

Tracing the Informal: Analyzing Labour Legislation in China

Reeja Nair

Research Associate, Institute of Chinese Studies
reejanair@live.com

On 12th December 2018, hundreds of temporary workers at Foxconn's Zhengzhou plant protested over nonpayment of wages by the recruitment agencies that employed them. The workers were promised cash bonuses amounting to 6000 yuan per person if they worked 55 days and were recruited on temporary contracts by the agencies (South China Morning Post 2018). They took to the streets when recruitment agencies failed to pay their bonuses. In January, the same year, the factory had come under fire when one of the dispatch workers jumped to death from a building, raising concerns about poor working conditions of dispatch workers in the electronics industry (The Telegraph 2018).

Dispatch workers, a form of informal labour, are employed by labour dispatch agencies for a short-term under the promise of regular pay for work and bonus. According to a report by China Labour Watch (2018), dispatch workers in Foxconn's Zhengzhou plant accounted for more than half of its total workforce in 2018, throwing light upon a rampant violation of labour laws.¹ Many are employed on a

temporary contract or even lack a formal labour contract. Unpaid wages, poor working conditions, long work hours, lack of employment contract, social insurance, training or rest days etc. are commonplace among informal workers. Instances such as these have only aggravated in the wake of an economic slowdown with employers trying to save labour costs by employing dispatch workers.²

This article analyzes the various institutional and legislative changes that occurred during the economic reforms to explain the rise of informality in China. It examines the enactment of the 1994 Labour Law and the 2008 Labour Contract Law to determine the legislative underpinnings behind the emergence of informal labour in China and shows how state played an important role in the creation of the informal sector in China.

Informal Employment in China

Informality has become the defining feature of urban employment in China since the

for only 10 per cent of dispatch workers at a company at a given time.

² For the first time since the 1990s, China's economy grew by just 6 per cent in 2019 and is estimated to slip further below 6 per cent this year (China Daily 2020).

¹ The report (2018) noted that 55 per cent of Foxconn's Zhengzhou workers were dispatch workers, though the Labor Contract Law allowed

implementation of economic reforms. The International Labor Organization (ILO) estimate for informal employment in China today is around 54.4 per cent, of which informal employment in urban areas accounts for 36.2 per cent (ILO 2018). A definition of informal economy is absent in the Chinese context despite the fact that more than half of the urban employment in China is informal (ILO 2018). This is significant as it implies a lack of recognition of informality by the government and thereby, a lack of formal mechanism to determine the nature and scale of informality in China. Explaining the rationale behind such an approach, some scholars argue that the government recognition of informality would testify to its “failure in assisting the vulnerable and the limits of government control” (Song, Appleton and Liang 2016). Given the absence of a standard and official definition of informal economy or informal employment, the rights of informal workers still remain a neglected terrain in the government idiom. This further precludes any possible formulation of policies targeting this vast sector of China’s economy that contributes to approximately one-third of China’s GDP.

Park and Cai (2011) have indicated a trend towards informalization of the Chinese labour market since the 1980s. There was an increasing participation of informal labour as temporary labour, casual labour, hourly work labour, self-employed labour etc. (Cooke 2011). The precise number of workers employed in informal work is unknown, and there are no national statistics on the size of informal employment and the spread of its subcategories. Existing figures are estimations calculated in different ways. For example, in 1978, there were 160,000 workers in informal employment in the urban area; another calculation suggested that the number of workers engaged in informal employment had grown from 29.84 million in 1990 to 150 million in 2007 (Cooke 2011).

Creating an Informal Labour Market

The opening up of China’s economy and the subsequent reform process after the Third Plenary Session of the Eleventh Central Committee in December 1978 spelled a

massive transformation of China’s social, economic and political contours. Restructuring of enterprises constituted a crucial element of the modernization of industries, one of the “Four Modernizations”, envisaged for developing China’s economy. The introduction of the labour contract system in 1986 was an important step towards informalization of work. The restructuring of enterprises began with the aim to improve the production efficiency of the industries by ‘smashing the iron-rice bowl’ system of employment and creating a labour market. Management was to be given full autonomy over decision-making in the enterprises. But most importantly, it sought to introduce labour flexibility by allowing the employers the freedom to hire and fire workers. The industrial restructuring process was intensified when many state-owned enterprises began registering losses. There was also a simultaneous shift in the organization of production which led to a transformation of the production workforce. There was a shift to assembly production techniques or Fordist/Taylorist production techniques³ as seen in the automobile industry, which required unskilled or semi-skilled workers for peripheral work and skilled workers for the core work, thus creating a segmentation of the labourforce (Zhang 2011). Informal workers formed the majority of the periphery workers, who could be hired and fired easily.

The *hukou* reforms of the 1990s were another major factor contributing to informalization. Before the 1980s, all urban citizens were formally employed by state-owned and collective enterprises and were provided social benefits by their work units (*danwei*) under the

³ Rosaline Wanjiru defines Fordist production as a “particular form of social and industrial organization characterized by the mass production of highly standardized products and the use of specific equipment and machines to create similar products, alongside the organization of workers into specified and rigid work systems”. It involves the “use of assembly lines and the streamlining of manufacturing through specialization and strictly defines divisions of labor”. See Wanjiru, R. 2015. ‘Fordist Production’, in F. Wherry and J. Schor (eds.), *The SAGE Encyclopedia of Economics and Society, Vol. 1*. Thousand Oaks, CA: SAGE Publications, 708-709.

iron rice bowl system. However, with economic reforms, China saw a drastic shift in the structure of employment and employment security. The *hukou* system had restricted rural migrants from having an urban residential permit and thereby, constraining access to resources - education, health and social insurance benefits. However, with the deregulation policy of the labour market in the 1990s, there was an influx of migrants into the cities as the local government began issuing temporary urban residency permits to rural migrants. This was coupled with rural reforms in the form of *de-collectivization*, or the Household Responsibility System, where peasants were now given land-use rights. However, as Zhun Xu (2013) shows, the increasing rural-urban wage gap in the aftermath of agricultural reforms generated a rural surplus labour as a standing industrial reserve that was mostly absorbed into informal employment.

Institutional reform, a wide and increasing rural-urban income gap and the easing of internal migration restrictions together contributed to attracting millions of workers to the fast-growing urban centres of China. The total number of migrant workers during this period increased from 6.57 million in 1982 to 21.35 million in 1990. While employment in the state sector declined from 78.3 per cent to 21.9 per cent, the urban workforce increased from 95.1 million to 293.5 million (Kuruvilla et.al 2011). With the pressure on urban employment rising, it created a pool of workers ready to take up any job and thereby, forming easy recruits in an informal labour market. On the one hand, informal employment as a flexible labour strategy has been increasingly used by the government to absorb the surplus labour force in the labour market, particularly the migrant workers (Huang 2009; Cooke 2011; Park and Cai 2011). On the other hand, Park and Cai (2011) argue that informality was a “tax evasion technique in industries used by the employers, especially for the self-employed and small private enterprises, as a reason for not reporting such employees to escape from payroll taxes for pension and other insurance schemes”.

1994 Labour Law

The 1994 Labour Law, in addition to guaranteeing rights to workers, also led to the formalization of the Labour Contract System. It essentially made contract the primary basis of employment. Article 16 defined labour contracts as: “agreements reached between laborers and the employer to establish labor relationships and specify the rights, interests and obligations of each party.”, and that “Labor contracts shall be concluded if labor relationships are to be established.”

Although labour relations were now ought to be regulated by contract, it also led to the creation of informality within the formal sector. The ambiguity or vagueness in some of the clauses in the Law allowed space for the employer to tweak it in their own favour. For instance, Article 20 of the Law allowed for a fixed term or a flexible contract between the employer and the employee but failed to define the length of time for a fixed contract and flexible contract. This allowed employers to enter into several short-term labour contracts of 6-8 months. Article 20 stated, “The time limits of labor contracts shall be divided into fixed and flexible time limits and time limits for the completion of certain amount of work.”. In addition, “Labor contracts with flexible time limits shall be concluded between the laborers and the employer if the former request for the conclusion of labor contracts with flexible time limits after working continuously with the employer for more than 10 years and with agreement between both of the parties involved to prolong their contracts.”

Moreover, the employers could now invoke the law to lay-off workers en-masse as Article 27 legalized lay-offs to overcome bankruptcy and other difficulties in business. They were required to merely “explain the situation” to the trade union or the labour administrative department, without providing evidence to the same. It stated:, “In case it becomes a must for the employer to cut down the number of workforce during the period of legal consolidation when it comes to the brink of bankruptcy or when it runs deep into difficulties in business, the employer shall

explain the situation to its trade union or all of its employees 30 days in advance, solicit opinions from its trade union or the employees, and report to the labor administrative department before it makes such cuts.”

Lacking any mention of temporary workers or the terms of employment of a temporary workforce, the law allowed employers to replace the permanent workforce with temporary workers unregulated by law. The feasibility of employing temporary workers because of increased labour costs incurred in maintaining a permanent workforce with complete social insurance benefits, made the use of temporary workers more rampant among industries. This provided the management with a more flexible labour force that could be hired and fired at will. They were paid less and lacked labour contracts and welfare benefits.

Employment of agency workers or dispatch labourers became rampant since the enactment of the 1994 Labour Law. In 2007, the number of employment agencies rose to 37,897 from 26,793 in 2001, with almost two-thirds of them funded by the local government (Cooke 2011). It was seen by the local government as an avenue for employment generation in the wake of mass layoffs triggered during industrial restructuring in the 1990s and as a result of the state’s labour market deregulation policy in the 1990s. Employing agency workers allowed employers to enter into an indirect relationship with the worker and escape the stringent regulations involved in a contractual relationship.

In the absence of state protection, the exploitation of these workers became rampant as a response to the transforming institutional and legal structure. A study conducted by China Labor Watch (CLW) on the conditions of agency workers in an electronics factory in Guangdong Province showed egregious violations of labour laws. The workers had to work overtime shifts under regular remuneration, were allowed few breaks, and imposed arbitrary fines for not wearing their uniforms, for forgetting to wear their IDs etc. They lived in cramped spaces where 150 production workers lived on each floor with the total space of about 1000 sq.m. (CLW 2012).

Gallager and Baohua observe that, “despite the many protections the law offered, its general principles leaned towards greater employment flexibility and enterprise autonomy”. Although the clauses in the law seemed to be setting progressive standards in the realm of workers rights, it indirectly lead to an expansion in the informal sector. The 1994 Labour Law, apart from defining and protecting workers’ rights, ensured that the interests of the employers were not entirely compromised, given the imperatives of the goals of economic reform.

2007 Labour Contract Law

The Tenth National People’s Congress (NPC) adopted the Labour Contract Law on 27 June 2007 with the objective of ensuring stable and harmonious relations between the workers and employers. At the same time, it sought to improve upon the 1994 Labour Law and the labour contract system which had been in place for more than a decade until then. Article 1 of the law stated, “This Law is formulated to improve the labor contract system, to specify the rights and obligations of the parties to labor contracts, to protect the legitimate rights and interests of workers, and to build and develop harmonious and stable employment relationships.” (State Council of the People’s Republic of China. 2007)

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Aimed at regulating the number of dispatch agencies, the 2008 Law legalized staffing firms and agency work as well as part-time labour, and assimilated them into the larger structure of contract- based labour relations. Article 57 of the law states, “Staffing firms shall be established in accordance with the relevant provisions of the Company Law and have registered capital of not less than RMB 500,000.” (State Council of the People’s Republic of China. 2007)

Article 58 brought staffing firms into the ambit of contractual relationship. It stated that, “Staffing firms are Employers as referred to in this Law and shall perform an Employer’s obligations toward its employees. The labor contract between a staffing firm and an employee to be placed shall, in addition to the matters stipulated in Article 17⁴ of this law, specify matters such as the entity to which the employee will be dispatched, the term of his placement, his position, etc.” (State Council of the People’s Republic of China. 2007)

Article 68, on the other hand, clearly defined “part- time labour” and emphasized upon the limit of working hours. It stated, “The term “part-time labor” refers to a form of labor for which the remuneration is mainly calculated on an hourly basis, and the employee’s average daily working hours shall not exceed 4 hours and the aggregate working hours per week shall not exceed 24 hours for the same Employer.” (State Council of the People’s Republic of China. 2007)

The Law also defined the responsibilities of both the staffing agencies and the “accepting entities” in terms of term of contract, job requirements, work conditions, wages and social welfare benefits. Although informal workers contributed to the large mass of cheap labour that fuelled China’s growth story as the hub of manufacturing, there has been a gradual trend towards formalization of the informal as implied by the inclusion of agency workers and part-time workers in the 2008 Law and its subsequent amendments. This could partially explain the rising labour costs in China.

Nevertheless, the loopholes in the law and the problem of enforcement provided the employers ample opportunities to manipulate or violate the laws. The general ambiguity in certain clauses allowed for ambiguous

⁴ Article 17 laid out the mandatory terms involved in the labour contract the employer drew with the worker. It included the details of the employer and the worker, the working hours, days of rest, wages etc.

implementation as well. For instance, Article 66 of the law states, “Work placement shall generally be implemented in respect of job positions of a temporary, auxiliary or substitute nature.” (State Council of the People’s Republic of China. 2007)

The nature of employment or the length of term involved in each type of employment is left undefined, paving the way for circumventing the law. Similarly, the clause on part- time labour considers verbal agreement between the employer and the part-time labourer as a valid ground for employment. Article 69 of the law states that, “Both parties to part-time labor may conclude an oral agreement.” (State Council of the People’s Republic of China. 2007)

This was accompanied by clauses in the law such as those on severance costs or financial compensation which made it cumbersome for the employers to employ permanent workers, in the light of increased labour costs involved in termination of contract. Article 47 of the Law clearly states, “An employee shall be paid financial compensation based on the number of years he has worked for the Employer at the rate of one month’s wages for each full year worked...the financial compensation payable to a worker for any period of less than 6 months shall be one-half of his monthly wage.” (State Council of the People’s Republic of China. 2007)

It also clearly stated the amount to be paid in compensation, in saying, “If the monthly wage of a worker is three times greater than the average monthly wage in the previous year for employees as announced by the people’s government at the municipal level directly under the central government or at the city-with-district level where the Employer is located, the rate for the financial compensations paid to him shall be three times the average monthly wage of employees and shall be for not more than 12 years of work.”

Despite providing protection to subcontracted workers, the loopholes within the law failed to put a check on informalisation. As a result, the number of dispatched workers increased

sharply in the period after the enactment of the Labor Contract Law (Liu, Kuruvilla and Chung 2010)⁵. The reason lay within the structural limitations inherent in the political system, where owing to the decentralisation of fiscal system, local authorities had become increasingly powerful and the competing goals set by market-oriented reforms dictated local government action. The competition among local governments to attract capital in the form of investment led to a weak enforcement of the law at the local level. Also, the fact that trade unions played a subordinate role to the party-state by acting under a “Communist state corporatist model” and at best, softened the blow of the economic reforms on workers (Chan 2008) also made sure that impact of the Law was diluted. This is further attested by Gallagher and Chen (2018) who contend that by letting the All-China Federation of Trade Union (ACFTU) monopolize the space for representation, the party-state made a representational fix to undercut class struggle. In their opinion, the labour legislations were mechanisms employed by the party-state as a political fix to fragment collective action by providing access to raise their grievances in courts.

Although the limitations in the 2008 Labor Contract Law were addressed by the 2012 amendment and the 2014 Interim Provisions, firms continued to invent new informal arrangements to evade the new, onerous protections of the law. One of the major amendments to the Labor Contract Law was regarding dispatch agencies and workers. For instance, one of the new clauses required dispatch agencies to obtain a license from the relevant issuing authority; applied equal pay for equal work and work benefits for dispatch workers; the 2014 Interim Provisions capped the number of dispatch workers to 10 per cent of the total employees per unit. In order to escape the 10 per cent cap and the additional costs of employing dispatch labour, employers

⁵ Although this trend was arrested by 2015, after the 2012 amendment and the 2014 Interim Provisions, scholars such as Feng Xiaojun (2018) argue that the laws were not particularly successful in regulating the rise of labour dispatch agencies as employers continued to find alternate mechanisms to employ agency workers.

employed them as outsourced workers while continuing management of the workers (Xiaojun 2018).

Conclusion

The introduction of the labour contract system and the industrial restructuring of the 1990s led to a change in the organization of production accompanied by a segmentation of labour into core and peripheral workers. The management responded to this change by transforming the production workforce by re-employing or freshly recruiting semi-skilled, unskilled and temporary workers for the peripheral jobs, which required a more flexible labourforce, effecting the creation of an unequal and informal labour market. The introduction of temporary and casual employees becomes an essential aspect of the business strategy to cut costs, subordinate workers by creating a hierarchy of rewards and by fragmenting the collective interests of workers. The concurrent enactment of 1994 Labor Law undergirded the process of readjustment of labour relations towards informalization. It intensified the process of casualization of labor in which labour flexibility strategies of employers interacted with the lack of effective regulation and resulted in the creation of an informal labour market. The emergence of an informal labour market can thus be located in the altered employment structure given the demands of capital. Although the intensification of informalization of labour relations during this period saw a withdrawal of the state from management functions and an increase in managerial autonomy, the 2008 Labour Contract Law reflects an attempt by the party-state to regulate informality by plugging in the loopholes of the 1994 Labour Law.

While informal labour was seen as a strategy by the party-state to address the issue of unemployment and cheap labour, there was a significant change in the government’s approach towards the issue of informality. Previously, the domain of informality was outside the state’s direct purview and state policies indirectly effected the intensification of the process of informalisation, there was a gradual transition into regulating informal labour relations. This was done by

accommodating them into the legislative fold, as a buffer to the formal sector, albeit a selective and incomplete accommodation and providing the workers a legal avenue to channel their discontent. Apart from highlighting the severity of the problem of informalisation and the palpable need to preserve social stability at a time when employment had become increasingly insecure, it also reflected how collective action was atomized by individualizing discontent as arbitration and mediation became the initial recourse for the workers.

The conflicting government efforts could be seen as a deliberate move in order to balance the competing logics of economic competitiveness, social justice and protection, and continued political control. The evolving tensions among market, state and workers was reconfigured by the rising tide of informalization.

The party-state in the post-Mao period thus tended to derive its legitimacy from economic construction over the remnants of class struggle. This in turn became an impetus for the labour policies during this period. The issues of workers' rights were increasingly subsumed within this overarching national discourse of economic development and nation-building. It formed the stage for the labour-capital conflict that dotted the landscape of industrial regime in China. These processes revealed the fractious nature of transition in China, faced with the conflicting goals of economic growth and welfare of the workers. These conflicting, antithetical ideas constituted the dialectic of industrial regime during the reform period in China.

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INSTITUTE OF CHINESE STUDIES

8/17, Sri Ram Road, Civil Lines,
Delhi 110054, INDIA

T: +91 (0) 11 2393 8202

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