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Thèse de doctorat

école normale supérieure paris–saclay

華東師範大學 EAST CHINA NORMAL UNIVERSITY

The Institutional Evolution of Social Insurance in China:
A Sociological Study of Law Mobilization

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Préparée à École normale supérieure Paris-Saclay

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Chapter 1. Introduction

Over the past decades, China has moved from a centrally-based economy to one with explicit market features. The success of China's economic achievements had been frequently interpreted as the results of its market-led liberal reform and export-oriented economic liberalism which were both based on the neglect of social and welfare provision so as to keep labour cost low and national competitiveness high. According to the mainstream creed, it was along this line of thinking that China has successfully become the 'world factory' in a time when both free capital flows and supranational multinationals featured the well accepted globalization (Guthrie, 2006). Along this line of narrative, considerable efforts were made, like many traditional Western Keynesian welfare state which were increasingly subjected to the imperatives of deregulation imposed by neoliberalism advocacy (Orenstein, 2008), to dismantle the paternalistic social protection system in favour of marketization and privatization in an effort to promote social and economic efficiency. Some overwhelming evidences have been extracted from the harsh reform engaged within state sectors during the 1990s: on the one hand millions of workers in the state sectors sacked and flexible labour relation emerged, on the other hand the gigantic domestic migrant population working without any social protection in the urban. Besides, they tried to prove that state intervention has been weaken in an effort to withdraw itself from the social burdens undertaken by paternalistic welfare state. In this regard, life-long job tenure, healthcare, education and housing have been particularly underlined because these welfare provisions offered directly through planned economy were linked to the state-owned enterprises whose 'social function' has been consistently removed during the famous campaign of 'restructuration' late 1990s. Despite some difficulties in explaining the ad-hoc resilience within China's political system, mainstream scholars seemed mostly agree to align the consequences of Chinese economic reform with the liberalization that similar to Western experience (Nee, 2007).

In fact, this continued interest on the social protection transformation in China reflected a widely shared thinking that predicted that the postwar 'Western Golden Age', characterized by the expansion of welfare state and strong state regulation imposed upon the capitalism market, was over and would be replaced by the neoliberal state which regarded welfare state as an impediment to economic efficiency in a time when all economic activities were globalizing. The famous 'There's no alternative'[1] creed turned down the so called 'Keynesian compromise' in an effort to release state's

[1] This political slogan has been made in various occasions by Margaret Thatcher during her mandate as Prime Minister of the UK in the 1980s.

regulation and promote free market capitalism everywhere in the world. Unfortunately, the prevalence of this view has led many to believe that China was just doing the same thing as its international counterpart did: free market transition, welfare state entrenchment, diminishing role of the state (Nee, 1989). However, this might not be the case. Rather than repeat this conventional wisdom, our study suggests an alternative approach that focuses more on the complex of realities. By 'realities', we refer not only to the changes that have been taking place in the field of state transformation in China in general, but also to the context within which the welfare state in particular were well re-formed, re-structured not only from its historical roots but also by new impetus and dynamism stemmed from the economic reform engaged by communist leadership.

While witnessing the mainstream account on the eclipse of the state in the Western welfare states, the Chinese case seems to offer a major challenge that defies international norm in that on the one hand China's economic miracle was widely interpreted by market reform success both domestically and internationally, but on the other hand, the continuing state's activism remained very strong and central in the economic activities and labour regulations. In a parallel way, in responding the pressure imposed by economic open and globalization, rather than to be a passive victim, the state takes actions so as to adapt by initiating institutional-building domestically (Wang, 2009). In China, even after an attempt to restructure the state sector during the 1990s, the state-owned enterprises are still vital in today's Chinese economy though private sectors soared. The social protection system, which was said to be dismantled hand-in-hand with sate sectors, is actually becoming full-fledged in terms of program design and expanding its coverage to informal sectors very rapidly by virtue of national legislations such as Labour Contract Law and Social Insurance Law (ILO, 2014). These laws were passed by the national legislative body, the National people's congress, in the aftermath of 2008 World Economic Crisis and become enforceable at all levels. These suggest that the transformation of welfare state is more resilient than commonly assumed.

The expected withdrawal of the state in the social domain seemed not overwhelming, at least in Chinese case state's intervention has been more frequent as new type of economic factors and labour relations emerged following the use of market as one of mechanisms to achieve economic efficiency. New situations were examined by stakeholders such as legislators, governmental bodies or parties in the labour relation. These new social phenomena were conceived, by state, as new challenges to which it has to respond in an authoritarian way as usually as before. By doing so, the state has nothing to do with a big retreat as becoming a market supporting role, rather, the state begun to reconsider the framework of reference in which different economic actors interacted. To make this happen, we have seen considerable changes in the legal domain where new social protection system took its roots.

These evidences are just a very small part of the whole picture of China's social protection transformation. Many reforms relating to social and labour are consistently changing the landscape of China's social protection system as the speed of urbanization and industrialization is soaring. It's true that one can't tell the full picture by describing everything because things are changing, also it will not be useful as well to list all the events that has been taking place at every corner of China as we know that there exists sometimes a great difference in implementing policies at regional level due to local specificities. But we can still grasp some important momentums, both historical and institutional, as a conceptual framework to further our understanding of what is actually happening behind the conventional discourse. Given this, our study seeks to raise and answer several overarching questions: What are the changes that have been taken place within the social protection system? The changes, once identified, how to understand the ways in which they have been transformed? What are the dynamics and reasons behind them?

1.1 Varieties of welfare states

Most academic accounts made within the welfare state research field were Western-centered, and they were very often discussed in the context of advanced democratic capitalistic economies. Notwithstanding China's one-party political regime and lack of free civil society invalidate its direct comparison with most Western counterparts, there remains the necessity to review Western literatures before plunging into Chinese case in the ground that China's industrialization and its impact on social relations was actually another version of modernity project inspired by Western civilization. This fact reflects some shared challenges that have been posed by the dynamics of modern capitalism all around the planet: the division of labour, the rise of market, and the industrial relation and social structure that underpin the ways in which people interact with each other. In this sense, China resembles some of the former Soviet Union and European welfare states and needs to be discussed within the international perspective.

One of the most important academic achievements in the field of welfare state research stemmed from an ambitious comparative welfare state project called 'worlds of welfare state'. This very influential, say dominant, scholarship was represented by an effort to develop a Weberian ideal typology on Western welfare states. Seminal work was done by Danish scholar Gøsta Esping-Andersen who identified at least three main welfare state regimes which coincide with a cluster of Western capitalist nations: Liberal, Corporatist-State and Social Democratic. The core idea of this approach is that each group of countries featured a unique way in which capitalism was governed and

regulated by welfare state politics. According to the criteria of 'de-commodification', labour was protected to various degree in terms of job stability and social provisions, these entail workers or families to 'uphold a socially acceptable standard of living independently of market participation' (Esping-Andersen, 1999:37). While the workers were more vulnerable when exposed to market fluctuation in liberal regime such as some Anglo-Saxon countries, the corporatist countries in European continent gave more job and social protection to workers who were relatively well protected by industrial and sectorial agreement. In social democratic countries, which are mainly located in the northern Europe, the state assumed very high level of social benefits and services based on universalism and citizenship.

When applying these general regime principals to the field of social protection, one can find that most continental European countries were more or less labelled as 'Bismarckian welfare state' in which the role of earning-related social insurance was dominant and social partnership between employer and employee flourished. The principal of social insurance is that, in case of life or social risks such as old age, work accident, sickness, maternity, and unemployment, the replacement of income should be high enough to maintain the beneficiary's living standard. In that sense, the full employment and wage mechanisms are the main policy objectives. This contrasts the situations in liberal regimes because in the latter case social protection was regarded as a residual factor that only guaranteed the minimal or subsidiary social standards overseen by the state. Here, the main goal of welfare state should not address the problem of how to maintain replacement rate but to offer social reliefs to cover those who are in poverty. Nordic case was somewhat different as the tax redistribution assumed by the state played a central role in its citizen-based universalism which promoted gender equality in the employment and ensured low poverty rate by high social expenditure. The thesis concluded with the account that political ideologies were fundamental in affecting the welfare regimes: social democratic ideas in the Scandinavia promoted the establishment of an egalitarian society immune to capitalistic exploitation. Liberal regime worked as a minima state so as to give as much as leeway to the operation of free market. The corporatist welfare states of continental Europe feature a well maintained fragmented regime where sectors and professional groups differ greatly. In a word, the reasoning that developed by this school can be best understood under the name of 'power resource approach' which depends on the dynamic made by partisan politics (Häusermann, 2010: 15-18).

As admitted by its leader, the ideal type offered by this school is not absolutely pure as explicit heterogeneity constituted by different regime factors could be easily found in one specific country (Esping-Andersen, 1990:28-29). This amounts to, sometimes, presupposition that is not necessarily to be used to analyze a given society (Smelser, 2003:648). For example, country like France who was normally categorized as a Corporatist one was actually governed much more by state's intervention

and French bureaucratic process supported by a strong legal order lied in the center of the regulation of market; In a liberal regime such as UK, social democratic factor can easily be found as the National Health Service assumed irrespectively a free and high-quality health services to all residents. As to Nordic countries, we have also observed country like Denmark where the practice of flexible labour was widespread and encouraged by the state in light of the so-called 'flexicurity' which was liberal in nature. This difficulty in accurately identifying different welfare states reveals that the notion of 'de-commodification' might lack some certain substantial dimension and neglects other factors that might play more importantly in determining a country's regime (Bonoli, 1997).

While this approach was widely used in the analysis of welfare states research, another powerful school, originated from the business study and comparative political economy, offered by a group of political economists, put 'institutions' at the core of the analysis of advanced welfare economies and they showed that the underlying principal of welfare regimes is not always about 'politics against markets'. Rather than take into account of political ideas on how welfare states should work, they look at how economies are governed by country-specific institutions by asking how the coordination between different stakeholders, labour, government, firms particularly, taking place through a set of institutions, organizations and social norms. From this perspective, they distinguished two types of countries: liberal market economies (LMEs) on the one hand, and coordinated market economies (CMEs), on the other. In the LMEs, firms coordinate their activities through competitive market which echoes, more or less, to neoclassical orthodoxy. In the CMEs, the firm's actions are more relational and been embedded in a set of national historical institutions that underpin a particular type of coordination.

This difference between LMEs and CMEs is reinforced by the so called 'institutional complementarities' which is defined as the interdependency of different institutions located in different spheres of a certain political economy. For instance, high levels of employment protection are more likely to be observed in non-market coordination countries. In contrast, industrial relation in liberal countries who rely on financial market tends to subject more to the rule of market (Hall and Soskice, 2001:1-68). They argued that social protection should not always been regarded as an extra labour cost that ought to be reduced as much as possible, in the contrary, at least in several CME type countries, business groups work together with social partners and governments to form welfare state that was compatible with the sustainable development of their political economy. In this regard, long-term employment, vocational training system, unemployment benefits, wage protection mechanism and other social protection policies advantageous to safeguarding skill formation and country-specific production regime are more likely to emerge as an institutional complementarity. For instance, Germany has frequently been seen as a typical case in which the national economy is export-oriented

and thus requires a stable workforce with industry-specific or firm-specific skills to meet the demands of the enterprises who adopt a product market strategy based on the formation of craft skills and high-quality products (Estevez-Abe et al., 2001).

Inspired by these comparative works, some scholars further the welfare state typology and comparative political economy to another civilization by asking if there exists an 'East Asian welfare model' (Goodman et al., 1998). In this region where 'Confucianism' as particular culture gene was said to play some curial role in harmonizing social relations by asserting values such as family, responsibility, work ethic, etc., but on the other hand, they put more weight on the role of the state which they regard as extremely important in stimulating economic efficiency while maintaining social cohesion at a lower welfare expenditure compared to Western counterparts.

While the comparative political economy scholarship was quite successful in explaining the formation and dynamic of Western welfare regimes, it will be extremely tricky for one who intends to apply it to explain things happened in Chinese soil because the institutional settings that vehicle the regulation activities in most Western countries are absent (or quite distinct) in Chinese case. For example, in China the disorganized labour and business do not entail an institutionalized collective bargaining between parties though there do exist a politicized tripartite mechanism well controlled by party-led representative bodies such as All-China Federation of Trade Unions (ACFTU), China Enterprise Confederation (CEC), among others (Witt, 2014:11-32). Second, while the working of social protection system in China shares some common points with continental Europeans counties in the way the system was financed as the Bismarckian social insurance scheme is omnipresent, it differs greatly in the way it was governed in that the governance of social insurance in China is exclusively assured by local governmental authorities specializing in labour issues rather than by social partners or corporatist associations who were, in most cases, enshrined in European corporatist countries; Moreover, the informal labour market in China remains very big and there still exists an institutional distinction between urban residents and migrant workers who were and are affecting negatively by *hukou* system though the labour legislations produced a strong convergence trend recently. The list of differences can be endless but the fundamental challenges that comparative scholarship faced with regards to Chinese case would be that the heterogeneity existed in China across different spheres as suggested sometimes by China's political slogan: socialist market economy. Thus, to conclude what type of country China belong to can be somewhat fruitless.

1.2 The crisis of welfare state in a post-industrial society?

If the comparative welfare state scholarship centers more on the static side, another line of thinking which oversaw the historical dynamic is also of great importance. This dynamic has been identified, first and foremost, by renowned economic historian Karl Polanyi in his best-known thesis — the 'Great transformation' in which self-regulated market force leads to the social protection movement characterized by embedded interventions imposed by the state, such as Speenhamland laws during the early 19th century in the England. He argued that this double movement between commodification of abstract market and social protection movement reveals the nature of the market vs. state dichotomy (Polanyi, 2001).

Following this, mainstream thinking confirmed that the 'Golden Age' emerged hand-in-hand with so the called Keynesian political economy in the sense that 'all modern state must become a social state' (Castel, 1999: 625). This means that, the purpose of the modern state is to fulfill the social vacuum formed by rapid industrialization and urbanization driven by self-regulated market. Keynesian economic management was considered as an instrument capable of reconciling the capital and labour in a stable Marco-economic environment. Very soon, however, the social and economic contexts have been altered, particularly in the aftermath of two petrol crisis during the 1970s, Western society has entered into a new era named 'Post-industrial' in which traditional welfare state was not being able to survive unless to undergo a profound overhaul so as to meet the new demands derived by new economic momentum that applies to all.

This change of context is widely interpreted as a multi-fold processes which challenged most Western welfare state. First, someone believed that the economic openness and free trade have negative influences on national welfare institutions (Garrett, 1998). 'Social dumping', 'retrenchment', 'recalibration' are fashion words that are used to describe the game that nation-state is forced to participate in the way of 'race-to-bottom'. While globalization was considered as external pressure imposed from outside, others have pointed out that traditional welfare state also faced pressure from inside, major advanced capitalist countries were witnessing the decline of traditional industries while the rise of the service economy (or 'tertiary sector') has profoundly altered the social structure by imposing new employment paradigm (Iversen et al.,1998): new technologies amount to high skill job demands but more low skill ones produced as well, flexible labour market practices such as atypical labour contract, outsourcing, subcontracting through mergers and acquisition, became much more widespread as the notion of 'financial control' in the field of corporate governance became dominant (Fligstein, 1993). Besides, another line of thinking weight more on the social environment variables, such as demographic change that gives rise to aging society in which the sustainability of old age

insurance scheme has been constantly called into question (Esping-Andersen, 2002), or gender issues like the rising female participation in the labour market which caused new social inequality (Castles, 2004). In a word, new social risks have emerged while the welfare institution was still anchored in a male-breadwinner model. There is a discrepancy that underlined the needs generated from new social risks and the necessity of recalibration of welfare states (Palier et al., 2007).

To many, all these changes claimed the end of traditional welfare state which needs to undertake a comprehensive modernization overhaul to meet the new challenges (Hemerijck, 2013). Again, as can be seen, the welfare state is regarded here as a Polanyian counter-movement against the rise of neoliberal domination. Despite the willingness to change, the reform of welfare state has experienced different trajectories, some estimated that the welfare state, particularly the Bismarckian one, has remained an 'unmovable one' (Pierson ,1998). Others suggested a closer look at the changes happened in many European welfare state suggest that the 'strength' of the state has been diminished, state intervention was challenged and questioned by new form of economic pattern as well as new technologies alike (Jessop, 2007). In order to promote labour market participation, activation policy designed to overcome long-term unemployment and gender gap became popular as these path-breaking policy orientations addressed new social problems that the traditional regimes failed to deal with (Hemerijck et al., 2009).

To sum up, though there existed controversy on the extent to which Western welfare state have changed their pattern to govern, this wide body of literatures seems all agreed on the demise of the state and the shift of the purpose and mentalities of the function of state in the new global economic context: state's capacity in intervening has been weakened and the underlying logic of state activism altered. Rather than steering the economy in a Keynesian way, supporting market has become the major goal of the state in a time when market competition grew both at home and abroad (Levy, 2006).

1.3 An alternative way of considering welfare state reasoning

As mentioned above, both the comparative welfare regimes school and post-industrial accounts regard welfare state as an instrumental tool, whether as the result of partisan politics or as institutional complementarity, that counterbalances the potential side-effects caused by self-regulated market. As the critical remark on the power resource thinking has shown, the welfare state was analyzed by quantitative measures that are categorized as social cost, a heavy burden on economy. All the conventional discussions about the welfare state dynamics is actually restricted by the dilemma set out by the 'double-movement' between intervention and abstention.

That said, despite the high quality exhibited by existing endeavors in explaining welfare state, we still doubt that something is lacking within this gigantic body of literatures. Inspired by the work done by Amartya Sen, as well as those realized by French conventional school, the normative dimensions of welfare state in general, and the substantial role that played by institutions within political economy in particular, have led us to reconsider the reasons why welfare state emerges and evolves.

Contrary to those who consider the 'institutions' as a result of the conflict between the unrestrained self-regulated market and the state intervention which aims to regulate the former, our approach prefers to take the state as a context in which economic actors are guided by the rules that are set out by the state itself in the form of legal orders (Didry et al, 2010). In this 'relational' approach, the state and its action are not narrowly defined as instruments but is more seen as a deliberative rule-maker whose function serves the general interests by using legal conceptions as referential framework within which economic actors take actions. Second, as demonstrated by most classical analysis, the welfare state was implicitly conceived in a 'quantitative' way as the reach of welfare state was usually measured based on the criteria such as income stratification, replacement level, social benefit expenditures, etc. In this respect, though Esping-Andersen's 'de-commodification' approach weighted more on politics that played within welfare institutions, it was no exception but still restrained within the 'quantity' perspective (Bonoli, 1997). Moreover, this tradition not only lacks a normative dimension that should contains the changing relationships between different actors in the realm of industrial politics, but also failed to take into account the legislative objects which was vital in defining the welfare state (Whiteside et al., 1998). In fact, the welfare state analysis provided by most mainstream scholars are more or less relied on the 'utilitarian' way of thinking which regard welfare simply as 'means' that should be equally or efficiently attributed to citizens who have right to vote in a democracy.

Sen, in analyzing the idea of 'justice', pointed out that the conventional wisdom about what is right in social policy is not a useful one when we look at the real freedom that one holds vis-à-vis the social risks. It is argued that, follow his approach base on the conception of 'capability', a useful thinking should '…focuses on human life, not just on some detached objects of convenience, such as incomes and commodities that a person may possess… (Sen, 2009)'. This alternative perspective leads us to reconsider what is the real meaning that the welfare state contains in general. For example, individuals with the same resources (means) may differ greatly in converting them to real freedom (capabilities) with which people can actually to be and do. Specifically, it can be argued that disabled people obviously may not achieve the same capability (e.g. enhanced mobility) as normal people can when both are endowed with the same good (e.g. a bike or a car). Extend this thinking to an

international level, it is no doubt to find that the Black Americans suffer more health risks and live considerably shorter than those who live in country like China where the GNP per Capita is much lower than the former. Educated women, compared to those who are deprived from knowledge in some countries, are more likely to have a longer and lower fertility life.

These simple but striking facts suggest that countries with similar GNP (wide accepted notion measured by wealth) can differ greatly in delivering public goods and thus in achieving social progress in terms of health, equality, etc. The shift of focus from the means and goals (Resourcism) to effective freedom invites us to stop seeing people as patient, or passive beneficiary in the traditional welfare framework, but rather to consider them as agents who should achieve their capabilities in a continued process supported by social arrangements (Sen, 1999). Evaluating people's real capabilities thus require an open-minded approach which relies on the information that reveal the complexity of people's real functioning when facing social risks.

This insight is actually compatible with the topic that we are going to discuss in this dissertation in the ground that the capability approach corresponds to the function of the use of law in real life which is relatively a brand-new phenomenon in Chinese industrial relation. While mainstream regards law, understood as a most straightforward way of state regulation, as an effort to counterbalance the 'miserable' outcomes caused by economic reform, we believed that it's through the law, or more broadly the state's legislative activities, that the new economic order found the soil for its actors to act (Didry, 2016). One example is that the social protection system, which was based on the state sector employment regime for privileged group of workers, has been transformed into an inclusive social insurance system based on the labour contract which has been firstly initiated by China's first labour law. We argue that, in this so-called market transition period, the labour relation has not been a 'victim' of liberal market turn but remained as a starting point for new institutional innovations such as the formation of social insurances schemes. Notwithstanding some institutional inertia displayed with regards to the rise of informal labour market where migrant workers suffered from discrimination explicitly or implicitly, the production of social legislations has driven the schemes to become full-fledged through the 'rule of law' in general, and 'rule of labour contract' in particular. In this process, legal infrastructures specializing in labour issues have been implemented at all levels. This deployment of 'legal weapon' made the legal tests of identifying both 'labour relation' and 'social rights' possible by using the criteria of 'subordinate' and 'dependent'. These criteria distinguish themselves from another legal concept of 'service relation' which was defined as a liberal exchange between freemen by 'Civil principal'. In the latter case, the free exchange of labour or service is not considered as labour relation in that there exists no 'dependent' or 'direction' factors which are indispensable in the legal test conducted by the People's court when it comes to labour relation identification.

As this principle of labour definition was reinforced by the 2008 Labour Contract Law, the standard labour relation has extended its scope of jurisdiction from traditional core workforce to any other form of employment previously practiced in informal sectors. Moreover, with the advent of 2010 Social Insurance Law, the social security rights became more closely associated with the labour contract in that any existing labour relation, whatever in paper or in practice, should entails social security obligations that was clearly defined between parties: While the regional government bodies exclusively run the social security programs by collecting contributions and paying benefits, employers and employees are required to make earning-related contributions respectively to the social funds according to statutory rules implemented at regional level.

Certainly, many would doubt if there is a full respect or implementation of laws in China, or put it more frankly: is law really matters in China? It is true that the institutions that we investigated have produced some side effects (contribution cheating or voluntary abandoned rights) or spill-over effects (rise of atypical work or agency work) for some actors despite the sound legal terms do appear in the paper. Regardless of the quality of the legal service in China, however, we can firmly confirm that the trend of using courts or other legal bodies to claim labour rights have been widespread than ever before.[2] The 'harmony' of labour relation has become a key concern for local authority. In fact, the focus on the law and its practice at concrete situations enable us, rather than validate or invalidate the effectiveness of laws, to apply the innovative approach mentioned above, to observe how people achieve their real capabilities or gain solid rights by mobilizing laws. Moreover, the observations that done within the labour authorities also contributed to the understanding of how state intervenes to

1.4 Design of field study and investigation method

In order to apply our alternative approach into sociological investigation a new way of considering welfare state evolution we look at how legal practices concerning labour and social protection issue change the way people conceive, claim and act, with relation to social protection rights, in a new institutional setting formed by legislations. We have chosen an economically dynamic area (Hangzhou) in China's Eastern coastal province to start our investigations which should include both qualitative and quantitative inquiries that would bring together original data based on interviews, reports (both open and internal), legal judgements, historical and contemporary statistics, etc. The reason that we focus on one economic area instead of analyzing issues at national level is multifold:

[2] For an historical statistic on labour dispute evolution, refer to China Labour Statistical Yearbook, 2010;2 011; 2012; 2013.

First, China's social protection system is basically a regionally administrated one, although national laws set out the general rules, authorities at regional level are the genuine performers of policy design and enforcements, they are entitled to run social protection (social insurance scheme defined by law) within their jurisdiction and thus are responsible to solve any disputes and conflicts. Because of local discrepancy, policies and enforcements of social insurance can vary across regions. For this reason, it's inevitable that we have to choose one place to know how labour and social protection are actually being performed in line with national law. Second, the region we choose is an economically prosperous one which allows us to get enough cases produced within both private and public sectors. Third, as we have more contacts in this area, it would be much easier for us to get access to potential sources of data. Finally, it should be very clear that we are not intending to examine all social protection programs practiced in China today. As a matter of fact, our interest lies in the issues of social insurance that is closely associated with formal (standard) employment in urban area. This means that many means-tested social assistance programs, which are also generally considered as social protection by many, are not included in our current research as social program such as the disabled assistance or social minimum living subsistence is much less, if any, related to labour transformation.

To get the data, we have visited and entered into a number of places, thanks to our local contacts, whereby we can not only collect useful statistical data and qualitative reports, but also, we get the chance to meet key people and thus are able to observe how legal disputes around social protection issues can be debated during legal procedures. As legal practice is at the center of our study, we conducted field research, in 2014 and 2015 respectively, at local labour arbitration commission and people's court in Hangzhou area so as to know how exactly the conflict around social protection rights has become a focal point of concerns expressed by stakeholders who act in the name of law. We select, according to various criteria, a set of cases which embody typical social protection concerns (social insurance contribution, pension calculation, work accident indemnity, etc.), to reconsider the practical implications of legal terms. This includes a set of interviews, with governmental officials, firm managers, labour arbitrators and labour inspectors mainly, investigating in labour authorities are a main part of overall qualitative corpus as they are the main institutional actors in disputes resolution process. These interviews constituted a basic understanding of how legal terms can be applied and enforced in a concrete and situated context. Closer observations also show that the use of law can be more flexible and contingent than one can expected by only referring to abstract terms written in texts. Arbitrators and judges are, sometimes, more rely on governmental documents rather than legal term because the latter is too abstract to refer, and it should be applied with concrete solution developed by ministerial decrees and local authorities. We found that 'material' resolution prevails when laws meet people in conflict. That's the reason why we read carefully, in addition to legal text such as Labour

Contract and Social Insurance Law, local government documents in an effort to be familiar with the 'policies' aimed at certain group of people (e.g., retired people or old people in *danwei*). Strategies such as 'mediation' is another interesting phenomenon that has been found during field study because this way of resolve dispute is seen as a very popular and practical means to deal with tensions between parties. While mediation is not always the optimal solution in terms of justice as required by law, it represents an alternative application of labour laws in Chinese context.

Besides, we conducted interviewed with litigants who are involved directly in disputes. We ask them about why and how they decide to take actions against other parties (their employers, governmental bodies who made decisions, etc.), their ways of conceiving social protection right can be heterogeneous as one's social and professional status (migrant worker, employee in private sector, former SOE retired worker, etc.) can be very much relevant in framing one's legal awareness and his way of act. Around 90% litigants interviewed are employees and workers who claiming rights. Less than 10% of interviews are employers. Moreover, we interviewed many other people who involved in labour management and social protection issues. For example, lawyers and firm managers specializing in labour issues are particularly targeted because they are professionals who are experienced in dealing with labour and social protection disputes. This allows us to know how people act with strategies to confront conflicts. In fact, human resource management and lawyers have an important role to play in negotiating practical solutions to de-escalating labour conflict.

Also, we have collected various official (internal) reports that have been produced or released by related authorities. The reason why we use these reports as one part of data lies in the fact that they represent official opinions on the momentum of labour disputes and expressed governmental concerns on how to deal with new phenomenon in this domain. Some core statistics can be found in these reports which we can use to exhibit descriptive trends of changes of labour disputes. Besides, we use historical archive to gain knowledges about how social protection in China evolved. This includes several visits to local archive centres where we were able to find historical materials relating to social protection in early years before and after *danwei* period. For instance, we found some original pieces which documented how first labour collective convention has been realized in the early years of new China. We also find how social protection experienced market factors that were introduced in the 1980s. Based on original documents, we are able to gain deeper knowledge about the origin and genesis of China's modern labour policies. This can be particularly beneficial when we try to understand the so-called market turn that came into scene in the late 1980s.

In a word, the field study we did is a multi-dimensional one. Since we are interested with the inception and origin of China's social protection (compared to European welfare states), it's essential that we gain knowledge from historical documents to inquiry what kind welfare state China was before

the market economy reform. While it's impossible to deliver a full picture of today's social protection practice, we choose one place to take into account how national principle can be actually translated into detailed solutions at regional level. The much smaller picture we are trying to draw is the result of the application of an alternative approach: a sociological point of view regarding law's functions in governing social protection.

1.5 The structure and argument of the dissertation

Given the mission discussed above, the dissertation is structured as follows. In the first part of this dissertation, we try to show, by a historical retrospect, how welfare state had been invented in China in a time when the Communist Party took power and was immediately addressed by incoming social challenges such as sever unemployment in cities and labour conflict between nationalist capital and new working class. Because we believe that any account concerning today's debate on how to understand the social protection transformation should be dealt, first and foremost, from its historical root. As the institutional school correctly claimed, the phenomenon of path-dependency should be taken into account when one analyzes something new in a given institutional configuration. Bear this insight in mind, we explore the very essential concept of '*danwei* (work unit)' that lied at the core of China's social and economic life during the pre-reform period. In fact, the reason that the 'danwei' weights so much is that it was so closely associated with the implementations of social and labour policies. It was designed, in a paternalistic way, as an atomic vehicle that contains many core social functions which were indispensable to the livelihoods of the people affiliated to it. However, the practice of welfare state within the '*danwei*' is not as uniform as most would expected. As a matter of fact, the working of welfare state within 'danwei' was highly differentiated and there existed a tendency of fragmentation through which the political leadership seek to secure the loyalty of core workforce working for state sectors which were the key to national independence and economic development. We shall see this similarity between Bismarck's concern in establishing social insurance in the 1880s and China's labour politics as a starting point that predating the advent of the economic reform engaged from 19880s.

The economic reform leads us then to open the second chapter of the first part. In this chapter, we discuss what are the changes that come to the field of social and labour relation in the era of 'open and reform' initiated by Deng Xiaoping. We argue that one of the most important events of the economic reform is the re-definition of the labour relation in the state sector. China's first labour law triggered the restructuration in the public sectors in which labour contract has been implemented and

flexible labour relation firstly became possible; On the other hand, the social protection has also experienced major overhaul in the absence of a national law. Whilst the labour law give more leeway for the firms to negotiate labour terms and conditions with employees, labour market in-formalization among migrant workers has contributed to form a hierarchy in terms of social protection. As the social protection was based on the formal employment relation that stemmed from the state-owned firms, social security schemes remained closely associated with the standard labour relation that mostly existed in formal sectors (Ngok, 2008). Together with the expansion of non-standard labour relation, it has been witnessed that a fragmented labour market has been formed along firm types which featured the 'labour dualism', one that similar to European continental regime in which formal labour relation is disproportionally protected with regards to labour market 'outsiders'. Nevertheless, new legislations aimed at defining labour in a much strict way have revered the trend toward labour precariousness (Adams, 2014). In China, we have seen that laws require equal treatment when it comes to labour floor. Despite deep-seated mindset, firm type was becoming less relevant as to law deliberating. The notion of social protection was also reinforced hand-in-hand with this strong revival of labour standardization based on contract. Identification of actual labour relation is becoming a key criterion that labour administrations and courts invoke as a clear sign to judge one's due rights.

In the second part, we develop a general conceptual framework that is based on the theoretical wisdoms derived from Max Weber's classics by adopting his ideas of the sociology of law. That said, law should not be understood in a jurisprudential manner, but should be approached in the way 'the law is produced by the legislative and the judicial activity that relies itself on the way ordinary people conceive law in their ordinary social activities (Diaz-Bone et al., 2015)'. More specifically, law is seen as an institution understood as a reference for the actors in their interactions, enabling these actors to qualify situation as 'work/labour' (Didry, 2015). Follow the argument, we apply this analytical tool onto the field study that is carried out in the concrete places. We show how the workers, or more broadly labour market participants, mobilize laws as a way to achieve labour rights in a concrete situation where labour and social protection disputes, administrative procedures and court deliberations intertwined in a complex institutional (legal) environment. Also, the concept of 'capability' developed by Amartya Sen is of important implication as we borrow this innovative idea to evaluate to what extend people's real capacity to act (the real freedom to choose one thing) can be achieved.

The last section of this research will be a concluding remark which we intend to respond to the very question posed by mainstream academic research: what is the nature of China's social protection transformation? Insights from the innovative framework of the sociology of law and our field research outputs constitute an argument that challenges the conventional wisdom. Also, the new economic

activities (‘sharing economy’) stemming from the mass application of Internet technologies are changing the labour landscape in a profound way, to many. While people saying that standard (formal) labour relation is becoming obsolete and it fails to address the new momentum brought about by the so-called ‘New Economy’, our answer will be more reality-oriented as we will discuss how exactly the labour relation is at work this new economic sector. Lastly, we will give a brief summary of future perspective of China’s labour landscape by providing trends and thinking that are in the process of fermentation.

Part 1. Social-historical dynamics of social Insurance in China

The steps that leads to the legislative activities on social insurance suppose a double evolution. On the one hand, it means the emergence of the rule of law as the base of the State's activity; on the other hand, the emergence of a labour law enables to define the population of the workers affected by the universal social insurance scheme based on social contributions. The new social insurance scheme remains grounded on labour, but it evolves from a community management integrated in labour units (*danwei*) to regional labour authorities who collecting contributions based on wages and distributing welfare compensations for health, work accidents, pensions, etc.

Obviously, French 'sécurité sociale' appears as a comparable counterpart, though the criticism it faces in Europe because of a so-called burden on labour-costs for the firms. It leads to an embeddedness of social insurance legislation in labour law, as it supposes the definition of the labour contract and its implantation in order to overcome the fundamental obstacle that represents informal economy. But, if the social insurance scheme is defined by the national legislation, its functioning is assumed by specific agencies attached to the regional government.

Before we start to discuss the advent of unprecedented legislative activities and employment changes, it remains indispensable to take a retrospect on the early development of social insurance in socialist China. In this part, we show how communist party envisaged the first edition of China's modern social protection scheme by leading the negotiation between capital and labour in the immediate aftermath of national liberation. This 'moderate' solution paved the way for the socialization of private economy in later stage, which led to the formation of *danwei,* a very core notion that every researcher interested in China's society should be familiar with. *Danwei* functioned as a clan-like socio-economic organization in distinguishing itself from other social categories such as farmers and township firm workers. It was a closed mini (or giant in some case) community and thus fostered the very basis of labour politics and welfare state in socialist period in which only few people can benefit comprehensive labour protection.

We also try to suggest that, the labour politics in the time of 'economic reform' was not a plausible break with its previous *danwei* root. While it was correct to point out that market idea such as contract had become a new means to restructure state firms in an effort to dismantle *danwei* system, labour contract and social insurance scheme were emerging as the cornerstone that sustains the overarching structure of standard (formal) employment regime, with supplementing (peripheral)

labour regimes such as precarious and informal relations embodied by the condition of labour market vulnerable groups such as migrant workers and many laid-off state firm workers. Employment changes were not neo-liberalized or marketized as it is social institution that condition the formation of structuralized labour regime.

Meanwhile, we have seen the development of labour and social laws had been accelerated to address labour market segmentation. Inclusiveness is the key to understand the trend of labour laws as legal terms become more universal and operational when it comes to the definition of labour relation. The simplification of labour relation amounted to the quick expansion of social insurance, particularly after the promulgation of Social Insurance Law in 2010. Regardless of social status, new law provides clear definition and enforceable terms on how to operate, by legally binding terms, it facilitates the identification and management of one's social insurance record by stipulating legal jurisdiction and procedures to which parties should obey and follow. Inspired by Sen, we consider the law as a means to enable people, no matter in good or bad condition, to take actions by virtue of the cause one has reason to value. Using (mobilizing) law can be seen as a process in which people's real freedom can be achieved by giving the chance to choose.

Chapter 2. Historical evolution formation of danwei

If the birth of welfare state was generally associated with the historical process of industrialization that prevailed among the Western capitalistic countries, in China, the first step of introducing a national social and labour policy was, by and large, rather characterized by an effort to strengthen the political power that had been gained by Communist Party in the immediate aftermath of China's civil war. This means that, very different from the cases of most European welfare state which were mainly based on the labour strikes and riots launched by urban workers, the China's labour movement derived from the revolution initiated by the communists who began their resistance firstly in rural areas and finally controlled modern industries in the urban area through the civil war against nationalist party. That said, the 'liberation' of working class was not done by workers themselves but though the military activities realized by Communist army. For this reason, the beginning of China's labour and social policy were deeply seated in the political context of communism which oversaw the mobilization of labour conflict as well as the restoration of national economy in the aftermath of its national victory. For communists, the priority, with the power in hand, has been shifted from rural military mobilization to urban economic reconstruction. In fact, in big cities, issues like unemployment, labour conflicts and worker strikes were seen by communists as key challenges that should be addressed through a new approach based on 'collective convention' which embodies the party's determination in governing a new country alternatively.[3]

However, it seems that even today, the knowledge about the labour politics of the new Republic still receives less attention. While *danwei* was widely understood as the basic form of organization to build socialist economy by communists, what is less known is that before the communist effort in building *danwei,* there had been other efforts in regulating labour relation between employers and employees at the early stage of new Republic. I will argue particularly that the inception of China's social and labour politics have different stages than a unique scenario of *danwei* would suggest. In fact, the spirit of 'collective convention' had been included in the 'Common program' which served as the role of temporary constitution at the beginning of People's republic. It might be surprising to denote that radical ways such as economic communism or central plan were not the primary objectives for communist leaders at that time. In the article 26 of the 'Common outline', the labour and capital were given equal importance in an effort to restore the industrial production and national economy. As

[3] Collective convention, or 'convention collective' has been studied in France by conventional school. See, Didry, 2002.

such, it was rather 'reconciliation' and 'cooperation' that set up the foundation for the labour politics of the new Republic.

When we take a closer look at the early politics of labour of the Republic, some significant characteristics could be found: 1) The conclusion of collective convention was widely spread across industrial sectors but agricultural sector was by no means included; 2) Given the situation of China at that time, this meant that only very small part of China's total population was covered; 3) Unions led by communists have played important role and gained currency when it comes to expression of workers' rights. This movement had given rise to an elaboration of national labour standard that was based on labour insurance for employees of big firms. Similar to Western welfare standard, the Chinese version provided comprehensive labour provisions everything from pension to healthcare or so. A strong awareness of being 'master' of the new republic and an emphasis on industries that were crucial for the independence were both indispensable.

But the politics climate has changed rapidly as some communist leaders considered more racial ways at the moment when some profound social and labour floors had been established following the collective convention and labour insurance. It was during the late 1950s that the Chairman Mao thank that the 'Common program' should be replaced and real communist method such as socialization of private capital should be launched. This change amounted to the hard action of 'massacre' upon private capital which had been tolerated at the beginning of communist rule. It was through this campaign of 'socialization' that the *danwei* had been invented and established as the basic form of state socialism.

Despite an explicit egalitarianism and uniformity that *danwei* exhibited during its heyday, implicit stratification and differentiation in terms of welfare provisions were overwhelmingly presented across the *danwei.* While big factories in heavy industries or located in big cities enjoyed privileged labour protection, other small plants or shops were, to some extent, less the case as the former. From within *danwei*, well established institutions existed so as to form a hierarchical structure in which labour provisions or benefits were attributed by virtue of centrally planned economy. In this case, status became vital in the process of planning since the bureaucratic nature of the system determined who got what.

Before the reform of 1980s, this small and enclosed world of *danwei* went hand-in-hand with another social institution named *hukou* which contributed to reinforce *danwei* on the grounds that the former imposed a strict police management and surveillance on the labour mobility, especially rural-to-urban flow. The highly restricted mobility made the free choice with regard to free choice of job and professional career impossible and everyone's social status or labour protection were stick to the *hukou.* In fact, even nowadays, nearly 40 years after the economic reform, *hukou* remained influential and migrant workers still face problems caused by this 'old institution'.

In sum, the formation of the Chinese welfare state was first, and foremost, the embodiment of the political ideology of communist party as a working-class liberator and its ambition on building a comprehensive industrial system that fostered the independence of its regime. Nevertheless, communist ideology did not result in, immediately, a socialist welfare state, collective convention was seen as a way to negotiate a peaceful relation between working class and capitalists. Then, after a very short period of collective convention, the experience of Soviet Union has become evidently dominant as the party leaders launched the campaign of socialization towards private capital, the *danwei* as the cornerstone of the state socialism emerged and reshaped the labour relation into a new era. By this, welfare state was no more a social contract but rather a function that fit to the rule of an authoritarian socialist regime.

2.1 The collective convention: 'benefit both labour and capital'

As Second world war and Civil war in China had both severely destroyed the national economy, restoring national economy was the first priority for the newly born Republic. How to archive this was crucial for the independence of the republic which was a costly and fragile achievement after decades of warfare. While the victory of communists gave them the absolute leadership, an authoritarian communist regime was, however, not even an option for the state reconstruction plan. In fact, the political goal of the communist was achieved: The Western enemies who embodied the 'imperialism' and domestic feudalism had been defeated, other domestic anti-revolutionary political forces too. The new republic that communists envisaged should be built in two steps according to chairman Mao. He invalided both bourgeois republic and soviet republic by proposing a unique republic structure for a country like China: The New Democracy. In the New Democracy, communists should work closely with other social classes so as to consolidate the Chinese victory. However, the New Democracy should be adopted only as a transitional period for China to achieve real socialism finally. The necessity for a New Democracy was proved by the fact that China was an under-developed poor country which should still relied on private capitalist to restore national economy. Notwithstanding the republic confiscated the capitals held by imperialism and feudalism, it would not take a hard stand on the 'private capital that is unable to control the national economy' (Mao, 1940). While the communists firmly killed Western imperialism and domestic feudalism, the New democracy they proposed featured a tolerance and cooperative attitude towards the private

national capitalists who not only didn't imperil the communist rule but also should be protected for their roles in strengthening China's independence.[4]

This plan of building republic was interpreted under the spirit of 'common outline' formed in the first Chinese People's Consultative Conference held two days before the inauguration of the New Republic on 1 October 1949. The famous project of 'common outline' proposed an economic policy that wish to reconcile labour and capital in an effort to promote production and industrialization. The restoration of national economy was made up by three forces: 1) State sector led by communists; 2) Small-scale peasant agriculture economy; 3) Small and medium urban capitalistic commerce and industries. In the spirit of 'restoring' the production, the party decided to reconcile the conflicts between capitalists and employees by initiating a political campaign of 'collective convention' especially in the private sectors. As a matter of fact, this was a practical reflect of the general principal that has been laid down in the 'common outline'[5] which featured the political methods that should be applied in a time when communism gained military victory but still need other political friends to further the transition to socialism. This period was marked by a complex set of economic challenges left by nationalist party: after severe civil war, the economic production reduced sharply, and unemployment soared among urban habitants. The national capitalists were unlikely to continue or expand their business in that the confidence for the future was rather low at the moment the communists liberating China. For instance, in Shanghai, the most important commercial and industrial city in China, among 13647 private firms across 87 industrial sectors, only one-fourth were running, about 260000 workers were unemployed and waiting for work (Shanghai labour annals, 1998; Huo, 2009). In Tianjin and Pekin, biggest commercial industrial cities in Northern China, capitalists and firm owners refused to continue business, sacking workers and outstanding wages were widespread. As a result, the labour conflicts in big cities had attained its height at the beginning of the liberation.
This situation led to a crisis characterized by rising labour conflicts in which workers fought for the right to work and to be paid. Some few workers went so far as to suggest communists to confiscate and divide private assets. However, for communist, radical claims on labour rights and private capital should be avoided, cooperating with capitalists was more than an option but rather an essential when it comes to economic production and national solidarity, as the party supreme leader Mao Zedong put it:

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[4] For a full development on the principles of the New Democracy, see Mao Zedong (1944) 'On the new democracy' & 'On the coalition government', *selective works*, volume 2 & 3, Beijing: People Press.
[5] Before the first constitution of People's Republic of China which was passed in 1956, 7 years after the Republic, the 'common outline' served the role of 'temporary constitution'.

'Our union cadres should be more positive in their work. They should develop good relations with capitalists and private firm management… the party, the government, the union, the common purpose we share is to improve production… We should unite with different parties, workers, farmers and bourgeois… (Mao, 1977)'

Against this background, finding a resolution to solve mass employment and restore production became the first priority in the party's labour agenda. In the name of 'New democracy', the union leaders, officially backed by the communist party, publicly explained on how to negotiate new labour terms so as to restore employment and production. Collective convention was envisaged by the All-China Federation of Trade Unions (ACFTU) as a way to solve the economic crisis. As a people organization that affiliated directly to the communist party, the ACFTU mobilized and represented workers by working as a 'bond' that transplanted party's labour orientation and received feedbacks from field practice, this was actually the basic working method that was used by communist over time. In July 1949, several seminal documents were passed during an ACFTU conference session, among which, the most important decision was made in the document named 'implementing collective convention within private sectors'. According to union leaders, issues such as labour hire, dismal, wage and welfares should be included in the process of negotiation between parties. Notwithstanding the spirit of free negotiation should be applied explicitly through democratic procedures conducted by both parties, some floor standards have been especially underlined by unionists, for example, the employer should at least take charge of maternal and medical provisions partially, any achieved labour provisions should be maintained in the collective convention. All these terms and conditions should be negotiated in the framework of collective convention. [6]

However, it was no easy job for an official trade union backed by communist party who had no experience in advocating labour rights against capitalists in an institutionalized environment before. In a national preparing conference, the union leader set out some basic principles that should be applied to the negotiation of collective convention. First of all, he maintained that union's stand is crucial in that union must uniquely defend worker's interests instead of becoming a mediator between two parties, in another word, union should not be an arbitrator standing in the middle. Secondly, advocating and deliberating collective convention are the key to solve labour conflict, all workers should be informed and mobilized in the process of negotiation to highlight the democratic nature of the union. Last, while in state-owned firm where no capitalist exploitation exists any more, workers' claims on

[6] Around the time of 'liberation', ACFTU charged the mission to solve disputes between labour and capital. The union issued some important documents ('*banfa' in Chinese*) so as to establish a framework in which the labour conflict should be addressed. Temporary ways on labour relation 22 November 1949.

labour conditions and benefits would contradict firm management in some cases, thus it is essential that management respect union (You, 2010).

It should also be noted that the collective convention was aimed at private sectors since in state-owned enterprise there existed no more capitalist control. At the core of collective convention lied the principle of 'equality between parties', but to do so, disorganized labour force and their enemies should be brought back upon an organized environment where guidance and mediation from party and government are indispensable. In an editorial aimed at concluding the experience of a collective convention signed in the Pekin traditional pharmacy commerce, the party's official media stated that:

'After the people's 'liberation', the workers in Pekin dare to speak out theirs claims and fight hard for their rights against capitalists, some of their claims are of course reasonable, but some others are not due to the current economic situation… the unrealistic ideas amount to the labour conflict and leads to the capitalist's unwillingness to continue their business which finally hurts production and employment, thus bad for both parties…. Though the class conflict between workers and capitalists is fundamental, we also think that a mutual foundation for cooperation can be found in today's circumstances. We welcome the equal wills voluntarily expressed by both parties in the process of bargaining. This is to say, while the workers have the right to claim, we also agree that this applies to capitalists too. All this is for the purpose of restoration of production. (People's Daily, 1949)'

This line of orientation was confirmed and advocated by other official media channels who concluded on how to find a reasonable way to address labour challenges.

'Trade unions are certainly responsible for the interests of workers… but government should be the final judge in governing labour conflicts and collective convention… In any case, for the interest of the whole state and the all people, we must work together under one leadership, and act in organized ways…by this way, we not only united our workers but also overcome the anarchism that wrongly prevailed among working class. (Xinhua News Agency, 1949)'

The big issue that addressed communists was rather how to find a reasonable way to persuade private capitalists to continue their business in order to fulfill the demands from the workers who are unable to suffer the misery caused by high rate of unemployment. For official union, though its direction should be guided by worker's interests ultimately, persuading them not to claim anything unrealistic was equally important to successfully strike a deal with capitalists. A pragmatist way to defend workers' suggested union to care capitalists' interests so as to foster a reciprocal relation that benefits workers finally. In sum, the repeatedly emphasize of the 'production' in the framing of labour policy proved that there was nothing bigger (more important) than making people back to work.

In October 1949, less than half year of the liberation of Shanghai, the municipal labour authority issued an administrative directive which imposed a checking list for the use of parties in preparing an effective labour negotiation. The list listed some basic terms and conditions that should be included in the constitution of collective convention. Among other things, labour protection and welfare provisions were underlined because issues related to working benefits and labour rights were common concerns among workers. The collective convention proved successful in that industrial production restored rapidly and mass unemployment as a severe social risk had been turned down by the rising of people employed. Until 1951, in Shanghai, a number of collective conventions were concluded in industries of tobacco, textile and rubber, more than 920000 workers and employees were covered. In Nankin, another key economic center in the Yangtze delta, by 1954, 181 collective conventions signed which covered more than 120000 workers and employees. (Huo, 2009)

Common concerns related to labour rights expressed in the collective convention were framed under the general political orientation set out by the New Democracy. On the one hand, workers' claims on wage rise and partial cover of Medicare and pension were backed by the official union who also gained legitimate organizational power to mobilize its members within the firm. On the other hand, labour discipline and capitalists' prerogative on firm management were both asserted and there would be no more objections from within the firm. Despite democratic mobilization among workers, their concrete claims were sophisticatedly framed towards a balance envisaged by the party. In fact, the fears and hostile attitudes made most urban capitalists reluctant to restore or continue production at a time when the communists liberated cities, party leaders considered more disadvantageous situation would be brought about by increased labour conflict if workers' one-sided claims are over represented. As such, over the first years of the new republic, labour conflict was well regulated in a political context in which both cooperation with capitalists and hard class struggle took place alternately. Unions had to perform a subtle balance between labour benefit based 'economism' urged by workers and the overarching goal in normalizing economic condition that is vital to communist victory.

Another important implication derived from the collective convention was that it formed a formal institution that allowed different parties to engage by throwing out their respective claims. For unionist, it was a historical occasion to step forward to mobilize workers under party's direction and in this way cultivate the soil to form a working-class alliance backed by urban workers who were crucial to fulfill industrial capability that fostered the state independence against external enemies. For capitalists, the signed convention gave their legitimate powers to continue their exploitive business and hence to hold important managerial prerogatives on issues like people and firm management. As to workers, their claims on working rights were well channeled by unions and be represented in the

negotiation of the convention. Given this picture, one could say that it was through the collective convention that China adopted a tripartite-liked system in which labour conflict can be peacefully addressed.

If this 'social cooperation' plan was stress and widely implemented, there existed some voices doubted that 'reformism' gained power over the radical nature that a communist party should hold, however, according to party and union leaders, 'reformism' is not an appropriate name for collective convention because social reformism in Western democracies are a tool to maintain capitalistic rule which is totally different from the Chinese case in that the main objective of collective convention is to promote production by concluding a peaceful accord with capitalists, 'production leads to better life which is the final goal of workers', labour rights can and should only be negotiated in the name of production. This political orientation was formed at the moment when some radical opinions such as 'take over' or 'confiscation' of private capital were spread among workers, theses 'unrealistic' approaches had been turned down by the government and party bodies in the name of 'common outline'. Union leader openly explained the right approach: we educated our workers from the very beginning that left-lean position is dangerous to their long-term interests, we are different from Western social reformism because the collective convention is designed for production which contributes to the consolidation of our people's regime.[7]

Despite the great achievements realized by collective convention, compared to the more privileged national labour insurance provision that were only given to those who work for state sectors, collective convention failed in enabling a national statutory floor for people working in private sectors. The welfare benefits that gained in the convention were different across the sectors, they were mostly concessions made by capitalists in an effort to satisfy both parties. The level of labour protection was rather low and contingent according to sectorial context. The collective convention took the form of a tripartite-style corporatism that prevailed in many European continental countries, however this democratic mechanism was guided by general interests and principles set out by communists at the beginning, managed democracy was only option for workers to engage with.

[7] Speech at the world federation of trade union Asia-Australia conference, 'Lessons and experiences from China's labour movement', Pekin, 1949 November.

Table 1. Labour protection levels at the beginning of the new republic

	Protection program	Protection level	Social Status
National sector	National labour insurance	Medium to high	State worker
Private Sector	Collective convention	Low to medium	Worker and employee
Agriculture Sector	None	Very low	Farmer

Sources: from the author

2.2 National Labour Insurance: A Political Issue?

In 1951, just two years after the victory of communism in China, labour right was 'achieved' under a strong political awareness of 'working class' conceived by communist party as a natural commitment consistent with its political ideology. The promulgation of 'labour insurance article' was the first modern labour related law in China's history. This sense of 'being master' contrasts sharply to the denounced 'old society' in which workers were rarely protected and working without dignity because of capitalistic exploitation. Although the law was given the name of 'labour', farmers working in agricultural sector, for example, were not mentioned, nor were other workers and employees working for private capital. In fact, the legislators consider the capacity of this welfare system in limiting it only to big state-owned firms (more than 100 employees) and firms specialized in key sectors such as post, transport. The relatively narrow jurisdiction of this labour law implied that the labour protection was closely associated to a superior working class political ideology that shed light on the big industrial establishments owned directly by state that were vital to Mao-style nationalist communism which valued on industrialization and national independence. As far as working class represented the most advanced productivity and served as the cornerstone for the consolidation of communism in China, their interests should be firstly concerned according to the party leadership.

The China's communist labour insurance distinguished itself from other social protection systems in the world (except the Soviet blocs) on the grounds it was uniquely financed by the firm, that is to say, workers as beneficiaries didn't pay anything from their wages; the management of the labour insurance was assured exclusively by official trade union who was mandated by the state as the sole responsible body in charge of welfare issues. The labour insurance program also featured a comprehensive coverage from old age pension, health care to other issues such as work accident

insurance, maternal leave and living aid for people in difficulties.[8] In addition, priorities such as additional benefits, awards or sanatorium leave were given to 'labour models' who receive national prix because of their excellent services performed at work. All these welfare benefits were designed as an encouragement to enshrine the exclusive nobleness of working class as we know it as the 'master' of the new republic. The basic goal was to provide an earning-related comprehensive social insurance regime similar to the European continental model so as to give a guarantee for workers, first time in the short modern history of China, to face risks related to subsistence.

While Western classical social insurance regimes, both Bismarckian and Beveridgean, were based primarily on social pooling that requires contributions or tax paid by firm together with workers, the Chinese socialist regime derived from an internally managed labour insurance placed within the firm.[9] As such, the labour insurance worked as a functional part of the firm management to cover the needs of workers. This workplace-based insurance regime corresponded to the limited application of the legislation at national level as big state-owned firms were not as many as other types of firms. Given the uniqueness of this very limited and enclosed regime, labour insurance as a social protection measure in China had not the same effect or reach as its counterparts did in European countries, most workers in small firms or private sectors were not the objectives of this narrowly applicable regime. Thus, it's not difficult to recognize a hierarchical mindset working behind which underpinned the design and implementation from the very beginning. For instance, in 1949, when the 'common outline' was firstly proposed, labour insurance was among one of the social goals that should be achieved 'step by step' in the following years. If the first implementation was only aimed at big state-owned firms in which 26.2 million workers were covered, then in 1953 and 1956, the regime extended to other smaller firms respectively, raising the total beneficiaries to 137.7 million by 1958 (data extracted from National Statistics Bureau 1992 Statistical Yearbook).

One of the reasons that the coverage had expanded during these years was that the socialization campaign launched around 1953 rapidly changed many private firms into state-owned firms which should be covered by state labour insurance regime. However, the recovery of economic situation and socialization campaign had both boosted the numbers of new established state firms. This again led to a hierarchical resolution that tried to set up some new different sub-regimes as national trade union decided not to further expand the coverage of national labour insurance regime. The regulatory practice at regional level showed that pragmatism had been introduction in dealing with newly set up firms:

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[8] State council, *Labour insurance article*, 1951.

[9] 3% of total wage paid by firm should be used as internal fund to cover labour insurance expenditures, 30% of the fund collected should be socialized as mutual fund to complement needs everywhere across the country, see *labour insurance article*, 1951.

that the firm previously covered by national standard would be maintained, but the new firms should comply with the latest regional standard that was inferior to national one.

As will be discussed in the below section, the attempts to made labour insurance regime more hierarchical and fragmented have resulted in an institutional 'status quo' whereby different groups of people claimed for different treatments in terms of welfare provisions. Moreover, more profound outcome was that path-dependence institutional evolution was more likely as policy makers usually addressed the new challenges by referring to old repertories which laid the foundation upon which new regime would be rooted.

Table 2. Comparison of China labour insurance with other European social insurance regimes

	Bismarck welfare state	Beveridge welfare state	China labour insurance
Pooling	Earning related contributions	Social tax on business and personal incomes	Undertaken uniquely by firms
Replacement	Medium to high	Low to medium	Medium to high
Coverage	Comprehensive traditional programs	Means tested comprehensive coverage	Comprehensive traditional programs
Objective	Maintain high level of livelihood facing risks	Offering social minimum standards	Give priorities to privileged group
Governance	Social partner	Governmental bodies	Official trade union
Finance	Defined benefit, pay-as-you-go	Defined contribution, funded	Defined benefit, pay-as-you-go

Sources: from the author

2.3 From new democracy to state socialism: the birth of *danwei*

It should be no surprise that the private capital was the fundamental enemy for a country governed henceforth by communist party, however fighting against capitalists was not party's first

priority before a broad campaign in nationalizing the private sectors can be launched several years after the republic. In fact, in the immediate years after liberation, the official trade union was quite successful in improving the labour conditions for workers in both the state sector and private sector, under the patronage of party's new democracy spirit. While labour insurance was fully implemented in big state-owned firms, collective convention and other pro-labour pacts alike played effective role in improving labour conditions for workers in private sectors as well. In fact, this was a period characterized by a pacific relation between labour and capital, labour conflict cooled as industrial production restored. As mentioned above, collective convention negotiated under the patronage of governmental bodies played an essential role in defining the labour rights for workers. Union's role was so dominant that it defended exclusively worker's right (both in private sector and public sector) and thus became very influential among workers.

When union leaders were enthusiastic about advancing their ways of implementing welfare provisions across sectors, other party leaders held quiet different attitudes. Inside the leadership of the communist party, a debate around 'syndicalism' took place and the question if there exists conflict in state-owned firms has been used subtly by some political opponents of the unionists, moreover others criticized union leaders' policy as 'economism' and 'corporatism' because unionists pay more attention to workers' benefits and provision than promoting production.[10] While it remained unclear what had exactly happen about this party political conflict, the result appeared clear that some union leaders failed to hold power and their adversaries were finally proved successful in the debate thank to the support from the party's supreme leader Mao Zedong who considered that the goal of the new democracy had been attained and should be ended by another wave of socialist movement in which more racial approaches should take place. The historical 'socialization' began in this context, the goal was to kill private sector step by step. From 1953 to 1956, everywhere in China from rural to urban areas, socialization of private capitals took place in an attempt to transform the capitalist production relation into a socialist or even a communist one. In this process, the mission of 'kill capitalist' was conducted in a relatively pacific way: the state openly bought the private capital (firms, productive materials, etc.) and paid the capitalists with incomes in the 10 following years that generated from the business and production, thus the final goal was to change their social role from capitalist exploiter to socialist worker.

As the campaign radically changed the economic scene, labour relation undertook significant changes too. Labour conflict had gradually diminished as private sectors shrank. By the year of 1956,

[10] For a detailed historical record of the political conflict around the ACFTU issue in the early years of the republic, see Zheng, A.Q. (2007) *Libertés et droits fondamentaux des travailleurs en Chine*, Paris: L'Harmattan, p 93-145 and You, Z.L. (2010) 'On the Three Great Reforms of Chinese Trade Unions since 1949', *Sociological Studies*, 4:76-105.

in Shanghai, the labour arbitration stopped working while there was no more dispute between workers and capitalists. The labour disputed were rather negotiated between firm management and unions as an inside conflict of the People. With regard to firm management, from 1954, decision had been made on labour recruitment in an attempt to change labour hire power from firm to labour authorities (Lu, 1993). As a result, firm's ability to hire or fire had been significantly reduced as the state gradually monopolized the control of labour force.

The socialization campaign paved way to the planned economy which was entirely based on the exclusive roles played by work unit (*danwei*) that was nationally implemented across sectors. With the experiences learnt from the Soviet bloc, and also by virtue of its direct economic and technological aids to the Chinese communism projects, multifunctional socio-economic actor was introduced in China hand-in-hand with the socialization campaign. The 'work unit', which was actually designed as a generating institutional platform to promote both industrial production and social integration. The social citizenship, normally developed through public policies in Wester welfare state, was closely related to the *danwei* in China, as it worked as a self-contained or self-sufficient body. Public regulations such as labour relation and social affairs were internalized by *danwei* through an array of institutional arrangements in terms of labour management and welfare provisions that were vertically managed by specialized central planners. The entry to and exit from the *danwei* was strictly managed through planning authority. At the workplace level, *danwei* offered an all-encompassing welfare package (comprehensive labour insurance, housing, childcare, schooling, life facilities, etc.) that formed an ultra-stable socio-economic community where people were attributed a lifetime work placement which generated a series of labour and social benefits.

This mini-society was reinforced by the strict labour discipline inside and a stringent household management outside, labour mobility had been significantly reduced and subjected to the surveillance of the police, any illegal mobility or disobedience would be sanctioned. Since the capability of supplying the urban habitants with daily subsistence was relatively limited due to the under-developed productivity, the running of the planned economy required a forced control of population, particularly so in the case of labour mobility between urban and rural. *Hukou* as a Chinese way of managing people was born along the socialization campaign in the late 1950s, it banned the liberal circulation and imposed a concept of adherence whereby urban or rural habitants can be integrated to their *danwei* respectively. In a word, the adoption of *danwei* went hand-in-hand with the fixation of people which produced profound effects on the labour management: 1) The hire and job placement were managed in an organized way by the planned authorities who gained managerial powers through socialization of private capital; 2) The liberty of choosing his job was turned down by the affectation system which not only promoted a full employment in urban industries but also compel one's life-long rigid

adherence to his *danwei*; 3) Once affected to a *danwei*, the job tenure along with welfare benefit were assured, for life long (Miège, 2005).

The conjunction of disciplinary and protective function constituted the core mechanism that underpinned a well-balanced labour politics performed in *danwei* system. By establishing and spreading *danwei* as prototype, a process of internalization in terms of labour management down from governmental bodies to *danwei* took place as the latter operated labour policies in an autonomous way. Besides production goals and labour recruitments received from central planning authority, the *danwei* could implement on its own the labour provisions that were defined by labour insurance article. With regard to labour relation, trade union had an important role to play in implementing labour policies, everything from budgeting pension and medical expenditures to organizing off-work social activities for employees. Since labour arbitration had been demolished after the socialization, it was the trade union who took charge of labour dispute. The director of trade union sits in the board of management, labour issues were very often politicized as an important section of party's attempts to represent the working class. Complaints and disagreements were carefully channeled by unionist who could effectively transfer them to *danwei* leadership. People working in *danwei* were actually living like in a big family in which its members have close ties with one another and they were all covered by the paternalistic cares offered from the seniors of family.

As can be seen, this unique socio-economic institution formed a particular way in which the Chinese welfare state was configured and operated. That said, the labour protection in pre-reform China was not 'social' in that it was an internal affair of an organization itself to decide in line with the policy orientation set by party. Although not every *danwei* had the same abilities to cover all subsistence requirements, local administrations had limited or residual roles to undertake, this was particularly so in the domain of labour relation. As a matter of fact, some big *danwei* can be as huge and comprehensive as a big modern industrial city as we know them in the northern-east China where heavy industrial like steel, automobile and ship building factories were constructed in the form of industrial clusters inspired by the Soviet model. [11]

As the national labour insurance regime was primarily dedicated to the big units in key industrial sectors, smaller ones in other sectors were often considered not as equally important as big ones. In small units, labour protection was not obligatory but facultative at the beginning. When the socialization campaigned enabled the change whereby most private firm became public *danwei*, there

[11] This was especially the case in Northeastern China where the most advanced industries had been developed much more rapidly than the rest of China. While most *danwei* in there had their own hospitals, schools, housing parks, theaters, stores, canteens, sports centers, etc., in Southern China, it was not the case that small to medium *danwei* could offer the same benefits at such level. Actually, during the time of pre-reform, which *danwei* is good at delivering welfare benefit was the most important topic among Chinese people.

was no automatic application of national labour insurance for them. Rather, regional standard was introduced as an alternative to cover more state workers given that the economic situation didn't allow a rapid extension of national labour standard. However, the problem got complicated when union leadership found that different practices aimed at different people co-existed from within a single *danwei*. This meant that a deliberate stratification of labour rights was being formed and labour dispute around unfair treatment would be more likely.

Being alerted by complaints collected from some factories, the local bureau of ACFTU in Hangzhou conducted an investigation aimed at figuring out how labour insurance was managed at workplace level. In the report of ACFTU Hangzhou, unionist denounced a trend of differentiation regarding labour protection:

'…Before 1957, in our region, there existed two systems of labour protection, big firms with more than 100 employees were covered by national labour protection article, others applied 'labour contract' which offer less benefits as national standard. While this obvious inequality existed, at least in one firm, the policy is unique and fair for all member workers. (ACFTU Hangzhou, 1965)'

However, situation became more complicated as new workers were recruited under other category which subjected to regional standard as the ACFTU decided not to cover more 'new people'. As consequence, within one firm.

'Some people enjoyed national labour protection, whilst newcomers being treated by virtue of regional directives which offer lower labour provisions than national standard, and some other people are categorized as party cadres and thus enjoy public servant provisions, party cadres and demobilized military officers for example.' (ACFTU Hangzhou, 1965)

This situation is not striking as industrial production resumed and new developmental projects needs more labour force to fulfill. Junior and young workers were often under-treated compared to senior ones, this discrepancy had been institutionalized by several decisions from the state regulators who didn't want to entitle the highest labour standard to everyone because the underlying principal underpinned a rapid industrialization of communist regime at early stage was to invest rather than to distribute. That said, the communist state should invest as much as possible to realize key projects in heavy industries for example, distribution of economic achievements should be very careful as saving to invest was the priority.

As such, despite an explicit stereotype of egalitarianism prevailed among *danwei* in the pre-reform period (which was true to some extent as the inequality of wage was very low), however, the institutional arrangements underpinning the labour insurance regime were implicitly embedded in a multi-layered structure which was a status-based social hierarchical pyramid. While national labour

article was rigorously implemented within big state firms, small and collective firms at regional level were covered alternatively by local standards or other type of convention, not to mention farmers working in the people community were completely excluded from the labour insurance. The pyramid cleared exhibited the political will at work that determined how labour relation should be designed to both promote industrial productivity and formed a stable hierarchical structure that keeps a socialist status quo.

The cultural revolution launched in the late 1960s had brought about profound (rather negative) effects on the way the labour policy was implemented. Official trade union, like other governmental bodies, were severely disrupted by the movement of 'class struggle' engaged by chairman Mao as many high-profile party leader and middle-level cadres had been turned down. An immediate outcome was that the management of labour insurance was no more assured, executive power had been handed over to the 'revolutionary committees' which were established everywhere in China. The weakening of state bureaucratic bodies left more autonomous room for *danwei* to take charge of itself. The labour insurance, previously managed by union, had been transferred to the 'committee' of *danwei* (Yang, 1987). The takeover had considerably changed the way labour insurance was governed since the collect and payment of benefits were entirely becoming an internal issue which had nothing to do with other firms or mutual fund that was managed by trade union before. This amounted to, sometimes, a huge difference between different *danwei* in terms of benefits level. For instance, in Shanghai, in industrial sector like textile where a higher rate of senior and retired workers (represented nearly 50% of total persons affiliated) not only significantly reduced the average benefits that everyone can enjoy but also jeopardized the overall financial health which vice-versa constrained the capacity to cover welfare needs. Secondly, as *danwei* deficit was taken care by central planner, the closer to them, more financial aids were likely, thus those who were placed at the top of industrial (or administrative) system would be attributed more resources which were crucial to promote workers' welfare benefits. Finally, the fragmented welfare management together with the mindset of 'big ice bowel' formed a hard resistance to any changes as was the big financial challenge that *danwei* dealt with during the late 1980s.

2.4 Labour insurance as a pragmatic approach

It should be noted that the Chines welfare state was born in an ambiguous context in which the conflict between labour and capital was not as evident as showed in Western industrialized countries in that the communist victory ensured a seized power that required subtle wisdom to confront workers' demands under an urgent economic situation. As underlined, the wills stemmed from different

stakeholders (party, workers, capitalists, etc.) were framed and guided under the 'common outline' in which capitalist exploitation could be tolerated in the condition that capital accepts, to some extent, worker's claims on labour rights and welfare benefits. Inspired by chairman Mao's vision on national communism, the political orientation was anchored to the 'production' which was favored as the only way to rapidly realize industrialization. For Chinese communists, the main objective was, at that time, to solve urban unemployment and recover national economy as soon as possible, the labour right of working class should not be treated as a separate or independent domain in which only urban workers' interests were concerned, but rather, the new 'master' of the republic should be responsible for the national interests in general. Political commitments such as 'All Chinese improved, working class right will improve', 'Only industrialization can liberate China from Western imperialism', articulated by union leaders made it easier to understand why production was the exclusive priority for communists.

In this way labour rights and welfare state were included in a broad political project in which labour conflict should be subjected to a compromise made by parties that was necessary to restore industrial production. Capital's interests were, to some extent, protected and encouraged. If a communist party naturally defend the interests for workers, working with capitalists to reconcile labour conflict is equally important as capital's cooperation was indispensable in consolidating the regime by its economic contribution. There was always a line of thinking behind which considered that only peaceful resolution conducted under party's engagement in persuading both parties would both cool down labour conflicts and promote benefits for all.

To do so, a well elaborated hierarchical resolution had been figured out as organized priorities were given step by step to different sectors. As we already know, the top priority was given to big state-owned firms with sound labour terms and conditions. These most privileged big firms were controlled by state and played dominant role in underpinning national economy. Other small state-owned firms and private firms were hardly concerned by the national standard and thus covered by collective convention negotiated at workplace or sectorial levels. Private capital was friend of communists at the beginning of the republic which was important to help maintain employment in big cities, that was why capitalists had equal status in the process of collective convention that assured their managerial powers. Last, farmers were never the objective of the labour politics because in the rural area another movement on land reform enabled farmers to own land property. These hierarchal arrangements clearly amounted to a differentiated world in which predominant view on the industrial independence determined the way in which the labour politics were oriented. Even the socialization campaign at a later stage altered most private firms to state-owned firms which finally generalized across the county in the form of *danwei*, the hierarchical way of governing labour remained intact. The co-existence of different arrangements on labour relation suggested that the construction of a welfare

state in an under-developed country like China was mostly subjected to the political wisdoms which addressed the labour conflicts in various ways so as to accommodate a pragmatist approach which would lead to adaptive resolutions.

However, the (managed) democratic inspiration and institutional effectiveness that the collective convention movement exhibited, the period of 'common outline' was proved short as it was soon replaced by a huge wave of socialization campaign which peacefully 'killed' private capital and formed a classical socialist production regime under Soviet model. Signed convention between labour and capital disappeared as industrial relation had been internalized harmonized as an issue of 'affair within people'. The Soviet model and cultural revolution both eliminated the possibility of an extension of labour insurance to a more widening scope though the radical campaign did extend the paternalistic *danwei* to ensure more stable employment.

2.5 The formation of standard employment regime in socialist economy

As indicated by Western experiences, standard employment was seen as a main, even unique, legal institution that vehicles the welfare states in most advanced political economies. The evolutions of Western welfare states were also tightly interwoven with the changing dynamic of standard employment. During the so-called 'Golden period', standard employment expanded quickly across all sectors and national welfare states had been widely adopted hand-in-hand with impressive economic growth. Since the formation of standard employment relation was county-specific and deeply embedded within national industrial and political contexts (Adams *et al,* 2014), the rise of welfare state in China might be observed through the definition and scope of the implementation of welfare politics at different stages. Rather than benefiting all the proletariat working in different sectors, the first labour insurance article applied itself narrowly to a number of key firms. This implied that a standard employment pact was based on the political needs to maintain a core industrial labour force that would foster the new regime. Despite its narrow scope of application, it served as a referential point that embodied what an ideal socialist welfare state should be. As such, workers' claims on labour protection and rights against capitalists during the collective convention could be seen as a semi-standard employment as the terms and conditions negotiated were very similar to national labour standard but discounted at a lower level. As mentioned above, efforts had been made by unionists who should defend workers claims, but in a more compromising way so that the semi-standard labour could be possible. Even at the later stage of the socialization, labour standards tended to be fragmented, rather

than unifying, by virtue of the introduction of some sub-group standards to subtly classify firms in terms of their importance.

In this regard, the implementation of *danwei* as full-fledged socio-economic actor had resulted in the birth of prototypical form of 'standard labour relation' that would be compared with standard employment schemes formed principally in the era of Keynesian economy: stringent hire and dismissal, long and stable labour relation, employment related welfare benefits, aid from state, sector corporatism, etc. Nevertheless, if the post-war Keynesian consensus was to some extent valid in advanced political economies, in socialized China, this consensus between capital and labour never existed since there was no labour market failure that should be compensated by welfare state. As already shown, the *raison d'être* of a Chinese welfare state was subjected to the political will of building an industrialized country. The strict economic management required an adaptive measure in coping with people's subsistence need in an enclosed 'mini-society'. The rise of the capacity of *danwei* to meet the welfare demands reinforced its role as a paternalistic protector who began to take over the definition of the standard employment from national labour article because the labour welfare conditions were more relied on the *danwei* rather than external regulations.

If the role of *danwei* in performing welfare state was overwhelmingly dominant during Mao's Era, then the economic reform engaged by Deng Xiaoping from 1980s would challenge this status quo by recalibrating the standard employment regime. However, this would not suggest a brief replacement embodied by an increased market force (order), but rather, as we shall see later in this study, the standard employment regime originated from *danwei* continued to be the reference point for institutional evolution in which traditional welfare state would extend itself to new categories of workers who were newly created by labour legislations.

Chapter 3. Deregulating or Complementing? Reform welfare policies revisited

The 1980s have witnessed an era of the so called 'market turn' which was described by mainstream scholars, not only those who advocated for neoliberal economics but also many sociologists working on China's social transformation, as an inevitable social transformation (*zhuanxing*) in which old style socialist *danwei* was dismantled by marketization and privatization which replaced the traditional welfare state built by planned economy. According to most of them, the adoption of individual labour contract served as a base to destabilize the lifelong employment relation and contributed to a market rule of labour force and welfare policies, with the rise of atypical job and informal migrant workers, China is no exception on social dumping required by liberal market impetus (Gao *et al*., 2008; Wang, 2008; Chan *et al*., 2010). While these conventional wisdoms were correct on anticipating the diminishing role of *danwei* in governing labour and social welfare, they were arguably wrong on insisting the plausible market force which was said, according to them, contributed exclusively to the rise of labour market and privatization of welfare state. Notwithstanding the macro-level structural changes related to labour relation and social protection system have brought about some more flexible market-like factors such as 'contract' and 'insurance' that were rarely known during the *danwei* period, there was actually no room to accommodate any liberal policy orientation that leads to 'privatization' or 'commodification' aiming at welfare state. As far as labour and welfare policies were concerned, the strategies adopted during the reform times embodied rather an incremental institutional change that gave rise to the formation of a multi-layered governance structure that juxtaposed the retained traditional paternalistic labour politics aimed at core workforce on the one hand, and the expansion of an informal and flexible labour order that have been, more or less, addressed by policy responses on the other hand.

In fact, the core challenge that addressed the policy markers at that time was not to decide whether to dismantle the old system in favor of the rise of the liberal market and private capital, but rather to figure out how to respond to the rise of new economic factors by which labour relation became multiplied because of SOE restructuration. In this process, the changes that have been taken place within welfare state reform arena came through a complicated process in which policy schemes became fragmented due to the rise of multiplied labour relations.

As a result, the overarching goal of China's labour and welfare transformation was certainly not to invent a liberal labour market that goes hand-in-hand with a privatized social protection system. Although the declining role of *danwei* in delivering social and welfare goods has been seen as an

explicit evidence of state's withdrawal from social protection, the parallel development in labour and welfare institutions showed that the real picture of the welfare state transformation was more complicated and exhibited both institutional path-dependency and environmental adaptation. In this process, welfare states have been, rather than surrendering to market, expanded through new legislations and policy alternatives, to meet the new demand of SOEs reform and new challenges induced by more flexible labour relation.

The purpose of this chapter is to provide a general account on the development of the labour and welfare state politics that had been conducted through the 1980s. It demonstrates that some new labour ideas such as flexible and informal labour relations emerged as a response to the exigencies of economic reform and governmental bodies were actively engaged in developing new policy instruments that reframing a balance between stakeholders whose interests were redefined by legislations.

Despite mainstream's strong argument on the irreversible decline of *danwei*, reform experiences suggest that the standard employment relation formed during socialist period remained resilient and continued to foster a new social insurance regime that based on social insurance scheme which were both public and mandatory. However, on the other hand, the rapid emergence of informal labour also stimulated a tendency of fragmentation in terms of welfare programs deliveries since the main scheme was governed in a conservative manner (limited geographically and high standard in terms of access) and the general legal texts left room for local authorities to perform concreted solutions to meet the most urgent policy needs.

3.1 The emergence of labour contract

SOEs in the 1980s were not the superstar of economic reform as more radical changes have been taken place in rural area where robust economic performance was achieved through some market like mechanism. While it is not our goal to discuss what had been done in rural reform, the recovery of China's agricultural sector had contributed to the rise of township and village enterprises which absorbed surplus labour on the one hand and offer labour force supply to urban area where rapid urbanization and export-oriented manufacturing need inputs to fulfill external demands on the other hand. However, it seems that the urban social protection system had not been prepared for the huge incoming flow of flexible labour, rather, the focus of reform in labour relation from the 1980s to early 1990s was the state sector itself.

Although the core SOEs and the general principles of labour insurance remained resilient with the so-called market turn, the emergence of vulnerable groups caused by SOE downsizing (*xiagang*) together with the rise of informalization induced by migrant workers, both called into question the social insurance scheme. In responding to rising concerns about the social exclusivity, the social protection system tried to develop sub-schemes and other social assistance program in an effort to hierarchize social welfares that meet different groups of workers. In this process, the institutional implication that can be draw was that the unregulated became regulated through policy innovations

3.1.1 Shadow of welfare expenditure

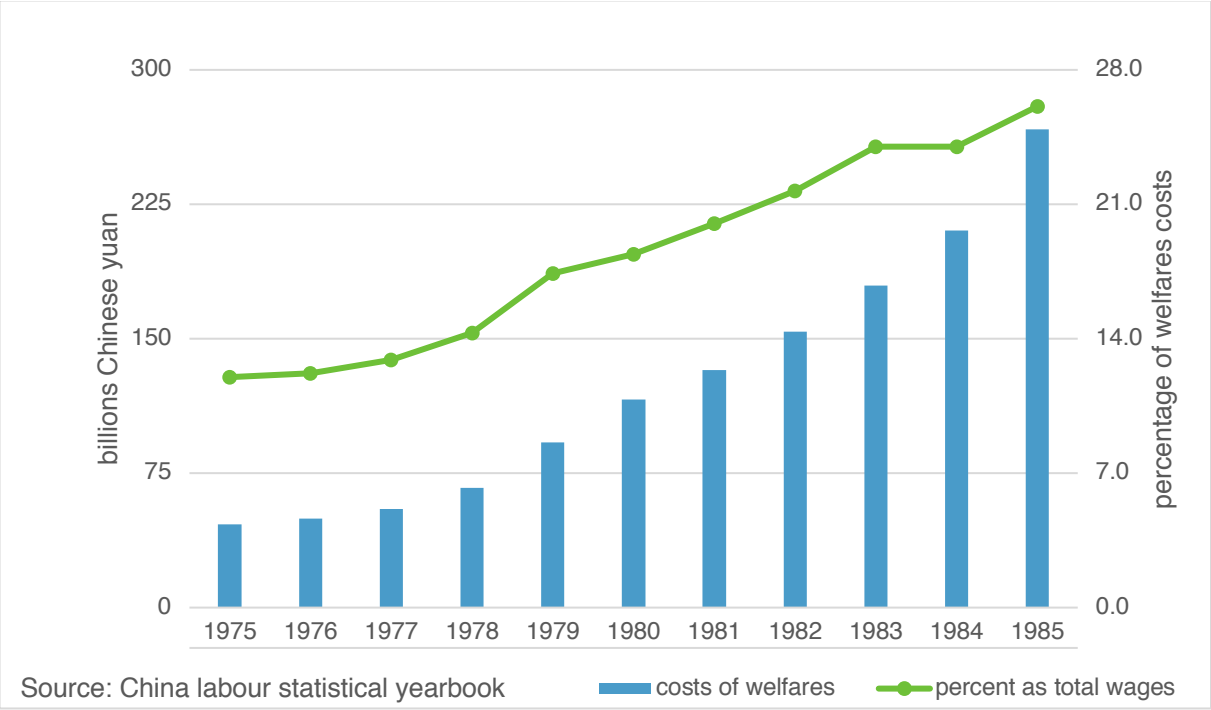
The underlying reason of this plausible 'market turn' was actually to deal with the long existing preoccupation related to SOEs' welfare expenditures. As planned economy came to its end after 10 years' cultural revolution, the beginning of the 'open and reform' was characterized by an urgent social problem caused by youth unemployment.[12] Since private sector almost didn't exist at that time, SOEs were naturally became the main container to absorb the mass young people who were waiting for job affection. For most people, finding a 'iron rice bowl' in *danwei* was a viable life choice which enabled them rushed into SOEs to get lifelong job tenure. While SOEs have contributed to solve some urgent issue like youth unemployment, the economic burden produced by the growing welfare expenditures made them more and more 'inefficiency' and need to be restrained, if not downsized. From 1975, the end of cultural revolution, to the years of the beginning of economic reform, the ratio of welfare expenditure as total wage almost doubled from nearly 14% to 30%. As mentioned before, large SOEs were very often the solo providers of social and welfare services to their employees, including not only basic labour insurances but also other social programs such as schooling, housing, leisure, etc., as millions of new workers have been 'taken care', the SOEs became overstaffed which severely undermined its economic performance.

3.1.2 Freedom in *danwei*: individual labour contract

Given this acute situation, the most significant labour reform took place relatively late compared to early economic reform deployed in rural area. It was until 1986, almost 8 years after the general 'open and reform' engaged by Deng Xiaoping, that the leadership tried to make an attempt in

[12] The unemployment rate in 1978 was 5.3%, the figure then dropped to 1.8% in 1985. See State statistical bureau, http://www.stats.gov.cn/ztjc/ztfx/jnggkf30n/200811/t20081103_65692.html.

Figure 1. SOEs welfares expenditure and its ratio to wage



re-orienting the labour policy domain so as to make it more sustainable.[13] At that year, the State council issued a series of regulations aimed at abolishing some old rules that prevailed during *danwei* period.[14] First, the feudal style internal and family based recruitment of labour was replaced by a hire campaign open to all social workforce, newly recruited workers must, henceforth, signed the labour contract with employer (SOEs); Second, dismissal became possible when workers failed to obey work discipline or committed crimes which go against to social norms. Third, unemployment prevention was particularly underlined when SOEs face economic difficulties due to the competition from other type of firms, especially those famous township and village enterprise where working terms and conditions were significantly inferior compared with SOEs (Ngok, 2008).

At first glance, these new policy measures aiming at removing old *danwei* style constraints on labour mobility appear to give more flexibility and mobility to both employers and employees because firms can decide the duration of labour contract in line with its efficiency concern, employee also have the right to terminate a labour contract with employer and change to other job. However, some other

[13] As a matter of fact, since 1978, in some special reform regions, Guangdong, Shanghai, and Zhejiang, experiments in relation to labour contract regulation had been implemented. Foreign-invested enterprises were the main terrain for experiments of new labour relation such as labour contract.

[14] In July 1986, some four regulations were issued by State Council; 'Temporary regulation on implementing labour contract within SOEs'; 'Temporary regulation on the recruitment of SOEs'; 'Temporary regulation on dismissal within SOEs'; 'Temporary regulation on unemployment insurance within SOEs'.

significant features could also be found since the new terms and conditions are only given to new labour entrants which means that existing (core) workforce would not be affected. This subtle transitional method was very often embodied in the general reform strategy adopted by the state leadership as it always minimized the potential conflicts while advancing some very controversial high risk agenda.[15] What's more, the liberal trend of contract was not conceived as a will of introducing a free labour market, instead, labour hire and mobility were well controlled by existing institutional 'barrier' such as *hukou* which oversaw the labour flow of migrant workers, social security rights were very tightly associated to the *hukou* one held because the regime was always governed within the municipal or regional limits which prevent the liberal mobility between rural and urban (Solinger, 1999).

3.1.3 Altered welfare logic: step into 'socialization'

Another important effect brought about by the labour contract was the welfare provision as workers with labour contract were no longer covered by the traditional *danwei* paternalism by which free labour and welfare provisions were given within SOEs. Instead, 'social insurance' has been invented as a means to externalize the social functions that SOEs undertook for a long time (Miège, 2005). For instance, while the 1986 labour contract regulation stipulated an equal treatment between existed workers and new entrants in terms of labour and welfare provisions, however, the way the welfare fund was financed differed greatly: new workers were belong to another labour insurance scheme which looks like more 'social' because it was set out that mutual contributions were obligatory for both parties: while the firms should pay 15% of its total wage to the fund, contract workers, too, have to pay a personal contribution that amounts to 3% of their wages, to this newly established fund managed directed by a specialized social insurance agency affiliated to local labour authority.[16]

While the majority of state sector workforce remained intact in the immediate aftermath of the implementation of labour contact and social insurance scheme, this institutional breakthrough has nevertheless brought about several far-reaching consequences: first, the widespread classical idea of *danwei* to cover all social welfares as an undoubtable responsibility was, to some extent, replaced by

[15] Specialized reform agenda in China always takes the form of a differentiated approach which means that 'one size fits all' policy rarely used but more often a hybrid solution dealt with different groups in various ways is ideal option. For instance, in the labour and welfare reform, the implementation of a policy often starts with a given timing based on which the policy makers distinguish those who would be affected, the so-called 'new people', from those who remained intact, the so-called 'old people'. Complicated case would add those who would be partially affected along with the reform, the so-called 'middle people'.
[16] State Council, 1986, 'Temporary regulation on implementing labour contract within SOEs'.

the newly established schemes which invoked mostly the Bismarckian social solidarity which required mutual commitments from both parties. As labour insurance in China was, from its onset, regarded as a prestigious entitlement that was exclusively reserved only for state workers, the contributory character of the new social insurance scheme implied that the 'exclusiveness 'or 'highnesses were undermined by the modern idea of labour contract which rebalanced the responsibility between the state and worker. This policy design not only reflected the direct concern about SOEs welfare expenditures sustainability but also designates the policy orientation in producing a segmented welfare world in the near future. Second, in contrast to the internal management of labour and welfare that were traditionally practiced within paternalistic *danwei*, the emergence of 'contract' and 'insurance' enabled a shift of managerial expertise from *danwei* to governmental bodies. By translating labour and welfare issues to public management policies, the labour authorities have taken over the management prerogatives which formed progressively a third-party governed structure. This externalization was driven primarily by the SOEs' difficulties in dealing with welfares but also contributed to secure a public nature of welfare management in a market-lean context.

In sum, the adoption of labour contract and social insurance scheme should be seen as an expansion of the traditional prestigious labour insurance to other highly regulated labour participants: those who recruited by SOEs but have been placed under a brand-new labour convention which gave more freedom and flexibilities based on a strong (absolute) state public management were more likely to be protected than others who were still outside the social protection system. One significant change was the emphasis on worker's obligation to contribute in the social regime which was entirely based on the labour contract.

3.2 Informal labour and informalization

The arguments based on marketization often invoke China's huge flow of migrant labour who have suffered from awful labour conditions. People tend to regard informal labour as a natural consequence of the upper hand that the market mechanism performed during the years of economic reform, abused migrant workers were seen as a clear evidence of the absence of welfare state (which was said to be dismantled by market reform). However, informal labour has never been a mechanical result of liberal market as in the modern capitalist history the idea of labour was itself a process of recognition and innovation, defined and redefined in a much more complicated institutional environment where the development of labour and social rights was closely associated with new form of economic coordination such as collective convention, modern horizontal large firms (Didry, 2016;

Deakin *et al*., 2005). Informal labour begins where formal (or standard) ends. This means that informal labour is a kind of activity that is not or insufficiently covered by formal arrangements. While there is no official definition concerning informal labour, some common points can be found across countries: temporary, part-time, agency and disguised, these are main characteristics of informal labour both found in developed and developing worlds (ILO, 2016).

As we already know, in China the SOEs were the dominant economic actors who offered life jobs and social protection at a time when everything was strictly planned, and personal mobility was limited. However, the capacity that allows SOEs continue to do so in a new economic juncture was considerably reduced due to its financial sustainability and changing labour dynamics: more and more migrant workers rushed into big cities to do non-standard jobs that are created by rapid urbanization. To the best, some of them could be recruited by SOEs as contract workers and thus be covered by labour contract and social insurance. But to most of them, the social protection as social rights never expanded to them because the work they performed were never regarded as 'standard' or 'formal'.

3.2.1 Paradox of informal labour

As rightly argued by Manuel Castells, the informal economy or 'informalization' of labour can't be understood as an object but should be approached as a process taken place within a historical reality (Castells *et al*., 1989). While there has never been a reliable official historical data about the development of informal labour in China, there has been some efforts in anticipating the volume of informal labour by using official macro statistical data. In the mid-1990s, urban employment was approximately 190 million, of which 144 million were state employees, 13.7 million formal private sector employees, and the remaining 32.6 million could then be classified as 'informal'. It was in 1998 that the start of the decline in reported employees was seen. By 2004, state sector employees were reduced by half (to 78 million), registered ('formal') private sector was 61.3 million, while the total urban employment had increased to around 265 million, leaving approximately 125 million (over 50 per cent) loosely classified as 'informal' (Cook, 2008).

Despite a bad reputation of working conditions, not all informal labour is born equally. There are various reasons for one to start an informal labour. For migrant workers, the main reason may mostly be the significant higher wage that can be earned in urban industries, like construction, services, and manufacturing. In this case, the social protection is not the core issue that one should takes into consideration when choosing a job. As the primary purpose was to top-up as much as possible their living subsistence or save more money for families who still stay in rural, the informal jobs that migrant

workers pick up were mainly those rejected by former SOEs workers or other urban residents. For other people who used to work for SOEs but choose to quit for other jobs that generates more money, the underlying logic was no more the social protection too. For them, earning cash was much important than staying with SOEs despite the welfare the latter can offer. Last, some migrant workers had the skill (or became skill workers at later stage), they were better positioned than others to integrate into urban industries. For them, social insurance was a crucial issue since they are more likely to stay with the industries and live in cities.

What behinds the big transformation scene was two thresholds of changes that took place at different places: first, for migrant workers, the 'informalization' was the process whereby they have been transferred, to certain degree, from traditional agricultural labour to non-agricultural sectors in urban area. In some industries like construction and manufacturing, migrant workers accounted more than 50% of total workforce. Because of the existing rule-urban institutional barriers and the level of industrial development, the extent to which their jobs are informalized depend on how stable their work is and if local authorities have the willingness to implement special arrangements for migrant workers. A general picture is that migrant workers are basically very flexible in terms of job mobilities, while very small part of them have acquired certain skill to get good job, most migrant workers would change job quickly due to lack of skill and long-term development perspective is rarely seen.

3.2.2 Why informal labour was excluded

People usually regard the non-cover of informal labour as a direct result of deliberate institutions. However, while institutions explicitly spill-out the informal labour for a various of reasons, the weak willingness of contributing among informal labour remains as an important reason that social insurance coverage was low among them. Since the social insurance scheme was based on the regional average salaries, migrant workers were less like to participant the scheme simply because their wages were too low to make a personal contribution, social insurance was too expansive for them in terms of contribution rate. Another reason came from the employment-related nature of the scheme, since informal labour were mainly working without a labour contract, and their potential mobility was very high compared to urban residents, the regional based social insurance was not a wise choice because the welfare provisions the scheme offer are much less mobile. Here, the core issue was stable employment, if the informal labour didn't have enough chance (both positive and objective) to find a

long-term job, then they would be more likely to be excluded from the social protection system.[17] In a word, the informal labour is itself an expression of insecurity, facing with a social insurance system that originated from an ultra-security plan, the flexible nature of informal labour is basically out of the reach of a conservative insider-based institution.

3.2.3 Structuring exclusiveness: production regime

This heterogeneous *raison d'être* of informal labour has led to a complicated labour practice in many labour intensified industries where informal labour was widespread. In a study on China's automobile industry, Lüthje illustrated that different production and labour regimes have been formed along sector chains and the regimes structured the informal labour by incorporated them to a stabilized production system in which low valued added factories were very often filled with migrant workers (Lüthje, 2014). The lack of skill often placed migrant workers in a relatively vulnerable place which undermined the bargaining possibilities with employers. For many employers both in private and public sectors, the recruitment of migrant workers was long regarded as to find someone to fulfill the least desirable jobs that were very often rejected by urban residents. This mindset has been reinforced along the SOEs reform which introduction private and international capitals whose aims were to generate profits for shareholders. Actually, the privatization of SOEs enabled private capital to take advantage of the institutional inertia of the stable employment based social insurance.

Although firms do have to comply with the legal requirement of social protection especially first written down in the 1995 labour law, however, facing international competition, the people working in low value added (because they compete with others by lowering price as much as possible) are less likely to be fully protected by laws. As we already known that the labour and welfare policies were basically implemented at local level, the quality of implementation depended on the local labour authorities' willingness, if there is a disagreement of interests between the labour imperatives from the central governments and local business development that would certainly generates benefit for local governors, then the local government 's effort in executing labour law would prove ineffective (Sarosh *et al*., 2011).

That said, the acceleration of SOEs reform and the rise of private capital have both contributed to the formation of a production regime that relied on informal labour force pool. Sub-contracting, violation or non-respecting of labour law were widespread and law enforcement was generally too weak to make a difference. Despite being exploited like sweatshop system, the informal labour has

[17] Research report on the social insurance of migrant workers conducted by the Ministry of Human Resources and Social Security, http://acftu.people.com.cn/GB/67584/8738318.html.

brought about very positive implications in that it started the transfer of labour force from rural to urban and promoted the productivity in many industries which are so vital in lifting out China from extreme poverty. Moreover, the side-effects of informal labour have also triggered the development of legislations which would play a much more important role in redefining the labour and social protection in a later stage.

3.3 Foundation of the social protection in a socialist market economy

As mentioned above, during the 1980s, SOEs were constrained from heavy welfare burdens and this had resulted in unsustainable financial situation that seriously undermined SOEs' survival, let alone its further development. State loan aid was very common as SOEs were public run firms that subjected to soft budget restraint. Given this, the most important reform agenda related to social protection system at that time was to figure out a new institutional plan that could uphold the traditional state labour insurance scheme by reconsidering the responsibility among stakeholders: state, firms and workers. A first try had been given to the labour contract that introduced personal responsibility. Reform has been significantly accelerated during the 1990s as government vows a generalization of the labour social insurance scheme practiced with labour contract experiment.

In 1991, the State council issued an important decision on pension reform, this regulation proposed to establish a real social insurance scheme that rebalance the equilibrium of responsibilities among stakeholders: workers have to pay contribution to mutual fund. SOEs continued their responsibilities to offer social welfare contributions but their roles in managing the fund have been transferred to newly set social insurance agency. This seminal reform laid down the fundamental principles that constituted the institutional underpinnings for future policy developments because it was the first time in modern Chinese history that a socialized social insurance project was proposed. The emphasis on personal contribution altered, quiet subtly, the standing of prestigious state workers from exclusive beneficiary of unconditional state cover to a solidarity social project participant who should partially responsible for welfares.

3.3.1 Orientation defined: Social insurance scheme at the core

To most mainstream account, welfare state privatization driven by neoliberal economics required a shift of welfare management from public to private. Privatization means more personal right and responsibility, while public social protection schemes are much more collectively managed. Technically, the most fundamental difference between a public social security system and private one

lies in the method of financing of the system itself: while public social security schemes are usually funded by 'pay-as-you-go' (PAYG) social contribution, private schemes are pre-funded and required financial investment activities to keep their values growing (Orenstein, 2008; Friot, 1998).

Without doubt, the socialized project we are talking about in China is a public social insurance scheme. According to 1991 State council proposal, workers and employees have to pay 3% of their wages to fund the social insurance scheme.[18] This policy design was quite similar to 1986 labour contract decision in which labour contacts workers were required to pay the same rate of social contribution. Personal contribution as an indispensable component was further reinforced by this generalization to all SOEs workers. Funds were governed by specialized agency directed led by labour authority, the agency collected mandatory contributions and paid the social insurance provisions directly to the beneficiaries.

While the scheme was first implemented to deal with SOEs welfare reform, 4 years later, with the first Chinese labour law came into effect, welfare reform had been accelerated so as to incorporate private and informal labour into the general social scheme. The primary legislative objective of labour law was to define an appropriate labour relation that adapted to the general strategy of the 'socialist market economy' adopted by communist party leadership in 1992. In this seminal legal project, it was clearly stipulated, in article 2, that the labour law applies to all firms, no matter public or private. The labour relation between firms and employees was under rule of labour law. Then in 1995 and 1997 respectively, state council furthered the social insurance reform by issuing two other decisions in an effort to consolidate the achieved policy gains. For instance, the 1995 decision established a growth mechanism of personal contribution to the fund, an annual raising speed of 1% was set in order to finally raise the personal rate to around 8%. Moreover, the decision also added a personal account that would be taken into account when calculating one's final pension level. The purpose of the introduction of personal account was to avoid the so-called 'moral risk' that was often mentioned in the free ride theory. Workers are encouraged to fully funded their own accounts for future full pension entitlement. Finally, the social insurance scheme became fully fledged as the decision unified the rate for firm and workers respectively, for pension, the total contribution funded by firms and workers was set at 20% of wage, it also reaffirmed the principle that required a combination of both socialization and personal account which underlined the balance between social equality and personal differentiation. In terms of coverage, the scheme considered expand access to more labour participants as employment, rather than

[18] State council, 1991, 'Decision on the pension reform'.

firm, became the only criteria to judge one's social insurance relation. Not only state workers but also those working for private sectors, foreign firms and own-account liberal professionals were all covered under the scheme.[19]

In sum, the escalation of social insurance scheme triggered by governmental decisions was clearly an incremental institutional adjustment that stemmed from the core elements extracted from the paternalistic labour insurance practiced within *danwei*. The public management and pay-as-you-go characters have been conserved while personal responsibility added. Some qualified this new system as a semi-funded or mixed social insurance system (Zheng *et al*., 2008), but in our study we found this system no different to the general framework of the Bismarckian social insurance model which was for long time practiced in the European continent because a social insurance project was underpinned by tripartite governance, state intervention, mandatory national scheme and personal account, these core characteristics were clearly present in the Chinese case.

3.3.2 Policy logic: insiders and outsiders

Although national labour law set out a clearly defined labour relation and stipulated that all workers do have the right to social insurance which should be offered by state, issues like how workers should be protected from social risks, how social insurance scheme should be deployed were less clear as the law only intended to set out the very general principles which could actually gave more leeway to regional authorities who were the final ones to implement applicable labour policy at local level. That said, despite a national law, how social protection was actually governed was very much subjected to regional policy deliveries. For them, a crucial problem ahead was the rise of informal labour and SOEs restructuration which created a huge number of flexible workforce less protected by social protection, for these two groups of workers, the core impediment that prevent them from covering entirely by unified social insurance scheme was constructed not by the law but due to their vulnerability in the labour market. As Chinese social insurance is not far from standard Bismarckian model, long and stable employment were key to social protection, however the informal labour was exactly the opposite case to standard employment enshrined in the social insurance, nor did SOEs laid off workers who interrupt their jobs could continue to pay stable contribution to the scheme.

[19] State council, 1995, 'Decision on deepening the reform of pension insurance'; State council, 1997, 'Decision on establishing the unified pension insurance'.

If regional authorities were better positioned to perform a practical interpretation of law, they are more likely to develop policies with special goals aiming at different groups so as to prioritize policy needs. For example, in Guangdong where migrant workers constituted the majority labour force working in the exporting manufacture sector, the regional authority decided to incorporated migrant workers into the social insurance scheme, to give them quasi-standard social insurance rights; In other regions like Zhejiang, the regional authority proposed a lowered contribution rate in order to encourage more firms and migrant workers to actively participate into the scheme (contribution rate for firms and workers have been reduced respectively to 12% and 4%); There were some regions like Beijing, Shanghai and Chengdu, where migrant workers were categorized as a special group that was managed independently from social insurance scheme, sub-scheme aimed at migrant workers were proposed, the policy design was similar to social insurance scheme but most of them were less mandatory and socialized at lower level compared to standard scheme (Gong, 2007).

While it is impossible to give a full picture of all local practices across China, not to mention policies were always changing, the way local authority tried to deal with migrant workers suggested that a dualism strategy was a preferred solution to distinguishes core labour management from other informal labour. Since the social insurance scheme was regionally governed, *hukou* played a significant role in restricting portability of social rights between regions, this negative effect has been magnified by the higher mobility of migrant workers to whom the lack of portability of social insurance discourage them, and their employers, to consider social insurance responsibilities as an indispensable term when negotiating labour contract. In contrast to mainstream arguments that regarded migrant workers as victims of deliberate institutional discrimination driven by local authorities (Solinger, 1999), we argue that the reason that dual system has been developed was two-fold: first, at the national level, the law never discriminated migrant workers as one that was inferior than standard employment, however the policy design was primarily based on the standard long term employment that mostly existed in state sector and big firms, this discrepancy amounted to a lack of policy coverage in terms of non-standard employment. Second, the job that many migrant workers did were mainly in those low value-added sectors, for both employees and employers, the high rate of social insurance contribution should be avoided as much as possible. In a word, the underlying reason that dual system worked was that the informal labour can't meet the general standard set by social insurance scheme, if there is something to be done to deal with informal labour, the most viable choice for many local authorities was to develop alternatives like sub-scheme or special arrangements so that social justice and social rights can be, to some extent, achieved.

3.3.3 More social programs, more fragmented social protection

Despite the prevailed 'soft governance' when it comes to informal labour, the development of alternatives at practical level has stimulated a rapid expansion of social protection programs as local authorities are more and more responsible for the labour and welfare issues. Besides informal labour, big challenges came after the SOEs restructuration as more and more formal core labour force became 'flexible' and thus need policy responses that moderates the rising difficulties encountered by laid-off workers.

The term 'flexible employment' was invented as opposed to state employment for most urban residents. The mass laid-off of SOEs workers starting from late 1990s has resulted millions of '*xiagang*', in 1997, more than 12 million SOEs workers were affected. Then, every year from 1998 to 2002, about 7 to 9 million workers were laid off. The '*xiagang*' amounted to a definitive termination of lifelong job tenure which, in practice, would be compensated by a payment of slum sum termination fee. To most laid off workers, the termination of job tenure means that the SOEs would no longer be responsible for their welfare contributions and they have to figure out ways to continue to support social insurance contributions.

The policy responses conducted at local level consisted a number of methods that differed across the regions. However, what they shared in common was that policies should be more targeted than ever before on certain groups of people so as to find a reliable solution to deal with rising numbers of 'atypical workers', caused mainly by SOEs restructuration. For policy makers, the primary mission was to prevent mass poverty, in this policy area, the most significant breakthrough was the introduction of a means-tested social assistance program. In 1997, state council decided to set up a 'urban minimum living subsistence program' for urban resident who are unemployed (or semi-unemployed) and their wages or other incomes are not enough to have a decent life acceding to local standard. As can be seen, the means-tested nature of this scheme required local government's financial support since the resource of program is coming from government's running budget.

The goal of this new policy invention was to uphold the new vulnerable social group in that it offered a social safety net that complements the vacuum left by social insurance scheme since unemployment has begun to be conceived as a public problem that menace social solidarity which was always the priority for communist leadership during the reform time. In 2007, some 10 years after, around 22 million urban residents have benefited from this means-tested social assistance program.

Another policy innovation came from the efforts in promoting jobs, particularly for those who were laid off by SOEs. Return to labour market was the most important objective for local labour authorities. Re-insertion centers have been established across China at all levels. The center provided

job-seeking consultation and job vacancies, financial subsidiaries were given to many public establishments who are willing to recruit laid off SOEs workers. Moreover, the centre paid unemployed workers with subsistence fee and social contributions too. As the re-insertion process was generally 3 years, the centre encouraged them to find, as soon as possible, jobs themselves: working in low-wage service sector, become own-account worker or entrepreneur were strongly advised by labour authority. The goal of re-insertion centre was to smooth the hard transition from well protected SOEs to a much more flexible environment where wages and social contribution would be less stable and more contingent.

On the other hand, migrant workers weighted more than ever before because they were becoming the majority of Chinese working class. Given the low level of participation to social insurance scheme, local labour authorities tried to find alternatives to deal with the most urgent problems such as health and occupational protection. As migrant workers are normally working in industries like construction and mining, high work risks required a full coverage of work accident insurance despite the later was basically a part of comprehensive social insurance. In line with the general spirit set by 'work accident article' which was issued in 2004, local labour authorities started to audit the implementation of work accident insurance as it was the sole responsibility of firms to pay the contributions. Many municipal authorities set up special funds to deal with migrant workers who were injured during work. Some innovative measures, like insurance based on the number of workmen in the project, insurances based on the total cost of the project, have been taken out as a means to cope with the high mobility of construction workers.

Fragmentation continued with medical insurance as some municipal authorities invented independent scheme aimed at migrant workers, in Hangzhou for example, the labour authority established a medical insurance scheme only for hospitalization which based solely on the employer's contribution of 3% of its total wage. This limited medical insurance was invented as a social relief particularly reserved for those who can't afford considerable hospitalization fees when they are sick. Such a pragmatism exhibited that while it was impossible to offer a one-size-fits-all solution, solving most urgent questions such as work accident and healthcare appeared more easily to be done (these two insurances are only paid by employers) at lower costs.

The rise of atypical employment in China can be compared with the rising trend of mini-job and flexible employment in many European continental countries where active labour market policies dominated the reform agenda during the 1990s. In China, because of the continuous incoming of migrant workers, the priorities of policy orientations lied more in the upholding the social insurance rights for these former SOEs worker as they were facing difficulties after losing permanent job. Either urban minimum or job promoting can be seen as a complement to adapt, as much as possible, to the

core social insurance scheme that required contributions to be entitled provisions. For migrant workers, the question was how to deal with their social protection in the context of informalization which undermined their motivations to argue for a better social protection as the urban formal workers. Measures of expediency have been widely used to offer limited social provisions to those who are excluded, positively or passively, in the labour market. This has given rise to an ongoing process of welfare fragmentation as endless sub-schemes and programs emerged at local levels.

3.4 Conclusion

The complex constellation of policy evolution, labour flexibilization and legalization of labour management in China has very often been generalized as a stylized account of market transition engaged by neoliberalism and globalization. However, this was probably nowhere reality when it comes to China where welfare state was not diminishing but growing, through a continuous policy experiments conducted at all levels. The reality included the emergence of new labour relations as well as an under-regulated labour market characterized by informal labour. Labour contract and professional social insurance have been invented to create a multi-layered governance structure that was basically embodied by a 'dualization' which gave rise to the formation of the hierarchical scenario of labour politics. It is true that paternalistic welfare state was gone with the rapid decline of *danwei*, but the social insurance scheme was clearly defined to reintegrate stakeholders into a renewed institutional environment in which social protection and mutual responsibility were underlined as the basis of labour relation that is based on labour contract.

As already discussed by western scholars, the rise of informal sector is not a unique phenomenon that exclusively related to developing countries, rather, the expansion of informal labour relation was equally visible in many Western countries when they came through economic recessions. Liberal creeds considered this as a symptom of market mechanism through which state-imposed constraints were replaced by liberal negotiations between parties. However, the brief discussion about China's experience implied that, at least in China, the rise of flexible labour and the emergence of informalization were not a mechanical result of market *laissez-faire*, but rather an outcome of 'redefined production relationship through the articulation of formal and informal activities'. For instance, in China, the reason we often describe the migrant workers as informal labour is because 'it is unregulated by the institutions of society, in a legal and social environment in which similar activities are regulated' (Castells *et al.*, 1989). This was especially the case when China redefined the labour relation during the 1980s because the standard employment relation formed in *danwei* period was basically confirmed and retained rather than being dismantled by the so-called market turn. Either the

invention of labour law or social insurance regime have proven that standard employment relation served as a basic referential point from which other 'informal' or 'precarious' relation could be defined and regulated.

Since then, we can identify some institutionalized strategies that have been adopted as means of addressing the rise of precariousness and flexibility prevailed among expanding workforce. While different world of welfare states had been used to accommodate labour force along with institutional factors such as firm property or social status, segmentation As we will soon see in next chapter that national legislations would play far more important role in normalizing labour rather than relying on the previous labour segmentation which legitimized informal labour relation by incorporated into a well maintained institutionalized process of insiders vs. outsiders dualization (Palier *et al*., 2010).

Quite similar to the economic junctures that the France and Germany have come through during the 1980s, although labour side reform had consistently called into question the sustainability of traditional employment-based Keynesian welfare state, the national responses to the supply side imperative were rather complicated. Instead of straightforward welfare retrenchment asserted by globalized competition, the policy adjustments that formed the institutional recalibration in European continent exhibited the state's attempts to create new tax-financed public social protection programs to foster the welfares for the rising marginal and informal workforces, while the core labour market insiders were relatively well protected in an effort to keep national core industries resilient (Palier *et al.*, 2010).

Back to China, the policy developments documented in this chapter suggest that the welfare state in China was not retrenched or dismantled because of the market rule but has been re-invented to deal with social challenges triggered by new labour relations. With the fall of the encompassing *danwei*, labour contract became central in coordinating not only labour relation but also welfare provisions in a time when SOEs have abandoned lifelong employment and turned to a rather flexible partnership with other parties such as employees and governmental bodies in charge of labour issues. On the other hand, by establishing a public run social insurance regime, what the state acquired, though, was the renewed capacity to implement labour market prioritization and hierarchization which contributed to from a categorical production regime in which core sectors were stabilized at the expense of a growing informal atypical workforce who became the source of recent labour legislations, to which we now turn.

Chapter 4 Emergence of the rule of law? Continuity and change after the 1980's reform

Market reform dating from late 1980s in rural and urban sectors initiated fundamental changes in the labour and social protection reforms which were generally conceived as state's withdrawal from traditional socialist welfare states. As such, any state's reactions in the later stage were understood as a functional response to social needs that should be well managed so as to maintain social and political orders. While it was true that labour riots and unrests had become an acute social (and political) issues in the early years of 1990s and some social assistance programs have been implemented to help vulnerable urban groups (Shi, 2014; Wong, 1998), it was much less evident that labour legislations and social protection regimes developed afterwards should been automatically seen as a functional response to the 'social debt' left by market reform as most people know it. As mentioned in the previous chapter, the origin of labour legislation lied in the socialist labour paternalism prevailed in the state owned *danwei*, the objective of labour reform was to 'socialize' or 'externalize' the labour and social protection. In a word, *danwei* should no longer be responsible for the delivery of all-encompassing welfare package at firm level, rather, a transformation in terms of jurisdiction and competency from *danwei* to public administrative bodies is essential to re-inventing welfare state at municipal (or regional) level which fit to new institutional environment where labour contract replaced clan-like lifelong labour membership.

In fact, we should not just ask if welfare states are retrenched by the market reform or not, but rather, we demand how reform is actually conducted. To answer this, we found that legislations are at the very core of this big picture. From 'open and reform' onwards, labour legislations became more and more salient as reforms in state sectors accelerated and informal labour had become an acute social agenda. 'Rule of law', 'Use the law as weapon', such political slogans which embodied a new way of governing labour issues showed that the political leadership vowed to use legislations as ways to address labour and social issues. Yet what is more important in this trend is that laws should not be seen narrowly as a mechanical response to the changes taken place in social reality, rather, law has its own ontological origin. If we look into the first Chinese labour law passed in 1994, the legal conception it used echoed the socialist working-class idea in which workers should be treated with dignity and labour welfares. Although the main objective of the labour law was to introduce labour contract as a means to allow more flexibility within state sectors, the conceptual change is obviously path-dependent in that old-fashioned working-class discourse had been invoked. This is essential when one considers how labour law have been evolved along with market reform, particularly facing with changing social

environment, laws that are constituted by core legal conceptions allow them to adjust and adapts (Deakin, 2015).

In this chapter, we analyze the first Chinese labour law and its plausible failure in addressing rising labour conflicts. Although labour law was the first try to give workers universal labour and social rights, we answer why it had effects in structuring vulnerability among certain social groups who had been preventing from enjoying core labour welfares. Then we turn to the most recent labour legislations in which the conception of worker has been deepened and became more operational when applied in practice.

4.1 Labour as social problem: informal work and vulnerable groups

As has been already discussed in Chapter 3, the rise of informal labour and the emergence of urban vulnerable groups formed the urban new poor who were believed to be the victims of market reform. Sweat-shop working conditions have led many to believe that it was the market reform that made migrant workers under such a 'assault' that was brought about by the globalization (Chan, 2001). However, this kind of argument had its limitation and rest too abstract because the legal developments suggest that the reason why unregulated labour and the lack of social protection prevailed among most Chinese workers lied in the extent to which labour law can produce formal employments. Labour law was first designed as a tool to address state firms issue by proposing labour contract system, however it failed to deal with the rising numbers of informal and vulnerable workers who were working outside the reach of laws. Thus, labour market dualism was the final outcome of the reform and would be remedy by further legislations which originated from the old system.

4.1.1 Early legal developments: First Chinese labour law and its outcome

In the aftermath of the breakthrough 1986 labour contract reform and 1992 social insurance regime reform within state sector, the direction of labour and social protection transformation has been oriented towards to an employment related regime based on labour contract, one that similar to European continental regime in which social protection is closely associated to the stable employment relation. However, the first Chinese labour law, which was promulgated in 1994, is an ambiguous legal project by its nature. It was more or less a by-product of the political leadership's willingness to redress state firms which was a core issue in the China's socialist market reform agenda. On the one hand, the labour law was seen widely as a great step forward to advance the state sector reform which aimed at

generating more labour flexibility and firm autonomy. How to restructure state firms so as to make them more efficient and profitable was the first priority in the years of 1990s. On the other hand, private sectors and informal labour had risen rapidly because of the entry of foreigner direct investments and migrant workers absorbed by urban booming sectors like manufacture and construction. Labour abuse and violation in private sectors were widespread across regions. Labour unrests and riots were emerging particularly in coast area where low-cost export-oriented plants located. As such, the lack of national labour law imperiled state's capacity to address labour problem and social stability (Gallagher & Dong, 2011).

This means that the priority of labour legislations, from the very outset of market reform, was to change the deep-seated mindset of lifetime employment practiced by *danwei.* Labour contract with fix-term had been formally recognized and short-term labour contract can be easily used by employer without worry. [20] In a word, the times of job security embodied by the famous slogan 'iron rice bowl' was gone. When it comes to social protection, the law did stipulate that employees and workers do have the right to social insurance regime, but the terms and conditions were too general to be rigorously implemented in practice.

Another important legal implication derived from the legislator's attempt to laid down a unique legal status for all workers. Before 1990s, China's labour was regulated in terms of firm ownerships and different labour status varied from state worker to temporary worker, etc. State owned firms in key industries and urban area generally delivery more labour welfares than collective owned firms in peripheral industries and rural area. This hierarchical notion of labour was erased by a more general (inclusive) conception — worker — which was chosen by legislator to define anyone who concludes a labour contract with an employer. This universal legal foundation had its pros and cons: first, a unique legal conception can, ideally, avoid any legal discrimination or exclusion at normative level. In practice, say, if state workers can be entitled social insurance rights, so do migrant workers as long as they work as the formers. In this sense, the 1994 labour law was open to all working people without prejudice, 'all workers are born equal in labour rights'. However, the ideal expression of 'worker' was actually derived from the traditional Chinese socialist discourse of working class as the master of county. The notion of 'worker' is too abstract to be precisely implemented in practice by any law enforcement. The legislator's willingness to use 'worker', rather than others, is not made on the basis of the empirical observation driven from social realm (Deakin, 2015).

[20] The 1994 labour law had a bad reputation of its flexible contract system. For example, both 10 years seniority and employer's will be necessary for one to obtain an open-ended labour contract. Employer can terminate fix-term labour contract and dismiss employee for economic reason became possible.

Despite the exhibited 'modernization' ambition to liberalize labour market, the equality of labour rights should not be neglected. The old prestigious labour prerogative was dead, at least theoretically. Everyone who works has right to basic labour conditions and social insurance regime. The term 'worker' has been used to denote all labour market participants. This was particularly interesting because we will see in the soon

4.1.2 'Soft law' in the shadow of soared economic achievements

For whatever reasons, the experiences of the implementation of China's first modern labour law were so far from the expected 'rule of law'. It was widely known that the people working in private sectors have been the main victims of law violations and labour abuse, the working contract in most private and foreigner firms tend to be shorter and shorter, not mention that most migrate workers didn't have formal labour contract. Firing workers was relatively easy, social insurance was rarely considered as an obligation for employer in private sectors. Why did labour law so useless in defending worker's rights? Some thank that the law itself was underdeveloped, the terms were too general or abstract to enforce practically, not to mention that legal enforcement was too weak as the lack of labour inspectors and arbitrators resulted a laissez-faire of labour law violations (Ngok, 2008; Chan, 2001), others considered that the lack of 'legal sense' of many migrant workers and low cost of legal violation were the reason why their rights were abused again and again.

While accounts on the lack of obedience of labour law were mostly true, it should also be noted that there existed a discrepancy of labour abuse in reality too. Labour contract was a key issue of 1994 labour law. In state sectors, up to 80% of workers were covered by formal labour contract in the immediate aftermath of labour law, in private sectors however, the number was less than 20%. As noted elsewhere in this dissertation, labour relation in state sectors was based on '*danwei*' style socialist paternalism, the high rate of labour contract was a direct reflect of the stable industrial relation that state firms exhibited. In an audit realized by the National People's Congress, it was reported that the enforcement of new labour law in state sector was generally satisfied: nearly 100 million state workers had labour contract by the year of 1996, 90 million are covered by social insurance scheme. The report also noted that labour law is rarely respected in foreign-owned and private firms. In eastern Jiangsu province, among 6 million workers covered by social insurance, only 260000 were private sector workers, in northern Jilin province, among 340000 workers in foreign-owned firms, only 15000

workers were covered by social insurance.[21] As a matter of fact, private sector was rather 'new things' to most Chinese people as working in private firms were often viewed by state workers as 'informal' job. Not like state firms, private firms in China was lately developed, and they were mainly small and medium in size, located in the labour-intensive export manufacture sectors. Migrant workers and laid-off state workers constituted the main labour resource for private sectors.

Although conventional arguments insisted that it was the market reform that directly led to the degradation of labour and welfare. The dual nature of China's labour configuration suggested that it was the great discrepancy among sectors that resulted in the 'misery labour condition' of outsiders who formed then the so-called social vulnerable groups that was ambiguously originated and reinforced by the 'rule of law'. Theoretically, the labour law did provide a unique legal status for most labour market participants (public servants and others alike were regulated by some special regulation other than labour law) by proposing an integral concept of 'worker', however, the reason why many migrant workers and informal labour were failed to get the same labour rights as formal workers in state sectors lied in the underlying objectives of the labour law. As mentioned, the labour law was made as an effort to redress *danwei*, thus the law should provide state workers with a more flexible but protective environment that allows state firms to downsize workers on the one hand and continue to provide stable employment with labour welfare on the other. With regard to many state workers who remained untouched by the downsizing, social insurance right was granted according to law as usual, however for laid-off workers the situation became much more complex. The unemployed basically can be covered by social insurance scheme in the condition that he or she continues to contribute to the social insurance fund as own-account workers,[22] which is, for many unemployed, too expansive to afford.

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[21] Report on the enforcement of labour law, National People's Congress, 1996, http://www.npc.gov.cn/wxzl/gongbao/1996-10/26/content_1481380.htm.

[22] Own-account worker or flexible worker as new social working groups began to emerge in the aftermath of the state firm downsizing (*xiagang*). Basically, urban laid-off workers should participate government's re-insertion program which aimed at improving their employability and proposed them with social benefits like minimum wage and social insurance package. In return, they must accept skill re-education and accept job offers proposed by re-insertion center or they would be announced unemployed afterwards. Actually, 'flexible employed worker' was the official name that has been used by labour authority to denote those who were laid off by state sectors and should find ways to get living subsistence on their own. In most cases, flexible worker faced great difficulties in finding stable job as they previously did during the socialist time, part-time job, informal job, self-employed or stay unemployed are the main solutions. Much like labour market activation policies practiced in some Western European countries, many local authorities in China provided financial subsidies to those precarious workers who are willing to pay social insurance contribution on their own.

4.1.3 The expansion of precariousness: structuring vulnerability

During the first decade after the 1994 labour law, the urban labour market has expanded from 190 million to 265 million because of the intake of migrant workers and rapid economic growth. By the year of 2005, the volume of migrant workers was around 100 million and they were mainly employed in the small and medium seize private sectors where the rate of having a labour contract was less than 20%, this extreme low level contrasted shapely to the almost full labour contract coverage in state sectors. Behind this big picture, one would find that the enforcement of labour law had a multidimensional effect on the divergence and convergence of labour market segmentation formation. Labour law did generate more flexibility that gives firms, both state and private, more freedom to adjust the volume of workforce in terms of economic efficiency and financial performance. During the restructuration, about 20 million state workers became victims of labour downsizing and most of them suffered from the vulnerability created in a more flexible labour environment than before.

Generally speaking, the working conditions in most private firms, as compared to state ones, were much more tough and poorly respected according to laws. Long working hours, unsafe working environment, unpaid salaries, discrimination and unfair labour discipline, absence of labour contract, rare participation of social insurance, etc., these were general characteristics of a job offered in most Chinese labour-intensive private firms. Moreover, the precarious labour trend has had a negative effect on the vulnerable groups that were constituted by laid-off workers and migrant works. As the social insurance scheme was closely associated with long and stable employment relation, the unregulated use of fix-term contract and the tendency of shorter labour relation prevented them from entering into the formal social insurance scheme. All these labour abuses had been widespread in sectors like urban construction, service, garment, and light industries where employers enjoyed absolute upper-hand facing with workers.[23]

Although old-fashion *danwei* paternalism has been eroded to a great degree, however, the labour law contributed to the formation of another segmented world in which a dual labour market emerged with insiders remained intact in terms of labour and welfare entitlements. Social insurance scheme continued to provide comprehensive labour insurance to state workers with long and open-ended labour contract. On the other hand, the labour contract had provided a legal instrument whereby employers in private sectors can make use of as ways to promote precarious labour relation that would

[23] In 2005, 10 yeas after the first labour law, the National People's Congress issued a second audit report on the enforcement of labour law. The report criticized heavily on the widespread ignorance of labour standards in private sectors and proposed an overhaul of labour contract terms. http://www.npc.gov.cn/npc/zt/2005-12/29/content_343899.htm.

benefit only business's interests. In the latter case, migrant and laid-off state workers were subjected to lower labour standards that were created because of the insider based institutional arrangements such as formal employment-based social insurance scheme. In a word, as the first Chinese labour law, it served mainly as a legal foundation for the state firms reform which gave rise to a new labour and social protection scheme in the *post-danwei* period. Standard employment relation has been laid down as a reference, benchmark for other regulations to be aligned with.

4.2 Labour contract law and social insurance law: addressing labour segmentation

The first decade of the New century witnessed a rapid growth of migrant workers coming from rural area who was gradually becoming a dominant workforce in urban sectors. The working condition of migrant workers and others alike not only became the hot topics discussed everyday by medias, but also came into the vision of government and legislators. National Statistics Bureau and 'All-China Federation of Trade Unions' did regular field investigations on the labour issues of migrant workers, and the statistical numbers they collect exhibited a deepening trend of labour dualism and welfare division, more and more migrant workers moved to urban area to work, however their labour contract coverage and participation to the social insurance scheme remained inappropriately low as compared to workers with urban residency. By the year of 2008, only 9.8% of migrant workers were enrolled in pension scheme and 13.1% enrolled in healthcare.[24] Social contribution was not fully paid, most firms under-declared the payroll so as to avoid more social charges. Also, there existed a tendency that migrant or other worker who want cash tried to avoid social contribution as well (this phenomenon will be discussed in the following chapter). Besides state firms and some big and formal private or foreign-owned firms, plenty of small and medium size private firms were out of the scope of social insurance scheme.

The low level of social insurance coverage in small and medium private sectors is not the immediate outcome of market reform. Rather, it was something new to the conservative regulation of labour in China. As informal labour is growing fast, the priority is to regularize it through legislations. Notwithstanding widespread critics on the rigidities that these laws would bring about, the National People's Congress passed the law with absolute majority, just months before the outburst of world economic crisis. Together with the social insurance law two years later passed, these brand-new legislations advanced the standard employment relation by introducing more labour 'rigidities' which

[24] National migrant workers surveillance report, National Bureau of Statistics.

enable more individualized workers to be fully empowered when claiming rights without a collective context as is the case in many European welfare states.

4.2.1 Normalizing labour: extension of standard employment relation

One of the most significant effects of labour contract lies in the emergence of individualized labour relation. Compared with the collective labour relation in the past, the turn to individual runs the risk, for the worker, of being more exposed to market fluctuation and less protected in the absence of collective bargaining (Chang, 2013). However, labour contract has been seen, by policy makers and legislators, as the most promising legislative agenda as labour abuse often took place in the absence of contract. Beyond the general account expressed in the first labour law, the labour contract law greatly advanced the concept of 'labour contract' by clearly stipulated what must be included in a formal written contract. Among others, the abuse of fix-term labour contract has been severely restricted than ever before and open-ended contract is granted with certain conditions. A worker with 10 years seniority or two contracts with one same employer can ask for an open-ended contract.

As a matter of fact, the labour rigidities that brought about by this law is not novel as it resembles to the characteristics of the standard employment relation exercised in state sectors. Thus, the rigidities can be regarded as an extension and concretization of 'worker's rights' as abstractly defined many years before. In another word, prerogative labour rights have been socialized through pubic legislation that applied equally to all labour market participants.

4.2.2 Labour contract as an inclusive basis to social protection

Given the low rate of labour contract particularly in informal sectors, the deliberation of labour contract law in 2008 has been seen as a focal point that would normalize and regularize outsiders into the standard 'social contract'. In 2010, the first China's social insurance law was passed by National People's Congress, this law reaffirmed that the social insurance scheme in China is a public social protection program which is mandatory in nature. This character forced that any labour market participant with a formal labour contact should be enrolled into national social insurance.[25] However, self-employed, own-account worker, and other type of flexible worker alike can also participate to social insurance by making contribution to the scheme. This is a considerable change as in the past

[25] See Social Insurance Law, article 2 and 4.

only those who have standard employment (normally offered within state firms) can be covered by social insurance. The change from status-based entitlement to labour contract based universal access implied that social insurance is becoming more inclusive since anyone who works can be, legally, covered by national public social protection program.

The socialized turn of social insurance also embodied the rise of dependent wage earners as migrant workers become more stable in urban sectors. As numbers shows, their work contributed to the development of urban economy. Despite the *hukou* remained an institutional barrier which prevent many from benefiting some means-tested urban welfares, for example, urban minimum living subsistence was reserved only for those who have *hukou*, the social insurance law associated itself closely with labour contract, like worker with urban residency, a stable labour contract is 'urban residency' that gives them equal opportunities to pension, healthcare, etc.

4.2.3 Consolidation of social insurance management

Another important institutional development lies in the management of social insurance. The law gives exclusive mandate of management to a unique social insurance agency, which is also a public governmental body in nature (the agency is direct affiliated to labour authority). This represents an effort to further consolidate the fragmented management of social insurance in the past. As labour welfare was historically managed internally within *danwei*, the state sector reform externalized the 'social function' to 'society' which has never been clearly understood according to regions and sectors. In reality, the credibility of social insurance management was relatively low due to its inability to address social security as a whole, schemes and programs were usually managed through different administrative bodies at municipal level. Fragmented management left different standard and conditions when considering labour rights, this ended up reinforcing the exclusiveness of informal labour. For this reason, the unification of different management into one unique governmental body would concretize the social security right as a whole. As a result, pension, healthcare, maternity, unemployment and work accident have been consolidated as one social insurance package with a fix contribution rate. Employers and employees are obliged to participate and contribute accordingly.

However, since the social insurance issue is always practiced at regional level, the national law basically set out principle rules which stipulated how social insurance should work in general, but there do existed some regional differences particularly with regard to the contribution rate and social security portability. For instance, labour mobility between regions could be problematic since wage level varies across regions, the transfer and calculation of compensation would be complicated when one work

somewhere but retired elsewhere. Despite the ambition to address fragmentation, this legislation yet allowed cross-region variations to exist as social contribution funds are collected and spent at regional level.

4.3 Public consultation as a way of engaging legal projects

As the legal weapon is becoming a preferred means to regulate labour, legislative projects are attracting public attention. In 2006, the legislative consultation process of Labour Contract Law might be the most controversial one among all legal projects in reform times. During the consultation, public participation and academic debate were both vibrant as different groups of people were engaged. As a way to hear social voice, 'mass line' campaign was used to collect opinions and ideas expressed from the bottom (Gallagher and Dong, 2011). Starting from 2006, nearly 200000 public opinions have been received through different channels, this unprecedented public participation has been widely seen as a landmark of 'democratic legislation' in modern Chinese history.[26] Just two years later, when the Congress started to draft the Social Insurance Law, the Congress received more than 70000 public opinions. Despite an ostensible decrease compared with Labour Contract Law in 2008, this number is well beyond other legal projects in the same year. The degree of public interest and engagement in legislating labour laws showed that the 'rule of law' has been progressively accepted as an appropriate way for different social members to work together when facing increasing labour problems.

China's official trade union, the ACFTU (*All-China Federation of Trade Unions*) played an important role in engaging pro-labour terms because of its politically favourable position within high leadership, while Chinese employer's association undertook a relative marginal role (Gallagher and Dong, 2011). Besides domestic representatives, foreign business groups were also very active in influencing drafting process by openly expressing their concerns about the potential legal risks. As can be expected, legal rigidities generated by new legislations could quickly raise labour cost and cause new challenges for foreign business in China, however their attitudes were subtle than commonly assumed as they both welcomed the promulgation of new laws finally.

The success of Labour Contract Law facilities the 2010 Social Insurance Law, same process of consultation was repeated, wide range of stakeholders have participated. While most workers and employees are in favor of Social Insurance Law in general, public servant and some migrant workers

[26] Wang Jiaoping, 'Common will formed amidst debates: behind the labour contract legislation', *Workers' Daily*, 2007-7-10.

expressed their special concerns in particular. Concerns were associated to how laws are to be implemented on ground as regional practices can be different with regard to different groups.

Despite the fragmented regional labour management *status quo*, national Social Insurance Law is moving the labour and social protection into a universally defined legal environment in which general principles and standard were laid down to ensure more statutory terms so as to delivery more protection. Our analysis shows that legitimacy of these two legal projects are enhanced by public consultation process whereby stakeholders were mobilized to engage, by participating in controversial issues relating to labour market coordination problem such as labour contract and social insurance.

4.3.1 Voice from the bottom: 'mass line campaign' of consultation

In contrast to legislations in other domains, Labour contract and social insurance are a broadly shared topic among workers and employees which regulate the most basic social relation among people who work. The social nature of these legislative projects has provoked widespread attention and discussion at all levels, for this reason, the National People Congress was fully committed to launch a nationwide consultation campaign which brought together different stakeholders into a public room. As the party-State always takes into account the social stability concern, which is a politically important issue, the campaign of labour-related legislations is featured as a means to archive a harmonious society in which labour dispute and conflict should be peacefully addressed.

During the consultation campaign of social insurance law, the legal working committee of the Congress have received more than 70000 opinions and comments. Nearly 97% of them were received through Internet, the rest were expressed through traditional channels like letters of appeal. These opinions have been carefully analysed by Congress and formed a body of literature that embodied the public wills, and thus contributed to the going debate and revision of draft in the following process.[27]

The geographical distribution of received opinions shows that people living in the economically advanced area (eastern coastal provinces most notably) are more likely to be interested in social insurance topic. As illustrated below, among the top provinces, Guangdong is widely known for its export-oriented manufacturing, both private sector and migrant workers are highlighted characteristics that made its labour condition extremely debatable.[28] Shandong and Jiangsu are

[27] During consultation stage, draft should be reviewed at least three times, revisions of draft are open to public discussions and deliberations.

[28] Many internationally known academic studies on China's labour condition are derived from field studies conducted in Guangdong province. labour conflicts took place in Guangdong, for instance, Shenzhen Foxconn electronic factory worker suicides (2010); Nanhai Honda automobile factory strike (2010); Dongguan Yuyuan Shoe factory strike (2014), have sparked widespread media reports and public attentions.

provinces with huge labour market participation, not to mention that Beijing and Shanghai are national political and economic centers. In fact, the blowout of the 'enthusiasm' on labour legislations in these areas is another symptom which embodied that labour intensification is closely associated with economic development as numbers of labour-related disputes in these national key economic areas are always ahead of other provinces.

As far as professional category is concerned, almost all labour market participants were engaged by sending their concerns. While most workers and employees in formal and informal sectors agreed with the general principles of the draft (more than 70%), a number of topics were particularly criticized even opposed. These reserved comments were concentred in policy areas linking to unequal arrangement in contribution and entitlements. For example, public servant and employees working in public institutions like hospitals and schools objected to the universalization of social insurance regime because they believe that the alignment of pension and medical insurance to general regime would lower their entitlements, while other working categories consider this dual system unfair as they contributed a good deal of their salaries to regime but received much less than public servants who don't contribute.[29] In fact, both people employed under formal standard labour contract and people in unstable and precarious employment relation (self-employed, part-time workers, unemployed, etc.) consider that the social insurance regime is too expensive and unequal.

Moreover, migrant workers expressed considerable objections as the draft failed to fully address the institutional barriers that prevent them from benefiting social insurance: the draft law only set up general principles that could not solve problems took place at regional level. According to them, the relatively low level of governance in terms of social insurance regime is the main reason that social insurance could not fit to their mobile and precarious employment situation.[30] Lastly, laid-off SOE workers' difficulties in getting social insurance entitlements were also discussed, as transitional group from *danwei* to socialized scheme and victims of state sector restructuration, their social insurance records were incomplete and thus failed to meet the general requirement of retirement or medical reimbursement in some cases, they argued that there should be special arrangement in the future law that allows them to remedy personal record so as to fully benefit social insurance entitlements.

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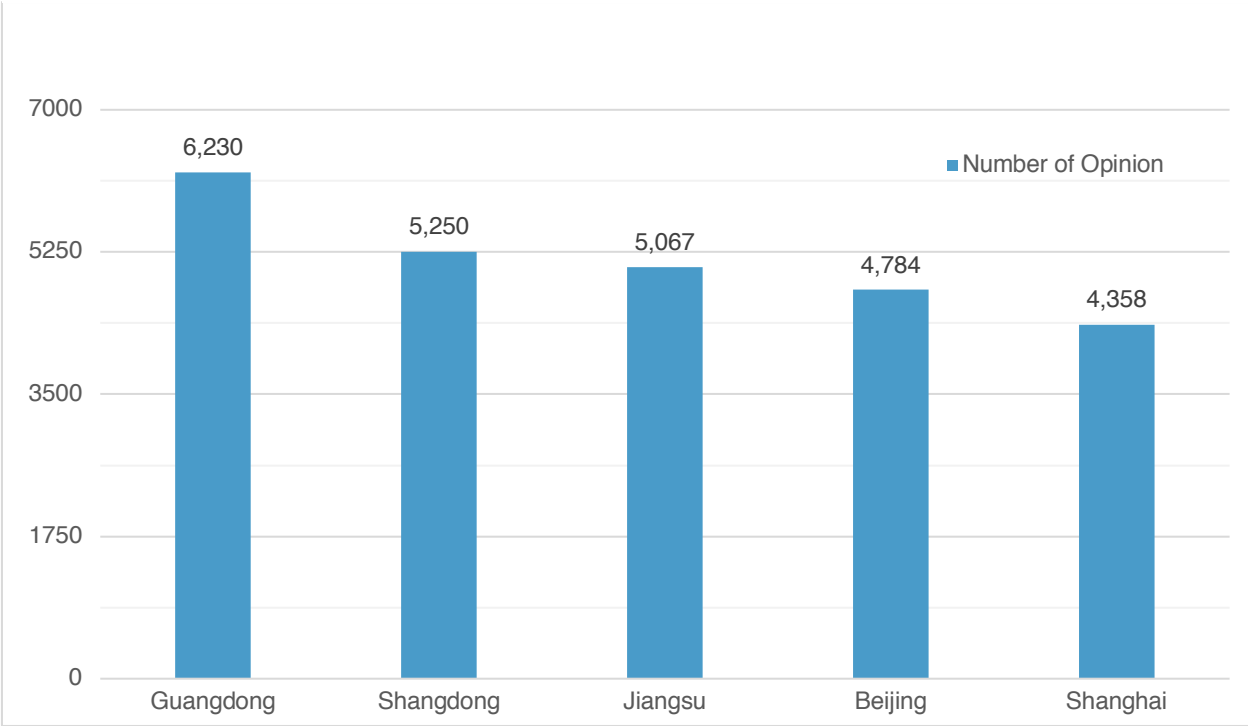
[29] The dual social insurance system has been changed as of 2016, public servants and employees working in public institutions have to pay contributions to general social insurance regime as other workers and employees. However, this reform takes the classical form of 'step by step' which only affects the new comers, senior public servants and employees remained their *status quo*.

[30] For example, migrant workers are usually denied to social insurance participation if they are in flexible employment which is a common situation among them. In some regions, migrant workers are treated as special group subjected to low rate of social insurance contribution rate. Transfer of social insurance recorded is complicated due to administrative segmentation among regions.

Generally speaking, about 75% of opinions are in favour of the draft law, while some expressed the need to further modify some technically terms relating to insurance payment procedures, only very small portion of opinions go against the draft law. Public seemed all agreed on the need to have a national law that sets up general principles on key issues. As a top-level legislator puts it, the most significant implication of this legislation work lies in its fundamental terms which constitute the general framework under which social insurance programs could be further implemented and developed (Cui, 2011). Despite regional interpretations in detailed program implementation and regionally segmented *status quo*, the promulgation of the national law is formalizing social insurance right as a civil right that complements the labour rigidity delivered by Labour Contract Law.

Figure 2. Geographical distribution of received opinions



Source: opinion expressed in the consultation of draft of social insurance law

4.3.2 Western chamber of commerce: for or against?

In addition to the unprecedented domestic public consultation campaign, foreign firms were also concerned with this strategic topic as they were, for sure, aware of the incoming labour rigidities that might change the 'cheap labour' image that China displayed. Nevertheless, the attitudes and positions that foreign chambers exhibited were quiet heterogeneous, for many of them, the inevitable rise of labour cost is a key concern and they surely believe that China's social insurance rate is skyrocketing to a high figure in international terms and particularly for developing countries.[31] This attitude resembles to the strong criticism expressed by the American chamber of commerce during the 2008 Labour Contract Law consultation process,[32] which warned that 'race-to-bottom' neoliberal action (relocation of factory to other places, such as Southeast Asian countries where labour cost is low) is likely if China chooses to raise the labour standard significantly.[33]

Despite a widespread concern of an immediate raise od labour cost, not all foreign firms are in the same position. The position of a firm in the global value chain is a determining factor to understand chamber's lobbying activities. For example, while firms in the high value added sectors are good students in implementing sound labour standards like formal open-ended labour contract, compulsory social insurance contribution and other social benefits like annual leave, extra healthcare package etc., low value added labour-intensive industries like apparel and electronic manufacturing are more likely to be affected by the new labour standard, and thus are more likely to be closed or relocated to other places (Hui *et al.*, 2014). American chamber surveyed its member firms and found that in technology and R&D intensive and services sectors, attracting skilled managerial staff is more important than the concern of the social benefits cost.[34] This is why chamber's attitudes toward labour laws can be subtle in terms of firms' immediate challenges, for many firms producing high end products, compulsory social insurance is not an unaffordable extra cost. Another preoccupation comes from the human rights cause related to the established Western labour standard, which put Western (European chamber particularly) chambers under moral pressure if they choose to openly oppose the labour law draft in China (Hui *et al.,* 2014). To avoid a bad reputation of 'hypocrisy' or 'double-standard', chambers must

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[31] Grayson Clarke, 'China's New Social Insurance Law: What It Means for European Business', *Eurobiz*, July/August, 2011.
[32] David Barboza, 'China Drafts Law to Boost Unions and End Abuse', *New York Times,* 2006-10-13.
[33] Globalization Monitor. 2010. Complicity, campaigns, collaboration, and corruption: Strategies and responses to European corporations and lobbyists in China. http://www.globalmon.org.hk/sites/default/files/attachment/0519lobbying-report1.pdf.
[34] 2016 AmCham China White Paper, Part two, human resources section, http://www.iberchina.org/files/2016/amcham_white_paper.pdf.

be very careful when officially express their positions on labour related issues. In some cases, chambers even lauded the proposed new labour standard as they found it similar to European standard and thus would be helpful to improve the working condition in China.

After all, China is a necessity for many Western firms who seek business opportunity as labour cost is still relatively low and market potential is high. Thus, apart from labour cost, a good business environment, weighted usually by mature regulation based on the rule of law, is equally important to foreign business. Despite subtle attitudes towards labour law legislation as mentioned above, one common concern shared by Western chambers was the issue of the 'rule of law'. At least officially, the European and American Chambers both acknowledged that the laws are a great step forward in constructing a China ruled of law, for this reason, they welcomed the promulgation of labour related laws in general, but their deep concerns lied in the state's capacity in implementing the laws and the potential policy uncertainty related to foreigners working in China. In fact, rather than conventional concern related to the potential rise of labour cost, Western firms are more concerned about how the legal terms are actually being implemented at regional level and what effects (legal risks) the law would generate regarding their business. For example, European chamber recommended that the implementation of labour laws should be uniform given that most labour related regulations were implemented differently across the country (social contribution rate varies according to regions, interpretation of labour policies at regional level varies too). A unified national social insurance regime is welcomed as it can facilities firm's human resources management and alleviate the shortage of talent in face of labour mobility across regions.[35]

When it comes to the application of social insurance law, there is another issue that caused concern around the so-called 'double taxation' that would be brought about by the new legislation of inclusion of foreigners.[36] Foreign chambers understood this inclusion as government's effort to extend social insurance tax base so as to enhance the financial sustainability of the social insurance system, however, they argued that many foreigners working in China as expatriate would not benefit too much

[35] See 2009, 2010, 2011, 2012, 2013, European Business in China Position Paper. http://www.europeanchamber.com.cn/en/publications-archive?page=48. European business position papers are published every year with comprehensive views on a wide range of issues relating to doing business in China. We know that these papers are officially expressed to Chinese authorities as formal recommendation and advices.

[36] In 2011, the Ministry of Human Resource and Social Security announced that foreign employees hired by Chinese firms or dispatched by foreign firms in China should be included in the social insurance regime as other Chinese employees. As such, foreigner employees and their employers should pay social contributions and social insurance benefits are granted accordingly. For detail, see ministerial document 'Temporary regulation on foreigner working in China', http://www.mohrss.gov.cn/SYrlzyhshbzb/zcfg/flfg/gz/201601/t20160112_231574.html.

social insurance entitlements while are forced to pay the cost.[37] As a matter of fact, European chamber expected that the inclusion of foreign expatriate employees would further raise the labour cost, particularly, many European firms originated from the countries where Bismarckian social insurance prevails have to pay double extra costs of social insurance for their expatriates working in China.[38] Nevertheless it is standard practice among advanced economies that countries required compulsory enrolment of expatriates in social security programs, this problem could be addressed by negotiating bilateral agreements, signed between Chinese government and foreigner governments, so as to avoid double affiliation of social insurance.[39] In addition, European business has recently expressed concerns over the labour market flexibility issues which relate to the social insurance coverage of flexible workers, e.g., part-time workers, dispatched workers, student intern, etc. Chamber hopes to see improvements of social insurance regime in addressing flexible employment so as to deal with legal risks generated by these new employment practice.[40]

To sum up, Western chambers were not as hostile as expected when facing labour floor upgrading. If it was true that many foreign firms see China's new labour laws would raise business cost, they are actually more concerned about the new legal and labour environment in which they operate. Facing new standard, technologically advanced firms are less affected and rather they see it as a means to upgrade talent and human resources management. In fact, the primary concern of most Western firms in China is not to flee away to other cheap places, but rather to figure out how to keep workforce viable and achieve profit in a promising transformative market like China. This is why they are actually more caring about how laws are implemented regionally and how they should do to update their human resources management. Chambers' preoccupations proved the important role of labour law in coordinating economic activities on the ground that legal terms and their implementations are a basic convention whereby economic actor are guided to work together to achieve goals. In this sense, the advent of labour laws is contributing to the formation of a full-fledged modern labour market that is indispensable for foreign firms to do business.

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[37] See US China Business Council, 'USCBC Opinions on the new regulations of social insurance regarding foreigners working in China'. https://www.uschina.org/sites/default/files/social_insurance_comments_chn.pdf.

[38] It might be worth noting that giving foreigners national social insurance access is not taken for granted. At least in many developing countries, like Gulf countries, foreign workers are normally denied access to national social security programs which are reserved for nationals. However, in China, giving national treatment to foreigners is not welcomed by many European firms as they doubted that the underlying reason of Chinese government to do so is collecting contribution from foreigners.

[39] It was the Germany who firstly signed a bilateral agreement with Chinese government regarding social insurance fee exemption in 2001. Other European countries did the same during the successive years, especially in the aftermath of the 2010 Social Insurance Law. Denmark (in 2013), Finland (2014), Switzerland (in 2015), the Netherlands (in 2016), France (in 2016), Spain (in 2017).

[40] See 2017 European Business in China Position Paper, http://www.europeanchamber.com.cn/en/publications-position-paper.

4.3.3 Intellectual debate among academia: return to iron rice bowl?

While labour related legislations worried foreign business, contentious academic debate unfolded too. The academic argument regarding Labour Contract Law can be easily divided into two opposite groups who exhibited clear antagonism with each other. On the one side, the so-called 'Northern School' is represented by labour law professor Chang Kai based in Renmin University in Beijing. Served as the key advisory member to this legal project, he argued that the open-ended employment contract and economic compensation for termination of contract are a cornerstone of modern labour market in most advanced economies. Since the primary goal of labour contact legal project is to address the social unrest problem that caused by the extension of precarious labour condition among all kinds of workers, open-ended contract is a good way to give a precondition to form more stable and peaceful employment relation. In fact, labour leaned scholars were not satisfied with the weakened position of trade union in blocking firm's redundancy decision, they argue that the protection standard set by the draft is absolutely low compared with other advanced market economies in the world. According to them, the 2008 law is a solid complement to the general principles laid down by the 1994 Labour Law, protection labour is not necessarily go against employers' interest. Laws finally contribute to the cooperation of both parties.[41]

On the other side of this debate, Shanghai based law professor Dong Baohua represented the so-called 'Southern School', he expressed deep concern over the unconditional transfer to open-ended employment contract after two service terms or ten years of service for an employer, arguing that government regulation should not intervene in firm's business operation. 'Resuming iron rice bowl' is somehow used by media as slogan amidst people who saw open-ended contract as a renewal of old style 'big rice bowl' which impedes would firm's competitiveness. They argued that even 1994 Labour Law has never been rigorously implemented, it's unrealistic to imagine a higher labour standard is viable to be implemented. More sharp criticisms came from liberal economists by saying that new labour regulation can't protect vulnerable workers but rather kill them because firms are going to sack workers and produce unemployment finally.[42]

The debate ended up with a sharp contrast between the so-called 'labour stratification argument' and 'labour and capital conflict'. While labour stratification argument (Dong Baohua)

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[41] People Daily Net, interview with Professor Chang kai, http://www.people.com.cn/GB/32306/54155/57487/6577225.html.

[42] Famous Neo-liberal economist Zhang Wuchang () was very active in criticize Labour Contract Law draft by posting blogs or giving media interviews. His position was supported a number of businessmen and market fundamentalists. See, Cai Dingjian, 'Why Prof. Zhang coitizes labour contract law', http://finance.ifeng.com/news/opinion/jjsp/200810/1003_4457_815040.shtml.

insisted that the effect of Labour Contract Law will only reinforcing those who are already protected such as labour market insiders (managers, high skill workers) and is unable respond to those who are in need (precarious workers and unemployed) because it's unrealistic that the high labour standard can be correctly implemented in reality. Labour and capital conflict argument (Chang Kai) regard the conflict between workers and capitalists as fundamental and thus in order to protect working class, there is no other solution but give a sound labour standard.

Although the debate soon cooled down in the aftermath of the successful promulgation of law, however the contradictory stances are deep-rooted in many stakeholders as there has been constantly arguments that demand serious re-consideration of Labour Contract Law on the ground that the law is hindering labour market flexibility which leads to lowered economic efficiency and finally workers will become the victims.[43]

4.4 Conclusion

Chinese labour law and its later developments have shown that national legislation as a way of labour regulation has begun to replace the *danwei* paternalism. Unfortunately, mainstream wrongly regarded this process as an irreversible decline of state regulation as a liberal-like response to market reform imperative, many believe welfare states and social protection were dismantled due to rapid reform during the 1990s. What is missing in this kind of argument is that the contexts under which reform and laws were envisaged were generally ignored, a short review of China's labour legislation development suggests that the evidence is otherwise: legal system has been developed to foster a market reform and labour restructuration, public social protection system has been established and is expanding its scope from very limited labour market insiders to outsiders, i.e. informal labour. For a better understanding of China's labour changing politics, one should bear in mind that the 1994 labour law was a by-product of state sector restructuration, its goal was to turn down the so-called 'iron rice bowl' so that state firms could externalize the 'social functions' that they painfully performed during the past. As such, the core objective of this law was to implement labour contract so as to give more flexibility to both parties: firms could downsize workforce, employees can choose job freely. The implementation of labour law ended up forming a labour dualism which distinguished standard employment from informal one. Job security and social protection were re-invented in a Bismarckian way by establishing a social insurance scheme. State workers who weathered the restructuration continued to be covered by comprehensive social insurance programs. Long and stable employment

[43] Argument made by China's finance minister Lou Jiwei. See http://economy.caixin.com/2016-02-19/100910617.html.

relation still lied in the core of this social protection system. On the other hand, the rise of informal labour is a new issue that labour law tried to address but finally failed to deal with. Migrant workers have not been come into the scope of urban labour politics as they were generally considered as floating labour who had no stable job. State firm laid-off workers too, as they lost job tenure and employer's social insurance contribution support, it became less likely that vulnerable and precarious employment offered in private sectors can offer them with the same labour rights as before.

This ongoing stratification of labour status formed a dual system in terms of labour welfare and social protection. At the top of the pyramid, people working in the state sectors and small portion in private sectors are well covered by social insurance scheme. At the bottom lied the migrant workers working without or with little labour protection. In the middle, urban laid-off workers constituted a relative small portion of vulnerable group who are much less protected as compared to the people at the top but are managed by urban labour activation policies such as subsided job with limited social insurance or urban minimum living wage.

As discussed above, labour law played a vital role in structuring such a dual system in various ways. The abstract status of 'worker' that was ambiguously defined in the law explicitly deliver an equal status for all labour participants, but implicitly ignored those who work in informal sectors as private and foreign-owned firms expanded quickly. Laid-off workers have come into the scope of many specific legislations that provided them with minimum living subsistence. Activation labour policies were very often used on certain groups of people. Government offered atypical and flexible jobs to laid-off state workers, with subsidies of social insurance contribution in an effort to cover social risks created by state firms downsizing. However, migrant workers were often ignored by law enforcement. Although there existed regional-specific regulations on migrant workers, for instance, many municipal authorities set up independent work accident insurance fund to deal with the high labour risks exhibited by urban construction industry, but social insurance scheme as labour right has never been an overwhelming issue because migrant workers were considered as floating labour force who are so flexible and only looking for cash revenue.

The latest legislations that came into the industrial relation field after 2008 world economic crisis have significantly changed this by explicitly affirming that migrant worker's labour rights should be weighted equally important as others. These laws have been seen as the most ambitious national strategies for addressing labour segmentation. Migrant workers should have labour contract as did any other standard employment, the mandatory change to an open-ended labour contract after 10 years' service drew a lot of attentions because the legal rigidity these terms imposed would finally regulate and normalize the non-standard work and informal labour. The linking of labour contract to social insurance obligation is also of great importance because the rate of social insurance enrollment was

historically low among informal and casual labour. This also suggests that the basis of social security right has entirely moved from *hukou* based status-related to labour contract earning-based public scheme. Compare with the first labour law which created the standard/non-standard dualism in China's labour and welfare politics, recent legislative activities not only reinforced the standard employment relation, but also broaden its scope. Implementing laws have sparked a storm of labour dispute filing within arbitration commission and court which we analyse in the following chapter.

Chapter 5 Theorizing capability: Law and its social functioning

If the evolution of labour regulations takes the form of jurisprudence that is based on the universalisation of laws, this development of legalisation requires State's interventions that apply legal terms at various levels (and places). For law to be functional, legal enforcements and resolution mechanism as stakeholders' institutional capacity to action are a prerequisite whereby they can coordinate issues relating to labour standards such as wages and social protection. By providing formal rules and procedures, laws are seen as a social precondition that offer institutional capacity to people defending their interests.

From such a point of view, rather than considering law as secondary as compared to economic centralism (often articulated by utilitarian point of view or some Marx-centred economic determinism), the legal reorientation of labour and welfare regulation regard (new) laws as a growing body of rules which embodies, not only as formal regulation, i.e. the State's presence at the core of economic coordination, but also serving as the maxim of actions or as reference 'a frame qualifying the relations between the persons involved and defining the situation in which they act' (Diaz-Bone *et al.*, 2015: 15). This Weberian approach of law leads to a more complex explanation on the roles that laws actually play among people who are involved in affaires, particularly in labour-related affairs both formal and material causes are framing judges' decisions (Didry, 2002).

The referential and instituting function of law leads us to think about another line of thinking that reconsiders the evolution of welfare state in terms of the real capacity that one can develop thanks to enhanced informational basis and the growing liberty of engaging in order to gain more freedom (Sen, 1999:137). Under this perspective, far from seeing welfare benefit recipients as motionless 'passive patients', the changing dynamic of welfare state should be taken into account by its institutional ability in delivering more room for people to engage and deliberate in order to gain real capacity and freedom when facing social risks. In fact, capacity-oriented approach sees the development as 'a process of expanding the real freedoms that people enjoy', this nuanced definition goes in contrast with more narrower views either consider welfare state as a capitalistic by-product which compensates the inevitable 'market failure' (traditionally supported by mainstream economists), or as a mechanism of de-commodification of labour that features the so-called social protection movement (followers mostly inspired by the great work of Karl Polanyi).[44] In a word, the traditional

[44] Though political economist such as Esping-Andersen holds very different view as compared to mainstream economists when he sees welfare state as one of the cornerstones that constitutes modern advanced political economies, particularly his praise of Nordic social democratic model in de-commodifying labour against self-regulated capitalism market, his line of arguing still fells into the plausible dichotomy of 'State vs. Market'.

accounts on welfare state is based on the means centred reasoning while our understanding of welfare state lies in the fact that welfare state as an important parcel of social convention has the effect of instituting and constituting the interactions between parties in a market-oriented labour environment.

This chapter aims to elaborate a theoretical foundation that underpins an explanatory framework centred at the function and evolution of laws as an indispensable motor that initiates the successful (or failed) coordination in the labour market. By adopting the Weberian sociology of law and the theory of capacity developed by Amartya Sen, we intend to introduce a new line of thinking regarding welfare state reasoning by highlighting its normative effects in delivering justice and social convention whereby the so-called marketization finds its basis.

5.1 Weberian sociology of law: Starting point of legal order in governing the modern society

One of the lifelong academic questionings of Marx Weber lies in the inquiry of the rise of Capitalism as a historical phenomenon, particularly in Western European countries. Weber believes that this question can be answered by explaining the relationship between social structure such as law, religion and economic activities that laid the foundation to the later prevalence of capitalism. In this way, he basically rejects the Marxian economic (mechanical) determinism which regards human institutions like legal system and culture factors are caused by economic foundation. A general conclusion made by Weber is that Western European countries invented a more 'rational' legal system that other great civilisations failed to develop. This 'rationality' contributed to the corporate concept which is crucial in initiating modern capitalism in European countries not elsewhere (Trubek, 1972).

If law is widely regarded as coercive sanctions imposed by state's enforcements, Weber considered legitimacy and rationality as two important aspects of law because he saw that law can be one of the most important source of legitimacy in a given society in which people are guided by commonly accepting binding rules. Thus, law is functioning as a kind of social order. In addition to legitimate dimension of law, the degree of rationality is another measurement that distinguishes one legal system from another. If law is 'capable of formulating, promulgating and applying universal rules', for example, the degree of rationality in 'Common Law' prevails in Anglo-Saxon countries is essentially lower than that of 'Civil Law' which is much more logic and formal.

Based on these general concepts and dimensions, Weber realized a historical comparative study of law systems originated from different civilisations by using the famous ideal types which served as a non-reality referential point, and his seminal work inspired people to further develop the legal rule of labour and welfare state in a globalized modern. Weber considered legal innovations as equally

important as technological breakthroughs ushered the industrial revolution in the West, for example, the early development of commercial law in medieval Europe (*lex mercatoria*) created a series institution which helped to 'systematize and institutionalize a series of novel economic activities in Western Europe' (Swedberg, 2003: 200-202). Over time, this kind of 'private merchant law' had been replaced by rational bureaucracy embodied as state's actions in regulating economic activities since sovereign modern state began to monopolize forced means to ensure the law to be enforceable.

According to Weber, the birth of the first welfare state born in European continent in the name of 'enlightened despotism' was a clear sign of rationalization of a monopolized state in which the monarch rules the country through bureaucratized administration. The ultimate goal is to deliver justice based on material concern such as working class's welfare provisions rather than absolute rule of law defined by jurists or social customs. Successive development of welfare states in later stage in Western European countries demonstrated that the state became indispensable in regulating labour relation by establishing a set of institutions that govern everything from labour conditions to social protection issues. In a word, the achievement of 'social state' in Western Europe is a sign of high degree of state's presence in economic activities.

5.1.1 State's presence in economic activities

As defined by Weber's notions of law, state is indispensable in enforcing law in a coercive way in making law respectful. Meanwhile, on the other hand, law is also regarded as a necessary equipment by the social actors as mobilizable resources when they choose to engage into a conflict or dispute with others, as shown by the propaganda slogan 'using law as your weapon' in China's campaign of law education, laws serve as the tool to guide the actions and convey the formal expression of interests defined by binding terms. State's presence is essentially necessary as it ensures an environment in which laws are applicable to parties by virtue of legal enforcers whose operations conform with formal procedure. Effective state intervention requires competent regulatory bodies who are responsible in delivering justice to 'clients' on a daily basis. In labour and welfare domain for example, local labour authority is getting involved in a continued process of 'law-making' and 'law-finding' in Weber's terms due to the increased demands. In Chinese cases, labour authorities are entitled to set rules so that concrete requirement can be met.

Weber saw the development of state's competency in regulating social affairs as a solid proof of 'rationalisation' which includes a system of formal rules based on logic-deductive reasoning. The higher degree of rationality reached in a legal system could be illustrated by the existence of abstractness of legal concepts and its simplicity of logic, for instance, in the 1994 Chinese Labour

Law, concept such as 'worker (labourer)' featured a high degree of abstractness that can't be easily implemented at concrete situations, while different forms of workers (state workers, flexible workers, migrant workers, etc.) are actually regulated in terms of different contingent arrangements. As such, in contrast to rational law, the irrational law shows a low degree of legal purity and subjected to paternalistic or charisma rule. One example was the Chinese welfare paternalism prevailed during the *danwei* period, at a time when the level of labour condition was considerably subjected to the decision of the head of the unit and the resolution of conflict and dispute was internalized as a moral or political issue which should be solved in terms of 'spiritual' (ideology of communist working class or political clientelism) principles.[45] Since economic reform has largely destroyed the irrational regulation of labour supported by paternalism, new frontier has been released upon which state can intervene directly. Issues relating to labour contract and welfare insurance have been underlined as labour coordination issues addressed by state's efforts in instituting the labour contract in 1986 and unified social insurance scheme in 1992. These measures were actually designed as a proactive action aimed at restructuring state sector and formed a new floor of labour to foster the Chinese socialism market economy.

For this reason, state's presence can't only be understood as its ongoing rationalization of norms, law is evolving because of many reasons that derived from social facts such as the rise of market and private sector, the transformation of labour practice, the migrant labour, the need of establishing new regulatory bodies like labour inspection and social insurance agency who are in charge of overseeing the general welfares of parties involved. To address all of them, state is required to develop both rational and material laws so as to deliver both normative and concrete solutions to foster new social relations.

5.1.2 Worlds of law: Plural causes and possibilities

Despite the rational and formal character of law in Western world, Weberian sociology of law doesn't exclude a possible material dimension of law which is historically developed in another world that regulates social relations alternatively. In this aspect, formal rules characterised by universal and abstract rules are complemented by 'very concrete evolutions of particular cases that can be based on moral, sentimental or political factors (Didry, 2002: 36)'. While formal rules should be conformed in terms of pre-existing procedures established by pure terms, material dimension involved more social-

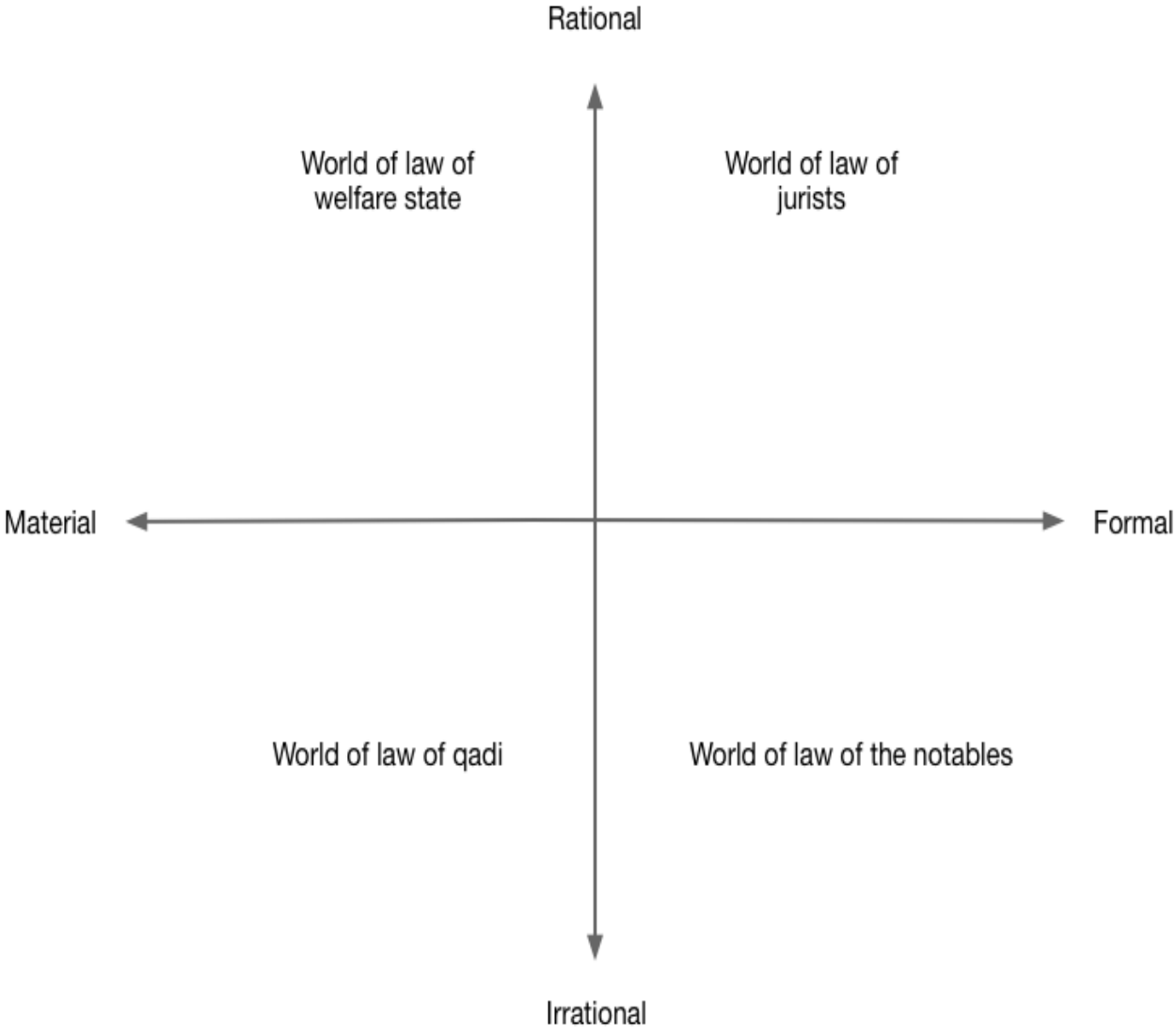
[45] Liner development of law from irrational to rational is a generally seen as a Weberian evolution of society. However, the world of law can be plural and shows multiple characters coming from social forces (formal, material, irrational, etc.). In contrasts to theoretical jurisprudence viewed by jurists, Labour-related legislations are a more socially oriented legal product. See Didry *et al.*, 2013: 61-68.

related values that supported non-procedure (deductive) terms to be considered. In another axe, there is a seemly contradictory relationship between 'rationality' and 'irrationality'. Rationality means following criteria of decisions which is applicable to all like cases, thus high rationality involved more universality and generality while irrational refers to jurisdiction based on specific lawsuits and situations. Combined these two axes of legal dimensions, a world of law can be depicted as an analytical scheme so that different worlds of law can be appropriately situated in terms of degree of rationality and formality. Inspired by Weber's insights into the causes of law, the scholars of the 'French Conventional School' developed a pragmatist sociology of law by analysing the process of law production (Didry, 2002; Salais, 1997).[46] Particularly, they added plurality to the analysis of law discourse so as to allow a pragmatist interpretation of how laws are actually conceived by social actors structured within economic conventions such as labour law or social protection pact.

The conventional approach brought in by the French conventionalists allows us to look more at the real cognitive structure working as the logic of coordination in situated context where people conceive, interpret, and produce laws that closely relate to social reality, or working as a social fact as defined by Durkheim.

[46] French Conventional School (economie des conventions) represents an innovative academic movement aimed at developing a pragmatic and historical approach on economic coordination and economic institutions. They put social institutions at the very center of the analysis of the political economy in advanced European countries. Law is seen as a vital institution of which economic actors can make sense while acting in a market environment. For a close look, see: Diaz-Bone, 2015.

Figure 3 The space of the world of laws



Source: Didry, (2002: 39), (2013: 68).

Generally speaking, four worlds of law can be identified, based on Weber's comparative study of legal order, by the innovative work of Claude Didry (Didry, 2002: 31-53; 2006: 91-114). They are the law of jurists, law of welfare state, law of *qadi* and law of the notables respectively, and we discuss them one by one. Firstly, on the right-up space, the law of jurists is the most systematic and rational form of legal order in a given society. It is marked by its very high degree of abstractness and is strictly applicable only in terms of its pure reasoning of law itself which excludes other social, ethical or political factors from intervening. Law of jurist usually stems from abstract and deductive logical concept such as liberal will, individual right, etc. It is often regarded as the most formal and rational form of law according to jurists. Secondly, we find the law of welfare state on the left, which is equally strong in terms of rationality but differs great with law of jurist in the dimension of formality as it shows a degree of materiality as opposed to formal jurisprudence. The materiality dimension of law relates to the considerations and deliberations of collective (public) interests that respond to demands generated from social conjuncture and this is why the laws of welfare state and social laws are sometimes synonymous according to jurists. A typical case of the law of welfare state is the landmark inception of Bismarckian welfare state in the late 1870s as a preventive solution to the rising threats generated from socialism and communism. While the law of welfare state is represented by rational bureaucracy, it serves as an instrumental tool to address the social justice problems invoked by class struggle.[47] Then, the law of qadi (qadi) characterized by its irrational and material positions embodied in muslin world where theological resources and the ritual judgement are dominant. Qadi invents its own decision without refer to priori rules and thus remained wholly informal. The justice of qadi is less professional and more open to ethical causes as compared to rational and formal justice. Equal to the law of qadi, Weber considered some legal forms practiced in European countries as similar as they exhibited a certain degree of irrationality by introducing the popular elements into the production of laws. Very concrete ethical and social considerations are underlined as a technic to mediate and conciliate the dispute. Last, the law of notables is a world where a prestigious group of legal notables such as judges and lawyers who monopolize the interpretations of laws. Their activities around law make up a considerable body of literature which consists of precedent experiences and lessons. Weber regarded Common Law as an obvious example of the law of notables. Historically, the culture of lawyers has important role in organizing the composition of judge and interpreting law in virtue of precedent cases. Elite lawyers with abundant legal experiences made them ideal for becoming judges who delivery the justice by referring to other similar situations. State's prerogative role in governing

[47] The formal justice ignores ethical and political considerations as economic wealth, in most human societies, is always unequally distributed among social members, abstract terms preferred by formal justice can't consider substantive demands formed by certain social values and interests. See, Trubek, 1972.

jurisprudence, as overwhelmingly displayed in European continent, is relatively limited in a system like Common Law in Great Britain.

5.1.3 The real world of law in China

Weber's comparative study on law and its innovative explanatory framework developed by French conventionalist allow us to take an alternative regard on China's changing labour legislation. Although Weber generally concluded that China's ancient legal system is substantively irrational, and material as compared with formally rational European law (Weber considered German law as the most rational and formal), it remains unknown that if China correctly fells into the ideal-type of qadi (Marsh, 2008). The transformation of China's economic structure and labour welfare system from the late 1980s should be treated as a renewal topic as labour politics in today's China is focusing on the rule of law, law is extensively used both as a daily weapon by ordinary workers to claim rights and as a political agenda in developing new institutional capacities to address social demands by governmental bodies. While our study has no intention in debating with Weber on the theoretical issues relating to the nature of Chinese legal system, we are nevertheless very much interested by the normative and dimensional characteristics discussed in Weber's ideal-type. Particularly, the approach regarding the worlds of law is of great relevance since it opened new space to analyse the law without ignoring its connections to social realities.

As far as China's labour and social protection legislation is concerned, we could identify not only a trend of formal legal rationalization that reaches a high degree of abstractness embodied by the universal concept of 'worker' which denotes all labour market participants regardless of their real social (labour) status, but also a parallel legal development along material and irrational lines that based on alternative solutions so as to meet very concrete issues relating to conflict resolution. The juxtaposition of different worlds of law doesn't necessarily goes against the rise of a 'market economy' which seeming advocates the rationalization of economic actors who should obey the 'natural' economic principles like individual will, freedom of contract, decline of state, etc. Rather, it's the very issue of how to envisage a new way that could breaks away from the paternalistic *danwei* system while meanwhile laid a foundation for new labour relation.

In doing so, state's intervention began to become frequent in a time when state firms detached their social functions in favour of market-oriented labour contract, labour law and social insurance are novel means developed from 1990s to meet the labour market coordination demands through the 'rule of law' though mostly in a rather abstract manner and complemented by material social policy aimed

at vulnerable workers. Although immature terms, lack of implementation, narrow coverage had led many to believe that China's labour law is 'soft' and unable to protect worker, labour law are developing so fast that many *danwei* style labour characteristics such as long-term contract and comprehensive social insurance are seeming re-emerging. As a matter of fact, labour law is evolving in the name of 'constructing harmonious' society in which labour relation is an important part.

Apart from the general spirit of the 'rule of law', many concrete measures have been underlined as means to foster a market labour environment. Migrant workers and other informal workers alike are particularly focused as their labour rights are regularly violated due to the absence of legal jurisdiction. Both Labour Contract Law and Social Insurance Law ensured a formalization of informal labour by imposing some 'irrational' and 'material' terms that go against the freedom of parties to certain degree, on the other hand growing labour conciliation and arbitration activities are seen as developed institutional capacities for both state and individuals to address social injustice in a practical way as compared with formal legal procedure. It's in this context that the labour law is becoming a recognized normative framework to regulate labour relation without ignoring its material and irrational dimensions as it becomes inclusive and practical in delivering social justice at a more closer distance.

5.2 Development as freedom: Capability matters

If the sociology of law shows us with a multiple stances and possibilities that a certain kind of law can exhibits, the approach developed by Indian Noble laureate economist Amartya Sen is another theoretical insight to which we can know how institutions like law can be a 'conversion factor' that changes people's real freedom. According to Sen, the obstacle to the freedom is basically associated to the deprivation of entitlements to some good, rather than the absence of good itself (Sen, 1983). Sen takes severe famine as an example to show that an authoritarian government can be blind to real situation and suppresses the circulation of truth. Also, Sen turns down the mainstream account of means (income, average GDP, etc.) as core factor in determining one's welfare condition in a given society by pointing out a set of international comparisons to show that means doesn't necessarily reflects one's real *capability*. For instance, African Americans are clearly well off than most Asians (Chinese, Indians, etc.) in terms of absolute income, however, African Americans suffer from higher mortality rate than people from these relatively poor economies. In fact, providing basic healthcare for all is not a priority in American society (before the Obama Care) while this is weighted as an indispensable issue (as basic human right or of public interest) in most European countries, China, or in some states in India like Kerala. As such, it's no strange to observe that people with more income can still fall behind considerably when considering some basic human living criteria. If we return to

Asia where a number of countries started to adopt economic reform to develop more economic opportunities for individuals, the reason why some Eastern Asian countries are doing remarkably well than India lied in the fact that social facilities (good health care, literacy, basic education, etc.) that support individuals to fully take advantage of the opened market in Eastern Asian countries are more developed. Thus, the capability is a kind of freedom: the substantive freedom to achieve whatever values or goals he or she has good reason to value (Sen, 1985).

The astonishing difference between income poverty and capability poverty leads us to reconsider the real meaning of welfare state when asking about what are the real effects that a market reform brings about as to the changing of welfare state in countries like post-reform China. Rather than considering the income (means) as key, more relevant questioning would be the lives people can actually lead and the freedoms they do actually have (Sen, 1999:92). As our attention has been, by virtue of Sen's insights, shifted from means inequality to the inequality of substantive capabilities, it is reasonable for us to ask what is the key factor that can really affect one's real capability and furthermore we should ask how the evolution of social institution changes what people can do and what they are allowed to do. Apparently, the development of labour law in China is playing a considerable role in re-framing the industrial relations among stakeholders by giving more capabilities to workers to claim for defined rights. For this reason, it is essential to know what law can mean when people decide to action according to law and how law changes people's cognitive framework by bringing forth information that sustain one's logic (or reason) of deliberation.

5.2.1 Informational basis and capability evaluating

The capability approach opens a new (normative) dimension of analysis when it comes to the foundation of welfare study. Sen actually challenges the very core notion of the criteria when comparing people's well-being based on conventional wisdom. In contrast to the classical concept of utility that is defined as accomplished happiness and desire (or in modern version as numerical representation of a person's preference), Sen believes that utilitarianism failed to realize the true relation between income and well-being. Sen considers well-being as heterogeneous and diversified since the real freedom as an end depends heavily on the capabilities to choose a life one has reason to value. For example, 'rich people who fasts may have the same functioning achievement in terms of eating or nourishment as a destitute person who is forced to starve, but the first person does have a different 'capability set' than the second because the first can choose to eat well and be well nourished in a way the second cannot' (Sen, 1999:75). The distance between the 'things that a person does and the things a person is substantively free to do' is sometimes so remote that leads us to shift focus to a

normative dimension that brings forth discussions about under what forms and how people's real capabilities have been created or changed over time.

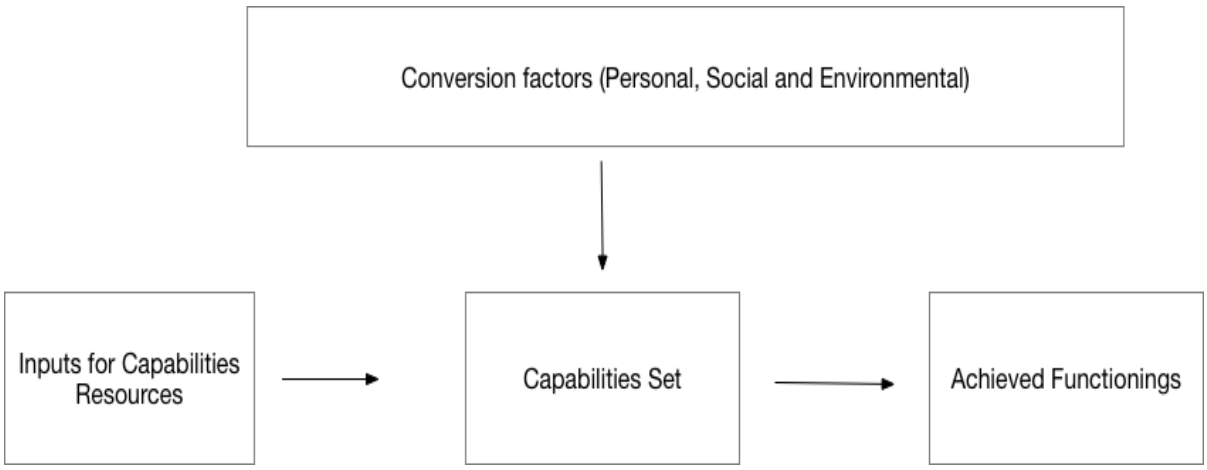
Difficulties in evaluating one's status of well-being should be addressed by introducing informationally rich methods. When criticizing Rawls's theory of justice, Sen considers that the mainstream theory of social justice is so far from social reality as it relied heavily on the presupposed assumptions and logic deduction from a perfect ideal social justice condition (primary goods as defined by Rwals). Sen argues that in order to know precisely one's capability, it's essential that a shift away from means-based approach to capability deprivation takes place. In labour and social protection domain, what matters with the perspective of informational based approach is what a person can do (e.g. to claim labour and social rights) with the endowed resources (both material and normative) over which she or he command. Take labour law as an example, informational base lie in the substantive legal terms and procedures which created many new possibilities and effective ways for people to action and engage. This has been especially the case in the European legislations in promoting social dialogue through new legal mechanisms like the Directive on European Work Council and the Directive on Information and Consultation of Workers (Salais and Villeneuve, 2004). These legal tools helped workers to directly express concerns over firm's strategic issues such as restructuration and working condition through a legally binding manner (representation, information disclosure, tripartite negotiation, etc.), thus workers become more relevant, rather than only passively contesting compensation, when they participate to the discussion of the future of firm (Didry, 2013). In a similar way, the production of labour laws in China ushered a great campaign for the rule of law, though law system is difficult for many to fully understand or to take advantage of, it has an effect to offer a framework whereby people can develop their strategies because of different causes behind. Thus, informational basis like laws can be a good starting point from which we can observe how people take to action within a framework.

5.2.2 Conversion factors: enabling and facilitating

Sen's insights on means and capabilities show that equally distributed resources don't lead to equal achievement as capabilities may vary from person to person, and thus affect one's ability in converting disposable resources (commodities) into functioning (utility). To make sense of the conversion process, Sen frequently use the example of bicycle riding by illustrating the individual conversion factors, social conversion factors and environmental factors that can be found everywhere in a given society through its formal or informal institutions. Because people generally don't have the same abilities to convert the same bundle of resources into functioning that they have reason to value,

social and environmental conversion factors should address the diverse characteristics and circumstances of a person with more concrete arrangements. The process of conversion can be influenced by personal, social and environment conversion factors or the interwoven effect of these factors as a whole because personal factors such as working skill and social ability to action are closely associated with social factors such as education or healthcare systems. In addition, conversion is also an informationally demanding process which reflects the differentiated abilities and capabilities that each person exhibit, it's inevitable that people face different constraints and thus the diversity and heterogeneity should be addressed accordingly.

Figure 4. Conversion Process in Sen's Capability Approach



Source: Sen, (1985, 1999)

If associate Sen's approach to the social functioning of law as explained in the approach of worlds of law, we may argue that law as a fundamental social institution (as normative environment) has the effects of 'enabling and facilitating' that drives the conversion process (hindering or enabling) in a way that people can qualified themselves, by virtue of law, as legitimate actors to pursue the things they have reason to value. This process can be regarded as enhancing capabilities through the 'active

agency' which refers to the practical steps and actions that a person takes to achieve goals (Hvindan and Halversen, 2017). Basically, the rule of law offers a highly institutionalized environment in which interpersonal interactions and exchanges are stably regulated and can become continuous with potential modifications. State is particularly active and important in creating and enforcing formal institutions such as legal systems. Take China's labour legislations as an example, labour-related laws are becoming increasingly significant in converting capabilities for people who are historically deprived of being protected by labour and welfare state arrangements.

Although labour standard is generally improving fast in China, capabilities conversion may be more than complicated as the mobilization of law entails a mix of complexity in which concrete solutions are very often subjected to the contingent situations. For instance, the famous Nanhai Honda strike that took place in 2010 (Chang, 2013b) is widely known for its success in achieving a balance between worker's claim for raising wage and employer's interest in resuming production. The event ended up with raising wage in a considerable manner. Although the plant didn't violate the minimum wage set by government, it was the huge internal wage inequality between assembly line workers and Japanese managers triggered the movement. The role of labour law was less significant in advancing negotiation as plant management was willing to negotiate. In another strike in the same area, in 2014 strike took place in a shoe factory (named Yuyuan shoe manufacturing, contracting for Nike, Adidas, etc.) where workers claiming for social insurance right as employer didn't fully pay the social insurance contribution.[48] Despite employer's concession to correct social insurance contribution, raising wage considerably (real concern for many) was not achieved as Honda strike did. In a word, law can may a key conversion factor in creating capability, while the effects of mobilizing labour law are subjected to the quality of agency. Access to law may differ from person to person as heterogeneous causes continually affect people's preferences and choice, thus law becomes reflexive when it has been mobilized in an institutional learning process (Didry *et al.*, 2014).

5.3 Capability building: legalism and devised opportunities

As demonstrated in previous chapters, the real world of labour law in China is characterized by the increased use of legal regulation on labour through market mechanism like contract and flexible labour market solution to deal with vulnerable social groups. On the other hand, national legislative

[48] Although many workers went to strike for different reasons (e.g. raise of wages, improve of working conditions, or only to express grievance that has been ignored by employer for so long), social insurance right has been chosen as a most legitimate cause that would generates wider attention as violation of law is generally considered as inacceptable. Nevertheless, many are unwilling to accept if they have to pay for the personal social insurance contribution part while their genuine agenda in demanding (take home) wage increase fails.

activities and the regulation by law are more intensified than ever before, state's presence becomes strong and compelling as sound labour standards imposed by Labour Contract Law and Social Insurance Law intervene directly into firm's labour management. This unprecedented trend has brought about many changes that is reshaping China's labour, particularly What we are seeing is a rudiment of standard labour relation that resonates to *danwei* paternalistic welfare.

5.3.1 Enhanced law enforcements: formal institutions in charge of labour governance

A direct result of the rise of labour-related law is the emerging formal institutions of labour governance at all levels. We have seen an establishment of horizontal management of labour issues: everything from labour inspection, social insurance agency, to labour arbitration commission. These new institutional settings are seen as supporting measures that assure labour legislations can be enforced in a juridical manner. The emphasis of rule of law embodies state's determination of becoming a regulator, rather than a central planer during the past time, who governs in terms of law. The central leadership considers the rule of law compatible with the general direction set in the overarching agenda of 'socialist market economy' in which market should work with modern law (Didry et Wu, 2010).

It's in this context that labour governance started to become a public issue (or problem) that local authorities should confront. In the case of labour inspection, workers have the right to report or lodge a case at local labour inspection branch and the latter is obliged to give an official answer based on legal investigations. Violations should be corrected by legal enforcements. Issues like non-labour contract, non-social insurance, refuse to pay overtime, etc. are frequent topics of complaint.

Despite the institutional achievements, China's labour governance is suffering from several shortcomings though. Insufficient enforcements have been documented as a sign of deliberative soft enforcement which makes China's labour law less credible. Labour law enforcement is said to cater local authorities' efforts in creating friendly business environment that attracts external investment to the region. Labour law enforcement at local level lacks enough autonomy to fully conduct enforcement action as prescribed by law (Zhuang and Ngok, 2014).

5.3.2 Engaging and protection: from deprivation to enhanced capability

As articulated by Sen and others, capabilities building depends on various factors ranging from one's initial state to the policy input. The most innovative aspect of Sen's approach lies in its analytical perspective based on the real capability as he regards one's state of real freedom of doing as key of evaluating social policy. While mainstream scholars have been constantly debating about how China's

labour law is evolving and its shortcomings (imperfection) when practiced, Sen's approach allows us to ask many more about how law can help people to achieve 'valuable functioning' and make real difference compared to the past when law had nothing to do with labour politics.

China's labour transformation towards the rule of law enabled a shift of labour politics from the one based on socialist paternalism to the universal legal order. With the law, people can freely choose to invoke legal terms to claim their rights or not. Despite a deliberate ignorance due to *hukou* issue, Chinese workers (particularly migrant workers) can mobilize legal weapon so as to be treated equally. This relates to two aspects of Sen's approach: informational basis and opportunity. Informational basis gives a comprehensive evaluation of one's actual situation. A person chooses to fast ends up in the same situation with a person suffers from starvation, but the former is completely different from the later in that the person who fasts can choose between eating and fasting while the latter has no choice but to endure hunger. We may again take vulnerable labour as an example: if a migrant worker has a higher income but is denied of social welfare such as pension or healthcare, then the person may not necessarily be seen as being well-off, compared to workers who benefits from comprehensive social welfare that can minimize one's life-long risks. As argued constantly by Sen, the capability approach looks more at 'what people is in fact able to do, whether or not she chooses to make use of that opportunity' (Sen, 2009: 235).

Labour contract and its subsequent affiliation of social security may be seen as a broader institutional achievement, besides its material aspect of granting workers with more benefits, but also because of its normative dimension in instituting new capabilities for those who need more other than cash income. To sign a labour contract means a worker is formally protected by law, even though employee choose to stay informal, worker can invoke law to contest right latterly.

5.3.3 Resource of acting: Three main ways of contesting

While positive institutional capacity has been built in virtue of new legislations that favours labour in general, the real capacity gained by each individual (or the quality) can be particularly heterogeneous given different contextualized situations. By 'real capability gained' we mean what people can actually do with the laws in their hands. Should they pick-up the 'legal weapon' immediately to defend for themselves? What are their real preoccupations when they get into legal case? The reasons behind can be various because of a plurality of different features of our lives and concerns: at times the sense of getting justice dominates people's behaviours as they exhausted themselves by going through all possible legal procedures in order to get the final justice at whatever costs (time, money, reputation, etc.), while more often people seek for material and practical solutions which compensate what they

consider as 'not bad' or 'almost', 'so-so'. Apart from this, mobilizing law can also bring about normative implications that relates to one's social status. Say, a worker with a claim of formal labour contract is actually the one who tries to say no to labour market informalization (either forced by employer or by one's own volition) and ask for corresponding welfare entitlements that a formal labour contract entails. In the case of migrant worker, to claim social security right may lead to a financial loss as once recognized as employee, one should pay social contribution that many consider as too 'expensive', however claims with labour contract and social contribution amounts to a transformation of social status that money can't buy.

What we can see from the real capacity gained through the mobilization of law is not how much utilities people can earn (material compensation), but, in line with Sen's approach, that the real freedom (the capability of doing something one values). The reach of people's actions should not be unidimensional, only dominated by the material resource. However, the extent to which people can benefit from the opportunities differed greatly as we will soon show in the next chapter. In order to develop the capability, workers are given three main ways of contesting include:

1) *Labour Inspection*. The main goal of the establishment of labour inspection lie in state's determination in effectively implementing labour law. In contrast to Western counterparts, Chinese labour inspection is an affiliated administrative function oversaw by local government. Workers can lodge complaints against employer when they find the evidence of law violation, however, labour inspectors' reach is limited as they can only issue a small fine and a notice of rectification. Inspectors are considered as the frontline watchdog of labour rights, but their actions are more passive than active in reality.
2) *Labour arbitration commission*. Arbitration was a renewed program aiming at solving dispute around labour issues within the firm. Initially, it was a supporting program to the labour market reform in state firms. Labour arbitration was not that important during the 'market turn period' but has gained currency as more labour legislations came into the field. It was in the year of 2008 that labour arbitration became the focal point of labour dispute as the law set out clear rules of how to use labour arbitration to defend rights, it also stipulates how a legal binding process on how a labour dispute should be handled. Today, arbitration is seen as a key to address labour conflict as the mediation process performed by arbitrator is particularly underlined by government as a means to neutralize conflict.
3) *People's court*. This is the most formal place to contest labour law in China. Cases related to labour issues are basically considered as civil dispute between parties, and thus labour trial is heard in civil court. Some particular cases (pensions, work accident) are treated by administrative court because governmental bodies in charge of social insurance intervene as

stakeholder. While people's court has the final decision on labour dispute, the supreme court limited the range of causes in an effort to transfer caseload to labour arbitration.

5.4 Conclusion

Douglas North defined, in his famous book, legal order as a 'humanly devised constraints on action', which goes against the common understanding of law as a mechanical reflection of economic development (Didry and Vincencini, 2011). This insight helps us to develop an alternative view on the changing dynamic of labour legislations in China. While mainstream scholars regard the constraints imposed by state in terms of labour as a Polanyi's double movement response to the unregulated marketization launched from 1980s, we found that his big picture is somewhat ambivalent and thus prevents us from knowing what are the real changes that are taking place in labour market coordination. Although it is apparently true that Chinese workers are better protected by labour laws facing rising risks generated in labour market, this is not because social protection mechanism is fighting back against market trend within mainstream's framework in which free market is evolving without regulation, what we have learnt is that labour laws are producing foundation so as to foster a market idea such as labour contract which defines what are the conditions a contract should meets and how people can engage when problems arise. This suggests that labour law is not by-product of market economy, but vice versa, labour law is the indispensable foundation upon which market economy can exist (Deakin, 2016).

Bear this understanding in mind, we can better comprehend the famous sociological argument made by Durkheim in his seminal work: 'The contract is not sufficient by itself, but is only possible because of the regulation of contracts, which is of social origin' (Durkheim, 1984: 162). As a social institution, law is an endogenous factor, rather than external constrains, in devising explanations and arguments that support one's expression of interest in a formal way. Laws impose binding rule on parties but most importantly, laws produce new capacities as accessible legal equipment whereby actors can claim to solve coordination problems prevail in labour market. Issues relating to labour contract and welfare provisions are becoming socially structured factors that are not solely an extra burden imposed from outside, but, rather as an integral part of the general pact of labour that constitutes the new notion of work in a so-called marketization era.

The capability approach developed by Sen offers an alternative evaluative devise other than traditional welfare analysis based only on the quantitative perspective. Capability approach also told us that means as input can be multiple as it can be material or non-material (Robeyns, 2005), our field

study in a Chinese city will be a case study by using the normative dimension of ‘Capability approach’ in an effort to analysing how people mobilizing law.

Part 2 Social insurance at work: Observing juridical cases from a sociological point of view

The worlds of law developed by Weberian sociology and Sen's capability approach allow us to examine how laws, as one of the most important social conversion factors, are actually being practised in concrete situations, such as in labour dispute activities. In our study, this general academic interest includes a set of questions that ask about: 1) How the legal rules that are formally defined are actually conceived by law enforcers (inspectors, arbitrators, judges, etc.) at concrete situations; 2) How the laws frame the labour and social protection issues by qualifying them into plural relations that span from individuals to governmental bodies; 3) Under what condition (formal procedures, ad hoc case, for example) people can engage to raise dispute to express their claims concerning coordination failure with their employers; 4) What are the strategies commonly employed by parties to address claims raised, both from litigants and government bodies. Thanks to the analytical framework discussed in the previous chapter, we are capable of raising these questions which lead us from abstract paper jurisprudence to tested social reality without taking the risk of a latent rupture between the former and later. The starting point is that the interaction of these two spheres should be understood in an integral way so that both the judicial causes and concrete context of a certain case can be clearly and practically reasoned. Conversion process, as defined by Sen's approach, is embodied here as a continuum of actions of legal mobilizations in order to achieve enhanced capability. The process takes the form of agency which should be seen as the outcome of institutional constructs, it's essential to uncover the extent to which laws, as an accepted social institution that forms people's cognitive mechanism in making sense out of the situations around them, can constrains or enables the converting process of capability building (Denzau and North, 1994).

In this part, we will, first of all, take a panoramic look at the main characteristics of the legal activities with relation to labour disputes at both national and regional level. We show how labour law dispute has become a rising preoccupation that attracts public attention. Then, in order to get a closer look, we focus on a coastal province where economic activities, in both public firms and private firms, are so dynamic that the caseload of labour dispute is constantly rising and thus causes major preoccupations among different stakeholders. Then, particular emphasis would be given to labour dispute cases formed by social insurance concerns such as social insurance contribution, pension

calculation and work accident dispute.[49] Meanwhile, parallel developments of state's capacity in dealing with labour issues also take place on the other side of this grand picture, we have witnessed a consolidated formal status granted to various legal and governmental settings at all levels who are playing a strengthened role in coordinating labour disputes within a broadening jurisdiction. This change takes the form of legalization of labour affaires that gives rise to a rapid rise of lawsuits among individuals and law enforcements or other parties alike. These cases bring together different stakeholders that are involved in a shared cause to which different legislations may apply (social insurance contribution can be either a labour law case between employee and employer or an administrative case between employer and governmental body in charge of social insurance management, for example). This multiple nature of cases offers the possibility to understand how claims on social insurance become a means (or a legal action technically) for people, whatever their labour market conditions are, to express their conventional expectations while coordinating economic activities (Diaz-Bone *et al.*, 2015). By illustrating and analysing the cases debated within legal institutions, we show that how different stakeholders engage lawsuits and what are their strategies and reasons when they take actions. As such, we intend to construct a potential labour case typology that features the labour dispute mechanism in China today.

[49] As we will see afterwards, social insurance claims are oftentimes partly incorporated into a labour case as a primary or secondary demand, they go hand-in-hand with other claims such as confirmation of labour contract or non-payment of outstanding salaries. This is why we select labour cases as the access to social insurance dispute.

Chapter 6 Labour dispute: litigations, numbers and causes

Despite a continuous practise of labour mediation and arbitration activities within state sector dating from the very beginning of labour contract reform in 1980s, the significant rise of labour dispute registers, from the 'year of social legislation',[50] is a relatively new phenomenon and thus provoked an unprecedented public enthusiasm in debating labour law *weiquan*.[51] As mentioned in the previous chapter, the delivery of pro-labour terms stipulated in the Labour Contract Law and Labour Dispute Mediation and Arbitration Law has greatly simplified the legal procedures and lowered the access threshold by extending the jurisdiction of labour law application to all labour market participants. Legal instruments and procedures become more favourable to those who are ill-placed in labour relation before. First of all, it's free to lodge a labour dispute demand and the burden of proof is on the employer provided that employee has no access to key proof.[52] The proof adverse made it much easier for claimants to demand a confirmation of a formal labour relation, this is especially significant for people working in informal condition since formal labour relation becomes evidence-based. Vulnerable groups such as migrant workers are the main beneficiaries because laws are more accessible and inclusive than ever before, *hukou* and *danwei* constraints become much less relevant as the core criteria of defining one's labour and social protection rights has been progressively transferred from status related issues to labour contract related tests. As a result, caseload of labour dispute has soared compared to previous year (Figure 6.1). Moreover, the advent of the World Economic Crisis in 2008 aggravated the labour situation due to the difficulties encountered by many export-orientated private firms located in eastern coastal areas where migrant workers constitute the main workforce in private sector. Closure of many low-end product plants resulted in rising claims on outstanding salaries.

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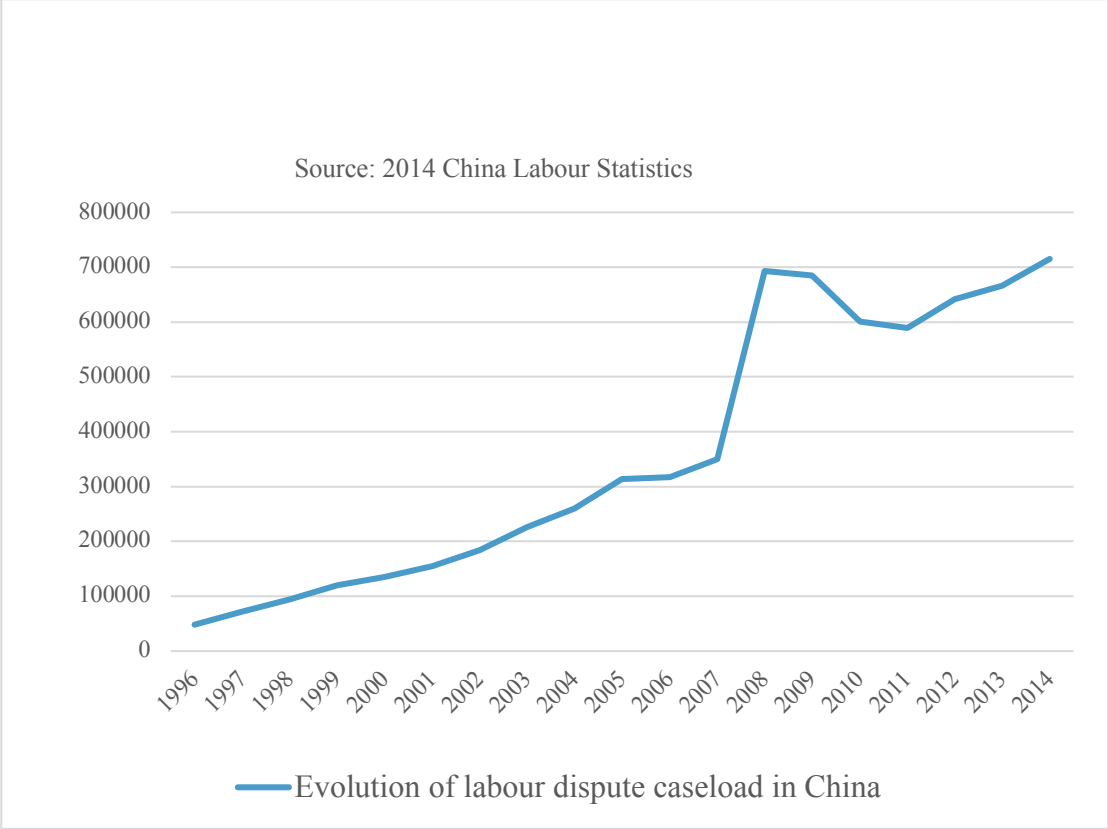
[50] Many labour observers consider 2007 as 'Social legislation year' because three landmark labour related laws were passed that year. Labour Contract Law (29 June 2007), Employment Promotion Law (30 August 2007), Labour Dispute Mediation and Arbitration Law (29 December 2007).

[51] *Weiquan* refers to the Chinese expression of 'defending one's right', the term is widely known, through governmental or media propaganda, as a legal act of launching formal dispute regarding labour rights, and thus becomes a widely accepted concept, governments usually encourage *weiquan* within formal procedure.

[52] Normally in a civil litigation, the burden of proof is on those who claim, however this general equal principle doesn't apply to claimant in labour relation. According to Labour Mediation and Arbitration Law, 'If the proofs are held by employers, they should give that proof to trail or they shall bear unfavourable consequences.' (Article 6)

Figure 5. Evolution of labour dispute caseload in China (1996-2014)



Among the rising cases, labour mediation and arbitration commission is becoming a focal point as it's the first 'station' that any labour dispute should go through. In a time of crisis, arbitration becomes a place where stakeholders met to figure out effective solutions.

Behind the numbers of labour dispute lied the changing economic context and employment practice which brought about new reasons and causes that drive people to act, with the new acquired judicial disposition. While numbers do show that people are using law to claim more frequently than before, little is known about how people engaged in law, how people frame the legal terms and translate them into legal actions that qualify themselves in terms of concept, principle, or strategy.

Based on a deeper investigation conduct in an eastern coastal province in China, we have been able to get data includes not only statistical numbers concerning labour dispute in general, but also onsite observations and semi-open interviews in particular. We also collect a body of official working report and white papers in an effort to do content analysis. As a result of the commitment to open governmental information to public, the judgement of litigations and cases are so easy to be found on-line, we can collect relevant cases in a given period as a simple context to be 1familiar with how a labour law case should be started, such as claims, evidence, procedures, etc. Then we can start our field investigation with people actually engaged within lawsuits. In total, we have met around 30 people including labour arbitrators, labour inspectors, judges in people's court, litigants (workers),

firm management (human resource agent, foremen), lawyers, etc. Some 60 interviews have been done at various places.[53] Interviews give us something important, such as people's idea and preferred language that we wound not have the chance to find in formal judicial judgement. Another important reason lies in the use of mediation as a means to resolve dispute since many disputes have been mediated before getting into arbitration or judgement. The conduct of a mediation relies heavily on communication between parties who often act strategically according to circumstances. As such, we believe that a combination of numbers and speech might be more advantage to deliver a nuanced explanation which makes sense of the people who are engaging in law.

6.1 Economic changes and labour market structure

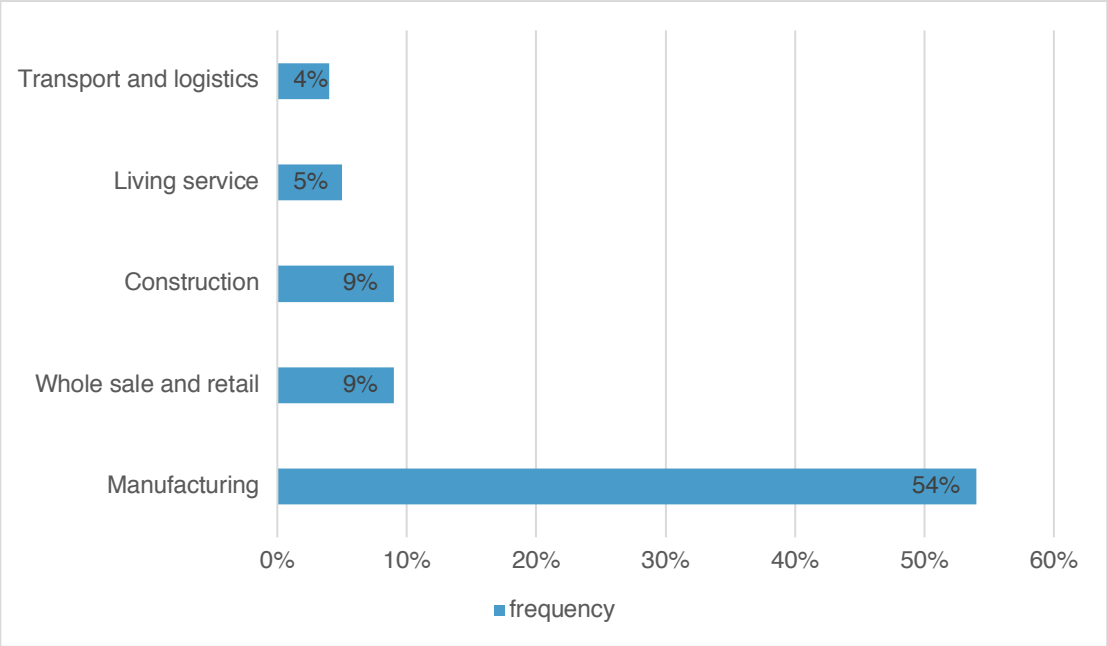
In Hangzhou where we conducted our investigation, the non-public sector is relatively large in size and characterized by some 62000 private firms who operate across different sectors, this represents 59.2% Gross Domestic Product (GDP) created each year in this metropolitan area. While it's groundless to estimate that private firms are born to violate labour laws, it's true that many labour law disputes come from private sector and non-public firms mainly, at least statistically. Private sector is important as it creates as much as jobs that absorb incoming migrant labour force every year, this is probably the very reason that the official unemployment rate remains low compared to Western counterparts. Private firms, they become vital in securing economic growth because of their strength in transforming rural labour force into modern industrial workers. However, private firms are normally small in size and thus lacks good management practices which caused potential labour risks. In small and medium private firms, labour mobility remains relatively high as low skill jobs and economic uncertainties forced firms to keep labour cost as low as possible. Moreover, the region of Hangzhou and its surrounding area like Ningbo and Wenzhou constructed the central economic zone in Zhejiang province which is famous for its export-oriented economy characterised by private small and medium size manufacture workshops. Although the regional industrial production is generally considered as competitive at global level, the 2008 World Economic Crisis affected seriously the region (though less serious than regions like Guangdong) due to the decline of foreigner orders. While industry is upgrading in virtue of new economy such as Internet-based knowledge economy and the appearance of high-end manufacturing, the majority of firms remained low-value added ones as compared to advanced economies.

[53] A more detailed description of field study design will be given in the next section before we start go into case analysis.

On the other hand, though employment is dynamic, only 12% people in the labour market have attended tertiary education, the ratio of skilled workers is still very low and low skilled employment is the dominant form of labour, particularly in Ningbo and Wenzhou where private small workshops fulfilled by migrant workers are the classical type of manufacture named 'Made in China'. Although the official general unemployment rate remains very low (between 2% and 4% historically), facing with economic crisis and industry upgrading, employment is becoming more vulnerable than ever since there exist a structural discrepancy in terms of the shortage of skilled workers and surplus abundant low-skill workers.[54] To sum up, low-skilled employment as the form of employment in the region constituted a main pillar to foster a manufacturing economy characterized by small and medium private firms which found itself in a tough situation given the global context. In a white paper published by Zhejiang labour mediation and arbitration commission, official pointed out that in the aftermath of World Economic Crisis, labour disputes were particularly concentrated in private sector in which 85% labour disputes took place, while the rest 15% of labour affaires took place in state sector.[55] It can be appropriate to conclude that precarious and insecure jobs in low-end firms in difficulties should be the main reason labour dispute broke out.

[54] See Zhejiang Statistical Year book 2015, 2016, http://tjj.zj.gov.cn//tjsj/tjnj/; 'The Transformation of Employment in Zhejiang and Its Relation to Industrial Structure', Zhejiang Statistical Bureau, http://tjj.zj.gov.cn//ztzl/lcpc/rkpc/dlc/ktxb/201408/P020140828536851189668.pdf.
[55] White Paper of Labour Dispute in Zhejiang, Zhejiang Labour Mediation and Arbitration Commission.

Figure 6. Labour dispute distribution in terms of industrial sectors



Source: Estimation based on datasets of China Judgements online, China Labour Law, Itslaw, WuSong law cases.[56]

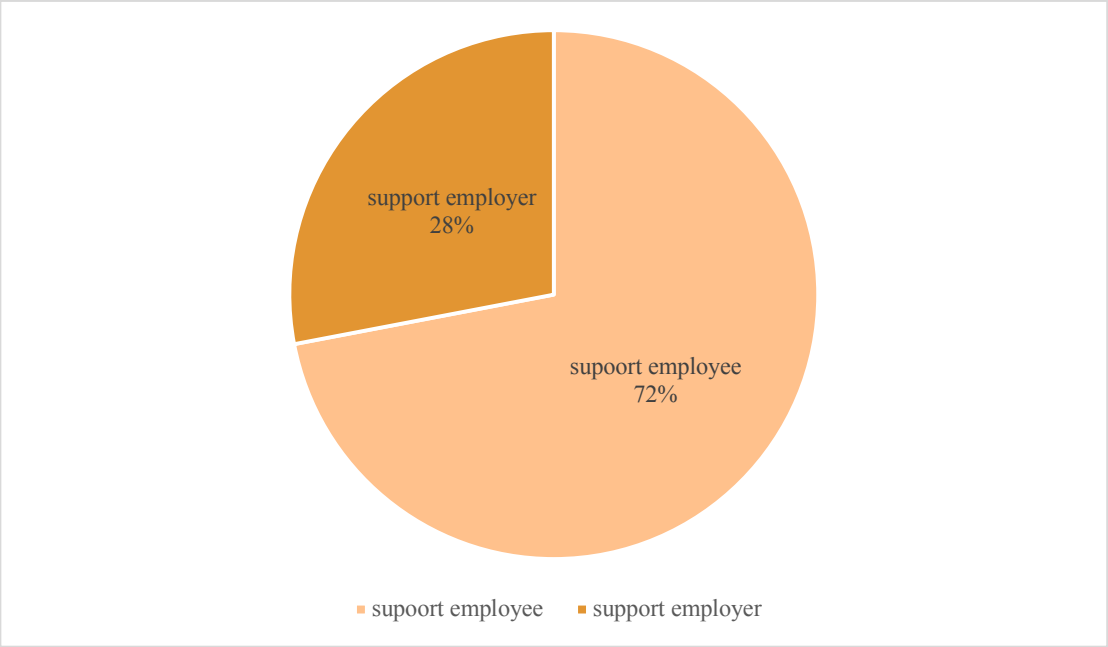
Precarious labour marked by job insecurity is seen as a main reason that social insurance is repeatedly violated in private sector. In many small private businesses like service and manufacture workshops, labour condition is marked by a high mobility because of frequent change between jobs. According to our investigation and common understanding, while state and big firms featured a relatively stable job security, the labour mobility is much higher among migrant workers who shift jobs between companies and workshops, and this is particularly so in small and precarious service business like restaurant, transport, logistics, commerce, or other living-related shops. Employment in this sector is remarkably unstable as wage has been limited in very low level and labour protection like social insurance is generally out of reach. These kind of unstable 'mini jobs' are generally regarded as informal employment as compared to formal ones. Chinese conventionally conceive informal jobs as the source of life uncertainty which should be avoided, this is one of the reasons that urban residents generally refused informal job offers and seek to stable life-long jobs as much as possible. On the other hand, as informal jobs become more widespread, job precariousness is creating new momentum because of labour disputes. For many who go to labour arbitration and court, precariousness previously

[56] WuSong law cases is a start-up firm specializing in big data and AI that have been applied in the data mining of legal data set, helping legal-related people to visualize legal cases.

excludes them from 'formal' world now becomes the very cause which enables them to take actions that change their situations.

In 2016, in area of Hangzhou, around 400 cases have been proceeded to second instance in people's court (last instance) which means that parties refused mediation and oppose to the result of arbitration and first instance court. After second instance hearing, employers' claims are much less supported by the courts. Only 28% of employer's claims were supported by judges, while employees' claims for labour right are more likely to be supported in the court with a win rate of 72%. This result corresponds to the general trend at national level that employees get greater chance to win dispute in labour arbitration and court. At a glance, legal terms and their successive results show that informal labour is actively engaged in invoking legal terms as ways to address job precariousness.

Figure 7. Case supported by court



Source: Estimation based on datasets of China Judgements online, China Labour Law, Itslaw, WuSong law cases.

Yet, cases won by employees does not necessarily lead to the full achievement of the claimed labour standard floor (compensation, labour conditions, etc.). In fact, the average supported rights and compensation is around 50000 Yuan, while employees' average claim is 188275 Yuan. This significant difference could be explained by the following reasons: 1) Employees tend to over-claim the amount, particularly when they hire lawyers who normally adopt a ceiling compensation strategy (raise

claiming amount as much as possible because lawyers can charge more if they win big), recent years have seen cases with amount over 1 million Yuan in some extreme cases; 2) Employees include other irrelevant claims (civil responsibilities) into case, this is especially in cases relate to work accident in which litigants involved in traffic accident which causes major damage, this kind of case relates to firm's responsibility in ensuring job security; 3) Claims on double wage due to labour contract (employer refuse to sign labour contract or labour contract is not renewed correctly due to various reasons, and dispute around wage (employees like salesmen are paid by commission) are the main causes which significantly augment the claimed amount.

The rise of the trend of over-estimation and unrealistic claims made by employees has been identified by many courts as an unhealthy sign of vicious relation between parties. Worker tend to regard lodging labour dispute as an occasion to punish employers for long lasting predatory violation of labour law, while employers consider workers as outrageous and their actions as revenge. As we know in China's tradition, proceed to court to settle a dispute is seen as a total break, employees' legal action should be understood as an overwhelming sign of labour tension.

6.2 Causes and reasons: Terms that trigger litigation

It has been widely observed that labour dispute outburst as an immediate of economic difficulties and rigid terms by Labour Contract Law. Claims were expressed in a more formal way as they derived from legal terms which becoming restrictive in regulating employer's liabilities. One of the famous and sound legal term that aims at promoting formalization of labour lies in the article 82 of Labour Contract Law, which punishes firms who don't provide formal labour contract to workers at a cost of doubling monthly wage as wage compensations to workers. This article has been frequently invoked by workers who are refused of having formal labour contract. Thus, identifying and examining *de facto* labour relation becomes a central issue where labour contract is not present. Judging labour contract required evidence-based cross-examinations that show the real degree of substantive engagements of parties. Thus, legal confirmation of labour relation is central in deciding if parties fall under the jurisdiction of labour law. Moreover, social insurance right is getting more closely associated with labour contract as the 2013 Social Insurance Law defined labour contract as the unique gateway to get into comprehensive social insurance scheme. As a result, *hukou*'s negative effect embodied by institutional constraints on migrant workers as to social insurance participation has been officially removed. Because of the close interrelationship between labour contract and social insurance, we have seen a clear trend in which labour case convey multiple claims, such as claim simultaneously for

compensation of no labour contract, compensation of participation of social insurance, compensation of overtime payment or annul leave, etc.

Normative explanation is essential for those who, employed through agency, claim for compensation of work accident. Particularly because employer use agency labour as a means to avoid any direct labour costs related to considerable responsibilities.[57] Arbitrators and judges report that identify 'real' labour relation is becoming more challenging as through agency work the legal responsibility is separated from the place where subordination between parties really take place. Trade union is concerned with agency labour since it has grown significantly in the aftermath of 2008 law, they found that migrant workers working in the construction site, security guard working at entrance of a building, even a bank teller sitting behind bank counter, in a word, people working in operational posts in the forefront of service, they are more likely to be hired through labour agency (ACFTU, 2012).

Another cause frequently mobilized by litigants relates to the termination of contract due to the violation of labour law from employer (See Figure 6.4). In fact, the very motivation of terminating labour contract, by employee, lies in the considerable economic compensation that one can get if employer violates labour law as defined in Labour Contract Law (Article 38, 46). More precisely, employee is given the capability of terminating labour contract if employer fails to deliver an appropriate working condition and protection. This term alters the balance of power by endowing employee the initiative to punish employers if necessary. By triggering relevant terms, employees can get the violated right such as social contribution record and access, plus an economic compensation based on monthly wage.[58]

Coupled with double wage of no labour contract, firms and employer are becoming more legally risky if they try to violate labour contract and social contribution. Actually, the law punishes only employers even if it's employees' own willingness to not have labour contract and social insurance. There are already cases in which employees claim for social insurance even when employer can prove that it's employee' own initiative to abandon social contribution in exchange of taking home cash paid by employers. Thus, employers are required to pay overdue social contribution with no right of recourse to cash they paid to employee.

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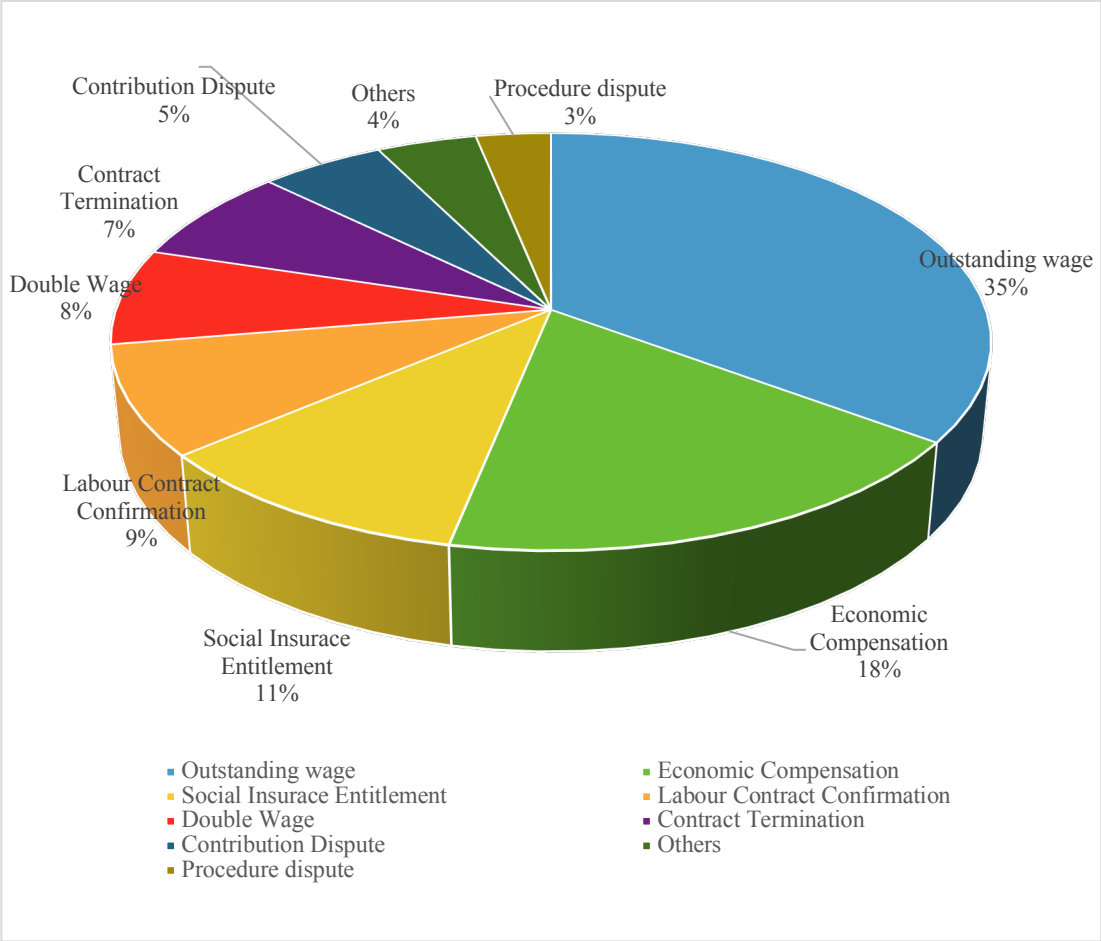
[57] In the operation of agency work, worker is hired by a human resource agency who hires out worker to a user firm. In many Asian countries, agency labour is referred to the term 'labour dispatch'. Generally, there exists no direct employment relation between user firm and agency worker, but law tries to regulate agency worker's right at workplace. See ILO, 2016: 7-10.

[58] Labour Contract Law precise the method of calculation as N+1, which means that if worker has worked three years in a same place, he or she can get compensation of about four months wages. The range of wage is set between 60% and 300% of average regional wage. See Article 47, Labour Contract Law.

Besides dispute between employer and employee, a number of litigations take the form of administrative dispute between citizen (people with labour issues) and governmental bodies like labour authorities. The number of this type of case is generally small but these cases are particularly relevant to social insurance practice as most cases involved in issues relating to how to translate one's legal right from abstract administrative definition to material entitlements. In order to achieve the principle goal that has been set up by legislations at national level, regional authorities specializing in labour issues have to form a body of regulations to address people with different situations. Getting pension is among the most important concerns because to decide a pension entitlement and calculate how much pension one should receive depends upon various criteria (policy test) that subjected to heterogeneous reasoning in many cases. For example, in the article 13 and 16 od Social Insurance Law, in order to be entitled to a state labour pension, one should meet the minimum 15 years of contribution record, both collected from employer and employee, state worker who started to work before the labour reform are given preferential treatment that recognizes their historical working records in *danwei* as legal record when they retired under new reformed scheme. This special arrangement has caused great difficulties in deciding one's 'legal' contribution records as local labour authority has to deal with pension applicant whose historical employment records are sometimes too fragmented that needs case-by-case study which includes in-depth debates about how one's personal historical file should be red, to answer test questions like what are the crucial moment (entry and exit to a *danwei*) that would be eventually subjected differently to the related rules, how much money one should pay for missing social contribution, etc.

Figure 8. Causes of litigations (Hangzhou)



Source: Estimation based on datasets of China Judgements online, China Labour Law, Itslaw, WuSong law case.

Another body of litigations is based on work accident claims which employers refuse to acknowledge. Firms, particularly those who didn't pay work accident insurance show their resistance to administrative decision by appealing and re-appealing to second instance court in an effort to hinder, intentionally or unintentionally, the legal procedure for worker to be compensated. Confirm a work accident is a technical issue which includes investigations that gathers evidences everything from police officers, hospital doctors, family members to colleagues, etc., and also intense debate about how to define a work accident during one's route to workplace (or caused by reasonable detour).

By interacting with governmental bodies in a legal manner, people can feel enhanced or deteriorated during the recourse (grievance) procedures within governmental bodies or court trial at court. In contrast to social partner management in many European welfare states, China's social

insurance system endowed governmental bodies the exclusive jurisdiction regarding social insurance routine management. At the core of these administrative cases, there is an explicit expression of demanding authorities' actions to implement law in a practical manner so as to deliver welfare entitlements. This made China's social insurance more policy-oriented in so far as the law at national level itself remained in general principle (or abstract) and governmental bodies are authorized to address detailed demand at regional level.

6.3 The changing dynamic of labour litigation: towards right conscious

Historically, labour disputes were dominated by cases like demanding unpaid or outstanding salaries, work accident compensation which were especially represented by migrant workers and other informal workers alike. For a long time, getting paid and due salary was the most central issue to which even high political leaders like China's premier ministers have been engaged personally.[59] The implementation of labour contract law improved the situation by imposing labour contract which stipulates rigid terms and conditions to parties involved. It has become more difficult to violate law as legal institution became fully fledged. Media exposure and political considerations usually lead to inspection campaign that fighting on outstanding wages, particularly in the construction sector where unpaid wage is a very common phenomenon.[60] Thus, pro-active way has been figured out as government requires project contractor to pay cash deposit before an approval of construction permit can be issued. In doing so, workers can have, at least, the guarantee of their wages (a part of) already in the hand of government before they started to work for contractor. This measure can minimize potential payment risks.

While employers face more restrictive legal constraints, workers armed with 'legal weapons' are more rights conscious. People begin to realize that labour law can do more. Statistical data shows that the focus of labour disputes has moving towards other area of topics: wage compensation, hire and fire, social insurance, welfare entitlement (holiday, vacation), employment equality, etc. Clearly defined right is of course a main reason that drives people to act, however, the ascending right conscious also proves that workers is becoming keener to job quality which is basically evaluated

[59] In 2003, Premier Minister Wen Jiabao helped a migrant worker to successfully get back the outstanding salary during his visit to Three Gorges Area. This symbolic action from high political leader provoked national attention to the labour condition of migrant workers. Even nowadays, outstanding salary is a renewed topic and Premier minister Li Keqiang repeatedly do the same job as his precedent did. See: http://news.sina.com.cn/c/2004-06-30/17313568725.shtml., http://news.creaders.net/china/2017/01/26/1778491.html.

[60] As politically sensitive issue, regional governments started to discovery new ways to ensure the in-time payment of wage for migrant workers working in construction sector, http://www.zhejiang.gov.cn/art/2017/5/31/art_12881_293042.html.

through the rights and welfares that one can have when accepting a job. To find a formal (with standard rights) job is a growing preoccupation among migrant

6.4 Field study conduct: pilot typology of conceptions and relations

Given the big and somewhat confused picture, it might be appropriate to choose a single place to know what happens with the enforcement of law in concrete situations. In order to achieve this goal, we investigated a set of places (labour arbitration commission, people's court, social insurance agency, workplace, etc.) and interviewed a number of representative people about their labour concerns and their previous engagements facing with labour-related coordination issues. Thus, we are able to record and document how they understand labour laws and why and in what conditions they take actions. The group of interviewees consists of people from various professions: government officials working in labour authorities, people involved in legal case, firm managers, legal professionals, etc.

In total, we have conducted 64 interviews during our whole research study in Hangzhou, of which we met with some people for several times because of their key positions (functions) in labour dispute. Stable relation with some key interviewees enabled us to visit and re-visit them over time, and this repeated encounter with them is actually a learning process in which we are able to test the conceptual notions learnt from written legal text, their answers guided us to re-examine our acquired knowledge, and enable us to approach new research dimension that can't be easily found by only reading law itself. Despite the fruitful reach, we have encountered unwillingness when asking questions that sound 'not comfortable' in several cases. For example, asking firm mangers about the labour law compliance can be tricky as they usually have no intention to share with you their business details, thus we failed to get first-hand data on how firm pay social insurance contribution. In social insurance bureau too, it's not possible to get the data on social contribution detail because the data is not listed as the information that government should disclose to public in the framework of information disclosure regulation. As regards to litigants, talking and discussing with them can be more relax as litigants are generally much more willing to share with you their experiences as to why they go to court and how they defend rights, etc. Moreover, meeting with litigants gives more opportunities to find new contacts as it's quite usual that they introduce your new friends with similar case.

Table 3. Field interview fact sheet

Type of litigant	How many (Persons in numbers)	How often (Interview frequency)
Labour arbitrator	6	18
Labour inspector	4	12
Court judge	2	2
Firm manager	3	5
Litigant	10	23
Lawyer	2	2
Social insurance agency officials	1	2

Source: Author

Most interviews we conduct are based on open questions which we consider less offensive because we firmly believe that issuing a structural questionnaire can be an unamiable act which is likely to generate resentments. During interview, we try to talk with our interviewee in a convivial way so that they can feel free to talk. As we know little about labour dispute before we entered into this field, we rely primarily on stories and discourses heard, having the actors to describe themselves can be a good way to get inspirations and directions. To be sure, we do want to collect information related to one's socio-economic background by asking directly questions about their professional trajectories, but in many cases my respondents seem reluctant to answer questions about their 'dark pages' or something they consider private.[61] However, we never intend to establish any causal relationship (extend of correlation and dependency) that can be tested by quantifiable hypothesis afterwards, the interviews we have are treated as qualitative resource

Before we entered into the field research stage, a pilot typology (figure) has been envisaged as a conceptual tool to approach the field destination where we operate our investigations. The aim of this

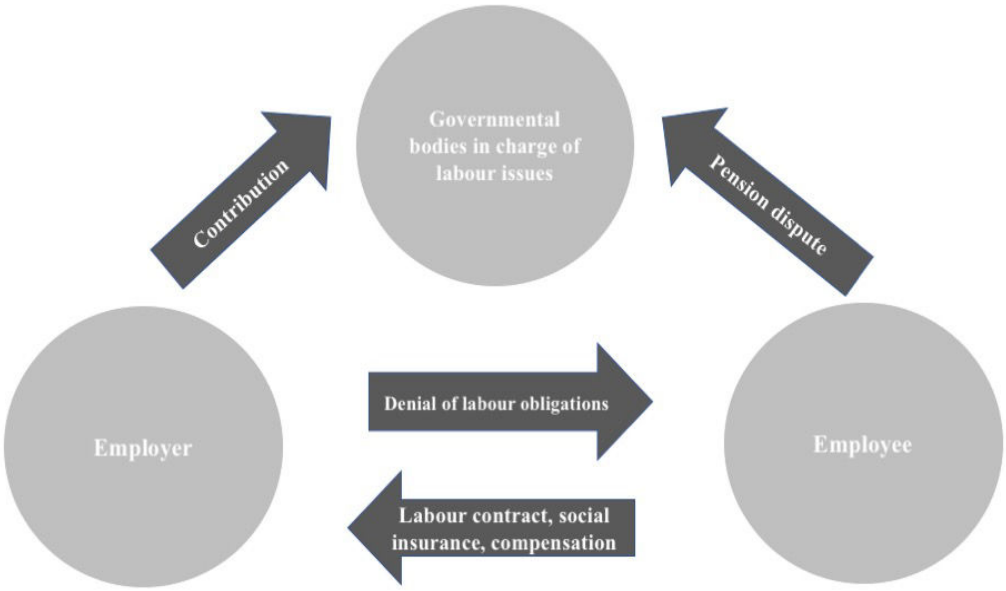
[61] As we are not necessarily being familiar with all interviewees, quality of interview normally depends on our relations with respondent.

typology is to grab a number of critical conceptions that are frequently invoked within legal affair, for example, 'labour contract' is a high frequency word appeared in every stage of labour affair because the word itself implies a legal test of interpersonal relation between an employee and employer. On the other hand, we can also find cases labelled as 'administrative' ones, which involve an administrative counterpart (e.g. a retired worker or a pensioner) and an administrator (e.g. social insurance agency). Thus, two basic lines can be identified as different type of actors play their respective roles in a labour-related case. Moreover, a single case may include multiple relations as labour dispute involves public management because of its nature as 'social problem', the dispute about social insurance contribution can be a good example. Say, a worker found his employer failed to rightly claim the due social contribution. At first glance, it's obvious a case between an employee and an employer, arbitrator and court can labelled it as 'civil case' which fells under the jurisdiction of Labour Contract Law. Nevertheless, as we already know the social insurance scheme in China is a public insurance regime that requires mandatory contribution once employee enters into actual labour relation with employer, social insurance agency thus should be included in the case as third party who invokes Social Insurance Law as source to intervene.

Similar situation occurs in industrial accident cases as work accident is certified by the local labour bureau who classes workplace accident in terms of an evaluative scale from 0-10 degrees.[62] Any work accident should be reported within 48 hours. Investigation should be conducted by appointed bureau agent who looks into the case in a professional way before an official certification can be made. Without the certification delivered by labour bureau, one can't win compensation in arbitration process or court trail. In this way, work accident becomes an administrative issue rather than a civil one. Any discussion of civil dispute stems from the official report from administrative bodies, that's why cases with work accident cause are likely to have more chance of reviewing.

[62] Levels 1-4 signifies the complete loss of labour capacity, levels 5-6 refers 50% or more labour capacity loss, levels 7-10 means partial loss of labour capacity.

Figure 9. Pilot Typology of Labour Relation Among Principal Actors



Source: Author

The intervention of public forces as represented by labour authority's administrative activities is a relatively new phenomenon, as compared to *danwei* period, and its active role in defining labour issues has generated more and more (administrative) litigations. Civil case often overlaps with administrative case in that the investigation of former should be based on the result of the later as work accident case can shows. While workers get more power to act thanks to pro-labour law, law enforcements too, takes more responsibilities in addressing grievance from workers because labour laws as a social intervention into 'civil relation' has the effect of framing the maxim of actions. The interplay of parties confirms that labour cases has become a 'social issue', dispute around labour issues should be addressed in a conventional environment where legal process is represented by an array of administrative decisions on parties.

6.5 Data from courts

To procced the typology and schema mentioned above, it's indispensable that we construct a date corpus that consisted of labour dispute contents at the very beginning, as the corpus itself can served as a referential framework. Although many studies use labour statistics to indicate the general trend of disputes heard in court, we consider a structural understanding might be more pertinent since our

research interest lie in the reasons and drives of each case, in this way, we are able to find out the underlying dynamics that drives and shifts the paradigm of labour reasoning.

With the set goal, we have searched legal datasets that are open to public[63], on-line legal cases can be searched and reviewed freely. As the total number of cases at national level is massive, we applied some criterion to restrict the scope of data volume so that we can focus exclusively on the target region that was previously selected (i.e. Hangzhou city in Zhejiang region). We tried to search all cases with social insurance and labour dispute causes that have taken place within jurisdiction of Hangzhou city during a set period (2013-2017) as the case volume grows at a faster pace. With the help of existing dataset developed by China people's court, we have been able to capture judgements that one can hardly review before.

The aim of such an analysis based on dataset is to know 'what are the core pre-occupations expressed in a labour dispute', in another word, what are the driving causes that lead people to take legal actions against others. Also, we would like to know the distribution of causes across case type. We designate labour cases that have been heard in Hangzhou court system between 2013 and 2017,[64] we find that 8338 cases were proceeded with labour dispute causes. This means that all these cases were operated under, somehow, the jurisdiction of labour-related legislations.

As regards to administrative case, we find that in total 243 cases suing governmental bodies have been heard and judged between 2013 and 2017. Work accident dispute is the most representative cause as 93 cases related to the confirmation of work accident; the second largest caseload comes from the dispute around 'recognized working history' and 'pension calculation' as up to 30 cases fell into this category.

Based on this description of general trend of juridical activities, we can identify the critical reasons whereby people take to court, rather than accepting arbitrations. This also contributes to the formation of our pilot typology which summarize some of the most important relations that can be conceived by stakeholders involved.

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[63] As a public project of government information open, China's courts have gradually opened its legal judgements and other related information to public. Today, most legal cases can be searched and viewed through the website China Judgement Online, http://wenshu.court.gov.cn. However, cases with confidential information and successfully mediated cases are not open to public.

[64] By Hangzhou court system, we indicate all people's court branch operated in this region. Hangzhou intermediate court and branch court located in each district. Normally, a litigation begins at a branch court in the district, parties can appeal to intermediate court if they refuse to obey the decision of branch court.

6.6 Closer observation on sites: investigating legal activities

While conceptual typology and legal dataset can help us to be familiar with the structural characteristics of labour law and its implementation at regional level, it should be also noted that many labour cases have been terminated in early stage during labour arbitration process as mediation efforts are seen as preferential means to de-escalate conflict. In Labour Dispute Mediation and Arbitration Law, arbitrators are given legal responsibilities to mediate, as much as possible, dissymmetry expectations from two sides. Workers and employers are required to go through mediation and arbitration process before any court trial can takes place. In such process, law and its implementation become much more nuanced (complicated) than can be explicitly understood through paper text. The position of parties, acquired knowledge of laws and ad-hoc political considerations can intervene as non-legal factors that play significant role in navigating the development of case. If labour law is an (abstract) tool that most worker never considers ever before, mobilizing it can be a process in which one starts to know the real difference between a legal term writing in the text and its actual application in practice. This is certainly not to suggest that Chinese law is paper-tiger that doesn't in practice, admitting the gap between abstract legal idea and the practice it generates can help us to understand the real capability and the reach of labour laws. While labour law is helping workers to get more labour rights, the extent to which different people can benefit remains highly differentiated. That's the very reason why we are so convinced to immerse ourselves into the world of legal practice.

During our field study conducted in 2014 and 2015, we have reached a local labour arbitration branch in a northern administrative district in Hangzhou city thanks to our local network. The branch is responsible for daily implementation of labour mediation and arbitration law by responding to the grievance lodged by litigants, the local branch is seen as the 'forefront' where a small team of arbitrators (less than 20 persons) confronts with various labour disputes and conflicts ranging from wages, social insurances to work accident issues. As a constitutive part of local labour human resource and social insurance bureau, the branch is an administrative body by its nature, branch agents are generally considered as government employees working under the direction of local labour bureau.[65] Everyday branch agents working there translate abstract legal terms into understandable discourse in an effort to address increasing caseload, de-escalating conflict and promoting harmonious labour

[65] The status of civil servant in China is strictly regulated by China's Civil Servant Law, the recruitment process and head-count are set by annual plan. Many public-related professions such as school professors, hospital doctors, nurses and other type of employees are not included in Civil Servant Law. However, most employees working in these public institutions hold similar labour entitlements to civil servant, labour arbitrator is a profession that performs administrative function inside labour bureau. They are a part of public agents but not considered as civil servant as their colleagues in the bureau.

relation are a goal that both advocated by national law and local labour bureau. In a word, labour arbitration commission is not a third party who provides professional advices to parties in conflict, normally the commission does not include representatives or labour-related specialist, rather, it works in a way that is similar to other governmental bodies, arbitrators apply law like governmental official executing administrative orders. However, labour arbitrators have no legal binding power to execute a legal decision like court judge does, the arbitration award they grant can be reviewed (appealed) by court judge if parties refuse to obey. As one arbitrator puts it: 'we are a quasi-juridical institution because we apply labour law, but we are not judges'.

While many consider labour arbitration much less credible (or powerful) than court trial, legislators started to grant more final (legally binding power) decision power to arbitrators. This means that arbitrators can finalize a certain type of cases which claim smaller bid or social insurance demand[66], in this way, many small and simple cases may be terminated at an early stage so that people's court can release their increasing labour-related caseload. Given the skyrocketing labour dispute demands in the court, more emphasize has been put on the role that labour arbitration can play in dealing with frequent labour disputes.

This unique chance allows us, as academic researcher equipped with conceptual framework and abstract terms only, to step into the daily legal practice which mainstream scholars rarely know about. To take advantage of this field opportunity, we have visited the place six times in total, each time we spent a length of time (usually half day or one day) with labour arbitrators who constantly work with incoming cases. We have got the chance to take part, to some extent, in the daily operation of labour mediation and arbitration activities by looking not only at how labour dispute can be 'processed' in a standard way, but also how arbitrators would deal with special cases in a flexible way. Closer observations enabled us to know how labour mediation and arbitration can be done in face-to-face scenario. Besides direct observations, we selected a number of people as interviewees with whom we conduct semi-structured and unstructured interviews. We were allowed to review some arbitration case files but failed to get the official permission to use them as direct research material for research use. For this reason, we can't disclose any specific information (such as date, name, cause, working place, etc.) recorded in the files. Even so, it's still possible that we present the files in an anonymous way so that field material can be fully-fledged.

[66] Article 47 of Labour Mediation and Arbitration Law stipulates that 'case with a bid less than 12 month's wage' or 'case with social insurance cause' shall be terminated by labour arbitrators, only employee can appeal (employer must obey the result).

Figure 10. Field Study Tasks in Labour Arbitration Commission

Source: Author

In addition to arbitration, we also visited the bureau of labour inspection as they work together with arbitration commission in the same building, this made our investigation relatively easy because our pre-existing contacts can introduce us to their colleagues. Inspectors have to respond to complaints and grievances like arbitrators do, they receive telephone calls and on-site visitors who come to lodge complaints on labour violations. On the other hand, they have their own working agenda that is formed and shaped by 'key points' given by leaders from higher authorities. For example, in 'high seasons' (usually at the end of year and before spring festival), ensuring migrant workers to get paid is an absolute priority, inspectors are required to respond to complaint immediately as angers can leads to potential social unrest, onsite negotiation work they perform is critical to calm down conflict, while in 'low seasons', main working tasks include auditing labour contract and social insurance compliance. On several occasions, labour inspector is required to address issues in a way that reconciles political consideration and administrative rules (Zhuang, 2010). For instance, how to deal with a firm who violates labour law but meanwhile is seen as a key (critical) firm who creates plenty of jobs and brings about considerable tax revenue for the district, particularly when inspector finally get to know that the firm is experiencing some difficulties and will be good afterwards. How inspector can act is subjected

to a set of concerns that not only include formal rules but also the very reality that needs careful manoeuvre.

'in the district, many small firms are vulnerable to economic challenges, but they are start-ups and small size high-tech firms which are praised by political leadership, they create new jobs and represent the so-called new economy, if they violate labour law, we try to persuade employee to give employer more time to get over crisis, we also tell the employer that they can choose to give compensation to get the reconciliation rather than to be punished by law if their employees sue them… all in all, not to kill them…' (Interview, labour arbitrator)

Labour inspector suffers from obscure legal boundary and lack of administrative binding force. Despite clear jurisdiction of their reach, inspector's expertise (responsibilities) overlaps with other governmental bodies such as social insurance agency when it comes to social insurance contribution.[67] That's the reason why workers get the feeling of buck-passing when lodging complaint. Moreover, inspectors' administrative power is relatively limited as they can only issue an amendment notice or a fine (less than 20000 Yuan) but lacks substantial power (like police or court who can arrest people or confiscate assets). These shortcomings not only weaken inspectors' ability to act critically, but also shaped the forms of their action when facing complicated reality. By interviewing labour inspectors, we try to understand the underlying reason behind the gap between written law and its actual practice.

Lastly, we have taken part in court hearing at a district people's court as most case hearings are open to public. Legal activities in the court are highly institutionalized given the strict legal procedures, however, as there is no court specialized in labour issues, cases are classified either as civil case or as administrative one. Our primary goal is to know how people choose objects to which they claim rights, and what are the standard procedures to proceed a new case. We intend to know how judges communicate with litigants in when they debate about the subject in question. During court hearing, we have been able to get in touch with some litigants who share with us their experiences. Although we were not able to establish contact with judges, we are able to get familiar with the ways how judges follow the legal procedures.

Cases usually start with an information verification session which includes a cross check of litigants' personal information and the people they sue (employer or governmental bodies). In a civil case, to identify an employer requires examination based on several criteria as we will discuss very soon in the next section, while in an administrative case, who are responsible for litigants' claim is

[67] Labour Inspection Article allows inspector to deal with complaint about social insurance violation, however, Social Insurance Law (article. 63) stipulates that social insurance agency should be responsible for issues relate to social contribution compliance. In such a contradictory case, the effect of law is discounted as claimants can be trapped by excuses. In practice, labour inspectors are given the authority to correct illegal conduct by issuing administrative fine, but the effect is limited as they have no right to take coercive action against violation.

subjected to the legal jurisdiction stipulated by law. Judges invoke administrative law and interpretations of law to determine who should be responsible. A special case is that if a person sues employer due to violation of social insurance right, judges may refuse such demand, and suggest the person to sue labour authority in charge of social insurance issue. In reality, social insurance issues are complicated issues that involve different parties who has their own stake at various stage of social insurance management, thus suspending a case process is high likely if one fails to follow formal procedures. For example, work accident case derives from a conflict between employer (refuse to recognize work accident) and employee (no work accident insurance for worker), but to determine a work accident belongs to social insurance agency, disagreement on the facts relating to work accident may trigger a series of cases (both civil and administrative) which litigants consider exhausting.

Going to court normally represents a firm determination of parties who are not satisfied with mediation and arbitration, but in reality, most cases have been terminated well before law hearing. As one labour arbitrator told us that in his office, 'around 80% cases have been terminated through mediation and arbitration, only a small part goes to court trial'. For this reason, it's obviously key to know what kind of jobs arbitrators have done so as to neutralizing the conflict before they can reach to courts. This is why we have spent more time with labour arbitration commission.

Chapter 7. Escaping contract and social contribution: Strategy of the informal

Ideally, a standard labour relation starts with a formal labour contract based on labour-related legislations, however the violation of laws was routinely used as a means by employers to avoid labour-related cost so as to gain more profits. This is especially so in private sector where many workers are ill placed when discussing terms and conditions. The difficulties to conclude a formal standard labour contract can be explained for a number of reasons. For example, migrant workers are very often considered as under-educated workforce and thus much less equipped with legal knowledges to bargain with employers. Their weakened positions often preventing them from taking actions against employers who do not respect labour laws. On the other hand, many employers in private sector take advantage of this asymmetrical situation to avoid legal obligations. This lack of 'legal sense' was so common that most migrant workers just pick up any job possible when they firstly came to urban area to find a job, without discussing the legal terms and conditions. That's why employers always have the upper-hand when they have troubles with their employees. Government and official trade union are aware of this 'education problem', launching public campaign to disseminate labour law legislation knowledges become a routine work for many union officials. 'Know your legal rights', 'Use the law as the weapon' are famous slogans that are regularly underlined, legal aid stations have been set up to deliver free legal consultations. For instance, many official trade union cadres' daily mission is to organize legal consultation campaign when new legislations promulgated.

However, labour contract can be more sophisticatedly escaped as some employers choose to use intermediary, or more officially 'labour agency', to complicate the original or the so-called 'real' labour relation. Typical operation includes the sub-contracting system which prevents employers from undertaking direct labour protection obligation for employees who work actually working for them, but never for labour agency. Intermediary has been particularly invoked as a means to evade the rigid labour standard underlined in 2008 labour contract law. Even in state sector where formal standard labour relation dominated, using dispatched (agency) employees and workers is becoming a common practice. But, by contracting-out worker, firm is not exempted from liability as the direct subordination at workplace can lead judges to rule against employer if they fail to produce complete evidence.

Finally, deliberate ignorance or negotiated abdication of rights can also be observed in many labour disputes. This is especially the case among migrant workers or the so-called 'floating workers' who are ultra-flexible characterized by a high mobility between jobs and regions. Labour contract is

conceived, by them, as something restrictive since the formal labour relation would leads to social contribution obligation which both parties, employers and employees, are asked to contribute proportionally. In reality, people working in temporary jobs are more likely to be seduced by real income, for instance, the net cash income in hand, rather than by intangible labour right such as pension paid in far future. Although it is widely believed that the mindset of cash instead of rights is deep-seated among migrant workers, this deliberate abandon of labour rights can also be understood according to some institutional inertia which contributed to squeeze out those who are in uncertainty. For instance, one of the main impediments that discouraged migrants from taking part in social insurance lied in the portability problem because the social insurance scheme is regionally managed and thus transfer of right across regions is not easy and calculation of welfare provisions varies greatly sometimes.

Given all these factors mentioned above, we can turn into a nuanced explanatory framework by which we could exhibit and argue in what way people are involved in legal case with each other. During the hearing process, the very first thing is always to know what kind of relation between the litigants.

7.1 Labour relation: Identifying and Qualifying

During the labour dispute hearing process which we observed empirically, the very first thing for the judge to do is always to decide whether there exist solid evidences which manifest a formal labour relation as abstracted defined by labour laws. In practice, the existence of legal labour relation is seen as the starting point to get to apply labour-related legislations, however, the fact of delivering labour activity to other party does not necessarily lead to a standard labour relation as defined by labour contract law. In many cases, standard labour relation does not even exist despite written agreement signed by parties. For example, a carpenter agreed to work for a house owner to fabricate furniture, and get paid, in a daily basis, this kind of labour activity is more likely to be considered as equal exchange between parties who are free to choose independently. On the other hand, however, when someone deliveries labour activity in a more organized environment, for example, under direct or indirect conduct of others, to continually work and get paid, then labour law is more likely to become applicable. This general principle has been widely understood in the name of 'subordination' in the Western labour law development (Supiot, 2013), which suggests the fact that an employee is subjected to employer's power of direction and control and in return employee come under the scope of employment protection and social security legislation (Deakin, 2009:121). Though the degree of

subordination can be justified according to a number of criteria such as direct formal subordination or indirect but substantive subordination (e.g. a person is economically subordinated to some party).

Chinese legal system generally divides workforce into two main categories of worker and labour service provider. While the former is for sure fell under the jurisdiction of labour laws, the latter is likely to be more subjected to the rule of civil principles because to provide some labour service does not necessarily lead to formal labour relation.[68] For this reason, the first thing labour arbitrators and judges should deal with is to *identifying* facts whereby labour relation can be *qualified* between parties this test is a prerequisite before any further legal tests can takes place.

Qualification process is based on the evaluation of facts presented. Criteria can be diverse, but judges often refer to an evaluative framework based on a ministerial order issued by MOLSS ('Ministry of Labour and Social Security', as of 2008 renamed 'Ministry of Human Resource and Social Security') that set out an operational reference by which arbitrators and government officials can practically test the degree of subordination. The reference was constituted by a set of evidences among which the legal status of the employer as an entity, the substantive human management during the work and business, worker's activities are an indispensable part of employer's business are the most important signs to reveal the existence of labour subordination. Evidences include bulletin of salary, social insurance record, uniform, labour discipline, location of work, transaction of salary, testimony from colleague, etc. These items are integral parts that can constitute a whole picture of subordination that exits between parties.

Party who claims is generally required to produce all these supporting document, but in labour dispute exception is that if one of these evidences is held by employer (which means that employee has difficulty to get such information, e.g. attendance record, company payslip.), employer is equally responsible to provide. Arbitrators and judges are responsible to verify the authenticity of the evidences and conduct a logic analysis to judge if the evidences parties presented can be attributed to a chain of evidence. Nevertheless, labour relation can be more obscure when agency worker as an 'alternative' form intervenes. Agency worker in China is a type of contracting worker who is designated by labour agency to contracting firm. Agency employment is defined by law as a temporary, auxiliary or substitutive way that firm can resort to deal with unplanned or contingent labour demand,[69] it can't be the main form of employment in a given firm. However, in state sector and governments, agency workers are more becoming more frequent as a means to keep labour cost low. In this case, who is the

[68] In China, providing labour or other service based on liberal consent of parties and the freedom to decide how, when and where the work or service should be done is generally seen as labour service relation.
[69] See Labour Contract Law and Temporary Regulation on Labour Contracting, http://www.mohrss.gov.cn/gkml/xxgk/201401/t20140126_123297.htm.

real 'employer' and who are responsible for the labour and social responsibilities become focal points when debating law

In a labour contract dispute, *YinJiang Group vs. Chen Yuetong*, Mr. Chen, a construction worker signed a labour contract with an agency company and thus dispatched to a construction site where he got hurt due to a work accident for the *de facto* employer YinJiang Group. The worker demanded a confirmation of labour relation with the employer for whom he work, the employer insisted that the worker is dispatched by agency company and thus has nothing to do with them legally. Agency company also admitted that Mr. Chen was their dispatched worker. However, both of them failed to show solid evidence to indicate that they have signed contract with each other, nor can they prove social insurance record which should be a key to show who pays the contribution. Judge finally ruled that Mr. Chen has labour relation with YinJiang Group where he actually worked.[70] The case proved that the principle of subordination is at the core of legal practice of identifying labour relation.

Besides, new trend of work brought about by new technologies, such as digital-related internet application, is coming so fast that challenges the traditional labour relation definition. Shared economy is a good example since it blurs the explicit subordination link between employer and employee by introducing internet technologies such as mobile phone application to promote freelance or called-on work. In this case, people should work on their own means, for example, an Uber driver should work with his own car, to deliver the service to client with business information provided by company. Many other companies specializing in O2O (on-line to off-line) functioning in a same way. The separation of labour and direction (management) made the sharing economy a very controversial topic. Already there have been cases head in labour arbitration and in court. While some cases win with confirmation of labour relation between platform company and worker, others lose.[71] The judicial reactions towards new form of employment are subtle as long as China is pursuing a transformation through the combination of Internet and Industrial production. Using new (Digital) technology to upgrade industries and services is generally encouraged by government. Interestingly, the China's ministry of transport, in 2015, ran a public consultation of a draft regulation aimed at setting up rules to regulate

[70] *YinJiang Group vs. Chen Yuetong*, 2012-12-28, Hangzhou intermediate people's court.

[71] The reasons that judges rule for or against the existence of labour relation in Internet taxi company depend on the extent to which the subordination can actually affects parties. For instance, some companies provide chauffeurs with uniform and means of work (vehicle), require them to work according to the rule and standard, these ones are often considered as standard labour relation in that it shows a high degree of subordination, while other companies like Uber or 'DiDi' who use part-time (they called) chauffeurs by providing them with client information and guide them indirectly (through mobile app) to get the business, are generally considered as having no labour relation with chauffer. An exception is if company has special deals with chauffeur in terms of working time, working place and payment then courts are likely to reconsider the case towards labour relation instead of service relation. See Wang and Peng, 2015.

this market, and draft suggested that companies should sign labour contract with drivers, however, when the regulation finally passed by the ministry, people found the article has been modified to company should establish various type of labour relation in terms of the working time, frequency, etc.[72] Obviously, there has been some kind of manoeuvre in the spirit of pragmatism which tries to seek a feasible resolution to address people with different degree of subordination.

Signing a formal labour contract is not an issue for big firms particularly state firms, disputes and conflicts often occur in very small and mini firms where labour relation remains informal. During our field research in Hangzhou, our friends working in the local labour authority told us that:

'we are unworried about labour contract in big firms, there they have mature rules and management, so labour contract is strictly implemented, state firms are good examples in respecting law, actually we never heard any state firm violates labour contract. Big firms and most medium firms also know that the legal risk of labour contract violation is serious…. problems are with the private mini companies and business. There is a lack of management and legal sense as well, many of them never take law seriously, but when they have disputes or problems, they come to us' (Interview, labour inspector)

Labour contract is based on a strict analysis of subordination, which means that essential factors such as evidence of employer's direction, economic dependence of worker, employer act as a legal status, etc. are core signs that one work for another. However, in mini business, many failed to understand (or establish) the formal relation as these business sectors share a common point that labour force remains highly flexible and precarious, not only employers but also workers basically consider their relations as an equal exchange for a relative short time. For precarious labour, to work for someone is equal to the notion of 'trade economy' which corresponds to the classical capitalist labour subordination in the period of 19th century England, deliver labour service to a boss in exchange of remuneration is the main form in small business. For instance, in the business of express deliver, there exists many national firms that deliver parcels through a network of participating shops (concessionaries) which belong to many individual bosses who hire a number of persons working for him and shop. Boss paid money to express firm in order to get the license to run a part of the business. Although they do business under one trademark, the people working in the shop have nothing to do with the company itself, they work for the boss who has license to operate only. In this business sector,

[72] See 'Temporary Regulation on the management of Internet Sharing Taxi', Article 18. http://www.miit.gov.cn/n1146295/n1146557/n1146624/c5218603/content.html.

around 90% people working without social insurance, even a formal labour contract is rare.[73] Express delivery industry is an ideal example to exhibit informal labour relation within low-skill sectors, the so-called floating labour constitute the main influx of precarious labour.

While it remains a legal question if parcel delivery workers working for a concessionary fall under the jurisdiction of labour law, there are many businesses operating like this in reality. We met one of our friends who has a small business in Hangzhou, actually he owns a small salad and café shop in a big shopping mall, he bought the concessionary and get the right to use the trademark. He hires 4 people working in the shop, making salad and café, selling them to clients. The people he hires work in a regular basis with fix working time, they receive remuneration in a monthly basis, however, there are no specific rules concerning working terms and conditions.

'Yes, they work for me, and I have my own company and this shop, they receive money from me because of their work performed…. we can call this money salary, but we have no labour contract and social insurance because I don't want to pay for this…. until now everything goes well, we have no problem they never ask me about contract and insurance, why should I care?' (Interview, small business owner)

We remind our friend that potential legal risks (e.g., work accident, employee seek legal action against him, etc.) are possible even though the employees agreed to work informally at present, however, but it's not likely that he would sign labour contract and pay social contribution as the people working for him are highly flexible, to do social insurance is technically less viable in this case because he told us that his men always change jobs, not to mention that the willingness of his employees to become formal workers is weak.

Facing with rigid labour law, mini firms actually doesn't care too much because labour inspection is passive in this case, everything should be fine in so far as both parties agree to work in informal way. This means that both employer and employee consider the relation between them obscure as they are more likely to look forward to an instant pay (in cash), their mind-sets reflect a short-term perspective as the job requires no specific skill, thus is not likely offer any professional training and career path. Labour

However, disputes and conflicts are high likely particularly when parties failed to keep peace as before. In reality, unpaid wages, over-time work without economic compensation, work accidents,

[73] 'Who are responsible for express parcel courier', People's Daily, http://society.people.com.cn/n1/2017/0224/c1008-29104196.html. A common practice in this sector is that the boss buy commercial insurance for employees to avoid potential risks. On the other hand, big logistics firm normally hire workers through formal procedures, in companies like JD, SF Express, workers do have labour contract and social insurance, service quality is higher, so does the price of service they offer.

or personal insults are the main reasons that trigger 'war'. Law becomes a weapon to revenge, to express angers.

'facing mini firms, law is too much, if people come with reasons, say, I want double-wage because my boss didn't give me labour contract, how can we do? If we do strictly according to law which fines the firm with double wage, we kill the firm, to be sure…. in most cases, we keep in mind that such thing should be dealt by negotiation, mediation…. To tell them not to demand too much, if you want labour contract, then we made one because it's legal, but forgot the double-wage….' (Interview, labour arbitrator)

As such, confirming labour contract is completely a rational and formal demand if one wants to become formal labour as it serves as the starting point to apply any existing labour relation in a legal way. This is why Chinese governments launched education campaign on labour market, to use your legal weapon, it's indispensable to know firstly that if laws can apply in your situation.

'I have no labour contract…. we were Ok before, but I got an accident now, in order to get the compensation, I must be recognized as a worker, so that I can use law for myself' (Interview, litigant with work accident cause)

In any case, no matter in labour arbitration or in court, the very first question to be examined by judges is whether parties are in a formal labour relation. Labour contract represents the world of jurist in a sense that it stems from the very concept of a contract between individuals. It's rational because labour contract is one of the basic interpersonal relations that drives from logical analysis of legal concept such as an abstract process; it's formal because there is no exception in judging one's labour relation, judges faced two options: labour relation is (actually) present or labour relation is not present. Not like law of social policy as we will soon examine, legal terms relate to labour contract rejects consideration based on 'case-by-case' or 'concrete factors' (Morris, 1958). In a word, the criterion of judging a formal labour relation put no difference

However, this doesn't mean that negotiation of labour contract is not possible, labour arbitrators are aware of some litigants read into formal rules utilitarian and opportunistic meanings. In the case of demanding double-wage fine, workers consider it as a weapon ready for use as double-wage fine for employer is seen as a punitive term that unequally biased as employers are generally considered as labour violation suspect.[74] Arbitrators should watch cases carefully because it's essential to know that who are the real victim of labour contract violation.

'it's possible that employee violates the labour contract law because they don't want the contract initially, employer is Ok with this kind of will, though they never understand the risks and

[74] Article 82, Labour Contract Law.

outcomes afterwards, but they only see the advantages of informal relation…. But finally, double-wage can be a bomb, we try to persuade them to sign a labour contract to end this tricky game if they still want to work together….' (Interview, labour arbitrator)

It's actually hard to image that in a state firm or big firm such tricky thing can takes place, however, it's logical that in mini firms where labour relation remains so precarious, the law is understood in a more practical (material) way (rather than principle), people feel that law is unnecessary as they seek traditional exchange of labour and money, they prefer a model of labour service provider that allows maxim freedom of each, but on the other hand law becomes pertinent only when parties found it useful in pressuring on each other as events arise. Thus, labour contract becomes an object of negotiation that is subjected to whether parties need formalization.

7.2 Social insurance contribution paradox: Cost or right?

Most litigations concerned with social insurance come from the contribution issue. While this 'fee' represents an added labour cost for employer that should be avoided as much as possible, it is also true for certain workers who only work for cash income. As personal social insurance contribution represents around 11% of one's monthly wage, many migrant workers are reluctant to claim social insurance rights when discussing labour conditions with employers or they prefer to invoke social insurance as a bargaining chip:

'I earn no big money, if I have to pay that 11% of my wage, that would be too much for me, so I don't want my boss to do so […] but it does not go against my interest of getting compensation from my boss, no? (interview, migrant workers involved in litigation).

The right comes certainly expensive for them, however, what they probably don't know is that their bosses, the employers, should pay nearly 30% of firm's total wage as social insurance contribution to the social insurance regime, employers can save much more when they violate the law than employee does. During our investigation, we often observed that migrant workers talking about their employers pay a lot of money to 'buy' social insurance to which they have to pay accordingly. For some of them, taking home cash income weights more than legal right due to doubt and misunderstanding of functioning of social insurance.

'My boss told me that they can arrange social insurance for me, but I have to pay a huge part of my wage because they have to pay for me, they said I can arrange social insurance for myself while they can give me good salary…. I choose to buy social insurance for myself because I can get more money….' (Interview, migrant worker)

If social insurance charge is seen as a 'trade deal' between employer and employee, this bargaining strategy can be found in many small businesses where both employer and employee are so alert to any 'extra tax'.[75] In contrast to widespread stereotype that employer is cheater as they tell lie to employee, we found that employer tries to persuade employee to violate together Social Insurance Law in the name of mutual benefits, to evade 'extra tax' as much as possible, then to share those that have been saved. Although they both failed to understand that the very objective of law is to formalize labour relation, they surely believe that cash income, not the intangible social rights related to a standard employment, is better. It's the scale (nature) of the business and the implicit notion of migrant workers that enable them to choose to remain in informal.[76]

Beside subjective unwillingness of those who prefer to remain informal, another external barrier that discourages migrant worker is the problem of 'portability' of social insurance record which calls into the question of labour mobility between regions. While labour market in China has been opened from 1990s, the level of management of social insurance scheme is inconsistent with the high labour mobility exhibited by migrant workers due to the fragmented management system. Although Social Insurance Law stipulated that one's social insurance contribution can be transferred to other region when person changes job, there still exists institutional inertia that can be a (potential) impediment as regions already show a high degree of heterogeneous in wage and entitlement level.[77] In practice, making social insurance record 'travel' requires complicated administrative formalities which normal people fear, transfer from poorer region (western province of China) to richer one (eastern coaster areas) can be worrisome as it requires several signatures and accords from different authorities.

In fact, social insurance scheme remains a conservative regime as it only concerns the standard (formal) employment in the region where it operates. The system has no intention to address precarious people with high flexibility in the labour market because it considers every worker has the right to be included in such a protection scheme. This is a main reason, according to many, why social insurance can be negatively conceived by many who adopt short-term perspective due to incertitude caused by their positions within the labour market structure and institutions.

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[75] Governmental charges are always negatively conceived by migrant workers as they opted for cash in hand. Today, they become much more aware that these charges can bring about benefits in the future in a time when they need public assistance to address social risks.

[76] Attitudes on social insurance right can be various, and they are changing overtime. At least we can confirm that law never comes as a main factor that prevents workers from benefiting social rights, most time it's the design and implementation of the institution itself that discourages people.

[77] Central government always tries to lift the management level of social insurance from regional to national level by adding term in the law. However, it seems unlikely that regions with sometime considerable difference would willing to do so, not to mention that opinions contradict among central ministries involved. National legislators discussed the difficulties on implementing the law and its future reform perspective. See http://www.npc.gov.cn/npc/zt/2008-12/25/content_1464553.htm; http://www.npc.gov.cn/npc/xinwen/2016-03/15/content_1983745.htm.

Table 4. An example of Professional Social Insurance Scheme Contribution Rate

Program name	Employee Contribution Rate	Employer Contribution Rate
Pension	8%	14%
Medicare	2%	11.5%
Unemployment	0.5%	0.5%
Work accident	Not applicable	0.4%-1.6%
Maternity	Not applicable	1%
Housing Provision (Not mandatory by law)	12%	12%

Source: Hangzhou Municipal Social Insurance Agency

Table 5. Ceiling and Floor of Social Contribution Baseline[78]

	Floor (minimum)	Actual (floating)	Ceiling (maximum)
Contribution Baseline	60% of social average salary in the region	Actual declared wage, e.g., employee's real wage or under-estimated wage	300% of social average salary in the region

Source: Hangzhou Municipal Social Insurance Agency

[78] Social insurance contribution is calculated in terms of employee's declared wages. In practice, under-estimation is widespread. The range of baseline is set by social insurance agency which aims at rationalizing the wage difference among different sectors (workers) as the goal of the system is to reflect the characteristics of solidarity while encourages those who earns more contribute more. The social insurance scheme is similar to European continental earning-related social insurance regime, as embodied by Germany, France and Italy.

Here comes the real paradox of social insurance right. While some people think social insurance as welfare good that is basically 'bought' by employers and themselves, they rarely regard this 'good' as a sound labour right that is publicly defined in national legislation. Different to commercial insurance that is normally considered as a commercial product sold in the insurance market, the social insurance is entirely a public program with mandatory contribution and unconditional terms stipulated in the law, which means that there is no room for bargaining or negotiation between parties.

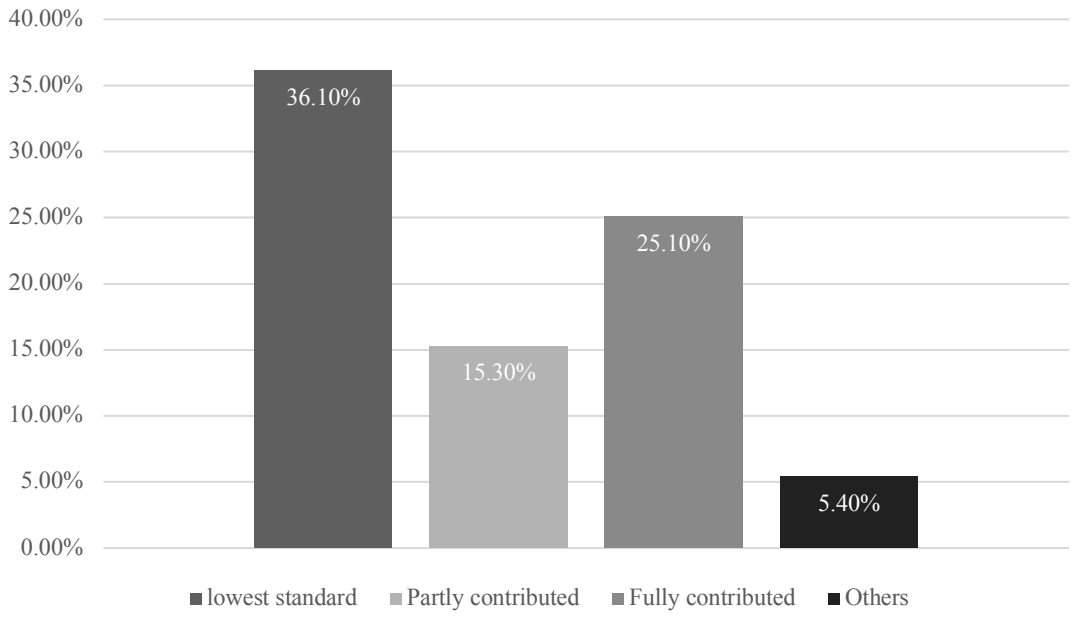
'As professional arbitrators, we absolutely know that social insurance is mandatory when formal labour relation is present but the ironic thing is that workers and bosses both come to your to ask a solution so that they can get indemnity from each other, the line of reasoning here is that boss, as he admits that he violates the law, agrees to pay money as compensation to worker who wants just money in cash regardless of social insurance right, and boss finally pay much less than legally paying social contribution to government. We know for certain that such deal will not working if worker come again next time, but everybody is happy with this solution for this moment, only law and government loss'. (Interview, labour arbitrator)

Driven by the work performance evaluated in terms of successful mediation, arbitrators are more willing to end dispute before they would enter to next stage of justice. As discussed above, the arbitration process is an indispensable stage that one should go through before any lawsuit can be filed in people's court. The original idea to put arbitration commission as a prerequisite is that most cases should not be rushing to people's court since civil court are not fully capable of addressing rising labour dispute as it gets huge in volume and complicated in content. On the other hand, mediation work has been seen as an effective way to persuade parties not to escalate conflict, officials hope to deal with issues with smallest repercussion before anything negative would take place, this is why mediation is such a deep-seated mindset among government officials who believe it as a priority in the agenda to deal with rocketing numbers of labour cases.

While the 'cheating' of social contribution is somehow left unaddressed due to an implicit encouragement within labour mediation process, social insurance fund governed by government risks losing contribution base which would finally weaken the financial capacity of social insurance scheme in delivering welfare programs. As a matter of fact, the full compliance of private firms in terms of social insurance contribution is so rare that most of them have problems, either conspire with their employees to cheat or deliberately underestimated the total wages so as to lower contribution burden (Frazier, 2004). The latter is becoming increasingly popular since the implementation of social insurance law in 2013 enacted unprecedented restrictive and rigid terms on the social contribution issue, firms are facing rising pressure both from employees and government, nevertheless they are less likely to fully to do so, report said that although social insurance contribution is much more obliged than ever before because of the increasing effect of Social Insurance Law, at least 75% Chinese firms

under declare the total wage in an effort to reduce cost, evasion and avoidance of social charges are favored by firms to deal with the rising labour cost in a time when economic profit is declining.

Figure 11. Compliance of social contribution



Source: Survey released by WUYI (51shebao) social insurance consultation company.

The survey shows that only 25% firms can comply with the legal requirement to fully declare wages and salaries to social insurance authority, while one third firms only declare the lowest level social insurance contribution.[79] Compliance situation varies according to firm scale and owner property type. Generally speaking, state firms are normally good students in observing the law, while small and medium private firms are more likely to cheat (or completely violate) social insurance by declaring false wage level. Nevertheless, state firms can also cheat social insurance because of the

[79] Fully contribute to social insurance means that firm includes basic wage, compensation, bonus, allowance and other salary alike as one's total income when calculating social contribution. In practice, many firms only declare basic wage as the reference to which they contribute. As China's social insurance system is based on the principles of both solidarity (socialized wage, mainly based on firm contribution) and personal efficiency (based on personal account contribution). Social insurance authority set out a legal interval in terms of contribution level (between minimum 60% of average wage and maximum 300% of average wage) in an effort to ensure people with modest wage can receive reasonable pension in the future. For example, if the average social wage in set at 4310 Yuan in 2016, the lowest contribution would be 2586 Yuan, which means that a worker with minimum wage of 1860 Yuan would benefit as if his contribution level is same as people with a wage of 2586 Yuan. However, this also leads to some people to avoid social insurance because the personal contribution can be too expensive to afford.

restructuration and new type of employment (agency worker). Famous scandal was a state firm called 'Nanjing Sinopec' who under-declared at least one hundred million (100000000 Yuan) of social insurance during eight years from 2002. Some six hundred employees were involved in this case, lied behind the shocking news was the use of various types of employment, particularly the agency worker, whose social contribution records normally touch the lowest standard.[80] In fact, in state firms, alternative employment relationship began to boom since the restructuration, agency worker become a significant phenomenon in many state firms and public institutions (e.g. government, hospital, universities), All-China Federation of Trade Union estimated that in 2001 about 37 million workers can be regarded as alternative employment, which represents 13.1% of all labour market participants (ACFTU, 201). Although agency workers employed in state sector are generally in a better condition than migrant workers in private sector, they are the 'outsiders' inside an establishment characterised by a hierarchical mix of standard employment relation and alternative employment, compare with those in standard relation, their labour contract is shorter and precarious, their social contribution level is low, and their integration to the firm's is weak. As one media broadcaster working in the Hangzhou municipal broadcasting told us:

'Newcomers never enjoy the same social benefits level as insiders although our wages are as high as theirs…. since welfare can be a great difference…. *danwei* pay the social contribution for me but not in terms of my actual (real) income in hand, they pay according to my basic salary which is very modest. However, a great part of my total income comes from the so-called bonus and deduction which are for sure not included in social insurance recorded.... this means that my future social welfare entitlement will be much lower than others… this never happens with people with seniority, the insiders I mean.' (Interview, employee working in state firm)

Precarious work is closely associated with social insurance fraud if under-estimation of real wage can be a crime. While state firms (no matter they are in lucrative sectors or in non-profit organization like universities, hospitals) are accustomed to using agency labour to save labour cost, cheating social insurance is another way to lower headcount costs since 2008 Labour Contract and successive regulation on agency worker stipulated very strict terms on the use of alternative employment.

If the non-standard employment can be so well accepted within state sector, compliance of social insurance is much worse. While we have no precise data on this question, our interviewees mentioned that in small and medium firms, violate social insurance contribution completely or partly, is common

[80] See the litigation of 'Cai Peilong v. Nanjing social insurance agency, 15-10-2014' and media report 'Nanjing Sinopec Under Declare Social Insurance Contribution', China News Agency, http://finance.sina.com.cn/chanjing/gsnews/20131029/201217154221.shtml.

practice, and very often subjected to parties' will rather than an understanding of law. High labour mobility is a central reason that one does not care so much about social protection.

> 'As I said, migrant worker without certain skill can't find quality and stable job, so they changed job so frequent among restaurants and small commerce and services alike. However, you should also know that they have land and family in their hometown which means that they can return if they encounter major economic difficulty here. Many of them are floating labour force for certain.' (Interview, labour inspector)

Partial dependency on wages amounts to an altitude that consider social contribution fee as an extra cost which should be avoided. Employers and small firm owners too, regard this mindset as an occasion to evade labour standards. Negotiation of a deal to reduce social insurance burden has become common practice within mini business sectors due to very low legal risks. For many small firms, particularly start-ups, how to attract talents while maintain a reasonable labour cost are a core pre-occupation.

'…young graduates usually look at how much taking home they can get, if we tell them the nominal wage is 10000 Yuan, and we pay social insurance at this level, then our wage is not competitive after tax…. if we negotiate, say, a part of wage that is subjected to social insurance and the rest is paid as bonus…. for example, we set a basic wage of 4000 Yuan, then the rest is paid in the name of allowance, they can get the 6000 Yuan without paying social insurance…' (Interview, firm HR manger)

It's easy to find that in the latter case, workers can get more taking home wage while they can still have social insurance as they contribute at a much lower level, both the firm and the worker can 'save'. Given such 'operation', one can conclude that 'cheating' social insurance is a result of common will because employee doesn't trust the social insurance system and the firm can 'save' money for them. Such a mind-set is frequently reflected in the famous puzzle of the moral hazard of social insurance system as people are pessimistic about future entitlement level. Many institutional flaws exacerbate the likelihood of cheating, for instance, people contribute at a much higher level enjoys similar Medicare entitlements with those who contribute at a lower level; 15 years is required to get the basic pension according to law, people working in rich region can get a basic pension (with 15 years contribution period) similar to people working in poorer regions with much longer contribution period.

Although people started to consider social insurance as a right rather than a cost, however, under-declare wages to evade contribution is a common practice in private sectors.[81]

On the side of governmental bodies, cheating is obviously dangerous because it reduces the social insurance incomes which in turn undermines the safety of social insurance pool. Social insurance agency is trying to audit the violation of contribution in a more austere way, inviting professional company like accounting firm to audit firm's compliance of social contribution becomes a legally binding term in Social Insurance Law (Article 80). Basically, social insurance agency draws lots (randomly) to decide who should be audited, about 10% firms should be audited in a given year. Auditing is clearly a proactive way to correct social insurance violation, but this doesn't increase the legal risk since auditing is not a fine and thus many firms are likely to take the chance. Our interviews with small business owners show that social insurance compliance is out of question since the scale of business is a key preoccupation for government. Big firms usually support more jobs with quality (which means jobs with good pay and potential considerable contributions), that's the very target of social insurance audit. Small business is by nature highly flexible and difficult to monitor, governments often turn blind eye to small violations taken place in these sectors. Actions were said to be very passive due to less motivated determination (Zhuang & Ngok, 2014). In a word, social insurance agency is worried about social contribution compliance of course, but they generally keep an eye on big firms mostly.

Besides the implicit preferences shown by social insurance agency, the paradox of social insurance contribution also lies in the contradictory understanding held by parties involved. On the one hand, the social insurance right the 2013 law endeavours to delivery is aimed to give equal treatment of all workers, irrespective of the *hukou* origin which historically prevents, directly or indirectly, many migrant workers from participating full social insurance; On the other hand, a number of migrant workers conceived this universal right as something comparable to wage compensation that can be negotiated according to arbitration procedure. Going to arbitration commission means to bargaining with their boss, but the real justice seems irreverent in that case:

'Workers do have the right to include social insurance related issue when they lodge a formal arbitration demand according to national arbitration article, but the tricky thing is that it's not only an issue between employer and employee, government (the social insurance agency) has a say here […] you can find regulations with regard to how to punish violation of social insurance payment and how to rectify the cheat of contribution, and so forth. Our job here is more or less stuck because, technically, we have no

[81] Regional management of social insurance is seen as a major reason why people with high labour mobility are usually reluctant to pay full contribution. This is the very reason why legislator wants to lift the level of social insurance to national pool management so that people can get the same right wherever they work or live.

jurisdiction over issues relating to social insurance calculation, but we have to issue an award to parties anyway. For this reason, normally, if mediation is failed, we will deliver an arbitration award by saying that employer is required to pay due social insurance contribution to social insurance agency in the name of law, but how to remit contribution is subjected to labour authority and government, not us.' (Interview, labour arbitrator)

As suggested by scholars working with the topic of informal labour, the irregularity and partial dependence on wage are a main reason that people prefer to cheat when it comes to social security (Deakin, 2016). In the case of migrant workers, as unskilled job and high uncertainty are widely shared by people working in low value-added sectors, wage level is significantly lower than other sectors, the stable employment model associated with wage-dependence and social protection has no ground to thrive as one human resource manager in a manufacturing firm told us:

'Not every firm can afford social insurance charges, this is designed for formal jobs in *danwei*…. small workshops and firms, they just work for survive, not for high labour standard…. It's not only the problem of the employer… you have workers who can't afford social contribution, who have no motivation to have social insurance, like their boss, they want taking home salary, forcing them to pay contribution is unrealistic.' (Interview, HR manager)

For a great number of migrant workers, win the arbitration is just a starting point of the long chase of justice. If their goal is limited to get some reasonable compensation from boss, then the voluntary mediation is more likely; If not, then there are more litigations and controversies to come with parties like governments to be involved as contribution

Besides the voluntary or conspiratorial cheat of social insurance prevailed among migrant workers, on the side of firm, cheating social insurance is also seen as a way to reduce 'labour cost'. Compared with the abandoned right, many workers are forced to accept low level social contribution. As mentioned previously, agency worker is widely invoked as one of the ways for firm to externalize 'labour cost'. In this case, the 'reduction' can be achieved through various 'tactics'. For instance, agency worker's salary payment and social insurance issues are taken charge by labour agency who, as the paper employer, generally declare their salaries at a very low level. Although agency worker can negotiate, according to their professional abilities, more interesting salary or compensation with their real employers, they can do nothing about social insurance level:

'It's very common that a part of people (newcomers particularly) are recruited through labour agency, and agency only pay basic level salary and social insurance contribution for us, though finally we can get much higher salary here paid in different names such as compensation, bonus, commission, etc. But we know that our pension, social entitlements would not be as high as our current income

level. This can be a problem for our future pension, no?' (Interview, employee working at state owned firm)

While under-declare wage is frequently used as a way to reduce social insurance cost for client firm, labour agency can even do much more by transferring their workforce to other regions where wage level and contribution rate might be lower. It sounds unrealistic but operational since social insurance scheme in China is currently managed at regional level, each region has its own contribution rate and pay-scale level, labour agency signed labour contract in cheaper places where they have branch offices.[82]

Generally speaking, in economic strong region like eastern costal area, social insurance is in good health as economic growth and employment are booming which generate contribution income well beyond expenditure, however, in places where industries are experiencing restructuration, social insurance is facing austerity and direct help from state is indispensable in keeping the system working. As such, region with higher level of economic development charges more social contribution as average wage is higher, while poorer regions can be more 'competitive' due to its lower wage level.[83] Some regions like Shanghai started to be aware of this relocation tactic and requires labour agency to pay social insurance in locally.

All in all, despite defined as mandatory legal obligation, social contribution is constantly ignored or violated for a various of reasons. In certain cases, both employee and employer may opt to cheat social contribution in order to get more taking home cash income. Social insurance has been framed as a risk, not as a legal right, that parties should address with strategies that fit to their demands. Workers with high mobility is not likely to contribute too much to local fund which they found selfish as shown by the case in Guangdong where migrant worker squeezed (withdraw their money in personal account) social contribution when they leave the region,[84] while employers consider legal obligation would not only hinders its profit but also goes against employee's willingness to get taking home wage.

Government is trying to strengthen the extent of enforcement so that the violation of law can be more risky and unsustainable, this includes the regular audition in a random inspection manner, a recent trend in lifting the importance of social insurance is to require constant social contribution record (from two years to five years according to region) when one wants to buy property, register

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[82] For instance, in Shanghai, the average regional monthly wage is set at 6504 Yuan, while in Nanchang, a capital of Jiangxi province in central China, the average monthly wage is only 2141 Yuan. As such, the average pension in Shanghai and Jiangxi in 2015 is 3315 Yuan, 2046Yuan accordingly.

[83] 'Workers should say no to social insurance paid in other regions', Labour Journal, 2012-3-05. http://www.lawtime.cn/info/laodong/laodongguanxix/laodongpaiqian/20120305130654.html.

[84] Migrant workers view the access to social insurance too high given the high contribution rate and condition to entitlement, See report on the withdrawl of social insurance contribution, http://news.china.com/zh_cn/domestic/945/20050922/12680835.html.

vehicle, or enrol their children in local schools. These measures have a significant effect since people can't exempt themselves from life necessities such as settling down in a city or sending children to school. People who are previously underestimated the meaning of social insurance begin to worry about a constant social contribution record as it can affect their life seriously.

It's difficulty to conclude that whether the emphasis, through binding law or policies that affect one's live, on social insurance is encouraging or discouraging people to accept. But if one looks at the cases relating to social contribution, it becomes more or less clear that people with stable job and long-term life perspective living in city are definitely more concerned with the issues in a positive way, while precarious and instable labour attach more attention to the 'cost' side of the system, because the system costs 'too much' for one only earns a modest living wage.

This reflects a clear change in the meaning of social insurance when this prerogative right opens to all labour market participant regardless of *hukou,* precarious job itself can become the main barrier for one to be fully protected. Migrant workers swing between 'cost' and 'right' can be strange to those who laud the universal character of new law, but how people frame acquired right can be tricky since they are more likely be trapped by existing institutional effects that is actually squeezing out people who are less fit to the system. Moreover, although public hold overwhelming support for social protection in general, there tends to be a limited understanding of how social insurance scheme functions, particularly when employees conceive employers' cash compensation as a substitute to intangible right, they just keep a blind eye on the long-term perspective and social (public) solidary character of the scheme.

7.3 Law as moral sanction: Pension calculation and recognized contribution

Social insurance becomes a multi-fold concern as far as government, as one of the stakeholders, is involved. Quite different to continental European welfare states where social partners have an important role in managing social insurance (the case of France and Germany), Chinese local governments are powerfully backed by national legislations in executing the responsibilities of managing social insurance programs: everything from setting up branch fund program, setting wage reference to which contributions are paid, collecting contributions, to paying indemnities to social insurance beneficiaries, etc. Thus, it's their core interest to make sure that firms are correctly contributing according to the pay scale adjusted annually by labour authority. In a word, governmental bodies are entitled with absolute mandate to implement a mandatory social protection scheme within

their jurisdictions. In this manner, normalizing informal labour is seen as a feasible means to expand contribution base so that the routine social insurance expenditure need can be meet.

Generally speaking, in economic strong region like eastern costal area, social insurance pool is in good health as economic growth and employment are booming, which generate incoming contributions well beyond expenditure budget, however, in places where industrial sectors are experiencing restructuration, social insurance is facing payment crisis and direct financial help from state is indispensable in keeping the system working.[85] As discussed in previous chapter that the developments of institutional capacities of governmental bodies specializing on labour issues at local level has become increasingly essential in regulating issues as these bodies are in charge of the creating, maintaining and modifying local policies so that general principles prescribed in labour law at national level could be met. National legislations need to be implemented by local governmental bodies by authorizing, to certain degree, some leeway of freedom in designing practical policies. Governmental bodies' regulating activities usually take the form of administrative actions aimed at those who should be included in labour laws: employee, employer, etc.

Essential steps include to build a social contribution pool which requires measures to set up average wage at regional level which is subjected to annual adjustment and serves as a base for contribution floor and ceiling. Firms are required to submit their payroll details to labour authority so that the latter can figure out a harmonized social average. In such a way, the problem of under-estimated or undeclared work (wage) could be partly solved as social standard intervenes as a means to normalizing those who wish to avoid social charges.

As the officially mandated manager (administrator) of social insurance fund (pension, healthcare, work accident, unemployment, maternity), most disputes and litigations are concerned with pension calculation and work accident confirmation. Claims on these issues are more likely to provoke dissatisfaction among stakeholders. Pension issues, for example, often involves a complicated calculation process, administrator should take into account various issues such as one's wage level, contribution record, working history before reform, etc. However, in the cases we collected, we found that claims are more concentrated on the historical problem that originated from *danwei* period. These cases share a high similarity on the grounds that litigants demand re-calculation of the recognized period because they started to work in state firm before the labour contract in 1985 and the social insurance reform dating from 1992, how to deal with working history in *danwei* time is critical in

[85] In China's northeastern region where traditional heavy industries have undergone considerable restructuration, social insurance base is diminishing because of declining employment. Youth labour force are constantly fleeing to southern regions to seek better life. http://pl.ifeng.com/a/20171207/53931324_0.shtml.

finally deciding one's pension level. Thus, debate around one's working history and recognized contribution record is a frequent cause among administrative cases.

In fact, as a generation who experienced the reform and is affected by the reform, [86] how many years should be counted as recognized contribution is repeatedly called into question by social insurance agency who finally decides how much pension one can get.[87] Unfortunately, there is no general rule that can address this issue in the Social Insurance Law, some articles relate to pension of middle people are rather obscure as they states that 'state workers who started to work before the reform, their social insurance contribution should be covered by state (Article 13)'; 'Those who meet 15 years of contribution should be entitled with legal pension, while those who failed to do so can pay back duty up to 15 years in order to get pension (Article 16)'. The general aim of these terms is to address the people who experienced difficulties during the hard times of state restructuration because laid-off SOE workers were so vulnerable that many of them had no formal job after leaving *danwei,* which means that they can't afford social contribution (people with better financial condition may continue to pay contribution). In practice, abandoning social insurance was widespread, for this reason, Article 16 allows people to pay back duty up to 15 years at the time when they apply pension.

On the other hand, these terms almost have nothing to do with the legal and administrative practice in reality because before the Social Insurance Law enter into force in 2011, labour authorities already developed a body of administrative guidance to deal with the pension of 'middle people' by stipulating some test models (which period should be recognized as contribution period, which period not) to help social insurance agency make decisions in terms of pension review and calculation. That's the reason why we find administrative court judges regularly (even exclusively) invoke local government's documents and decision to judge one's recognized working history. Moreover, how to pay contribution back duty is another technical question that regional authorities should find their proper ways. In a relatively rich region like Hangzhou, social insurance agency gives financial allowance to those who are willing to pay back duty at their age of retirement. The policy is accurately aiming at the groups of former SOE laid-off workers, and thus has two main goals: 1) to offer a chance to complement social contribution record to meet the minimum requirement; 2) to offer a chance for those who wants more pension at an acceptable cost.

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[86] Taking 1998 as watershed, government distinguishes three group of people in terms of entrance year to firms: newcomers (enter after 1998), middle people (enter before 1998 but retired after 1998), and old people (retired before 1998). While newcomers and old people are generally less concern by the changing of social insurance reform, middle people are the group who are most touched since their previous working history in state firm can be a focal point of debate.

[87] As a pay-as-you-go pension system, longer contribution record means more pension, vice-versa. For this reason, former SOE worker's chance to get more pension relies on the recognized pension record because at the time of SOE, worker have no pension record, only service seniority can be a solid proof of one's working record.

"laid-off SOE workers have insufficient social insurance records, the outcome is that their pension levels may be much lower than social average pension level…. so, the local government designed a preferential policy which gives people 50% financial aid (discount) if they accept to pay back duty to extend contribution record, for instance, if you have to pay 40000 Yuan to buy 6-year records, government will return you with 20000 Yuan" (Interview, agent of social insurance agency)

Generally speaking, policy of pay back duty is seen as a 'material' solution in an effort to address the negative effects left by state sector restructuration which produced vulnerable workers who have no stable jobs, i.e. the people of *xiagang*. But, to pay back duty is not only a money issue, eligibility test is another crucial factor that matters because to calculate one's existing record and recognized record is a multi-fold process. In certain case, government recognizes one's previous working history in *danwei* which the social insurance agency bridge to one's after-reform record. The result is normally a mixed application of national law, regional policy and personal history. Let's see some examples:

Case A: A female worker was not satisfied with the result of her calculated pension, thus raised an administrative reconsideration based on the claim of pension recalculation. Her reason lied in the working history in a firm before 1990s. The social insurance agency (local human resource and social insurance bureau) denied her claim after reviewing personal archive and document. They found the firm this female worker worked for was a small collective firm belongs to street-level authority and thus failed to fall into the category of state firm. The worker was not satisfied and raised administrative litigation against social insurance agency. The first appeal and second appeal both held that her working history in that collective firm can't be recognized based on the same reason as social insurance agency did.[88]

Case B: A male worker objects to the calculation of recognized contribution period and his administrative reconsideration is turned down. He raises litigation against social insurance agency. Court held against his claim because judge found in his personal document that he left the firm without management's permission, thus he had been classified as fired worker. Despite his working record is explicit as shown in the archive, as a fired worker his working record in that firm should not be recognized.[89]

Case C: A male worker claimed that he has worked for municipal silk factory between 1973 and 1991, after 1991, he was 'transferred' to another silk factory. However, social insurance agency denied his previous working record because the agency failed to find solid evidence in his personal file. The

[88] Wang Qin vs. Hangzhou XiHu District Human Resource and Social Insurance Bureau, 2015-3-10.
[89] Lu Dejian vs. Hangzhou ShangCheng District Human Resource and Social Insurance Bureau, 2014-6-30.

worker made a request of reconsideration, Hangzhou municipal human resource and social insurance bureau held that his working record can't be recognized because in his personal file, they found no justification of transfer. In this case, he was classified as voluntary separation.[90]

After reviewing in the dataset nearly one hundred similar cases, we found that all cases are rejected by administrative court. Reasons can be various, firstly, firm's scale and its property nature is a critical determinant factor, actually not all state firms are equally treated, policy excludes those who had worked for small state firms owned by town and village; secondly, a review of worker's personal file (committed to crime, discipline issue, etc.) should be done by providing original supporting documents; the way how worker left the firm (fired, voluntary, etc.), when they left the firm are also important factors. Lastly, difference between contract worker (hired within the framework of central economic plan) and temporary worker (hired through non-plan channel) can leads to differential treatments as the latter is seen as secondary.[91]

To judge these problems, one can hardly rely on any labour-related legislations in paper, rather, the only legitimate resource is very often made by governmental bodies in an exceptional way. In all cases, we found that a number of governmental regulations, documents, decisions have been frequently referred by court judges to establish a set of criterions to test litigant's situation. On the one hand, judges are aware of the term in Social Insurance Article saying that delivering special solution to former state firm worker is one of the goal of law, but on the other hand they stick to some criteria when deciding how former state worker should be treated. We have found that a special government document has been particularly underlined because it was referred all the time by social insurance agency and court judges as source of legitimacy, we try to translate this document's name into English, 'Notification on the calculation of working record and contribution history of former employees'.[92] The name reveals that this document is issued as a passive solution to address former SOE workers' historical problems related to pension calculation. This notification was issued in 1995, in the immediate aftermath of the implementation of social insurance reform. The key points of this notification can be summarized as follows:

A: '…temporary worker hired by *danwei* itself (no-plan recruitment), his working records are not recognized before he participated the social insurance reform….'

B: 'those who left *danwei* without official permission (voluntary separation) and dismissed before 1988, their working records in this *danwei* are not recognized…'

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[90] Administrative reconsideration on Mr. Wu's demand of recognized working record, Hangzhou Municipal Human Resource and Social Insurance Bureau, 13/01/2016, http://www.zjhz.lss.gov.cn/html/xxgk/yfxz/fyjdsgk/73147.html.
[91] http://politics.people.com.cn/n/2015/0729/c1001-27376924.html.
[92] http://www.zj.gov.cn/art/2014/3/17/art_13019_140326.html.

C: '…those who had committed to a crime before the social insurance reform (precise time depends on the implementation date in different area), their working records are not recognized…'

Obviously, the year of 1988 has been chosen as a watershed year to distinguish people, actually this year saw the beginning of the labour contract reform within *danwei* as state sectors faced unbearable financial burden, redundant employees were encouraged to seek opportunities in the labour market, i.e. to seek job in private firms. Thus, we can estimate that a part of SOE worker left *danwei* after 1988 were somehow forced to make such a choice, while others who were able to find more competitive wage in the labour market took advantage of this policy window as they finally got the freedom of choosing jobs. In contrast, people left before 1988 have been classified as 'dishonest' as generally no one can leave without permission, voluntary separation generally means people violate labour discipline because of better economic revenue outside.[93]

The present day legal practice, as we will soon discuss, proves that *danwei* legacy and prerogative are still working as a constraint that prevents those who were stigmatized (due to their 'reckless' actions) from benefiting social insurance. To comply with danwei prerogative has important rhetoric significance because labour politics in socialist period was based on an implicit agreement between worker and state as the latter praised worker as master of the society, punishing those who fails to comply with labour discipline (e.g. long absenteeism, taking part time jobs outside) was actually an act of denounce, dishonest worker should never be recognized as society's master. So, if worker failed to show loyalty to state firms or defies labour rule, his labour and welfare right can't be recognized. The classical paternalistic subordination is very much similar to the 'master and servant' system in the Nineteenth century in the UK, in which we found a close subordination between parties who work together like a clan or primitive community.

Obviously, government's attitude towards social insurance contrasts sharply with the prevailed willingness to avoid social charges mentioned above in the case of cheating of social insurance contribution. The conflict between employer and employee, which has been generally considered as a private issue, has moved to a new arena in which the presence of local government (particularly the bodies who are in charge of social insurance practices) brings about administrative dimension that is traditionally subjected to the public law. As a matter of fact, local government was historically the main actor of managing social insurance in the times of SOE restructuration and its role had been confirmed several years before the 2013 law was passed. Parallel with the establishment of social insurance, local labour authority was granted the right of collecting social contribution fees within its

[93] Change of job in socialist period was subjected to economic plan, not personal motivation. The labour discipline can be understood by its paternalistic way of managing people.

jurisdiction. Coming after the 2013 social insurance law is an overhaul of institutional infrastructure. With the newly established Ministry of Human Resource and Social Insurance, the expertise of social insurance management has been completed transferred from *danwei* (mainly state firms) to professional governmental organism such as local social insurance agency (with district branch in big metropolitan area) which is a part of local labour authority system. In this case, former SOE workers are now under the jurisdiction of social insurance agency as other workers, dispute around social insurance issues which were rooted in danwei should be dealt with agency in a legal way: sue and litigation. However, this doesn't mean that *danwei* is out of game, in fact, rather than disappearing, *danwei* shows its vitality as parties constantly look back to one's history in *danwei* so as to judge one's deserved right. In this process, we have identified a combination of legal spirit explicitly written in the law and a number of disposable solutions aims at settling material issues such as recognized contribution record.

Claiming contribution record as social insurance right is expressed and tested in a subtle way as the official terms stipulated in Social Insurance Law are subjected to debates and explanations that are based on archives exams and *ad hoc* governmental policies relate to unsolved historical problems that have been taken place during *danwei* and state sector restructuration. The legal term of fifteen years contribution record as compulsory requirement to get a pension (Article 16) and the term on the calculation of contribution record (Article 13) have provoked many cases. Moreover, it's the government bodies, rather than employer, who have been constantly called into question by litigants who stand rather in an irrational and material position vis-à-vis the rational and formal law. Rather than invoking legal principles, solutions are very often being found in local policies and measures which are specifically tailored in an effort to address very concrete problems.[94] Explaining policies and testing qualifications are the main working method. For example, there have been a number of cases relating to how to calculate one's recognized working record within danwei,

In reviewing an administrative judgement, we found that governmental bodies defend themselves in a quiet as a local social insurance branch insisted, in during a court hearing session, that the 'administrative decision allowing middle man to pay back duty of social insurance contribution is an act of mercy given that there had been turmoil within *danwei* during the 1980s at a time when state

[94] In Guangdong province for example, measures relating to how former state worker can pay social insurance back duty is a very complicated issue. Regional labour authority listed at least six situations in which workers have been categorized in terms of their former status (permanent or temporary employee) and danwei property nature (big firm or small firm). While no one can actually analyze why and according to what criteria these measures have been formulated, these administrative considerations derive from the general political consideration set by law, solving historical problem. Detail see: http://www.gdhrss.gov.cn/jybl/20170613/10780.html.

sector employees seek new economic activities by withdrawing from danwei position. When the bureau tells middle man that they can benefit from this tailor-made policy, this act can't be seen as an administrative one, but rather as a notice.'[95] Such a notice drives from specific documents released by governments, and this type of documents are subjective to changes over time. In theory and in practice, these governmental documents are seen as a concrete form of policy that echoes the general legal rule, on the other hand, policy should also address local context, thus policy is somehow one-dimensional that one can hardly question through law. Because they are a product of government's commitment to archive certain goal, the orientation of policy-design is responsive than deductive. Notwithstanding we know nothing about the real preoccupations behind the policy deliberation process as it's impossible for us to approach the policy design work, we do know that pension issue has been repeatedly raised by pensioners through a number of complain channels such as letter and visit petition system.[96] There is no doubt that policy is designed in a way that grievance should be addressed in a suitable way, policy design normally takes into account of both national legislation and local context. So, it's not surprising that people can hardly win administrative case with pension cause. We had identified that former SOE workers (middle man) lost the cases just because it's not appropriate to sue government based on a notice since a single notice can't be understood as a coercive administrative order.

'…. notice is not administrative order, it drives from policy, we notify middle man that it's possible to pay social insurance duty back because policy allows to do so…. no one knows why policy say this say that, many things are historical problems, policy can change, it's disposable and temporary….' (Interview, social insurance agency)

At the height of SOE worker retirement (the generation of 1950s and 1960s reach retirement age), many found that they face pension problems (insufficient record mainly) due to the change of social insurance scheme, particularly those who left *danwei* as they became own-account worker (doing small business or work for small business), who suffers from policy changes and unexpected results:

'I knew I had problem with social insurance record issue because I left *danwei* for many years, I was informed by party's community branch one day that I can pay social insurance back duty now, I was happy because longer social insurance record will give me better pension income, so I went to bureau to pay the contribution, then they told me that I can't pay for that (earlier) period, I can only pay for this period, etc.… it was so complicated, and I can't understand why, they told me this is not

[95] Xu ChenLi vs. Hangzhou XiaCheng District Human Resource and Social Insurance Bureau.

[96] Besides mobilizing law, there exists other ways of protesting, letter and visit petition is a popular way of making complains against government decisions in today's China. As in some areas, law is not so well developed, letter and visit petition is a good way for people to speak out their concerns. Government is usually alerted by group petition, response is obligatory. For a deeper description of China's letter and visit petition, See: Isabelle Thireau and Hua Linshan, *Les ruses de la démocratie: Protester en Chine*, Paris: Seuil, 2010.

law, this is policy…. you can go to court if you have question' (Interview, pensioner and former SOE worker)

Due to historical reasons, a great deal of SOE workers have had problems with social insurance record as they experienced labour contract reform in the 1980s and state firm restructuration in 1990s. Examining personal case usually requires a thorough review of one's personal history file that is stored either in *danwei* or at municipal archive centre if *danwei* no longer exists. A couple of days later, we met this person at the municipal archive where he spent a whole afternoon to search his personal file. He finally found a small piece of notification which states that he was dismissed in 1983, well before the labour contract reform and social insurance reform after 1985, which means that he had violated *danwei* labour discipline, that's the reason why social insurance agency and court refused to recognize his early working history.

Evidences of violation of labour discipline can be various: leaving one's working position without official permission is seen as a common cause, this is regarded as a solid evidence that person failed to show his loyalty to *danwei*. As such, one can hardly raise question about the dismiss notification during court hearing session. For court judges too, a dismiss notification in personal file is a decisive evidence whereby they can decide if the person is eligible to the mercy solution.

Although many *danwei* are actually closed because of state sector restructuration, its legacy still persists in a way that person's historical *danwei* file can determine one's social welfare entitlement today. Though such 'historical determinism' is nowhere to find in any given labour law text, nor can it conform to any type of legal deduction, neither legislators nor governments interrogates its effects in working out a practical means that can bridge past and today. Due to the complexity of former SOE workers' cases, authority in charge has to interpret abstract law in a material way, i.e. to decide who can benefit, who can't, and explain why. This Q & A finally formed a body of policies which secured some effective criterions and transform them into normative rules which court can invoke as a source of legitimacy. In this process, not all men are equal before the law, there are people who maintained labour discipline and people who escaped paternalism, rather than applying labour law in a rational and formal way, law responses to these people with material answers which correspond to each's context.

If migrant workers are more likely to win court trials against employers, pensioners almost never win a single case. In terms of total numbers, administrative cases are significantly less than labour case handled by civil court.

'I have never seen someone win administrative case here in my court, these cases should be firstly reviewed by social insurance agency or branch, actually it's almost impossible that they can get wrong, we have policies from the labour administration, they implement these policies, no much room

for negotiation since social insurance is a kind of governmental work, it should be authoritative and coherent' (Interview, court judge)

Calculation of contribution record can be a sensitive issue as it has a considerable effect on one's retirement standard. Social Insurance Law allows workers to pay back contribution duty to meet the minimum 15 years of contribution which enables them to get a basis pension (Article 13, 16). The term ensures that every Chinese worker can have a basic subsistence after legal retirement age, no matter one's previous working history. This material dimension will certainly cause moral risks related to contribution cheat, however, it's a clear evidence that Social Insurance Law and its implementation has been more material than any other legislations.

Chapter 8. Different strategies of law mobilization

While law takes the form of rational and formal application in its ideal-type way, law in practice can be more diverse as 'speaking of law' is a process that is subjected to the very conditions where law operates, not to mention that labour-related legislations are deeply embedded within a given configuration that displays both the mental cognition of law users and the contingent situation that law didn't forecast. How law has been landed in concrete situation required us to take a closer look at how legal enforcement's activities (inspection, arbitration, court, etc.) take place. Through closer observation, a sociology of law proved useful and effective to understand how people involved in law frame the ruthless terms into local translation in consistence with concrete conditions. The debate around social contribution shows that various motivations are constantly shaping the

8.1 Labour inspection: between passive and pro-active

Rule of law normally required a corresponding force of implementation that insures people are doing the right thing. The implementation of law is a debated topic both within the country and abroad. Opposite conclusions on the effectiveness of rule of law in China can be drew according to different perspectives. While there are people who suggests that labour law in China is a by-product of the politics which means that law enforcement can be very selective and only work for the political purpose (such as keeping labour cost law or maintain social peace by propitiating workers, etc.), the rising number of litigations and shows that Chinese workers begins to learn laws. So, the question posed here might not be decide whether the law is pro-business or pro-labour, rather, as things are changing so fast today in China, we should be more concerned with how labour inspection are actually implemented. Through our observation, what interests us is that what are the preoccupations and constraints that labour inspectors are facing when they deal with complaints made by workers

The role of law enforcement gives labour inspection a special task to fulfil when it comes to labour issues. If employers violated the law, the workers can make a formal complaint with labour inspector and the latter should respond to this demand within a certain time limit. Great pressure translates to workload that the small brigade can't handle:

'Here in our office, we are five people and within our jurisdiction there are thousand firms. On site patrol is one of our work task but it is obviously impossible for us to do so […] we rely on firm's self-audit report to know if there is problem […] Concerning labour contract and social insurance, almost every single working way, we will receive new complaint, we should go to check and made an administrative decision

to issue a requirement of or a fine. In a word, we are under-equipped to enforce the laws for sure.' (Interview, labour inspector)

Besides this, labour inspection's routine activities are often confused with local government's strategic interest. As a matter of fact, pro-business mindset is popular among local governors since local governments vow more businesses to come and invest, for example, to set up plants which can bring about employment and tax revenue. So, maintaining good relationship and be friendly with key account firms are many local governors' priorities in agenda. This context made labour inspection's law enforcement actives sometimes undesirable because strict enforcement has a negative impact on firms' labour cost control according to many local officials. Media reported that local governors are so cared about the administrative fine that they demand that any fine beyond 2000 RMB should be reported to local governments to be further discussed. This pro-business altitude has been confirmed by our interviewee:

'Yes, we can issue an expansive fine to punish firms who violate laws, however, it's so rare that we directly issue fine without caution […] Actually, we will contact the firm with problems and give them time to correct […] in some case firms ignored us, you have to threaten them with a possible fine, that works and that is our way of doing our job.' (Interview, labour inspector)

Law enforcement at the labour inspection is oftentimes passive as suggested before in this chapter. However, it does not mean that labour inspectors are always siting in the office ready for the complaints to come, priorities are set out in working agenda, issues relate to outstanding wage is the most 'dangerous' case according to labour inspector as it creates social unrest that is an absolute redline in the eye of government officials. We can detect the same mindset

'…. Small business is not our main target, they are so many, and they change so fast, for sure we don't have corresponding means to check them all the time…. Actually, big firms and group litigants are a major concern because it can create social unrest which is dangerous…. We receive orders from our leader that which firm should be our target then we take action…." (Interview, labour inspector)

Priorities set by labour inspection can certainly be understood in a practical way as administration has its own logic of action. Small businesses like restaurants, retail shops, craft workshop, etc., are generally considered as informal economy that should not be treated in an active way, which means that 'we never actively inspect them only when we receive complaints.' The reason behind this line of logic lies in the huge numbers of mini firms of course, but also, informal sector is generally ignored (intentionally or unintentionally) because of its inherent nature that is incompatible with policy design (based on formal labour relation).

8.2 Mediating work accident: Justice beyond the boundary between formal and informal

If the significant rise or labour arbitration and court decision has been seen as a sign of rising legal consciousness and the soared tension between workers and employer, mediation performed by labour arbitrator (and judge at court) played an important role in channelling this legal indignation in a more 'situated' way. Despite a voluntary action by legal definition, labour dispute mediation was a prioritized process required by law which stipulates that labour arbitration commission must try to mediate before any arbitration award is made. At practice, local labour authority encourages arbitrators to increase the successful rate of mediation as an evidence of peacefully solving labour conflict, not to mention that successful mediation can lead to the withdrawal of the claim. More successful mediation means less cases go to courts; thus, it becomes an indispensable conception in constructing harmonious labour relation.

'We have KPI (performance evaluation) of successful mediation rate here', when investigating labour arbitration committee, many confirmed that the general working principle explicitly encourages arbitrators to mediate the case as far as possible, though mediation is clearly defined as voluntary process which is subjected to the wills of parties, arbitrators normally give hints to parties that mediation can be good for everyone.

'…When labour dispute arises, party can apply for mediation, or demand arbitration if the former is not applicable' (extracted from Labour Mediation and Arbitration Law)

However, 'mediation first' has been underlined for a number of reasons: 1) Labour arbitration activity has been assumed in the aftermath of the implementation of labour contract in state sector, this mechanism remained active and has been regarded as an acquired institutional capacity to deal with labour conflict; 2) At regional level, the rising labour conflict has been perceived by local authorities as a sensitive issue as it, to some extent, threatens public security which is politically risky in the eye of local governors;[97] 3) Soared incoming caseload is actually paralyze the credibility of many judicial institutions, lack of judicial capacity to address rising claims is everywhere and a direct outcome is the time cost becomes unbearable for litigants.

It's in this context that mediation began to gain currency among legislators and local governors. From 2006, state began to launch a campaign aimed at promoting a coordinated mediation network which includes many stakeholders like trade union, local government (particularly street level

[97] Escalated labour conflict, particularly petition, strike and violence are seen as 'mass event' that should be seriously addressed. In many cases, it's no easy job to calm down as shown by strikes in Southern China.

mediation mechanism) and legal assistance, etc. The 'grand mediation network' is seen as a policy innovation of social governance which can absorb social conflict in a moderate way. It has been said that the successful mediation rate in labour dispute has been increased considerably and even outnumbered the rate of adjudication in the year of 2011 and 2012 (Ngok and Zhuang, 2014).

Actually, arbitrators would try to persuade, as much as possible, both parties to strike a possible deal. If there is a deal finally struck, then arbitrators are considered as successfully mediated a labour dispute and thus prevent a potential lawsuit afterwards. In fact, labour mediation is seen as an effective means to construct 'harmonious labour relation'. Behind the strong favour of mediation lies a shared belief among many legislators who consider mediation as a very practical (or Chinese) way to solve subtle problem such as labour related issues. During the consultation of labour arbitration law, one member of National People's Congress put it, "In China, we have a tradition of mediation and we have accumulated a wealth of experiences over time, not to mention that most people involved in labour dispute prefer not to offend with each other openly, this is different with other civil litigations." This mindset reflects a widely shared sense of feeling embarrassed when one has no other option but is forced to recourse to court to seek justice. "The peace and harmony are the most precious characters of Chinese culture, there is no need for small labour dispute to be heard in civil tribunal, we should neutralize labour dispute and conflict at the lowest level, this is good for social stability." While formal litigation is seen by many as an unnecessary escalation of 'small problem', others regard 'mediation first' can be adopted as a fast track of solving problem which would eventually benefits workers themselves: "We found that labour dispute can be a very time costly activity if one decides to go through all legal procedures, many vulnerable workers particularly migrant workers and injured workers can't bear this painful justice", "mediation and arbitration should be formalized so as to facilitate the legal process".[98] Whatever the underlying reason, it seems that legislators are optimistic about the effectiveness of mediation as a way to mitigate labour dispute, in a 'harmonious' manner. As openly required in a ministerial document, '…mediation should be particularly understood as a key to address rising labour dispute and conflict as it can prevent and neutralize conflict at grass roots level…'.[99]

However, 'mediation first' comes not as beautifully as many legislators would expected, the significant rise of labour arbitration and court hearing show that workers are using legal weapons much more frequently than ever before, 'Many claimants come with a solid determination because they

[98] These opinions are presented by members of National People Congress, http://www.npc.gov.cn/npc/xinwen/lfgz/lfdt/2007-09/06/content_371637.htm.
[99] 'opinion on the promoting labour mediation', http://www.mohrss.gov.cn/tjzcgls/TJZCzcwj/200910/t20091030_83229.html.

found their rights have been violated for so long' (interview, labour arbitrator). As a matter of fact, open conflict such as lawsuit and appeal to government is seen as a clear sign of offence to both parties, basically most people regard lawsuit as unfavourable action as it can be disaster for the future relation (cooperation) between parties. 'If one still wants to work in this firm, it's unwise to resort to law' (interview, litigant). On the other hand, employer too, regard lawsuit as a clear sign of break up and thus tries to bring about difficulties on the judicial process. This includes deliberately extending the process by appealing to higher court while the facts and legal responsibilities are clearly presented at the trial. Many firms are unwilling to obey the arbitration award and they find everything they can to ignore the justice.

'You have cases in which the facts are so clear and recognized by both parties, but afterwards, employer just ignore the award I give and appeal to court…. Why? Because employer considers appeal as a tactic to postpone the justice. The logic is that if I can't win the case then I cause damage so that we all lose…. in any case, to revenge as much as possible, both emotionally and economically (interview, labour arbitrator)'

In a word, there exists a considerable distrust (even moral anomie) between parties who both regard lawsuit as a last battle not only in terms of money but about one's 'determination' to get justice. However, despite the strong intension between parties, mediation as a soft way is ironically relevant by its pragmatism which presents itself as an inevitable question in some situations. In fact, the applicability of mediation depends on the willingness of parties involved, or more precisely their real causes that drive them to appeal. Generally, if one frames his grievance in terms of (rational and formal) justice at whatever cost (fight only for written justice), then it's unlikely that mediation would be an option as they have no interests in obtaining a discounted justice. On the other hand, if the one frames his claim in terms of (material) solution, mediation can be a good way to achieve the goal as it can be more efficient in terms of money and time, i.e., justice comes at a lower price. During our investigation in arbitration committee, a number of cases ended up by successful mediations because of some good reasons that people involved value as viable. However, we found two interesting examples that show contradictory mind-sets that leads to differentiate strategies when mobilizing law.

We encountered two workers with same work accident in a metal plant. A male litigant, working in this manufacturing workshop, seeks for indemnity of work accident that firm refused to pay (employer didn't pay the work insurance for employee actually), the facts were clear, and justice can be judged without great difficulties. However, the case ended up by a successful mediation. In another case that took place in the same plant, a female litigant, the male litigant's former colleague, experienced quiet the same work accident as her palm has been flatten by the machine tool, refused to mediate but went through all legal procedures to get the justice she seeks for. While we can't disclose

all the details (personal information) of the cases due to the demand of litigants, we may elaborate how they did reasons that drive people act differently.

Firstly, if we take a standard (ideal) law application as a process to achieve formal and rational justice, it would probably be that the litigant firstly makes a formal complaint to the labour inspection so that the latter would engages to conduct an investigation into firm's violation of law in terms of non-compliance of social insurance (work accident insurance). But, how the inspection process was conducted has nothing to do with litigant's demand as the key is to get indemnified by someone who is responsible this violation. While waiting for the result of investigation (if there is an administrative fine to be issued on the firm, this has nothing to do with the litigant), he can raise an arbitration demand to get a solution before appealing to court. During mediation and arbitration, the process depends on the parties' willingness to end the case, if one of the parties wants to use tactics to delay procedures, then the litigant would be forced to go through a series of (complicated) legal processes (e.g. confirmation of work accident, evaluation of hurt, appeal at the court, appeal at higher court, waiting for legal enforcement, etc.) which could last two or three years maximum. Obviously, if justice comes at such a price, litigant has good reason to act alternatively (such as prefer to mediate) rather than fighting until the end.

In reality, litigations concern with work accident have a common feature that the parties involved are out of the reach of social insurance. Violation of work accident is widespread, usually, those who entered labour court

Let's focus firstly on the male litigant, the reason is clear as he got hurt of his hand when operating machine tool (his work accident was around five degrees work injury according to evaluation scale) during work and he claimed for indemnity as long as he knew he didn't have the work accident entitlement because firm's violation of social insurance law. He didn't report this accident to officials (local labour bureau is in charge of evaluating work accident) to be considered as work accident as he was sent to hospital by the boss, the boss paid the initial medical fees relating to medical treatments and promised him that everything would be taken care by the firm. He believed in what the boss told him and continued to work after recovery:

'the boss treated me very well, he took me to the hospital and then paid for everything… I knew nothing about work accident and social insurance, so I never declare anything to anyone…. I got a sum of compensation, actually, everything was good at that time, after recovery, boss let me back to work, he gave me an easy job, so I continue to work here, now we have more laws to protect workers, it's good but I didn't declare, so I can't benefit….' (Interview, employee with work accident)

Now we turn to the case in which the female worker got hurt when working, the way she dealt with the issue was quite different from her male colleague.

‘I got hurt with my palm, very similar to my colleague’s, I though it is serious, and my friend told me that I should report to labour bureau, so I did, at that time, many people didn’t know this, so labour bureau recognized my injury. Boss took me to hospital and paid the fees….’ (Interview, employee with work accident)

The female litigant told us that she got 40000 Yuan as accident compensation afterwards, moreover the boss should contribute social insurance for her up to 15 years so that she will get a pension when she retires. She retained her job in the firm. The reconciliation was conducted by the labour arbitration commission as she told us the ‘officials said it’s good for her’, so everything calmed down. For the male litigant too, he got a sum similar to the female litigant, but he never told us the precise number the detail of his final resolution with the boss.

However, several years later, things have been greatly changed: national legislation on work accident and particularly the Labour Contract Law (Articles 46-48) stipulate that employer shall pay a considerable compensation (based on monthly wage) to injured employee who terminates labour relation (employee’s willingness) because of loss of labour capacity. Besides, firm management decided to move the firm to another place. This decision triggered a series of legal actions between the female worker and boss. Firstly, the female worker demanded a solution of mercy by asking to be relocated because her heath condition doesn’t allow her to work too far away. The boss refused and fired her. Female worker took to labour arbitration again, she claimed for an economic compensation and a severance as stipulated by law (around 140000 Yuan in total), arbitration commission made a decision in favour of her claim, but the boss refused and appealed to district court where judge found that they had already reached a mediation at the time the accident took place (the reconciliation made many years before), so it’s groundless to claim again for the same issue, the court made a decision in favour of the boss. The female worker again took to labour arbitration and court for several times, it costs her about 2 years to claim repeatedly (2 arbitration demands and 2 court hearings). She even appealed to higher court of Zhejiang for legal reconsideration after failure in the court, but still failed to get what she claims for. In a latest interview with her, we got to know that the district court reviewed her case and suggested that the boss pay social insurance contribution to her as it had been included in the first mediation solution that social insurance charge should be paid by the boss up to 15 years. Because worker lost labour capacity, the boss should be responsible for work-related welfare.

‘The social insurance fee is about 40000 Yuan, as to the rest of 100000 Yuan, they said it’s baseless, they suggest me to accept the mediation because I had been fought for three years, they consider that I am a legal fighter, so they offer me this solution. My idea is that my work accident had been recognized by government, so new law on work accident compensation should apply in my case

anyway, the boss fired me because I am useless, it's his fault, so I will insist to sue.' (Interview, employee with work accident)

Although she had been turned down by courts for so many times (which one of our friend arbitrator consider fairly rare in his career life), she still decides to forward this case to higher legal authority for reconsideration. Moreover, her case was accompanied by an experienced labour law lawyer who works as a legal assistance volunteer in local trade union. The role of the lawyer was critical as she told us it was the lawyer's help that cemented her very will to fight until the end.

As regards to the male worker, as he did nothing when the accident took place, he was unable to claim right as his female colleague did, although he had been compensated by the boss, he was unable to act in the name of work accident law. Talking about his case and his colleague's, it seems that he is not that enthusiastic about the legal rights for injured worker. He still feels that his work accident had been correctly compensated several years before in a reasonable way. As to today's legal right, he admits that he has no reason to mobilize as he was never recognized as injured worker legally. He even seems indifferent to what has been happen with the female litigant, but he admits that if he knows the law as today's people do, he might act differently.

Based on the above cases, one can easily conclude that the explicit difference between an official (recognized) work accident and undeclared one is that in the latter case one is deprived of taking legal action to contest. But there is at least one common thing in both cases, that two workers both accepted mediation process hosted by labour authority, and thus got a fair cash compensation (at that time, compensation was subjected to local rules with which we are not familiar with), the proof is that they both retained their job and choose to stay in the firm, and the boss was required to give them social insurance. Even in today's work accident cases, mediation still dominates as a main way to reconcile parties. In practice, mediated cases can significantly reduce the claimed compensation sum as compared to arbitrated cases (Zheng and Deakin, 2016). Apparently, one may conclude that choose to mediate may amount to a discounted justice, however, we found that the reason why mediation prevails has its own root due to concrete concerns.

For labour arbitrators, they are experienced governmental agents and they can estimate, to some degree, if the employer is willing to fully obey the award. For them, they can easily issue an award by stating that firm has to pay the indemnity in accordance with law, meanwhile, they believe that firm may be tactical in this case since they can deliberately ignore the arbitral award by appealing to court (repeatedly in many cases). On the other hand, it becomes more regular that litigants claim for 'unreasonable' compensation (particularly with the assistance of lawyer), which the officials consider as causing troubles. Tension is high likely if parties both choose to fight against each other at any cost, as it is the main reason that many work accident cases in China look like running a legal marathon

which finally everyone found less interesting because of huge cost. Justice is certainly crucial as the mission of Chinese court is to 'let everyone who enters into the court to feel justice', however, practical concerns are stringent as even in the court, judges are more inclined to mediate particularly when the parties are trapped during complicated legal procedures.

For firm, successful mediation usually reduces the claimed indemnity which means that firm can pay less than prescribed by law in most cases. Though they can take morally vice action against the litigant by deliberately postponing the cases (which they can do legally as they have right to appeal too), but finally they have to pay, maybe much more, thus choose to mediate seems a good deal before a legal marathon can take place, which they would lose for sure in certain case (where facts are very clear, and employee can win 100% for sure). To persuade firm to accept mediation is seen as a breakthrough that can help accelerate mediation.

'if the labour relation and accident details are clear, we try best to guide parties to go through mediation process because there is no dispute about the facts, going to court could only cost time…. It's a good chance to balance the interests of two sides when everything is recognized by parties….' (Interview, labour arbitrator)

In contrast to a standard application of law through formal and rational procedures, the very reality is that the litigant comes with his own capability sets (knowledge of law, financial situation, willingness to sacrifice time and money, level of urgency of one's state, one's family condition, etc.) that may prevent (or enable) him from fully engaging to fight for one's justice. The choice of mediation or not depends on person's real demand and ability to act. In this case, litigant may prefer immediate indemnity rather than painful justice with tangible costs (time, money, etc.). Arbitrators are, of course, capable of conceiving this implicit context because of his precedent experiences. They try to persuade firm to accept mediation since firm has good reason to compromise as their violation of law is so clear that they would lose the case in any case although they are generally more immune to legal costs than a worker. As such, the condition to start a mediation has been met due to parties' concrete capability set and demands. While the likelihood of a successful mediation is subjected to a number of factors: such as parties' baselines (the extent to which parties are willing to compromise), arbitrator's skill (ability to detect parties' real concerns), the distance between mediation (negotiated indemnity) and legal judgement (legal binding responsibilities), mediation as an 'irrational' solution is usually preferred as a means to neutralize the dispute or conflict.

Besides the bargaining skill, labour arbitrators are responsible for the quality of mediation solution. They should be aware of terms that may explicitly biased toward one side. For example, term like 'worker shall give up right of taking legal action once he receives the indemnity' is identified as 'illegal', arbitrator should examine every mediated term since the mediation has the same effects as

court judgement. Moreover, the sum of indemnity should be carefully calculated as in most cases workers renounced a part of right in exchange of efficiency of pay, however, the gap between a mediated sum and legal sum should be reasonable. For such a mediation to be made, both civil willingness from the parties and law standard are critical.

Although many consider this kind of justice as 'discounted', 'irrational', 'unfair', whatever you name it, our nuanced analysis shows that, by doing so, people's real capability can be achieved to some degree, rather than suffering from the brutal (unbearable) reality. In this case, the only loser is, ironically, the written justice itself. However, it's the existence of law that facilities the parties to engage to discuss an acceptable solution. As an arbitrator put it:

'This is the reality of labour dispute, maybe it's stupid to debating if we are helping people to get the written justice perfectly since our main goal here is to satisfy the parties, to calm down issues…Yes, we do have written law saying this saying that, I was very cling to written terms when I began my career, however, things are usually much more complicated than written law can estimates and you have to face the reality, Anyway, mediation is one of our officially defined working tasks, government and leaders believe in it, and you know well that they encourage mediation before award and trial. If you observe the case in the court, it's quiet the same that judge is more willing to mediate than giving verdict.' (Interview, labour arbitrator)

Far from negotiating a civil reconciliation which is primarily based on party's free will, to discuss an indemnity solution of work accident is actually a tripartite interaction that involves state's will (embodied by arbitrators' intervention) in de-escalating labour conflict. Arbitrator tries to seek an equilibrium point where litigants find 'reasonable' (or valuable) causes to accept an abandon of legal right in exchange of an amicable resolution with the firm, in the condition that his immediate need is met by firm. Both arbitrator and firm know that worker is very often ill-placed in the process of mediation and thus vulnerable to potential legal procedures. This intrinsic 'disequilibrium of capability' has been underlined as a main reason why governmental official are so keen to mediation rather than legal procedures. The balance of power matters despite labour law tends to protect workers more than employers. Pro-labour legal legislations do have an impact in helping vulnerable workers to contest right, however, the inability to fully to do so is widespread among our interviewees.

'we suggest our clients (both firms and employees) to think carefully before accepting or rejecting a solution proposed by arbitrator, the very first thing is not the written right, everyone knows the right, it is written in the law, everyone can understand actually. But my job is more than this (telling the law), I tell my clients that to know you adversary is much more important than knowing legal terms. To put it simple, you have to know if your adversary has the will to reconcile the case, then you take advantage of it.' (Interview, with labour lawyer)

Experienced arbitrators, lawyers are the most active personalities during a mediation, this is not to suggest that they do this because they want to get the job done (or get the commission) as soon as possible, rather, it's the very reality of capability gap that legitimize their actions, that stem from the preoccupation of. It's true that arbitrators are pressured because of increasing caseload, but they are the ones who know better than how refuses a mediation can means (). The aim of persuading litigant is not simply to calm them down, in the eyes of state officials, law mobilization in China is unique as it generates potential escalation of conflict, the peace is the most

Of course, law is not shamed as we can observe from the female litigant who went through every procedure she could triggers, although she spent time and money but not the result she expects, her capability has been developed as she has more chances than the male litigant to kick-off potential litigations. To be recognized by law means more opportunities to act, this is obviously a process of obtaining capability that generates real freedom. Quite similar to the phenomenon observed by researcher in this field, litigants with firm determination (fight for justice regardless of cost) are those who have experienced both victory (even insignificant) and defeat. The critical implication is that mobilization of law is, in most cases, a process from high expectation to informed disenchantment (Gallagher, 2006), in which litigants realized that law is not something automatically applied but is based on nuanced manoeuvre performed by state officials. Mediation and arbitration have been seen as the main means to terminate labour cases. In the case of female litigant, she got to know that law is a process of a series of repeated litigations that costs time, not to mention that labour rights written in the law is not necessarily the same sense captured by parties, besides the strong aspiration for the justice, learning law is another driving factor. She becomes a fan of legal knowledges, told us that she is willingness to help others who have the same problem. At the end of our interview, she confirmed with us that despite the failures in the court, the experiences of fighting justice made her more confident, and particularly she believes that law is a good way for people to express rather than 'irrational acts'.

Such law activism is not rare in Chinese law field, during our stay with labour arbitration, many returns to home with disappointed result but feel more empowered when talking legal subjects with others. To many, those who have done trails are seem as 'little experts' in responding questions about labour violations. In extreme cases, they become volunteers or representatives for people in need of legal assistance. However, governments are reluctant to accept a rise of labour activism as they consider their interventions in court dangerous. Rising legal consciousness, according to policy makers, shall never be an excuse of over-claiming of one's right.

8.3 Mediation as alternative justice: formal or material?

After reviewing different causes that lead people to court, it is obvious that labour mediation and arbitration are actually functioned as the first line of 'defence' vis-à-vis labour dispute. The priority on mediation embodies a form of 'active justice' which offer a way for parties to work together to explore a mutually viable solution that is based on very concrete and detailed concerns, which means that in most cases the 'pragmatism' prevails. Arbitrators working at local level are not theorists of labour and social insurance laws, rather, their working style is similar to street level routine bureaucrats, the characteristics of the job requires high working efficiency so as to release heavier caseload, not to mention that government put increasing emphasis on labour arbitration with the belief that 'mini' labour dispute should be terminated by arbitrators, not court judges. However, far from mechanically applying the law as required by bureaucracy, interpreting law to litigants, in a practical and understandable way, is the real challenge that arbitrators face as it's necessary to develop appropriate strategy (local solutions) to interact with litigants who don't necessarily know how to relate their situations to law (Weller, 2003). Our closer observation shows that if the concerns expressed by parties in labour dispute are those with 'material' claims that prioritize money (cash) indemnity over other issues, arbitrators prefer to use mediation, while other litigants with strong confidence to win the case or with firm determination to get written justice who exhibited formal and rational characters, arbitrators consider that they are not likely to be persuaded to mediate or compromise. As such, strategies can be heterogeneous when confronting people with completely different mentalities.

'Generally speaking, if people come with money concern, that's good news because negotiating money can be much easier than discussing legal procedure and applicability. It's like a bargaining process in which I will suggest reasonable (in reference to written law) price to both parties. Normally it can work in so far as there is a will to end case. Mediation result is legally binding thus we can end the case officially. On the contrary, if people come with the claim for labour right, a kind of justice, for example, confirmation of labour relation or demand social insurance payment, as you know these are something with long term, not like lump-sum indemnity, thus they can be more complicated and usually parties are unlikely to mediate, in this case, I will give award very quickly so that they can proceed to court trail.' (interview, labour arbitrator)

Obviously, efficiently terminate the case is one of the main goals for most labour arbitrators given the huge workload they face every day, they deploy strategies accordingly that are based on their accumulated experiences which they cherish as a stock of local knowledges. If mediation can be desirable solution to parties involved, why should they unnecessarily stick to written legal terms which would definitely bring about unsatisfied results and uncertainties to everyone? Once mediation

activated, the legal character of arbitrator weakened, tension relaxed, it's the bargaining of interests, rather than legal spirit, becomes the dominant tune. The de-escalating character of mediation has been valued for many reasons: it's cost saving for both parties; law is pro-labour on the surface but not every worker can afford its cost (time, money and uncertainty), thus mediation can be an alternative; mediation is better than court judge as the former can maintain the relation between parties while the latter is a radical action of break up. The pragmatism of mediation does show its effectiveness in resolving dispute and conflict. On the other hand, however, the advocacy of mediation might not stop people with strong legal expectation to continue their 'combats until the end'. In this case, mediation and arbitration process serves only as an appetizer that further contributes to the interest of proceeding to main course (court trail) where parties believe they can find real justice. That's why court is receiving more caseload in spite of an effort in mediation.

Although some may argue that the reliance on mediation reveals that labour laws in China failed to address very concretes concerns expressed in labour dispute and insisted that the clear emphasis on the mediation and state's attempt to promote it are a clear sign of the so-called 'de-judicialization' (Peerenboom, 2009) which undermines the credibility of China's legal system. This leads to doubt the plausible effect of 'legal consciousness' in defending one's right as when workers get to know the 'realistic' dimension of law, rather than appreciating the greatness of law', they have more or less learnt with informed disenchantment (Gallagher, 2006). Moreover, the practice of mediation reflects a sign of 'commodification' of legal right, seeing labour right as an exchange price that workers don't have the equal position to bargain with employer due to the implicit pressure from arbitrators (Zheng, 2010). In a word, the active attitude that mediation activities exhibited is criticized as a deliberate action backed by government to weaken the effectiveness of legal weapon, and thus formed a new type of 'inequality' that in the name of rule of law.

While the politically correct campaign of 'active justice' embodied through mediation is seen as a 'counter movement' to the formed 'legalism' that has been widely praised and accepted as 'weapon' that people can mobilize to fight against injustice, causing debate on the legal trend in China (Su, 2010), our investigation shows that people in situated context are, to some extent, constrained by different capability set and their legal actions can differ in terms of strategy invoked. The framing process is of great relevance since it is the outcome of how people conceive the environment around them. As a matter of fact, there can be no absolute 'active justice' or 'passive justice', nor can arbitrators apply the law just like a motionless machine that functions in terms of absolute rational bureaucracy, actually they simply play it by ear according to their accumulated strategies and often subjected to outside constrains (e.g. political concern, requirements from superior, parties' willingness, etc.). We found that both the 'informed disenchantment' and 'legalism' can be found simply because

people have many reasons to act and their actions can be driven by heterogeneous causes over time. Changing strategy is possible in so far as people realized the very limit of labour law in 'correcting' unfair situation. For example, lawyer has a role to play in advising litigant how to maximize of fully make use of legal terms:

'There has never been a mechanical application of law from our point of view, for us, arbitration is like a game in which you should carefully play the cards you have, to let you adversaries know that your determination but also your solid will to get correct compensation in a most reasonable way. So firstly, it's essential to know what your client looks for and how much he can concede. Basically, for case like labour dispute, my own experience is that mediation is not bad option for my client in most time. We can teach clients how to do best in so far as they trust me.' (Interview, labour law lawyer)

Arbitrators and lawyers actually can do more to help litigant to get what they consider as reasonable. If a compensation negotiated has the same 'effect' as law, why should one to sacrifice the considerable cost to get the formal justice? Our investigation has shown that labour compliance is only problematic for those who

Of course, not every case is negotiable, in many cases people can surly win and where parties have absolute evidence that they can get the complete (full) justice defined in law. In this sense, law is actually helping people to discover, rather than constraining, new possibilities to make sense of the situation they face according to their capability sets respectively. In a word, people can choose between a full justice (despite costly) and a reasonable solution.

8.4 Forms of actions and capabilities configuration

As we observed empirically how cases can be mediated or not, it might be relevant that we now turn to the 'worlds of law' and 'capability approach' as both an analytical and evaluative framework whereby we can shed light on the implication of the use of legal tools in addressing social protection issues.

Another implication lies in the *ex poste* legal trails. Arbitrators and judges saw ending cases as an appropriate source for launching education campaign, there are more and more courts (and other institutions alike) begin to release ended and solved cases to public, in the form of press conference or governmental white book, so that people can be aware of how arbitration and courts apply or translate laws into concrete actions. This leaves a clear sign to the public that the ultimate goal of a legal verdict is to 'teach' and 'guide' firms and worker to sustain a 'harmonious' relationship. Among example litigations, a clear characteristic is that the common point is that all the case ended up with the favourable decision made towards works. The evidence is clear, employer's violation is typical. In this

sense, the use and mobilization of law is itself a process of empowerment which can contributed to the formation of 'legal sense', 'legal consciousness' for workers and employers because for employers too, violation of labour law becomes a real risk than ever before, they should be educated through the court's determination in implementing pro-labour laws.

Terms of social protection for migrant workers have been consolidated through legislative efforts in providing equal treatments to all wage workers (i.e. workers with legal labour relation). This leads to a definitive end to previous institutional arrangement that discriminates migrant worker by establishing inferior insurance scheme.[100] The distinction between migrant workers and workers with urban *hukou* now has no formal place in law as far as all workers are subjected to mandatory nationally defined social insurance scheme (public servants, hospital and university employees too) under unique criteria (a formal labour contract). Despite the great step forward of the universalization of social protection right, migrant workers without formal jobs is still excluded from social insurance scheme while those with urban *hukou* but without job (people in flexible situation as defined by local government) can participate.[101] We can still feel something conservative when we observe such subtle 'discrimination', or rather, an obvious preferential treatment for people with urban *hukou*. A double-standard still exists despite a clear move from *hukou* to labour contract. On the one hand, migrant workers are vulnerable as informal labour is the only viable option for many of them (particularly unskilled ones), on the other hand, urban residents with *hukou* can have social insurance in so far as he is willing to pay the contribution. A *danwei* legacy is still at working as people without stable jobs are treated differently, the social insurance scheme, conceived as a professional welfare institution is overwhelmingly biased towards people with standard employment, or the local people who are supposed as 'stable people' living in the region.

In Sen's 'capability approach', informational focus has been underlined as a key to understand people's real state of advantage. The ability to choose (or to act), or the freedom that 'person actually has to do this or be that' is more relevant than narrowly defined utilitarian (Jeremy Bentham's individual happiness) or resource based (Rawlsian primary good) approach. Opportunity aspect of freedom means that there is no design of rule that can brings equal goods to all people, rather, it enables us to alter the way of thinking, in fact the pertinent question becomes to know how people can actually

[100] Shanghai is one of the last regions to cancel discriminative arrangement on migrant workers. From 2011 onwards, all workers in Shanghai can participate to the same social insurance scheme. Before that date, migrant workers were categorized as a special group who subjected to tailored social insurance scheme.

[101] The underlying reason is that social insurance represents regional living and social protection standard as wage varies across regions. Migrants should be excluded if he didn't formally work in the region, however, the locals can participate even if he is unemployed or in other flexible conditions (self-employed, mini-entrepreneur, own-account worker, etc.). In terms of contribution, locals face a higher rate since they should pay both the employee contribution and employer contribution (8%+12%).

act within a given institutional environmental (social norms such as laws and rules) to fulfil his or her needs. Different features of our lives and concerns can lead to heterogeneous actions when facing the same rules. As our in-depth field study can reveals, China's labour legislations are somehow obscure when legal terms generally make no difference when defining worker's status. The concept of worker is badly defined and lacks substantial information that are needed to address workers with plural backgrounds. As the concept of 'worker' is not enough to be invoked as an operable idea, implement such a law in principle needs many concrete solutions as shown by our case study of legal practice in social insurance dispute.

First, in our analysis of migrant workers who demand social insurance, they were guided to arbitration commission and court by different motivations: 1) those who learnt that Social Insurance Law is designed for all who work, *hukou* is no longer an inherent constraint that prevents them from benefiting social welfare as before, migrant worker now can have the same welfare level as insider workers as long as they can prove a formal labour relation with others. Of course, they are required to pay considerable contribution to social insurance scheme which many of them consider expansive even disagreeable; 2) for those who regard social insurance regime as a conservative regime that fails to match with their real needs (many migrant workers change job quickly between region but social insurance record doesn't move with them), they consider the legal right less interesting as regards to their precariousness in the labour market, they are more likely to negotiate and accept compensation as an exchange of their acquired rights. In the latter case, they failed to understand that social insurance right can't be bargained. Though migrant workers generally prefer cash in hand, one can hardly say that a migrant worker's capability has been enhanced because of the cash compensation he can get in hand from his employer as an exchange of right, actually he is still excluded from the social welfare regime and thus greatly exposed to future social risks.

This comparison proves that evaluation of social policy based on 'means' is obviously not enough to judge one's overall welfare 'state', capability perspective can do more in this matter because legal right is seen here as an institutive factor which people can invoke whenever he or she finds reason to act (e.g., to stabilize job track, to settle down in a place, to enrol his child in school, to buy a property, etc.). Social insurance right gives all labour market participants, no matter their actual conditions, the opportunity to formalize labour relation and get well protected through official legal test (to decide whether one is legally working for another). Legal terms and procedures are given for those who are ready to use, however, whether to mobilize it depends on the one's concrete situations and needs (or the 'capabilities set' as Sen suggests) of everyone, that's the reason why we saw heterogeneous strategies and results in the labour arbitration process. According to Weberian sociology of law, choose to negotiate resembles to the 'justice of the notables' because a mediation process is formal in the legal

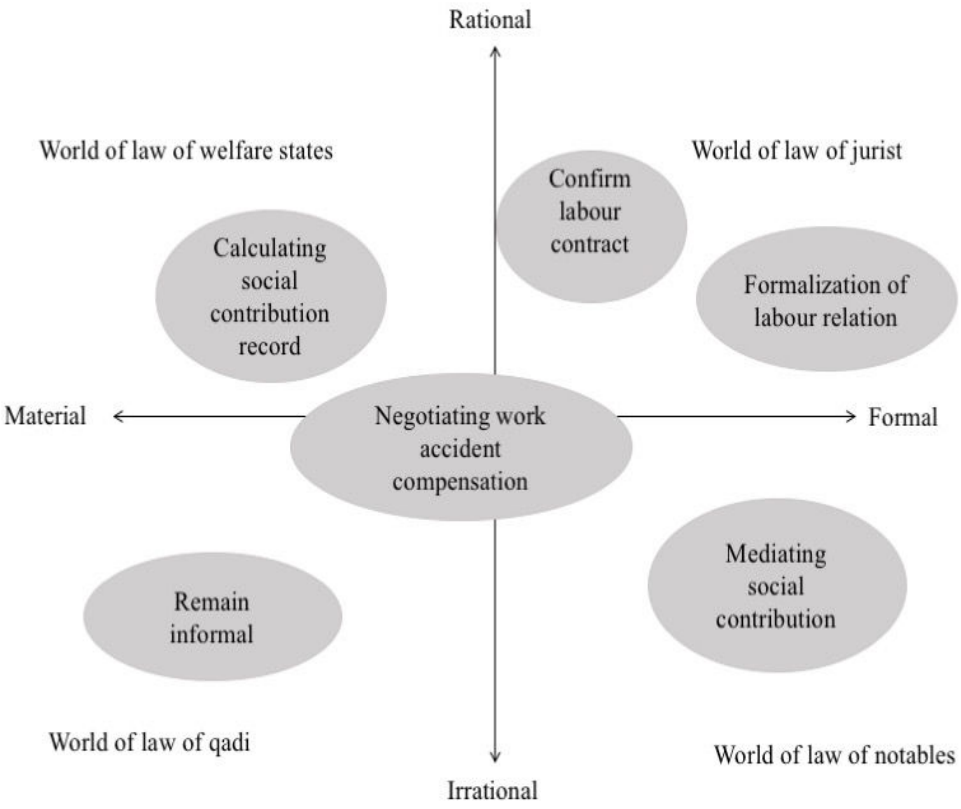
sense as law allows parties to negotiate in an organized way (hosted by arbitrator, participation of relative stakeholders, resulted recognized by arbitrator) which leads to a formal conciliation result, but the content of negotiation can be quiet irrational as the primary goal of mediation is try to calm down grievance as much as possible, arbitrators and lawyers (if any) usually seek to maximize the specific interests (very often the cash compensation) that parties can accept, the written justice and legal right might be less attractive since they come with considerable 'costs' due to potential procedures, in this case, a 'deal' is irrational in legal sense but makes sense when it comes to mutual expectations.

Hence, it's one's capability set, not only the law, limits the reach of person's action while informal labour has no willingness to pay for social insurance charges which he considers 'expansive' or not that 'worthy'. Legal right only matters when one finds it's indispensable to have these social rights to live in the city. In a word, they would eventually face the question: remain informal or seek formal. Although they may invoke law for various reasons, but governments are using social insurance right as a way to force informal become formal, in most big cities in China, local governments required minimum social insurance records if one wants to get access into public service such as health service and education, this made informal labour relation less attractive since having social insurance becomes a prerequisite for a better life in city.

While to have social insurance can be a personal choice, in the case of pension dispute, we have seen many 'middle men' went to court by using administrative law as the cause of action but failed to get a happy ending because of unchangeable factors such as one's past. Here, the use of law is passive since law is itself incomplete in dealing with problems left over by complicated *danwei* history, the mobilization of legal resource is subjected to *ad hoc* solutions made by local governments. Again, in the scheme developed by Weberian approach, this type of case falls perfectly into the 'world of law of welfare states' as the design and orientation of policy solutions are material in nature. As legal practices in pension dispute reveals, national law usually lacks operable terms when facing very concrete cases, however, the goal is to remedy historical unsolved issues by *ad-hoc* solutions that is designed specifically for a certain type of group, the 'middle people' in our case study, who has to be judged by disposable administrative order developed by the authority in charge of pension calculation. The approach is 'rational' in that the selection of criterion to judge people's pension record stems from the definition of Social Insurance Law, to allow middle man to pay contribution back duty to meet minimum legal requirement of a legal pension, can be seen as a practical application in situated context. However, how much middle man can eventually benefit depends on their working history, a topic so material as their allegiance records matter. In terms of capability, to allow people pay back duty is an overwhelmingly affirmative action against the state restructuration as it gives those who lost contribution record before a chance to re-valorise. On the other hand, how much one can 'fix' his past

depends on one's personal file which has nothing to do with juridical reasoning, but falls into a question of eligibility test based on one's previous

Figure 12. Mapping labour dispute causes in the worlds of law



Source: author

In the case of work accident, capability achievement depends on litigant's legal consciousness and capability sets. Compared with social insurance contribution and pension calculation, a resolution of work accident can be cross-dimensional as it includes almost all legal dimensions in Weber's sociology of law. Frist, the resolution of work accident case is clearly defined by laws, the degree of injury, the responsible party, the complicated process of work accident insurance, etc. The process is generally considered as rational and formal. However, go through such a long legal march requires not only one's very pertinence but also necessary personal resources. In the case of work accident, injury workers are generally subjected to pains that one can't support too long (as injury workers loss labour

capacity to some extent) without an appropriate compensation. Desperate situation amounts to a potential escalation of conflict which government doesn't want to see. It's in this context that, mediation is exclusively preferred, in the form of amical reconciliation in which parties negotiate under the direction of labour arbitrators. After all, for injury workers, who works without work insurance, get compensation immediately is the very preoccupation when they act. Thus, arbitrators and lawyers have the leeway to do some operation that looks beneficial to both parties. In our view, to get the discounted justice is not that simple as it's often seen as a sign of ineffective implementation of law, rather, it reflects the very reality of Chinese workers: again, because of labour market segmentation, informal workers are much less protected as compared to labour market insiders. They do have rights as stipulated, to get that, however can be more than simple. Obviously, to negotiate a sum of compensation is the most viable solution to address risks from everywhere. It's simple, fast and legally-binding. Despite renouncing part of right, injured worker can be quickly compensated, which means an acceptable solution for all. In this case, everyone's capability has been enhanced, it should be clear that it's because of formal law that informal or material solution become possible as a legally binding solution.

To sum up, the capability approach is a good solution to the problem of 'commensurability' encountered in social policy evaluation as 'we cannot reduce all the things we have reason to value into one homogeneous magnitude' (Sen, 2009: 239). The effects of law mobilizations, through our case studies, suggest that the relation between legal consciousness and actions taken in the court is more than unidimensional. While legal consciousness, stems from law terms, stimulates people to contest, the final effects are contingent because of different strategies. We saw that institutional factors such as labour market segmentation is explicitly effective in explaining why litigants prefer to terminate case with the option of mediation, other factors are consistently influence toady's social insurance practice as the case of pension calculation reveals.

8.5 Conclusion: Illusive market and law rhetoric

'Rule of law' formed a body of legislations in relation to labour and welfare issues, in contrast to commonly accepted argument that sees pro-labour laws as material compensation to workers who are deprived social protection due to market reform, our examination of law mobilized in situated context shows that worker-protective legislations are evolving with the ongoing market reform and contributes to the formation of standard employment relation which drives partly from *danwei* legacy and becomes more inclusive in formalizing informal labour. Also, the increasing reliance on law in regulating labour relation is compatible with state's attempts to build and create new institutional capacities that can

channel and absorb the immediate social pressure caused by labour related conflicts. By observing the legal actions performed by different stakeholders with various methods, a nuanced picture has been captured to illustrate how labour legislation is actually conceived, understood and mobilized in various contexts.

Although in some cases, we have observed that the resolution of labour dispute in reality is actually far from what has been stipulated in law, however, as suggested by Amartya Sen in his formidable 'capability approach', not all the people are in the same state facing with same legislations, thus, the process of evaluation one's actual state should be conducted in an effort to know the very reason and caused that frame the reach of people's actions. What we can confirm is that law gives people substantive freedom to act, to mobilize for various causes, wrongly or rightly. Of course, people's poor capability set is not the excuse that they deserve discounted justice, conversely, state vows to use alternative means to guide parties to reach a compromise based on a careful consideration of equilibrium between written law and one's actual capability set.

Given the growing body of legislations, the examined labour development in this chapter shows that the state is far from neoliberal tenets that assume necessary its withdrawal from market, on the contrary, we have actually seen a momentum of re-regulation, not de-regulation. Argument of away from state and towards market founds no real ground because these two concepts can't be separately understood as opposition *a priori*, rather, it is based on the human convention and collective institution that market economy can be built and survive (Deakin, 2016).

Chapter 9. General conclusion

To discuss social protection in China is actually to talk about China's labour politics. European histories and practices have revealed that social protection transformation is closely associated with changes taken place in employment relation. Employment practices can take various forms in terms of the way how labour relation is regulated within a certain legal framework (context). While some countries are more 'liberal' because of relative weak employment protection level, standard employment regime has been widely accepted and adopted by most countries as an indispensable part of post-war socio-economic order (Hall &Soskice, 2001; Deakin et al., 2005). If the very goal of this study is to know how China's social protection has been changed, we can confirm that China has accomplished labour transformation that is similar to its European counterpart. One basic judgement of today's China's labour politics is the overwhelm increasing use of law as a new means to govern labour relation. Using law to govern labour is not unique as rule of law can be found in many other policy areas such as finance, environment, urban development, etc. This leads us to ask the question: how labour law is changing China's labour landscape? Or more precisely, to what extent law can make a difference when facing labour-related issues.

Through our case study conducted in a big provincial city in China's Eastern coast area where economic activities are characterized by vibrant employment both in formal and informal sector, we can secure the trend of using law and other relative public legislations to regulate labour-related issues: such as labour contract, wages, social insurance, entitlements, etc. However, our field observations also show that the effects of law are not as explicit as paper terms written in the legal text. While in most European welfare economies labour law is a traditional social achievement that has been identified as one of the essential parts of the so-called European social model, China is still on its stage of forming law at national level, the country is trying to create a unique institution that works as a foundation upon which harmonious labour relation can thrives. Using law to govern labour is line with the general spirit of China's socialist market economy according to which old paternalistic labour regime should be replaced by an equal institution based on law (job contract). Law is seen by policy makers as an effective way to restructure state firms. However, replacing *danwei* by law doesn't mean a clear break with the past, formal labour relation (open-ended labour contract) and comprehensive social insurance scheme remained as the core elements that constitute labour relation in today's China. At the same time, informal sectors grew at a rapid pace that attracts incoming labour flow from rural area. Labour violation is not a direct result of market economy or decline of *danwei* as mainstream would suggests, rather, it reflects the facts that China's labour market is structuralized in in terms of

dualization of workforce: well protected core workers and poor protected outsiders. While big and high value-added firms are good student when it comes to law compliance, small and low value-added firms are more likely to violate law to save 'labour cost'. Through our field research, we found that law can mean differently to people in heterogeneous states although all people are equal before the law. This induces us to further ask how why labour law is deliberately or unintentionally ignored by people involved (law enforcers, workers, employers, etc.).

To do such a field research, we intend not to make judgement on what kind of labour law is at working in China, rather, very much inspired by Weber's sociology of law, we are concerned by the question that how laws, mobilizing in terms of different lines of reason, can address various issues that are emerging because of the changing labour relation.

In contrasts to widely accepted mainstream idea which considers China's labour inequality as a direct outcome of market reform, thus should fall into the hypothesis of Polanyi's double movement, a basic lesson that can be drawn from our study is that the development of labour legislation is not necessarily the logic outcome of economic changes. Facing the rise of market mechanism that has been developed in parallel with state sector restructuration, standard (formal) employment relation is not on the decline, on the contrary, it has become full-fledged institutional foundation by virtue of the implementation of a body of national legislations, and complemented by government regulations, circulars and instructions at regional level.

Rule of law replaces traditional clan-like labour-welfare regime which was embodied by *danwei*, provides inclusive and universal labour floor to all labour market participants, it actually defines the very notion of employment in a socialist market economy. However, it doesn't mean that all workers can actually enjoy same rights, we have found that how people can be protected and promoted by law is greatly subjected to a number of factors among which the capability that law can deliver is vital to decide one's real condition of labour right. This is why we are particularly concerned by the practices and debates taken place in place where law enforcements meet with real conflict between employer (and government) and employee.

9.1 Plausible market vs. social rhetoric?

Labour market changes and social protection transformations are generally seen as a by-product of market economy. Market is particularly underlined as the main factor that leads to changes in social areas. However, our analysis of the changes taken place in labour market in reform China and the

working of today's social protection in China suggest that the story is not that simple, and we found no direct sign of a market-social double movement affirmed by Polanyian school.

Similar to the rise of modern firm (enterprise) as a new form of innovation based on the collective cooperation between frim administration and various professional workers (Segrestin and Hatchuel, 2012: 45), the legal order of labour market and social protection shall not be seen as a spontaneous outcome of the developing market economy that replaced planned economy, on the contrary, it's rather a clear break with the old tradition of *danwei* welfare state, one which set out new principles (labour contract, socialized scheme) that laid down the very conditions for new labour relation and social protection to thrive. A complex set of law replaced *danwei* based paternalistic rule. Such a change of paradigm has brought about new normative implications:

1) *A new form of administration*. Labour authorities take the charge of issues related to labour law implementations: everything from inspection, arbitration to management of social insurance scheme. Part of these labour functions existed in *danwei* period as internal affairs that belong exclusively to firm administration, however, state sector restructuration externalized firm's labour functions, with a transfer of administrative competency from *danwei* to local labour authority. As we know already the primary reason of labour reform was aimed at state firms, but the outcome is the use of law and new institutional settings to deal with various labour problem (unemployment, flexible labour, social insurance integration, etc.). Labour law contributes to the formation of the space of labour governance in which negotiation, coordination of labour related issues take place. Employees and employers are given clear rights and responsibilities as governmental bodies are ready to intervene when dispute arises.
2) *Redefinition of labour relation*. Begin with state sector restructuration, the introduction of labour contract thrived as a new form of labour relation in a 'socialist market economy' like China. On the one hand, *danwei* style life job tenure was called into question by freedom of choose (job) based mutual will; on the other hand, labour contract and social insurance scheme together formed the basis of the standard (formal) employment relation in today's China, one that echoes with, to some extent, *danwei* labour prerogative (life job tenure and free social protection), but more innovative and inclusive as it includes all wage earners no matter their socio-economic status. Key characteristics have been retained as basic elements to form the framework of formal labour relation, as stipulated by Labour Contract Law and Social Insurance Law.
3) *Extending formal labour relation*. Sound legal terms created opportunities for those who work in informal sectors. Clearly defined criteria have been adopted to identify one's actual relation with others to test if a formal labour relation exists. Rather than status-based labour prerogative embodied in *danwei* times, labour contract is more inclusive as it includes all workers, no matter

who they are or where they come from (farmer or urban residents), by providing workers with equal

9.2 Rigid or flexible? Dual system sustains

Labour contract law is becoming an institutional constraint in the eye of mainstream economists and business representatives because of its rigid terms and conditions imposed on firm's business operation. However, our study shows that this kind of argument is more rhetoric than practical as the implementation of labour law at local level is greatly subjected to contingent situations. As has been analyzed in our field study, labour inspection in China is generally passive in that the law is not that dangerous as it depends on the will of parties to decide whether to obey law in strict sense, in another words, the cost of violation is not that high. Take social insurance as example, under-estimate contribution is widespread within small and medium firms. As regards to the formal employment in medium and big firms, it's indeed right that they are facing a full-fledged legal environment in which they operate, however, the degree of legal compliance varies as can be showed in the issue of labour contract as state firms are using agency workers to lower costs brought about by open-ended contract. As a matter of fact, the inspection and audit activities in the labour area are overwhelmingly weak as compared to other state-owned competency such as taxation.

While many see labour law is becoming a (grave) burden on Chinese economy, our observations suggest that the effects of labour law are never unique because we found that the employment structure and thus people's real concerns are the decisive factors that determine their actual state in the labour market. Very much similar to the vigorous informal economy in the Southern Italy and elsewhere (mainly developing countries) in the world, China's informal economy is still dominant particularly among migrant workers who work in low-value added sectors where labour precariousness prevails. For those who work mainly for cash income, high cost of social rights, low-skilled job and high labour mobility are the main reasons why people prefer informal labour solution, precariousness, etc; on the other hand, we rarely see workers in state firms have problem with formal labour contract or social insurance because state firms are generally considered as the main platform of formal labour relation, which means that they are the main resource of social insurance fund.

Obviously, the labour landscape in China exhibits a dualized picture in which government keep eyes on big firms who are vital as they not only perform as the stabilizer of formal employment but also, they are the very resources to ensure the sustainability of China's social protection system. On the other hand, despite the huge volume of jobs represented by informal employment, the precariousness and high uncertainly in this sector made government reluctant to intervene, on many

occasion, in full capacity. Although labour contract based on actual labour relation provides people in unstable employment with the possibility to be recognized as formal wage workers protected by employment rigidity and social insurance, it still might be interesting for many to choose to stay informal because 'the law is designed for those who can afford it, not for all'.[102]

In a word, employment structure matters as it is the degree of firm's development (or the extent to which a firm can sustain its workforce) determines the possibility that workers and employer can cooperate together to do innovation, thus create value. In this sense, it becomes cliché for one to assert that China's labour law is too high or too low. In any given political economy, the development of economic activities is closely associated with employment structure, thus labour law has a role to play when it comes to create a commonly accepted institutional environment in which stakeholders can work together. Through our study, we found that the degree of the integration of migrant workers to urban economic lift varies greatly as many migrant workers gradually become dependent on regular wage and stable job position by upgrading knowledge and skill, while others still remained in low-skill service sectors for various reasons. Labour law serves as a model that set up the rules according to which economic actors can coordinate with each other, but it doesn't mean that law is designed as an extra cost or countermeasure to market recklessness.

9.3 New trend in employment form: challenges from digital economy

Knowledge economy and new technologies based on Internet and information are changing the world not only because they are reshaping traditional business models around the globe, but also because they have started to change the form of classical labour subordination in so far as more jobs can be done and coordinated by virtue of Internet and mobile technologies. The way how a worker is governed (or used) by an employer (traditional view of labour subordination) has been called into question by state-of-the-art technologies as they blurred the conventional image of the traditional way a 'boss' exploits a 'worker'. Sharing economy is a good example as it thrives as a new way to conduct business by trying to redefine the very notion of employment relation and even the idea of work itself (famous controversy can be found in the legal affair of Uber London and California). China is among the world leaders of sharing economy for sure, ordering meal through 'MeiTuan', calling shared taxi by 'DiDi', or using 'Airbnb' to rent a house, these are commonly accepted life-style among today's

[102] A conclusion made by labour inspector, which expresses the mainstream view of many who work in labour authority.

Chinese people, sharing economy is growing fast no matter how you view it.[103] However, behind the high-tech scene, the question of labour is still pertinent: how people can understand his job as he works with mobile phone, particularly in a country with formal employment backed by sound laws?

As labour researcher, we would rather say that sharing economy is not that magic because the basic mentality of sharing economy model is the outsourcing (destabilization) of labour: there is no more employer in strict sense, 'you work for yourself as you can decide when and how to work', even with your own tool (by own car or other material). In 2016, DiDi stated that the company had created 17.5 million 'flexible' job opportunities and said that 90% of its participants believe DiDi can bring about better working opportunities and economic benefits.[104] Drivers working with DiDi should have their own vehicles and pay for the fuel and daily maintenance, not to mention that drivers are required to be responsible for their own and clients' safety, DiDi limits itself to a service platform that only provides business information to drivers who are basically independent contractor, the so-called own-account people who has nothing to do with the company. DiDi never recognized drivers as formal worker (like Uber does) or labour service provider, of course no labour contract and social insurance can be arranged in this case. There have been a number of cases concerning the legal status of DiDi drivers and alike, however, courts are reluctant to qualify the relationship between DiDi and drive as formal labour relation.

Government's attitude towards sharing economy is rather obscure as it tries to regulate this emerging market in an inclusive (open) way. On the one hand, government recognizes sharing economy as a legal business that should not be prohibited,[105] given that it provides new employment opportunities in any case, while on the other hand, regulator throws out rules in an effort to establish a legally binding framework that guides sharing economy business. Take DiDi's sharing taxi business again for example, the Ministry of Transport and other related Ministries issued a ministerial regulation in 2016 aimed at internet-based taxi service, demanding that firms operating in this business sector should do like a professional taxi company does. Firm is required to offer essential information and dispositions so as to meet passenger's safety and service requirements. This includes a daily management of drivers' information, conduct activities relate to safety and professional training. [106]

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[103] State Information Center estimates that the scale of sharing economy will boon in the coming years, participants to sharing economy will exceed 100 million by the year of 2020, of which 20 million are full-time participants, see: http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Default/20170306164936642988.pdf.

[104] 2016 Report of Big Data and Smart Transport, released by DiDi research department and CBN Data, http://cbndata.com/report/93?isReading=report&page=1&winzoom=1%28Accessed.

[105] Unlike Uber pop in France, which is violently contested by drivers working in a traditional way. Facing national strike and protest, French government finally banned Uber Pop.

[106] Regulation detail: http://www.miit.gov.cn/n1146295/n1146557/n1146624/c5218603/content.html

The tricky is that a person trained by the company, work according to the 'information' sent from the company, provides standard service that is based on company rule, is not guaranteed to the legal status of worker, even for the driver himself, it's not a question since they regard themselves as 'freelance' people who enjoy the freedom to choose (accept) work or not. In contrast, the court trial in which Uber UK had been concerned has revealed that sharing economy platform is not that 'neutral', hidden behind the technology surface lies the clear sign of labour subordination.[107] Drives do have the freedom but to a certain limit as Uber punished those who repeatedly refuse to accept orders attributed by the system. Such way of 'managing' its workforce is widespread among sharing economy firm around the globe.

Thus, it's actually a new form of labour informalization, vested by chic techs, that offers attractive pay in a more flexible way. Social insurance and welfare benefits are regarded as extra costs that undermines the possibility that people can engage themselves in such business. While sharing economy is creating jobs (and many more to come we believe), the quality of the jobs it offers is constantly ignored for various reasons:

1) Even the participants in sharing economy themselves do deny that they are workers as others do. Many choose sharing economy because of its flexible way of working, traditional labour surveillance and subordination (free to choose working time and place, duration, etc.)
2) People in informal sectors are more willing to accept jobs based on mobile internet because of higher pay. Internet company generally adopts aggressive strategy to acquire customers at early stage. Higher subvention and attractive deductions are a lure to those who shifts jobs between precarious work such as drivers, deliveryman, etc.
3) Local governments are generally unable to handle labour inspection regarding sharing jobs. Take DiDi as an example, what interests governmental body is not the labour right of the driver, but rather the unfair competition between informal taxi like DiDi and formal taxi (traditional taxi).

However, the political leadership didn't turn blind eye on the new trend of work that is quickly expanding its territory. At the beginning of 2017, the State Council issued an 'opinion' on the employment and entrepreneurship, while it firmly supports new economy as a means to diversify employment opportunity and create new jobs given uncertain economic environment, meanwhile it stressed also that innovations on employment and social insurance design are urgent in order to address challenges. As far as it goes, the political leadership suggests that the traditional social insurance remains relevant if people sign labour contract with employers in new economy sectors, for the rest,

[107] To know how employment tribunal in London proceeds the labour case relates to Uber UK, refer to the court decision, https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf.

flexible employment scheme might be a solution as worker may participate social insurance without employer's contribution, it also advises to set up an Internet based platform that allows easy transfer and management of one's social insurance record given the high labour mobility in the sharing economy.[108]

This general policy orientation confirmed a continued commitment of maintaining standard formal employment relationship which functioned as the cornerstone of China's labour politics, the political leadership still consider labour contract and social insurance as a viable solution to foster Chinese economy.[109] But, 'one size does not fit all', Chinese policy makers are familiar with policy pragmatism which is tested repeatedly when addressing concrete solutions in the past decades. To be sure, labour politics in China has never been associated with ideas of 'neo-liberal' or 'laissez-faire', even in hard times during state firm restructuration, social insurance had always been the priority as policy makers consider it as social stabilizer and

9.4 Future perspective: enhanced formal employment sustains

Quite similar to the Chinese ageing phenomenon which has been described by many as 'getting old before getting rich', China's labour standard exhibits a parallel scenario when China's labour law is facing substantive challenge caused by new technologies and economic uncertainties, while a considerable part of China's workforce remains informal (out of standard employment). If European welfare economies are struggling to find ways to address fierce international competitions (mainly from emerging players like China, India, etc.) by conducting an overhaul on its 'honourable' social labour standard (the European social model), China's labour transformation is multi-fold: on the one hand, our study can confirm that China's labour law is already a higher standard one in the world, one that similar to European continental scheme, at least in terms of employment protection level and social insurance integrity, China's social protection provides comprehensive welfare entitlements that cover one's social risks. This is obviously an employment-related labour regime which is based on formal labour relation between an employer and employee in their classical sense. That said, economic reform never has had the plausible neo-liberal impact; on the contrary, the reform conducted in state sector generalize the privileged socialist labour welfare in the form of universal labour contract and social

[108] State council's opinion on the employment and entrepreneurship, Detail, see http://www.gov.cn/gongbao/content/2017/content_5189008.htm.
[109] 'New employment damages labour rights? Gig economy calls for new social insurance', *China Comment*, see, http://www.chinanews.com/gn/2018/02-23/8452876.shtml.

insurance that are available to all labour participants. Nevertheless, China's labour market structure is still highly fragmented, while labour influx into modern industrial sectors generates formal jobs with standard employment terms and conditions, the majority of migrant worker are still trapped in low-value added unskilled positions mainly located in urban informal economy. Job precariousness is growing as more industrial sectors are experiencing economic incertitude brought about by global economic volatility, not to mention that new employment forms worldwide is also shaping China's business model as discussed above. With sharing economy, more job opportunities have been created but in a complete different way, despite its innovative aspect exhibited by chic technologies that allow people to work in an autonomous way, that is different from traditional labour subordination, these new jobs at least share one common point, that they bring about precariousness into labour market with incoming non-standard labour relation. What we have saw is that state is acting in a pro-active way to regulate this emerging field by injecting very traditional elements: stable labour relation and social insurance. In this regard, new form of employment has been accepted as complementary aspects while standard employment relation remains at the core of the system. Consolidating formal employment scheme just getting started as state vows to strengthen the credibility of social insurance contribution by transferring collecting function to State Tax Bureau who has powerful means to impose tax. This means that firms and individuals are required to declare correctly their wages to social insurance scheme. Despite the slowdown growth context where firms complain about 'social charge', it's never a question of labour cost but rather how to develop new industries that attracts talent who should be protected and invested in skill formation.

Until 2017, in China, there are 770 million labour force work under different forms, of which around 400 million are well protected by professional social insurance scheme. This means that around half of China's labour fall into standard labour relation. This is an amazing achievement in global history if we look at historical data: in 1997 the number was 110 million, and in 2007, 200 million. Social insurance is growing quickly in parallel with the development of labour legislations. However, the rest 370 million are basically informal workers due to employment structural hierarchy and labour market precariousness. From European point of view, this exhibits a typical labour market dualization, this is certainly not a new phenomenon as informal and agency labour can reveal in Chinese case. It's overwhelming that labour law is in crisis, in China and in the world, it's not the first time, nor the last. A preliminary conclusion can be drawn from this study is that the development of formal employment and inclusive social insurance scheme is not necessarily the result of 'social protection movement' that goes against 'laissez-faire market force', rather, it grew with China's economic miracle in the past decades and thus formed the very foundation of China's labour politics. It will go through challenges in the near future as its European counterparts do today.

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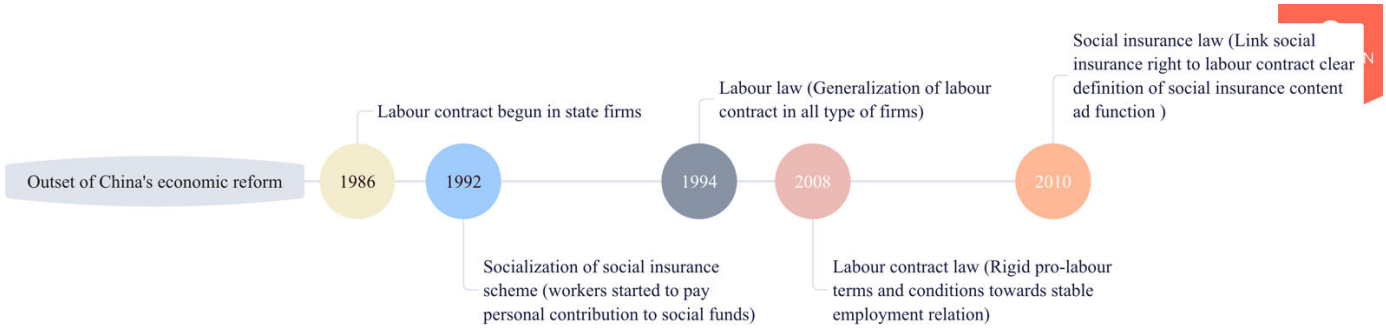
Appendix 1. Overview of Interviews

Status	Sex	Post	First Interview Date	Second Interview	Third Interview
Migrant worker	M	Taxi driver without contract	August 1, 2014	February 16, 2015	May 4, 2015
Labour arbitrator	M	Local arbitration commission	August 14, 2014	February 15, 2015	September 29, 2016
Labour arbitrator	M	Local arbitration commission	August 16, 2014	February 25, 2015	September 29, 2016
Migrant worker	F	Industrial workshop	March 3, 2015	September 28, 2016	
SOE worker	M	Active	March 4, 2015		
SOE worker	F	Active	April 5, 2015		
HR Professional	F	Private firm	March 12, 2015	September 20, 2016	
Migrant worker	M	Industrial workshop	March 11, 2015		
Court Judge	M	Local people court	April 2, 2015		
Labour inspector	M	Local arbitration commission	April 3, 2015	May 13, 2015	September 19, 2016
SOE worker	F	Active	May 2, 2015		
Migrant worker	M	Restaurant	March 14, 2015		
Migrant worker	M	Restaurant	March 15, 2015		
Labour inspector	M	Local arbitration commission	August 28, 2014	March 1, 2015	September 21, 2016
SOE worker	M	Retired	May 13, 2015		
Labour arbitrator	M	Local arbitration commission	March 1, 2015	March 16, 2015	September 23, 2016
Lawyer	M	Law firm lawyer	September 20, 2016		
SOE worker	M	Retired	September 30, 2016		

Migrant worker	M	DiDi driver	July 30, 2014	March 13, 2015	October 5, 2016
Labour inspector	M	Local labour bureau	August 4, 2014	May 8, 2015	September 23, 2016
Labour inspector	M	Local labour bureau	August 4, 2014	February 17, 2016	October 16, 2016
HR Professional	M	State firm	April 12, 2015		
Court Judge	M	Local people court	May 13, 2015		
HR Professional	F	Private firm	May 9, 2015	October 2, 2016	
Labour arbitrator	M	Municipal arbitration commission	August 3, 2014	March 16, 2015	September 27, 2016
HR Professional	F	Foreign-invested firm	October 10, 2016		
SOE worker	M	Active	October 17, 2016		
Social Insurance Agency Official	F	Agent	August 15, 2014	September 26, 2016	
Lawyer	M	Individual counsel	September 25, 2016		

Appendix 2. Key Milestones of China's Social and Labour legislations



Appendix 3. Social Insurance Law of the People's Republic of China

Presidential Decree of the People's Republic of China (No. 35)

October 28, 2010

The Social Insurance Law of the People's Republic of China, adopted at the Seventeenth Session of the Standing Committee of the Eleventh National People's Congress on October 28, 2010, is hereby promulgated and shall come into effect as of July 1, 2011.

Hu Jintao
President of the People's Republic of China

Social Insurance Law of the People's Republic of China

Adopted at the Seventeenth Session of the Standing Committee of the Eleventh National People's Congress on October 28, 2010

Chapter I General Provisions

Article 1 This law is hereby enacted in accordance with the Constitution for the purposes of regulating social insurance relationships, securing citizens' legitimate rights and interests to participate in a social insurance system and receive social insurance benefits, achieving a fair sharing of benefits of development by citizens, and promoting social harmony and stability.

Article 2 The State shall establish a social insurance system consisting of a basic old-age insurance, basic medical insurance, work injury insurance, unemployment insurance, and maternity insurance to guarantee citizens' rights to receive material assistance from the State and society according to law upon old age, sickness, work injury, unemployment and maternity.

Article 3 The social insurance system follows the principle of wide coverage, modest benefits, multi-tiered programmes and a sustainable system. The level of the social insurance system shall correspond to that of economic and social development.

Article 4 Each employer and individual within the boundary of the People's Republic of China shall, according to law, make social insurance contributions, have the right to access the related contribution records and individual social insurance benefit credits, and request social insurance consultancy and other relevant services from a social insurance agency.

Each individual shall be entitled to social insurance benefits according to law, and have the right to exercise oversight over contributions made by the employer on his or her behalf.

Article 5 The People's Governments at and above the county level shall incorporate social insurance into their local economic and social development programmes.

The State shall raise funds for the social insurance system through multiple channels. The People's Governments at and above the county level shall provide financial support as deemed necessary to social insurance programmes.

The State shall support social insurance through tax incentive policies.

Article 6 The State shall subject social insurance funds to vigorous supervision and control.

The State Council，and People's Governments of provinces, autonomous regions, and municipalities directly under the Central Government shall establish and improve the supervision and management system for social insurance funds, and guarantee safe and effective fund operations.

The People's Governments at and above the county level shall adopt measures to encourage and support all stakeholders to participate in social insurance fund supervision.

Article 7 The social insurance administrative department of the State Council shall take charge of national social insurance administration. Any other relevant department of the State Council shall take charge of social insurance affairs within its jurisdiction of responsibility.

The social insurance administrative department of the local People's Government at or above the county level shall take charge of social insurance administration in its administrative region. Any other relevant department of the local People's Government at or above the county level shall take charge of social insurance affairs within its jurisdiction of responsibility.

Article 8 A social insurance agency provides social insurance services, and is responsible for social insurance registration, bookkeeping for the participants, and paying social insurance benefits to the beneficiaries.

Article 9 Trade unions shall defend workers' legitimate rights and interests according to law, have the right to participate in studies and research on fundamental issues related to social insurance, and act as members of the social insurance supervisory committees to perform supervision over the matters related to workers' social insurance rights and interests.

Chapter II Basic Old-Age Insurance

Article 10 Each employee shall enroll in the basic old-age insurance system; and the employer and the employee shall jointly make basic old-age insurance contributions.

A proprietor of privately or individually-owned business with no hired labour, a part-time worker who is not covered by the basic old-age insurance system through his or her employer, and any other person in employment of flexible forms, may elect to enroll in the basic old-age insurance system, and the person in question shall make basic old-age insurance contributions.

The approach to the basic old-age insurance for civil servants and that for working people who are governed likewise by *the Civil Service Law* shall be regulated by the State Council.

Article 11 The basic old-age insurance shall be a combination of social pooling and individual accounts.

The basic old-age insurance fund shall consist of contributions from the employers and employees and government subsidies.

Article 12 An employer shall make basic old-age insurance contributions at the State-fixed rate of the employees' payroll, and the contributions shall be deposited into the basic old-age insurance pooling fund.

An employee shall make basic old-age insurance contributions at the State-fixed rate for his or her wage, and the contributions shall be deposited into his or her individual account.

A member of the basic old-age insurance as proprietor of privately or individually-owned business with no hired labour, part-time worker who is not covered by the basic old-age insurance system through his or her employer, or any other person in employment of flexible forms shall make basic old-age insurance contributions as set by the State; and the contributions shall be divided and deposited separately into the pooling fund and an individual account.

Article 13 The basic old-age insurance contributions due from employees of state enterprises and institutions for their working years prior to the initiation of the old-age insurance system, which are treated as contributing years, shall be made up by the government.

When there arises shortfall for the basic old-age insurance fund to cover its obligations, subsidies shall be provided by the government into the fund.

Article 14 Advance withdrawal from an individual account shall not be allowed. The interest rate of an individual account shall be no less than that for a fixed-term bank account, and interests accrued are not subject to taxation. The balances in the individual account are hereditary upon death of the account bearer.

Article 15 Basic old-age insurance benefits consist of pensions from the pooling and from the individual account.

The basic old-age insurance benefit for a member is determined by the following factors: the member's cumulative length of contribution payment and assessed wage for contributions, the mean wage of the employees of the district where the member resides, his or her credits in the individual account, and life expectancy of the urban population.

Article 16 A member of the basic old-age insurance shall receive the basic old-age pension on a monthly basis if the member's cumulative length of contribution payment is no less than fifteen years upon reaching the legal retirement age.

If the cumulative length of contribution payment of a member of the basic old-age insurance is less than fifteen years when the member reaches the legal retirement age, the member may receive the basic old-age insurance on a monthly basis once the member makes up the contribution payment to what is required for fifteen years. The member may elect to transfer to the new rural social insurance of the old-age pension or social insurance of the old-age pension for urban residents, and receive pensions in accordance with the regulations of the State Council.

Article 17 When a member of the basic old-age insurance dies from illnesses or causes not related to work, the survivors of the member are entitled to receive funeral subsidies and bereavement allowances; when a member becomes completely unfit for work due to illnesses or causes not related to work before reaching the legal retirement age, the member is entitled to illness and disability allowances. The expenses required shall be covered from the basic old-age insurance fund.

Article 18 The State shall set up a mechanism for adjusting basic old-age insurance benefits when necessary, and raise the basic old-age insurance benefits at appropriate intervals according to the factors of mean growth of employees' wages and price increases.

Article 19 The basic old-age insurance relationship of a member who has worked across different pooling districts shall transfer together with the member, and the member's lengths of contribution payment shall be cumulative. When the member reaches the legal retirement age, his or her basic old-age pension shall be calculated in segregation corresponding to the phases of contribution payment, yet the pension shall be paid in integration as an aggregate. The concrete approach shall be regulated by the State Council.

Article 20 The State shall establish and improve the new rural social insurance of the old-age pension.

The new rural social insurance of the old-age pension shall be a combination of individual contributions, collective subsidies and government allowances.

Article 21 The benefits of the new rural social insurance of the old-age pension shall consist of base pensions and individual account benefits.

A rural resident who is a member of the new rural social insurance of the old-age pension shall receive benefits of the new rural social insurance of the old-age pension on a monthly basis when the member satisfies the conditions set by the State

Article 22 The State shall establish and improve the social insurance of the old-age pension for urban residents.

The People's Government of a province, autonomous region or municipality directly under the Central Government may, in accordance with its circumstances, may adopt an integrated programme to combine its social insurance of the old-age pension for urban residents with its new rural social insurance of the old-age pension.

Chapter III Basic Medical Insurance

Article 23 Each employee shall enroll in the basic medical insurance system for employees, and the employer and employees shall jointly make basic medical insurance contributions as set by the State.

A proprietor of privately or individually-owned business with no hired labour, a part-time worker who is not covered by the basic medical insurance system for employees through his or her employer, or any other person in employment of flexible forms may enroll in the basic medical insurance system for employees, and the individual in question shall make basic medical insurance contributions as set by the State.

Article 24 The State shall establish and improve the new rural cooperative medical system.

The administration of the new rural cooperative medical system shall be regulated by the State Council.

Article 25 The State shall establish and improve the basic medical insurance system for urban residents.

The basic medical insurance for urban residents shall be a combination of individual contributions and government subsidies.

The assessed individual contributions for beneficiaries of minimum living allowances, disabled persons who are unfit for work, seniors older than sixty years of age and minors from low-income families shall be covered by government subsidies.

Article 26 The benefits of the basic medical insurance for employees, new rural cooperative medical system and the basic medical insurance for urban residents shall be governed by national provisions.

Article 27 A member of the basic medical insurance for employees who satisfies the condition set by the State in terms of cumulative length of contribution payment upon reaching the legal age of retirement shall make no more basic medical insurance contributions after retirement, and be entitled to basic medical insurance benefits in accordance with national provisions; the member who does not satisfy that condition may make further contributions to reach the length of the years set by the State.

Article 28 Medical expenses for pharmaceuticals listed in the basic medical insurance directory, for diagnosis and treatment services and application of medical care facilities covered by the basic medical insurance, and medical expenses for emergencies and rescue services, shall be paid from the basic medical insurance fund in accordance with national provisions.

Article 29 Direct transactions shall be arranged between social insurance agencies and medical institutions and pharmaceutical entities to settle for insured members the proportion of the medical expenses payable by the basic medical insurance fund.

Social insurance administrative departments and health administrative departments shall set up a mechanism to settle medical expenses incurred in different localities, facilitating access of the insured members to their basic medical insurance benefits.

Article 30 Medical expenses listed as follows are not covered by the basic medical insurance fund:

(1) Expenses payable from the work injury insurance fund;
(2) Expenses payable by a third party;
(3) Expenses payable by public health; and
(4) Expenses for overseas medical services.

For medical expenses payable by a third party, when the third party refuses to pay or cannot be identified, interim payment shall be arranged from the basic medical insurance fund. The basic medical insurance fund has the right to demand repayment by the third party after providing the interim payment.

Article 31 Social insurance agencies may, for the sake of managing services, sign service agreements with medical institutions and pharmaceutical entities so as to regulate medical service performance.

Medical institutions shall provide to insured members medical services deemed as suitable and necessary.

Article 32 The basic medical insurance relationship of a member who has worked across different pooling districts shall transfer together with the member, and the member's lengths of contribution payment shall be cumulative.

Chapter IV Work Injury Insurance

Article 33 Each employee shall enroll in the work injury insurance system. The employer shall make work injury contributions, and the employee is not liable for contributions.

Article 34 Differentiated rates of contributions for industries shall be determined by the State with due consideration of the risk levels associated with the industries. The rate for each industry shall be subdivided into stages according to the following factors: expenditures paid by work injury fund and frequency of work injury occurrences. The differentiated rates of contributions for industries and the rate stages for each industry shall be formulated by the social insurance administrative department of the State Council, and published and put into practice after approval by the State Council.

A social insurance agency shall determine the rate of contributions for an employer according to the following factors: the employer's expenditures paid by the work injury fund, frequency of work injury occurrences in the business facility, and rate stage for the industry branch of the business.

Article 35 Each employer shall make work injury contributions at the rate set by the social insurance agency of its employees' payroll.

Article 36 An employee shall be entitled to work injury benefits when the person is injured in an accident due to work-related causes or is affected by occupational diseases, and has undertaken work injury certification. The employee shall be entitled to disability benefits if the person has become unfit for work as assessed in the working fitness assessment.

Work injury certification and working fitness assessment shall be simple and convenient to operate.

Article 37 An employee who is injured or dies at work due to one of the following factors shall not be certified as a victim of work injury:

(1) Committing a crime intentionally;
(2) Insobriety or drug addiction;
(3) Self-mutilation or suicide; or
(4) Any other circumstance as provided by laws and administrative regulations.

Article 38 The following expenses related to work injury are payable from the work injury fund in accordance with national provisions:

(1) Medical expenses for work injury and rehabilitation expenses;
(2) Food allowances during hospitalization;
(3) Transportation, accommodation and food expenses incurred for medical services outside the pooling district;
(4) Expenses for provision and installation of disability aid equipment;
(5) The expenses of personal care as set by the working fitness assessment committee for people who need personal care in life;
(6) Lump-sum disability subsidies, and disability allowances payable on a monthly basis to disabled employees of degrees one through to four;
(7) Lump-sum medical subsidies payable to employees upon termination or rescinding of labour contracts;

(8) Funeral expenses, pension allowances for dependents and subsidies for work-related deaths paid to the survivors when employees die from work-related causes; and
(9) Expenses incurred for working fitness assessments.

Article 39 The following expenses incurred for work injury shall be payable by the employer in accordance with national provisions:
(1) Wages and welfare expenses for the duration of work injury treatment;
(2) Disability allowances paid each month to disabled employees of degrees five and six; and
(3) Lump-sum subsidies for disability employment eligible by employees upon termination or rescinding of labour contracts.

Article 40 When work-injured employees meet the conditions for receiving basic old-age pensions, payment of disability allowances shall cease, and the employees shall instead receive basic old-age pensions. If basic old-age pensions are less than disability allowances, the differentials shall be made up from the work injury insurance fund.

Article 41 When a work injury accident occurs while the employer does not make work injury contributions as required by law, work injury benefits shall be paid by the employer. If the employer refuses to pay, interim payment shall be arranged from the work injury insurance fund.

Interim payment for work injury benefits paid from the work injury fund shall be paid off by the employer. When the employer refuses to pay off, the social insurance agency may demand repayment in accordance with Article 63 of this law.

Article 42 When a work injury accident is caused by a third party, and the third party refuses to pay medical expenses for work injury treatment or the third party cannot be identified, interim payment for the expenses shall be arranged from the work injury insurance fund. The work injury insurance fund has the right to demand repayment from the third party after providing the interim payment.

Article 43 Work-injured employees shall cease receipt of work injury benefits when one of the following conditions is met:
(1) Losing eligibility for benefits;
(2) Refusing working fitness assessment; or
(3) Refusing medical treatment.

Chapter V Unemployment Insurance

Article 44 Each employee shall enroll in the unemployment insurance system, and the employer and employee shall jointly make unemployment insurance contributions as set by the State.

Article 45 An unemployed person shall receive unemployment benefits from the unemployment insurance fund when the following conditions are met:
(1) The employer and the person in question have made unemployment insurance contributions no less than one year prior to the unemployment;
(2) Termination of employment is not caused by the intentional actions of the person in question; and
(3) The person in question has registered as unemployed and is a jobseeker.

Article 46 When the cumulative length of contribution payment of the unemployed person and his or her employer prior to unemployment is greater than one year and less than five years, the maximum duration for unemployment benefits shall be twelve months; when the cumulative length is greater than five years but less than ten years, the maximum duration for unemployment benefits shall be eighteen months; when the cumulative length exceeds ten years, the maximum duration for unemployment benefits shall be twenty-four months. When a person becomes

unemployed once again after taking up a new job, the length of contribution payment shall be counted anew, the duration for unemployment benefits shall be counted together with the balances left over from the entitled duration in the previous case, and the maximum shall not exceed twenty-four months.

Article 47 The standard of unemployment benefits shall be determined by the People's Government of a province, autonomous region or municipality under the Central Government, and shall be no less than the minimum living allowances for urban residents in the region.

Article 48 For the duration of receiving unemployment benefits, unemployed persons shall be entitled to basic medical insurance benefits if they are members of the basic medical insurance for employees.

Basic medical insurance contributions due from unemployed persons shall be paid from the unemployment insurance fund. Unemployed persons are not liable for basic medical insurance contributions.

Article 49 When an unemployed person dies while still a beneficiary of unemployment benefits, local regulations on welfare associated with death of an employed person shall serve as a reference with regard to payment to the survivors of a lump-sum funeral subsidy and bereavement allowance. The expenditures shall be covered by the unemployment insurance fund.

When a person dies and concurrently qualifies for a funeral subsidy under the basic old-age insurance, a funeral subsidy under work injury insurance, and a funeral subsidy under unemployment insurance, the survivors can only choose one of the three.

Article 50 An employer shall provide in a timely manner documentation on termination or rescinding of labour relations to unemployed persons, and present the list of unemployed persons to the social insurance agency within fifteen days as of termination or rescinding of their labour relations.

An unemployed person shall take the documentation provided by his or her employer on termination or rescinding of labour relations and proceed to the designated public employment agency to process unemployment registration in a timely manner.

An unemployed person shall present unemployment registration and personal identity document to the social insurance agency to process the claim for unemployment benefits. The duration for unemployment benefits shall be counted as of the date of unemployment registration.

Article 51 An unemployed person who is a beneficiary of unemployment benefits shall cease receipt of unemployment benefits and shall cease access to other benefits related to unemployment insurance when the person satisfies one of the following conditions:

(1) Taking up a new job;
(2) Enlisted for military service;
(3) Migrating overseas;
(4) Receiving a basic old-age pension; or
(5) Declining without justification a suitable job offer referred by or a training programme provided by the department or agency designated by the local People's Government.

Article 52 The unemployment insurance relationship of a member who has worked across different pooling districts shall transfer together with the member, and the member's lengths of contribution payment shall be cumulative.

Chapter VI Maternity Insurance

Article 53 Each employee shall enroll in the maternity insurance system. The employer shall make maternity insurance contributions as set by the State, and the employee is not liable for maternity insurance contributions.

Article 54 When the employer has made maternity insurance contributions, his or her employees shall be eligible for maternity benefits. The unemployed spouse of an employee shall be eligible for benefits related to maternity medical expenses in accordance with national provisions. The payment shall be made from the maternity insurance fund.

Maternity insurance benefits consist of maternity medical expenses and maternity allowances.

Article 55 Maternity medical expenses cover the following items:

(1) Medical expenses for child-bearing;

(2) Medical expenses for family planning; and

(3) Expenses for other items as prescribed by laws and regulations.

Article 56 An employee is eligible for maternity allowances in accordance with national provisions when the employee satisfies one of the following conditions:

(1) A child-bearing female worker taking maternal leave;

(2) Taking leave for an operation of family planning; or

(3) Any other circumstance prescribed by laws and regulations.

Maternity allowance shall be calculated and paid at the monthly mean wage of the prior-year of the employees from the unit where the beneficiary works.

Chapter VII Collection and Payment of Social Insurance Contributions

Article 57 An employer shall, within thirty days from the date of establishment of the entity, proceed with the business license, registration certificate or entity seal to the local social insurance agency to apply for social insurance registration. The social insurance agency shall complete the check and review process and issue social insurance registration certificate to the employer within fifteen days from receipt of the application.

When there are changes in the social insurance registration items of an employer, or the entity of an employer is terminated in accordance with law, the employer shall proceed to the social insurance agency to register the changes or cancel social insurance registration within thirty days from occurrence of the changes or cancellation of the entity.

Each administrative bureau for industry and commerce, department of civil affairs and public sector reform commission shall notify the social insurance agency in a timely manner of entity establishments and terminations; each department for public security shall notify the social insurance agency in a timely manner of citizen births and deaths, and of household registrations, transfers and cancellations.

Article 58 An employer shall, within thirty days after taking on labour, proceed to the social insurance agency to apply for social insurance registrations on behalf of the employees. For those whose social insurance registrations are not processed, the assessed scale of social insurance contributions shall be set by the social insurance agency.

The member who enrolls voluntarily in social insurance system as a proprietor of privately or individually-owned business with no hired labour, or a part-time worker who is not covered by social insurance system through his or her employer, or any other person in employment of flexible forms, shall apply for his or her social insurance registration with the social insurance agency.

The State provides each individual with a social security number valid across the whole country. The citizen's identity number serves as his or her social security number.

Article 59 The People's Governments at and above the county level shall devote more efforts for collecting social insurance contributions.

Collection of social insurance contributions shall be carried out in a consolidated way. The steps of implementation and the concrete approaches in this regard shall be regulated by the State Council.

Article 60 Each employer shall declare on its own and pay on time and in full social insurance contributions. The payment shall not be deferred, or lowered in amount or exempted unless due to lawful causes such as force majeure. Social insurance contributions payable by an employee shall be paid on his or her behalf by the employer through

transfer from wage deduction. The employer shall notify each employee of details of social insurance contributions to his or her account on a monthly basis.

A member as proprietor of privately or individually-owned business with no hired labour, or part-time worker who is not covered by the social insurance system through his or her employer, or any other person in employment of flexible forms may pay social insurance contributions directly to a social insurance contributions collecting agency.

Article 61 Each social insurance contributions collecting agency shall collect social insurance contributions on time and in full according to law, and notify the employers and individuals concerned of their payments at regular intervals.

Article 62 When an employer fails to declare social insurance payables as prescribed, the payables by the employer shall be set as a 110% multiples of its prior-month payables. When the employer has completed a makeup payment declaration, the social insurance contributions collecting agency shall settle the accounts for the employer in accordance with relevant regulations.

Article 63 When an employer fails to pay on time and in full social insurance contributions, the social insurance contributions collecting agency shall compel the employer to pay or replenish the deficiency within the prescribed period.

When social insurance payables by the employer remain unpaid or deficient at the expiry of the prescribed period, the social insurance contributions collecting agency has the right to inquire from banks and other financial institutions regarding the employer's bank accounts, and may apply to the relevant administrative department at or above the county level for a decision on capital transfer for social insurance contributions, and notify in writing the banks or other financial institutions where the employer has opened accounts to make the transfer for payment of social insurance contributions. When the balances in the employer's accounts are less than the social insurance payables, the social insurance contributions collecting agency may require the employer to provide a guarantee, and sign an agreement on payment deferral.

When an employer fails to pay social insurance contributions in full and fails to provide a guarantee, the social insurance contributions collecting agency may request a people's court to seize, seal up and sell at auction properties owned by the employer equivalent in value to the social insurance payables, and collect the auction earnings as social insurance contributions.

Chapter VIII Social Insurance Funds

Article 64 Social insurance funds consist of the basic old-age insurance fund, basic medical insurance fund, work injury insurance fund, unemployment insurance fund, and maternity insurance fund. Each fund shall have its own account, as corresponding to its social insurance category, and financial settlement of the accounts shall be kept within the category. The national standard accounting system shall apply herewith.

Social insurance funds are earmarked for intended purposes. Any organization or individual shall not usurp or divert for other purposes.

The basic old-age insurance fund shall be progressively put under nationwide pooling, and other social insurance funds shall be progressively put under social pooling at provincial level. The concrete timeframe and schedules shall be provided by the State Council.

Article 65 Social insurance funds shall maintain balance of payments through budgeting exercises.

The People's Governments at and above the county level shall provide subsidies when there is a shortfall in social insurance funds to cover obligations.

Article 66 Budget for a social insurance fund shall be set up at the pooling level. Each social insurance fund budget shall correspond to its insurance category, and be compiled and formulated in separation from each other.

Article 67 Compilation, review and approval of budget and final account proposals for a social insurance fund shall be governed by laws and by regulations of the State Council.

Article 68 Social insurance funds shall be deposited into dedicated public financial accounts, and the administrative approaches shall be regulated by the State Council.

Article 69 With assured safety as a prerequisite, social insurance funds shall be invested and managed following rules set by the State Council so as to achieve maintenance and accrual of capital values of the funds.

Social insurance funds shall be excluded from investments and operations violating the rules, shall not be utilized to offset other government budgets, shall not be spent on building or altering offices, nor shall they be used to cover personnel expenses, operational and administrative costs. The funds shall not be embezzled for other purposes in violation of the laws and administrative regulations.

Article 70 Social insurance agencies shall provide at regular intervals to the public information concerning social insurance coverage, and incomes and expenditures, balances and investment returns of social insurance funds.

Article 71 The State establishes the National Social Security Fund, which is financed by fiscal allocation of the Central Government and other resources approved by the State Council. The fund is meant for supplementing and adjusting social security expenditures. The National Social Security Fund shall be put to the National Social Security Fund administrative and operating agency for management and fund operations. Maintenance and accrual of capital values of the fund shall be realized with assured safety as a prerequisite.

The National Social Security Fund shall provide at regular intervals to the public information concerning revenues and expenditures, management and investment operations of the Fund. The department of finance, social insurance administrative department and audit office under the State Council discharge supervision of the fund in relation to its revenues and expenditures, management and investment operations.

Chapter IX Social Insurance Operations

Article 72 Each pooling district shall set up a social insurance agency. A social insurance agency may, given its workload, set up branches and service network points within the pooling district with approval from the local social insurance administrative department and the local public sector reform commission.

Personnel expenses of a social insurance agency, its essential operational costs and administration expenses shall be appropriated from the government at the same administrative level as the agency in accordance with national provisions.

Article 73 Each social insurance agency shall establish and improve the institution for its business operations, finance, safety and risk management.

Social insurance agencies shall pay social insurance benefit obligations on time and in full.

Article 74 Social insurance agencies collect data required for their work on social insurance through business operations, statistics, and surveys. The employers and individuals concerned shall provide data faithfully and in a timely manner.

A social insurance agency shall create files in a timely manner for an employer, keep comprehensive and accurate records of the insured members and social insurance contributions, and guard in a safe way original proofs of social insurance registrations and declarations of contributions and accounting invoices of the payments made.

A social insurance agency shall keep an updated, comprehensive and accurate record for each insured member with regard to the contributions paid by the member and by the employer on his or her behalf, his or her social insurance benefit credits, and deliver to the member free of charge his or her credit account at fixed intervals.

An employer and an individual member may inquire about and verify their records of contributions and social insurance benefit credits with the social insurance agency free of charge, and demand from the social insurance agency social insurance consultancy and other services.

Article 75 In line with the overall design of the State, the National Social Insurance Information System shall be jointly constructed by the People's Governments at and above the county level, following the principle of jurisdiction-based responsibility system.

Chapter X Social Insurance Supervision

Article 76 The Standing Committee of the People's Congress at every level shall be briefed by the People's Government at its corresponding level and review its report on income and expenditure accounts, management, investment operations and supervisions of social insurance funds, shall organize enforcement inspections on this law and discharge its supervisory functions by law.

Article 77 The social insurance administrative department of the People's Government at or above the county level shall devote more vigorous efforts for supervision and inspection on compliance by employers and individuals with social insurance laws and regulations.

When a social insurance administrative department performs an inspection or supervision, the employers and individuals questioned shall faithfully provide documents and data related to social insurance, and shall not refuse inspection nor provide fraudulent information or practice under-reporting.

Article 78 Finance departments and audit offices within their respective jurisdiction shall carry out supervisions on social insurance funds in terms of income and expenditure accounts, management and investment operations.

Article 79 Social insurance administrative departments shall exercise supervisions and inspections over social insurance funds in terms of income and expenditure accounts, management and investment operations. When an administrative department identifies a problem, it shall put forward rectifying recommendations, and make a punitive decision or recommend a punitive proposal to the relevant authorities according to law. Inspection reports on social insurance funds shall be provided to the public at regular intervals.

A social insurance administrative department shall have the right to adopt the following measures when discharging supervision and inspection over social insurance funds:

(1) Accessing, recording and copying materials related to income and expenditure accounts, management and investment operations of social insurance funds, and sealing materials liable to be transferred, concealed or destroyed for the sake of safekeeping;

(2) Questioning the employers and individuals involved in an investigation, and demanding them to explain and provide relevant evidence on the matters under investigation; and

(3) Interdicting and ordering for rectification the acts of concealing, transferring, misappropriating or embezzling social insurance funds.

Article 80 The People's Government in a pooling district shall establish a social insurance supervisory committee, composed of representatives of employers, insured persons and trade unions, and professional experts. The committee shall have full knowledge and conduct analysis of social insurance funds in terms of income and expenditure accounts, management, and investment operations. The committee can provide consultancies and recommendations on social insurance affairs, and perform public oversight.

A social insurance agency shall brief the social insurance supervisory committee at regular intervals on performance of social insurance funds, and report the funds' income and expenditure accounts, management and investment operations. A social insurance supervisory committee can hire an accounting firm to conduct annual audits and specified audits for income and expenditure accounts, management and investment operations of social insurance funds. The auditing reports should be provided to the public at regular intervals.

When a social insurance supervisory committee identifies a problem associated with income and expenditure accounts, management, and investment operations of social insurance funds, it shall have the right to put up rectifying recommendations, and shall have the right to recommend a punitive measure stipulated in law to the authoritative department for any unlawful act of a social insurance agency and its employees.

Article 81 Social insurance administrative departments and other administrative departments concerned, social insurance agencies, social insurance contributions collecting agencies and their employees shall keep secret the data of the employers and the individuals according to law, and shall not disclose data in any manner.

Article 82 Any organization or individual shall have the right to report or complain about any non-compliance of social insurance laws and regulations.

Any social insurance administrative department, health administrative department, social insurance agency, social insurance contributions collecting agency, finance department and audit office shall deal with the complaints or reporting that fall under its jurisdiction according to law; for a case beyond its jurisdiction, a notification in writing together with the documents received shall be passed on to the proper authoritative department or agency to address. The proper authoritative department or agency shall handle the complaints and reporting in a timely manner, and any act of shifting of responsibility shall be prohibited.

Article 83 When an employer or individual believes that their legitimate rights have been violated by an act or acts of a social insurance contributions collecting agency, the employer or individual in question can apply for an administrative review or initiate administrative proceedings according to law.

For any non-compliance by a social insurance agency with regard to social insurance registration, calculation and determination of social insurance contributions, paying social insurance benefit obligations, processing transfer or renewal of social insurance relationships, or any other act violating social insurance rights, the employer or individual concerned can apply for an administrative review or initiate administrative proceedings according to law.

When a dispute on social insurance occurs between an individual and his or her employer, the person in question can apply for mediation, arbitration or initiate court proceedings according to law. When an employer infringes upon the social insurance rights of an individual, the individual in question may also demand a lawful settlement by the social insurance administrative department or social insurance contributions collecting agency.

Chapter XI Legal Liabilities

Article 84 When an employer fails to process social insurance registration, the social insurance administrative department shall deliver to the employer concerned an order for rectification within a prescribed period. When rectification does not occur at the expiry of the prescribed period, the employer shall be liable for a fine in excess of its assessed social insurance contribution but less than its triple, and the principals who bear direct responsibilities and other persons with direct responsibilities shall be liable for a fine over 500 but less than 3000 Yuan RBM.

Article 85 When an employer refuses to provide documentation on termination or rescinding of labour relations, a sanction shall be given in accordance with *the Labour Contract Law of the People's Republic of China*.

Article 86 When an employer fails to pay social insurance contributions on time and in full, the social insurance contributions collecting agency shall place an order with the employer demanding full payment within a prescribed period, and an overdue payment fine at the rate of 5 per 10,000 shall be levied as of the date of indebtedness. When the payment is not made at the expiry of the prescribed period, a fine above the overdue amount but less than its triple shall be demanded by the authoritative administrative department.

Article 87 When a social insurance service agency such as a social insurance agency, medical institution, or pharmaceutical entity defrauds payment from social insurance funds by cheating, fake documentation or other means, the social insurance administrative agency shall order a return of the defrauded fund, and demand a sanction larger than double but lower than quintuple of the amount defrauded. If the agency involved is one with a contract for provision of social insurance services, such contract shall be terminated; if the principals who bear direct responsibilities and other persons with direct responsibilities are licensed, their licenses shall be revoked according to law.

Article 88 For any offence of making fraudulent claims for social insurance benefits through cheating, fake documentation or other means, the social insurance administrative department shall order a return of the social insurance benefits defrauded, and levy a fine larger than double but less than quintuple of the amount defrauded.

Article 89 When a social insurance agency and its staff commit an offence included in the following list, the social insurance administrative department shall order for rectification. When damage has been done to social insurance funds, an employer or an individual, liability for damage shall be assumed by the person(s) responsible according to law. The principals who bear direct responsibilities and other persons with direct responsibilities shall be sanctioned by law.

(1) Not discharging social insurance statutory functions;
(2) Not depositing social insurance funds into dedicated financial accounts;
(3) Underpaying or refusing to pay on time social insurance benefit obligations;
(4) Missing or interpolating social insurance data such as contribution records, payment records of social insurance benefits, and individuals' credit records; or
(5) Any other non-compliance of social insurance laws and regulations.

Article 90 When a social insurance contribution collecting agency amends without authorization the calculating base and rate of social insurance contributions, which leads to under or over collection of social insurance contributions, the authoritative administrative department shall order for payment of the overdue or return of the overpayment. The principals who bear direct responsibilities and other persons with direct responsibilities shall be sanctioned by law.

Article 91 For any act in violation of this law involving concealing, transferring, misappropriating or embezzling social insurance funds, or engaging in investment operations in defiance of rules, the social insurance administrative department, finance department, audit office shall give an order for repayment of the misappropriated funds. If any illegal gains have been obtained, the gains shall be confiscated. The principals who bear direct responsibilities and other persons with direct responsibilities shall be sanctioned by law.

Article 92 When a social insurance administrative department or any other relevant administrative department, social insurance agency, social insurance contributions collecting agency and its staff disclose illegally information concerning an employer or an individual, the principals who bear direct responsibilities and other persons with direct responsibilities shall be sanctioned by law. If damage has been done to the employer or individual, liability for damage shall be assumed by the person(s) responsible according to law.

Article 93 The public officials who abuse their power, neglect their duties, or engage in fraudulent acts for personal gains shall be sanctioned according to law.

Article 94 Any offence in violation of this law amounting to a crime shall be liable for criminal penalty.

Chapter XII Supplementary Provisions

Article 95 Rural residents who migrate to work in urban areas shall enroll in the social insurance system in accordance with this law.

Article 96 When land acquisition is carried out on properties collectively owned by a farming community, a full payment of social insurance expenses shall be arranged for the farmers who lose their land, and the farmers in question shall be covered in relevant social insurance schemes in accordance with the regulations of the State Council.

Article 97 Foreign nationals who are employed in the Chinese territory shall enroll in the social insurance system in accordance with this law.

Article 98 This law shall enter into force on July 1, 2011.

université PARIS-SACLAY | ÉCOLE DOCTORALE Sciences de l'homme et de la société (SHS)

Titre : Évolution institutionnelle de l'assurance sociale en Chine : Une étude sociologique de la mobilisation du droit

Mots clés : Institution, État-providence, Sociologie du droit, Structure d'emploi, Contentieux

Résumé : La réforme économique en Chine a été largement appréhendée comme un processus dans lequel le paternaliste *danwei* a été remplacé par le contrat de travail, un concept plutôt libéral. A cet égard, le déclin de bien-être à caractère socialiste et la montée d'assurance sociale sont considérés comme un phénomène de marche, les récents législations sociales sont discutés dans le cadre polanyien de double-mouvement qui invoque la dichotomie entre état et marche.

Cette étude vise à offrir une perspective alternative en repensant l'évolution de la transformation moderne du travail en Chine d'une manière institutionnelle. Nous montrons que la structure de l'emploi héritée de *danwei* était au cœur des lois du travail de la Chine en temps de réforme. La protection de l'emploi reste pertinente tandis que l'afflux de main-d'œuvre informelle en provenance des zones rurales a explosé dans les secteurs privés urbains. Eux, ils sont devenus de plus en plus des outsiders du marché du travail qui sont vulnérables quant à leur condition précaire. Cette configuration institutionnelle correspond à une structure hiérarchique dans laquelle le 'insider' se distingue clairement du 'outsider' en termes de stabilité de l'emploi et de bien-être social. Malgré les récentes législations qui visent à rendre l'assurance sociale plus inclusive, notre étude de terrain sur la résolution des conflits du travail dans l'arbitrage et le tribunal a montré que la capacité de mobiliser la loi peut différer en termes de préoccupation personnelle sur le marché du travail.

L'approche de capabilité et la sociologie du droit nous permettent de développer un cadre analytique nuancé permettant d'identifier la raison sous-jacente pour laquelle les individus adoptent différentes stratégies tout en contestant la loi abstraite dans une situation concrète. Notre étude conclut que la législation du travail ne sont pas nécessairement des réactions intentionnelles à la dynamique du marché mais plutôt, en tant que forme essentielle de convention sociale, a initié le cadre dans lequel les parties coordonnent leurs activités économiques.

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Title: The Institutional Evolution of Social Insurance in China: A Sociological Study of Law Mobilization

Keywords: Institution, Welfare state, Sociology of law, Employment structure, Legal case

Abstract: Market reform in China has been widely understood as a process in which paternalistic socialist *danwei* was replaced by labour contract that is liberal-oriented. In this regard, decline of all-encompassing welfare arrangements and the rise of social insurance is seen by mainstream as a market phenomenon, recent legislations on social rights are discussed within Polanyian double-movement framework which invokes the dichotomy between state intervention and market.

This study provides an alternative perspective by rethinking the evolution of China's modern labour transformation in an institutional way. We show that inherited employment structure rooted in *danwei* lied at the core of China's labour laws in reform time. Employment protection remained relevant while influx of informal labour from rural area boomed in urban private sectors. The later, increasingly became labour market outsiders who are vulnerable as to their precarious condition.

This institutional configuration amounted to a hierarchical structure in which core workforce is clearly distinguished from precarious one in terms of job stability and welfare benefit. Despite the recent legislations which aim at making social insurance more inclusive, through our field study on labour dispute resolution practice in the labour arbitration and court, we found that the extent to which people can benefit favourable legal terms is contingent as the ability to mobilize law can differ in terms of people's own preoccupation in the labour market.

The Capability approach and Sociology of Law allow us to develop a nuanced analytical framework whereby we could identify the underlying reason why people take various strategies while contesting 'abstract law' in concrete situation. Our study concludes that labour legislations are not necessarily intentional reactions to market momentum but rather, as essential form of social convention, initiated the framework in which parties coordinate their economic activities.