizen. All working people in state enterprises and in urban and rural economic collectives should perform their tasks with an attitude consonant with their status as masters of the country. The state promotes socialist labour emulation, and commends and rewards model and advanced workers. The state encourages citizens to take part in voluntary labour. The state provides necessary vocational training to citizens before they are employed,

¹¹ Chang Kai 常凯, 老权论: 当代中国劳动关系的法律调整研究 *Theory of Workers’ Rights: Research on the Legal Regulation of Labor Relations in Contemporary China*, 中国劳动社会保障出版社 (2004)

¹² *Id.* at 389-391.

¹³ See, e.g. Mary Gallagher, “Time is Money, Efficiency is Life”: The Transformation of Labor Relations in China,’ (2004) 39 *Studies in Comparative International Development* 11.

constraints on business operation, the encouragement of competition, the move from an administrative-based to a contract-based mode of labour relations and far greater labour mobility.¹⁴

- 2.6. In the late 1990s, protection of working conditions did not seem to rate highly on the national agenda. This appears to have changed since 2003 when the ‘fourth generation’ of PRC leadership (including President Hu Jintao and Premier Wen Jiabao) came to power. A leading idea that has characterised this current period is that of the ‘harmonious society’ (和谐社会).¹⁵ This concept signifies a recognition that many of the imbalances created by the country’s economic reforms and rapid growth need to be addressed. These include wealth disparities, environmental degradation and rising labour unrest.
- 2.7. In the area of labour, this has meant that, while economic development is still a key objective, it is complemented by initiatives to create better quality jobs¹⁶ and to improve labour protection. Thus, in the last few years, some key new labour laws have been enacted, most prominently the Labour Contract Law, but also the Labour Disputes Mediation and Arbitration Law,¹⁷ and the Employment Promotion Law.¹⁸ Moreover, there has been greater encouragement of collective negotiations and support for a more pro-active role for Chinese unions.
- 2.8. The attempts at reconciling liberal economic policies and social objectives have not, however, prevented the emergence of sharply conflicting views over the content of labour regulation. Indeed, the greater scope for public debate – within an authoritarian context – has enabled the expression of conflicting views more forcefully than in the past.

The controversy over the Labour Contract Law

- 2.9. Perhaps the clearest demonstration of the divisions on labour regulation in China was the debate leading up to the passage of the Labour Contract Law in 2007. The Labour Contract Law does not predominantly set standards for working conditions.¹⁹ It governs the formation, performance and termination

¹⁴ See, e.g. Kinglun Ngok, ‘The Changes of Chinese Labor Policy and Labor Legislation in the Context of Market Transition’, (2008) 73 *International Labor and Working Class History* 45-64; for an important empirical study of the impact of market reforms on enterprises during the 1990s, see Doug Guthrie, *Dragon in a Three-Piece Suit*, Princeton University Press, Princeton, 1999. For a critical account of the impact on workers of economic reforms, see Ching Kwan Lee, *Against the Law: Labor Protests in China’s Rustbelt and Sunbelt*, University of California Press, 2007.

¹⁵ For an overview of the economic policy implications of the change in orientation, see Chu-Yuan Cheng, ‘China’s New Development Plan: Strategy, Agenda, and Prospects.’ (2007) 34 *Asian Affairs: An American Review* 34.1.

¹⁶ For a detailed analysis of China’s employment policies see Yang Weiguo, 杨伟国, 转型中的中国就业政策, 中国劳动社会保障出版社 (2007)

¹⁷ 中华人民共和国劳动争议调解仲裁法, passed by the Standing Committee of the National People’s Congress 29th December 2007 with effect from 1st May 2008

¹⁸ 中华人民共和国就业促进法, passed by the Standing Committee of the National People’s Congress 30th August, 2007, with effect from 1st January 2008

¹⁹ For more extensive discussions of the Law: See Ye Jingyi, 叶静漪, 劳动合同法十二讲, 中国法制出版社(China Legal Publishing House), 2007; Sean Cooney, Sarah Biddulph, Li Kungang and Ying

of employment relationships. At first glance, it seems to reiterate many of the legal rules already established in the 1994 Labour Law. However, in stipulating the forms of permissible contracting in much more detail than was previously the case, it attacks labour arrangements designed to avoid or reduce labour standards. It also tightens the rules about payment of wages to a very significant extent.

2.10. In the lead-up to the enactment of the Labour Contract Law, the central government released drafts for public comment. The draft was supported by the All China Federation of Trade Unions (ACFTU), many labour academics and many members of the public. However, it was vigorously attacked by some domestic and foreign business groups,²⁰ most prominently the American Chamber of Commerce in Shanghai. Several foreign corporations indicated that China would face reduced investment and higher joblessness if it passed the law. However, as one of the most powerful economic and political entities in the world, with extensive policy-making capacity, China is better placed than most countries to resist foreign pressures on its law-making. Such pressures can be outweighed by significant domestic unrest. In the event, while some changes were made to the original draft, the final version preserved most of its essential features.

2.11. As the commencement date for the Labour Contract Law drew near, in late 2007, claims began to be made that it was creating job losses and that employers were sacking staff to avoid their new legal obligations. The Chinese government was, at least publicly, unmoved by these claims.²¹

2.12. Critics of the Labour Contract Law, and of labour regulation more generally, launched further objections once China began to feel the impact of the World Financial Crisis. Many businesses breached the Law by laying off workers without proper entitlements, and some local governments seemed reluctant to enforce it.²² While the national government has instigated a freeze of the minimum wage, it continues to support the Labour Contract Law and other legislation pertaining to working conditions. For example, in March 2009, an official of the National People's Congress Standing Committee, Ms Xin Chunying, while recognising the labour costs had increased as a result of the Labour Contract Law, declared:

*The Labour Contract Law has nothing to do with the financial crisis and won't be revised because of it. ... China's labor relations are basically stable and orderly, and they can weather the test of time.*²³

Zhu, 'China's New Labour Contract Law: Responding To The Growing Complexity of Labour Relations in the PRC' (2007) 30 *University of New South Wales Law Journal* 788-805; Hilary Josephs, 'Measuring Progress under China's Labor Law: Goals, Processes, Outcomes, (2009) 30 *Comparative Labor Law and Policy Journal* 373-394

²⁰ David Barboza, China Drafts Law to Boost Unions and End Abuse, *New York Times*, October 13, 2006; Joseph Kahn and David Barboza, China Passes a Sweeping Labor Law, *New York Times*, June 30, 2007

²¹ 'Top Legislature Defends New Labor Contract Law', *Xinhua News Agency*, December 22, 2007.

²² Sky Canaves, 'Factory Closures Strain China's Labor Law', *Wall Street Journal*, 16 January 2009.

²³ At http://www.npc.cn/englishnpc/Special_11_2/2009-03/10/content_1488236.htm

The relative attention given to different categories of labour standards

- 2.13. The Labour Contract Law addresses wages much more extensively than other labour standards. This reflects the fact that wage determination and wage protection are a major preoccupation of policy makers and researchers.²⁴ This is unsurprising, since underpayment of wages is, along with employment termination, a major cause of labour unrest.²⁵ Both national and local governments have devoted much effort to wage protection measures, and in the last few years the legislative and administrative initiatives have been impressive, as explained below.
- 2.14. On the other hand, there has been far less development of the law on working time, with few significant changes since the Labour Law was passed in 1994. An exception to this is in the area of annual leave and holidays. There have been a number of innovations in recent years. As discussed in more detail below, paid annual leave was expanded in 2008 and national holidays were reorganised.
- 2.15. Work/life law has also received little attention until very recently. The law in the area is increasingly anachronistic. It consists mainly of old legal material that presumes an economy in which most enterprises operate in the state sector. The material is sometimes couched in terms which suggest an administrative directive, rather than a legal entitlement. It thus becomes unclear whether rules are applicable to workers in the state sector only, or also in the private sector.
- 2.16. As discussed below, there now are plans to substantially revise one of the key provisions on work/life, namely the Women's Labour Protection Law. Some of the reform proposals are discussed below.

Minimum labour standards and other modes of determining labour conditions

- 2.17. Minimum standards are highly important in the Chinese context because there has until recently been little tradition of workplace or industry level bargaining. The content pertaining to working conditions set out in labour contracts, including collective labour contracts (which are now encouraged by the state) tends simply to reflect the applicable legal standards, perhaps with higher salary rates in more prosperous industries.²⁶

²⁴ See, e.g. Su Hainan (ed.), 苏海南, 我国企业薪酬热点问题剖析, 中国劳动社会保障出版社 (2007); Zuo Xiangqi 左祥琦, 工资与福利, *Wages and Benefits*, 中国劳动社会保障出版社 (2002); Xin Weiping, 信卫平, 公平与不平, 当代中国的劳动收入问题研究, 中国劳动社会保障出版社 (2002)

²⁵ Sean Cooney. 'Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China'. (2007) 30 *Fordham International Law Journal*, 1050-1097; Aaron Halegua. (2008) 'Getting Paid: Processing the Labor Disputes of China's Migrant Workers' (2008) 26 *Berkeley Journal of International Law*, 101-167.

²⁶ See, e.g. Simon Clarke et al., 'Collective Consultation and Industrial Relations in China', (2004) 42 *British Journal of Industrial Relations* 235. For a comprehensive exposition of collective bargaining in China, see Ronald Brown, 'China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining' (2006) 16 *Duke Journal of Comparative and International Law* 35.

2.18. Since unions have not, at least until recently, systematically negotiated for in Ronald Brown's terms, 'contractual labor rights above and supplementary to statutory labor rights'²⁷, collective negotiation has offered virtually no scope for innovation in labour conditions. There has been no systemic equivalent of the pattern in other societies of establishing a standard in one industry through bargaining and then gradually extending it across the workplace. Innovation has thus been heavily dependent on the state rule-making process.

3. Scope of the labour law

3.1. The labour standards underpinning working conditions discussed in this report derive directly or indirectly from the Labour Law and the Labour Contract Law. Those Laws have broad application, but do not apply to all forms of work. This section identifies categories of workers to whom the Laws do not apply. It also discussed two categories of workers for whom special provision has been made.

3.2. Some standards have their own specific thresholds (for example, annual leave applies only to employees with at least one year's service). These are discussed in the context of those standards.

3.3. Three of the main issues to be considered in determining the categories of workers who enjoy the protection of labour standards in China are:

- The nature of the entity which engages the worker;
- The nature of the worker; and
- The existence and nature of the contract.

The Engaging Entity

3.4. During the 1980s there existed a bifurcated regulatory system which set up separate rules for state and private sector firms (and indeed distinguished between foreign and domestic firms). One of the great achievements of the Labour Law was to create uniform standards across both private and state-sectors. It uses the term 'employing unit (用人单位)' to apply to all enterprises and individual businesses in China.²⁸ This use has been continued in the Labour Contract Law and other labour legislation.

3.5. However, as already mentioned, some legal material promulgated prior to the Labour Law appears to contemplate a bifurcated system, and its application to the private sector is uncertain.

²⁷ At 72. Of course, particular enterprises, especially those employing high end workers may offer working conditions above the legal standards. Moreover, some corporate social responsibility measures may lead to improvement in standards, but this has been confined to enterprises closely linked to those foreign corporations most exposed to consumer campaigns.

²⁸ Labour Law art 2. The Labour Contract Law makes clear that the definition of employing unit includes non-business organisations.

- 3.6. One problem with the interpretation of the term ‘employing unit’ was that, at least prior to the enactment of the Labour Contract Law, some labour officials and judges were of the view that if an employing entity was unlawfully registered, it was not an ‘employing unit’ for the purposes of the Labour Law, and the standards in the Law did not therefore apply to it.²⁹
- 3.7. This formulistic view is unfortunately not untypical in Chinese legal interpretation, particular among judges, who apply commercial concepts to labour relations – there is not a specialist labour court system in China.
- 3.8. The Labour Contract Law has addressed this problem by indicating that where a firm is established illegally, the firm is liable to pay employers remuneration, as well as compensation for any loss caused.³⁰

The Nature of the Worker

- 3.9. As is the case with statutes in many countries, the Labour Law does not define the categories of workers to which it applies. It uses the term ‘labourers’ (劳动者) rather than some of the possible terms for employees (e.g. 受雇者). However, the law only applies to labourers who ‘form a labour relationship’ with employing units (形成劳动关系)³¹ This means that – again as in many other countries – the law applies only to employment contracts. The term ‘labour relationship’ is also used in the Labour Contract Law and although there was an attempt in an earlier draft to define this (using a concept of incorporation into the employing unit), the definition did not appear in the final version of the law.³²
- 3.10. As the concept of ‘labour relationship’ is not defined in the major laws, its meaning falls to be determined in individual cases by judges and arbitrators. There is no interpretation issued by the Supreme People’s Court which addresses the issue at length,³³ so there is considerable scope for variation.
- 3.11. However, it is well established that the following relationships do not fall within the scope of the labour laws:³⁴
- Contracts for service (independent contractors)(民事劳务关系);

²⁹ Dong Baohua, 董保华, 劳动合同研究 *Research on Labour Contracts*, 中国劳动社会保障出版社 (2005), 54-77

³⁰ Art 93.

³¹ Id.

³² Ye, at 32.

³³ Although see *Interpretation of the Supreme People's Court Concerning Several Issues Regarding the Application of Law to the Trial of Labor Dispute Cases* 最高人民法院关于审理劳动争议案件适用法律若干问题的解释 Interpretation 14 of 2001; see particularly art 1. This was important in indicating that cases where no written contract could be established could be dealt with under the Labour Law procedures, rather than proceeding as a civil court matter.

³⁴ See Ye at 31-55 for a comprehensive discussion. See also Dong Baohua, 54-77.

- Civil servants (公务员) for whom there is a separate system of regulation, although its administering agency has been recently consolidated with the former Ministry of Labour;
- Quasi-civil servants in certain kinds of government enterprises;
- Agricultural labourers;
- Military officials; and
- Domestic workers.

Some scholars have argued that senior management employees should be excluded from the scope of the Labour Contract Law, but this does not appear to be generally accepted.³⁵

The Existence and Nature of the Contract

- 3.12. Another indication of the formalism referred to above is that labour arbitrators and courts have paid great attention to the existence and terms of the labour contract, to the extent of sometimes concluding that the non-existence of a written contract means there is no labour relationship, regardless of the other evidence suggesting that one exists.³⁶ Again, the Labour Contract Law has addressed this by specifically recognising that a labour relationship may exist even where there is no contract.³⁷
- 3.13. Moreover, the Labour Contract Law penalises firms which do not sign written contracts with their on-going, fixed term and project-based (but not casual) employees.³⁸ Failure to sign a written contract within one month of an engagement triggers an obligation to pay double remuneration.³⁹
- 3.14. The heavy emphasis on written contracts is not only designed to help prove the existence of an employment relationship, it is also aimed at ensuring that both employers and employees are aware of their conditions of employment. Labour contracts must contain terms pertaining to remuneration, working hours, rest and vacation⁴⁰ and these terms must be at or above the state minima.⁴¹
- 3.15. While the Labour Contract Law has done much to remedy the problems for employees caused by the undue emphasis on formal contracts, a second contractual issue remains, that is categorising the contract. Since only employment contracts attract the operation of the standards in the two main labour laws, a worker whose contract is determined to be a contract for services will be denied legal protection. As in other jurisdictions, China uses the concept of ‘subordination’ (从属性) to distinguish employees from

³⁵ Ye, at 51-54.

³⁶ Dong Baohua 45-53. See also Halegua 119-123

³⁷ Art 10.

³⁸ Art. 10

³⁹ Art 82. These provisions are clarified in Chapter II of the 中华人民共和国劳动合同法实施条例, Implementing Regulations of the Labour Contract Law, promulgated by the State Council, 3rd September 2008 (Order 535).

⁴⁰ LCL art 17(5), (6)

⁴¹ LCL arts 18.

independent contractors. However, this term tends in China to be used in the sense of subordination to a firm's labour management rules and systems, rather than in the wider sense of economic subordination.⁴² This approach is likely to deny 'dependent workers' the benefit of labour standards.

Categories of workers for whom special provision has been made

- 3.16. In addition to these general principles, the Labour Contract Law lays out important sets of legal rules pertaining to the application of labour standards to two categories of 'non-standard' workers:
- Labour hire workers; and
 - 'Part-time workers' (referred to in this report as casual workers).

The Law provides for better conditions for workers in the first category. It seeks to narrow the second category but those workers who fall within it are markedly worse off than all other kinds of employees.

Labour hire

- 3.17. Labour hire (劳动派遣) refers, as in other countries, to the arrangement whereby workers are engaged by a company (the hirer) which then 'dispatches' them to another entity (the user) where the actual work is performed. There is usually no labour contract between the dispatched worker and the user company. Labour hire workers are frequently low skilled and tend to be either migrant workers from China's rural areas or the urban unemployed.⁴³ Empirical surveys suggest that, in China as elsewhere, dispatch workers receive less income, enjoy fewer benefits and sustain more injuries than regular workers.⁴⁴

- 3.18. The Labour Contract Law addresses labour hire by seeking to ensure that labour hire workers are entitled to at least the legally prescribed minimum standards:
- Labour hire workers must be employed on fixed term contracts of no less than two years by the labour hire companies, and must be paid at least the local minimum wage, even where there is no work available;⁴⁵
 - Both the hirer and the user companies must not appropriate the wages of or charge fees to the labour hire workers;⁴⁶

⁴² Dong at 76. See also the then MOLSS's 2005 Notice on criteria for establishing a labour relationship: 关于确立劳动关系有关事项的通知 (NO 12 of 2005, issued 25th May 2005). This emphasizes matters such as whether in practice a worker is subject to a firm's directions, including its work rules.

⁴³ For an extensive study of the labour hire arrangements in China, see Zhou Changzheng 周长征 (ed), 劳动派遣的发展与法律规制 (*The Development and Legal Regulation of Labor Dispatch*), 中国劳动社会保障出版社 (2007); See also Li Kungang, 李坤刚, 劳动者派遣: 起因与规制, in the same volume, citing figures indicating that around 25 million workers were employed on a labour hire basis in public sector enterprises alone, with 10 million of these in the construction sector: 57).

⁴⁴ See the survey of labour hire practices in Shanghai by the Shanghai union federation: see 屠国名, 山还是企业劳务用工的现状, 问题与对策 in Zhou. The survey reported that labour hire workers received only 80-90% of the monthly wages of regular workers, and were much more likely to suffer injuries: 17-21.

⁴⁵ Artt 58-2.

⁴⁶ Art 60.

- User companies must comply with state labour standards when engaging labour hire workers;⁴⁷ and
- User companies must pay labour hire workers the same rate as regular workers for the same work;⁴⁸

“Part-time” contracts (casual workers)

3.19. An exception to the requirement that a written contract be concluded applies to a category of workers who are engaged on a ‘part-time’ basis (非全日制用工).⁴⁹ These are defined quite strictly as workers who are remunerated by the hour, and where the engagement is for an average of no more than four hours per day and no more than a twenty-four hours per week.⁵⁰ The term ‘part-time’ is thus misleading since many employees who work less than standard working hours will not fall within this category, provided they work more than twenty-four hours a week. Consequently, the term ‘casual’ workers will be used here. This is appropriate since such workers are terminable at will and without compensation. This is in contrast to the ‘standard’ workers who are entitled to both notice and compensation, and who may not be terminated except for cause.

3.20. The Labour Contract Law has few provisions governing the conditions of casual workers. There is a requirement that the hourly rate of pay be no less than the local hourly minimum wage rate.⁵¹ However, the maximum working time provisions have no application because the work is by definition less than full time. There are also no provisions in the Law concerning leave entitlements, although a long term casual may fall within the terms of other legislative instruments.⁵²

3.21. A number of national and local regulations, promulgated prior to the Labour Contract Law contain additional limitations and protections for casual workers. To the extent that these are inconsistent with the Labour Contract Law, their validity may be doubtful. For example, some legal instruments require employers engaging casual workers for more than a month to enter into formal contracts.⁵³ In contrast, the Labour Contract Law states that casual contracts do not have to be in writing.⁵⁴

3.22. One potential problem with this category is that it would seem possible for people to be employed on a casual basis indefinitely (that is, long time

⁴⁷ Art. 62

⁴⁸ Art. 63.

⁴⁹ LCL Chapter 5 Section 3. For further discussion, see Ye, *supra*, 229-234; Zhu Wenwen 朱雯雯, 关于非全日制就业立法例综述, in Dong Baohua.

⁵⁰ LCL art. 68.

⁵¹ Art. 69. An earlier Ministry of Labour and Social Security Opinion indicates that part-time workers are eligible to participate in social security schemes: 劳动保障部关于非全日制用工若干问题的意见, (promulgated 23rd March, 2003).

⁵² Although arguably some of the administrative regulations or local rules pertaining leave could apply to long term casuals.

⁵³ For example, 大连市非全日制用工若干规定 (promulgated by Dalian Department of Labour and Social Security 14th November 2003) art 1-2

⁵⁴ LCL art. 69.

casual employment) without enjoying the entitlements such as termination pay and (probably) leave. Workers with responsibilities for aged parents and children may be particularly at risk. Although there are some restrictions on the use of such labour – for example, they cannot be used by labour hire companies –⁵⁵ this does not appear to be any obstacle to long term engagement.

4. Wages

4.1. This report looks at two aspects of wage regulation. The setting of minimum wages, and wage protection. While minimum wage setting is important in China, it is wage protection which has received major attention at both national and local levels in recent years.

Minimum wage setting

4.2. Minimum wages are set at the provincial government or equivalent level, in consultation with local unions and employer groups, and are supposed to be adjusted at least once every two years.⁵⁶ The Labour Law states that the following principles must be taken into account:

- The minimum living costs of workers and the number of family members they support;
- Average wage levels;
- Labour productivity;
- The ‘employment situation’; and
- Differences between regions in their levels of economic development.

4.3. These principles are obviously very vague. Greater guidance was provided in 2003 by the then MOLSS, in the form of the Regulations on the Minimum Wage.⁵⁷ These Regulations set out a detailed mathematical formula to be followed in setting minimum wages, with the wage set at approximately 40 to 60% of the average monthly wage in the relevant area.⁵⁸ The Regulations also explain to which workers the minimum wage applies; how to calculate the applicable wage in relation to various categories of workers, such as casuals; and how matters such as leave are treated. Some of these issues are now regulated by the Labour Contract Law which has, for example, displaced the provision in the Minimum Wage Regulations that confine its application to workers with written contracts.⁵⁹

4.4. Since minimum wage rates are set at provincial and municipal levels, the rates vary markedly across the country.⁶⁰ In Guangdong Province for

⁵⁵ LCL IP art. 30

⁵⁶ Labour Law arts. 48 and 49.

⁵⁷ 最低工资规定, promulgated on 30th December 2003 with effect from January 1, 2004,

⁵⁸ See the Attachment to the Rules

⁵⁹ Art. 3

⁶⁰ On the operation of the minimum wage generally, see Yang Du and Weiguang Pan, ‘Minimum Wage Regulation in China and Its Applications to Migrant Workers in the Urban Labor Market’ (2009) 17 *China & World Economy*, 79 – 93. The authors note that the system has become more comprehensive in recent years. They also point out that ratio of the minimum wage to average wages has declined, but suggest that it does not necessarily follow that the minimum wage is set too low.

example, there are five⁶¹ categories of minimum wage rates; each category consists of a monthly rate for non-casual workers and an hourly rate for casual ones.⁶² Each category applies to specific cities, with more prosperous and expensive cities, such as Guangzhou, having higher rates.⁶³

4.5. The minimum wage system has gradually expanded in China since the Labour Law was passed, as each province began implementing the system in its cities and adjusting the rates, often on an annual basis (rural areas are not covered by the minimum wage). The impact of the World Financial Crisis has however led to a pause in increases in the various rates. Labour market economists Du and Pan write that:

*With robust economic growth, the effect of raising minimum wages on employment is insignificant because demand for labor is strong. However, once economic growth slows down, for example, once the effects of the recent shock induced by the financial tsunami are felt, the effects of minimum wages on employment will be revealed. In response to the world economic crisis, the Ministry of Human Resources and Social Security has decided not to raise the minimum wage standard in the near future.*⁶⁴

Wage protection

4.6. The Labour Law contains few provisions dealing with wage protection, and these are, again, quite vague:

- There must be “equal pay for equal work” (同工同酬);⁶⁵
- Wages must be paid monthly and in currency;⁶⁶
- There can no ‘(inappropriate) deductions or unreasonable delays’ (不得克扣或者无故拖欠劳动者的工资);⁶⁷
- Wages must be paid during holiday, certain kinds of family⁶⁸ and funeral leave, as well as for public activities stipulated by law⁶⁹

4.7. These sparse provisions have been ineffective in preventing wide scale non-payment of wages.⁷⁰ Consequently, reform of wage protection law is an issue which has received great attention both at national and local government levels. A significant part of the Labour Contract Law is devoted to the issue, and the title of the Law itself suggests one major policy response to the problem – producing a paper trail of contracts (for non casual workers) which provides crucial evidence in disputes over wages.

⁶¹ Not including the rates at Shenzhen which has its own system.

⁶² For the 2008 rates, see http://www.gd.lss.gov.cn/gdlss/sy/pnews/t20080219_52384.htm

⁶³ The rate in the category one city of Guangzhou as at 1st April 2008 was 860 Yuan per month (for casual workers it was 8.3 yuan per hour). The rate in category five was 530 and 5.1 respectively.

⁶⁴ See above, note 60, at 80.

⁶⁵ Art. 46

⁶⁶ Art 50.

⁶⁷ Id

⁶⁸ See below

⁶⁹ Art. 51.

⁷⁰ See generally Cooney and Halegua cited at note 25..

4.8. In addition to these provisions formalising employment relations, measures in the Labour Contract Law protecting wages include the following:

- Clauses in labour contracts requiring workers to pay penalties are invalid, except where (a) they enable employers to recover special training costs, the repayment of which is subject to a specific agreement; and (b) where senior employees have a non-compete agreement;⁷¹
- Employers are prohibited from requiring workers to pay bonds or other forms of guarantees;⁷²
- Employers who fail to make timely payments of salary at at least the applicable minimum wage rate, or who fail to pay overtime, may be fined between fifty and one hundred percent of the amount owing.⁷³

4.9. Provincial and municipal level wage protection regulations⁷⁴ have been directed at:

- Defining more clearly what forms of service attract wages, and at what rate;
- Requiring employers to establish wage payment systems, involving the public display of wage schemes and overtime payments; the delivery of pay slips to employees; the keeping of wage records available for inspection; and
- Tightening liability rules, for example, making managers personally liable in some circumstances, or requiring head contractors on a construction site to pay the unpaid workers of subcontractors prior to paying the subcontractors.

It should be emphasised, though, that there is great variation in these regulations from region to region.

5. Working Hours⁷⁵

5.1. The principles applicable to working time are more complex than they seem at first glance. This is because the Labour Law sets out a fairly simple scheme, not dissimilar to that found in many other countries. However, the operation of other regulatory instruments make the picture a good deal more complicated.

The National Default Rules

5.2. The Labour Law provides for an eight-hour day, and an average working week of 44 hours.⁷⁶ Workers are entitled to at least one day off per week⁷⁷

⁷¹ Arts 22-25.

⁷² Art 84.

⁷³ Art 85.

⁷⁴ For example, the Guangdong Wage Protection Regulations (广东省工资支付条例) passed by the Standing Committee of the Guangdong Provincial Congress on 19th January 2005 with effect from 1st May 2005. These are discussed in Cooney at 1078-1081.

⁷⁵ See also Sean Cooney, 'Addressing Extreme Working Hours in China: The Contributions of Regulation Theory in S. Biddulph and S. Nicholson, *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Martinus Nijhoff Publishers (2008).

⁷⁶ Labour Law, art. 36.

⁷⁷ Art 38.

- 5.3. The Law also regulates overtime; the basic rule is that this is limited to one hour per day.⁷⁸ However, an extension of the working day by up to three hours is permitted for ‘special reasons’ (特殊原因) if (a) the workers’ health is protected and (b) the total monthly extension is no more than 36 hours.⁷⁹ Any extension to working hours is subject to consultation with the unions and the workers concerned.⁸⁰ Extensions of working hours in violation of the law are expressly prohibited.⁸¹
- 5.4. A penalty rate of 150% is applicable to overtime work (150%).⁸²
- 5.5. Within months of the Law entering into effect, the State Council promulgated a short regulation stipulating ordinary working hours as *forty* (not forty-four) hours per week.⁸³ In the same regulation, Saturday and Sunday were specified as the usual rest days for government enterprises.⁸⁴
- 5.6. The shift from forty to forty created some confusion,⁸⁵ since the State Council’s regulation stipulated no penalties for failure to comply. The Labour Ministry (as it then was), having authority to interpret the State Council regulation,⁸⁶ subsequently indicated that a firm operating between forty-four to forty hours per week could be ordered to ‘make corrections’ (改正) but did not indicate whether such a firm could be fined.⁸⁷ Labour law texts now generally take the 40 hour standards as generally applicable.
- 5.7. The Labour Law does not contain specific provisions on rest breaks at work or night work. The author has not been able to track down other legal instruments which regulate these issues, apart from rules pertaining to women which are considered below. However, several texts⁸⁸ refer to employees on night shift working seven rather than eight hours, and certain dangerous industries also have reduced hours, often based on regulations dating from the early 1980s.

⁷⁸ Art. 41.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Arts. 43, 90.

⁸² Art. 44.

⁸³ State Council Regulation concerning Working Hours, 国务院关于职工工作时间的规定., promulgated by the State Council March 25, 1995, in effect from May 1, 1995, art. 3. Some firms were given until May 1997 to implement the Regulations..

⁸⁴ Art 7.

⁸⁵ See Xiangquan Zeng, Liang LU and Sa’as Umar Idris, *Working Time in Transition: The Dual Task of Standardization and Flexibilisation in China*, ILO Conditions of Work and Employment Series NO.11 (2005), 7.

⁸⁶ State Council Regulation concerning Working Hours, art. 8.

⁸⁷ This clarification, issued in 1997, was in response to a request from the Guangzhou Labour Bureau: Guanyu Zhigong Gongzuo Shijian youguan Wenti de Fuhuan [Reply concerning Working Hours], issued by the Ministry of Labour on September 10, 1997.

⁸⁸ E.g. Christopher Hunter, Louisa Lam and Ketong Lim, *Employment Law in China* (2ed), CCH, 50-361; Ye at 85.

National and local level laws allowing a departure from the general standard

- 5.8. The provisions just cited from the Labour Law are the default working time rules. However, the Law creates considerable scope for their avoidance. There two provisions which enable such ‘opt outs’. Article 39 provides that where, owing to the ‘special nature of production’ (因生产特点), an employer cannot follow the default rules on working hours, as well as the weekly rest period, it may, with the approval of the local department of labour, adopt other rules on working hours and rest (described below as ‘non-standard working hours systems’).
- 5.9. 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’ (法律，行政法规规定的其他情形)。
- 5.10. Neither of these provisions allow an employer of its own accord to opt out of the rules. What they do is to enable labour departments to create their own regulations which depart from the default rules, regulations which may apply to large categories of employers.
- 5.11. It is up to local labour bureaux to authorise employers to set up working arrangements outside the default rules. The parameters of the authorisation are laid out in national working time regulations, introduced at the same time as the Labour Law by the then Ministry of Labour pursuant to art 39 These national regulations, the Measures concerning the Approval of the Implementation in Enterprises of Systems of Non-standard Working Hours and of Accumulated Working Hours (‘the Working Hours Measures’),⁸⁹ give the local bureaux great latitude.
- 5.12. The Working Hours Measures refer to two separate schemes of non-standard working hours:
- irregular hours, which exclude the default Labour Law rules,⁹⁰ and
 - ‘accumulated hours’, which permit employers to calculate hours on a weekly, monthly, seasonal or annualised basis. The average working day and working week must be ‘basically similar’ (基本相同) to the standards in the Law.⁹¹
- 5.13. Workers for whom irregular hour schemes are possible include senior managers, salespeople, field personnel, transport, stevedoring and tourism workers as well as the rather vague category of ‘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’.

⁸⁹关于企业实行不定时工作制度和综合计算工时工作制的审批办法, promulgated by the Ministry of Labour on December 14, 1994, with effect from January 1, 1995,

⁹⁰ Art 4.

⁹¹ *Id.* art 5. Note that such systems can be used to reduce overtime payments.

- 5.14. The accumulated hours schemes can apply to industries including transport, railway, post, aviation, fishing, construction, prospecting, salt and sugar production and tourism. They can also apply to other seasonal workers and ‘other employees for whom accumulated hours schemes are suitable’.
- 5.15. The Working Hours Measures do place some constraints on the implementation of these schemes, but these are not tightly drawn.⁹² Employers must have regard to the employees’ health and must ‘listen to their views’ prior to implementation, in order to protect their employees rights to rest.
- 5.16. The Working Time Measures are quite short – it is up to local governments to issue more detailed rules (except in the case of certain state owned enterprises, where the rules are made at national level).⁹³ These rules must be sent to the MOHRSS, but do not require MOHRSS approval to take effect. The Working Time Measures seem to enable local labour bureaux to exclude many, if not most, workers from the default rules in the Labour Law, although several have not chosen to do so.⁹⁴
- 5.17. For example, they have sought to set substantive and/or procedural constraints on attempts to opt out of the default rules. Beijing City provides an example of substantive constraints. The Beijing Working Time Measures, implemented in 2004, are much more detailed than the national Working Time Measures, and over twice their length. The Beijing Measures confine irregular hours schemes to *long-haul* transport workers and to non-production line workers.⁹⁵ Schemes must be devised through consultation with the firm’s union, worker’s congress or with the workers directly⁹⁶ and may be approved for a maximum of three years.⁹⁷
- 5.18. Guangdong Province has taken a more procedural approach, with new Working Time Measures⁹⁸ that came into effect in March 2009. These do not limit categories of workers in respect of whom irregular or accumulated hours schemes may be implemented. However, they set out extensive approval procedures which requires a formal application by an employer, detailing the positions affected.⁹⁹ The employer must present any proposed scheme to employees for comment and must provide the labour bureau with a record of

⁹² Art. 6

⁹³ Art 7.

⁹⁴ Some local governments do not appear to have devised their own rules, which suggests they may be adopting an ad hoc approach to applying the Working Time Measures.

⁹⁵ Beijing Municipality Measures on Enterprise Implementation of Systems of Accumulated Hours of Work and Non-Standard Working Hours, 关于印发北京市企业实行综合计算工时工作制和不定工时工作制办法的通知. No 57 of 2003, issued by Beijing Labour Department December 9, 2003 with effect from January 1, 2004, art. 11(5).

⁹⁶ *Id.* art. 14. The application form in the Beijing area requires the inclusion of union or workers’ congress comments.

⁹⁷ *Id.* art. 16.

⁹⁸ 广东省关于企业实行不定时工作制和综合计算工时工作制的审批管理办法, adopted by Guangdong Province labour and social security bureau 18th February, 2009.

⁹⁹ Art 5.

the comments. The bureau must audit the material and may decide to inspect conditions in an enterprise prior to giving approval.¹⁰⁰ They *must* send at least two inspectors to an enterprise if the enterprise seeks an exemption for more than half the workforce, or if the accumulated hours scheme involves seasonal, half-yearly or annual calculation of hours.¹⁰¹

5.19. If it decides to approve the request for an exemption, the labour bureau can alter the scheme or impose conditions.¹⁰² The maximum period for an exemption is two years, with enterprises ordinarily given a one year term.¹⁰³

5.20. Another Guangdong regulation¹⁰⁴ seeks to prevent use of accumulated hours schemes to avoid overtime by requiring employers to pay overtime rates if the number of hours worked in the reference period (e.g. a month) exceeds the number of ordinary hours that could have been worked in the same period. The regulation also clarify that holiday penalty rates are payable even if employees are on an accumulated hours scheme.

National holidays

5.21. The Labour Law refers to four paid national holidays,¹⁰⁵ but this can be supplemented by State Council regulation. The current State Council provisions¹⁰⁶ provide for a total of seven public holidays, two of which run for three days, so that there are eleven public holidays. There is an additional half-day holidays for women on International Women's Day.

Paid Annual Leave

5.22. The Labour Law provision on annual leave¹⁰⁷ is simply an enabling one that requires the State Council to promulgate specific rules. The most recent rules were passed by State Council in December 2007,¹⁰⁸ and took effect in 2008. Employees with between one and ten years' service are now entitled to five paid annual leave days per year, rising to fifteen where the employment period is 20 years or more.¹⁰⁹

¹⁰⁰ Art 6.

¹⁰¹ Id. This fairly onerous requirement may be intended as a disincentive to adopt such schemes.

¹⁰² Art. 8

¹⁰³ Art 8.

¹⁰⁴ 广东省工资支付条例, Guangdong Wage Regulations, passed by the Guangdong Provincial Congress, 18th January 2005. Art 22

¹⁰⁵ Article 40.

¹⁰⁶ 全国年节及纪念日放假办法, Measures on Annual Holidays for Public Festivals and Memorial Days, amended and reissued 7th December 2007 with effect from 1 January 2008.

¹⁰⁷ Art 45.

¹⁰⁸ 职工带薪年休假条例 (Regulations on Employee Paid Annual Leave), adopted December 7th, 2007.

¹⁰⁹ Art 3. This is subject to various restrictions: art 4. If annual leave is not granted, the employee must be remunerated at the rate of 300%. The Regulations on Employee Paid Annual Leave are supplemented by 企业职工带薪年休假实施办法 (Measures for Implementing Paid Annual Leave for Employees in Enterprises), promulgated by the Ministry of Human Resources and Social Security, July 17, 2008.

6. Work/family balance¹¹⁰

6.1. The basic structure of leave arrangements is set out in the Labour Law, but the detail is to be found in other regulatory material. The principle forms of leave are set out below:

*Sick leave*¹¹¹

6.2. Both the Labour Law¹¹² and the Labour Contract Law¹¹³ prohibit an employer from terminating an employee's employment while the worker has a non-work related illness, but only during the period stipulated by the Ministry of Labour (now MOHRSS).¹¹⁴ This ranges from three months for workers with less than five years service up to a maximum of twenty-four months. Sick leave is payable under a very longstanding labour insurance scheme, with direct employer payments for non-work related illness of less than three months and payment from the insurance fund (financed by employer contributions) for longer periods.¹¹⁵ However, there are many enterprises which fail to make payments into the fund.

Parental leave: women

6.3. Chapter Seven of the Labour Law of 1994 adopts a 'special protection' model for women, and arguably needs to be rethought with reference to work/life balance concepts.¹¹⁶ Most of the provisions in Chapter Seven applicable to women are concerned with prohibiting the employment of women, or certain categories of women (e.g. breastfeeding mothers), in various industries.¹¹⁷ These are explored further below. This focus on protecting women creates a tension with gender equality which has been succinctly summarised by Professor Margaret Woo:

*Legislation protective of women's differences can undermine women's equality of opportunity by categorizing and perpetuating specific roles for women, yet legislation ensuring equality of opportunity and treatment can fail to accommodate the different biological needs of women.*¹¹⁸

6.4. Within this framework of protection, the Labour Law also stipulates that female workers are entitled to no less than ninety days' maternity leave.¹¹⁹

¹¹⁰ See generally Ye, 74-96.

¹¹¹ See further Zuo, 187-201

¹¹² Art 29.

¹¹³ Art 40(1)

¹¹⁴ 企业职工患病或非因工负伤医疗期规定, issued 1st December 1994.

¹¹⁵ See the Labour Insurance Regulations 中华人民共和国劳动保险条例 passed by the State Council in 1953 art 13

¹¹⁶ Art 58. An early but excellent article on this is Margaret Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, (1993) 42 *Emory Law Journal* 143-196.

¹¹⁷ See Table 1, below.

¹¹⁸ See Woo, above note 116 at 170. Of course, labour standards are inherently 'protective' but the 'special' protections for women risk perpetuating unhelpful stereotypes.

¹¹⁹ Art. 62.

Wages during this period are paid through the labour insurance scheme referred to above.¹²⁰

- 6.5. The Labour Law provisions are complemented by two other important legal instruments. One is the Law of the People's Republic of China on the Protection of Rights and Interests of Women (the Women's Protection Law).¹²¹ Article 27 of that Law states that 'no [employer] shall reduce the salary of female employees, dismiss female employees, or unilaterally terminate labour contracts or service agreements with them by reason of marriage, pregnancy, maternity leave or nursing unless the female employees request the termination [...]'.¹²²
- 6.6. The second legal instrument is the Regulations Governing Labor Protection for Female Staff Members and Workers ('Women's Labour Protection Regulations')¹²³, which date from 1988. These contain provisions which have now been restated in the Women's Protection Law¹²⁴ and the Labour Law.¹²⁵ However, the Regulations are more expansive. In relation to parental leave they stipulate that:
- Women may take 15 days paid leave prior to birth, as part of their parental leave entitlement;¹²⁶
 - In the case of difficult births or where there is more than one child from the same birth, there is a additional entitlement of 15 days;¹²⁷
- 6.7. The Women's Labour Protection Regulations also set out entitlements for breastfeeding mothers.¹²⁸ Women breastfeeding babies under one year of age are entitled to two 30 minutes breaks (this also applies to bottle-fed babies). Larger enterprises are required to set up special lounges for women, kindergartens and other infrastructure.¹²⁹ This provision seems to reflect the fact that the Regulations were issued in the late 1980s, as it is unclear what obligations, if any, apply to large private-sector enterprises.
- 6.8. The Women's Labour Protection Regulations include a limitation on parental leave that is not apparent in the other laws just mentioned. This is that the normal maternity leave benefits are not applicable to women who violate the

¹²⁰ See the Labour Insurance Regulations 中华人民共和国劳动保险条例 passed by the State Council in 1953 art 16.

¹²¹ 中华人民共和国妇女权益保障法, passed by the National People's Congress 3rd April 1992, amended in 28th August 2005.

¹²² On employment discrimination generally see Ron Brown, 'China's Employment Discrimination Laws During Economic Transition', 19 *Columbia J. of Asian Law* 361 (2006).

¹²³ 女职工劳动保护规定, promulgated by the State Council 21st July, 1988. Some provinces have adopted their own implementing measures.

¹²⁴ E.g. concerning termination and salary reduction (art.4).

¹²⁵ E.g. concerning prohibiting women from engaging in certain kinds of work.

¹²⁶ Article 8.

¹²⁷ Id.

¹²⁸ Art. 9.

¹²⁹ Art 11.

national family planning laws.¹³⁰ Although the Labour Law and the Women's Protection Law are of higher legal status because they are statutes rather than regulations, and because they are enacted later, it would seem that this limitation is still current. There is a reference to it in a still later statute, the Law of the People's Republic of China on the Population and Family Planning (the Family Planning Law).¹³¹

- 6.9. Moreover the Family Planning Law authorises local governments to extend parental leave periods for parents who adhere to the family planning measures¹³² and many such governments have done so. For example, in regulations passed in Guangdong Province,¹³³ women who marry 'late' (after 23) are entitled to an additional fifteen days leave, and women who hold a certificate confirming they will have only one child are entitled to an additional 35 days leave.

Parental leave: men

- 6.10. There is no reference to leave for fathers in the Labour Law, but given the way parental leave is framed – as part of women's protection - this is not surprising.¹³⁴ However, the Family Planning Law *does* refer to leave for fathers, and this has led to at least some local governments granting leave to fathers where they marry 'late' (after 25) or commit to having only one child. For example, in the Guangdong Province regulations just referred to, such fathers enjoy ten days' parental leave. Shanghai has similar arrangements (but not quite so generous)¹³⁵

*Personal leave – separated couples*¹³⁶

- 6.11. An old, but still current, State Council regulation¹³⁷ entitles government sector employees (at least) with one years' service or more to thirty days' paid¹³⁸ leave once a year where their spouse is located in another city. The regulation also entitles staff to visit their parents (twenty days per year where a staff member is unmarried, twenty days every four years where

¹³⁰ Art. 15. China's national family planning laws are based on the 'one child policy' (计划生育政策) which limits many couples to one child (there are various exceptions). This policy is implemented through a complex system of incentives and disincentives.

¹³¹ 中华人民共和国人口与计划生育法, promulgated by the National People's Congress Standing Committee 29th December, 2001

¹³² Art 26.

¹³³ 广东省计划生育条例, Guangdong Regulations on Planned Childbirth, adopted by the Standing Committee of the Guangdong People's Congress on 18th October 1998, art 24.

¹³⁴ Similarly, the Women's Protection Law and the Women's Labour Protection Regulations contain no reference to leave for fathers.

¹³⁵ 上海市计划生育条例实施细则, originally adopted by Shanghai Municipal Government on 11th October 1990 and subsequently amended several times.

¹³⁶ Zuo Xiangqi 左祥琦, 工资与福利, *Wages and Benefits*, 中国劳动社会保障出版社 (2002), 211-220

¹³⁷ 职工探亲待遇的规定 Employee Home Leave Provisions, March 14th, 1981. . The regulation also entitles staff to visit their parents (twenty days per year where a staff member is unmarried, twenty days every four years where a staff member is married).

¹³⁸ The 2004 Minimum Wage Regulations stipulate that this category of leave counts as service for the purposes of the minimum wage: art 3.

a staff member is married). The regulation applies only where couples are unable to visit each other on the weekend.¹³⁹

*Marriage and funeral leave*¹⁴⁰

6.12. Another old State Council regulation entitles employees to up to three days paid leave to attend their own wedding, or the wedding or funeral of an immediate relative. Again, this appears to be confined to state employees at the national level, although some provinces and municipalities have extended it to private sector workers.¹⁴¹

The 'protection' of women from certain kinds of work

6.13. The Labour Law, the Women's Protection Law and the Women's Labour Protection Regulations all contain provisions restricting woman from working. Remarkably for a statute that generally lacks specificity, there are four articles in the Labour Law setting out prohibitions, and the Law authorizes further limitations by other rule-making bodies:

Table 1: Provisions in the Labour Law restricting women from working

Provision	Category of women	Work prohibited
Art 59	All	Mines; Grade 4 physical labour
Art 60	Menstruating women	High above ground; in low temperatures; in cold water; Grade 3 physical labour
Art 61	Pregnancy	Grade 3 physical labour; night shifts from seven months; extended hours from seven months
Art 63	Breastfeeding	Grade 3 physical labour; night shifts; extended hours

Grades 3 and 4 refer to complex measurements of calories expended over a specific time frame.¹⁴²

Reform

6.14. There has been significant recent debate on reform of the Women's Protection Regulations and they are currently under review by the State Council.¹⁴³ A number of amendments have been proposed by scholars,¹⁴⁴ as

¹³⁹ Art. 2.

¹⁴⁰ Zuo, above, 221-223.

¹⁴¹ 关于国营企业职工请婚丧假和路程假问题的规定. Promulgated 20th February 1980.

¹⁴² 中华人民共和国国家标准 G B 3 8 6 9 — 8 3 .

¹⁴³ 女职工劳动保护与性别平等, 妇女研究论丛 Vol 92(2) March 2009, 36. This edition of the journal 妇女研究论丛 (officially translated as *Collection of Women's Studies*) contains several contributions from scholars and officials on reform proposals.

¹⁴⁴ E.g. Liu Bohong, 刘伯红, 中国社会转型期的女职工劳动保护, 妇女研究论丛 Vol 92(2) March 2009, 11. Dr Liu is a Deputy Director of the China Women's Research Institute, Beijing, which is operated by the Women's Federation (妇联)

well as policy officers in the MOHRSS.¹⁴⁵ One strong case for the need to reconsider the Regulations has been put by Liu Bohang, a scholar at the research arm of the Women's Federation. This is translated at length because of the many parallels with similar analyses in developed countries:

Under the planned economy, women received certain guarantees in relation to their health, but under market conditions, the priority accorded to profit making has led to the diminution, erosion or replacement of those guarantees. Global economic liberalization and convergence has led to greater labour market flexibility, short term working relationships and the holding of concurrent jobs, as well as a range of non-standard employment forms, such as contracting out, sub-contracting, casual work and home work. One of the purposes of these non-standard arrangements is to evade protective labour standards, so as to reduce costs and maximise profits. Women shoulder the major burden of these new employment forms because of their family responsibilities and their lower capacity to participate in the labour market.

On the one hand, society as a whole tends to expect women to play the role of caring for the family - and as a result they are refused entry into the labour market. On the other, when they do enter the labour market, this is either when they do not have responsibilities associated with reproduction or when there is a lack of health guarantees. This perpetuates the traditional gendered division of labour and places major obstacles in way of equal participation for women in economic development and of equal access to safe and healthy jobs.¹⁴⁶

6.15. Based on such analyses, suggestions for reform of the Women's Labour Protection Regulations include:

- Redesigning the law with regard to the diversification of enterprise forms and expansion of the private sector that has occurred since 1988, and in particular, ensuring that the Regulations have at least the same scope as the Labour Law;¹⁴⁷
- Rendering more secure the insurance payments made in association with childbirth and child raising, including through increased government subsidisation of maternity leave-related payments;
- Making clear that women on maternity leave are entitled to return to their original position, except in the event of financial exigencies or other causes outside the control of an enterprise, in which case a suitable alternative position should be found;
- Ensuring that the Regulations fully reflect ILO Convention 156 on Workers with Family Responsibilities;

¹⁴⁵ E.g. Lü Hongyan 吕鸿雁, 女职工劳动保护立法的重点问题, 妇女研究论丛 Vol 92(2) March 2009, 36. is an assistant director at the Legal Affairs Office of the MOHRSS.

¹⁴⁶ At 15.

¹⁴⁷ It is clear that the Women's Labour Protection Provisions were designed where the economy was still dominated by state-owned industry. For example, a major remedy for breach of the provisions is to appeal to the state instrumentality overseeing the management of the firms to impose a disciplinary sanction: art. 13.

- Broadening the concept of women's protection from reproduction-related situations to a wider range of issues including occupational health and safety, and the prevention of sexual harassment;
- Continuing the provisions in the current Regulations requiring large firms to establish nurseries and child care facilities, but extending them to encourage large private sector firms to do so;

6.16. Finally, a striking characteristic of Chinese labour regulation is the extensive use of work restrictions in order to 'protect' (保护) women. Many of these restrictions seem antiquated, arbitrary and discriminatory. In particular, they exclude women entirely from certain (not very clearly defined) categories of work. It is possible to argue that some of the restrictions are of benefit in those industries where high concentrations of young women working very long hours. This is especially the case since, as we have seen, there is considerable scope for enterprises to avoid the default working hours rules. However, Chinese feminist scholars argue that it would be better to reconceptualise the objectives of the legal protection, replacing the various limitations on women's work with a system of few or no restrictions, established by reference to research rather than presuppositions.

7. Enforcement

7.1. There is a considerable literature on labour enforcement in China.¹⁴⁸ This is part of a wider literature concerned with implementation of the law in China.¹⁴⁹ This is briefly and inadequate summarised here in a table identifying several well known difficulties with enforcement, as well as recent improvements.

7.2. Earlier, this report emphasised the need to understand the structure of rule-making in China so as to better appreciate the nature of labour regulation. Similarly, one should be aware of a key structural feature of Chinese administration when considering the difficulties with regulatory implementation. That feature is the so-called *tiao-kuai* (条块) system of administrative responsibility. As we have seen, there is no clear hierarchical relationship between legal rules made by central government ministries and those made by provincial governments. This uncertainty has a parallel in departmental lines of authority. Labour inspectors located in a labour bureau in a Chinese city will be accountable both to the MOHRSS (the *tiao* or vertical relationship) and to the relevant provincial or major municipal government (the *kuai* or horizontal relationship). In practice, it is often the local government which provides the financial resources for the bureau, and

¹⁴⁸ See, in English, e.g. Cooney; Halegua; and, Josephs; in Chinese, e.g. Li Bing'an 李炳安, 劳动权论, 人民法院出版社, 北京, 2005, 167-278.

¹⁴⁹ One of the best empirical studies of Chinese enforcement is by the Dutch scholars Benjamin Van Rooij: *Regulating Land and Pollution in China, Lawmaking, Compliance, and Enforcement: Theory and Cases*. Leiden: Leiden University Press, 2006; other excellent studies include Neil J. Diamant, Stanley B. Lubman, and Kevin J. O'Brien, *Engaging the Law in China: State, Society, and Possibilities for Justice*, Stanford University Press 2006.

which is empowered to hire and fire staff, so the *kuai* relationship can tend to prevail.

Some enforcement difficulties with Chinese labour law

<i>Difficulty</i>	<i>Policy response</i>
Legal rules are insufficiently clear, or are contradictory, or are of uncertain application, so law enforcement officials are unable to point definitively to breaches of the law.	Statutes such as the Labour Contract Law are improving the framework of legal standards
Law enforcement officials, as well as courts and arbitrators, tend to take a formalistic approach to employment relationships and may not act if there is no formal contract.	Following the enactment of the Labour Contract Law, employers are now subject to much higher penalties if they do not sign contracts with their employees, and written contracts are no longer a prerequisite for the establishment of an employment relationship.
Law enforcement officers have vague and limited powers.	Some provincial and sub-provincial governments, as well as the MOHRSS, have been increasing and clarifying the powers of labour inspectors. ¹⁵⁰ The Labour Contract Law has reinforced these ¹⁵¹ and has also increased the penalties that may be imposed for breaches of labour standards.
Law enforcement officers have unsophisticated compliance strategies. There has been a focus on finding someone at fault rather than improving workplace systems.	Some cities, such as Shenzhen, are adopting creative approaches, like carefully targeting labour inspection to the most problematic areas. Recent laws place a greater emphasis on improving workplace systems, such as record keeping.
Chinese enforcement institutions have been criticised for lack of training, inadequate resources, and corruption, especially since inspectors, arbitrators and judges are dependent on local governments for their positions, and those governments may be unduly influenced by business.	Staff in the more developed cities are gradually becoming more professional. Rising labour disputes across the country have been forcing local governments to take enforcement more seriously.
Arbitration and court procedures have been inaccessible to many workers because of the expense and delay	The Labour Disputes Mediation and Arbitration Law, which come into effect in 2008, reduces some procedural obstacles to workers, and enables interim relief.

¹⁵⁰ See, e.g. The Labour Protection Inspection Regulations, 劳动保障监察条例, State Council Order 423 of 2004, promulgated on 26th October 2004, with effect from 1st December 2004.

¹⁵¹ In Chapter 5.

<p>Workers are often unable to get access to legal advice about their working conditions, or to get representation</p>	<p>Several quasi-NGO organisations have emerged in recent years to provide workers, including migrant labourers, with advice, support and legal representation. These include legal aid organisations associated with major universities or run by lawyers.¹⁵²</p>
<p>Chinese unions have historically acted as social welfare agencies and mediators rather than as enforcers of the law. They traditionally represented only urban workers, who are more likely to have employers compliant with the law.</p>	<p>Amendments to the Trade Union Law in 2001 increased trade union's enforcement responsibilities. Since 2003, Chinese unions have actively recruited migrant workers. Some union branches have developed programs to strengthen enterprise-level enforcement. Expansion of union capacity to legally represent workers where breaches of labour standards occur would be a substantial improvement.</p>
<p>There is limited scope for civil society organisations such as media outlets and community groups to highlight non-compliance and agitate for better enforcement.</p>	<p>There is some media reporting of labour abuses, and some worker advocacy groups have been established, including several in the Pearl River Delta.</p>
<p>Private sector enforcement measures, such as corporate social responsibility programs involving supply chain regulation, have tended to lack credibility, because of lack of independent monitoring and of worker participation.</p>	<p>Some CSR measures are becoming increasingly sophisticated with multiple stakeholder involvement, codes more capable of implementation and better supervision regimes. However, these generally remain confined to certain industries, especially those exposed to consumer pressure in the developed countries.</p>

8. Conclusion

- 8.1. After a period of relative inactivity in the regulation of working conditions, from the mid 1990s to the early 2000s, national and local governments in China have in recent years extensively revised labour law norms, especially in relation to wages. There have been considerable advances in the content of legal rules, and important innovations have been made in enforcement.
- 8.2. However, some aspects of working conditions regulation, especially national level norms concerning working time and work/family, have remained little changed since the Labour Law was enacted in 1994, or even earlier. There has been a far-reaching transformation of the economy since that time, with the private sector becoming the dominant employer. Many of the older legal

¹⁵² See Halegua at note 25

instruments primarily address state enterprises and require reworking. Moreover, some instruments rest on problematic gender assumptions, such as the Women's Labour Protection Regulations.

- 8.3. It would be useful, therefore, to re-examine the working conditions provisions in the Labour Law. The advances made in the Labour Contract Law and in many provincial and municipal level initiatives, as well as the emergence of Chinese-authored empirical and theoretical research much richer than that available when the Labour Law was drafted, provide ample material for the production of new working conditions norms more appropriate to work in contemporary China.

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