Asia Pacific Labour Law Review

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Workers' Rights for the New Century

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AMRC is an independent non-governmental organisation
that focuses on Asian and Pacific labour concerns.
The Center provides information, research, publishing, training, labour networking
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AMRC's main goal is to support democratic and independent labour movements in Asia and the Pacific.
In order to achieve this goal, AMRC upholds the principles
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Introduction

Stephen Frost

In 1999 the Asia Monitor Resource Center (AMRC) attempted to fill a serious gap in the literature on workers' rights in Asia and the Pacific. After nearly 25 years of researching and documenting workplace conditions and abuses of workers' rights, we concluded that there was no single work that described the role of labour law and its impact on workers. Several good books had appeared over the years, and continue to be published, on the issue (eg., Bamber et al. 2000; Rowley and John Benson 2000; Blanpain 1999; Woodiwiss 1998; Levine 1997; and Mitchell and Wu 1997). But no single publication covered the entire region. There was no book that could lay claim to being a general reference work on the state of labour law and what that law meant to workers. As an organisation dedicated to telling workers' stories, AMRC decided that it should endeavour to do likewise with labour law. That is, rather than simply outline the laws as they appear on paper, AMRC would attempt to document the impact of the law; a case of juxtaposing theory and practice. Of most importance were issues surrounding the ability of workers to use the law, the implementation of those laws by the state or other regulatory bodies, and the enforcement of the law.

AMRC wanted to know if laws actually protected all workers, or were only applicable to a proportion. Did workers have access to labour or arbitration courts, labour tribunals or other official institutions, or were they out of reach for most? Did the labour law operate fairly, or was it a toothless tiger in the face of powerful business interests? What changes were taking place in the arena of laws designed to protect workers; were they getting stronger and more comprehensive, or were they under attack with workers actually losing rights they may well have fought long battles to achieve. And perhaps most pertinent of all: what role did labour law play in an era defined by what some believe is a reduction in the role of the state (comprising the institutions that made, ratified, implemented, and enforced laws) in the face of perhaps even more powerful interests such as transnational capital?

At an anecdotal level, AMRC knew that the answers to many of these questions were not heartening. We had documented conditions in export processing zones across the region and seen how governments had capitulated in the face of transnational corporations (TNCs) and provided conditions guaranteed to entice them; caps on wages, tax breaks and holidays, strong arm tactics designed to dampen or extinguish trade unions or any other sort of labour organising, and the writing of new laws to override older laws designed to protect workers (AMRC 2002). Despite this, we had access to no coherent exploration of conditions across the region from which we could compare laws or provide others with a clear and succinct view.

During 1999, AMRC contacted partner organisations across Asia to write chapters on the state of labour law and its impact on workers. As an initial and exploratory undertaking, the product that resulted was a success. Early in 2000 AMRC published the *Asia-Pacific Labour Law Review: 1999*. It had fifteen chapters and contributions on labour law from Pakistan to Aotearoa (New Zealand). It was the first publication of its sort to range so widely, but even so it covered only 15 countries.

In this new undertaking Asia Pacific Labour Law Review: Workers' Rights For The New Century, we have included chapters on the Pacific (Fiji, Papua New Guinea, Samoa, and Vanuatu), mindful that these countries are often excised from books with Asia-Pacific in the title. Across the rest of region, from Pakistan to Japan, we have been able to finalise chapters on almost every country (including North Korea and Bhutan – on which labour laws are almost unknown). There are gaps, which include the Maldives, and the half dozen sovereign states in the Pacific for which we could find no contributor (the Marshall Islands, Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, French Polynesia, the Solomon Islands, and New Caledonia). Nevertheless, with 30 chapters we believe that the coverage of Asia and the Pacific is the most comprehensive in print.

The chapters in this book are the result of an intense process that included a workshop in Bangkok (8-9 August 2002) that saw the development of a loose network of people concerned about the current state of labour

law. With labour lawyers, academics, trade unionists, labour activists, and researchers, the spread of expertise was as broad as it was deep. Not surprisingly, a number of key issues repeatedly surfaced. We say not surprisingly because one of the effects of globalisation has been the development of a contest by countries within Asia to attract capital investment. This contest, sometime referred to as the 'race to the bottom', has led to the increase in flexible laws that enable easier hiring and firing, an increase in casual workers and the consequent decrease in permanent jobs, the general decline in trade union numbers and thus power, and widespread un- or under-employment. Even in countries most often perceived as investor countries in the region (such as Taiwan, South Korea, Hong Kong, and Japan) have all faced the same broad general trends (as indigenous investors in these countries have relocated their investments abroad, workers have lost jobs, laws have come under attack from business groups as too inflexible, and trade union numbers have declined). Thus, despite the wide variety of historical, economic, and political circumstances, there are a number of clear trends that emerge from the chapters that follow.

Regulations are contradictory or ambiguous

It is not unusual that certain provisions within labour laws contradict others. This is not a peculiarity of labour law; national laws are a living set of documents open to interpretation and contestation. Yet in a number of cases the contradictions are not simply the result of fine interpretations and lengthy legal arguments. They are quite simply the result of the state undermining workers' rights by taking away with one hand what they have given with the other.

For example, Chinese labour law provides gaping loopholes that allow employers to completely avoid compliance with key items like hours of work. Thus, Article 36 of the Chinese Labour Law declares the 'State shall practise a working hour system under which labourers shall work for no more than eight hours a day and no more than 44 hours a week on the average'. Article 38 stipulates the 'employing unit shall guarantee that its staff and workers have at least one day off in a week'. Article 41, also on hours, states that the 'employing unit may extend working hours due to the requirements of its production or business after consultation with the trade union and labourers, but the extended working hour for a day shall generally not exceed one hour; if such extension is called for due to special reasons, the extended hours shall not exceed three hours a day under the condition that the health of labourers is guaranteed. However, the total extension in a month shall not exceed thirty-six hours.'

Together, Articles 36, 38 and 41 provide clear protection to workers. However, Article 39 effectively rescinds them by stating, 'Where an enterprise cannot follow the stipulations in Article 36 and Article 38 of this Law due to its special production nature, it may adopt other rules on working hours and rest with the approval of the labour administrative department.'

Enterprises can easily obtain dispensation to increase hours well beyond those stipulated. Workers' rights are undermined by a single sentence, and thus provide a legal avenue for employers to require employees to work round the clock, a not unheard of phenomenon in low-end manufacturing in foreign-invested factories in the Pearl River Delta area of southern China. 'Special production nature' usually means enterprises that work in highly pressurised sectors such as those that have multiple peak seasons (garments with fashion seasons, and toys with Christmas and Easter peaks, for instance).

Laws can be vague in any setting, and interpretation is a key element of the judicial process the world over. However, ambiguity to the point of confusion undermines workers' rights and is an important element in many labour laws.

For instance, labour law in Laos stipulates that employers must arrange a 'reasonable production schedule', but leaves employers to determine what 'reasonable' might mean. For enterprises supplying to buyers with peak seasons, 'reasonable' production schedules may require 18-hour days for weeks on end to meet schedules for which the failure to do so may involve hefty financial penalties.

The law does not cover all workers

Almost all labour laws define very clearly the persons covered by the law. The term 'employee' is often outlined with great care, as are exclusions with regard to

coverage. Of course this varies across the region, but there are some stark examples where large numbers of workers are not provided for under labour laws.

For example, Cambodia has a progressive labour law. It is the result of numerous actors, but among them the International Labour Organisation had a major input in determining key sections. Thus, the law 'guarantees freedom of association and the right to strike, provides for free registration of labour unions and collective bargaining, and sets a minimum age of employment.' In many respects it provides workers with protection and freedoms that can only be imagined in many other countries. However, this progressive law only covers workers in the formal sector who account for around 25 percent of the total labour force (see also Pandita, 2002: 17).

In Thailand, the 1975 Labour Relations Act (LRA) does not provide coverage to public servants, agricultural workers, or workers in enterprises employing less than ten persons. These are not minority groups, and workers in these categories constitute nearly 50 percent of the workforce (see also Brown et al. 2002: 9). That is, nearly half the workers in Thailand have no access to key provisions under the LRA, which includes the basic right to join trade unions.

In Singapore, the Employment Act of 1968 includes almost all workers, but excludes various sectors from key provisions. For example, a range of provisions are applicable only to employees who are in receipt of salaries not exceeding SG$1,600 per month (a figure that the Minister of Manpower may vary). Other provisions apply only to 'workman' (defined as 'any person, skilled or unskilled, doing manual work, including any artisan or apprentice but excluding any seaman or domestic servant; any person other than clerical staff …, any person specified in the First Schedule of the Employment Act, namely, bus conductors, lorry attendant, tailors, all workmen employed on piece rates in the premises of the employer', and so on). Thus, clerical workers (who are not defined as 'workmen') earning more than SG$1,600 per month are not entitled to claim overtime payments because the relevant section of the Act (Part IV) only covers 'workmen'.

In Papua New Guinea, for example, the Employment Act 1978 stipulates that the maximum number of hours an employer can legally request an employee to work per day is twelve. However, piece rate workers are excluded from this protection.

Finally, we have noted above that one of globalisation's key features has been increased flows of capital and people. Although not a specific theme of the book, several chapters note that labour laws do not cover migrants, particularly if the state defines them as illegal residents.

Other laws or government policies may annul labour laws

Labour laws do not exist in a legal vacuum; all countries have legal frameworks to administer civil laws, and possess constitutions and acts of parliament regarding trade unions, dispute resolution, and so on. As many of the chapters that follow show, it is not unusual for stipulations in other legal traditions to counter or even annul provisions in labour law. The key question to ask in this regard, then, may not be whether a country has adequate labour laws, but at what level do those laws work; that is, what traditions trump labour laws? In many instances labour law is a poor cousin to more esteemed customs or traditions such as a country's constitution, its civil law, or others. This situation need not necessarily be a problem; after all, constitutions may in fact provide key protection and rights to all citizens (such as the right to form trade unions). However, this is not always the case.

For example, Bangladesh labour legislation protects key rights and allows for the free formation of trade unions (there were around 5,000 in 1999). However, the government has enacted special legislation to prevent trade union organising and activity in the country's three fully functioning Export Processing Zones (EPZ). This state of affairs is not unusual, but is a clear example of one set of laws eclipsing another.

Increased integration of the world's economy along with enhanced trade and investment flows has led to some governments competing with others to attract foreign direct investment (FDI). This 'race to the bottom' has motivated governments to deny key rights so as to provide ideal conditions for investors (a compliant and subdued workforce among them).

For instance in Pakistan, government policies designed to encourage inward FDI prevents teachers, agricultural workers, most civil servants, workers in

‘essential services’, and workers in export-oriented industries and EPZs from organising or bargaining collectively.

Current labour laws are under attack

Most of the examples provided above consist of loopholes and the use (or design) of other laws to override existing labour regulations. However, in several countries current labour laws are under direct attack. This is most often the case where the trade union movement has been strong (and although perhaps weakened is still relatively strong), and concerted efforts have been made to roll back hard-won victories. Business groups are obviously one of the key beneficiaries in rolling back labour laws, but they have willing accomplices in both conservative and labour governments around the region who have adopted the neo-liberal cant that free markets and a competitive (read flexible) workforce are the keys to national wealth, economic security, and full employment.

In Japan, for instance, key policy makers and business groups have successfully argued that labour laws as they stand are too rigid and inflexible and that civil law is sufficient to deal with many workplace issues (such as dismissal, protective measures for women, the right to hire dispatched workers, and so on).

Workers in Vietnam have found themselves facing the same sorts of attacks. For instance, up until 1987 all full-time workers in state-owned enterprises (SOE) enjoyed a regime of ‘work for life’ (*bien che*). Under this system, if employees had been provided with a job under the ‘work for life’ system then they continued to work under this system until retirement. During the period of economic reform (*Doi Moi*), permanent employment contracts in SOEs were seen as no longer appropriate and all economic sectors were required to be more flexible in order to cope with market pressure. The government transferred all SOE employees from lifetime employment contracts to more flexible contracts, which constituted a fundamental change in the government’s approach to workers’ rights.

In Papua New Guinea, despite the exclusion of piece rate workers noted above with regard to maximum work hours per day, employers have still complained that the Act has not responded to the current needs of the manufacturing sector, particularly employment flexibility.

Fiji faces similar problems. In 1991 and 1992 – following the military coup of 1987 – the Interim Government enacted significant reforms to various laws (such as the Industrial Association Act 1942, the Trade Unions Act 1964, the Trade Union (Recognition) Act 1976, and the Trade Disputes Act 1973. Most of the changes were aimed at reducing the power of trade unions to bargain collectively. For instance, under the new provisions of the Act, the Minister with responsibilities for labour has the power to declare strikes or lockouts unlawful where ballots as required to be taken have not been held. The Minister also has powers to declare strikes unlawful where agreed procedures as contained in workers’ collective agreements have not been followed. Workers in essential services are prohibited from striking, and the Minister is able to order parties to compulsory arbitration *prior to* a report being lodged of a trade dispute.

Interestingly, the government of North Korea seems to have rolled back key legislation and denied workers access to fundamental rights. Despite appeals in the name of socialism (and North Korea’s isolation from the global economy), workers there too have found themselves at the mercy of what would anywhere else be regarded as neo-liberal economic reforms. For example, in April 2000, the Cabinet of North Korea approved an amendment to the Regulation of Labour Discipline (ReLD), which was originally enacted by the Central People’s Committee in 1978. The main objectives of the ReLD are to ‘strengthen labour discipline and order, to remove labour waste, to continuously improve labour productivity, and thereby to accelerate the construction of socialism’.

Governments do not implement or enforce the laws

One of the most common comments about Chinese and Cambodian labour law regimes is that they are good on paper but not enforced. There is good reason for saying so; for example, Cambodia’s 1997 labour law stipulates that workers’ grievances can be dealt with in specially convened labour courts or the Council of Arbitration, both of which have yet to see the light of day.

However they are not the only examples of countries with relatively comprehensive labour laws but the lack of political will to enforce them.

In Papua New Guinea, for instance, the Office of Workers’ Compensation (OWC) is under-resourced in

terms of both finance and staffing capacity. As a consequence, workers are unable to access the full protection provided by legislation. On average, the OWC receives 1,300 claims each year, of which less than one half are resolved. Of the figures available, in 1995 some 1,370 cases were received and of these only 757 were settled. Even then, an excess of 5,600 claims was awaiting settlement.

In Mongolia, the weak enforcement of a comprehensive labour law is a major cause of workers' disappointments in the obvious gap between the expectations from a new democracy and the results of the transition towards the market economy. Labour law has outlined minimum standards that have, in effect, become – as is the case right across the region – maximum standards. According to the trade union movement, private enterprises, especially in the mainly foreign-invested textile sector, even minimum conditions are not applied. For example, Mongolian Labour Law stipulates that employees should be paid for overtime work (that is, extending the eight-hour day) by at least 1.5 times average compensation. However, 62 percent of workers responding to a union survey indicated that they did not receive overtime payment of any kind. In addition to insufficient wages, workers suffer low standards of safety, health, and sanitation in the working environment, and average workdays of 9-12 hours. Workers however rarely lodge complaint to the relevant authorities for fear of dismissal.

The historical circumstances of labour law formation deny workers access to rights

Many countries in the region have attained independence only in the last half century or less (and colonies still exist in the Pacific – with French, Australian, Aotearoan, UK, and USA interests controlling several territories). Despite debates over the impact of colonialism, it is undeniable that it played a major role in determining significant aspects of labour laws currently on the books.

For example, the British in India enacted key labour legislation (the Trade Disputes Act 1929) to contain striking workers and trade unions. Although post-independence governments have modified such laws, much is still based on a clear partnership between labour and capital, where employers promise fair pay and conditions and labour promises uninterrupted production and higher productivity.

In Taiwan, laws enacted under Japanese control in the 1920s to the 1940s are still on the books and need to be either abolished or overhauled to take into account changes in workplace conditions and practices, and the changing relationship with the People's Republic of China. For example, the Trade Union Law was formulated on the basis of Taiwan's tenuous relationship with the Chinese mainland immediately following the accession to power of Mao Zedong in 1949. Under these circumstances, for the sake of political and social stability, lawmakers placed stringent restrictions on union formation and operation. However, union organisers and leaders enjoy substantial freedoms in Taiwan today and thus the old laws no longer apply to Taiwan's current territorial and political situation.

Likewise, the Labour Standards Law of Taiwan states that a person who has worked for a single business for at least 15 years is entitled to a retirement pension. Today, 98 percent of firms in Taiwan are small- or medium-sized (with regular employees numbering fewer than 200) and, on average, their survival rate stands at around 13 years. This means that a major proportion of workers do not meet the legal requirements for pension entitlements.

In North Korea the situation is markedly different, but there too history has given rise to circumstances that deny the rights of workers. For instance, one of the key characteristics of 'The Socialist Labour Law of the Democratic People's Republic of Korea' of 1978 (SLL) is the absence of the provision for trade union rights. Neither the Constitution nor the SLL contains the right to organise a trade union. Workers are only allowed to join 'mass organisations' depending on the category into which they are assigned. The major 'mass organisations' are the General Federation of Trade Unions in Korea, the Agricultural Workers Union, the Socialist Youth Workers Union and the Women's Union. The main role of mass organisations is described as a 'transmission belt between the party and the mass people'.

Bhutan, like North Korea, has remained almost invisible behind its self-imposed isolation from world affairs. This has enabled the ruling elite to deny workers almost every fundamental right imaginable. With a policy de-

signed to ethnically cleanse the country of groups traditionally resident in the southern parts of the country, the Bhutanese government has flouted international conventions and standards with nary a cry raised internationally. A workers' movement exists in exile (in Nepal where more than 15 percent of the population live), but it has no impact on conditions inside the country. Bhutan has no written Constitution and there are no basic guarantees concerning the rights of individuals (let alone rights to freedom of association and so on). Workers in the formal sector (a small minority) are covered by 'service rules', which are generally oppressive and provide no formal mechanisms for workers to air their grievances or resolve disputes. The civil courts offer little hope given they are firmly controlled by the government. Many service rules are determined by individual employers, such as overtime payments that when paid take the form of an 'honorarium' and not a legally binding rate (Neopaney 2003).

A short note on occupational health and safety

We would like to insert a final note with regard to occupational health and safety (OHS) regulations and laws. The phenomenon of poor or poorly enforced labour laws is perhaps even more acute with regard to OHS regulations. Some countries do not have OHS regulations at all. Cambodia, for example, has no specific OHS standards and the law makes only vague and ambiguous claims about the responsibility of employers to provide clean and safe working environments, but without specifying what that might mean in practice. Others have a confusing morass of laws and departments responsible for OHS, which means effective monitoring and enforcement is all but impossible. For instance, in 1995 it took fourteen separate Chinese authorities to draft 18 rules and regulations pertaining to the prevention of fire and explosions. In others, such as India, where only six percent of the labour force is in the formal sector, trade unions or other institutions have almost no capacity to enforce OHS regulations (Pandita, 2001).

Conclusion

In conclusion, we would like to reiterate that labour laws and their capability to protect workers are under threat across the region. New forms of work (brought about by new technology), increased mobility of capital and labour, the rising influence of FDI (and not just from TNCs but from small- and medium-sized enterprises as well – in particular from Hong Kong, South Korea, Taiwan, Singapore and increasingly Malaysia, Thailand, and China) are all changing the terrain upon which labour law functions. Whether it is wilful disregard for workers' rights or the inability to enforce laws, the capacity for laws to protect workers has in general diminished.

Clearly, the authors in this collection have been unable to note every aspect of labour laws and their impact on workers. Hundreds of intricacies, anomalies and other factors characterise the law in the 30 countries under review. We have outlined key themes and tried to give a flavour of changes and the impact on workers. Despite a small number of positive changes, we believe that the overwhelming majority of legal regimes across the region designed to protect workers' rights are either under threat, or are undergoing radical reforms of which the majority will be detrimental to many workers.

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