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Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China

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Abstract

This Article examines the capacity of Chinese labor laws and labor institutions to combat abuses. It finds that the Chinese regulatory framework pertaining to work relationships is impeded by a failure to clarify key norms, a bureaucratic “command and control” approach to inspection and dispute resolution, and a narrow and ineffective range of tools for inducing compliance. The Article, however, also finds evidence of emerging regulatory innovation and sophistication that may lead to a much more effective legal response. The legal material relevant to China’s labor abuses is vast and highly complex, so it is necessary to choose specific abuses to render the analysis manageable. This Article focuses on underpayment of wages for work performed for three reasons. First, underpayment of wages is among the most common labor abuses, affecting many millions of workers. Second, systematic underpayment of contracted wages is a practice that is generally acknowledged, within and outside China, to be unjustifiable. Third, underpayment of wages is apparently a violation of Chinese law, and thus raises the central question of this Article: What is it about Chinese labor law norms and institutions that inhibit better compliance with the law? Part I of the Article briefly describes the extent of the wage underpayment problem in China. Part II concentrates on the internal structure of the legal rules and the legal institutions that regulate work, especially with respect to remuneration. It analyzes the nature of the relevant legal rules, the enforcement work of the bureaucracy, the principal labor dispute resolution institutions, and the functions of the official trade union organization (which is treated as a quasi-regulatory agency). Part II concludes by discussing a new draft national law and a promising regional initiative. Part III sketches out several reform proposals. Drawing on successful international examples of regulatory innovation, as well as the recent creative Chinese experiments in labor enforcement, Part III proposes regulatory initiatives that have realistic prospects of inducing greater adherence to the law in China’s current political and economic context. Of course, no legal reforms will definitively close the gap between the letter of labor law and workplace practice. Deficient implementation of, and compliance with, labor law (and law in general) is universal. Even in developed countries, labor regulation frequently fails to induce change in workplaces or provokes unintended outcomes. This is unsurprising; work relations are characterized by disparate social systems (or frames of reference). Workplace participants determine their actions not just with a view to legal validity, but also, or even more so, on the basis of such matters as cost-benefit calculations, concordance with organizational decision-making and politics, consistency with local “custom and practice,” and perspectives about appropriate gender roles. In light of this complexity, attempts to invoke law to

achieve a change in work relations practices may be ineffective, counterproductive, and incoherent. Nonetheless, there is now a rich literature that identifies which forms of legal interventions are more likely to achieve positive outcomes in a given context. That literature informs this discussion of reform in China. Regulatory scholars have suggested that, in many circumstances, “responsive,” “reflexive,” or “decentered” forms of regulation have proved to be superior alternatives to traditional “command and control” style rule-making, with its emphasis on State-based standard setting, coupled with the imposition of sanctions. Chinese labor law heavily emphasizes “command and control,” so there is certainly a need to consider alternative approaches. The analysis in this Article is important for at least two reasons. First, China is frequently criticized for its labor abuses, yet this criticism is frequently unaccompanied by specific reform proposals that are feasible in the Chinese context. This Article assists those who want to see improvements in Chinese labor law to develop such proposals. Second, by pointing to the possibilities of regulatory innovation in the context of one problem (wage arrears), the author hopes to contribute to debates about how Chinese law can respond more effectively to other kinds of labor, social, and environmental problems.

MAKING CHINESE LABOR LAW WORK: THE PROSPECTS FOR REGULATORY INNOVATION IN THE PEOPLE'S REPUBLIC OF CHINA

*Sean Cooney**

INTRODUCTION

China's extraordinary economic success is marred by widespread labor abuses, epitomized by the manufacturing sweatshop staffed by ill-treated workers migrating from China's hinterland.¹ Many kinds of abuse occur in apparent defiance of Chinese labor law. Firms breach labor contracts and wage regulations by underpaying their employees for work performed, or not paying them at all. They violate legal provisions on working hours by requiring staff to work for extreme periods of time without rest. They ignore health and safety law by operating egregiously dangerous workplaces.

In China, domestic pressure for reform of the labor laws is powerful and increasing. Workers dissatisfied with the lack of remedies for their mistreatment are resorting ever more frequently to self-help measures such as spontaneous protests, many of which turn violent.² These events are sufficiently serious to induce government officials and labor law scholars to develop an array of proposals for improving law enforcement. Some of these proposals are ill-considered and makeshift; others are carefully crafted and highly sophisticated. As the latter have some potential to elicit broader compliance with the law, they merit international attention and analysis.

This Article examines the capacity of Chinese labor laws and

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1. See, e.g., ANITA CHAN, CHINA'S WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY (2001); STEPHEN FROST, WORKERS' RIGHTS FOR THE NEW CENTURY 16-36 (2002); KAI-MING LIU & SHEN TAN, KUAGUO GONGSI DE SHEHUI ZEREN YU ZHONGGUO SHEHUI [CORPORATE SOCIAL RESPONSIBILITY IN CHINA] (2003).

2. See, e.g., *China Rioters Clash with Police over Unpaid Wages*, ASIANews.IT, Sept. 30, 2005, <http://www.asianews.it/index.php?l=en&art=4234> (last visited Mar. 7, 2007).

labor institutions to combat abuses. It finds that the Chinese regulatory framework pertaining to work relationships is impeded by a failure to clarify key norms, a bureaucratic “command and control” approach to inspection and dispute resolution, and a narrow and ineffective range of tools for inducing compliance. The Article, however, also finds evidence of emerging regulatory innovation and sophistication that may lead to a much more effective legal response.

The legal material relevant to China’s labor abuses is vast and highly complex, so it is necessary to choose specific abuses to render the analysis manageable. This Article focuses on underpayment of wages for work performed for three reasons. First, underpayment of wages is among the most common labor abuses, affecting many millions of workers. Second, systematic underpayment of contracted wages is a practice that is generally acknowledged, within and outside China, to be unjustifiable.³ Third, underpayment of wages is apparently a violation of Chinese law, and thus raises the central question of this Article: What is it about Chinese labor law norms and institutions that inhibit better compliance with the law?

Part I of the Article briefly describes the extent of the wage underpayment problem in China. Part II concentrates on the internal structure of the legal rules and the legal institutions that regulate work, especially with respect to remuneration. It analyzes the nature of the relevant legal rules, the enforcement work of the bureaucracy, the principal labor dispute resolution institutions, and the functions of the official trade union organization (which is treated as a quasi-regulatory agency). Part II concludes by discussing a new draft national law and a promising regional initiative. Part III sketches out several reform proposals. Drawing on successful international examples of regulatory innovation, as well as the recent creative Chinese experiments in labor enforcement, Part III proposes regulatory initiatives that

3. Some neo-liberal lawyers and economists believe that minimum wages are counter-productive, in which case their non-observance is unproblematic, even desirable. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 361-65 (5th ed. 1998). For a more positive evaluation of minimum wages, see, for example, *United Kingdom Low Pay Commission, National Minimum Wage: Low Pay Commission Report 2005* (on file with author). Even given this neo-liberal view, however, the problem of wage arrears in China must be addressed because it is not simply a case of payment below the minimum wage; frequently workers are not paid at all for work performed. The issue goes to the enforceability of contracts, which neo-liberals, too, uphold. See POSNER, *supra*, at 101-08.

have realistic prospects of inducing greater adherence to the law in China's current political and economic context.

Of course, no legal reforms will definitively close the gap between the letter of labor law and workplace practice. Deficient implementation of, and compliance with, labor law (and law in general) is universal. Even in developed countries, labor regulation frequently fails to induce change in workplaces or provokes unintended outcomes.⁴ This is unsurprising: work relations are characterized by disparate social systems (or frames of reference).⁵ Workplace participants determine their actions not just with a view to legal validity, but also, or even more so, on the basis of such matters as cost-benefit calculations, concordance with organizational decision-making and politics, consistency with local "custom and practice," and perspectives about appropriate gender roles. In light of this complexity, attempts to invoke law to achieve a change in work relations practices may be ineffective, counterproductive, and incoherent.

Nonetheless, there is now a rich literature that identifies which forms of legal interventions are more likely to achieve positive outcomes in a given context.⁶ That literature informs this discussion of reform in China. Regulatory scholars have suggested that, in many circumstances, "responsive," "reflexive," or "decentered" forms of regulation have proved to be superior alternatives to traditional "command and control" style rule-making, with its emphasis on State-based standard setting, coupled with the imposition of sanctions. Chinese labor law heavily emphasizes "command and control," so there is certainly a need to consider alternative approaches.

The analysis in this Article is important for at least two reasons. First, China is frequently criticized for its labor abuses, yet this criticism is frequently unaccompanied by specific reform proposals that are feasible in the Chinese context. This Article assists those who want to see improvements in Chinese labor law

4. See, e.g., REFLEXIVE LABOR LAW (Roger Rogowski ed., 1994); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

5. See, e.g., Christine Parker et al., *Introduction*, in REGULATING LAW I (Christine Parker et al., eds., 2004); Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW (Gunther Teubner ed., 1987).

6. See *infra* notes 195-205 and accompanying text.

to develop such proposals. Second, by pointing to the possibilities of regulatory innovation in the context of one problem (wage arrears), the author hopes to contribute to debates about how Chinese law can respond more effectively to other kinds of labor, social, and environmental problems.

I. ALL WORK AND NO PAY

Underpayment (and sometimes total non-payment) of wages is widespread in China. Millions of Chinese workers fail to receive agreed remuneration, with arrears amounting to US\$12,000,000,000 annually, according to official Chinese estimates.⁷ Wage arrears are common in all parts of the economy.⁸ While arrears occur frequently in the State-owned parts of the economy, non-payment of wages in the private sector is an increasingly acute problem. This is because the private sector, with its vast number of business entities and manifold organizational forms, is an ever more significant employer of labor in the Chinese economy.⁹ An International Labor Organization (“ILO”) study reports that anywhere from fifty percent to eighty percent of private enterprises in Guangdong Province, China’s manufacturing powerhouse, illegally retain wages.¹⁰ The practice is so prevalent it is sometimes described as a “local custom.”¹¹

Most importantly, underpayments in the private sector occur *not* simply because firms are in economic difficulty (and therefore unable to comply with their legal obligations); in many cases it is simply fraudulent and manipulative conduct on the part of the debtor employer.¹² For example, it is common for employers to demand that workers pay a bond prior to com-

7. See *Defaulting Wage Payment Should Be Incriminated*, XINHUA NEWS AGENCY, Mar. 8, 2005, <http://www.china.org.cn/english/null/122105.htm> (last visited Mar. 7, 2007).

8. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: CHINA, § 6(e) (Mar. 8, 2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm> (last visited Mar. 7, 2007).

9. See generally TOSHIKI KANAMORI & ZHIJUN ZHAO, ASIAN DEV. BANK INST., PRIVATE SECTOR DEVELOPMENT IN THE PEOPLE’S REPUBLIC OF CHINA (2004).

10. See Gerard Greenfield & Tim Pringle, *The Challenge of Wage Arrears in China*, in PAYING ATTENTION TO WAGES 30, 35 (Manuel Simon Velasco eds., 2002).

11. *Id.*

12. See, e.g., Anita Chan, *Labor Standards and Human Rights: The Case of Chinese Workers Under Market Socialism*, 20 HUM. RTS. Q. 886, 891-93 (1998).

mencing work.¹³ This practice, together with the retention of wages, is used extensively in order to impose labor discipline and prevent staff turnover, especially during holiday periods.¹⁴

One group of Chinese workers is particularly vulnerable to wage arrears: migrant laborers (that is, workers migrating from China's rural areas or *nongmingong*). They are regularly accorded treatment inferior to their urban counterparts. It is they who bear the brunt of labor abuses, including underpayments.¹⁵

Estimates of migrant workers vary widely, but they number well in excess of 100,000,000.¹⁶ They are often in poor health¹⁷ and remain dependent on their home communities for social security support.¹⁸ There is an entrenched view among firm managers that it is acceptable to accord migrant workers worse treatment.¹⁹ On the other hand, in comparison with migrant workers, the local residents are generally much better educated, much better connected politically and economically, and much more likely to occupy a skilled or managerial position in, or indeed to own, enterprises employing rural workers.²⁰

13. See *id.* at 889-91; see also Anita Chan, *Globalization, China's Free (Read Bonded) Labour Market, and the Chinese Trade Unions*, 6 ASIA PAC. BUS. REV. 260, 261-68 (2000).

14. See GREENFIELD & PRINGLE, *supra* note 10, at 35.

15. The poor treatment of migrant workers has been widely chronicled. See, e.g., LANCE COMPA, AM. CTR. FOR INT'L LABOR SOLIDARITY, JUSTICE FOR ALL: THE STRUGGLE FOR WORKER RIGHTS IN CHINA 44-55 (2005); KAIMING LIU, BIANYUAN REN [THE MARGINALISED PEOPLE] (2003); DOROTHY SOLINGER, CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE, AND THE LOGIC OF THE MARKET (1999). Individual accounts by women migrant workers telling of their poor conditions are regularly collected and published on the website of the Chinese Working Women Network. See Chinese Working Women Network Website, <http://www.cwwn.org> (last visited Jan. 19, 2007).

16. According to a Chinese National Bureau of Statistics report, there were 113.9 million workers from rural China in 2003. Of these workers, 69.9 percent traveled to Eastern provinces, and 47.3 percent were under twenty-five years of age. See *Migrant Workers Number 113.9 Million in 2003*, XINHUA NEWS AGENCY, May 15, 2004, available at <http://www.xinhuanet.com/english/>.

17. See, e.g., the 2001 survey of 1043 workers by Chinese Working Women Network, *The Health 2001 Survey Report of Migrant Women Workers* (Chinese Working Women Network ed., 2001) (reporting that thirty-seven percent of respondents experienced fainting spells).

18. See LIU, *supra* note 15, at 12-13.

19. See, e.g., John Knight et al., *Chinese Rural Migrants in Urban Enterprises: Three Perspectives*, 35 J. DEV. STUD. 73, 92 tbl.13 (1999) (surveying managerial attitudes towards migrants in 118 enterprises in four major Chinese cities). The most significant reason given for recruiting migrant workers is that they can "bear hardship." *Id.* at 91.

20. See SALLY SARGENSON, *REWORKING CHINA'S PROLETARIAT* 67 (1999). The distinction between urban and rural workers has been institutionalized by the household re-

II. NON-IMPLEMENTATION OF LABOR LAW: FACTORS INTERNAL TO THE EGAL SYSTEM²¹

Clearly, violations of core labor law principles are rife in China—millions of workers are not paid their due wages for their labor. While no legal system can entirely eradicate these abuses, one may well ask why the law does not do more to reduce their prevalence. This Part explores the facets of formal Chinese labor regulation that blunt and confuse its capacity to speak authoritatively to workplaces.

A. *The State of Legal Rules*

1. The Labor Law

At first glance, China appears to have built up a relatively comprehensive and logically ordered framework of labor regulation. The Labor Law of 1994 (“Labor Law”) establishes a contract-based system of employment regulation²² based on “voluntary” and “equal” negotiation, and replaces the former communist system based on administrative allocation.²³ The Labor Law also stipulates a number of minimum standards with which employment arrangements must comply.

The Labor Law is a major legislative achievement. On closer examination, however, it has serious limitations.²⁴ It provides only the skeleton of a regulatory framework, with its arti-

gistration, or *hukou* system, which has specified for every Chinese citizen their place of residence and classified them as either agricultural or non-agricultural (i.e., urban). However, the Labor Law draws no formal distinction in the application of key norms on the basis of *hukou*; urban and rural workers are equally entitled to the protections of the Labor Law. See LIU, *supra* note 15, at 139–67, 209–44; Fei-Ling Wang, *Reformed Migration Control and New Targeted People: China’s Hukou System in the 2000s*, 177 CHINA Q. 115 (2004).

21. For comprehensive accounts of the Chinese legal system, see generally STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999) and RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD THE RULE OF LAW* (2002). On implementation issues, see generally Jianfu Chen, *Implementation of Law in China—An Introduction*, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA I (Jianfu Chen et al. eds., 2002) and NEIL DIAMANT ET AL., *ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE* (2005).

22. See Zhonghua Renmin Gongheguo Laodong Fa [Labor Law of the P.R.C.] (promulgated by the Nat’l People’s Cong., July 5, 1994, effective May 1, 1995) art. 17 [hereinafter Labor Law].

23. See HILARY JOSEPHS, *LABOR LAW IN CHINA* 41-48 (2003); RONALD KEITH & ZHIQIU LIN, *LAW AND JUSTICE IN CHINA’S NEW MARKETPLACE* 93-127 (2001).

24. See VIRGINIA HO, *LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR RIGHTS AND LEGAL REFORM* 196-200 (2003).

cles either supplemented by subordinate legal instruments produced by various State agencies (which number in the thousands)²⁵ or left unelaborated. The rules pertaining to arrears illustrate this point because bright-line rules rendering this abuse unlawful are not readily available.

2. Underpayment of Wages

Article 50 of the Labor Law stipulates that: “Wages shall be paid monthly to workers in person in the form of cash. Wages shall not be misappropriated (*kekou*) nor shall the employer fall in arrears (*tuogian*) without justification.”²⁶ Provisions complementary to Article 50 require parties to the employment relationship to abide by their contractual commitments.²⁷

While these provisions appear to generate straight forward obligations to pay wages, they are very vague. They do not define wages. They do not spell out how they can be varied. They do not provide for wage records to be kept and given to employees. They do not explain what forms of labor service generate an entitlement to wages; for example, what happens if there is no work to be performed or an employee is sick or must perform a public duty? They do not explain how to deal with a situation where an employer-employee relationship is obscured by a network of contractual arrangements. They do not clarify what “misappropriation” or “delay without justification” mean or whether, for example, an employer is permitted to retain a bond.

The lacunae in the regulatory framework are filled to some extent by subordinate legal instruments issued by the Ministry of Labor and Social Security (“MOLSS”).²⁸ Even these subordinate instruments do not address, however, the legality of bonds. It is not until we come to low-level Ministry “Notices” that we find

25. See, e.g., China’s Ministry of Labor and Social Security Website, <http://trs.molss.gov.cn/was40/mainframe.htm> (last visited Jan. 22, 2007) (listing subordinate legal instruments that supplement the Labor Law). This list does not include many provincial and local rules.

26. See Labor Law, art. 50.

27. See Labor Law, arts. 17, 48.

28. See, e.g., Gongzi Zhifu Zhanxing Guiding [Temporary Regulation on the Payment of Wages] (promulgated by the Ministry of Labor, Dec. 6, 1994, effective Jan. 1, 1995); Dui “Gongzi Zhifu Zhanxing Guiding” youguan Wenti de Buchong Guiding [Supplementary Regulation on Questions Concerning the Temporary Regulations on the Payment of Wages].

explicit statements that employers are not permitted to require employees to furnish any kind of bond or security. A Notice directed at the private sector²⁹ provides: "An enterprise must not collect currency, or other objects as 'security upon entering the factory' (*ruchang diyao*), and must not detain an employee's identity card or temporary resident card, or hold them as security."³⁰

A major reason for the lacunae in the regulatory framework is that the Chinese legal system creates a radical separation between employment contracts and other types of contractual relationships.³¹ This sharp delineation is apparently made for ideological reasons; it preserves in legal form the ideological position that Chinese workers are not commodities.³²

As the national contract law does not apply to employment contracts, there is no contractual substratum like the one underpinning employment contracts in common law or other major civil law systems. It is thus a legal error to draw on general contractual principles to determine the legal rules applicable to, for example, central issues in wage disputes such as when, how, by whom, and to whom wages must be paid; the circumstances in which non-payment may be justified; and, where wages are not paid in accordance with law, how compensation is to be determined.

This means that the Labor Law and related legislation should comprehensively spell out the major principles relating to labor contracting. While the Labor Law deals with individual labor contracts, however, its specific treatment is limited to only twenty-one articles,³³ ten of which solely concern termination.³⁴ The Labor Law is silent on matters such as variation, capacity, interpretation, the implications of terms, the effect of work en-

29. See Guanyu Jiaqiang Waishang Touzi Qiye he Siying Qiye Laodong Guanli Qieshi Baozhang Zhigong Hefa Quanyi de Tongzhi [Notice Concerning Strengthening the Real Protection of Workers' Lawful Rights and Interests in Foreign Invested and Private Enterprises] (promulgated by the Ministry of Labor, the Ministry of Public Security, and the All China Federation of Trade Unions, Mar. 4, 1994).

30. *Id.* cl. 2.

31. See Zhonghua Renmin Gongheguo Hetong Fa [Contract Law of the P.R.C.] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) [hereinafter Contract Law]. Article 123 of the Contract Law provides that "where other laws stipulate otherwise on contracts, such provisions shall govern." *Id.* art. 123.

32. See HUAI GUAN, LAODONG FAXUE [LABOR LAW] 215 (5th ed. 2001). For a critique of this position, see KEITH & LIN, *supra* note 23, at 110-11.

33. See Labor Law, arts. 16-32, 97-99, 102.

34. See *id.* arts. 23-32.

gaged in under an invalid contract, the rules of contract performance, transfer of business, and the principles for determining compensation for breach.

It is clear that the important rules governing underpayment of wages are not readily ascertainable by those who wish to assert their rights. They are not located within the texts of major laws. Indeed, one of the most significant rules—that against taking bonds—is buried in low-level Notices. Furthermore, while these subordinate instruments themselves seem to be publicly available from the MOLSS website (although this is not always up-to-date), availability is quite different from accessibility. The scattered location of the applicable rules defies easy retrieval.³⁵

To be sure, it is not only in China that legal concepts, including those pertaining to the employment relationship, evolve in a piecemeal and fragmented fashion. The Chinese can scarcely be criticized because the elaboration process has had to be compressed into a few years rather than centuries as in Western legal systems. What is distinctively problematic about the Chinese mode of elaboration, however, is that the pursuit of detail takes an inquirer ever further away from laws directed at the general public often to temporary legal instruments primarily designed for and directed at State agencies.³⁶ The people informed about the legal position are the labor bureaucracy rather than, at least in the first instance, employers, employees, or the courts.

3. “Non-Standard Workers”

In addition to the shortcomings specific to remuneration, there is further limitation that underlies the framework regulating labor law as a whole. As mentioned earlier, the Labor Law creates a radical separation between employment contracts and other types of contractual relationships. This separation fails to recognize one of the dominant challenges for contemporary labor regulation. Increasingly, work relationships are no longer typified by the putative subject of traditional employment regulation: long-term employees engaged by a clearly identifiable em-

35. See Ho, *supra* note 24, at 194-96.

36. Thus, labor regulation is frequently addressed to labor bureaus in the various provinces and relevant ministries.

ployer.³⁷ The traditional boundary between an employee and an “independent contractor,” fundamental to the conceptual structure of labor law, has become very blurred. This global trend is mirrored in China. As the vestiges of the command economy disappear and global supply chains anchor their labor intensive manufacturing in a vast network of Chinese firms, new forms of work arrangements are proliferating, many of them short-term and precarious.³⁸

Many societies have sought to adapt their regulatory framework in response to these changes in work arrangements, so as to avoid seeing increasing numbers of people working outside that framework. China’s Labor Law and labor institutions, however, very much persist with the traditional approach and the complete legal uncoupling of labor contracting from general contracting accentuates this. While the Labor Law is broad in terms of the types of enterprise it covers,³⁹ it applies only to certain categories of workers, namely to “workers (*laodongzhe*) who form a labor relationship (*laodong guanxi*) with enterprises. . . .”⁴⁰ This phrase sets the boundary between those workers to whom the Labor Law standards apply and those whose work relations are governed by the general contract law. However, the phrase is quite vague—it is not apparent how it should be applied to work relationships that could be categorized as either employer-employee or as two independent contractors. Such relationships include home-workers (or outworkers) in the textile industry or individual trades-people in the construction industry.

A second boundary question concerns the situation in which a worker is clearly an employee, but it is difficult to identify the employer. Such a problem arises where workers are transferred between firms, when firms merge or divide, or in long-term labor hire arrangements. This problem is also not adequately addressed in Chinese law.

Guidance on how to decide whether a person is a worker for

37. See generally MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (1996); KATHERINE W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004).

38. See Mary Gallagher, “*Time is Money, Efficiency is Life*”: *The Transformation of Labor Relations in China*, 39 *STUD. COMP. INT’L DEV.* 11, 21-26 (2004).

39. See GUAN, *supra* note 32, at 148-49.

40. Labor Law, art. 2.

the purposes of the Labor Law is crucial. Not only does this decision indicate whether labor standards apply to that person, but it also determines whether the labor bureau and the labor disputes arbitration committees have jurisdiction, and whether the person is eligible to be a union member.

Many legal experts in China are alert to the deficiencies of the Labor Law framework: One important response is that a Labor Contract Law has been drafted nationally.⁴¹ This Law may make it much easier for employers and employees to determine their rights and obligations in relation to the payment of wages, and indeed for bureaucrats to understand what rules they must implement.

Moreover, several provincial level congresses have already enacted their own local regulations on labor contracts or wages.⁴² While these different local initiatives lead to further fragmentation and inconsistency, they may provide models for law at the national level. The draft national law and a promising local attempt to create a comprehensive and comprehensible framework (responding not only to the need to specify clear norms but also to problems with enforcement) are examined at the end of this Part.

B. Enforcing the Rules: Bureaucratic Implementation

Notwithstanding the difficulties associated with exactly identifying the relevant legal norms, many of the more extreme instances of withholding wages can be safely characterized as unlawful. The widespread nature of these abuses suggests that the institutions charged with securing compliance with the law have severe shortcomings. This section and the following two sections examine these shortcomings insofar as they relate to the legal character of these institutions.

There are three main, interrelated State vehicles for implementing labor law: enforcement by State agencies, dispute resolution processes, and monitoring by the official trade union organization. In China, the burden for ensuring that labor laws

41. *See infra* Part III.

42. *See, e.g.*, Guangdong Sheng Gongzi Zhifu Tiaoli [Guangdong Province Regulations on the Payment of Wages] (promulgated by the Standing Committee of the Guangdong Provincial People's Cong., Feb. 19, 2005, effective May 1, 2005) (P.R.C.) [hereinafter Guangdong Wage Regulations].

are enforced is placed even more heavily on administrative agencies than it is in many other countries. Most labor law norms (as with very many legal rules in China) take the form of “command and control” regulations.⁴³ Legal instruments state rules, charge an agency with implementing them, and then set out a range of sanctions that that agency or another state agency can impose if the rules are violated.

The main institutions responsible for implementing labor law are the “labor administration departments established under people’s governments above county level” (*xianji yishang geji renmin zhengfu laodong xingzheng bumen*).⁴⁴ These local labor departments, which operate both under the MOLSS and under their local provincial or municipal government, have jurisdiction over most aspects of labor law within their area, with the important exception of occupational health and safety.⁴⁵ The Labor Law requires labor departments to “supervise and inspect” (*jinxing jiandu jiancha*) employer compliance with labor regulation.⁴⁶ They do so through inspectorates established in the principle provincial/municipal departmental offices and in local branch and sub-branch offices.

The precise responsibilities, procedural rules, and enforcement powers of labor inspectors were until very recently governed mainly by a complex set of rules promulgated at various times by the MOLSS as well as by other governmental organs at the provincial and municipal level. Fortunately, the State Council’s 2004 Labor Inspection Regulations have authoritatively updated and consolidated these rules.⁴⁷

The Labor Inspection Regulations, elaborated in supplementary rules promulgated by the MOLSS,⁴⁸ establish a clear

43. See ANTHONY OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 4, 245-56 (1994).

44. Labor Law, art. 85; see *Laodong Baozhang Jiancha Tiaoli* [Regulations on Labor Protection Inspection] (promulgated by the State Council, Oct. 26, 2004, effective Dec. 1, 2004) [hereinafter Labor Inspection Regulations].

45. See Labor Inspection Regulations, art. 35.

46. Labor Law, art. 85.

47. See Labor Law, art. 85; see also Labor Inspection Regulations (promulgated by the State Council, Oct. 26, 2004, effective Dec. 1, 2004).

48. See *Guanyu Shishi Laodong Baozhang Jiancha Tiaoli Ruogan Guiding* [Certain Provisions Concerning Implementation of the Regulations on Labor Protection Inspection] (promulgated by the Ministry of Labor and Social Security (“MOLSS”), Jan. 24, 2005, effective Feb. 1, 2005) [hereinafter Labor Inspection Implementing Provisions].

process for dealing with allegations concerning violations of the Labor Law. Any person or organization may report a violation of the law to their local labor department, and any worker whose rights or interests have been violated by an employer may lodge a complaint within two years of becoming aware of the violation.⁴⁹ These include complaints about unpaid wages, which are the most common complaints in some areas.⁵⁰

If the complaint is accepted, departmental officers must investigate it. They may exercise wide powers to enter premises, interview people, engage accountants, collect data, and preserve evidence.⁵¹ If they find that breaches of the legislation and rules have occurred, the local labor departments can exercise a range of powers. They can order a firm to cease a wrongful act and "make corrections" (*zeling gaizheng*)⁵² within a specified time period,⁵³ and order a firm to provide compensation for harm caused.⁵⁴ The local labor departments can also impose a range of administrative penalties (or sanctions, *chufa*).⁵⁵

This analysis suggests thus far that Chinese labor departments have the authority and powers necessary to force employers to observe the law. There are many factors, however, blunting their potential effectiveness. First, the disorderly state of legal rules means that local agencies may observe rules or policies devised by themselves or related agencies rather than higher inconsistent legal instruments, which formally have greater authority.

Second, and more significantly, the sanctions that labor departments can deploy against egregious violators are actually

49. See Labor Inspection Regulations, arts. 9, 20.

50. See Isabelle Thireau & Hua Linshan, *One Law, Two Interpretations: Mobilizing the Labor Law in Arbitration Committees and in Letters and Visits Offices*, in *ENGAGING THE LAW IN CHINA: STATE, SOCIETY AND POSSIBILITIES FOR JUSTICE*, *supra* note 21, at 91.

51. See Labor Law, art. 86; Labor Inspection Regulations, art. 15; Labor Inspection Implementing Provisions, arts. 26-29.

52. Labor Law, arts. 85, 89, 90, 92, 94, 95, 98.

53. See *Zhonghua Renmin Gongheguo Xingzheng Chufa Fa* [Administrative Punishments Law of the P.R.C.] (promulgated by the Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996) art. 23.

54. See Labor Law, art. 91.

55. The Labor Inspection Regulations and subordinate legal instruments produced by the MOLSS delineate the scope of these penalties and the principles governing their imposition. These rules clarify the amount of compensation that can be ordered, the various punishments for breaches of the Labor Law, and the procedures for imposing those punishments.

quite weak. Firms clearly orient their actions not simply on the basis of legality, but, even more so, in accordance with cost-benefit calculations. Sanctions need to be sufficiently powerful to overcome incentives not to comply with the law. These incentives are extremely strong in many Chinese firms. They face constant pressure to lower their labor costs by illegal means, such as through breaching labor contracts. Evasion of labor law by some firms creates immense pressure on other firms that might initially have a stronger disposition to abide by the law. This cascade effect is well illustrated in China's export-oriented manufacturing sector. If a firm in that hypercompetitive environment, struggling to meet its supply deadlines, knows that its rivals will fail to pay agreed wages, and knows that these rivals are very unlikely to be punished, it faces a choice between adhering to the law and survival.⁵⁶ Most firms are likely to choose survival over a steadfast but suicidal commitment to the law.

Firms using low-skilled migrant labor have been especially prone to violate the law because their workers have, at least until recently, been unable to use labor market pressures to compel the employer to act lawfully. Threats to exit the firm unless the law is obeyed have carried little weight because of China's huge labor surplus,⁵⁷ although recent unskilled labor shortages in certain cities may indicate that poor working conditions have at last deterred many rural workers.⁵⁸ Further, as discussed below, industrial action to force compliance has no legal status or protection and union officials (who are often also managers or party officials) discourage it.⁵⁹

In these circumstances, the economic incentives for non-compliance with the law need to be countered by credible legal sanctions, which are generally not available to labor departments. Where employers fail to heed formal warnings, or refuse to obey correction orders, labor departments are limited to imposing fines and compensation orders in most instances. The usefulness of these measures is attenuated by the labor depart-

56. See LIU & TAN, *supra* note 1, at 83–85.

57. According to official estimates, there are 150 million surplus rural workers, in addition to the more than 100 million migrant rural workers. See *Migrant Workers Number 113.0 Million in 2003*, *supra* note 16.

58. See, e.g., Brian Ho, *Is There a Migrant Labor Shortage in China?*, 2 CSR ASIA WKLY. 8, 8-9 (Feb. 22, 2006), available at <http://www.csr-asia.com/index.php?p=5764>.

59. See *infra* notes 139-40 and accompanying text.

ment's reliance on judicial compulsory execution procedures to force unwilling firms to pay.⁶⁰ On the other hand, the law does not enable labor departments to deploy sanctions such as cessation of business, confiscation of earnings, or revocation of license against cases of underpayment of wages.

The restriction on sanctions available to labor departments is partly a consequence of important administrative reforms directed at preventing bureaucratic agencies from arbitrarily inflicting a wide range of punishments on individuals. Viewed from an administrative law perspective, the restrictions seem appropriate in a system where arbitrary action has been notorious. On the other hand, an unfortunate by-product of these reforms in the labor context is that these restrictions limit the scope of credible threats that can be made to a recalcitrant employer. Relatively effective enforcement strategies often involve the ability to "escalate" interventions.⁶¹

Third, although, as we have also seen, employees individually and collectively are entitled to lodge complaints with labor departments, they have difficulty compelling a department to pursue a case where it is unwilling to devote resources to the case. Labor inspectors have considerable discretion to dismiss complaints if they consider them trivial or already remedied, or if they cannot substantiate the complaints.⁶² Labor inspectors can also dismiss employee complaints if the complaint is made more than two years after the violation, if the employees are unable to identify the correct employer (which may be difficult in the context of complex supply chains) or if the labor department considers the matter outside its jurisdiction.⁶³

The steady improvements in administrative law mean that employees can seek both internal administrative reconsideration and judicial review of a decision not to pursue a labor complaint. Unfortunately, neither administrative reconsideration nor judicial review of administrative actions is well-used to secure compliance with a statutory duty, nor are they particularly effective.⁶⁴ Administrative review is hampered by the unwillingness of agencies to accept complaints and to correct improper decisions

60. See Labor Inspection Implementing Provisions, art. 44.

61. See *infra* notes 216-17 and accompanying text.

62. See Labor Inspection Implementing Provisions, art. 35.

63. See *id.* art. 18.

64. See PEERENBOOM, *supra* note 21, at 399-424.

(often as a result of local political or economic pressures) and by a lack of proper procedures. Judicial review is restricted by the inability of the courts to invalidate administrative rules, and by the generally conservative approach taken by courts to the scope of their review powers. Both processes are impeded by lack of public knowledge about, or fear of, legal procedures, compounded by the failure of agencies to inform citizens of their remedies (despite being legally obliged to do so).⁶⁵

Moreover, employers rather than employees are best placed to take advantage of administrative law reforms. Unscrupulous employers may invoke them to stall and dissuade labor departments from implementing the law. Thus, where a labor department proposes to impose a large fine, it must, at its own expense, arrange for a hearing in which the parties enjoy extensive procedural rights, including a right to representation.⁶⁶ Further, administrative penalties are quite often challenged.⁶⁷ Specifically, error on the part of a labor department officer can lead to invalidation of the penalty⁶⁸ or to sanctions being imposed on the officer rather than the firm.⁶⁹ It is understandable that inexperienced departmental staff, lacking legal qualifications and often lacking resources, may be reluctant to pursue an employer prepared to exhaust its legal options.

Fourth, corruption and local protectionism can set the prevailing agenda for the bureaucracy.⁷⁰ In accordance with Chinese administrative practice,⁷¹ local labor departments have two masters: they are subordinate both to higher level units of their

65. *See id.* at 418.

66. *See* Laodong Xingzheng Chufa Tingzheng Chengyu Guiding [Regulation on Hearing Procedures for Administrative Punishments with Respect to Labor] (promulgated by the Ministry of Labor, Sept. 27, 1996, effective Oct. 1, 1996).

67. Challenges to administrative punishments accounted for almost half of all applications for administrative. *See* ZHONGGUO FALÜ NIANJIAN [LAW YEARBOOK OF CHINA] 1072 (2004).

68. *See* Zhonghua Renmin Gongheguo Xingzheng Chufa Fa [Administrative Punishments Law of the PRC] (promulgated by the Nat'l People's Cong., Mar. 17, 1996, effective, Oct. 1, 1996), arts. 6, 35.

69. *See id.* art. 44.

70. *See* Feng Ye, *The Chinese Procuratorate and the Anti-Corruption Campaigns in the People's Republic of China*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 21, at 113, 117-18; Andrew Wederman, *The Intensification of Corruption in China*, 180 CHINA Q. 895 (2004).

71. *See* Benjamin van Rooij, *China's System of Public Administration*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 21, at 323, 329-31, 341-42.

ministry (the MOLSS) (the vertical or *tiao* relationship)⁷² and to the provincial congress and government of the area in which they operate (the horizontal or *kuai* relationship). Since local governments' staff and fund labor departments, these governments often have the upper hand in directing the day-to-day work of departmental officers.⁷³ Indeed, local governments often have close links to businesses under scrutiny or manage those businesses.⁷⁴

Fifth, the quantity of labor inspectors may well be inadequate to implement the law systematically across the country. While there are more than 3,000 inspecting agencies and 40,000 labor inspectors,⁷⁵ this number is dwarfed by the number of business entities in China—around thirty million.⁷⁶

Finally, despite the potential sanctions for so doing, firms adopt extensive strategies to frustrate inspection work. For example, in the event that bribes do not succeed, many firms keep false records and coach workers so that when an external inspection into working conditions takes place, the inspectors are deceived.⁷⁷

C. *Enforcing the Rules: Dispute Resolution Procedures*

The shortcomings in bureaucratic enforcement render it all the more important for workers to be able to enforce their rights through formal dispute resolution processes.⁷⁸ This form of enforcement process enables workers to be directly engaged in seeking compliance. When a complaint is referred to a labor department, workers lose control of it, in the sense that labor departments cannot be readily compelled to act in workers' interests. On the other hand, dispute resolution procedures constitute workers as parties, with the ability to structure the claim and pursue the issue to conclusion.

The centerpiece of the Chinese labor dispute resolution

72. See Labor Inspection Regulations, art. 7.

73. See van Rooij, *supra* note 71, at 149, 164-68, 330.

74. See BILL TAYLOR ET AL., *INDUSTRIAL RELATIONS IN CHINA* 43-45, 47-76 (2003).

75. See ZHONGGUO FALÜ NIANJIAN [LAW YEARBOOK OF CHINA] 45 (2003).

76. See KANAMORI, *supra* note 9, at 24.

77. See CHAN, *supra* note 1, at 123-25; LIU & TAN, *supra* note 1, at 76-79.

78. For excellent studies on this topic, see generally HO, *supra* note 24, and SHANGYUAN ZHENG, LAODONG ZHENGYI CHULI CHENGXUFA DE XIANDAIHUA [THE MODERNISATION OF LABOR DISPUTES ADJUSTMENT PROCEDURE LAW] (2003).

process is labor arbitration. According to the Labor Law, all formal disputes that cannot be resolved by mediation within an enterprise should be channeled through arbitration. Arbitration is an essential precondition, not an alternative, to litigation.⁷⁹ A worker cannot directly file suit in a court, even for a claim for unpaid wages (a simple debt) without first going through arbitration.⁸⁰

Labor arbitration operates as follows. When a labor dispute first occurs, a worker or an employer may apply for mediation within the enterprise.⁸¹ If mediation fails, or if one of the parties is unwilling to have the dispute mediated, one or both of the parties may apply for labor arbitration.⁸² Labor arbitrations are conducted by tripartite labor dispute arbitration committees (*laodong zhengyi zhongcai weiyuanhui*, "LDACs"), established by the local labor departments.⁸³

The LDACs (of which there are close to 3,000)⁸⁴ have very wide jurisdiction on paper, extending to disputes over wages by present and former employees.⁸⁵ The LDACs also have broad powers to rule on the validity of a contract, order reinstatement of a terminated employee, order the payment of compensation, or require employers to comply with labor contracts.⁸⁶

More and more labor disputes are being brought before LDACs.⁸⁷ According to statistics from the MOLSS,⁸⁸ the number

79. See Labor Law, art. 83.

80. See GUAN, *supra* note 32, at 531; ZHENG, *supra* note 78, at 146-49.

81. See Labor Law, art. 79; see also Zhonghua Renmin Gongheguo Qiye Laodong Zhengyi Chuli Tiaoli [Regulations of the People's Republic of China on Settlement of Labor Disputes in Enterprises] (promulgated by the State Council, July 6, 1993, effective Aug. 1, 1993) art. 6 [hereinafter Dispute Regulations].

82. See Labor Law, art. 79; Dispute Regulations, art. 6.

83. See Labor Law, art. 81; Dispute Regulations, art. 12.

84. There were 2934 in 2003. ZHONGGUO FALÜ NIANJIAN [LAW YEARBOOK OF CHINA] 603 (2004).

85. Labor disputes are broadly defined to cover a range of matters in connection with an employment relationship. See Dispute Regulations, art. 2. The labor dispute procedure applies to disputes where a labor relationship has existed, notwithstanding that no contract has been concluded. See Labor Disputes Interpretation, art. 1.

86. On the kinds of orders that LDACs make, see JOSEPHS, *supra* note 23, at 90-95.

87. See HO, *supra* note 24, at 82-143 (setting forth a comprehensive analysis of labor dispute occurrence and types); see also Mary 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, *supra* note 21, at 54, 67-70; THIREAU & HUA, *supra* note 50.

88. These statistics are not entirely reliable since the figures do not always tally with each other. However, the MOLSS statistics probably do indicate general trends.

of new cases has been increasing yearly, from 47,951 in 1996 to 226,391 in 2003, an increase of more than 470% in just seven years.⁸⁹ Further, more than one third of all labor arbitrations concern remuneration.⁹⁰

However, LDACs frequently fail to resolve disputes. Although the statistics are inconsistent, it would seem that a majority of cases are appealed from arbitration.⁹¹ One reason for this appears to be that many LDACs reject cases because of an excessively narrow view of their jurisdiction—perhaps to lower their workload by shifting cases to the courts—but the courts then take them up.⁹² Yet, even where LDACs acknowledge jurisdiction, parties to the dispute appeal a very high proportion of their arbitral judgments.⁹³

The high rate of court applications suggests that the Chinese labor arbitration system has serious weaknesses. This impression is confirmed by the comprehensive critique of the system by Chinese labor law scholar, Zheng Shang-yuan.⁹⁴ Professor Zheng first observes that the present labor dispute resolution processes were conceived in the era when the economy was much more centrally planned and dominated by the State sector than it is today. These processes remain highly bureaucratized (*xingzhenghua*), with the labor departments as the central actors.⁹⁵ The LDACs, while formally separate entities authorized to “settle labor disputes independently according to law,”⁹⁶ are chaired by a labor department representative,⁹⁷ located within the labor dispute settlement section of the department,⁹⁸ and

89. See ZHONGGUO LAODONG TONGJI NIANJIAN [YEARBOOK OF LABOR STATISTICS] 2004, tbl.9-1.

90. See *id.* tbl.9-2 (indicated that, in 2003, 76,774 cases, or thirty-four percent of the total number of labor arbitrations, involved remuneration and that sixty-five percent of these cases came from the non-State sector).

91. See Ho, *supra* note 24, at 79.

92. See Gallagher, *supra* note 87, at 62; see also THIREAU & HUA, *supra* note 50, at 87.

93. See Gallagher, *supra* note 87, at 73 (reporting that officials in Beijing and Shanghai indicated that in 2003 nearly seventy percent of all judgments were appealed).

94. See ZHENG, *supra* note 78.

95. See *id.* at 137-41.

96. Laodong Zhengyi Zhongcai Weiyuanhui Zuzhi Guize [Organic Rules of Labor Dispute Arbitration Committees] (promulgated by the Ministry of Labor, Nov. 5, 1993, effective Nov. 5, 1993), art. 2 [hereinafter LDAS Rules].

97. See Labor Law, art. 81; Dispute Regulations, art. 13.

98. See Dispute Regulations, art. 13.

dependent on the department for administrative work.⁹⁹ Moreover, the LDACs do not have the status of legal persons, do not have their own assets or control over their financial operations, and cannot pay the wages and benefits of their members. This means in effect that the full-time arbitrators must be employees of the labor departments.¹⁰⁰

Further, although LDACs are ostensibly based on the principle of tripartism and should be comprised of State, employer, and employee representatives, in practice State representatives dominate.¹⁰¹ We have just seen that the labor department representative is the chair of a LDAC. The “employer” representative is nominated by government agencies responsible for administering State-owned enterprises;¹⁰² this means that despite the growing private sector of the economy, there is no engagement in the dispute resolution process by private employers. On the other hand, the “employee” representative is drawn from the quasi-governmental official trade union organization.¹⁰³ In any event, these “non-State” representatives may not be present in many of these cases, which can be heard by individual arbitrators.¹⁰⁴ Under these conditions, labor arbitration crosses over into bureaucratic implementation of the law, rather than constituting an autonomous dispute resolution procedure.¹⁰⁵

A further problem is that LDAC arbitrators face strong incentives to be biased against employees. The law provides that arbitrators must recuse themselves if they have a conflict of interest and prohibits them from taking bribes.¹⁰⁶ However, LDACs are often predisposed to favor local government and local business interests (often intertwined) to the detriment of individual workers.¹⁰⁷ This may be because of corrupt financial inducements, but the structural reason why LDACs would not wish to offend local governments is that they are dependent on labor departments for their resources and personnel, and those de-

99. *See id.*; LDAC Rules, art. 3.

100. *See* ZHENG, *supra* note 78, at 154; *see also* LDAC Rules, art. 15.

101. *See* ZHENG, *supra* note 78, at 150-53.

102. LDAC Rules, art. 7; *see also* ZHENG, *supra* note 78, at 151-52.

103. *See* LDAC Rules, art. 7; *see also* ZHENG, *supra* note 78, at 153.

104. Union representatives were involved in only 30,396 of the cases in 2003. ZHONGGUO FALŪ NIANJIAN [LAW YEARBOOK OF CHINA] 603 (2004).

105. *See* ZHENG, *supra* note 78, at 139.

106. *See* Dispute Regulations, arts. 35, 38.

107. *See* Gallagher, *supra* note 87, at 74.

partments are, in turn, dependent on local governments for *their* resources and personnel.

Finally, LDACs do not have jurisdiction where there is not an employer-employee relationship. Chinese labor law does not explain in detail how to identify such a relationship; this leaves scope for the LDACs to determine the existence of these relationships for themselves. As mentioned above, many LDACs take a very narrow view of their jurisdiction¹⁰⁸—perhaps to reduce their workload—and are therefore likely to dismiss cases from workers who do not have a clearly identifiable employer. These workers may be the most vulnerable to violations of their contractual entitlements.

Turning from the status and composition of the LDACs to questions of process, a first problem is that a party (usually the employer) is able to draw out a dispute until the other party is exhausted.¹⁰⁹ When a LDAC accepts an application, it has a maximum of 104 days within which to conclude the case.¹¹⁰ This in itself is a reasonable period. If one of the parties is dissatisfied with the arbitral award, however, it can elect to commence court proceedings, preventing the arbitrated award from taking effect.¹¹¹

The court process involves a *de novo* hearing at first instance, and, if there is an appeal of the first instance judgment, a second *de novo* hearing.¹¹² Professor Zheng points out that this process places workers seeking to recover arrears in wages in a highly disadvantageous position. First, they face the prospect of maintaining legal proceedings without their primary source of income (especially if they have been wrongly terminated). Court proceedings are expensive,¹¹³ and there is inadequate legal aid for persons without means, such as individual workers, who wish to access lawyers.¹¹⁴

108. For example, they reject cases where there is a labor relationship without a written contract. See *supra* note 92.

109. See ZHENG, *supra* note 78, at 201-04.

110. See Dispute Regulations, arts. 25, 32.

111. See Labor Dispute Interpretation, art. 17.

112. See Zhonghua Renmin Gongheguo Minshi Susong Fa [Civil Procedure Law of the P.R.C.] (promulgated by the Nat'l People's Congress, Apr. 9, 1991), chs. XII-XIV [hereafter Civil Procedure Law].

113. For more extensive accounts of the Chinese court system, see LUBMAN, *supra* note 21, at 250-97, and PEERENBOOM, *supra* note 21, at 280-342.

114. See PEERENBOOM, *supra* note 21, at 362-64. On access to competent and hon-

Second, workers run the risk of the employer absconding, or removing assets from the jurisdiction.¹¹⁵ In the case of court proceedings, it is possible to obtain preventative orders, such as orders to preserve property and evidence.¹¹⁶ Most usefully, a court can order interim relief, including, specifically, in cases involving labor remuneration.¹¹⁷ Such orders cannot be made by LDACs.¹¹⁸

Not surprisingly, then, LDACs appear to be rarely used by migrant workers. Research by Thireau and Hua of data at the Shenzhen Labor Bureau suggests that LDACs are used to resolve disputes by wealthier, long-term, and frequently skilled workers.¹¹⁹ Other research suggests that these workers are overwhelmingly well-resourced males.¹²⁰ On the other hand, poorer workers use oral or written complaints submitted to the labor department as their principle means of trying to engage State institutions to deal with labor abuses.¹²¹

Even if a worker can sustain the expenses associated with an arbitration or court proceeding, and obtains an order in her or his favor, this may be of little avail. It is often very difficult in China to execute either arbitral awards or court judgments. As application for execution of arbitral awards involves court proceedings, in both cases the difficulty lies with the court compulsory execution process. It is well established that Chinese courts are frequently unable to enforce their judgments.¹²²

Another procedural shortcoming is that the legal instruments regulating dispute resolution generally draw no procedural distinctions between individual and collective disputes. This is a legacy of central planning, where industrial conflict did not

est lawyers, see Yuwen Li, *Court Reform in China: Problems, Progress and Prospects*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 21, at 55, 61-62, 69, and PEERENBOOM, *supra* note 21, at 361-69.

115. See ZHENG, *supra* note 78, at 167-70.

116. Civil Procedure Law, chs. VI, IX.

117. See *id.* arts. 97, 98.

118. ZHENG, *supra* note 78, at 166-70.

119. Thireau & Hua, *supra* note 50, at 90; see also JOSEPHS, *supra* note 23, at 92-94.

120. Hualing Fu & D.W. Choy, *From Mediation to Adjudication: Settling Labor Disputes in China*, 3 CHINA RIGHTS FORUM 17, 18-19 (2004).

121. See Thireau & Hua, *supra* note 50, at 90.

122. See generally Donald Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996); see also Jianfu Chen, *Mission Impossible: Judicial Efforts to Enforce Civil Judgments and Rulings*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 21, at 85.

take the same form as collective disputes in market-based economies.¹²³ This means that the LDACs use the same procedures for a small individual dispute and a large-scale conflict that may involve considerable economic and social disruption, for instance, where a factory suddenly closes, leaving thousands of workers unpaid.

D. *Enforcing the Rules: Unions*

Shortcomings in labor bureaucracies and dispute procedures are, of course, observed in very many jurisdictions. Nonetheless, in many countries, the injurious effects such shortcomings have on workers are counteracted by workers' capacity to pursue compliance issues collectively, through their unions. In China, however, the extent to which lawful trade unions are responsible for compelling compliance with the law is determined by the State, not by ordinary union members. The compliance function of Chinese unions is thus really another aspect of State bureaucratic enforcement of labor law. It is worth while to examine how far this compliance function contributes to the implementation of labor law.

China's official trade union organization, the All-China Federation of Trade Unions ("ACFTU"), is the largest "labor organization" in the world, claiming a membership of over 130 million, more than 300,000 full time officials, and more than one and a half million base-level (that is, enterprise) unions.¹²⁴ The ACFTU, however, is not an organization controlled by its membership. It is subordinate to the Chinese Communist Party ("CCP") and the State.¹²⁵ This arrangement is spelled out both in the Trade Union Law¹²⁶ and in the ACFTU Charter.¹²⁷

It is well known that China does not permit unions to be formed without ACFTU approval¹²⁸ and has harshly punished

123. See ZHENG, *supra* note 78, at 141-46, 207-16.

124. See All-China Federation of Trade Unions ("ACFTU") Website, <http://www.acftu.org.cn/about.htm> (last visited Feb. 15, 2007).

125. See, e.g., TAYLOR ET AL., *supra* note 74, at 40-43, 102-23.

126. Amended Trade Union Law of the P.R.C. (promulgated by the Standing Comm. of the Nat'l People's Congress on Amending the Trade Union Law of the People's Republic of China, Oct. 27, 2001, effective Oct. 27, 2001), art. 4 [hereinafter Trade Union Law].

127. Charter of Chinese Unions, passed by the 14th National Congress of the ACFTU on September 26, 2003 [hereinafter the Charter].

128. Trade Union Law, art. 11.

labor activists who have attempted such actions.¹²⁹ This clearly violates the key ILO conventions on freedom of association,¹³⁰ as the ILO Committee on Freedom of Association has repeatedly found.¹³¹ Despite this, there is very little prospect that China will substantially alter its stance on freedom of association in the short to medium term as the party-State sees dominance of labor organizations as essential to its survival.¹³²

The Trade Union Law, then, binds Chinese trade unions to the CCP and the State through the ACFTU structure and treats worker representative bodies outside this structure as illegal. Moreover, the law goes beyond simply ensuring that the CCP/State has ultimate authority over trade unions; it directs the functions unions are to perform. It treats them essentially as State regulatory agencies.

Among these mandated functions, a major responsibility of the trade unions is to seek employer compliance with the Labor Law. The 2001 amendments to the Trade Union Law delineate specifically that trade unions are obligated to (*yingdang*) take action “on behalf of employees” where enterprises misappropriate wages.¹³³

These provisions suggest that, while Chinese trade unions may not be worker-representative organizations as understood in liberal democratic societies, they are nevertheless well positioned to protect worker entitlements where these are set out in the law. Indeed, they are directed to do so.¹³⁴ Importantly, seeing that labor law is properly implemented does not, on its face, put unions in tension with the party-State.

In principle, official Chinese trade unions could be a much more effective force for securing compliance than labor department inspectors. According to official data, union officials out-

129. See International Confederation of Free Trade Unions, *ICFTU Comments on the First Report Submitted by the People's Republic of China in its Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1966, app. 3 (2005).

130. See, e.g., *Freedom of Association and Protection of the Right to Organize Convention (ILO No 87)*, July 9, 1948, 68 U.N.T.S. 17; *Right to Organize and Collective Bargaining Convention (ILO No 98)*, July 1, 1949, 96 U.N.T.S. 257.

131. See, e.g., ILO Committee on Freedom of Association Reports Vol. LXXXVI, 2003, Series B, No. 1, paras. 385-467, 465.

132. See ANN KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS 128-45 (1999) (discussing the interaction between China and the ILO on freedom of association).

133. Trade Union Law, arts. (1)-(2).

134. See Labor Law, art. 7.

number inspectors by more than seven to one, and, unlike labor inspectors, officials of base-level unions are located within enterprises and so can conduct ongoing monitoring.¹³⁵

Unfortunately, for many reasons, the compliance function of Chinese unions remains weak. First, the legal powers available to a union to compel an employer to adhere to the law are inadequate. Where a union identifies a violation of the law, it has no direct remedy against the employer. Its power is essentially limited to raising the issue with the employer and seeking its response.¹³⁶ The union has no substantive legal or industrial weapon at its disposal. It is dependent on other agencies to apply legal sanctions or issue binding orders—in most cases either the labor inspectorate¹³⁷ or a LDAC.¹³⁸ As already demonstrated, these agencies have problems of their own.

As for industrial sanctions, there is no right to strike in China, even when there is a life-endangering hazard in the enterprise.¹³⁹ Where industrial action occurs in an enterprise, the union is required to “express the employee’s views, negotiate with the employer and propose a resolution”—it cannot lead a stoppage but, on the contrary, is enjoined to help the enterprise “resume production as quickly as possible” and “restore work discipline.”¹⁴⁰

Second, many enterprise level unions are dominated by management.¹⁴¹ Indeed, union officials may themselves be enterprise managers.¹⁴² This is clearly in conflict with the ILO principles on preventing interference with union autonomy¹⁴³ as well as with the situation in most industrialized countries, where legislation or the internal rules of unions prevent management dominance of unions.

135. Cf. statistics *supra* notes 75, 124 and accompanying text.

136. Trade Union Law, art. 22.

137. *See id.*

138. *See id.* arts. 20-21.

139. *See id.* art. 24. A union may only suggest to the employer that work cease.

140. *Id.* art. 27. Union officials frequently seek actively to prevent or defuse industrial action on the basis of the “national interest.” Feng Chen, *Between the State and Labor: The Conflict of Chinese Trade Unions’ Double Identity in Market Reform*, 176 CHINA Q. 1006, 1018-22 (2003).

141. For the historical reasons for this, see, e.g., TAYLOR ET AL., *supra* note 74, at 103-07.

142. *See* Gallagher, *supra* note 38, at 26-28, 32-33; Simon Clarke et al., *Collective Consultation and Industrial Relations in China*, 42 BRIT. J. INDUS. REL. 235, 241-44 (2004).

143. *Right to Organize and Collective Bargaining Convention*, *supra* note 130, art. 2.

In the context of enforcement of Labor Law, it is obvious that a manager in a firm that has breached obligations to its employees will be tempted to prevent a union taking action against the firm or assisting a worker to take such action. If the firm manager is also the union secretary, then union support for enforcement proceedings is unlikely to be forthcoming.¹⁴⁴ Observation confirms this; in many wage arrears cases, for example, the union official has actively represented management in arbitration proceedings.¹⁴⁵

The 2001 revisions of the Trade Union Law state that “close relatives of those chiefly responsible for running a firm” (*qiye zhuyao fuzeren*) cannot be candidates for election to union committees at enterprise union level.¹⁴⁶ Crucially, however, the Law does not prevent managers themselves being elected.

Third, there are limited means through which members can compel their unions to protect their entitlements or to represent them, as the law requires. The Trade Union Law obliges unions to assist individual workers who commence proceedings in a LDAC or in the courts.¹⁴⁷ One of the important revisions to the Trade Union Law made in 2001 was to confer an express right on trade unions to litigate directly when an employer violates a collective contract.¹⁴⁸ The relevant union can take the employer to a LDAC and then to court.¹⁴⁹

There are many disputes in which unions do in fact assist workers.¹⁵⁰ Nevertheless, there are many other circumstances (apart from straightforward management domination) in which the unions decline to help, especially if facts are disputed or there is a large collective dispute. As Feng Chen has pointed out, when it occurs, the involvement of unions in compliance issues tends to be case-based rather than focusing on underlying

144. See TAYLOR ET AL., *supra* note 74, at 127 (reporting from their fieldwork that in some localities, the ACFTU has agreed to allow private firm managers to appoint the union chairperson because of pressure applied by local government authorities).

145. See Greenfield & Pringle, *supra* note 10, at 36; see also Ching Kwan Lee, *From Organized Dependence to Disorganized Despotism: Changing Labour Relations in Chinese Factories*, 157 CHINA Q. 44, 58 (1999).

146. Trade Union Law, art. 9.

147. See *id.* art. 21.

148. See *id.* arts. 20, 49.

149. See *id.*

150. See, e.g., Chen, *supra* note 140, at 1012-17.

structural issues that lead to abuses becoming endemic.¹⁵¹

Fourth, when Chinese unions do attempt to assist workers, their efforts have not been directed to those workers who suffer the most egregious violations of the law. Either unions are not present in those enterprises where the worst violations occur, or they fail to include the worst affected workers. Despite the apparently large number of union members and union officials, at best only around thirty percent of private enterprises are unionized,¹⁵² and even in the unionized firms, the union structures often exist only on paper.¹⁵³

Of still more consequence, the ACFTU, until very recently, did not attempt to represent or act in the interests of migrant workers at all. Migrant workers, being from rural areas, were classified as agricultural workers (*nongmingong*) and therefore not part of the “working class” participating in the union. Chinese unions have focused on representing urban workers with long-term contracts; such workers generally enjoy much better working conditions than migrant workers.¹⁵⁴

The union position has now changed, at least in a formal sense. In 2003, the ACFTU issued a circular stipulating that all migrant workers are entitled to join trade unions, irrespective of their residence status or their work experience.¹⁵⁵ Since then, the organization has issued further notices, actively encouraging its constituent unions to recruit migrant workers.¹⁵⁶ There is, however, little firm evidence of large scale migrant worker involvement in the running of Chinese unions.

151. *See id.* at 1017.

152. *See* Kai Chang, *Collective Bargaining: Problems and Solutions*, 11 INT'L UNION RTS. 3, 4 (2004). *See generally* Daniel Ding et al., *The Impact of Economic Reform on the Role of Trade Unions in Chinese Enterprises*, 13 INT'L J. HUM. RESOURCE MGMT. 431 (2002). On the conduct of unions in various kinds of private sector firms, see Gallagher, *supra* note 38, at 26-31.

153. *See* Chen, *supra* note 140, at 1025 (discussing the top-down approach to organizing taken by the ACFTU); *see also* Ding et al., *supra* note 152, at 445-46.

154. Local surveys indicated that very few migrant workers participated in unions prior to the 2003 policy change. *See* Jiu Mingong Jiaru Gonghui, *Laodong Bumen Ying Ti Mingong Shuohua*, WANFANG DUSHI BAO, Mar. 14, 2003 (reporting survey commissioned by firms in Shenzhen).

155. *Union Accepts Migrant Workers*, CHINA DAILY, Sept. 3, 2003, http://www.china-daily.com.cn/en/doc/2003-09/03/content_260707.htm (last visited Mar. 7, 2007).

156. *See, e.g.*, Guanyu Zuzhi Gezhong Suoyouzhi, Shiye Danwei Ji Jiguan de Laowugong Jiaru Gonghui de Tongzhi [Notice on Organizing Laborers to Join Unions in Business Enterprises with All Kinds of Ownership Structures, and Non-profit Enterprises Organs] Oct. 30, 2004.

E. *Towards a More Comprehensive Response to Underpayment of Wages?*

Chinese labor law's internal defects seem to provide little hope that it will steer workplaces away from abusive practices. Still, an overly pessimistic conclusion is not justified: There is a high degree of dynamism in the process of legal reform in China. This opens up sites for progressive intervention, so that certain useful changes to the law may be feasible. Two important legal initiatives illustrate these possibilities.

1. The Draft Labor Contract Law

On March 20, 2006, the National People's Congress released a draft Labor Contract Law,¹⁵⁷ which expands the legal rights of employees in several significant respects. In particular, it goes a long way towards addressing four of the major gaps in the labor law framework identified above. First, the draft sets out a number of contractual principles dealing with interpretation, variation, the effect of work performed under invalid contracts, and the effect of contractual relations following transfer or restructuring of business.¹⁵⁸ As noted above, these matters are not addressed in the current Labor Law, nor can they be regulated by the general Contract Law.¹⁵⁹

Second, the draft law tackles one aspect of the "boundary" problem¹⁶⁰ encountered in contemporary employment relations—the position where workers are "dispatched" (*paiqian*) or transferred between firms.¹⁶¹ Third, the law clarifies the circumstances in which deductions can be made from wages. Articles 11, 26, and 31 are the key provisions. Article 11 prohibits an

157. Labor Contract Law (draft) (Nat'l People's Cong., Mar. 20, 2006) (P.R.C.) [hereinafter Draft Labor Contract Law]. A revised draft was released in December 2006. See *Vote on Labour Contract Law Put Off*, CHINA DAILY, Dec. 27, 2006, http://www.chinadaily.com.cn/china/2006-12/27/content_768327.htm (last visited Apr. 17, 2007). The provisions cited here refer to the revised draft.

158. See Draft Labor Contract Law, art. 8 (interpretation in favor of employee in cases of ambiguity); see also *id.* arts. 27-29 (validity and effect of work performed under invalid contracts); *id.* arts. 34-35 (transfer of business); *id.* art. 36 (variation). The law also includes provisions dealing with matters including staff and union consultation over firm policies, and termination of the contract through frustration, mass redundancy and other circumstances.

159. See *supra* notes 31-34 and accompanying text.

160. See *supra* Part II.A.3.

161. Draft Labor Contract Law, ch. 5, § 2.

employer from requiring a worker to pay a bond, from receiving a worker's property as a bond, and from retaining a worker's residence permit or other identity papers. Article 26 prohibits an employer from including a term in an employment contract requiring an employee to pay a fine for breaching the contract.¹⁶² An employer who contravenes these provisions can be directed by the labor bureau to return any property wrongly acquired and to pay a fine of between 500 and 2000 yuan per worker.¹⁶³ An employee is entitled to compensation for any loss caused by the employer's breach of these provisions.¹⁶⁴ There are also new penalty provisions for employers who fail to pay wages on time.¹⁶⁵ Fourth, Article 31 of the revised draft appears to enable a worker to sue for wage arrears in a court, without first proceeding through labor arbitration.

The draft law still has significant shortcomings—in particular it fails to address many systemic problems with enforcement mechanisms discussed above.¹⁶⁶ Furthermore, it is not clear whether the provisions on wages will be watered down when it is finally enacted by the National People's Congress or its Standing Committee. Nonetheless, the draft demonstrates that there are serious attempts, at the highest level of Chinese government, to respond to the lacunae in the system of legal rules governing payment, and to respond in a way that increases the legal rights of workers.

2. The Guangdong Wage Regulations

The second example concerns a law that is actually in force, albeit at the provincial level. This illustrates that, paradoxically, one of the apparent difficulties with the Chinese system of labor

162. There are two exceptions: an employer may under certain circumstances recover training expenses, and an employer may include a restraint of trade clause in a contract specifying a financial penalty for breach. *See id.* arts. 23-24.

163. *Id.* art. 84.

164. *Id.*

165. *Id.* art. 85.

166. *See* David Barboza, *China Drafts Law to Empower Unions and End Labor Abuse*, N.Y. TIMES, Oct. 12, 2006, at A1. The draft has been the subject of vigorous international debate between labor activists and major corporations. *See, e.g.*, GLOBAL LABOR STRATEGIES, *UNDUE INFLUENCE: CORPORATIONS GAIN GROUND IN BATTLE OVER CHINA'S NEW LABOR LAW* (March 2007), available at http://laborstrategies.blogs.com/global_labor_strategies/files/undue_influence_global_labor_strategies.pdf.

regulation—its jurisdictional fragmentation—can in fact lead to productive innovation.

While national legislators have been moving towards a new labor contract law, several provincial and municipal governments have already improved the regulatory framework dealing with underpayment of wages. One of the most comprehensive efforts came into effect at the beginning of 2005. The Guangdong Province Regulations on the Payment of Wages (the “Guangdong Wage Regulations”) bring together in one well-ordered document many of the principles on wage determination and wage enforcement scattered in various national and local legal materials.¹⁶⁷ Compared to the draft Labor Contract Law, the Guangdong Wage Regulations are much more specific, and are more creative and sophisticated, especially in the way they approach compliance with the law.

The Guangdong Wage Regulations clarify the method of determining wages,¹⁶⁸ the form in which, and the person to whom, they must be paid,¹⁶⁹ and the relationship between wages and individual and collective contracts.¹⁷⁰ They stipulate the method of calculating the minimum wage and penalty rates, including for the rates for piecework.¹⁷¹ The Guangdong Wage Regulations establish the entitlement to wages in the event of work stoppages,¹⁷² when there has been a wrongful termination,¹⁷³ and when a worker takes various forms of leave.¹⁷⁴ They also ensure that workers will receive remuneration when they are engaged in representational activities¹⁷⁵ (such as work for the union or workers congresses, and participation in the negotiation of collective contracts).

In relation to the vague terms in the Labor Law examined above (“misappropriation” and “payment in arrears without justification”), the Guangdong Wage Regulations indicate which types of deductions are lawful and which types of deductions

167. See Guangdong Wage Regulations, *supra* note 42.

168. See *id.* art. 54.

169. See *id.* arts. 10-11.

170. See *id.* arts. 8-9.

171. See *id.* arts. 4, 8, 10, 18, 20-22.

172. See *id.* art. 35.

173. See *id.* arts. 13, 29.

174. See *id.* arts. 12, 19, 24-25.

175. See *id.* art. 26.

constitute misappropriation.¹⁷⁶ Unfortunately, though, unlike the draft national labor contract law, they do not state categorically that the payment of a bond on commencement of employment is unlawful.¹⁷⁷

While the systematic stipulation of key rules on remuneration is a very significant advance on the fragmentary state of the law at the national level, the most important aspect of the Guangdong Wage Regulations is their treatment of enforcement and compliance. The Guangdong Wage Regulations include a number of provisions that strengthen the enforcement process.

First, firms are required to implement their own compliance systems.¹⁷⁸ All firms must establish and make public to their workforce a wages scheme that indicates how wages are determined and varied, when they are to be paid, how overtime is to be paid, and which deductions may lawfully be made.¹⁷⁹ Individual workers are entitled to be informed of the content of the scheme.¹⁸⁰ Firms must also keep detailed records on wages for two years. The records must indicate matters such as wages paid, how the wages are related to time worked, and any deductions made.¹⁸¹ Individual workers receive their own pay slips that must be consistent with the general firm records.¹⁸² In the event of any dispute, the onus is on the employer to show that he or she has produced these records; if the employer does not produce them, employees may be deemed to be unpaid.¹⁸³

Second, the Guangdong Wage Regulations broaden legal liability for wages to employers who might otherwise escape responsibility through interposing other legal entities; thus liability for wages may extend to individual partners of insolvent partnerships,¹⁸⁴ head contractors in building projects,¹⁸⁵ and successor firms following merger or division.¹⁸⁶ This goes some way to-

176. *See id.* arts. 10, 14-15.

177. *Compare* Draft Labor Contract Law, art. 11, *with* Guangdong Wage Regulations.

178. Guangdong Wage Regulations, art. 7.

179. *See id.*

180. *See id.*

181. *See id.* art. 16.

182. *See id.* art. 17.

183. *See id.* arts. 17, 44.

184. *See id.* art. 30.

185. *See id.* art. 33.

186. *See id.* art. 34.

wards addressing the failure in the Labor Law to deal with "boundary" issues.¹⁸⁷

Third, the Regulations set up a public warning system for firms significantly in arrears.¹⁸⁸ The labor department can notify the public of the firm's poor record through the media, at employment agencies, and by notices in the firm itself.¹⁸⁹ Fourth, a firm's legal representative (such as the general manager or head of the board of directors) can be personally fined for a firm's non-compliance with the regulations. This is the case, for example, when a wages scheme is not established, records are not kept,¹⁹⁰ or when industrial conflict breaks out and the manager fails to attend on the spot within twenty-four hours.¹⁹¹ If the conflict arises because a firm has attempted to relocate in order to avoid paying wages, the legal representative can be detained by the public security bureau or arrested.¹⁹²

The Guangdong Wage Regulations indicate that it is possible to develop clear substantive norms regulating remuneration in a systematic manner. They also deploy compliance strategies that are far more sophisticated than those in the national law. The critical question is of course how well this important initiative will operate in practice. It is too early to know.

III. PROSPECTS FOR BETTER IMPLEMENTATION

Despite progressive initiatives such as the draft Labor Contract Law and the Guangdong Wage Regulations, the overall impression from this analysis is that there are very serious flaws in the law relating to payment of wages and in the implementation of that law. Some of these problems are specific to labor law (such as the labor disputes system and the peculiar legal status of Chinese trade unions), while others concern the legal system as a whole (such as the disorderly state of legal norms, local bureaucratic corruption, and the difficulties with enforcing court judgments).

One way in which researchers outside China might contribute to improving the formulation of and compliance with the

187. *See supra* Part II.A.3.

188. Guangdong Wage Regulations, arts. 37, 41.

189. *See id.*

190. *See id.* art. 48.

191. *See id.* art. 51.

192. *See id.*

labor law is to draw on their own societies' experience of regulatory implementation, to the extent that those experiences are relevant in the Chinese context. The next part of this Article begins with a discussion of the relative strengths of different regulatory approaches in the Chinese context and then offers a number of reform proposals.

A. *Alternative Regulatory Approaches*

China's approach to formal (or State-based) regulation in general, and to labor regulation in particular, heavily favors "command and control" methods. For several decades now, command and control approaches have been severely criticized in the regulatory literature of industrialized societies.¹⁹³ Command and control is premised on the ability of a regulator to craft rules and enforcement mechanisms, which both address in a comprehensive manner the social problem that prompted the regulatory intervention and foresee and avert the potential adverse effects of the intervention itself.¹⁹⁴ The complexity of social relations and the scarce resources available to regulatory agencies make this frequently unachievable. Consequently, command and control regulation often tends towards excessive bureaucratization and legalism, and resistance by the regulatory target,¹⁹⁵ although as stated below, there are some circumstances in which it may still be the preferable strategy.

Furthermore, many studies demonstrate that the "command" is very often transformed when it is placed in the hands of officers in regulatory agencies. The agencies' interpretation of the legal rules they enforce is refracted through their own systems of values and practices,¹⁹⁶ which affect matters such as the priority accorded to remedying different kinds of violations, and the nature of the sanction deployed.¹⁹⁷ It follows that the practical implementation of legal rules by regulatory agencies

193. See, e.g., EUGENE BARDACH & ROBERT KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).

194. See Winston Harrington & Richard D. Morgenstern, *Economic Incentives Versus Command and Control*, *RESOURCES FOR THE FUTURE* 13, 13 (Fall/Winter 2004), http://www.rff.org/Documents/RFF_Resources_152_ecoincentives.pdf (last visited Mar. 2, 2007).

195. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (Donald R. Harris et al., eds., 1992).

196. See *id.* at 19.

197. See *id.* at 35-38.

can depart far from what the original drafters of the legal rules intended.¹⁹⁸

In response to these adverse effects, many scholars, including some in the field of labor law, have described a range of complementary and alternative regulatory approaches. These approaches have frequently proved superior to command and control in practice.¹⁹⁹ They have involved efforts to make law more “responsive”²⁰⁰ or “reflexive,”²⁰¹ enlisting the co-operation of those subject to the law through establishing connections with their own frames of reference, or radically reconfiguring legal institutions on democratic experimentalist lines.²⁰² One common theme in these approaches is the coordinated “decentering”²⁰³ of responsibility for both the creation of regulatory norms and their implementation to multiple actors (including especially local non-State actors), albeit usually with oversight from and accountability to governmental institutions (“metaregulation”). In some instances, the literature attempts to integrate “corporate social responsibility” initiatives into regulatory frameworks, although these initiatives have also elicited considerable skepticism.²⁰⁴

A second theme is the encouragement of local democratic deliberation—the participation of those most affected by the social problem that calls for a regulatory response. A third theme is an emphasis on local experimentation in the development of responses to social problems, which, when monitored and evalu-

198. See, e.g., KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT (John C. Boal et al., eds., 1987); see also John Paterson & Gunther Teubner, *Changing Maps: Empirical Legal Autopoiesis*, 7 SOC. & LEGAL STUD. 451, 455 (1998).

199. See, e.g., AYRES & BRAITHWAITE, *supra* note 195; CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002); Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC. REV. 239 (1983). In the area of labor law, see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005), and Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146 (2003).

200. See, e.g., AYRES & BRAITHWAITE, *supra* note 195.

201. See, e.g., Teubner, *supra* note 199.

202. See Dorf & Sabel, *supra* note 199.

203. Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-regulation in a Post-regulating World*, 54 CURRENT LEGAL PROBS. 103, 106-11 (2001). For a related analysis in the field of labor law, see Mark Barenberg, *Labor Federalism in the United States: Lessons for International Labor Rights*, 2001 J. INT'L ECON. L. 303 (2000).

204. Sean Cooney, *A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?*, 28 MELB. U. L. REV. 290, 308-14 (2004).

ated, yields a dynamic learning process that generates ongoing improvements in regulatory norms and mechanisms.

B. *The Feasibility of Alternative Regulatory Approaches in China*

While alternative regulatory approaches offer a way to escape the pitfalls of command and control, it is doubtful how far they can be applied in the Chinese context. Randy Peerenboom cites many serious obstacles to alternative regulatory approaches (in particular to democratic experimentalism) in China. The list is formidable: the adherence to democratic centralism; the absence of strong, autonomous, civil society organizations and the lack of independent vehicles for diffusing and critiquing information; low education and literacy levels; the likely hostility of the bureaucracy to alternative approaches; the likely resistance of local governmental institutions to requirements of information disclosure and external monitoring and evaluation (vital to the effectiveness of those approaches); the prevalence of corruption among both State and private actors; widespread intolerance of diverse viewpoints, inhibiting reasoned deliberation; and weak judicial institutions.²⁰⁵

While Peerenboom is writing in general terms about the Chinese regulatory environment, analysis in this Article confirms that the obstacles he identifies are present in an acute form in the field of work relations. This suggests that reflexive strategies for regulating labor relations in Chinese firms will be difficult to implement. The civil society organizations most relevant to more participatory forms of workplace regulation—organizations of working people—are either subordinate to the party-State, top-driven and frequently aligned with management, or actively suppressed. Moreover, as has been shown, the lawful worker organizations have, at least until very recently, done very little to give voice to migrant workers—the socially and economically marginalized people whom Chinese labor law is most deficient in assisting. Migrant workers' low educational levels and social status often leave them unwilling and unable to articulate their concerns; unless they receive institutional support, they will not be able to contribute to local regulatory processes.

Overall, circumstances are not very promising for new approaches displacing the current command and control mode of

205. PEERENBOOM, *supra* note 21, at 428-31.

regulation. Norm-setting and enforcement will continue to be focused on State agencies. That said, there is still some scope for regulatory experimentation and decentralization. This scope is fairly wide *within the State apparatus*. In the post-1978 period, China has frequently taken an incremental, localized, and experimental approach to economic and social reform.²⁰⁶ This approach has extended to labor regulation: There have been rolling improvements in legal norms and enforcement strategies, as the Guangdong Wage Regulations (themselves the product of experimentation at the local municipal level)²⁰⁷ illustrate. To be sure, these initiatives do not devolve regulatory power away from State entities (although they do shift it from the central government). They do not involve affected citizens in collaborative problem-solving (other than through “their” quasi-State organization, the ACFTU).²⁰⁸ They mainly consist of a series of commands coupled with punishments (although they try to prompt firms to build internal compliance systems). Their profusion also makes the Chinese legal landscape unstable and complex.

Despite all this, Chinese norm-making practice is a relatively nimble form of coordinated decentralization (especially when compared to law-making in major federal systems). It has enabled the ongoing revision of labor norms and processes and the simultaneous trial of a diverse range of regulatory innovations. It has given law some prospect of responding to the accelerating changes in, and the diversification of, Chinese work relations. Moreover, even non-State initiatives experience some success. Many Chinese workplaces are affected by decentered forms of regulation, particular those associated with “corporate social responsibility” initiatives in global supply chains.²⁰⁹ Many of these are plagued by disingenuous compliance and false information flows.²¹⁰ As discussed further below, however, not all of these initiatives fail.

206. *See id.* at 427-28.

207. John Chen, *Wage Arrears Fuel Discontent*, CHINA LAB. BULL., Aug. 31, 2002, <http://www.clb.org.hk/public/contents/article?revision%5fid=18557&item%5fid=2110> (last visited Mar. 7, 2007).

208. *Id.*

209. *See* WORLD BANK GROUP, STRENGTHENING IMPLEMENTATION OF CORPORATE SOCIAL RESPONSIBILITY IN GLOBAL SUPPLY CHAINS (Oct. 2003), http://siteresources.worldbank.org/INTPSD/Resources/CSR/Strengthening_Implementatio.pdf (last visited Mar. 7, 2007).

210. *See id.* at 20.

In sum, labor reform proposals need to recognize that the basic “command and control” orientation of labor regulation will persist in China. Within that orientation, there is some possibility for experimenting and for integrating insights from alternative regulatory approaches in order to construct more sophisticated labor enforcement strategies. Wholesale adoption of decentralized, participative, approaches, however, is not viable while corruption is endemic and worker organizations are subverted by democratic centralism and management interference.

C. Some Suggestions

The following suggestions aim to improve compliance with labor law, particularly the entitlement of workers to be paid for their services. They assume that there is no impending radical change to China’s regulatory practices. They seek to recognize and respond to the limitations of those practices, and to the wider political, economic, and social contexts of Chinese work relations.

1. Clarification of Key Norms

Basic labor law norms need to be clarified through the enactment of further legislation on labor contracts and wages. There are grounds for optimism on this point. As shown, the legislative amendment process is already well advanced both at the national and the provincial level.

A more challenging task for legal norm-creation is the need to address new forms of working relationships that cannot easily be accommodated within the labor contract/contract for services divide. The ideological insistence that a labor contract is radically different from other forms of contracting, although admirable in seeking to avoid the commoditization of labor, does not assist in practice. Decentralized legislative experiments are needed to develop ways of assisting dependent workers, who do not fall clearly within the present definition of employee, or where the identity of the employer is uncertain. Such experiments will also allow for greater responsiveness to local conditions (and industry structure). The provisions in the Guangdong Wage Regulations addressing construction sites provide examples of how innovation may be achieved.²¹¹

211. See Guangdong Wage Regulations, arts. 33-34.

2. More Effective Sanctions

A number of fairly obvious changes to the institutions responsible for implementing the laws are needed. One line of reforms would be to increase the enforcement powers of the labor bureaucracy and the quasi-State agency, the ACFTU. As noted above, these are quite weak and fail to outweigh economic incentives to flout the law. The suggestion is controversial. It is a classic “command and control” response to a regulatory problem, and may perpetuate the pathologies associated with the bureaucratic mentality. Even worse, increasing sanctions available to Chinese State agencies, notorious for abuse of discretionary power (not least against labor activists), may be viewed by many as retrograde.

Nonetheless, at least in the context of the abuse this Article examines, bolstering enforcement powers is defensible and indeed desirable. As many regulatory scholars acknowledge, despite the undoubted deficiencies of command and control approaches, there are circumstances in which the specification of a clear standard accompanied by an effective penalty is appropriate.²¹² This may be so where a regulated firm is persistently recalcitrant and failing to correct its deficiencies, even though it is clearly feasible for it to do so. The case for a heavy-handed approach strengthens where a firm’s actions cause considerable suffering, as in occupational health and safety breaches.²¹³ The persistent and willful failure to pay wages due, or to require large bonds, falls into this category.

At present, the strongest weapon in the labor department’s armory is the issuing of fines, which are often difficult to collect²¹⁴ and they are not sufficient to induce many firms to prevent arrears. It is true that labor departments can refer matters to other State agencies for tougher penalties (such as the police), but those other State agencies will often not be familiar with the principles governing labor relations. Moreover, there is

212. See, e.g., NEIL GUNNINGHAM & PETER GRABOSKY, *SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY* 41-42 (Keith Hawkins et al., eds., 1998).

213. NEIL GUNNINGHAM & RICHARD JOHNSTONE, *REGULATING WORKPLACE SAFETY: SYSTEMS AND SANCTIONS* 183-291 (1999).

214. See Information Office of the State Council of the People’s Republic of China, *Labor and Social Security in China*, XINHUA NEWS AGENCY, 2002, available at <http://www.xinhuanet.com/english/>; see also AM. CTR. FOR INT’L LABOR SOLIDARITY, *THE SOLIDARITY CTR., JUSTICE FOR ALL: THE STRUGGLE FOR WORKERS RIGHTS IN CHINA* 38 (2004).

a need for sanctions intermediate between a mere fine (in the case of the labor department) and imprisonment (in the case of the police).

One way to increase the powers of the labor bureaucracy would be to enable them to suspend an individual employer's business licenses, until the law is complied with. This is a penalty wielded by other administrative agencies.²¹⁵ This power could be exercised in the more serious circumstances of unpaid wages or the imposition of bonds, where command and control strategies are likely to be more effective.

The best way for labor departments to deploy increased powers (and to prevent their abuse) is to ensure they are integrated into a comprehensive and systematic enforcement strategy. Professors Ian Ayres & John Braithwaite's concept of the "enforcement pyramid" is relevant here.²¹⁶ Low-cost enforcement strategies such as persuasion and warning are more easily deployed against non-compliant firms in the first instance, but where they are met with defiance, the enforcement agency needs to be able to threaten a range of sanctions of varying severity. Firms, knowing that regulatory agencies can impose credible and effective penalties, will then take their advice and warning more seriously.²¹⁷

Labor departments cannot, at present, escalate up the enforcement pyramid to suspending an employer's entitlement to operate a business.²¹⁸ This undermines the effective use of even those weak sanctions they already have.

3. Improving Dispute Resolution

Labor dispute resolution institutions also need major revision, along the lines proposed by Professor Zheng²¹⁹ and many other Chinese scholars.²²⁰ First, the requirement that arbitration always precede litigation should be abolished, especially when a worker simply wishes to recover outstanding wages. Sec-

215. *See* Administrative Punishments Law, art. 8(4).

216. AYRES & BRAITHWAITE, *supra* note 195, at 35-38.

217. *See id.* at 36.

218. *See* Labor Law, art. 91.

219. ZHENG, *supra* note 78, at 179-222.

220. The support for these ideas was evident from the participants (leading Chinese Labor Law scholars and labor officials) in the International Seminar on Labor Dispute Resolution, held at Peking University Law School from November 19-21, 2004.

ond, LDACs would benefit from greater institutional independence from the labor bureau and from better-trained personnel.

Third, more specific procedures for different kinds of labor disputes (rights/interest, collective/individual) seem appropriate, and greater powers to assist workers left without income as a result of lengthy dispute resolution proceedings. The procedural rules should also enable LDACs to grant interim relief. Fourth, the scope of "labor dispute" should be broadly interpreted to cover sub-contracting arrangements that involve dependent labor (who may not technically be employees). One possibility would be to enable LDACS to entertain disputes between independent contractors in certain circumstances, as occurs with "unfair contract" legislation in several international jurisdictions.²²¹

4. Trade Union Reform

If China observed ILO conventions on the right to organize and to bargain collectively, compliance with labor law would almost certainly improve. Under present political circumstances, however, it is unrealistic to think that China is prepared to do this.²²² Nevertheless, if Chinese unions cannot lawfully become fully autonomous worker organizations, they can at least become more effective compliance agencies. There are several ways in which this could occur.

First, unions should have the power to direct workers to cease production under certain conditions. This would in effect confer a power on unions to call a strike, albeit one that could be formulated to be linked to the enforcement of State law and not constitute a challenge to government policy on public unrest. In any event, strikes over existing entitlements occur on an informal basis very frequently.²²³ This change would provide a means of both legitimizing and regulating them.

A further crucial move would be to render Chinese trade unions more independent from firm management, especially in the private sector. Ideally, the Trade Union Law would be

221. See, e.g., Industrial Relations Act (New South Wales), pt. 9 (1996).

222. See generally Toby D. Merchant, *Recognizing ILO Rights to Organize and Bargain Collectively: Grease in China's Transition to a Socialist Market Economy*, 36 CASE W. RES. J. INT'L L. 223, 236-53 (2004).

223. See *id.* at 224, 235.

amended to require this; but internal measures within the ACFTU, such as directives from higher-level union bodies to grassroots unions located in firms, may be just as effective if done systematically. Higher-level unions, could, for example, systematically refuse to affirm (*pizhun*) the election of firm managers to trade union offices at grass root level.

Even if these measures were adopted, they would not assist the most vulnerable workers unless the ACFTU is able to mobilize its enterprise unions to take up the issues of migrant workers. There is no longer a structural obstacle to this within the organization.²²⁴ Moreover, at a rhetorical level, the ACFTU appears committed to renouncing its previous exclusionary practices.²²⁵ Yet, it will take a considerable change in the mentality of local union cadres (overwhelmingly drawn from among the more privileged urban employees with their prejudices against migrant workers) to give practical effect to this.

If, on the other hand, the organization fails to confront the reality of oppressive management treatment of workers in many private firms and persists with its “mediating” approach to dispute resolution, it will be, at best, irrelevant to those workers.

5. Coordination between State and Private Sector Initiatives

In addition to improving individual State-based compliance mechanisms, there needs to be greater coordination between those mechanisms and private sector initiatives (self-regulatory measures). While Chinese civil society is tightly controlled, and firms are resistant to notions of corporate social responsibility, there are nevertheless many significant private sector attempts to improve labor conditions, including ensuring that workers are paid for work performed.²²⁶ Major sources of these private sector initiatives are multinational corporations whose supply chains are anchored in China.²²⁷ Under often intense consumer

224. See Ronald C. Brown, *China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 *DUKE J. COMP. & INT'L L.* 35, 37-46 (2006).

225. See *id.* at 52; see also ACFTU, Constitution of the Trade Unions of the People's Republic of China, General Principles, 1998, <http://www.Acftu.org.cn/constitu.htm> (last visited Mar. 7, 2007).

226. See HILARY MURDOCH & DANIEL GOULD, CORPORATE SOCIAL RESPONSIBILITY IN CHINA: MAPPING THE ENVIRONMENT, GLOBAL ALLIANCE FOR WORKERS AND COMMUNITIES 63-71 (2004).

227. See Benedict Rogers, *Supply Chain Crucial to Boosting Profits*, HONG KONG IMAIL

pressure, many multinational corporations have attempted to require their subcontractors to improve working conditions.²²⁸ Many of these private sector initiatives fail in the face of perfunctory and disingenuous participation by sub-contractors, lack of participation by the affected workers, and an unwillingness or inability of multinational corporations to establish effective monitoring and compliance systems.²²⁹ Nonetheless, multinational firms are continually reworking their initiatives in the face of criticism, and have occasionally come up with credible and creative compliance strategies, especially where they collaborate with multi-stakeholder groups such as the Ethical Trade Initiative or SA8000.²³⁰

It is not only multinational firms that are devising methods of raising compliance with labor law. An increasing number of actors outside the labor bureaucracy and the ACFTU are attempting to improve Chinese working conditions.²³¹ These include groups with links to non-government organizations (particularly in Hong Kong),²³² free-standing research and training institutes,²³³ advisory services associated with Chinese universities,²³⁴ some parts of the All China Women's Federation²³⁵ and some individual Chinese firms.²³⁶ Even the Chinese government, at both the national and provincial levels, is now promot-

EMERGING MARKETS DATAFILE (May 10, 2001); *Dressed for Success: Global Trade Management Technology is a Good Fit for Liz Claiborne*, LOGISTICS TODAY, June 1, 2005, at 1.

228. In any case, the author agrees with Liu and Tan, who argue that major international firms must take more responsibility for the pressure they place on their suppliers to cut costs. They must themselves bear some of the financial burden of improving working conditions. See LIU & TAN, *supra* note 1, at 81-82.

229. *Id.* at 75.

230. See MURDOCH & GOULD, *supra* note 226, at 72-76.

231. See *id.* at 35-61 (cataloging groups).

232. See, e.g., Ngai Pun & Wai Ling Chan, *Community Based Labor Organizing*, 11 INT'L UNION RTS. 4, 10-11 (2004); Chinese Working Women Network Website, <http://www.cwwn.org> (last visited Feb. 15, 2007).

233. See, e.g., Institute for Contemporary Observation Website, <http://www.ico-china.org> (last visited Feb. 15, 2007); see also Asia Monitor Resource Centre Website, <http://www.amrc.org.hk> (last visited Feb. 15, 2007).

234. An example of these can be seen in the legal clinics operated by the Law School at Sun Yat-sen University in Guangzhou and at East China Normal University in Shanghai.

235. See Chinese Working Women Network Website, <http://www.cwwn.org> (last visited Feb. 15, 2007).

236. See *CSR in China's Supply Chains*, 1 CSR ASIA WKLY. 15, at 1 (2005), <http://www.csr-asia.com/upload/CSR%20Asia%20Vol%201%20Week%2015.pdf> (last visited Mar. 7, 2007).

ing “corporate social responsibility.”²³⁷

The range of initiatives in labor regulation occurring in both the State and non-State spheres could be more productive if there were better channels for coordinating and evaluating them. If each measure is pursued in isolation, there is the potential for wasted resources through the simultaneous and independent adoption of overlapping and even inconsistent strategies. To be sure, some private sector initiatives are implemented in consultation with State agencies and official trade unions; but this is too ad hoc and firm specific.²³⁸ For systematic evaluation of measures to occur, co-ordination must take place across a range of firms within an industry or geographic area. Moreover, when a measure is successful, there needs to be a way of diffusing it by enabling knowledge of it to become widespread.

Is there space to establish institutions that could coordinate and evaluate new labor initiatives in China? Aside from the serious obstacles to implementing alternative regulatory approaches already mentioned, there are further problems in coordinating institutions. If an institution is concerned solely with private initiatives, then it will fail to coordinate with State and quasi-State regulatory measures and may even provoke bureaucratic hostility and obstruction.²³⁹ On the other hand, if the institution examines both private and State measures, it will need to involve State actors and would therefore risk either being dominated by the State bureaucracy with its command and control mentality (at the national level) or being captured by corrupt State-business networks (at the local level).²⁴⁰ Nonetheless, while recognizing that the prospects for successful implementation are fairly limited, this Article outlines how such institutions might work.

A locality in China (preferably one with a relatively efficient and progressive government and a relatively capable trade union organization) could support the establishment of a multi-party agency, or committee, which would collect, evaluate and diffuse information from various sources about methods used to improve compliance with labor law. Instead of simply working to

237. Chenyan Liu, *China's NPC, CSR and Social Harmony*, 1 *CSR ASIA WKLY.* 12, at 2 (2005), <http://www.csr-asia.com/upload/CSR%20Asia%20Vol%201%20Week%2012.pdf> (last visited Mar. 7, 2007).

238. *See* PEERENBOOM, *supra* note 21, at 429.

239. *See id.*

240. *See id.* at 429-30.

coordinate the efforts of labor departments and official trade unions, which already occurs, the committee would include representatives from firms and from non-State actors. The agency could seek the cooperation of these actors in its actions.

Each of the constituents could contribute to the improving compliance by drawing on its particular regulatory strengths. Local labor bureaus could map out their compliance strategies and use their investigation powers under the Labor Law and other legislation to gain data about firm enforcement,²⁴¹ imposing sanctions for non-disclosure.²⁴² Trade unions could invoke their own inspection and monitoring powers under the law. Local and, even more importantly, international, firms could indicate what new measures they had made to improve compliance. The social organizations could provide information (which may well be the most reliable data) to cross-check the other sources.

The coordinating committee would determine which initiatives were promising and successful. It could then:

- publicize the initiatives widely, to other firms, to social organizations, and to labor bureaus;
- use the initiatives to define “best practice” in the industry, advise firms to comply with best practice; and help the labor bureaus, unions, and other social organizations to insist that firms adopt the practice;
- suggest to the labor bureaus that those firms that had developed successful initiatives be financially rewarded; and
- assist the labor bureaus to identify, criticize and (in cases of refusal to improve) punish poor performers.

This process would be dynamic. Evaluation of best practice would change from year-to-year (or according to another time frame) as firms develop new and better ways of improving conditions.

6. More General Legal Reforms

The reforms proposed to date have all been specific to labor law. While important in themselves, the prospects for success of those proposals will be enhanced by wider reforms to legal institutions. Other writers have extensively canvassed such reforms

241. *See, e.g.*, Labor Law, arts. 85-87.

242. *Id.* art. 101.

and this Article will not examine them in depth.²⁴³ The main areas in which ongoing improvements are needed include matters such as more effective anticorruption measures focusing on local government-business networks, better means of enforcing legal judgments, and better judicial training, to name a few.²⁴⁴ Such reforms are obviously long-term undertakings in the Chinese context.

7. Campaigns and the Media

While legal reforms may lead to better enforcement, there are of course non-legal means of addressing labor abuses.²⁴⁵ The Chinese State has often resorted to campaigns to target social problems such as criminal activity and environmental pollution.²⁴⁶ The campaigns involve the mobilization of party members and the coordinated concentration of State agency resources on the social problem.²⁴⁷ At times, the campaigns have included resort to extra-legal measures, although more recently State action is likely to be in accordance with law.

A strong campaign against labor abuses initiated by government is likely to induce labor departments, police, and other relevant agencies to deal more firmly with recalcitrant firms. A major advantage of a campaign is that it facilitates cooperation among diverse parts of government. Thus, while labor departments do not have effective enforcement powers on their own, the capacity to sanction is strengthened if they can credibly threaten police action in egregious cases.²⁴⁸ There is evidence that such co-ordination is beginning to occur. In early 2006, in what seems to have been a municipal government campaign, eight firm owners in Shenzhen were detained for economic

243. See, e.g., LUBMAN, *supra* note 21; PEERENBOOM, *supra* note 21.

244. See, e.g., PEERENBOOM, *supra* note 21. See generally CHEN, *supra* note 21; LUBMAN, *supra* note 21.

245. This is a major topic in its own right, but can be dealt with only briefly here.

246. Sarah Biddulph, *The Legal Field of Policing in China: Administrative Detention and Legal Reform* 62-86 (2004) (unpublished Ph.D. Thesis, University of Melbourne) (on file with the University of Melbourne Library) (discussing the "hard strike" anti-crime campaigns); van Rooij, *supra* note 71 at 169-77 (discussing environmental pollution).

247. See PEERENBOOM, *supra* note 21, at 303; see also van Rooij, *supra* note 71, at 169-77.

248. See Gallagher, *supra* note 38, at 23 (commenting on individual limitations of regulatory agencies in labor disputes).

crimes in connection with failure to pay wages—the first time such action has been taken in China.²⁴⁹

Unfortunately, campaigns have a significant drawback—they are ephemeral. Once a campaign ceases, attention and resources may be directed to other issues. The problem may reemerge, unless there are institutional reforms that complement the campaign.²⁵⁰

Another powerful means of addressing labor abuses is the media. The Chinese media regularly highlight labor abuses,²⁵¹ whether as part of a campaign or as a result of the work of individual journalists. Media exposure of injustice can lead to swift governmental intervention redressing the wrong. Benjamin Liebman notes that many Chinese believe the media are more effective than the legal system for citizen redress.²⁵² Nonetheless, as with campaigns, the media cannot substitute for legal reform. As Liebman also points out, the media are unreliable allies and can create injustices through misrepresentation and sensationalism.²⁵³ Moreover, while the media can be extremely useful in bringing worker abuses to the public's attention, they are not well placed to address systematically the deficiencies which produce the abuses.

CONCLUSION

Out of the wreck of the Cultural Revolution, China's leaders have built an economy that is gaining an ever greater share of world manufacturing. They have thereby raised the living standards of hundreds of millions of citizens. Notoriously, this manufacturing success is marred by widespread labor abuses, epitomized by the sweatshop staffed by suffering migrant women workers. Domestically, rising labor disputes and evidence of emerging labor shortages stoke demands for policy reform.

Better regulatory strategies are needed to deal with these widespread labor abuses. Confining consideration to the feasi-

249. Stephen Frost, *China View*, 2 CSR ASIA WKLY. 3 (Corporate Social Responsibility in Asia, 2005).

250. van Rooij, *supra* note 71, at 172-74.

251. CHAN, *supra* note 1, at 4-7. The accounts in Chan's study are based on media reports of incidents which Chan has often further investigated.

252. Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 127-30 (2005).

253. *See id.*

ble rather than the ideal—accepting that radical change to China’s legal and political institutions is unlikely in the short term—those strategies must be devised in light of the existing institutional context. This entails analyzing the deficiencies of those institutions and identifying opportunities for improvement. The analysis undertaken here has focused on underpayment of wages. This Article argues that the legal norms directed at preventing this abuse need to be more coherently elaborated and publicly accessible, although there are already considerable improvements being made, as the draft Labor Contract Law suggests.

Much more challenging is the problem of securing compliance. The economic and social forces that deter firms from adhering to the law are frequently very powerful, and even a highly sophisticated enforcement system would struggle to steer firms towards legal norms. Yet, there is clearly scope for China’s framework of labor regulation to increase its authority. A fundamental difficulty is that the key state enforcement institutions—labor departments, dispute resolution bodies and the official trade union—continue to employ bureaucratic methods increasingly anachronistic in China’s private-sector driven labor markets. They operate with little active participation from the persons most affected by labor abuses and with little connection to emerging private sector initiatives directed at creating better workplaces. Current thinking in regulatory theory suggests that China’s current approach is misconceived, but the potential for introducing alternative regulatory models remains limited.

Despite the limited room to maneuver, significant improvements to enforcement institutions can be implemented under current conditions. This Article seeks to identify several such improvements; mainly extrapolations of processes already underway or based on internal critiques from Chinese scholars and officials. Given the complexity of the social systems impacting on the workplace in China and the relative absence of empirical data on how law interrelates with those systems, the impact of the reform proposals cannot be predicted; they must be provisional and revisable.

Nonetheless, the reform proposals are worth developing and implementing as a response to present flaws. Crucially, they can be supported and pressed by international actors concerned with poor working conditions—governments, businesses, un-

ions, and human rights organizations. As the proposals are feasible in the Chinese context, they enable international actors to engage with sympathetic Chinese actors without ipso facto putting them at risk. They also enable international actors to improve in measurable ways the lives of the many exploited workers at the hub of world industrial production.