

The Prospects for Legal Enforcement of Labor Rights in China Today - A Glass Half Full

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Everyday in China's manufacturing heartland, the Pearl River Delta, there is a strike or some form of labor dispute involving more than one thousand workers. At countless other factories in the region there are smaller disputes over low wages, non-payment of wages, overtime and benefits or management abuse and exploitation. Strikes and work stoppages are part of daily life in the Pearl River Delta. This is in spite of the fact that, under the current constitution of the People's Republic of China (PRC), workers do not have the right to strike. The daily strikes and protests have forced legislators in the delta boom town of Shenzhen to take a long hard look at local labor legislation and amend it in an attempt to placate the demands and grievances of ordinary workers.

In June this year, the standing committee of the municipal people's congress issued *Draft Regulations on the Growth and Development of Harmonious Labor Relations in Shenzhen Special Economic Zone*. They represent a significant step towards redressing the current huge imbalance of power between labor and management in the region. In particular, the regulations stipulate that when a major strike breaks out, the government can order management not to take any action for a period of 30 days that is liable to exacerbate the dispute. As a local labor union official in Guangdong province has pointed out in a recent article in the *New Express* newspaper, by clearly stipulating the rights and obligations of employers and workers, these *Draft Regulations* bring strike action within the scope of legal regulation, and as such, the legal right to strike is now "only one step away."

The Role of China's Labor Union

The pressure of workers' actions is changing the legislative landscape in China. Laws are being amended to better serve workers' interests. However, simply changing the law is not enough. For China's legal system to really develop, the law must be enforced, and workers must be allowed to exercise their legal rights to actively participate in the legal process. The new *Labor Contract Law* gives prominence to the use of collective labor contracts as a means of fostering more harmonious labor relations in the workplace. There is a crucial role to be played here by China's sole legally permitted union, the All China Federation of Trade Unions (ACFTU), in both ensuring the law is respected and implemented, and in bringing workers into the negotiation process for collective labor contracts — factory-wide, legally binding contracts covering the wages, overtime payments and benefits of all employees.

Unfortunately, the ACFTU has so far been more focused on fulfilling quotas and meeting targets than in effectively representing workers, and has tended to impose collective labor contracts in a top-down manner and with little regard for the actual needs and conditions of the enterprise concerned. However, at the local level, there are ACFTU officials — people who have the difficult job of actually ensuring greater social and political stability at the grassroots level — who realize that developing worker participation in the negotiation process is the only effective way of ensuring that a collective labor contract has any real meaning. They understand that if the workers are not involved, the contract cannot reflect their demands and therefore will do little, if anything, to address or resolve problems on the factory floor.

By actively encouraging worker participation, the ACFTU would both improve its own, currently very limited, credibility as a genuinely representative workers' organization, and help develop respect for and confidence in the law among workers. The PRC has a wide range of labor legislation dating back to the 1992 *Trade Union Law* and the 1995 *Labor Law*, which give China's workers basic legal rights. These

rights have been enhanced by the new *Employment Promotion Law* and *Labor Contract Law*, both of which went into effect on January 1, 2008, and by the *Labor Dispute Mediation and Arbitration Law*, which was enacted on May 1, 2008. The promulgation of three major labor laws in one year indicates just how effective worker action has been in forcing the government's hand. These laws have not been introduced because the government is particularly enlightened, but because workers' strikes and protests against widespread and continued rights violations left the government with no option but to change the law, as a means of forestalling increased labor conflict. In other words, China's emerging labor movement, although still spontaneous and unorganized, is already acting as a positive force for change.

Changing the Legislative Landscape across China

It is not just at the national level and in relatively progressive areas such as Shenzhen where the legislative framework is changing. Local and regional governments across China are responding to rapidly changing economic and social conditions and workers' demands by introducing new labor regulations and provisions designed both to protect workers' rights and to improve relations between labor and management. The provinces of Hebei, Liaoning, Jiangsu, and the cities of Beijing, Shanghai and Shenyang, for example, have all recently introduced new regulations on the promotion and implementation of collective labor contracts.

Hebei took the lead in this process by introducing its Regulations on Enterprise Collective Consultations between Labor and Management on January 3, 2008. The regulations specify that the negotiation process between labor and management "should be open and equal, seeking consensus, and giving equal weight to the interests of the enterprise and the workers, safeguard workers' actual pay levels, and conform to enterprise productivity levels and local economic conditions." The Shenyang regulations even make it compulsory for employers to accept workers' requests to conduct collective negotiations over the terms and conditions of employment, and substantial fines are specified for companies and CEOs that refuse to do so.

Significantly, the Hebei regulations explicitly state that where there is no labor union at the enterprise, the workers' representatives in the negotiations should be "democratically elected by a majority of employees." Where there is a labor union, representatives should be "recommended" by the union, and scrutinized by the workers' congress. (Currently, the majority of private-sector workplaces still have no official union presence.) The regulations outline in detail the scope of the negotiations, which focus on wage levels but include a wide-range of pay and benefit related issues, including methods and times of wage payment, subsidies and allowances, holidays, sick leave and maternity leave, as well as the length and conditions of renewal of the collective labor contract. They specify that the workers' remuneration agreed in the collective contract can not be lower than the local minimum wage, and that the remuneration specified in individual workers' contracts can not be lower than the terms specified in the collective contract.

Labor Rights Litigation

The problem for workers in China is not a lack of legislation; it is a lack of legal implementation and enforcement. Many workers believe that the law only exists on paper and lacks real force to protect their rights. In 2003, China Labour Bulletin (CLB) set up its Labor Rights Litigation Project, to demonstrate that, even if local government agencies are unwilling to enforce the labor laws, ordinary Chinese workers can use that legislation to protect their rights in a court of law. CLB provides workers with local lawyers to represent them in civil and administrative actions against employers and local government authorities, or — in cases where worker activists have been detained by the police — in mounting an effective court defense for them against the criminal charges involved.

It is often assumed that there is little or no judicial independence in China. While this is certainly still true in politically sensitive cases, in the majority of labor rights cases, the courts nowadays tend to deal with cases impartially and to render verdicts on the basis of the law. In many cases, the labor rights violations are so blatant and egregious that the judge has no option but to rule in favor of the plaintiff. And over the last two years, workers, in particular migrant workers, have been winning larger and more significant awards. The *Shenzhen Commercial Daily* reported that on October 16, 2007, a 36 year old migrant worker was awarded 440,000 yuan (approximately \$50,000) in compensation by a court in Shenzhen after being paralyzed in an accident on a construction site the previous year. The award was more than twice the government's recommended compensation for the families of workers killed in coal mining accidents. Other recent cases have significantly broadened the scope of labor rights litigation. The *Southern Daily* reported that on October 22, 2007, a Guangdong court awarded a migrant worker named Song 45,000 yuan in compensation even though he had signed a contract waiving his rights to work-related compensation. The court deemed the contract to be invalid.

Probably the most widespread grievance among migrant workers is the issue of non-payment of wages. However, workers' attempts to claim wages in arrears through the arbitration and court systems have been hampered by a common misunderstanding of China's *Labor Law*. Article 82 states that: "In raising an arbitration claim a party should make a written application to the Labor Dispute Arbitration Committee within 60 days of when the labor dispute first occurred." Many legal and government officials have assumed this stipulation meant claims for wages in arrears could only be for two months at the most. However, according to the *Southern Workers' Daily*, in December 2006, a Shenzhen court awarded a migrant worker named Hu two years worth of unpaid overtime wages, totaling more than 46,000 yuan.

Facilitating Mediation, Arbitration and Litigation

The main problem for workers seeking legal redress for violations of their rights is not, in most cases, a lack of judicial independence; it is simply that they cannot afford a lawyer. As such, CLB is committed to paying the legal fees for workers who are unable to pay for their own lawyer. Over the last 15 months, CLB has taken on 274 labor rights cases, and provided about \$87,000 in fees to law firms and individual lawyers in China who specialize in workplace discrimination and work-related injury cases, as well as those handling disputes over the non-payment of wages, pension, redundancy and economic compensation cases. The great majority of cases concluded have been successful and many have resulted in substantial compensation awards for the plaintiffs. Over sixty cases have been concluded so far, mostly via court litigation, and provisional verdicts and compensation awards have been handed down in an additional 104 cases. The worker plaintiffs lost in fewer than ten of these cases. In all the rest they won compensation for industrial injuries, recovered wages in arrears, gained job reinstatement or obtained other benefits such as labor insurance payouts. The total amount of compensation (confirmed or provisional) and other benefits obtained by workers was 3.8 million yuan (about \$547,000).

In addition, CLB last year helped obtain 7.2 million yuan (\$1.02 million) in wages in arrears for about 2,000 construction workers who had been staging a week-long public protest. Mediators in the dispute not only diffused the protest but successfully negotiated a settlement with local government officials, demonstrating that mediation and other non-adversarial dispute resolution techniques are just as important as litigation in developing a civil society in which legal contracts between employers and employees are honored. Indeed, mediation is often preferable to litigation, which tends to be a measure of last resort used after a labor dispute has become irreconcilable.

The Key Role of NGOs in Creating a Civil Society

The role of non-governmental organizations (NGOs) and civil rights groups in China has been, and will continue to be, crucial in the development of the country's legal system. The Beijing-based group Yirenping, for example, is actively involved in raising awareness of HIV/AIDS and Hepatitis B discrimination in China. It has published a handbook informing people with HBV how to protect their rights, it runs an online support group, and most significantly for labor rights protection, it intercedes in cases where workers have been sacked or refused employment because of their HBV status. Yirenping has helped to bring dozens of anti-discrimination lawsuits and has already obtained significant compensation awards for the plaintiffs. Regrettably, however, many of these compensation awards are subject to confidentiality clauses and cannot be made public.

In addition to winning compensation for individual plaintiffs, Yirenping's advocacy has also helped change the legislative landscape. On April 2, 2008, a university graduate denied employment at a computer firm in Shanghai because of his HBV status was awarded "satisfactory" compensation through a confidential court-mediated settlement. The same day, local media reported that the Shanghai Public Health Bureau had stipulated that HBV testing would no longer be routine for prospective employees and that the city's medical examination forms were being modified accordingly. The bureau added that prospective employees could only be tested for HBV if the examinee requested it or if the employer proved that the job advertised was legally off-limits to people with HBV. China has an estimated 130 million carriers of the HBV virus, so these lawsuit-driven reforms have a huge potential impact.

Earlier, on May 18, 2007, the Ministry for Labor and Social Security and the Ministry for Public Health issued a joint circular, *Regarding Views on the Protection of HBV Carriers' Right to Employment*, clearly stipulating that apart from specific industries where national laws, administrative regulations and Ministry of Health regulations have identified a higher risk of transmission of HBV, employers cannot refuse to hire, and cannot dismiss, employees on the basis of their HBV status. The *Employment Promotion Law*, which went into effect on January 1, 2008, further stipulates that employers "cannot reject applicants on the basis of their carrying an infectious disease."

Keeping the Support and Good Will of the People

It is clear that the Chinese government has, to some extent, been more willing than in previous years to listen to its citizens when they voice dissatisfaction and grievances, and to make changes to the law designed to enhance and safeguard their legal rights. In the wake of the terrible earthquake of May 12 this year, the government has garnered a tremendous amount of good will from the Chinese people. It is imperative that Beijing maintains and utilizes that good will by making sure its citizens are included in the future development of civil society. In other words, the government must seek to strike a better balance between the need for economic growth and the interests of social justice.

In the area of labor rights, this means workers exercising their rights by establishing genuinely representative labor organizations and participating in collective bargaining with management. On an individual level, workers must be encouraged and assisted to use the existing and wide-ranging canon of labor legislation in China to demand mediation or arbitration or to bring law suits against employers for violations of their rights. In addition, the active support and involvement of civil rights groups in defending workers rights will be crucial in the development of a functioning civil society in China.

Several questions remain. How can China establish the nuts and bolts of a genuine collective bargaining system? Will that system allow workers to negotiate wage agreements that reflect the true value of their labor and not just — as tends to be the case today — the legally mandated minimum wage? Will the ACFTU embrace the system or simply sit on the fence, an increasing irrelevance to the real issues?

The Chinese government has a historic opportunity to create a system of peaceful negotiation between labor and management in which both sides respect each other, the negotiation process and the resultant legal contract. If it has the vision and courage to do so, Beijing will take a significant step towards realizing its own goal of creating a "harmonious society," one in which citizens not only have confidence in and respect for the law, but also are active participants in the legal process and play a role in promoting greater social justice for all.