

# Regulating On-demand Work in China: Just Getting Started?

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## ABSTRACT

In China, a significant and rising number of workers are engaged in on-demand work. The legal status of on-demand workers has been widely debated, and it seems that the vast majority are not protected by labour law, since the law accords rights only to those workers with ‘labour relationships’. While there is widespread consensus in China that on-demand workers need more protection, steps taken in that direction to date have been small indeed. This paper seeks to explain the current legal situation of Chinese on-demand workers by outlining the responses to the spread of on-demand work of the judicial and arbitration system, national government, trade unions and workers themselves. Addressing the question why on-demand workers have not yet been accorded labour protections, it points in particular to the national government’s concern to maintain high levels of employment and ensure economic growth.

## 1. INTRODUCTION

This paper deals with one of two forms of work provided via digital platforms, namely *work on-demand*, meaning work allocated to individuals in a specific geographical area through location-based apps.<sup>1</sup> So-called crowd-work, involving tasks completed remotely via the internet, is not considered

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<sup>1</sup>V. De Stefano, ‘The Rise of the “Just-in-time Workforce”’: On-Demand Work, Crowd Work and Labour Protection in the “Gig-Economy”’ (2016) 37 *Comparative Labour Law and Policy Journal* 471, 471.

in any detail. On-demand apps, of which Didi Chuxing (a company providing car-hailing services) is the most prominent, first appeared in China in the early 2010s. From 2015, with the support of the Chinese government, they skyrocketed in size and significance, particularly in the transportation and delivery service sectors. Today, it is estimated that around 2.6% of the total employed population in China is engaged in on-demand work.

As in other countries, the legal status of on-demand workers has been widely debated. As is explained in greater detail below, Chinese labour law accords rights only to those workers who have a 'labour relation' with a 'work unit', or employer, and the vast majority of on-demand workers do not have such a labour relation. Without the protection of the law, they are vulnerable to low pay, long working hours and, in many cases, unsafe and degrading working conditions. While there is widespread consensus in China that on-demand workers need more protection, steps taken in that direction to date have been minimal indeed. Confronting their poor working conditions and lack of labour rights, hundreds of on-demand workers have filed lawsuits, or organised protest actions, demonstrating their determination to fight for their rights. The legislature currently has no plans to tackle the issue of the on-demand workers' legal status, however, and the government has chosen instead to emphasise the positive contribution that platforms can make to the Chinese economy by creating novel forms of employment. Trade unions have started to recruit some on-demand workers but whether they can effect positive change under current political and legal constraints remains to be seen.

This paper seeks to explain why the legal response to the growth of on-demand work has been, so far, ineffectual in terms of protecting workers from ill treatment and poor terms and conditions. It begins by outlining the development of on-demand platforms and on-demand work in China and the response of the judicial and arbitration system, demonstrates a reluctance to identify labour relationships without clear guidelines. Part 4 addresses the policy priorities of central government in respect of the platform economy, and part 5 considers the limits of the capacity of trade unions to effect positive change. It also reviews the extent of action taken by on-demand workers themselves, without trade union support. In the conclusion, the question is addressed head on of why on-demand workers have not been accorded legal protections to date, including employment rights. A number of possible explanations suggest themselves. First, the national government's general approach to regulation may have shaped its thinking

in respect of the sharing economy. Second, the nature of the statutory law system itself creates barriers to law reform. Perhaps the most likely explanation, however, lies with the ever increasing importance accorded by the national government in recent years to ensuring and stabilising employment and maintaining a flexible labour market. The fact that most on-demand workers are rural migrants complicates matters because it means that the legal situation of on-demand workers is closely bound up with the daunting, systematic and long-standing issue of migrant workers' social exclusion and labour market discrimination.

## 2. WORK ON-DEMAND IN CHINA

Both policy and academic discourse on work on-demand, and its discussion in mainstream media, tend to make use of the terms 'sharing economy' and 'platform economy'. While prominent on-demand apps, such as Didi Chuxing, have typically been discussed separately and extensively, the development of on-demand apps more generally has usually been treated as one aspect of the development of the sharing or platform economy. Most sharing economy companies appeared in China in the early 2010s, developing slowly at first. 2015 was hailed as the epoch-making year for the sharing economy.<sup>2</sup> This was when the Chinese government first gave its official approval to the arrival of the sharing economy, with the term 'develop sharing economy' appearing for the first time in the state official documents at the Third Plenary Session of the 18th Central Committee of the Communist Party, and later written into the Proposal for a 13th Five-Year Plan (2016–20) for Economic and Social Development. Since then, the sharing economy has repeatedly been referred to in the annual Government Work Reports, from 2016 until 2020. The term 'platform economy' first appeared in the 2018 Government Work Report and was thereafter consistently referred to until 2020, together with the sharing economy. The government has never clarified the difference between the two terms, but rather has tended to use them in conjunction with one another to refer to the digitally based new economy. Accordingly, this paper uses them interchangeably.

With the strong support and endorsement of the government, the sharing economy expanded rapidly. A series of reports detailed its explosive growth

<sup>2</sup>J. Wen He, 'The Epoch-making Year for China Sharing Economy' (2015) 24 *China Economic Information* 32. Note that wherever a Chinese-language source has been cited, the title of the article and journal in question, or other work, has been translated into English by the author.

and the equally explosive growth of the associated workforce.<sup>3</sup> In 2015, the market size of China's sharing economy was about 195.6 billion Yuan, employing around 50 million people accounting for about 5.5 per cent of the total workforce. By 2019, the market size had reached 328.8 billion Yuan with 78 million people engaged in providing services, accounting for around 10.08% of the total employed population, calculated at the end of 2019 as 774.71 million.<sup>4</sup> The definition of sharing economy in the reports is widely drawn: 'the sum of economic activities that make use of modern information technology to integrate and share large amounts of decentralised and idle resources to meet diverse needs'. This includes Uber, Didi, Airbnb, Coursera, even the peer-to-peer lending platform LendingClub. The figure of 78 million workers therefore includes but is much broader than the category of on-demand workers with which this paper is concerned.

While there are no official data detailing the size of the on-demand workforce, an approximate figure may be arrived at by aggregating data provided by the main apps. While locally based labour platforms offer a range of services, including manicures, catering and other domestic services, the prominent platforms that spread in large, and most small and medium sized cities or counties, operate mainly in the fields of private transport (car-hailing and designated driver) and food and other deliveries. For the most part, these prominent platforms have succeeded in creating monopolies in their target markets and have begun to make profits.<sup>5</sup> A very rough estimate of the workforce of the main platforms is in excess of 20 million, accounting for around 2.6% of the total employed population, as calculated in 2019 (see Table 1).

In addition to contracting directly with workers, it is also common for platforms to make use of labour market intermediaries as a means of insulating themselves from risks associated with changes in market demand

<sup>3</sup>The State Information Center and Sharing Economy Working Committee of Internet Society of China, 'China Annual Sharing Economy Report 2016, 2017, 2018, 2019, and 2020', <http://www.sic.gov.cn/News/568/6010.htm> (accessed 6 October 2020).

<sup>4</sup>Figures concerning the total employed population are taken from the Statistical Communiqué of the People's Republic of China on the 2019 National Economic and Social Development, <http://www.lawinfochina.com/display.aspx?id=33158&lib=law> (accessed 6 October 2020).

<sup>5</sup>Z. Ying Yang and B. Goh, 'Chinese Food Delivery Firm Meituan Posts First Quarterly Profit since Listing' (*REUTERS*, 23 August 2019), <https://www.reuters.com/article/us-meituan-dianping-results-idUSKCN1VD0YR>; A. Kharpal, 'Chinese Ride Hailing Giant DiDi Says Core Business is Profitable as Signs of Recovery Take Hold' (*CNBC*, 6 May 2020), <https://www.cnbc.com/2020/05/07/chinese-ride-hailing-giant-didi-says-core-business-is-profitable.html> (both accessed 6 October 2020).

and employment law compliance.<sup>6</sup> Platforms and intermediaries sign agreements of various kinds, which mainly aim to transfer the recruitment and (often minimal) managerial functions to the intermediary. For example, Didi Daijia has signed ‘information service cooperative agreements’ with agencies, stipulating that the agencies will provide them with labour services.<sup>7</sup> Ele has ‘franchise agreements’, franchising the trademark ‘Ele’ and logo ‘Fengniao Peisong’<sup>8</sup> to delivery service providers, which then recruit riders and conduct the delivery service.<sup>9</sup> In some cases, there may be a labour contract between the intermediary and the worker.<sup>10</sup> In others, there may be a traditional relation of subordination, even without the existence of a written labour or other form of contract, involving fixed daily working time and breaks, monthly wages, and monitoring by team leaders.<sup>11</sup> In such cases, judges tend to find that here is a labour relationship in existence. In yet further cases, the relation between the workers and the intermediaries, based on cooperative agreements or other form of agreement between the two, is one of ‘on-demand work’, rather than a ‘labour relation’.

Who are these workers, couriating food and other goods on electric motorbikes or public transport, dressed in different coloured uniforms, or driving customers from A to B, dressed no differently to taxi drivers, both shuttling constantly across streets day and night. As with the workforce statistics, a more detailed profile of the workers can be gleaned from data published by the main platforms, which taken together suggest that on-demand workers are mainly young, male rural migrants.

Rural migrant workers appeared in China with the beginnings of the transformation of the urban–rural dual structure system based on *hukou* (household registration) status, which essentially locked rural residents down in their birthplace and limited their freedom of movement. The state-enforced rural–urban divide created a regime of unequal citizenship. After the reform and opening-up of the 1980s, the government adjusted the policy to permit rural migrants to work in urban areas. Since they moved en masse to the cities, rural migrants have experienced unequal treatment, economically, culturally and socially despite the many measures that have been taken to address the problem.

<sup>6</sup>Q. Wang, ‘Determination of Labour Relationships and Liabilities for Triangular Work Relationships on the Platform’ (2020) 469 *Law Science* 176, 178.

<sup>7</sup>(2016) Jing 0108 MinChu No. 28105.

<sup>8</sup>Ele is one of the biggest online food delivery platform in China, and Fengniao Peisong is the instant delivery platform established by Ele.

<sup>9</sup>(2018) Su 0411 MinChu No. 4891.

<sup>10</sup>(2020) Su 05 MinZhong No. 6253; (2020) Su 02 MinZhong No. 2546; (2020) Su 0303 MinChu No. 289.

<sup>11</sup>(2019) Su 0282 MinChu No. 7570.

Data from the top three platforms in Table 1, employing the most workers, suggest that more than 90% of the workers are male, with rural migrants accounting for almost 80%, and young workers more than half.<sup>12</sup> The representation of other groups on on-demand platforms is also rising: unemployed urban residents, workers made redundant from industrial jobs, demobilised and transitioning soldiers,<sup>13</sup> university graduates<sup>14</sup> and young manufacturing workers (also mainly rural migrants) who have ‘escaped’ from the traditional factories and production lines.<sup>15</sup>

Platforms claim to offer a novel form of employment providing flexible working time, equal opportunities, high income or security of income, and freedom. In fact, working conditions are poor, dangerous in some respects, and even injurious to the dignity of the worker, who is subjected to the control of the algorithms and rating systems. Since income is highly contingent on working time, long hours are common. Accurate figures concerning the proportions of workers who are solely, mainly, largely or only partially reliant on platforms for their income are difficult to find. Reports provided by the platforms may be more likely to emphasise the flexible and part-time characteristics of the work, but academic and third party research has demonstrated that a large number of workers actually work full time or earn the main part of their income from these apps.<sup>16</sup> Even the platforms’ own

<sup>12</sup>The data are taken from the following reports and news items: Didi Research, ‘Technology Advancement and Women’s Development: Women’s New Employment Report on Didi 2019’, <http://www.199it.com/archives/843423.html>; Meituan Research, ‘2016 China Takeaway O2O Industry Insights Report’, <https://about.meituan.com/news/institute>; Meituan Research, ‘The New Urban Youth: 2018 Takeaway Rider Employment Report’, <https://about.meituan.com/news/institute>; Fengniao Peisong, ‘2018 Takeaway Rider Group Insights Report’, <http://www.nbd.com.cn/articles/2018-12-28/1286600.html>; J. Li, ‘The New Generation of Migrant Workers Has Changed Their Career Choices’ (2019) *People’s Daily Overseas Edition* (Beijing, 20 October 2019), [http://paper.people.com.cn/rmrbhwb/html/2019-10/29/content\\_1952966.htm](http://paper.people.com.cn/rmrbhwb/html/2019-10/29/content_1952966.htm) (all accessed 8 October 2020).

<sup>13</sup>Didi Research, ‘New Economy New Employment: 2017 Employment Reports on Didi Platform’, <http://www.199it.com/archives/646093.html> (accessed 8 October 2020).

<sup>14</sup>Meituan Research, ‘The New Urban Youth: 2018 Takeaway Rider Employment Report’, <https://about.meituan.com/news/institute> (accessed 8 October 2020).

<sup>15</sup>X. Fei Yin, ‘Actively Resolving the Structural Contradictions of Employment in China’s Manufacturing Industry’ 2019 (4) *China Development Observation* 45, 46.

<sup>16</sup>More detailed data can be found from: Green Ranking, ‘2016 Car Hailing Driver Living Conditions Survey Report’, <http://www.199it.com/archives/527027.html>; H. Guan Zhen and others, ‘Platform Workers’ and ‘Downloaded Labour’: Group Characteristics and Labour Process of Couriers and Food Delivery Workers in Wuhan’ (*Jikan*, 30 March 2020), <https://www.jikan.com.cn/infoDetail/article/30000002> (both accessed 8 October 2022); N. Xiang Feng, ‘Research on the Labour Rights and Protection of Delivery Riders in Beijing and the Factors Affecting Them’ 2018 (33) *Labour Security World* 8, 9.

Table 1.  
The Workforce of the Leading On-Demand Apps in China<sup>a</sup>

Name	Field	Size of Workforce (Million)	Business Area (Cities, Counties)	Date of Data
Didi Chuxing	Transport (car hailing)	11.66	Over 400 cities	2018
Didi Daijia	Transport (designated driver)	2.18	Over 200 cities	2016
E Daijia	Transport (designated driver)	0.2	Over 298 cities	November 2020
Fengniao Peisong	Delivery (mainly takeaway food delivery)	3	over 1,200 cities and counties	August 2020
Meituan Peisong	Delivery (mainly takeaway food delivery)	3.99	over 2,800 cities and counties	May 2020
Dianwoda	Delivery (mainly takeaway food delivery)	4	Over 350 cities	2020
FlashEX	Rapid delivery (no takeaway food)	1	over 220 cities	2020
UU Paotui	Delivery (no takeaway food)	2.22	Over 170 cities	August 2020
Dada Kuaisong	Delivery (no takeaway food)	0.634	over 2,400 cities and counties	March 2020

<sup>a</sup>(1) Some of this data are taken from the platforms' websites and platform reports except Didi Daijia from news, <http://m.ccidnet.com/pcarticle/10115700> (accessed 8 October 2020); (2) statistical standards of workforce that platforms used varies, for example 'workers' might include all those who completed at least one order and earned income through the app (Didi Chuxing), all active riders (Meituan Peisong and Dianwoda), riders employed by platforms and agencies (Fengniao Peisong and Meituan Peisong); (3) workers might include those who have labour relationships with intermediaries as explained in the main text; (4) the administrative division is complicated in China. By the end of 2018, there were 672 cities in China according to the National Bureau of Statistics of China, [http://www.stats.gov.cn/tjsj/zxfb/201908/t20190815\\_1691416.html](http://www.stats.gov.cn/tjsj/zxfb/201908/t20190815_1691416.html) (accessed 8 October 2020).



reports state that almost 10% of workers work more than eight hours daily and over 60% of workers have no other source of income.<sup>17</sup> The supposedly high income comes at the expense of the workers' time and health. In fact, average hourly and monthly earnings are below the local minimum hourly wage and average monthly wage.<sup>18</sup>

The pressure and the risks that workers experience as a result of management by algorithms and rating systems have increased over time as the platforms succeeded in creating monopolies and then used their monopoly power to cut piece rates and bonus rates in order to make profits. (As elsewhere, labour costs account for the greater part of the costs incurred by platforms). For on-demand drivers, driving fatigue and traffic accidents pose a very serious threat. After a number of traffic accidents were reported, and vicious crimes perpetrated by workers against customers, including sexual assault, rape and murder, Didi Chuxing launched its *Didi ride-hailing driver's anti-fatigue driving rules to reduce drivers' tiredness*. The primary concern here was the safety of customers rather than workers. According to Didi itself, an average of 6,000 drivers a day were then forced to log off of their apps for at least six hours to counter driving fatigue, and more than 170,000 drivers were forced to log off to rest for at least 20 minutes.<sup>19</sup> The very existence of these rules stands as testimony to the possibility of long working hours without adequate breaks, and the way in which the service hour criteria and restrictive calculation of billing time serve to encourage workers to keep working without breaks.<sup>20</sup>

For delivery riders, the risks are even more pronounced. A recent magazine article that drew a great deal of attention, 'Delivery Riders, Stuck in the System', characterised the issue as follows. 'Delivery time is the most important indicator in the setting of the algorithm, and late arrival is not

<sup>17</sup>Didi Research, n.13 above; Meituan Research, n.14 above.

<sup>18</sup>X. Zhou, 'Meituan Data Are Not Credible, Riders Really Earn Less Than City Minimum Wage' (*Guancha Syndicate*, 16 September 2020), [https://www.guancha.cn/zhouxian/2020\\_09\\_16\\_565266.shtml](https://www.guancha.cn/zhouxian/2020_09_16_565266.shtml) (accessed 8 October 2020).

<sup>19</sup>W. Cheng Chen, 'Didi Chief Security Officer Hou Jinglei: More Than 170,000 Drivers Are Forced to Rest Every Day' (*Beijing News*, 8 July 2020), <http://www.bjnews.com.cn/finance/2020/08/07/756309.html> (accessed 9 October 2020).

<sup>20</sup>The rules include a short-shift strategy and a long-shift strategy. The first requires that all Didi ride-hailing driver service hours (from the time the driver receives the order to the end of the billing) accumulate 4 hours with one 20-minute break. If the time is less than 20 minutes, the latter strategy requires the driver to take a 6-hour break after reaching a certain billing time (from the time the passenger gets into the car and the driver clicks to start billing until the end of billing) before going online, and the certain billing time is either 10 or 9 hours.



allowed. Once it happens, it means bad reviews, reduced income, or even being fired.<sup>21</sup> Similarly, one rider wrote in an online forum, ‘Delivering food is a race against death, a competition with traffic police, and becoming a friend with red lights.’<sup>22</sup> The frequency of traffic accidents and deaths is astonishing.

In the first half of 2017, data from the Traffic Police Corps of the Shanghai Public Security Bureau showed that on average, one delivery rider was killed or injured every 2.5 days in Shanghai. In the same year, 12 riders were killed or injured over three months in Shenzhen. In 2018, there was an average of one dead or injured rider every day in Chengdu.<sup>23</sup>

In order to meet the demands of the algorithm, moreover, riders may be forced to act in undignified ways: kneeling before the doorman of a residential property or university campus to beg to be allowed to enter,<sup>24</sup> performing extra, unpaid work for customers, such as disposing of rubbish,<sup>25</sup> or begging customers to give good reviews. In order to survive, these workers must do whatever it takes to satisfy the customer and the ratings system.

### 3. THE LEGAL REGULATION OF ON-DEMAND WORK

As in many other countries, the business model of platforms raises the question in China of the workers’ legal status. More precisely, what has been at issue in both policy and academic debates is the legal status of on-demand workers. In Chinese statutory law, a distinction is drawn between a labour relationship under the labour law, and a labour services relationship governed by civil law. The existence in principle of a third form of working relation, namely an ‘employment relationship’ has been recognised by only one

<sup>21</sup>Y. Xuan Lai, ‘Delivery Riders, Stuck in the System’ (2020) 9 *Renwu* 71. English Edition translated by F. Ge and D. Ownby, <https://www.readingthechinadream.com/lai-youxuan-lidquodelivery-drivers-stuck-in-the-systemrdquo.html> (accessed 20 March 2020).

<sup>22</sup>Ibid.

<sup>23</sup>Ibid.

<sup>24</sup>Northeast Forestry University Responded to “Security Guard Asked the Rider to Kneel”: Suddenly Kneeling Security Guards Were “Confused” (*Guancha*, 17 April 2019), [https://www.guancha.cn/politics/2019\\_04\\_17\\_497992.shtml?s=zwyxgtjbt](https://www.guancha.cn/politics/2019_04_17_497992.shtml?s=zwyxgtjbt); Y. Chao Zhen, ‘The Rider Was Prevented from Entering a Residential Property, Kneeling in front of Doorman’ (*The Paper*, 2 July 2020), [https://www.thepaper.cn/newsDetail\\_forward\\_7671889?hotComm=true](https://www.thepaper.cn/newsDetail_forward_7671889?hotComm=true) (both accessed 9 October 2020).

<sup>25</sup>‘A Dispute Over a Bag of Rubbish, Who Is Right, Customer or Rider?’ (*Fjnews*, 3 July 2018), [http://fjnews.fjsen.com/wap/2018-07/03/content\\_21216299.htm](http://fjnews.fjsen.com/wap/2018-07/03/content_21216299.htm) (accessed 9 October 2020).

Interpretation of the Supreme People's Court (SPC).<sup>26</sup> This Interpretation initially threw oil on already hot debates concerning the character and interrelation of different employment statuses, but the relevant section was deleted in the revised version of the same Interpretation in 2020.

The complex set of classifications of employment statuses in Chinese law does not map very clearly onto concepts familiar to labour lawyers in Europe or the West more generally.<sup>27</sup> That said, the worker, or 'person engaged in labour' who has a 'labour relationship' with a 'work unit' comes closest to the concepts of 'employee' or 'worker' with a 'contract of employment' or other relevant contract with an 'employer' in UK labour law. In respect of platform work, the critical issue in Chinese law is whether or not the worker has a labour relationship with the platform. Only where there is a labour relationship, will labour law apply.

Whether there is a labour relationship between an on-demand worker and either a platform or an intermediary is decisive in respect of the worker's entitlement to labour and social insurance rights. The current system of labour law was instituted by the enactment of the Labour Act in 1994, just one year after the decision was taken to establish a socialist market economic system. Between 1994 and 2006, the State Council and the Ministry of Labour and Social Security enacted many supporting administrative regulations regarding the labour contracts, collective agreements, hours and wages, labour protection, employment promotion, labour market management, vocational training, social insurance and so on.<sup>28</sup> For labour legislation, 2007 was an important year.<sup>29</sup> In February 2007, the National People's Congress Standing Committee issued its legislative plan for that year, providing for four new labour and social security statutes: the Employment Promotion Act, the Labour Contracts Act, the Labour Dispute Mediation and Arbitration Act

<sup>26</sup>SPC, *Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury* (2003), articles 9 and 11. 'Employment relationship' is not a statutory terminology as 'the authority of judicial interpretations is by far unclear, they are outside the formal hierarchy of legal norms though the SPC is authorised by the legislation to make it'. See C. Wang, 'Study on the Interpretations of the Supreme People's Court' (2016) 28 *Peking University Law Journal* 263.

<sup>27</sup>S. Cooney, 'The "Labour Relationship" in Chinese Jurisprudence: Mistranslating Definitional Barriers to Labour Protection' (2019) *University of Melbourne Legal Studies Research Paper* No. 824.

<sup>28</sup>X. Quan Wang and C. Shi, 'Review and Reflections on 70 Years of Labour Law in New China' (2020) 3 *Seeker* 118, 122.

<sup>29</sup>H. Guan, 'The Sixty-Year Development and Relative Prospect of China Labour Law' (2009) 12 *Law Science Magazine* 1, 4.

and the Social Insurance Act. The first three laws were enacted in 2007 and the last in 2010, completing the basic framework of Chinese labour legislation to date. The Labour Contracts Act and associated Regulation on the Implementation of the Labour Contracts Act had an enormous influence on the rights and duties of employers and workers, serving to improve significantly the position of the latter. The ensuing large-scale publicity campaigns drew people's attention to labour issues and enhanced workers' own awareness of their rights.<sup>30</sup> In general, the substance of employment law in China closely resembles or even exceeds employment rights in much of the West.<sup>31</sup> With the exception of collective rights, no significant discrepancy was found to exist between most of the provisions in China's Labour Act and Labour Contracts Act and international labour standards.<sup>32</sup> In addition, a sizable body of administrative regulations, local laws and local administrative regulations clarifies, supplements, and even improves upon the basic labour law in line with the particular conditions and imbalanced development among vastly different regions. With respect to on-demand work, two specific features of Chinese labour law must be highlighted: first, as mentioned before, that labour rights and social security rights apply only to workers who have 'labour relationships' with 'work units'; second, that a labour dispute must be referred to arbitration before it can be raised before a court.

A huge number of disputes between platforms and workers have been heard by the courts and arbitration agencies,<sup>33</sup> most of these involving the matter of the existence of a labour relationship and issues such as personal injury as a result of accident which also raise the question of employment status. In respect of workers' rights and benefits, the existence of a labour relationship functions as an 'all or nothing' mechanism and this can serve to heighten tensions between the platforms and workers.<sup>34</sup> In deciding whether

<sup>30</sup>G. XianYao, 'The Boundaries of Rights-Reflections on Labour Contracts Act' (2011) 5 *Economic Perspectives* 37, 37.

<sup>31</sup>C. Kwan Lee, 'Precarization or Empowerment? Reflections on Recent Labour Unrest in China' (2016) 75 *The Journal of Asian Studies* 317, 320.

<sup>32</sup>Y. Jiang, 'Labour Law and the International Labour Standards in China' (2016) 2(1) *Dispute Settlement* 7, 10.

<sup>33</sup>A number of courts mentioned the explosive growth of the cases concerning the on-demand platforms. These include the Labour Dispute Trial White Paper (2010–18) Announced by No.1 Intermediate People's Court of Beijing Municipality, Nanjing Labour Dispute Trial White Paper 2018 Announced by Nanjing Intermediate People's Court, White Paper on the Trial of Employment Disputes in New Form of Businesses in Qingdao (2016–18) Announced by Intermediate People's Court of Qingdao.

<sup>34</sup>Y. Lou, 'The Construction of the Social Insurance System for Platform Worker' (2020) 2 *Chinese Journal of Law* 190, 191.

a worker is an employee, the only official guidance available to courts is a Notice issued in 2005 by what is now the Ministry of Human Resources and Social Security (MOHRSS),<sup>35</sup> which includes a series of substantial and formal criteria. One criterion highly relevant to on-demand workers' legal status is whether 'the worker is subject to the work unit's rules and labour management and engages in paid work arranged by the work unit'.<sup>36</sup> In applying it, judicial experience and academic opinion both suggest that the key question for courts is whether a worker is personally, economically and organisationally subordinated to the employer's authority and control as regards the work to be performed.<sup>37</sup> Where a worker has a traditional job too and only works part-time via the platform, or the intermediary/platform has a labour contract with a worker or uses traditional control methods, there will be little doubt that s/he is an employee of either the intermediary or the platform. For those for whom platform work is the primary or sole source of income, implying a relation of economic dependency, if not sufficient personal or organisational dependency, the matter is rather more complicated and controversial.

Through an examination of a series of cases decided from 2014 to 2020 and published on the official website China Judgments Online,<sup>38</sup> it can be found that the courts demonstrated a reluctance to identify labour relationships between on-demand workers and platforms or intermediaries. All claims requesting recognition of the existence of a labour relationship were

<sup>35</sup>MOHRSS, *Notice Concerning Matters Relevant to the Establishment of a Labour Relationship* (2005).

<sup>36</sup>*Ibid.*, Para. 2(2).

<sup>37</sup>Q. Huang Yue, *Labour Law New Perspective* (Beijing: China University of Political Science and Law Press, 2003) 94–6.

<sup>38</sup>I used the key word 'rider(qishou)' in the full text search and chose the case decision date from 1 January 2014 to 31 December 2020. I firstly chose the civil cases judgments decided by courts from Beijing, Shanghai and Jiangsu Province separately and chose cases in the two categories of 'labour contracts' and 'employment relationships (guyong guanxi)'. Approximately 220 cases were found. Excluding the cases in which intermediaries signed labour contracts with riders or had a traditional control relationship with riders and which were upheld by the appellate courts, 51 cases were finally collected. The 51 cases can be divided into two kinds based on the nature of the claims, one is for identifying labour relationships and the other is for personal injuries compensations. Note: (1) the cases are limited in three main areas which just included 'riders', on-demand workers in other industries were not included; (2) Not all judgments are published on the website according to the Provisions of the Supreme People's Court on the Issuance of Judgments on the Internet by the People's Courts (2016).

rejected.<sup>39</sup> In cases concerning personal injury compensation where there was no intermediary, the dominant opinion was that the platform itself was an intermediary and that the workers had to bear the burden of personal injury after insurance.<sup>40</sup> In cases concerning personal injury compensation where there was an intermediary, courts used many different terminologies to describe the relationships, such as labour service relationships,<sup>41</sup> employment relationships,<sup>42</sup> labour employment relationship,<sup>43</sup> cooperation relationship,<sup>44</sup> ‘performing duties’ or ‘duty behaviours’.<sup>45</sup> In no case was a ‘labour relationship’ identified. Whatever terminology the courts use, it remains the case that if there is no ‘labour relationship’, the worker is not entitled to labour law protections. In respect of on-demand workers, ‘labour relationships’ have only been held to exist in a small number of cases.<sup>46</sup> In the 2017 case of *Li Xiangguo v Beijing Tongcheng Biying Technology Co., Ltd.*,<sup>47</sup> the court analysed in detail that a ‘considerable’ degree of personal subordination and a ‘highly visible’ degree of economic subordination existed indicative of the existence of a labour relationship.<sup>48</sup> This was a most commendable attempt to address the challenge of bridging the gap between

<sup>39</sup>(2019) Jing 0105 MinChu No. 86060; (2020) Jing 0105 Minchu No. 38306; (2020) Su 01 MinZhong No. 2138; (2020) Su 07 MinZhong No. 1334; (2020) Hu 01 MinZhong No. 7540; (2020) Hu 0118 MinChu No. 3496; (2019) Su 0115 MinChu No. 17870; (2019) Su 0312 MinChu No. 3933; (2018) Su 0214 MinChu No. 5328; (2018) Su 0311 MinChu No. 313.

<sup>40</sup>Seven of ten cases were decided in this way. (2020) Su 04 Minzhong No. 4622; (2020) Su 0102 MinChu No. 1605; (2020) Hu 02 MinZhong No. 3154; (2020) Jing 03 MinZhong No. 4460; (2019) Hu 0104 MinChu No. 7635; (2019) Hu 0106 MinChu No. 33486; (2018) Hu 010 MinChu No. 20843.

<sup>41</sup>(2020) Hu 011 MinChu No. 14690; (2020) Hu 0112 MinChu No. 34956; (2020) Hu 0112 MinChu No. 4291; (2020) Hu 0112 MinChu No. 4667; (2019) Hu 104 MinChu No. 1334; (2019) Jing 0108 Min Chu No. 4140; (2019) Hu 0117 MinChu No. 17912.

<sup>42</sup>(2020) Hu 0115 MinChu No. 48904; (2020) Hu 0115 MinChu No. 20040; (2020) Hu 0114 MinChu No. 614; (2020) Hu 0109MinChu No. 5877; (2020) Jing 0115 MinChu No. 3687; (2019) Hu 0115 MinChu No. 84182; (2019) Hu 0109 MinChu No. 24838; (2019) Hu 0112 MinChu No. 29000; (2019) Jing 0113 MinChu No. 19923; (2019) Jing 0105 MinChu No. 23702; (2020) Su 05 MinZhong No. 9203; (2019) Su 1002 MinChu No. 4878; (2019) Su 0102 MinChu No. 5847; (2019) Hu 0105 MinChu No. 22760; (2018) Jing 0112 MinChu No. 39176;

<sup>43</sup>(2020) Hu 0117 MinChu No. 1157.

<sup>44</sup>(2019) Jing 0108 MinChu No. 51659.

<sup>45</sup>(2020) Jing 0101 MinChu No. 4714; (2019) Hu 01 MinZhong No. 14383; (2019) Hu 0115 MinChu No. 88622.

<sup>46</sup>(2017) Jing 0108 Minchu No. 53634; (2017) Yu 05 XingZhong No. 351, etc.

<sup>47</sup>(2017) Jing 0108 Minchu No. 53634.

<sup>48</sup>T. Yan, ‘The Concept of Labour Relationships: Crisis, Perseverance and Rebirth’ 2018 (6) *China Law Review* 127.

the terms of the law and the factual circumstances and characteristics of a particular working relation.<sup>49</sup>

Generally, courts tend to exercise caution in cases involving on-demand work. In most cases, they briefly explain the sensitive issues in a few sentences, and the reasoning part of the judgment does not analyse the relationship between the platform and the worker in any detail.<sup>50</sup> Given the limited scope of judicial activism in China and the lack of a good fit between the traditional subordination approach and on-demand work, it seems unlikely that the courts will begin, of themselves, to treat on-demand workers as having labour relationships.

To date, there is no government plan to modify the law or to establish clear administrative regulations to assist the courts in deciding the legal status of on-demand workers. More likely, perhaps, is that the Supreme Court will issue a relevant judicial interpretation in the future.<sup>51</sup> In light of the challenges involved, some local judiciary bodies and administrative departments have felt compelled to draft their own general interpretative guidance. While such guidance is not legally binding, it can have a significant impact on judicial decision making.<sup>52</sup> The substance of interpretative guidance published to date suggests that it is unlikely to assist the case of on-demand workers: some of it refers to the MOHRSS Notice 2005<sup>53</sup>

<sup>49</sup>Ibid.

<sup>50</sup>Nanjing Intermediate People's Court Civil Fifth Division Research Group, 'Labour Disputes under the Sharing Economy: Difficulties and Solutions' (2020), [http://www.njfy.gov.cn/www/njfy/xwzx\\_mb\\_a39200331130480.htm](http://www.njfy.gov.cn/www/njfy/xwzx_mb_a39200331130480.htm) (accessed 20 October 2020).

<sup>51</sup>The vice president of the Supreme People's Court said at 'two sessions' in 2021: 'Next, the Supreme People's Court will, on the basis of extensive research and listening to the views of all walks of life, formulate judicial interpretations for hearing cases related to delivery riders, etc'. See L. Li Wang, 'Vice President of the Supreme People's Court He Xiaorong Explains SPC Work Report Online' (2021), <http://www.court.gov.cn/zixun-xiangqing-289691.html> (accessed 20 March 2021).

<sup>52</sup>L. Chun Shi, 'The Predicament and Way Out of the Local Interpretative Judicial Documents' 2019 (4) *Journal of South China University of Technology (Social Science Edition)* 69, 73.

<sup>53</sup>Jiangsu Provincial Employment and Personnel Dispute Arbitration Commission, *Minutes of the Seminar for Labour and Personnel Disputes Concerning difficult issues in Jiangsu Province* (2017), Paragraphs 1–3: 'If the worker has not entered into a labour contract with the online platform and has signed an agency contract or other type of contract, the legal relationship between the two parties shall generally be determined by their own agreement. If their relationships meets the requirements of MOHRSS Notice 2005, the parties shall be deemed to have a labour relationship'.

and some expresses a preference for respecting the written terms of the contract.<sup>54</sup>

Given the unlikelihood of law reform in the short term and the current complicated economic and social context in China, discussed below, many labour law scholars have shifted their focus from an initial theoretical discussion of subordination, or reframing the category of employment status,<sup>55</sup> to more practical suggestions regarding the provision of basic labour protections to on-demand workers. A mainstream view appears to be gradually emerging, that on-demand work is a novel form of employment,<sup>56</sup> and that while on-demand workers cannot be defined as workers with ‘labour relationships’ under the current law, they are in need of some basic employment and social security rights and protections.<sup>57</sup>

#### 4. THE GOVERNMENT’ RESPONSE TO ON-DEMAND WORK: A NOVEL FORM AND IMPORTANT SOURCE OF EMPLOYMENT

In 2012, following three decades of high growth (average 9.78%) since the opening-up policy began in 1978, the national government officially announced that the Chinese economy had entered a state of ‘new normal’ or ‘economic new normal’. Growth had shifted down a gear, from high speed to medium-to-high speed, and the expectation of an annual rate would be reduced in the 13th Five-Year Plan (2016–20) to 6.5%. The two engines

<sup>54</sup>Jiangxi Provincial Higher People’s Court and Jiangxi Province Human Resources and Social Security Department, *Answers to Several Issues Concerning Handling Labour Dispute Cases (Trial Implementation)* (2020). Paragraphs 1–2: ‘The platform and workers concerned have a written labour contract and implement it, which can be recognised as a labour relationship; The two sides entered into contracts, such as contracting, leasing, joint venture, with the objective of sharing operational risk, benefit and distribution mechanism; The relationship should be recognised as mutually agreed and should not be recognised as a labour relationship. For two sides without contracts, whether or not there is a labour relationship shall be decided on the MOHRSS Notice 2005’.

<sup>55</sup>See, eg, X. Quan Wang and Q. Wang, ‘Recognition of Labour Relationships and Protection of On-demand Workers in China’ (2018) 4 *Law Science* 57; Z. Xiao, ‘The Theoretical Reflection and Alternative Paths of the Third Category of Worker System’ (2017) 6 *Global Law Review* 4.

<sup>56</sup>As far the author is aware, no Chinese academics stated that on-demand work is similar to or just an updated version of older forms of employment, such as the putting-out system, as some western academics did.

<sup>57</sup>See, eg, Y. Tian Wang, ‘Explanatory Path and Normative System of “Employee-Like Person” for Platform Employment’ (2020) 3 *Global Law Review* 86; Y. Zeng Xie, ‘Determination of Labour Relationships for Online Platform Work’ (2018) 30(6) *Peiking University Law Journal* 1546. Also Lou, n.34 above.



for high-speed growth, demographic dividend and economic globalisation, are now in decline. The ‘unlimited’ low-cost labour supply seemed at last to dry up, and China lost its competitiveness in respect of labour costs relative to ASEAN (Association of South East Asian Nations) countries.<sup>58</sup> Following the global financial crisis of 2008, foreign demand and investment have weakened.<sup>59</sup> To meet the ensuing challenges, the Chinese government has embarked on a series of top-down national structural reforms from ‘supply-side’ reforms in 2015 to ‘cutting excessive industrial capacity and de-leveraging’ in 2017. Meanwhile, disagreement between China and WTO members became apparent in 2017 over whether or not China should qualify for WTO membership. Perceptions of a market economy were revealed to diverge as the USA and the European Union took it in turns to formally reject China’s market economy status.<sup>60</sup> In 2018, the China–USA trade war began and at the very end of 2019, the corona virus pandemic.

It is difficult to know exactly how hard the job market has been hit by these events. The official urban surveyed unemployment rate from 2018 has slightly increased in the past two years and the number of newly increased employed people in urban areas has decreased significantly, particularly in 2020.<sup>61</sup> The Chinese government was already concerned about employment, which has become a sizable and growing challenge in recent years. In 2015, Premier Li Keqiang announced ‘mass entrepreneurship and innovation based on internet+’<sup>62</sup> in his Government Work Report, characterising these as a new engine to expand employment given that the employment aggregate pressure still persisted in the economic new normal.<sup>63</sup> In 2018, ‘ensuring

<sup>58</sup>M. Yu Cui and R. Chang Lu, ‘Are China’s Unit Labour Costs Still Competitive? A Comparison with ASEAN Countries’ (2018) 32(1) *Asian-Pacific Economic Literature* 59, 60–3.

<sup>59</sup>Jilian Wu and others (eds), *China’s New Economic Orientation: How to Get Out of the Growth Dilemma* (Beijing: CITIC Press, 2017) 5–7.

<sup>60</sup>Y. Qin, ‘The Boundaries of and Responses to China’s Economic Internal Circulation’ (*FTChinese*, 10 August 2020), <https://m.ftchinese.com/story/001088908?archive> (accessed 12 October 2020).

<sup>61</sup>The surveyed urban unemployment rate was 4.9% at the end of 2018 and 5.2% at the end of 2020. Newly employed people in urban areas numbered 11.86 million, 13.53 million and 13.61 million, respectively, in 2020, 2019 and 2018. Statistical Communiqué of the People’s Republic of China on the 2018, 2019 and 2020 National Economic and Social Development, <http://www.stats.gov.cn/english/PressRelease/> (accessed 20 March 2021).

<sup>62</sup>‘China Boosts Mass Entrepreneurship and Innovation’ (16 July 2015), [http://english.www.gov.cn/policies/latest\\_releases/2015/06/16/content\\_281475128473681.htm](http://english.www.gov.cn/policies/latest_releases/2015/06/16/content_281475128473681.htm) (accessed 12 October 2020).

<sup>63</sup>MOHRSS, ‘The State Council Promulgating Employment and Entrepreneurship Policy under the New Circumstances’ (24 April 2015), <http://www.scio.gov.cn/32344/32345/32347/32797/xgzc32803/Document/1431935/1431935.htm> (accessed 12 October 2020).

stability in six areas’ was first proposed at the Central Economic Work Conference, with ‘ensuing stability in employment’ appearing at the top of the list of six. In the 2019 Government Work Report, the employment-first policy was elevated to the status of a macro policy for the first time, with the aim of increasing society-wide attention and support for employment. In the Meeting of the Standing Committee of the Political Bureau of the Chinese Communist Party in April 2020, ‘ensuring security in six areas’ was proposed, with ‘ensuring security at work’ placed first. In the recent 2021 Government Work Report, stabilising employment was described as the top priority. During the pandemic, Premier Li Keqiang praised and voiced his support for the ‘street-stall economy’—encouraging people to set up open-air stalls as their full or part-time jobs, creating micro businesses and self-employment to absorb the newly unemployed.<sup>64</sup> All of this indicates that employment is high up on the government’s policy agenda.

In this context, the sharing economy has been welcomed by the government as a means of stimulating employment. Together with the term ‘sharing economy’, the term ‘novel form of employment’ was mentioned in the Government Work Reports from 2016 to 2019. In late December 2019, the State Council issued Opinions on Further Stabilizing Employment, which state ‘as the risks and challenges at home and abroad increase, the national government has relied heavily on the sharing economy to expand employment and entrepreneurship’. The Premier said: ‘China’s greatest employment potential is embedded in the emergence of novel forms of business, especially in the service sector, there is still plenty of room for employment.’<sup>65</sup> In July 2020, in the aftermath of the Covid-19 lockdown, the State Council emphasised again the importance of ‘bolstering novel forms of employment’.<sup>66</sup>

Initially, in 2015, the government focused on encouraging a culture of entrepreneurship rather than a culture of employment through ‘internet+’.<sup>67</sup> More recently, it has emphasised the importance of job creation to mitigate rising unemployment, to some extent quite regardless

<sup>64</sup>X. Zhou, ‘China Turns to “Street Vendor Economy” to Help Manage Unemployment Crisis’ (5 July 2020), <https://www.scmp.com/economy/china-economy/article/3087770/china-turns-street-vendor-economy-help-manage-unemployment> (accessed 12 October 2020).

<sup>65</sup>P. Long Xiao, ‘The Sharing Economy Is Expected to Be the Main Driver of Job Expansion’ (*Beijing News*, 16 July 2018), <http://www.bjnews.com.cn/finance/2018/07/16/495198.html> (accessed 12 October 2020).

<sup>66</sup>General Office of the State Council, *The Opinions on Supporting Flexible Employment through Multiple Channels* (2020).

<sup>67</sup>K. Kwan Lee, ‘China’s Precariats’ (2019) 16(2) *Globalizations* 137, 148.

of the quality of the jobs. In February 2020, MOHRSS, in conjunction with the State Administration of Market Regulation and the National Bureau of Statistics, jointly published a list of 16 new professions, which is the second such list released since the 2015 edition of the Occupational Classification System. On-demand delivery riders feature on the list, officially named as *delivery personnel for online orders*,<sup>68</sup> and this again demonstrates the government's commitment to promoting this novel form of employment.

Aligning themselves with national government policy, platforms have made bold claims about their capacities to provide jobs. Nearly all the main on-demand platforms have published reports outlining the significant contribution they have made to employment levels. A 2017 Didi Chuxing report stated, for example, that 'Didi played a role as the reservoir and stabiliser of employment'.<sup>69</sup> A second Didi report concerned women's employment on the platform.<sup>70</sup> Meituan Peisong too claimed to have become a reservoir of employment, playing an effective role in stabilising employment levels during the pandemic.<sup>71</sup> In September 2020, at the initiative of Didi Chuxing and with the participation of a number of digital economy platforms, the 'New Economy and New Employment Promotion Alliance' was established, which, guided by the government's employment promotion policy, aims to help more workers to earn an income via apps.<sup>72</sup>

In connection with employment policy, it is interesting to note that the Labour Contracts Act has been heavily criticised along neoliberal lines since it came into force in 2008, for increasing the cost of labour and reducing labour market flexibility. The debate peaked in around 2015, when the then Minister of Finance criticised the Act on several occasions. The critique has received many responses from labour law scholars, who fiercely rejected

<sup>68</sup>The Ministry of Human Resources and Social Affairs Intends to Release 16 New Occupations: Delivery Personnel for Online Orders, Artificial Intelligence Trainer, etc' (*The Paper*, 3 January 2020), [https://www.thepaper.cn/newsDetail\\_forward\\_5415474](https://www.thepaper.cn/newsDetail_forward_5415474) (accessed 12 October 2020).

<sup>69</sup>Didi Research, n.13 above.

<sup>70</sup>Didi Research, n.12 above.

<sup>71</sup>Meituan Research, 'Meituan Delivery Riders' Employment Report during Covid 19 Pandemic from 2019–2020'; <https://about.meituan.com/news/institute> (accessed 15 October 2020).

<sup>72</sup>'Didi and Other Platforms Establish "New Economy and New Employment Promotion Alliance" to Empower Employment with Technology' (24 September 2020), [https://www.sohu.com/a/420605573\\_362042](https://www.sohu.com/a/420605573_362042) (accessed 15 October 2020).

the ‘cost’ accusation,<sup>73</sup> but agreed in part with the ‘flexibility’ accusation, pointing in particular, to the dismissal protection and open-ended contracts provisions of the Act.<sup>74</sup> Given the intensity of the debate, there have been regular proposals to amend the Labour Contracts Act in recent years and many rumours concerning its amendment. So far proposals for amendment have not been included in the NPC Standing Committee’s plan. It is of course true that the labour costs of platforms would increase if on-demand workers were entitled to labour protections. Indeed one of the main reasons for the rapid development of platforms in China is the relatively abundant supply and relatively low cost of labour.<sup>75</sup> In some quarters, it may well be feared that improved labour rights for on-demand workers could impede the future development of the platforms, causing a loss of employment.

In contrast to the emphasis given in government documents and policy debates to the platforms’ role in the growth of employment, on-demand workers’ rights have been rather less prominent. It is clear that the novel form of employment should not expand at the expense of the basic rights of workers, but unless the criteria of labour relationships can be adapted, it will be difficult for the ‘all or nothing’ model of labour protection to encompass on-demand workers. At the moment, more attention has been paid to the apparently more pressing issue of on-demand worker’s personal injury. Traffic accidents are the greatest risk posed to on-demand workers,<sup>76</sup> but the current work-related injury insurance is contingent on the existence of a labour relationship. The current solution is that platforms deduct some money from workers’ daily income mandatorily to purchase commercial insurance for them, but the coverage is limited and constrained in various ways, which lead to workers bearing the loss themselves in most cases. In

<sup>73</sup>The reasons given for the high cost include heavy taxes and fees, social insurance payments, the decrease of labour supply, etc. See K. Chang and others, ‘A War of Amending Law without Smoke’ (2016) 7 *Fellow Workers* 8; X. Quan Wang, ‘Thinking of Labor Contracts Act Modifications from the Perspective of Supply-Side Reform: Responses to Minister of Finance Lou’ three-time Critiques’ (2016) 4 *Labour Union Studies* 4; Y. Jiang and F. Jian Shen, ‘Correctly Evaluating Labour Contracts Act to Amend Labour Act in Due Course’ (2017) 31 *Journal Of China Institute of Industrial Relations* 53.

<sup>74</sup>Y. Zeng Xie, ‘The Flexibility of Labour Market and the Modification of Labour Contracts Act’ (2017) 39 *Chinese Journal of Law* 95, 112; J. Lin, ‘Be Cautious about the Pros and Cons of Labour Contracts Act’ (2016) 8 *Exploration and Free Views* 56, 61.

<sup>75</sup>X. Quan Wang and Q. Wang, ‘Recognition of Labour Relationships and Protection of On-demand Workers in China’ (2018) 4 *Law Science* 57, 70.

<sup>76</sup>L. Dong, ‘The Institute of Law of Chinese Academy of Social Sciences: Traffic Accidents are the Greatest Risk Posed to On-demand Work’ (YCWB, 8 June 2020), [http://news.ycwb.com/2020-06/08/content\\_870886.htm](http://news.ycwb.com/2020-06/08/content_870886.htm) (accessed 15 October 2020).

2017, the National Development and Reform Commission and seven other government authorities issued guidance, which specifically mentioned the need to ‘study measures for social insurance participation and payment for flexibly employed in the sharing economy, and effectively strengthen the protection of workers’ rights and interests.’<sup>77</sup> In 2019, the General Office of the State Council published an opinion, which stated its intention ‘to protect the rights and interests of workers engaged in the platform economy, specifically study and improve social security policies for workers engaged in platform employment, launch a pilot project on occupational injury protection.’<sup>78</sup> The China No.1 Central Document of 2020 again addressed the need to ‘launch a pilot project on occupational injury protection for workers in new types and new models of businesses.’<sup>79</sup> Clearly, the priority of government is to establish an occupational injury system, considered as a new form of social insurance tailored to on-demand workers. Some cities or districts have begun to launch experimental insurance schemes.<sup>80</sup> Others have tried to adapt the existing work-related injury insurance system. According to the new Zhejiang Province Regulations on the Promotion of the Digital Economy: ‘In respect of workers in the new digital economy who provide ride-hailing, food delivering, express delivery or other services, the platform can participate in single work-related injury insurance for workers. Social insurance agencies should be processed if the platform participates in the single work-related injury insurance.’<sup>81</sup> In Guangdong Province, a recent local Notice stated that work units can voluntarily buy work-related injury insurance for workers engaged in novel forms of employment, including on-demand workers.<sup>82</sup> These local trials could be considered as a positive

<sup>77</sup>National Development and Reform Commission and others, *Guiding Opinions on Promoting the Development of the Sharing Economy* (2017).

<sup>78</sup>General Office of the State Council, *Guiding Opinions of the General Office of the State Council on Promoting the Well-regulated and Sound Development of the Platform Economy* (2019).

<sup>79</sup>General Office of the State Council, *Opinions of the Communist Party of China Central Committee and the State Council on Focusing on Priorities in Areas of ‘Agriculture, Rural Areas and Farmers’ to Secure the Success in Realizing Moderate Prosperity in All Respects as Scheduled* (2020).

<sup>80</sup>L. Chen, ‘A National Occupational Injury Protection System Needs to Be Established Urgently’ (*Legal Daily*, 10 February 2020), [http://www.legaldaily.com.cn/index/content/2020-02/19/content\\_8120947.htm](http://www.legaldaily.com.cn/index/content/2020-02/19/content_8120947.htm) (accessed 15 October 2020).

<sup>81</sup>Regulations implemented from 1 March 2021, article 57(2).

<sup>82</sup>The Human Resources and Social Department of Guangdong Province and others, *Notice on the Work Units Employed over the Statutory Retirement Age Workers and other Specific Personnel to Participate in the Work-Injury Insurance (Trial Implementation)* (2020), which will be implemented from 1 April 2021.

response to the MOHRSS undertaking at ‘two sessions’ in 2019 to amend the Regulation on Work-Related Injure Insurances at an appropriate time in order to protect workers’ rights and interests in novel forms of employment.<sup>83</sup> For the most part, these are not compulsory; however, they indicate, at least, one possible means of addressing the vulnerability of on-demand workers. These are early days and the effects remain to be observed over the course of the next months and years.

Regarding the additional basic labour rights of on-demand workers, including working time, sick leave and so on, though both national and local government have mentioned the need ‘to protect workers’ legal rights’, they have never progressed to specifying which rights should be protected and how. In its most recent opinion, issued in July 2020, the national government expressed for the first time the need to:

Study and formulate policies on platform employment and labour security, clarifying the responsibilities of platforms in the protection of workers’ rights and interests, guide and affiliate platforms to negotiate with workers on matters such as labour remuneration, rest and leave, and occupational safety and security, and guide industrial (industry and local) trade unions to negotiate with industry associations or representatives of industry enterprises to formulate industry norms on labour quotas, working-hour standards, rewards and punishments.<sup>84</sup>

It can be inferred from this statement that the national government intends to delegate decision making in this context to negotiations between trade unions and platforms. To date, there have been a small number of local regulations or policy documents pronouncing on the rights of on-demand workers, including, for example, an opinion issued by the Department of Human Resources and Social Security of Zhejiang Province in December 2019.<sup>85</sup> This mentioned that in respect of working hours,

New types and new models of businesses and workers may reach agreement through negotiation, and may specify rest and leave or economic compensation methods in the labour contract or other types of agreement, and may implement a special working-hour system in accordance with the actual production situation upon approval by the local human resources and social security department.<sup>86</sup>

<sup>83</sup>Y. Xiao Chen and L. Zhen, ‘MOHRSS Replied “Regulation Work-Related Injury will Be Modified at An Appropriate Time”’, *Worker’s Daily* (Beijing, 10 March 2019) 2.

<sup>84</sup>General Office of the State Council, *Opinions of the General Office of the State Council on Supporting Flexible Employment through Multiple Channels* (2020).

<sup>85</sup>Zhejiang Province Human Resources and Social Security Department, *Guiding Opinions on the Optimization of Employment Service of New Types and New Models of Businesses* (2019).

<sup>86</sup>Ibid.

Another opinion issued by Shenyang Municipal Bureau of Human Resources and Social Security in 2020 is worded in nearly identical terms.<sup>87</sup> The basic message of these opinions was essentially the same as that contained in the recent opinion of the national government. The question arises, and is addressed in the next section, of how on-demand workers and others in ‘novel forms of employment’, with only weak trade union support, could possibly build sufficient bargaining power to negotiate with the giant monopoly platforms.

## 5. WORKER AND TRADE UNION RESPONSE

According to the terms of the Trade Union Act:

All workers doing physical or mental work in enterprises, public institutions and government organs within the Chinese territory who earn their living primarily from wages shall have the right to participate in and form trade union organizations.

This widely worded provision can be interpreted as extending the right of freedom of association to workers who do not fall within the category workers with ‘labour relationships’. The rationale here may be that trade union membership is not tied to the status of workers with ‘labour relationships’ but rather to wage income that is the main source of livelihood, and wage income is not confined to wages paid under a labour contract. The income that on-demand workers earn from platforms can be considered a wage.<sup>88</sup> Some have argued that the criteria of ‘wage income’ is not clear and that the legitimacy of on-demand workers’ participation in trade unions is therefore doubtful;<sup>89</sup> however, the official All-China Federation of Trade Unions (ACFTU), the only lawful trade union in China, has in practice opened the door to those workers whose wage incomes are not earned under a labour contract.

In March 2018, ACFTU launched a pilot campaign aimed at promoting the union membership of workers in the new industries, new forms of business and new models of employment, specifically workers in the so-called

<sup>87</sup>Shenyang Municipal Bureau of Human Resources and Social Security, *Guiding Opinions on the Optimization of Flexible Employment Service in New Industries* (2020).

<sup>88</sup>Quan Wang and Wang, n.75 above, 72.

<sup>89</sup>H. Xiao Ban, ‘Beyond Labour Relationships: The Expansion and Path of Collective Labour Rights under Platform Economy’ (2020) 8 *Law Science* 160, 162–3.



‘eight major groups’: truck drivers, couriers, nursing staff, domestic workers, security guards, online food delivery couriers, sales and real estate agents.<sup>90</sup> The goal of the campaign is to recruit flexibly employed workers who tend not to have labour contracts. While food delivery couriers are included in the ‘eight major groups’, car-hailing drivers and other on-demand workers are not. Some local trade unions have interpreted the groups very narrowly or rigidly, so that, for example, some on-demand delivery workers employed in logistics and express delivery were refused membership of a trade union because ‘they are technically part of the transportation sector, and not part of the “eight groups” specified by ACFTU.’<sup>91</sup> By August 2020, ACFTU had recruited 6.547 new million members from the ‘eight major groups.’<sup>92</sup>

In any case, however, ACFTU has demonstrated its welcoming attitude towards these flexibly employed workers. To date, its efforts to organise such workers are still at a very early stage. As it stated in the regular press conference in the first quarter of 2019:

The main plans of ACFTU for workers in new industries and new business forms this year comprised four elements. The first is effectively to organize the workers and let them join the union as soon as possible to give them a sense of belonging. Second, it is very important actively to investigate and research the possibility of including these workers in the protection of our relevant legal system. The third is to provide accurate assistance services to the workers. The fourth is to strengthen ideological guidance, strengthen education, and build our new working-class so that they can play their role in society.<sup>93</sup>

In January 2018, prior to the ACFTU pilot, the first trade union federation for the online food delivery industry was established in the Putuo District of Shanghai. This federation includes five online delivery riders’ allied unions and more than 400 members; however, the membership comprises

<sup>90</sup>‘The ACFTU Will Push Forward the Unionization of Eight Major Groups’ (*People Daily*, 11 April 2018), <http://politics.people.com.cn/n1/2018/0411/c1001-29917885.html> (accessed 15 October 2020).

<sup>91</sup>‘Dianwada Riders’ Strike’ (*China Labour Bulletin*, 13 August 2019), <https://clb.org.hk/zh-hans/content/%E5%B1%B1%E4%B8%9C-%E7%AC%AC58%E4%B8%AA%E6%A1%88%E4%BE%8B%EF%BC%9A%E5%A8%81%E6%B5%B7%E7%82%B9%E6%88%91%E8%BE%BE%E9%AA%91%E6%89%8B%E7%BD%A2%E5%B7%A5> (accessed 20 October 2020).

<sup>92</sup>H. Hao, ‘ACFTU Has Recruited 6.547 New Million Members from the “Eight Major Groups”’ (*Workers’ Daily*, 28 August 2020), <http://cpc.people.com.cn/n1/2020/0828/c432352-31840620.html> (accessed 25 October 2020).

<sup>93</sup>‘The ACFTU’s First Quarter Press Conference (ACFTU, 25 February 2019), [http://www.acftu.org/template/10041/news\\_file.jsp?aid=97870](http://www.acftu.org/template/10041/news_file.jsp?aid=97870) (accessed 20 October 2020).

riders mainly from the intermediaries, rather than on-demand workers.<sup>94</sup> In September 2019, the first collective agreement for the online food delivery industry was reportedly signed with the representatives of Bengbu delivery riders' trade union and three food delivery distribution companies in Bengbu City, but again the members were from the distribution companies.<sup>95</sup> It seems that the newly established online food delivery trade unions primarily recruit those workers with labour relationships rather than on-demand workers.<sup>96</sup> These newly established trade unions follow the traditional model of establishing unit or firm-based unions, with the units for the online food delivery industry being platform headquarters or food delivery sites or distribution companies. Whether on-demand riders have been approached or recruited by these unions is not known. The most recent documents from the Shanghai Federation of Trade Unions, in July 2020, show that it has been conducting a pilot membership recruitment activity to establish industrial trade unions, which can recruit workers from informal employment and non-standard employment who are not already members of any trade union.<sup>97</sup>

A more fundamental problem relating to on-demand workers' participation in trade unions concerns the role and position of trade unions in general, in China, and their ability to promote on-demand workers' interests once those workers have been organised. Two related concerns arise. The first is that workers have no right to organise their own independent unions. The second concern is that the right to strike and its legal consequences are not clearly recognised under Chinese law. China revised its Constitution and abolished the right to strike in 1982, and the new Labour Act and Trade Union Act do not explicitly permit strike action. The Trade Union Act refers only to 'stop work or slow down measures'. In the vast

<sup>94</sup>J. Pei Qian, 'The First National Trade Union Federation for the Online Food Delivery Industry Was Established' (*WorkerCN*, 4 January 2018), <http://acftu.workercn.cn/32/201801/04/180104071201790.shtml> (accessed 20 October 2020).

<sup>95</sup>Y. Chun Chen, 'The Nation's First Collective Agreement for the Online Food Delivery Industry Was Signed' (*Bengbu News*, 20 September 2019), <http://www.bbnews.cn/p/4532.html> (accessed 20 October 2020).

<sup>96</sup>'The First Trade Union Federation for the Online Food Delivery Industry Was Established in Tianmen' (*Hubei Daily News*, 17 July 2018), [http://m.xinhuanet.com/hb/2018-07/17/c\\_1123136197.htm](http://m.xinhuanet.com/hb/2018-07/17/c_1123136197.htm); C. Zhou, 'The First Trade Union for Instant Delivery Riders Was Established in Guangzhou' (*YCWB*, 9 January 2019), [http://news.ycwb.com/2019-01/09/content\\_30172276.htm](http://news.ycwb.com/2019-01/09/content_30172276.htm) (both accessed 20 October 2020).

<sup>97</sup>Shanghai Federation of Trade Unions, 'Responses to Proposal No. 0922 of the Eleventh Third Session of Shanghai's Political Consultative Conference' (2020), <http://zwzx.eastday.com/zgh/2020091512.pdf> (accessed 20 October 2020).

majority of cases concerning industrial action, the courts have characterised strikes as unlawful violations of the employer's rules and regulations.<sup>98</sup> Even if strikes are still a grey-zone or even unlawful, however, rising labour unrest in the late 2010s pushed ACFTU and its affiliates to make some reforms, especially in the southern and eastern areas, to improve trade union elections and internal democracy,<sup>99</sup> or to establish sectoral-level negotiation.<sup>100</sup> Sectoral-level negotiations are rendered dependent on external economic conditions;<sup>101</sup> however, trade elections have been indirect and only quasi-democratic in nature.<sup>102</sup>

Given the current political and legal context, ACTFU and local trade unions have opted to assist on-demand workers by supporting them in submitting proposals or motions to the national and local governments and legislative organs in furtherance of the workers' interests. During the municipal 'two sessions'<sup>103</sup> in Shanghai, in January 2020, for example, the Shanghai Federation of Trade Unions submitted a proposal 'Promoting the Establishment of an Employment Security System for Flexible Employment Groups', including delivery riders, on-demand drivers and couriers etc.<sup>104</sup> At the recent national 'two sessions' in March 2021, the ACTFU sector of the CPPCC submitted a proposal entitled 'Strengthening the Protection of the Rights and Interests of Workers in New Form of Employment', which put forward various suggestions from modifying laws and policies, strengthening law enforcement and supervision, and enhancing industrial self-regulation to addressing the dilemma of 'workers stuck in the system'.<sup>105</sup> In addition, it is possible that

<sup>98</sup> Y. Tian Wang, 'The Judicial Logic of Workers' Collective Action Governance-Based on 308 Published Strike Case Decisions from 2008–201' (2015) 122(2) *Law and Social Development* 178, 188.

<sup>99</sup> E. Sio-ieng Hui and C. King-chi Chan, 'Beyond the Union-Centred Approach: A Critical Evaluation of Recent Trade Union Elections in China' (2015) 53(3) *British Journal of Industrial Relations* 601.

<sup>100</sup> E.D. Friedman, 'Economic Development and Sectoral Unions in China' (2014) 67(2) *Industrial and Labour Relations Review* 481.

<sup>101</sup> Sio-ieng Hui and King-chi Chan, n.99 above.

<sup>102</sup> Friedman, n.100 above.

<sup>103</sup> The annual plenary sessions of the provincial People's Congress and provincial Political Consultative conference that make provincial-level political decisions.

<sup>104</sup> J. Jun Ge, 'Targeting Online Taxi Drivers and Delivery Riders, Shanghai Federation of Trade Unions' Proposal: Pay Attention to the Legitimate Rights and Interests of Flexible Employment Groups' (*People's Daily Online*, 14 January 2020), <http://sh.people.com.cn/n2/2020/0114/c134768-33716827.html> (accessed 25 October 2020).

<sup>105</sup> The ACTFU Sector of CPPCC Submitted a Proposal Focusing on the Protection of Workers' Rights and Interests in the Novel Form of Employment (*Worker's Daily*, 5 March 2021), [https://www.acftu.org/xwdt/ghyw/202103/t20210305\\_776184.html?7OkeOa4k=qAr2rqxcA9xcA9xcYUqNqrmKqiuJTyMbaPD76uv0x0qqqqqqqqqqcA](https://www.acftu.org/xwdt/ghyw/202103/t20210305_776184.html?7OkeOa4k=qAr2rqxcA9xcA9xcYUqNqrmKqiuJTyMbaPD76uv0x0qqqqqqqqqqcA) (accessed 25 March 2021).

ACTFU and its affiliates could act to negotiate collective agreements with platforms or otherwise help on-demand workers to communicate with the platforms as the State Council's opinion suggested.

It should not be assumed that on-demand workers have acted, to date, like passive entities subject to the digital 'panopticon'.<sup>106</sup> To the contrary, they have already taken action themselves, attempting, for example, to make sense of the app algorithms in order to develop a set of 'labour algorithms' to facilitate their work performance, such as sharing out orders between colleagues or even friends during rush hour, in order to complete the deliveries on time.<sup>107</sup> Using social media, they have constructed 'communities of practice' or mutual-aid, to offer each other assistance in the course of the working day or night.<sup>108</sup> The ever-increasing number of lawsuits filed by on-demand workers also demonstrates their wish to resist being ill-treated at work and readiness to take action. Moreover, on-demand workers have organised hundreds of 'wildcat strikes, riots, marches, sit-ins, demonstrations or other kinds of protests',<sup>109</sup> without the backup or support of a trade union. Taking food delivery as an example,<sup>110</sup> from the first recorded strike in April 2016 until February 2020, just before the national Covid lockdown, there were at least 121 recorded cases of different kinds of labour unrest, at least 44 cases conducted by on-demand food delivery riders. Mostly on-demand riders acted in support of demands for better piece rates, incentives and subsidies, and an end to platforms' ability to change contract terms or rules unilaterally. Unlike on-demand workers in some other countries,<sup>111</sup> they have not demanded 'employment' status: a labour relationship.<sup>112</sup> Mostly, their

<sup>106</sup>M. Foucault, *Discipline and Punish: The Birth of the Prison* (London: Vintage Books, 1995).

<sup>107</sup>P. Sun, 'Your Order, Their Labour: An Exploration of Algorithms and Labouring on Food Delivery Platforms in China' (2019) 12(3) *Chinese Journal of Communication* 308, 319.

<sup>108</sup>R. Dukes and W. Streeck, 'Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work' (2020) 47(4) *Journal of Law and Society* 612.

<sup>109</sup>All data are taken from the China labour bulletin. The China labour bulletin's strike map is currently the only publicly accessible database concerning workers' collective actions in China. Some records of strikes, especially for the on-demand workers' strikes, are very basic, comprising only a few pictures and basic information taken from Chinese social media (usually Weibo-one of the largest social media platforms in China), <https://clb.org.hk/content/introduction-china-labour-bulletin%E2%80%99s-strike-map> (accessed 25 October 2020).

<sup>110</sup>Ibid.

<sup>111</sup>S. Joyce and others, 'A Global Struggle: Worker Protest in the Platform Economy' (2020) 2 ETUI Research Paper—Policy Brief.

<sup>112</sup>Y. Wen Lei, 'Delivery Solidarity: Platform Architecture and Collective Contention and Collective Contention in China's Platform Economy' (2021) *American Sociological Review* (Online first). <https://doi.org/10.1177/0003122420979980>.

actions were small in scale and not well organised. The outcomes of the actions are not clear, and no reports or related research have been published yet. The labour unrest demonstrates that on-demand workers have become conscious of their poor working conditions; however, their consciousness may remain at an embryonic stage. Demands to date have concerned only wage levels; additional labour rights such as sick pay or holidays remain, it seems, a very distant dream. Nevertheless, the increasing worker unrest has served to put pressure on the governments and trade unions, and the series of measures and proposals taken in recent years may be considered as first positive, if limited, responses.

## 6. CONCLUSION: EXPLAINING THE REGULATION OF ON-DEMAND WORK

On-demand platforms have already absorbed a significant proportion of the employed population in China and look set to continue to expand. On-demand workers are subject to poor, unsafe and degrading working conditions. For the large part, they are not regarded as having a labour relationship with either the platform or any intermediary and this takes them outside of the scope of labour law. While there appears to be a general consensus that on-demand workers are in a position of precariousness and vulnerability, and that steps ought to be taken to protect them, initiatives to date have been limited to an occupational injury pilot and trials of voluntary work-related insurance on the one hand, and ACFTU's recruitment of on-line food delivery riders, on the other. Since its launch was initially limited to only a few geographical areas, with roll out to the whole country likely to take considerable time, the effectiveness of the pilot remains to be seen. The success of the very recent voluntary work-related insurance trials will not be known either until some months or years from now. In respect of ACFTU's recruitment drive, it remains to be seen whether the trade unions will be able to force significant improvements in on-demand workers' situations. When compared to the recent legal victories of on-demand workers in some other countries, it seems that on-demand workers in China still have a long way to go to obtain even basic labour rights.

Why have the legislature and government not taken more action to date to improve the situation of on-demand workers? A number of possible explanations suggest themselves. First, the national government's general approach to regulation may have shaped its thinking in respect of the sharing economy. In recent years, the government has adopted what it calls

a 'prudent yet accommodative' approach to regulation, intended to contribute to a boom in emerging industries and business.<sup>113</sup> In other words, the government believes that the new industries, new forms of business and new models of business characteristic of the sharing economy should be given enough space and flexibility to develop sustainably, provided that they do not act in contravention of existing laws. Second, the statutory law system itself increases the difficulties involved in timely law reform. As the scholar Wang commented: 'Laws are not easily amendable before we have a clear and credible course of action. Once laws and regulations are in place, the framework for allocation of benefits and disadvantages, profits and losses, is consolidated and develops further'.<sup>114</sup>

Perhaps the most likely explanation for the predicament of on-demand workers lies with the ever-increasing importance accorded by the national government in recent years to ensuring and stabilising employment. On-demand work is by its nature labour intensive and low skilled, making it well-suited to providing large numbers of workers with highly flexible employment. How to balance flexibility and security in the labour market has become a matter of great importance for the Chinese government and legislature.

Lastly, it may also be important to consider the identity of on-demand workers. The majority of on-demand workers are rural migrants who, prior to signing up to work via the platforms, are likely either never to have been in formal employment or, as marginal workers, to have enjoyed only a bare minimum of labour rights.<sup>115</sup> In the labour market, migrant workers have long been engaged in employment with low remuneration, high-labour intensity and poor working conditions, and the phenomena of unequal pay for equal work, unequal working hours and rights for equal work have become commonplace.<sup>116</sup> In recent years, both migrant workers' socio-economic conditions and their rights have improved to some extent. Bearing this longer history of rural migrant work in mind; however, it is possible to understand the predicament of on-demand workers as simply the continuation of that

<sup>113</sup>The State Council, *The 2017 Government Work Report* (2017).

<sup>114</sup>J. Wang, 'How to Regulate the Legal Relationships Between the Platform and Its Workers' (*The Paper*, 22 November 2019), [https://www.thepaper.cn/newsDetail\\_forward\\_5009024?luicode=20000061&lfid=4442825519212742&u=https%3A%2F%2Fwww.thepaper.cn%2FnewsDetail\\_forward\\_5009024](https://www.thepaper.cn/newsDetail_forward_5009024?luicode=20000061&lfid=4442825519212742&u=https%3A%2F%2Fwww.thepaper.cn%2FnewsDetail_forward_5009024) (accessed 25 October 2020).

<sup>115</sup>P. Huang, 'China's Neglected Informal Economy: Reality and Theory' (2009) 35 *Modern China* 405, 437.

<sup>116</sup>Y. Xue Lu, *Agriculture, 'Rural Development and Farmers' New Theory* (Beijing: China Social Sciences Academic Press, 2005) 237.

history in the current context of the ‘new economy’. It follows that regulating on-demand work has to meet the dual needs of promoting new economic development and addressing the significant challenge of the social exclusion and insecure employment of migrant workers.<sup>117</sup> The matter of the legal situation of on-demand workers is closely bound up, in other words, with the daunting, systematic and long-standing issue of migrant workers’ social exclusion and labour market discrimination. The protection of migrant workers cannot be solved by labour law alone.<sup>118</sup> To address it, a multi-sectoral cooperative planning and well-considered top-level strategy may be required, rather than simply the amendment of labour law.

<sup>117</sup>X. Quan Wang and Q. Liu, ‘Characteristics, Challenges and Legal Regulation of Flexible Employment in China’s New Economy’ (2019) 216 (4) *Law Review* 79, 83.

<sup>118</sup>Y. Tian Wang, ‘Stuck in the System, or Stuck in the Pits of Migrant Workers’ Rights and Interests’ (2020), [http://iolaw.cssn.cn/zxzp/202009/t20200925\\_5187086.shtml](http://iolaw.cssn.cn/zxzp/202009/t20200925_5187086.shtml) (accessed 25 October 2020).