

Congressional-Executive Committee on China
Testimony of Earl V. Brown, Jr.
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Addressing Problems in Chinese Labor Law

Introduction:

At the outset, I want to acknowledge the positive role this Commission plays in offering a capacious platform for many of the diverse voices in Chinese civil society, and for its attention to the development of Chinese labor law as an important foundation for a robust civil society.¹ Chinese civil society is vast, hugely diverse and rapidly changing. Inclusion of the full range of Chinese civil voice in efforts to understand developments in that complex country is crucial. Government to government dialogues often fail to capture or understand key changes brewing on the ground. Similarly, exchanges through more established and government-dominated institutions, such as universities, are often removed from grass roots ferment. In the absence of the range of grass roots voice that this Commission has encouraged, the flow of information about the extensive and rapid changes in China's civil society and industry runs the risk of being constricted and sanitized.

In no area is the need for inclusion of the grass roots voice more important than in my topic here, labor law. China is now the world's factory, with all the pluses and minuses that entails for China and the world. China faces a set of development and governance issues quite similar to those faced by most industrial countries in their histories—but at a vastly accelerated pace and involving a far greater number of workers. The labor “question” —how gains from economic growth are shared—so central to politics in industrial nations for such long periods, is—along with the environment and corruption—at the center of a fierce debate about the direction of China. Labor law's project is to establish fair standards for pay and working conditions, promote safe and healthy workplaces and provide efficient mechanisms for the timely resolution of industrial grievances before they ripen into strikes.² Because labor law affects the living standards and quality of life of millions of Chinese industrial workers, making labor law work for workers, employers and society is one key theme in the project of entrenching the rule of law by making the law work in China.

The history of industrializing societies rather uniformly teaches that fair treatment of industrial workers, and accessible, fair and transparent industrial dispute

¹ Congressional-Executive Commission on China. *CECC Annual report 2011*. Washington, DC. 2011. pp. 67-79; Congressional-Executive Commission on China. *CECC Annual report 2010*. Washington, DC. 2010. pp. 71-85; Congressional-Executive Commission on China. *CECC Annual report 2009*. Washington, DC. 2009. pp. 68-87; Congressional-Executive Commission on China. *CECC Annual report 2008*. Washington, DC. 2008. pp. 41-56.

² Rodgers, Gerry and Eddy Lee, Lee Swepston, Jasmien Van Daele. *The International Labour Organization and the Quest for Social Justice, 1919-2009*. Ithaca, NY: ILR Press/Cornell University Press, 2009. p. 3.

resolution mechanisms, are keys to establishing the overall rule of law and industrial peace. If workers are cheated on earned wages, if employers and their allies in government can suppress wages and build unsafe factories and mines that maim and debilitate large numbers of workers, only to eject them without health care and income support back into society, then a large segment of the citizenry will inevitably view the rule of law skeptically, and may proceed to the next logical step of questioning the legitimacy of government.³ These are recurrent themes in the history of industrialization and there is no reason to expect that China will be exempt. An effective and fair labor law may prove essential to promoting the rule of law and ultimately stability in China.

The mission of my organization, the Solidarity Center, is to work with labor movements around the world to strengthen worker voice. That mission flows from our intrinsic ties to the U.S. labor movement and to literally thousands of unions and grass roots worker rights support organizations around the world. We are thus rooted in an important sphere of US grass roots civil society and work with our counterparts in civil society around the world to promote international labor standards, human rights and worker voice. I am a labor lawyer and have practiced in the US, and Asia. Currently, I am the union co-chair of the ABA International Labor Law Committee and a Fellow of the US College of Labor and Employment Law. These professional positions allow me to engage in frequent dialogue with labor lawyers and scholars in China seeking to advance worker rights and voice.

In recent years, this Commission has wisely devoted attention to the details of labor law in China, and has been “*in the weeds*” on these important aspects of China’s economy and polity.⁴ On labor, the Commission has been inclusive, and where warranted has acknowledged progress in China on the “labor question.” And, indeed, over the period 2006-2010, China made great strides in laying new foundations on difficult ground for labor laws based on the principles of a private, market economy.

China allowed a broad and unprecedented debate, including robust advocacy from grass roots worker rights advocates in the official unions, in worker rights centers, in labor law legal aid clinics and labor law firms, preliminary to enacting a statute, the 2008 Labor Contract Law (LCL). The 2008 LCL seeks to redress the evils of wage theft from Chinese workers, to include internal migrant workers under the protection of labor law, and to begin to address the excessive casualization of work in China and the resulting lack of job security. The inclusive public debate, including strong and sometimes fierce advocacy from foreign and domestic employer groups such as the US commerce chambers, was unique. It was a hopeful precedent for future labor legislation—as it allowed the melding of all the interests affected, those

³ National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 April 12, 1937.

⁴ Congressional-Executive Commission on China. *CECC Annual report 2011*. Washington, DC. 2011. pp. 67-79; Congressional-Executive Commission on China. *CECC Annual report 2010*. Washington, DC. 2010. pp. 71-85; Congressional-Executive Commission on China. *CECC Annual report 2009*. Washington, DC. 2009. pp. 68-87; Congressional-Executive Commission on China. *CECC Annual report 2008*. Washington, DC. 2008. pp. 41-56.

of workers, employers and government. The resulting law deals with some of the problems comprehensively and reflects the balance of all the interested parties on labor issues. We believe that this open debate and inclusion of all voices was essential to securing wide spread support for law.

This belief was buttressed by the ensuing vigor with which many of China's labor relations institutions and the courts pursued unpaid wage claims, a huge social injustice and source of unrest. But this forward movement may have stalled, due to an inability to fill critical gaps in fashioning a Chinese labor law for industrial relations in a private market economy, as well as larger policy trends in addressing the emergence of a diverse and vigorous Chinese civil society.

In what follows, I attempt to examine the current official approaches to industrial unrest from the perspective of government policy, using the very values articulated by Chinese policy makers on the labor question. I will show that the existing legal framework for industrial relations and civil society, despite positive developments in recent years, will not advance the goals of China's own labor policies.

The stated labor policies of the government and the All China Federation of Trade Unions (ACFTU), and goals of current labor law are clear and obvious. I attempt to summarize them here: increase wages and the purchasing power of employees; make space for worker voice on wages, hours and working conditions; establish worker rights and implement those rights in a fair and timely fashion; and by these means advance the goal of industrial peace or "harmony".⁵

The ultimate goal of both the law and policy makers in government and the union is to ensure industrial peace by securing rights and enabling worker voice. These policy goals are standard in most economies with large industrial sectors. Yet the framework within which those goals are to be reached will not yet suffice to advance industrial peace or the rule of law in labor relations. Rather, China runs the risk of endorsing rights consciousness in workers and thereby intensifying worker voice but frustrating the achievement of fair and lawful outcomes for workers in industry. This mismatch between goals, rights consciousness and frameworks seems a recipe for social unrest, if the history of older industrial societies can serve as a guide.

⁵ "Full Text: National Human Rights Action Plan of China (2012-2015)" English.news.cn. 11 Jun 2012. Web. <http://news.xinhuanet.com/english/china/2012-06/11/c_131645029.htm>; Ligorner, K. Lesli, and Todd Liao. "The Renewed Unionization Campaign in China Coupled with Collective Bargaining." China Matters: A Paul Hastings Newsletter for Investing & Operating in the People's Republic of China. August 2010. Web. <<http://www.paulhastings.com/assets/publications/1718.pdf>>; "ACFTU Presses Ahead with Collective Wage Bargaining." All-China Federation of Trade Unions, 31 Jul 2010. Web. <<http://www.acftu.org.cn/template/10002/file.jsp?cid=23&aid=562>>; "Cheng Siwei: Increase People's Wages to Increase Domestic Consumption and Economic Growth." ifeng.com, 27 Jun. 2009. Web. <<http://finance.ifeng.com/topic/news/bjgjrltbgh/news/hgj/20090627/852320.shtml>>.

Labor Law Issues:

The principal labor law issue in industrial China is the regularization of grass roots voice and industrial action in a predictable rule of law framework. In the main, industrial workers in China have no accessible and continuously present institutions at the workplace to speak and bargain for them. International labor law supplies clear standards for forming unions and for providing scope for associational activities including strikes.⁶ International law additionally allows for freedom in creating relationships between Chinese grass roots worker institutions, national sectoral unions and national union centers, as well as association with international trade unions and worker rights institutions.⁷ The simple purpose of these freedom of association norms is to give legal recognition to those institutions for worker voice and for collective bargaining that are rooted in workers, and reflect the interests and demands of workers and not those of others. The goal of the norms is to permit real bargaining between workers and employers, bargaining that resolves disputes and ensures industrial peace—that is, “harmony.”

The current Chinese industrial relations system has little capacity to respond to workers’ demands at their source since it remains fused to the governmental structure and does not originate from the workplace. A vast private industrial sector has emerged with hundreds of millions of workers and millions of employers, all acting largely on their own perceptions of self-interest. This invites exploitation and conflict and does not promote harmony. The union, in the main, has no immediate presence on the factory floor. Located far from the factory, mine or transport hub, often attuned to local government more than to workers, the official union is likely the last to know of shop floor grievances and strikes.

The official union’s ties to local government rather than to the shop floor have another consequence. Employers, particularly large employers, have an outsized influence on local governments everywhere, and so too in China. This elemental fact of labor relations can mean that employers have more voice within the local or provincial union than workers, and far more than they should if the union is to act credibly as a vehicle of worker voice and interests. Bargaining over those worker interests should take place between employers and workers in a tri-partite framework rather than within the union. But often the employer-local government link means that worker voice is not even heard but extinguished until a crisis has erupted.

⁶ International Labour Organization (ILO) C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Convention concerning Freedom of Association and Protection of the Right to Organise (Entry into force: 04 Jul 1950) Adoption: San Francisco, 31st ILC session (09 Jul 1948); International Labour Organization (ILO) C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Entry into force: 18 Jul 1951) Adoption: Geneva, 32nd ILC session (01 Jul 1949).

⁷ International Labour Organization (ILO). *ILO Declaration on Fundamental Principles and Rights at Work*. 2003.

This disconnect between the union and the shop floor undermines the union's ability to reflect worker voice and channel grievances into dispute resolution mechanisms that are capable of grappling with the real clash of divergent interests and the real scope of the conflicts at hand. It also limits the union's ability to make settlements stick. The result is more industrial action and less industrial dispute resolution. Without roots and credibility on the floor, the official trade union structure has difficulties creating real sectoral union institutions able to address sector wide issues that often are at the heart of local strikes. Lack of freedom of association in forging international links means that Chinese unions—as well as foreign unions—remain crippled at dealing with common employers and common problems in a global economy.

Given China's astounding diversity, and the lack of accessible information about factory level industrial relations developments, every generality above is necessarily subject to qualification. In some instances, the official union is proceeding to root itself in the shop floor and we hope this trend continues. The union has also made strides in advocating for workers on the legislative level and representing them in courts and administrative tribunals. But it remains largely a stranger on the shop floor, and so viewed by most workers and observers. This lack of roots in industry has the result that industrial action is increasingly the avenue for settling industrial disputes.

The formal structure for employer input into industrial relations is equally removed from the realities of industrial relations. Employers do not bargain with industrial workers directly through employer associations. In fact, many aspects of industrial relations on both the worker and employer side are pursued outside the formal structures. Trade associations and grass roots actors on the employer and workers side compete without clear guidelines to impact labor laws, labor law compliance and wages, hours and working conditions. Employers often have no staff with training in industrial relations and collective bargaining, and are thus often unable to know how to recognize grievances and resolve them fairly and promptly before they erupt in industrial action.

The labor standards set by Chinese legislators and governmental regulators cannot be enforced by bureaucracy alone. There are simply too many employers and too many workers acting autonomously to allow for bureaucratic or judicial enforcement of basic labor standards, much less industrial peace. No government could reasonably be expected to have the number of factory inspectors necessary to police China's enormous economy. Without inclusion of grass roots worker organizations in the industrial relations picture, standards are not enforced uniformly and employers who evade standards achieve lower costs and competitive advantage based simply on their defiance of labor law. This subverts the efforts of compliant employers to remain in compliance, and fuels illegality in labor relations. The result—the rule of law is eroded in an area that affects millions of citizens. And labor peace remains elusive.

China's labor law as presently constituted is an effort to stage "Hamlet" without the Prince of Denmark. The missing actor is the worker based trade union that is able to articulate worker voice, conduct genuine bargaining and prevent and settle strikes and other labor disputes. As a result, China's industrial workers are pushing for better wages and conditions in the absence of any legal or work place institutional framework for channeling industrial grievances and discontent. The upshot--China has a lot of strikes.

In this environment, where the Prince of Denmark (the autonomous trade union) is absent, efforts to channel and resolve industrial protests by judicial, arbitration, mediation and human resource approaches may not yield the results promised by the advocates of those techniques in the US, China and elsewhere. To that end, U.S. government efforts to improve Chinese government administrative procedures in the industrial relations sphere, while welcome, are mainly beside the point. Individual case handling in courts is not the most effective approach to collective factory wide disputes. Mediation of disputes between individual workers and their employer is equally ineffective, as the fundamental lack of an equal advocate for the workers often skews the result in the employer's favor and leaves a bad taste on the shop floor. Trade union voice and comprehensive bargaining will predictably resolve disputes more rapidly and more effectively than courts, mediators or arbitrators.

Unfair compromises of basic labor standards as to hours, wages and conditions imposed by judges, arbitrators or mediators foster dilution of what in labor law are meant to be minimum standards. These standards in Chinese law and the labor laws elsewhere represent a legislative social judgment that they are the floor below which conditions and wages should never fall. Unbalanced compromises of those basic minimum standards promote a "race to the bottom" by corroding the basic statutory framework for work and have ramifications within the Chinese and global economies.⁸

Human resources techniques and corporate social responsibility initiatives that are aimed at putting a positive gloss on abusive industrial conditions cannot advance industrial relations in China, in the absence of a vigorous voice for workers. Witness, the elaborate but ultimately ineffective public relations efforts of Foxconn to pacify workers and to distract consumers' attention from the exploitation of young Chinese workers. Rather than recognizing the workers and bargaining with them, Foxconn has imported psychologists and staged ludicrous extravaganzas about "loving Foxconn" while leaving the fundamental labor law abuses unaddressed.⁹

⁸ If a worker recovers only half of the statutory minimum wages due for work performed in mediation, then the minimum standard set by government has effectively been halved. While there are circumstances, such as bankruptcy, where funds have evaporated and claims cannot be paid in full, routinely comprising minimum wage cases in mediation or judicial forums effectively lowers the minimum to the settlement amount.

⁹ "Foxconn Rallies: Employees Pledge To Cherish Their Lives." *Free Talk*. China.org.cn, 23 Aug 2010. Web. <<http://forum.china.org.cn/redirect.php?tid=15527&goto=lastpost>>.

A final problem in Chinese labor law is the misclassification of industrial workers. Many workers are classified as student interns or “temps” or contractors, and thus excluded from the protections of labor law, and consequently from bargaining over wages and conditions. These workers are excluded from the labor law as a result of artificial legal arrangements crafted by employers and their lawyers and human resource advisors. The artificial legal arrangements are designed for the purpose of disguising the evident empirical relationship. The excluded individuals are, in economic terms, “workers” working for pay for an employer who controls their wages, hours and working conditions.

In passing the 2008 LCL, the Chinese legislature, which is supreme with regard to framing law under the Chinese Constitution, sought to include all workers within its protections.¹⁰ However, employers have relied on regulatory passivity to misclassify workers coming to the factory floor from technical schools as student “interns” rather than the line workers they often are in fact. As a consequence, these millions of line workers are paid less than minimum wages and less than their co-workers on the line. Such interns make up a significant proportion of the work force, and have been active in recent strikes at car manufacturers at least in part because of this unequal treatment by their employers. A labor law that excludes young workers who perform unskilled factory work unrelated to their educational goals and with insignificant educational benefits can hardly claim to address worker rights comprehensively.¹¹ Yet employers and some regulators are using the intern label as a device to exclude these young factory workers. This misclassification does not reflect the LCL statutory values of covering workers comprehensively, and is linked to a feeling of unequal treatment among younger workers that results in industrial action and should be reversed.¹²

A similar problem arises from the abuse of the dispatch agency system (劳务派遣) and independent contract classification under current LCL practices being followed by employers without challenge by regulators. Employer flexibility is essential to

¹⁰ Constitution of People’s Republic of China, Section 2; Law of the People’s Republic of China on Employment Contracts, Adopted at the 28th Session of the Standing Committee of the 10th National People’s Congress on 29 Jun 2007. (in force 1 Jan 2008). Articles 1-3. (Unofficial Translation Prepared by Baker & McKenzie).

¹¹ Cooney, Sean, “The Scope of Chinese Labor Regulation: Boundaries and Consequences.” Paper delivered to the NYU Center for Labor and Employment Law and the US-Asia Law Institute Research Conference on the Chinese Labor Market, 11-12 May 2012. (New York 2012).

¹² This sub silentio acceptance of this interpretation of the coverage of the LCL to exclude student interns, in the face of the empirical realities in many workplaces, presents a fundamental challenge to the rule of law in China. The body charged with enacting law, the National People’s Congress, has passed, after much discussion and debate, a comprehensive general law with the goal of covering and protecting all workers (劳动者). Despite this deliberate legislative intention to reform Chinese labor law and fill its gaps in coverage and protections, a large number “interns” are now performing routine, unskilled work for industry in programs without discernible educational or training content. There is no stated exemption in the LCL for students or interns. But the proposition that these nominal “interns”, who are empirically “workers”, are not covered because employers declare they are not in view of the arrangements they have crafted with technical schools for line workers effectively ignores both the facts and the role of the legislature in defining the coverage of a law and using rather plain words to express this intent. *But see*, Cooney, supra note 11. But these employer arguments rely on Marxist notions of what a worker is ontologically and not on the actual facts of industry. Students working full time on the shop floor can also be workers.

allowing employers to grow their business and to respond to unforeseen obstacles and opportunities. But using “dispatch” or contract workers sourced from labor brokers (“dispatch companies” or temporary employment agencies [劳务公司]) working at lesser wages and with far lesser job security right alongside better paid workers with more job security, many times doing the same work, is a recipe for wholesale evasion of labor law standards, erosion of job security and a fertile field for strikes.

Some estimates put the number of ‘dispatch’ workers in Chinese industry at 27 million. As noted, many of that vast group of excluded workers work below standards with respect to wages, hours and job security.¹³ The wholesale use of dispatch workers to perform routine core enterprise functions is not much more than an effort to end run Chinese labor law standards, and not a balanced response to business exigencies.

China is now looking at plugging the “dispatch worker” and independent contractor loopholes in the LCL by limiting these outsourcing practices to temporary time periods, and requiring “equal pay for equal work.” China should also now address the intern issue, by insisting that employees who perform work under arrangements with technical schools that afford little in discernible educational or training value are, in all reality, workers and deserving of the full protection of the labor laws of China.

The Current Discomfort with Civil Society:

In an industrial world as huge and diverse as China’s, worker agency will inevitably be linked to ferment in the larger society. This is one lesson from other industrial societies—workers reflect and act upon larger trends in rights consciousness and often seek alliances in civil society. Their aspirations and interests also routinely spill over the vessels of formal trade unionism. Every industrial society I know of has seen the growth of worker centers, worker beneficial societies, legal aid clinics and legal advocacy by lay legal workers. These organizations and networks are not unions per se, but are means of autonomous worker rights advocacy and worker voice. It seems China right now is seeking to dampen this inherent and completely normal aspect of industrial development.

Worker rights activists and their fragile grass roots and community institutions are being surveilled and harassed by local government, employers and security officers. Activists are tracked by cops and employer security guards, leases cancelled by landlords under local government pressure, and activists and their families threatened and even roughed up. In one supposedly “open” province, Guangong,

¹³ Revisions to China’s Labour Contract Law focus on abuse of employment agency system.” China Labour Bulletin, 28 Jun 2012. Web. <<http://www.clb.org.hk/en/node/110086>>.

authorities have just shut down seven long standing grass roots worker centers.¹⁴ The official union in some areas is insisting that autonomous outlets for worker voice come in under the union umbrella, often with the goal of control and not protection.

On the factory floor, it seems that workers who speak out vigorously are being washed out of the work force. There is evidence, frankly, that in many places there is collusion between employers and the official union in “sanitizing” the shop floor. This official union should be recruiting those grass roots leaders to be organizers and grass roots advocates. Not expelling them from the work force.

A security approach to worker voice cannot work to advance industrial peace. It is true that the non-profit NGO sector in China needs a better legal framework within which to function, and that fraudulent or untrained providers of services to workers need to be regulated. It is equally true that bringing worker rights NGOs in close alliance with the union could serve to confer legitimacy on those fragile grass roots institutions that have emerged and protect them from hostility by employers and their friends in local government. Indeed, closer and more comradely interaction by the official union with these NGOs could enrich the union and open it to the new industrial arrangements that Chinese workers are forging outside the union with their employers. But it is equally true now that these trends to bring in the NGOs seem aimed at limiting and controlling worker institutions, rather than allying with them to represent workers vis-à-vis their employers.

Conclusion and Recommendations:

The above “criticisms” of Chinese industrial relations law and practice are meant in the sense of “critical” as in “critical” thinking. To show what improvements need to be made to conform the legal framework to the policy goals of China. The element of worker voice and grass roots civil society needs to be included prominently in the mix of industrial relations.

The United States should continue to support trade union cooperation and worker rights dialogue between U.S. unions and civil society organizations, on the one hand, and diverse Chinese worker rights organizations of all kinds, on the other hand. The activists struggling to make the promises of Chinese labor law real should always be included in the dialogues and cooperative programs of the two countries.

Work with diverse and fragile grass roots actors in China’s industry is difficult. There may be a tendency in our government to prefer dialogue and cooperation with safer partners—ministries, the official union and universities. But confining dialogue and cooperation to government influenced industrial actors in China—

¹⁴ Tam, Fiona. "Guangdong Shuts Down at Least Seven Labour NGOs." South China Morning Post 27 July 2012. <<http://www.scmp.com/portal/site/SCMP/menuitem.2af62ecb329d3d7733492d9253a0a0/?vgnnextoid=782a79b7634c8310VgnVCM100000360a0a0aRCRD&ss=China&s=News>>.

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officials, union heads as well as labor law and industrial relations professors—risks missing the grass roots industrial ferment so important to issues of governance and stability in China, and hence so large a factor in the relations of China and the U.S.

Civil society to civil society, union to union and worker rights advocate to worker rights advocate contact and cooperation should always be an element in our approach to the world's newest industrial giant, China. These direct civil society links imperil no government and do not import conflict where there is none already. But they inestimably enrich both China's and the U.S. understanding of the global economy and the China-U.S. relationship.

Thank you for this opportunity.