

MEASURING PROGRESS UNDER CHINA'S LABOR LAW: GOALS, PROCESSES, OUTCOMES

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*Only strong unions and strong laws, strongly enforced, can solve these problems
[in the American workplace].*
—Lance Compa¹

*[T]he paradigm of employment that underpinned much postwar labor legislation
in advanced economies became increasingly anachronistic. No longer could it be
assumed that industrial relations systems were populated primarily by semi-
skilled white male industrial workers employed by domestic companies, earning
relatively high salaries, enjoying lengthy job tenure and receiving social benefits
built on that tenure, and on the class and workplace solidarity which tenure
facilitated. No longer, therefore, could public policy platforms, legal entitlements
or union strategies be usefully constructed on the old paradigm.*
—Harry W. Arthurs²

I. INTRODUCTION

Each of the experts quoted in the epigraph is the product of a milieu different in every respect from that of China, the subject of this paper. The United States and Canada are *developed* countries, where even the poor—those who are entitled to government assistance—are

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1. Remarks for panel "New Ways of Governing the Workplace," Section on Labor Relations and Employment Law, American Association of Law Schools Annual Meeting, Washington, D.C., Jan. 5, 2007.

2. H.W. Arthurs, *Compared to What? The UCLA Comparative Labor Law Project and the Future of Comparative Labor Law*, 28 COMP. LAB. L. & POL'Y J. 591, 596-97 (2007) (citations omitted).

immeasurably better off than the average Chinese. An American writer relocated to a trendy historic quarter of Shanghai discovers that some of her neighbors still use chamber pots for lack of indoor plumbing, an absence of basic universal infrastructure that would simply not exist in urban areas of North America.³

Yet, despite a high standard of living, Compa and Arthurs view their countries' system of labor law and employment relations in a pessimistic light. Compa reaffirms the basic structure of existing law and believes that it can be reinvigorated. However, renewal demands, at one time, the combined pressure of solid organization, law reform, and tough enforcement. Arthurs calls for an entirely new paradigm, now already in its formative stage.⁴

For Arthurs, the decline of the regulatory state is an irreversible process; it cannot be resurrected. The future lies in "some" sort of "bottom up" political action.⁵ As an admittedly crude characterization of their views, Compa speaks for the "command and control" approach to labor regulation whereas Arthurs represents the "decentered responsibility" approach.⁶

If labor law in developed countries is sickly, what then of improving workplace conditions in a developing country such as China? It has not yet experienced a classic industrial revolution; the majority of the population is still classified as rural. While the written law is slowly coming abreast of that in developed countries, the administrative resources for implementing it are seriously deficient.⁷ Local governments, charged with the unfunded mandate of enforcement, are unwilling to implement protective legislation at the sacrifice of economic development. The generation of employment and tax revenue take priority over decent working conditions.⁸

3. Emily Prager, *Settling Down in a City in Motion*, N.Y. TIMES, July 20, 2007, at F1.

4. Since the 1960s, the United States has shifted toward the development of individual, as opposed to collective, employment rights law at both the state and federal level. ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW - CASES AND MATERIALS* 92 (2007). See also Christophe Vigneau, *Labor Law Between Changes and Continuity*, 25 COMP. LAB. L. & POL'Y J. 129 (2003)(discussing the French experience).

5. Harry Arthurs, *Who's Afraid of Globalization? Reflections on the future of labour law*, in *GLOBALIZATION AND THE FUTURE OF LABOUR LAW* 65 (J. Craig & M. Lynk eds., 2006).

6. See Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L. J. 1050, 1082-83 (2007).

7. See *id.* at 1066 nn.75-76 and accompanying text; Lin Jia, *The Labor Law System of the PRC*, Dec. 29, 2005 (lecture delivered to the Standing Committee of the National People's Congress), <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=347935&pdmc=1503> (in Chinese) (copy on file with author) (in the Haidian District of Beijing, China's Silicon Valley, there are only 23 inspectors for 70,000 enterprises).

8. Janil Anderlini & Mure Dickie, *Taking the Waters*, FIN. TIMES, July 24, 2007, at 11 (local governments prize economic development as their primary task, notwithstanding environmental pollution and other problems).

Though more flexible and tolerant of differing opinions than a generation ago, China remains a one-party authoritarian state. There is but a single official trade union, subservient to the Chinese Communist Party. No competing political party, or trade union organization, is likely to emerge in the near future. The kind of reciprocal, power enhancing alliances between political parties and trade unions one finds in other countries with representative democracy is absent.⁹

Therefore, to make the standards often taken for granted by Western observers relevant to the Chinese experience, one must never lose sight of the total environment in which such standards operate. In that regard, the views of domestic experts familiar with foreign and international law are certainly enlightening. To the extent that their public statements reflect translation of international standards into an agenda for the domestic legal system, they are eminently worthy of attention. As far as China is concerned, both Compa and Arthurs have a handle on the truth, although neither appears to have considered China in articulating his views.

II. THE "SOCIALIST MARKET ECONOMY"

In contrast to post-Renaissance Europe, China has been a unified nation-state for most of the last two thousand years. It attained its most recent height of political and economic power at the end of the eighteenth and early nineteenth centuries. In 1820 China produced about a third of the world's Gross Domestic Product (GDP), greater than that of all of Europe.¹⁰ But soon thereafter a period of decline set in, and by 1952, three years after the establishment of the People's Republic, China's share of world GDP had fallen to 5.2%.¹¹

The first order of business for the new government was to restore stability to a country that had been wracked by civil war and foreign occupation. Thereafter, China adopted the command model of economic development. Private property was expropriated and ownership of all of the resources of production was vested in the State. Following the death of Mao Zedong, the Great Helmsman, in 1976, it became possible to openly address the drawbacks of centralized control of the economy: slow growth and the strangling of entrepreneurial initiative.

9. BLANPAIN ET AL., *supra* note 4, at 213 (Mexico), 449 (France), 576 (India).

10. ANGUS MADDISON, CHINESE ECONOMIC PERFORMANCE IN THE LONG RUN 40 tbl. 2.2a (1998).

11. Comparable figures for the United States are 1.8% and 28.4%. *Id.*

Under the leadership of Deng Xiaoping, the model of a “socialist market economy” was adopted, though not without strenuous opposition from conservative politicians who deemed it a betrayal of socialism. Private economic activity reemerged in all sectors. Peasants were permitted to leave rural areas and seek non-agricultural employment. Workers in state enterprises were actively encouraged to set up private businesses. Overwhelming bias toward heavy industry gradually shifted to accommodate light industry and the service sector. From virtual non-participation in world trade for nearly two decades, China opened its doors to foreign investment and pursued an export-oriented approach to development, a policy that had worked well for Japan and other Asian countries.

The policy of a “socialist market economy” did indeed produce results. A “great people” have made a “modern comeback.”¹² China now has the fastest growing economy of any country. In just a quarter century, pursuant to policies of marketization and integration with the global economy, real per capita gross domestic product (purchasing power parity adjusted) leaped tenfold from \$430 international dollars in 1980 to \$4,475 international dollars in 2002.¹³ During this same period China dramatically reduced the proportion of the population living in “absolute poverty” (less than \$1.00 per day by the World Bank standard).¹⁴ China’s foreign exchange reserves exceed \$1 trillion dollars,¹⁵ approximately half of its annual gross domestic product (GDP) at the official exchange rate.¹⁶ It is predicted that China will soon overtake Germany as the world’s third largest economy, behind the United States and Japan.¹⁷

At the same time, the entire population has not benefitted uniformly from economic growth, and some are worse off now in absolute terms. Recently, the government has promoted the policy of a “harmonious society” (*hexie shehui*) in order to achieve a more equitable distribution of the positive effects of growth.¹⁸

12. JOHN KING FAIRBANK & MERLE GOLDMAN, *CHINA A NEW HISTORY* 2–3 (rev. ed. 1998).

13. Douglas Zhihua Zeng, *China's Employment Challenges and Strategies after the WTO Accession* (World Bank Policy Research Working Paper 3522, Feb. 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=667861.

14. *Id.* See also *China's parliament starts annual session with focus on social harmony*, Mar. 5, 2007, BBC MONITORING ASIA PACIFIC (nearly 200 million people brought out of poverty in last two decades).

15. Jim Yardley & David Barboza, *China Is Forming Agency To Invest Foreign Reserves*, N.Y. TIMES, Mar. 10, 2007, at C3.

16. U.S. Central Intelligence Agency, *The World Factbook—China*, <https://www.cia.gov/cia/publications/factbook/print/ch.html>.

17. David Barboza, *China's Growth Accelerates to 11.9%, and Food Prices Spur Inflation*, N.Y. TIMES, July 30, 2007, at C3.

18. *China's parliament*, *supra* note 14.

A society largely closed to contact with Western countries from 1949 until the 1970s, China is now a major voice in international organizations such as the United Nations, the World Trade Organization, and the International Labor Organization. China has been a member of the ILO Governing Board since 2002.¹⁹ By virtue of its membership in the ILO, irrespective of ratification of particular conventions,²⁰ China is bound by the 1998 Declaration on Fundamental Principles and Rights At Work.²¹

From a standing start in the late 1970s, China has done much to revive a legal system that, crippled by political factionalism, did not function with any degree of normality for two decades. Since at least the promulgation of the 1982 Constitution, it has been prevailing dogma that economic development requires the security and predictability of the “rule of law.”²²

III. THE LEGISLATIVE PROCESS

Both the National People’s Congress (NPC) and its Standing Committee (NPC SC) have the authority to pass legislation under the PRC Constitution. The NPC, a unicameral body of approximately three thousand delegates, which meets in plenary session once a year, is empowered to enact legislation dealing with “criminal offenses, civil affairs, the state organs, and other matters.”²³ The NPC SC, which meets throughout the year and has a membership of about 150, has the authority to enact “specific” legislation when the NPC is not in session “*with the exception* of those [basic laws] which should be enacted by the NPC.”²⁴

19. Congressional-Executive Commission of China, ANN. REP. § V(c) (2006), Protection of Internationally Recognized Labor Rights, n.2 and accompanying text, *available at* <http://www.cecc.gov>.

20. China has ratified 25 ILO Conventions (of which 22 are in force) but not Convention No. 87 (Freedom of Association and Protection of the Right to Organise) or Convention No. 98 (Right to Organise and Collective Bargaining). International Labour Standards Application of International Labour Standards (APPLIS), <http://webfusion.ilo.org/public/db/standards/norms/appl/index.cfm?lang=EN>.

21. These are: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.

22. J. CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 40–48 (1999). For a discussion of the minimum desiderata for a “rule of law,” see RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 2 (2002):

At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law, and equality of all before the law.

23. XIAN FA, art. 62, § 3 (1982) (P.R.C.).

24. *Id.* at § 2 (emphasis added).

Delegates to the NPC are chosen by the province or unit (such as the People's Liberation Army) that they represent. Delegates to the NPC SC are chosen, in turn, by the NPC. In both bodies, by tradition, slots are reserved to ensure diversity of representation, for example, by women, minority nationalities, and special interest groups.²⁵ The Chairmen's Group within the NPC SC acts as a kind of steering committee for the NPC and the NPC SC, setting and overseeing the agendas of both bodies.²⁶

Commentators universally agree that the delimitation of law-making authority between the NPC and the NPC SC is rather fuzzy.²⁷ Nonetheless, a pattern has emerged based on actual practice. In the last dozen years, "basic laws" have included a revised Criminal Law, a revised Criminal Procedure Law, an Economic Contract Law, and a Property Law. By contrast, "ordinary" laws of general application relating to labor and employment, such as the 1994 Labor Law, tend to be passed by the NPC SC, leading to the reasonable inference that they are of secondary importance.²⁸

Thus, despite renewed attention to the legal system, labor and employment law remains somewhat neglected. The PRC equivalent of a labor code, the Labor Law, was not passed until 1994, well into the reform period.²⁹ In the years since, labor law has not enjoyed high priority on the legislative agenda.³⁰ In a society where the Constitution

25. Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIA L. 1, 37-40 (1997).

26. *Id.* at 26-27.

27. *Id.* at 31; CHEN, *supra* note 22, at 115-16; Perry Keller, *Legislation in the People's Republic of China*, 23 U.B.C. L. REV. 653 (1989); Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994). One of the functions of the General Affairs Research Department of the NPC SC is to advise which laws should be handled as "basic laws" and which are appropriate for "ordinary" legislation. Dowdle, *supra* note 25, at 46.

28. One exception to this generalization is the 1992 Trade Union Law, amended in 2001, which was passed by the NPC. However, the reason may lie less in the power and prestige of trade unions than in the historic momentousness of the original Trade Union Law of 1950. It was passed by the revolutionary Central People's Government, less than a year after the founding of the PRC. At this time, the government operated under a provisional constitution known as the Common Program. The first formal constitution dates from 1954. CHEN, *supra* note 22, at 64-65.

29. See Hilary K. Josephs, *Labor Law in a "Socialist Market Economy": The Case of China*, 33 COLUM. J. TRANSNAT'L L. 559 (1995) (giving an overview of the Labor Law). English translations of the Law are available at the ILO Web site, in HILARY K. JOSEPHS, *LABOR LAW IN CHINA* (2d ed. 2003), and in BLANPAIN ET AL., *supra* note 4, at 488-99.

30. Chen's otherwise excellent treatise on Chinese law does not have a separate chapter on labor law, whereas it does for such subjects as constitutional law, criminal law, civil law, and family law. Not a single entry for "labor" or "employment" appears in the index. See also ALBERT HY CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* (3d ed. 2004). The same observation applies to collections of essays which purport to supply an overview of the legal system. E.g., C. STEPHEN HSU, *UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN* (2003). See Lin Jia, *supra* note 7 (discussing the paucity of labor legislation since 1994).

bestows a right and imposes a duty to work on every able-bodied adult, this state of affairs is puzzling.

As Compa noted, “hard law” alone is not self-executing and by itself will not effectuate workplace justice, but it surely is an essential ingredient to the process. With the passage of a new Employment Contract Law (Laodong hetong fa) (ECL), arguably the most important development since 1994, the time is ripe for a status report on the evolution of PRC labor law. After years of preoccupation with economic growth for its own sake, and expectation that a rising tide would lift all boats, the passage of the ECL is part of an overall effort at the national level to temper the adverse consequences of growth.³¹

A first draft of the ECL, containing 65 articles, was released for public comment by the NPC SC in March 2006.³² A second draft, greatly expanded to 96 articles, was reviewed by the NPC SC in December 2006.³³ A third draft, not made public, was taken up but not approved by the NPC SC in late April 2007.³⁴ The final version, containing 98 articles, was eventually passed by nearly unanimous vote of members of the NPC SC present and voting on June 29, 2007, approximately three months later than the original forecast.³⁵ The ECL will take effect January 1, 2008.

The ECL is best understood as an effort to elaborate upon, not replace particular sections of the 1994 law.³⁶ Other aspects of the 1994 law such as promotion of employment and improvement of the dispute resolution process are the subjects of separate legislation.³⁷

This article will analyze the new law, with due attention to earlier drafts, in the following respects: (A) what, if anything, would the new law add to existing law? (B) how responsive is the new law to areas of concern identified by various stake-holders during the information-gathering process? (C) will the new law make a significant contribution

31. Other major effluents of growth are environmental degradation and tainted food and drugs produced under substandard conditions. *See, e.g.,* Anderlini & Dickie, *supra* note 8.

32. *See* Laodong hetong fa cao'an, <http://www.npc.gov.cn> (in Chinese).

33. Baker & McKenzie (Hong Kong), Employment Contract Law: Major Changes in Second Draft, Feb. 21, 2007, available at <http://www.bakernet.com/NR/rdonlyres/C768B9F7-5505-435C-B4DE-825B7FE68FEF/0/CN2nddraftofemplcontractlaw207.pdf>.

34. Geoff Dyer, *China's labour debate spurs war of words for U.S. interests*, FIN. TIMES, May 3, 2007, at 7; Third draft of Employment Contract Law responds on four contentious points [Laodong hetong fa cao'an sanshen huiying si da nanti], April 25, 2007, <http://npc.people.com.cn/GB/14957/5660344.html> (required period of service after training; additional justifications for workforce reduction; calculation of severance; role of trade union in negotiating collective contracts).

35. For the original text and an unofficial English translation by the law firm of Baker & McKenzie, see Chinese Law Prof blog, <http://www.typepad.com/t/trackback/89778/19789676>.

36. Yang Jingyu, Chair of the NPC Law Comm., Remarks (July 23, 2007) (Chinese transcript available at <http://www.npc.gov.cn>).

37. The Law on Promotion of Employment was passed by the NPC SC on Aug. 30, 2007 and the Law on Labor Arbitration on Dec. 29, 2007.

to social stability, which has been affected in recent years by wildcat strikes and demonstrations? (D) would the new law significantly enhance the power of trade unions to mediate conflict and protect internationally recognized worker rights?

IV. WHAT WOULD THE NEW LAW ADD TO EXISTING LAW?

Clarification is first necessary as to what constitutes an “addition.” At its most elemental and obvious, a new law may fill an omission from existing law, a gap that has arisen due to changing circumstances. Of the eleven subjects that were identified for special attention in a December 2006 report,³⁸ only one—regulation of labor dispatching agencies—satisfies this criterion. The 1994 Law already mandates the signing of written contracts, to evidence the employment relationship, and the timely payment of wages; it already forbids regular compulsory overtime. However, labor dispatching agencies were not a significant factor in matching applicants to jobs when the Law was passed. Originally set up by the government to fill positions in foreign enterprises, they have proliferated since the mid-1990s along with the wave of marketization. An estimated 25 million people work as “dispatched employees,” particularly in the construction industry.³⁹

However, a statute may be amplified in ways other than the filling of gaps. Even in a one-party authoritarian political system, where the legislature is often disparaged as a rubber stamp for policies of the Communist Party, the legislative process still provides an opportunity for discussion and debate. Delegates to the NPC have been known to cast “no” votes or to abstain as a form of protest.⁴⁰ The passage of bills has been stalled, and re-tabled, due to an inability to reconcile opposing views.⁴¹ Thus, even if the text of a particular law does not effect substantive changes in existing law, the process of discussion and debate offers an opportunity for the airing of diverse and conflicting points of view. In that sense, it constitutes an “enhancement” of existing law.

Since the 1990s two distinct trends in the legislative process have emerged. First, the role of the Communist Party has evolved from direct

38. Report of the Law Committee of the NPC Concerning Revisions to the Employment Contract Law [Quanguo renda falü weiyuanhui guanyu Zhonghua renmin gongheguo laodong hetong fa (cao'an) xiugai qingkuang de huibao], Dec. 24, 2006 (copy on file with author). Those topics were: scope of application, enterprise rules, the requirement of a written contract, probationary employment, successive short term contracts, reimbursement of training expenses, non-competition clauses, delay in payment of salaries and social insurance premiums, economic layoff, collective contracts, and regulation of labor dispatching agencies.

39. Remarks of Yang Jingyu, *supra* note 36.

40. CHEN, *supra* note 22, at 62–63.

41. Dowdle, *supra* note 25, at 32–36.

manipulation and micro-management to influence exercised through indirect means, such as agenda setting and personnel appointments.⁴² Second, whereas the drafting process was once dominated by the State Council, the highest executive organ of government, the NPC and its support services now generate much legislation. Chief among the NPC's support services is the Commission of Legislative Affairs (CLA).⁴³ The CLA has been the lead drafter for most of the NPC SC's controversial legislative proposals, and informally assumes the role of spokesman for interests it deems underrepresented in the legislative process.⁴⁴ In the case of the ECL, although the State Council prepared a draft and presented it to the NPC SC in November 2005, the NPC SC took charge of the drafting process after that point.

As an example of open debate, during discussion of the revised ECL in December 2006, some delegates to the NPC SC took the position that the law should state an explicit bias in favor of workers, the economically weaker party vis-à-vis management.⁴⁵ Given that employment contracts are contracts of adhesion, the first draft of the ECL had contained a provision, subsequently dropped, that any ambiguity in terms would be construed in favor of the employee, unless evidence to the contrary was presented by the employer.

Other delegates advocated the position that the law should adopt a neutral stance, not tipping the balance one way or the other, for fear of dampening business efficiency and discouraging foreign investment.⁴⁶ Erecting obstacles to dismissal of workers for incompetence, indiscipline, or redundancy would reconstitute the "iron rice bowl" of the pre-reform era, during which time dismissal for any reason was virtually impossible.⁴⁷

42. *Id.* at 15–16.

43. *Id.* at 41–45. The CLA's research staff is highly professionalized and most have law degrees. *Id.* at 41.

44. *Id.* at 40–45.

45. How should the labor law express partiality towards workers?, [Laodong hetong fa gai ruhe pianxiang laodongzhe?], <http://npc.people.com.cn/GB/14957/5222447.html>.

46. *Id.*

47. HILARY K. JOSEPHS, *LABOR LAW IN CHINA* 21 (2d ed. 2003).

Those delegates who favored a clear bias toward workers pointed to job insecurity and income deprivation as major causes of social instability.⁴⁸ Those delegates favoring neutrality objected to payment of severance to workers whose fixed term contracts were not renewed⁴⁹ and restrictions on firms' selection of workers for retrenchment.⁵⁰

The tension between these two positions is evident from the very beginning, in the phrasing of article 1. In the first draft, protection of the lawful rights and interests of workers was the second of three legislative goals. In the second draft, it was moved to the third and last position. In the final version, it was the third of four legislative goals.⁵¹ Ironically, the 1994 law had this goal as its first stated objective.

At the time the Chinese government began a "reorientation" towards the market in the late 1970s, a pressing concern was the need to address unemployment and underemployment in both rural and urban areas.⁵² The command economy, and the practice of assigning school leavers to jobs (*tong'yi fenpei*), had clearly failed to deal adequately with the large numbers of young people entering the job market. The government well understood the causal relationship between high youth unemployment and outright criminal activity.

The government took measures to increase the role of market forces in generating employment, including the encouragement of self-employment, private enterprise, and foreign investment. However, the retreat of the state from direct allocation of human resources allowed for widespread exploitation of workers by private and foreign investors.

48. How should the labor law express partiality towards workers?, *supra* note 45.

49. Employment Contract Law (P.R.C.), art. 46 reads in pertinent part: "In any of the following circumstances, the Employer shall pay the worker severance: . . . (5) the employment contract is a fixed-term contract that [expires]." First draft, art. 39; second draft, art. 46; final version, art. 46 (5).

50. *Id.* at art. 41 reads in pertinent part: "In the event of redundancy layoff, the Employer shall retain: (1) those who have fixed term contracts of relatively long duration; (2) those who have contracts of indefinite duration; (3) those who are the only employed members of the household and must care for elderly persons or minors." First draft, art. 33; second draft, art. 41; final version, art. 41.

51. *Id.* at art. 1 reads in pertinent part: "In order to improve the contract employment system, clarify the rights and responsibilities of the parties to an employment contract, protect the lawful rights and interests of employees, and secure and develop harmonious and stable employment relationships, this law has been enacted."

52. BARRY NAUGHTON, *GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM 1978-1993*, 77-78 (1995).

Marketization created jobs,⁵³ but also appalling working conditions, well-documented in numerous studies by human rights organizations.⁵⁴

No matter how expertly drafted,⁵⁵ the law can never achieve a perfect point of equilibrium between promoting job creation on the one hand and shielding workers from exploitation on the other. Expanding avenues to employment for the young may come at the expense of increasing unemployment for the middle-aged.⁵⁶ Continual review and adjustment will inevitably be required to navigate between objectives.

Similarly, minimum wage laws have their advocates and their critics, one arguing for a living wage and the other complaining of reduced employment opportunities for the least skilled workers.⁵⁷ Where empirical studies do not consistently support either position,⁵⁸ society, through the political process and the legal system, must make a choice, even though only temporary and subject to later modification. In the words of the great political philosopher Machiavelli, no course of action is permanent and risk-free.⁵⁹

Periodic codification of administrative regulations and judicial opinions⁶⁰ in new legislation is yet another mode of amplifying existing

53. By 2002, China had thirty million people employed in over two thousand special economic zones, economic and technological development zones, export processing zones, and border zones. ILO, Committee on Employment and Social Policy, Employment and Special Policy in respect of Export Processing Zones (EPZs) (Mar. 2003), <http://www.ilo.org>.

54. See, e.g., Amnesty International, Internal migrants: Discrimination and abuse: The human cost of an economic "miracle" (2007), <http://web.amnesty.org/library/print/ENGASA170082007>.

55. This author, not being a native speaker of Chinese, is not qualified to judge the drafting competence of PRC lawmakers. Others have complained of "poor drafting," "vague language," and "unanswered questions." When Title VII of the Civil Rights Act of 1964 was passed in the United States, its broad prohibition against discrimination was considered ambiguous. Employers were left to craft new workplace policies and procedures in an atmosphere of great uncertainty. Susan Bisom-Rapp, *Globalization, Equality and Non-Discrimination: An Interdisciplinary Perspective from the U.S. on Diversity Programming*, 64 BULL. COMP. LAB. RELS. (Conference paper, The Global Workplace: The End of Labour Law?, Modena, Italy, Mar. 19, 2007) (forthcoming 2007) (citing Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights*, 97 AM. J. SOC. 1531, 1536-38 (1990)). Furthermore, the art of political compromise tends not to produce stylistic perfection. See Mark Magnier, *China grants some rights to urban property owners*, L.A. TIMES, Mar. 16, 2007, at A3 (quoting head of drafting team for Property Law).

56. Those most seriously affected by downsizing in state enterprises, discussion *infra*, are the middle-aged in their forties and fifties, too old to retrain for the "new" economy but too young for retirement.

57. RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 111-12 (8th ed. 2003).

58. *Id.* at 115-17.

59. "Nor should any state ever believe that it can always choose safe courses of action. On the contrary, it should recognize that they will all be risky . . . whenever we try to avoid one disadvantage, we run into another. Prudence consists in knowing how to recognize the nature of disadvantages, and how to choose the least sorry one as good." NICCOLÒ MACHIAVELLI, THE PRINCE 78 (Peter Bondanella trans., 2005).

60. Reported judicial "decisions" (anli or anjian) contain an extensive factual narrative, a brief statement of the applicable law, a conclusion, and commentary by an editor/expert. These decisions are specially approved and edited within the judiciary for study and discussion; they are not original court documents. See Peter Feng, *Intellectual Property in China* 33 (2d ed.

positive law. Since China, in theory, adheres to the doctrine of legislative supremacy over other branches of government, the NPC or the NPC SC, through statutes, may give its imprimatur to rules that have already been applied by administrative agencies or the courts pursuant to their jurisdictional authority.⁶¹

For example, article 47 of the ECL, the basic measure of severance pay, one month's wages for every year worked, is a codification of a 1994 ministry regulation.⁶² Article 30 of the ECL codifies a 2006 judicial interpretation allowing workers to sue directly in court for unpaid wages, without first going through the time-consuming labor arbitration process.⁶³

Thus, the ECL has "added" to the 1994 Labor Law by providing a forum for different interest groups, clarifying existing provisions of the Labor Law, responding to changing circumstances, and codifying rules developed by the executive and judicial branches of government.

V. HOW RESPONSIVE IS THE NEW LAW TO AREAS OF CONCERN IDENTIFIED BY VARIOUS STAKE-HOLDERS?

Like many other countries, both developed and developing, China has a segmented labor market, a surfeit of the unskilled and a scarcity of those with advanced education and skills appropriate to a globalized economy. As one labor administrator described to this author: "We have many people for whom jobs have to be found, and many jobs for which we cannot find people."⁶⁴ The power dynamic between employers and employees, and the kinds of problems that arise out of

2003). In addition to these case reports, the Supreme People's Court issues a variety of "interpretive" documents which might certainly be considered extremely persuasive to lower courts, though not technically binding in the common law sense of *stare decisis*. See Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 *J. Chinese L.* 145, 164–90 (1993).

61. Compare the effect of passing the Property Law. *Caught Between Right and Left, Town and Country*, *THE ECONOMIST*, Mar. 8, 2007, at 23–24 (many of law's provisions already contained in other regulations).

62. Weifan he jiechu laodong hetong de jingji buchang banfa [Economic Compensation in the Event of Enterprise Violation or Termination of an Employment Contract] (promulgated by the Ministry of Labor, Dec. 3, 1994), CEILAW L35901199459. The Employment Contract Law (P.R.C.), art. 47 caps severance pay for highly compensated employees at three times average monthly wages in the particular jurisdiction.

63. Guanyu shenli laodong zhengyi anjian shiyong ruogan wenti de jieshi (er) [Second Interpretation on Several Issues Concerning the Application of the Law to Labor Disputes] (Sup. People's Ct. [Zuigao renmin fayuan], (Oct. 2006) art. 3, available at http://www.chinacourt.org/flwk/show1.php?file_id=112724. See *infra* notes 70–71 and accompanying text.

64. See Jo Johnson & Richard McGregor, *Up to the job? How India and China risk being stifled by a skills squeeze*, *FIN. TIMES*, July 20, 2006, at 9.

the employment relationship, will vary greatly depending on supply and demand factors.

It is a challenge to the drafters to frame a law in general terms when its provisions will play out in a great variety of circumstances. Presumptions of equality or inequality of bargaining power are fictions used to rationalize particular legislative outcomes.

During the one month public comment period on the first draft of the ECL, the NPC received over 190,000 communications. In opening the drafting process to general scrutiny, China went beyond the commitments to transparency required by its accession protocol to the WTO.⁶⁵ Among those interest groups that responded with detailed comments were representatives of foreign businesses, such as the American Chamber of Commerce.⁶⁶

The most common complaint voiced by employees related to delayed payment of wages, unpaid overtime, and non-payment of social insurance premiums.⁶⁷ Since the requirement of a written contract is often honored in the breach, employees experience great difficulty in proving their claims.⁶⁸

Under the Civil Procedure Law, the plaintiff generally is expected to produce documentary proof to support his cause of action, even if the evidence is within the defendant's exclusive control.⁶⁹ Because litigants in China do not testify under oath, oral testimony by the parties or supporting witnesses is not given particular weight. There is no provision for discovery along the lines of civil procedure in the United States.

65. Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the WTO Legal System—An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483, 492 (2003).

66. While it may seem only logical that a submission by such a group would reflect management interests, AmCham and the U.S.-China Business Council were excoriated by NGOs and member of the U.S. Congress for improper interference in the legislative process. See *Global Labor Strategies, Undue Influence: Corporations Gain Ground in Battle over China's New Labor Law—But Human Rights and Labor Advocates Are Pushing Back*, <http://laborstrategies.blogs.com> (Mar. 2007); Harold Meyerson, *In Fear Of Chinese Democracy*, WASH. POST, Apr. 4, 2007, at A13.

67. Report of the Law Committee, *supra* note 38.

68. The process for settlement of employment disputes has three stages: non-compulsory in-house mediation, compulsory arbitration under the aegis of the local labor bureau, and litigation in court. The trend has been for workers to proceed directly to arbitration, bypassing mediation. Also, there has been an increase in arbitration decisions which are litigated in court. Mary E. Gallagher, "Use the Law as Your Weapon!" *Institutional Change and Legal Mobilization in China*, in *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* 54 (Neil J. Diamant, Stanley B. Lubman & Kevin J. O'Brien eds., 2005).

69. Civil Procedure Law, art. 64 (P.R.C.). Court regulations do permit the burden of proof to be shifted to the employer in certain employment disputes, but read literally, not to prove the employment relationship itself. Guanyu minshi susong zhengju de ruogan guiding [Certain Regulations Relating to Evidence in Civil Cases] (Sup. People's Ct. [Zuigao renmin fayuan], Dec. 21, 2001), art. 6, available at <http://www.court.gov.cn/lawdata/explain/civilcacion/200303200049.htm>.

However, with increasing numbers of workers besieging the judiciary with patently valid claims, the courts have, in some cases, been willing to grant relief on the basis of an oral employment agreement, or employment in fact (*shishi laodong guanxi*).⁷⁰ As of October 2006, the Supreme People's Court has allowed simple claims for unpaid wages, *if* evidenced by an IOU, to be treated as an ordinary civil case, the recovery of debt; it is not necessary for workers to first file for arbitration.⁷¹

Article 30 of the ECL codifies the right to recover unpaid wages as a civil action for debt,⁷² but does not resolve the problem of proof. Since employers evade the legal requirement of a signed employment contract, it is questionable whether they will be any more circumspect about giving documentary proof of unpaid wages unless pressured to do so by groups of hostile workers.⁷³ To put real teeth into the requirement of a written contract, the law of civil procedure should be amended so that the burden of proof shifts to the employer once the employee makes out a *prima facie* case by way of detailed allegations and witness statements.

The 1994 Labor Law does not state a distinct presumption in favor of indefinite employment, terminable only for cause and with payment of indemnity, such as one finds in the labor laws of other countries.⁷⁴ It classifies employment contracts as limited, unlimited, or for the performance of a specified task (art. 20). After ten years of continuous employment, the employee is entitled to a contract of unlimited duration (art. 20). The ECL introduces a presumption of indefinite employment, albeit circuitously. It penalizes failure to sign a contract within a year of employment by deeming such a contract to be one of indefinite duration (art. 14). Therefore, if an employee actually works a full-time job for a year without a written contract, s/he will be presumed to have a contract of indefinite duration, subject, of course, to the problems of proof already discussed.

70. See Chen Weili v. Lai Guofa, in BLANPAIN ET AL., *supra* note 4, at 501. However, the employment relationship in this case was substantiated by a settlement agreement and payment of medical expenses after plaintiff was injured on the job.

71. See Jill E. Monnin, *Extending the Reach of the Chinese Labor Law: How Does the Supreme People's Court's 2006 Interpretation Transform Labor Dispute Resolution?*, 16 PAC. RIM L. & POL'Y 753 (2007).

72. Cf. Ronald C. Brown, *Recent Developments: China's New Labor Contract Law*, 3 CHINA L. REP. 4, 11 (2007) (unclear whether claim for unpaid wages may be brought directly in court).

73. Cf. Wei jing laodong zhongcai, baiwei yuangong ping qiantiao qisu nadao gongzi [Without going through labor arbitration, 100 workers use IOUs to sue for unpaid wages] (Jan. 15, 2007), <http://www.laodonglaw.com/xinxifabu/benzhandongtai/200701/4775.html> (workers recovered unpaid wages from proceeds of bankruptcy auction).

74. See, e.g., the French labor law. BLANPAIN ET AL., *supra* note 4, at 436.

Experience over the last decade has chronicled employer abuses such as extended probationary periods, successive short-term contracts, and hiring of “temporary” employees through labor dispatching agencies. The ECL addresses these problems by imposing specific time limitations on probationary employment, not to exceed six months (art. 19), providing for indefinite employment after two contract renewals (art. 14), and setting two years as the minimum term of employment with labor dispatching agencies (art. 58). While under contract to a labor dispatching agency, the employee is entitled to at least minimum wages from the agency itself if s/he is not out on assignment.

Part-time workers enjoy far fewer protections than full-time employees (arts. 68–72). No written contract is required if the individual is paid on an hourly basis and works on average four hours per day, twenty-four hours per week. Part-timers may be dismissed without notice or severance. The disparity in standards invites casualization of full-time work, helping those who only want to work part-time like students and housewives, but harming those who are primary breadwinners.⁷⁵

Significantly, neither the 1994 Labor Law nor the ECL makes any direct reference to “restructuring” (*gaizhi or zichan chongzu*), “indefinite furlough” (*xiagang*), or “buy-outs” (*maiduan gongling*) as means of ending the employment relationship. In the last decade, particularly in the years 1998–2002, tens of millions of state enterprise workers have been, in effect, made redundant by administrative fiat.⁷⁶ It is common to downsize the workforce to ready a company for a public stock offering.⁷⁷ Claims arising from restructuring are non-justiciable.⁷⁸ At best, redundant workers receive a “livelihood allowance” for a limited period or minimal severance payments.⁷⁹

75. BLANPAIN ET AL., *supra* note 4, at 300–01.

76. As a rough approximation, the state enterprise workforce shrank by more than thirty million. Compare China Statistical Yearbook 1998, tbl. 5-1, with China Statistical Yearbook 2004, tbl. 5-1. The process of streamlining the state sector and “concentrating state-owned capital in important industries and key areas” is ongoing. *China’s parliament*, *supra* note 14.

77. *Hundreds of former bank employees protest over redundancies*, CHINA LAB. BULL., July 19, 2006, available at <http://www.clb.org.hk> (protest by 200 former employees of the Industrial and Commercial Bank of China (ICBC)); David Barboza, *China Adds Billionaires With I.P.O.*, N.Y. TIMES, Apr. 21, 2007, at C1 (after IPO, ICBC third most valuable bank in the world); Mark Landler, *Stakes in China Suddenly Seem Less Appealing*, N.Y. TIMES, Mar. 31, 2000, at C1 (PetroChina stock offering).

78. Guanyu shenli yu qiye gaizhi xiangguan minshi jiufenjian ruogan wenti de guiding [Regulations for the Disposition of Civil Law Claims Arising from the Restructuring of [State] Enterprises] (Sup. People’s Ct. [Zuigao renmin fayuan]), art. 3, available at <http://www.cas.cn/html/Dir/2003/01/03/3637.htm>.

79. OECD ECONOMIC SURVEYS: CHINA, Sept. 2005, at 95–96, available at http://www.oecd.org/document/21/0,3343,en_2649_201185_35331797_1_1_1_1,00.html.

As depicted in documentary films, the ripple effects of downsizing for families and entire communities has been catastrophic.⁸⁰ While mass protests do occur, sometimes leading to violence, they are easily contained by the police.⁸¹ Given the numbers of displaced workers, the rate of incidents is relatively small.⁸² Unemployment compensation from public funds and government sponsored retraining programs reach a minority of the unemployed. People tend to rely on savings and assistance from family members and friends to restart their lives.⁸³

Thus, the law places no real limitation on the ability of the government to shrink employment in the state sector. Although the Labor Law and the ECL purport to cover nearly all employment relationships, excluding only the civil service, it is the private and foreign invested sectors that are the true objects of regulation.

Where the employee has highly marketable skills, it is the employer who has the motivation to sign an employment contract of indefinite or extended duration, in order to recover its return on investment in training and minimize the costs of turnover. Under the ECL, the employment contract may require the employee to reimburse training costs if s/he leaves before the contract expires, in proportion to the period remaining on the contract, but not for training received in-house (art. 22).

Employers are also concerned that high echelon managerial and technical personnel who are privy to trade secrets will go to work for a competitor or set up their own businesses. The 1994 Labor Law acknowledges that a balance must be struck between labor mobility and protection of intellectual property rights.⁸⁴ Ministry regulations and court decisions approved post-employment non-competition agreements of reasonable temporal length and geographic scope.⁸⁵

The ECL maintains this balancing of interests in a series of refinements. The employment contract may require protection of trade secrets and include a post-employment covenant not to compete (art. 23). However, non-competition agreements are limited to high level managerial and technical personnel and may not exceed two years (art.

80. See, e.g., Jeannette Catsoulis, *Casualties Of China's Transformed Economy*, N.Y. TIMES, Apr. 18, 2007, at E5 (three part documentary entitled "Tie Xi Qu: West of Tracks").

81. Erik Eckholm, *Where Workers, Too, Rust, Bitterness Boils Over*, N.Y. TIMES, Mar. 20, 2002, at W1.

82. *Id.*

83. John Giles, Albert Park & Fang Cai, *How Has Economic Restructuring Affected China's Urban Workers?*, 185 CHINA Q. 61 (2006).

84. Article 22 authorizes protection of trade secrets, and art. 102 approves remedies for violation of a confidentiality agreement. See generally JOSEPHS, *supra* note 47, at 101-07.

85. *Id.* at 105.

24). The employee must be separately compensated for it, calculated on a monthly basis (art. 23). Breach of a non-competition agreement entitles the employer to liquidated damages (art. 23).

VI. WILL THE NEW LAW MAKE A SIGNIFICANT CONTRIBUTION TO SOCIAL STABILITY?

The Chinese government openly acknowledges the frequency of mass protests and the challenge they present to its legitimacy. In a society with a long tradition of paternalistic government, mass protests may portend the end of a regime, the loss of the “Mandate of Heaven.” In the language of modern economics, development undertaken without democratic representation and consultation exacts indirect transaction costs, such as the loss of confidence in government.⁸⁶

In order to reduce social unrest and create a “harmonious society,” the government has instituted various social welfare programs to close the growing gap between the haves and the have-nots.⁸⁷ As compared with most developed countries, China has a long row to hoe: there is no nationwide unemployment insurance scheme, health insurance system, pension fund, or welfare program.

Passage of laws shows, at a minimum, that the government is paying serious attention to social issues and taking action to resolve them. If the ECL has not been approved this year, after so much publicity, debate, and revision, the government would have appeared ineffectual. By contrast, a weakness of multi-party systems is legislative gridlock and inaction.⁸⁸

In any event, despite sporadic outbreaks of civil unrest, the PRC government does not face any serious risk of being overthrown. Because the government continues to maintain a strict divide between rural and urban populations through the household registration system, rural migrants, most working illegally in cities, are loathe to call attention to themselves, no matter how inferior their working conditions.⁸⁹ Participation in organized protests would invite arrest and forced repatriation. The population remaining in rural areas is so scattered and segregated into villages that isolated protests may be

86. Chenglin Liu, *Informal Rules, Transaction Costs, and the Failure of the “Takings” Law in China*, 29 HASTINGS INT’L & COMP. L. REV. 1, 25–27 (2005).

87. *China’s parliament*, *supra* note 14.

88. *Grandiose Failure*, FIN. TIMES, July 2, 2007, at 10 (U.S. immigration law reform), available at http://us.ft.com/ftgateway/superpage.ft?news_id=fto070120071622352607&page=1.

89. He Qinglian, *Why Is CSR [Corporate Social Responsibility] Such an Uphill Battle in China?*, 1 CHINA RIGHTS FORUM, 2007, at 69–70 (rural migrants fear unemployment more than exploitation).

quickly suppressed by the threat or use of force.⁹⁰ The ECL does not alter the fundamental inequality between urban and rural populations.⁹¹

To avoid a repeat of the 1989 Tiananmen Incident, when workers joined students in the streets, the government realizes that it is particularly important to mollify urban residents. Demonstrations and sit-ins by workers are handled gingerly, with a combination of placation and threat of force. For example, at one protest in central Beijing by redundant workers, hundreds of police officers were mobilized on the sidelines, at the ready.⁹²

The younger generation of urban employed, having grown up during the reform period, has lower expectations of government than people of middle age and also has many more opportunities for reemployment open to them.⁹³ Labor arbitration absorbs grievances across the spectrum, but a younger person is more likely to simply move on to another job after an unsuccessful outcome.⁹⁴ Central and local government can, and should do more to alleviate the distress of the middle-aged unemployed.⁹⁵ The fruits of economic growth that are being lavished on showcase projects, at home and abroad, might be better spent helping those who gave their productive years to the socialist revolution.

VII. WOULD THE NEW LAW SIGNIFICANTLY ENHANCE THE POWER OF TRADE UNIONS?

As mentioned previously, there is a single official trade union in China, the All China Federation of Trade Unions (ACFTU), which operates under the direct control of the Chinese Communist Party.

90. Howard W. French, *Police in China Battle Villagers In Land Protest*, N.Y. TIMES, Jan. 17, 2006, at A1.

91. Internal migrants, *supra* note 54.

92. *Hundreds of former bank employees protest over redundancies*, *supra* note 77. See also Feng Chen, *Subsistence Crises, Managerial Corruption and Labour Protests in China*, 44 CHINA J. 41 (2000). Cf. Zhu Jian'gang, *Not Against the State, Just Protecting the Residents' Interests: A Residents' Movement in a Shanghai Neighborhood*, 5 PERSPECTIVES 25 (2004), available at <http://www.oycf.org> (protest over redevelopment project using a multi-pronged strategy; combination of legal arguments, repeated complaints to government agencies, exposure through the media, and physical confrontation).

93. See Johnson & McGregor, *supra* note 64.

94. *Id.* See also 98% of labor arbitration cases in Shanghai are filed by workers (*Shanghai laodong zhengyi zhongcai an 98% you laodongzhe tichu*) (July 26, 2006), <http://news.eastday.com> (vast majority of cases filed by workers after leaving employment, with no interest or expectation of reinstatement).

95. Hu Ping, *The Accidental Spokesman for China's Workers*, CHINA RIGHTS FORUM, Mar. 2007, at 71-74 (some Chinese economists justify sacrifice of older workers as necessary for reform).

Even non-violent efforts to establish independent trade unions are ruthlessly and systematically repressed.⁹⁶

The ECL articulates certain powers of the enterprise branch of the ACFTU vis-à-vis management, but they are mostly a reiteration of provisions of the Labor Law and the Trade Union Law. The enterprise trade union is to be consulted about the formulation of work rules (art. 4), provides assistance in the signing and implementation of employment contracts (art. 6), must be consulted before retrenchment of twenty or more workers (art. 41), represents the workforce in the signing of collective contracts (art. 51), and has the right to offer its views when the employer commits a violation of law or breach of contract (art. 43).

There is no requirement that the union be consulted about retrenchment effected through “indefinite furlough” or “buy-outs.”⁹⁷ Nor is the trade union empowered to veto any managerial decision or to call a strike if management is unresponsive to legitimate demands. At the news conference that followed immediately upon passage of the ECL, a Hong Kong journalist asked whether workers could protest a bona fide disagreement with management by going on strike, without fear of being arrested. Mme. Xin Chunying, a member of the NPC SC, vice-chair of the influential Commission of Legislative Affairs,⁹⁸ and a staunch advocate of worker rights, parried the question: “The right to strike is not regulated by this law; the issue is a matter for constitutional law.”⁹⁹

While the ECL may add to (in the sense discussed in Part IV), or stress certain basic principles, it does not represent a radical substantive change from the structure created by the Labor Law and the Trade Union Law. In brief, it does nothing to advance fundamental rights of freedom of association and collective bargaining, deemed essential in the 1998 ILO Declaration of Fundamental Principles and Rights At Work. Legislative debate surrounding the draft ECL gives no indication that China will accede to ILO Conventions 87 and 98 in the near future.

International labor experts continue to maintain that the most effective way to protect worker interests is through the right of self-

96. JOSEPHS, *supra* note 47, at 72.

97. *Hundreds of former bank employees, supra* note 77 (protestors who were “bought out” complained that ACFTU did not even respond to questions). Cf. Shanghai Municipality, (*Second Notice in regard to Several Issues Concerning the Employment Contract Regulations (Shanghai shi laodong hetong tiaoli ruogan wenti de tongzhi (er))*), Mar. 16, 2004, <http://www.shanghai.gov.cn/shanghai/node2314/node16173/node16390/userobject43i54.html> (not clear whether “buy out” should be treated in same way as “termination” for purposes of calculating severance).

98. See *supra* notes 43–44 and accompanying text.

99. See Laodong hetong fa xinwen fabu hui, <http://www.npc.gov.cn>.

organization.¹⁰⁰ Yet even with the passage of the ECL, Chinese workers will be no better able to form independent unions or engage in meaningful collective bargaining over the terms and conditions of employment than they previously were.

Furthermore, the social mood of the country today is far different than it was fifty years ago. Fertile soil for mass organizing has disappeared. The excesses of the Cultural Revolution produced disillusionment with abstract ideals and self-sacrifice for the collective good. It is no longer possible to relieve pressure on the urban labor market by sending young people to the countryside to “learn” from the peasants. Young people, encouraged and supported by their parents, would refuse to go. The peasants themselves are leaving rural areas to seek cash employment in the cities.

Although the ACFTU makes its presence conspicuous in the legislative process, it is not as effective in actually using its powers at the grass roots level.¹⁰¹ By its own admission, it provides little legal assistance to workers, far less than other legal aid organizations.¹⁰² The Trade Union Law already obligates unions to provide support to individual workers and empowers the union to litigate directly in the case of a collective contract.¹⁰³

High profile organizing of workers at U.S. multinational enterprise operations such as Wal-Mart and McDonald's only covers a very small percentage of the foreign-invested sector,¹⁰⁴ which is dominated by Asian-owned companies.¹⁰⁵ Because of its militantly anti-union policy elsewhere, Wal-Mart presented an irresistible target for organization by the ACFTU, as the proxy for the Chinese government.¹⁰⁶ Preliminary

100. Internal migrants, *supra* note 54.

101. Jutta Hebel & Günter Schucher, *The Emergence of a New 'Socialist' Market Labour Regime in China* 27–29 (Dec. 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977988; Anita Chan, *Realities and Possibilities for Chinese Trade Unionism*, in *THE FUTURE OF ORGANISED LABOUR: GLOBAL PERSPECTIVES* 275, 288–89 (C. Phelan ed., 2006).

102. *China's first union lawyers to take office*, May 15, 2006, available at <http://en.chinacourt.org>; *More than 430,000 Chinese receive legal aid in 2005*, Jan. 11, 2006, available at <http://en.chinacourt.org>. Cf. Feng Chen, *Between the State and Labour: The Conflict of Chinese Trade Unions' Double Identity in Market Reform*, 176 *CHINA Q.* 1006, 1013–16 (2003) (describing union's willingness to intervene only in those cases involving individual workers or small groups and where violation of rights is obvious).

103. Cooney, *supra* note 6, at 1075.

104. David Lague, *Official Union in China Says All Wal-Marts Are Organized*, N.Y. TIMES, Oct. 13, 2006, at C6; David Barboza, *McDonald's in China Agrees to Unions*, N.Y. TIMES, Apr. 10, 2007, at C3. Cf. The American Chamber of Commerce in Shanghai, 2007 White Paper: American Business in China 36 (63% of respondents report that they do not have a union and are not experiencing pressure to unionize).

105. CHAN, *supra* note 101, at 283.

106. Anita Chan, *Organizing Wal-Mart in China: Two Steps Forward, One Step Back for China's Unions*, 16 *NEW LAB. FOR.* 87, 88 (2007) (“Wal-Mart miscalculated in thinking that it could use the same antiunion tactics in China that it does around the world”).

field research indicates that the ACFTU presence in Wal-Mart stores is mostly window-dressing,¹⁰⁷ but the government has made its point that no multinational company is above the law.

VIII. CONCLUSION

In the near term, it is probable that individual workers, singly or in plant-level groups, will continue to seek justice through litigation, combined with other modes of interest articulation—wildcat strikes, unauthorized demonstrations, intimidation of management by confrontation en masse without obvious leadership,¹⁰⁸ publicity through the media, and nagging of government officials.¹⁰⁹ How elements of guerrilla strategy will combine and operate in any given set of circumstances is, by definition, impossible to predict and therein lies prospects for achieving worker goals.

In this regard Chinese workers do not differ from those in other societies where the climate for union organization is adverse.¹¹⁰ Arthurs' observations about the importance of "bottom up" action are entirely apposite. There are indications that workers will resort to "exit" rather than "voice" if confrontational tactics do not look promising. Labor shortages in the Special Economic Zones suggest that workers have developed their own informal networks and will gravitate to those enterprises where remuneration and working conditions are reported to be relatively better.¹¹¹ At the same time, as wages rise along the eastern seaboard, manufacturers will relocate to less developed areas of the country.

The unabating increase in employment related cases should be viewed in a positive light because it shows plaintiffs have confidence in the legal system. Not every plaintiff with a legitimate claim will prevail, but if a critical mass does achieve some measure of redress, others will be encouraged to use the formal dispute resolution process.

How should unions and non-governmental organizations in developed countries respond to these trends? Transnational cooperation to improve working conditions and enhance worker rights

107. *Id.*

108. Zhunqie jieding laodong zhengyi tiaojie zhongcai de fanwei [Clarifying the Scope of Labor Mediation and Arbitration], Nov. 12, 2007, <http://www.npc.gov.cn> (comments by Huang Daifang).

109. Gallagher, *supra* note 68; BLANPAIN ET AL., *supra* note 4, at 11 ("workers' advocates [have] to be conversant with all the tools—legal and otherwise—at their disposal").

110. See generally MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

111. Tom Mitchell & Geoff Dyer, *Heat in the Workshop*, FIN. TIMES, Oct. 15, 2007, at 7.

in China is a praiseworthy enterprise.¹¹² Nonetheless, it should be recognized that even with independent unions, collective bargaining and more rigorous enforcement of protective legislation, China's comparative advantage in labor costs would persist for some time to come. While it is entirely rational for organizations with a mandate to improve worker rights to concentrate on those aspects of the China scene that deal directly with employment issues, strengthening local institutions in a comprehensive way may be more effective in the long run than targeting improvements or creating "islands of excellence" in specific areas of the law.

112. Tim Johnson, *U.S. union leaders woo China's labor federation*, KNIGHT RIDDER WASHINGTON BUREAU, May 22, 2007 (Lexis).