

An Interview with Professor Stephen Befort*

Ian Taylor:** Why were you in China?

Stephen Befort: In 2006 the UMN Law School launched a program in China where mostly American students and some Chinese students would have a residential semester during the summer. I went the second year the courses were offered. We had about 40 American students from 15 different law schools. There were about 10 Chinese students who audited courses as well.

IT: Is this something that might be offered again?

SB: Well, I went in 2007 and the program was scheduled to go again in 2009, but after the great recession happened, rather than having 40 students signed up to go as in 2007, we ended up with only 11 students. The decision was made that this was not enough students to make it work financially. We do not have a stand-alone program in China currently. It was very popular the years it was running.

IT: How long were you there?

SB: I was in China for six weeks. It was like a summer camp.

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Everyone stayed in a hotel owned by a law school in China. We lived in the hotel and there was a tunnel to classrooms. Everything was in the same facility, and we ate in that facility as well.

IT: Before we started the interview we were discussing you visiting the Great Wall of China. Was this city close to the wall?

SB: We took a bus, it was about a 2 hour trip to the wall. The program was located in Beijing.

IT: Were you pursuing a research question while you were there?

SB: While we were there the Chinese government adopted their new employment law. They had been working on it for 5-6 years, but it came to a head while our program was operating. I was able to get copies of the new law translated to English for analysis in class.

IT: What were your initial impressions of their changes?

SB: The changes were almost entirely helpful for employees. Prior to this time in China, the government had been granting more freedoms to employers which had produced some negative repercussions for employees. There was a massive exodus of migrants moving from the country-side to the cities and this increased unemployment. Also, there was growing mistreatment of employees by non-Chinese employers from other Asian countries.

The government was afraid they would lose support from the workers. They wanted to strengthen the regulations so there would be fairer outcomes.

IT: Have you had a chance to reflect on how those changes have worked in China?

SB: Yes, I have. And, I have talked with Chinese scholars, people who know the system, as well as with some of the Chinese students.

After having a chance to reflect on the changes, I wrote a summary of the more significant legal changes. The American students who were in China in 2007 were struck with the fact

that, on paper at least, Chinese regulation of employment security was much stronger than in the United States. On the other hand, the Chinese laws were not always enforced.

The law stated, for example, that an employer could only terminate an employee with advance notice and just cause, rather than in the US where an employer can dismiss employees at will. Every worker in China has a contract. The employment relationship requires an individualized contract.

And sometimes the contract spells out rights for employers. There are minimum rights for both employers and employees in those contracts.

Another thing that was going on at that time and is still happening in China was discrimination against Uighurs. They primarily live in the Xinjiang province in the far NW corner of China. The indigenous population in that province are not Han Chinese, but are of a different Turkish-type ethnicity and are predominantly Muslim.

IT: Were these changes in the law that had taken place, were they helping the Uighur population? Did they make a difference in that community?

SB: I can answer that in two parts:

First, there has been more protection of employees in China and there has been a lot more use of alternative dispute resolution and mediation.

Employees have had very good outcomes in employment cases largely as a result of the new statutory changes.

But, there was very little in the employment law about ethnic discrimination. The Chinese government is big on inclusion, but it sees inclusion as “be more like us,” more like the Han Chinese. And it has just been in the news recently that one million Uighurs are in camps, reeducation camps basically being arm-twisted into being more traditional Chinese by viewpoint and culture.

Ultimately the law hasn’t provided much help for the Uighurs.

IT: This seems to be more than cultural assimilation, it sounds like indoctrination that is occurring.

SB: Yes.

IT: Do you know if there are any studies on how the employment laws have changed outcomes for this community or not?

SB: I'm aware of the problems of the Uighurs, but China's employment law has not done much to either help or hurt them. There are separate anti-discrimination laws, but I'm not sure how well they are enforced. While there has been dramatic improvements for average workers in terms of protecting their rights, I think the Uighurs are still very much a downtrodden group.

IT: One thing I see in our employment discrimination course is even though Congress has the power to make some sort of proclamation about discrimination or protections for employees, our Court system has a lot of power to interpret the laws and guide how they operate. Is there a similar common law function in China, or does arbitration play a larger role?

SB: There are far fewer big precedential cases in China because mediation and arbitration are the norm and going to court is the last resort. There are many more outcomes based upon resolution and negotiation. And far less by a court issuing a Supreme Court case type decision. China experiences a lot of case-by-case resolution, but no so much development of case law as we know it in the United States.

Another widespread area of discrimination is the use of pictures on resumes, particularly for female job applicants

There is widespread concern that attractive people get hired over those who are considered to be less attractive. So, appearance discrimination is common.

IT: I would assume that in most on boarding procedures you will see someone's face in any culture. What makes it different for photos on a resume?

SB: It is like using criminal history as a basis for applicant screening. It can result in applicants being automatically disqualified.

IT: Was appearance discrimination addressed in the reform bill?

SB: No, it wasn't.

IT: It was an issue back then?

SB: Yes.

IT: How do people respond to that? Do people alter their photos?

SB: I am not sure, but that is a possibility.

IT: I could see someone who is tech-savvy doing that.

SB: Or, they could get someone else to pose for them.

IT: I'm also curious about labor law. I saw some of this in your teaching materials, did you get the impression that China supports unions?

SB: Well, labor law is very unique in China. There is only one lawful union – the All-China Federation of Trade Unions – and it is government run.

The union is basically part of the government. They do negotiate on behalf of the employees. The government uses the union to control employers to a great extent. By having a voice within the company, the government can make sure the company is being run properly. It really is a state-run economy. The government has its hands in everything. Its really quite amazing.

China's labor union is huge but it tends to be run from the top down by Communist party leaders

IT: So, in comparison with American unions where there are democratically elected union leaders, that doesn't exist in China?

SB: No, it doesn't. While the union does represent the workers, in part it is government-dominated to ensure that there are no independent unions that would be a threat to the existing order. Because revolutionary movements often start with organized groups of workers who demand different changes in the law, such as economic benefits and the like. If that is off the table, because the government is on both sides of the table, then that is one of many ways the Communist party seeks to maintain control.

IT: Do Chinese citizens have the option to create an independent union? Is there a NLRA thing?

SB: No, there is only one union.

IT: Does the jurisprudence favor employees or employers?

SB: There is the employment law that gives certain rights to workers as well as some obligations, but individual cases tend to just apply the principles set out in the statute rather than create new principles, which is similar to most of the world. Our common law system in the US is very different than in code-based countries. And China is very much a code-based country. China borrowed many of its laws from Germany and France.

IT: What is your estimation of how well the employment law is being enforced?

SB: For certain segments of the economy it is enforced quite well. So, an employee who works for a Taiwanese company or a Korean company can protect their rights by going to arbitration. Win rates for employees in arbitration is like 60-70%, which is very high.

On the other hand, there is an unregulated sector of the economy. There are millions of workers who are displaced from the rural areas because there is not enough work there anymore. They go into the cities to work on construction projects. Most wear blue costumes. It's like a separate part of the economy. They do not get much in the way of protection because they do not live in the area of their household registration or hukou. There is a principle that in order to have social, economic, and legal protection, a citizen has to sign up at their area of residence. When a rural person is displaced to an urban community, they do not have their hukou to rely on for their rights. That's changing. The way the Chinese system works is there is a tremendous amount of top-down control, but every once in a while, the government grants more rights to the people on the bottom, so that they do not rise up and do something about it. A benevolent dictatorship if you will.

It's the most capitalist country in the world. It's called a Communist society, but everything is for sale.

IT: Can you elaborate on that?

SB: There are shopkeepers everywhere. Everything is done by bargaining. There is negotiation to every aspect of the market. There may be advertisements on the radio, but nobody pays attention to it. They haggle. My wife hates haggling. She went to one of the markets to buy something for our youngest daughter and she said I'll pay the price that is marked. The shopkeeper said you can't buy it for that price you have to bargain with me. She said I'm not going to bargain with you, I'll pay full price.

IT: That's interesting. Because in one of your presentations for your course, you ask students what does it mean to be a social capitalist country? Where is the socialist aspect come in?

SB: There is a certain amount of economic and social support for the poor. But that is dwindling. There is free education and a financial subsidy for the disadvantaged. There is a social safety net of sorts, but it is breaking down in retirement. There is no good safety net for older workers. It's really important to have young family members to take care of you when you get old.

IT: There is such a large population. It seems that it would be dangerous to not have a strong social safety net for folks. In one of your class presentations you mention how globalization has contributed to greater income inequality, more hours worked, and a decline in union strength. Do you think that globalization has harmed the American worker more than it has helped him or her?

SB: Globalization has done both. Clearly, American businesses face international competition. We see that with manufacturing being sent to places like China and Vietnam. That really undercuts the ability of American unions to bargain for worker salaries. Meanwhile, the global marketplace for businesses has enabled those on the high end to compete internationally and make a lot of money by manufacturing things where it is cheap and selling them where it is expensive. So yes, there is definitely a growing gap between the top decile (20%) of American workers and the bottom decile.

IT: One thing I found interesting about your observations here

is when you talk about Chinese workers, at least statutorily, having a lot of protections and winning a lot of arbitrations. One story you hear about the global market is that we lose jobs in the United States because we have so many rights for workers here and workers in other places may not have the same scale, so it is easier for a corporation to employ people in other places. But that seems like a conflict with what is happening in China because it seems that workers have many rights there.

SB: I think that trope is somewhat inaccurate. America sometimes has problems competing with low-wage nations. The US tends to be economically richer, so American workers get paid a lot more than sending a job over to Cambodia, let's say, so that undercuts some of the rights of American workers, but it is not really regulation. As we saw in my comparative course, Germany and China on paper have much more regulation than the United States does. But, that's not always the case in reality. I remember one class we were talking about the restriction on hours worked by Chinese workers and one of the students raised their hand and said, if Chinese workers can only work 35 hours a week, why is that the girl who runs the cash register at the local market works 20 hours per day 7 days a week. There are holes in the economy where regulation just doesn't apply.

IT: In your presentation for the class, you discuss how the Depression sparked the New Deal. Is there any event that can spark a greater place for equity and voice in the Global era?

SB: The Great Depression really did create a sea change in an economy that was primarily dominated by government that had a hands off "employers you can do whatever you want" to a New Deal in which the government became a watchdog for workers because they thought the workers were treated unfairly under the old deal. But in the last 50 years, the government thumb on the scale has lightened up. With trade, technology, and the global market place shrinking the globe, efficiency has been the driving force rather than equity and this has created a wider gulf between the haves and the have nots.

IT: Do you think something can spark a contemporary change? For example, right now in the United States there are debates about a green new deal. Could climate change be a catalyst for creating more equity and voice for workers around the world?

SB: Climate change could influence people if it gets drastically worse. If it is shown that people's well-being is threatened by a looming environmental disaster. But so far, climatologists observe some change in global temperatures and people kind of say well lower heat bills aren't so bad and who knows what's causing that.

I read an article recently that said growing economic inequality could be a catalyst for rebalancing labor and employment laws, because the group at the bottom of the ladder will get fed up and demand more opportunities. I don't think we have gotten there yet. For climate change to be a catalyst for reform, there has to be more dire economic consequences. I don't mean to get political on you but...

IT: Get Political!

SB: In the 2016 election President Trump did well with low income white workers who were upset because middle class jobs were disappearing. But the response was not to make the people on top share their wealth. It was, instead, the culprits are immigrants who are taking our jobs away from us. I don't think income inequality has gotten to the point where it is a revolutionary engine yet. You don't want to have to wait for another great depression but I'm not sure what short of that would really compel a big change. I am speaking of the US specifically.

A couple of other things are at work. In Europe, the EU has basically made markets international. So it's not like Belgium and France are competing with each other, they share a common market, it's less me against them. The US is more of an outlier. So, in EU the basic employment laws are international. There are national variations but they conform with EU directives that say your laws got to be in this zone because we want everyone in the EU to have relative equality. But the US employment laws are definitely national in scope and not international. Environmental law is the same way. In the world of trade and tariffs, there are international rules for how those relationships are dealt with. But, when it comes to work and the environment, it's everybody against everybody else. That's sort of a problem because climate change is an international problem. As much as California is trying to deal with it, it's tough for one state in one country to affect meaningful change of an international problem,

particularly when employers in California have to compete with employers in states that do not have as much regulation.

IT: You're really laying out the difficulty of nations coming together to solve anything on a macro scale.

SB: It's difficult.

IT: Your course in China explored how Germany provides greater worker rights than the United States. Why do you think that the United States has such tough conditions related to other Western Nations?

SB: To a great extent it's the wild-west mentality of the United States. In most countries, workers want to have their lot as a worker improved. In the U.S., climbing the ladder of success means you will not be a worker anymore. You will be a manager or a supervisor and it is all up to you to change. So you don't have to hang your hat on system-wide changes because you will succeed even if everyone else doesn't. But, there is data that shows that its becoming harder to achieve social mobility for people coming from the bottom of the economic ladder. It's just not as easy as it used to be. Education is so expensive.

IT: Do you think that the United States' history has any role to play in terms of how it treats workers? I'm thinking about the fact that we had slavery as such a large part of our history and our labor capital for a couple of centuries.

SB: I think that has had an influence. If you look at the portion of our country where slavery was lawful, how it depressed the economy with free labor for plantation owners, that still coincides with the portion of the country that has less economic success and less of a free independent, critically thinking workforce. So, I think there is some hangover from that system. And with American Indians, being confined to reservations has contributed to their economic woes. There has been less education and less access to job. Similar to the Uighurs, American Indians used to be sent to reeducation camps, they called them parochial schools. There's a hangover there as well. In a way that there is not for other ethnic groups. I have some German ancestry, but there was never really any disadvantage for people of that ethnic group. But for African Americans, the

world did not open up to them automatically in 1865.

IT: I was wondering if the attitude and culture of how we approach labor was influenced on us having slavery. I'm unsure, there are labor abuses all over the world.

IT: Do you consider the concept of employment contracts? It sounded like when I am hired for a job and sign on-boarding documents? What are key distinctions?

SB: Well it depends whether or not the employee has any leverage in negotiating the contract. Pro football players have a lot of leverage and they do quite well. People at the bottom of the ladder do not have that and often times face a take it or leave it type job offer.

The contracts in China incorporate national laws and protections against unjust discharge, and if there is no contract that is agreed upon within a certain amount of time the government will impose a contract. So that's helpful, but there is a lot of leeway for employers to say this is your contract. Employers still have a lot of say.

IT: Anything else?

SB: Studying international labor and employment law really opened my eyes to different systems and different approaches and how they compared with our own. It shows that some concepts can be borrowed.

An example of that currently is right to request laws. They have existed for a couple of decades in some European countries. Workers have been trying to balance work time and family time. The traditional 9-5 schedule doesn't always work well. A number of European countries have said we are not going to compel employers to make more flexible schedules, but the laws give employees the right to request changes in working schedules. The employer must sit down and talk to the employee. There has been a lot of positive outcomes. Germany, England, Netherlands, and Australia have these laws. This is only just starting to be considered in the United States

IT: Who is looking at them?

SB: Paul Hallgren, a student who graduated last year wrote an article for the ABA Journal of Labor and Employment Law on this topic. More recently, San Francisco enacted a right to request ordinance, and Vermont adopted a statute. In addition, New Hampshire has adopted a statute that has not yet gone into effect.