

The Digitalization of China's Employment Law?

Tian YAN

I.

In recent years, observers have begun to discuss the possibility of China's employment law going digital. More precisely, people are concerned about whether, and to what extent, new occupations in the platform economy will change China's employment law. This paper attempts to answer this question. The primary conclusion is that China's employment law has established, and will continue to establish special rules differing from the general rules for these new occupations, thus creating a special zone of employment law, but the special zone for the most part does not affect other areas of employment law. In other words, digitalization does happen on China's employment law, but the process is only partial and depends mainly on the administration rather than the judiciary and the legislature.

II.

Platform economy is a very newly emerging of economy. On March 12, 2014, Uber Technologies Inc. officially announced its entry into Chinese market in Shanghai, which can be seen as a sign of the rise of platform economy in China. The platform economy has given birth to new forms of business, such as online car-hailing and online appointing distribution; new occupations have been created accordingly, such as online car-hailing drivers and online distribution-appointing deliverymen. These occupations have attracted the attention of the Chinese government. In 2019, the Chinese government included the occupation of online distribution-appointing deliverymen in the official occupational classification, hoping to show respect and recognition for the deliverymen. However, this occupation is still commonly called as the take-out riders among the people, because most deliverymen drive motorcycles or electric motorcycles as a means of transportation, and the goods they delivery are mainly take-out foods.

Of the three main branches of the Chinese government, the administrative branch is often the first organ to respond to new social events. This is associated with the fundamental logic of China's economic reforms. The regulation of new social things may face many risks and uncertainties, so the Chinese government has a habit of trying the administration's regulation at first, then being followed up by the legislature after accumulating sufficient experience. Compared with the judiciary, the administration is more justifiable to consider policy factors in addition to the law, it means that the administration is more suitable for making rules, while the judiciary is more suitable to act as the pure rules executor. The administration has a broad mandate from the legislature, and its rule-making activities are not subject to judicial review. Therefore, there is no or little worry about the attitudes of the legislature and the judiciary when the administration is responding to new social matters. All of these factors combined, making the administration the first organ to regulate the new occupations in the platform economy.

Over the past few years, China's administrative authorities have focused on regulating two new occupations

in the platform economy, one after another: the first focus is online car-hailing drivers, and the second is online distribution-appointing deliverymen. On July 27, 2016, seven ministries, including the Ministry of Transport, the Ministry of Industrial and Information Technology and the Ministry of Public Security, etc. jointly issued *the Interim Measures on the Administration of Operation and Service of Online Car-hailing*, which is the first important administrative rule formulated by the Chinese government for new occupations.

In deciding whether and how to regulate, the administration always consider not only the labor policy, but also industrial policy and other factors of public interests, rather than considering the interests of practitioners only. This makes decision making very complicated, especially when labor policy is in conflict with industrial policy. On the issue of online car-hailing drivers, at that time, factors of labor policy that the administration needs to consider mainly include: firstly, when a traffic accident happens to a car hailed online, the driver, passengers and passers-by are likely to be damaged. While these damages may not be compensated by insurance, so should the platform enterprise bear certain compensation liability? The platform often argues that it just brokers deals between drivers and passengers, it is not the employer of drivers, and should not be held responsible for their actions. However, the driving behavior of drivers is subject to the dispatching and command of the platform. Since drivers obey the platform's orders, they seem to treat themselves as employees. Secondly, in order to gain more profits, some drivers often drive continuously for a long time or choose to drive at night, which causes considerable risks and damages to the physical and mental health of them, and even causes the phenomenon of so-called overwork death. The platform believes that the working hours are decided by the drivers themselves, and they do not force drivers to drive, so it should not assume any responsibility. However, the platform is adopting the remuneration rule of "more orders, more money," and often stipulating that orders at night can earn more than during the day, which will induce drivers to overwork, so it seems reasonable for the platform to assume responsibility for the tragedy. Thirdly, except online car-hailing drivers, traditional taxi drivers are not covered by employment law, but in some places they have been given some treatments in the employment law. For example, the Shanghai government stepped in to establish the traditional taxi drivers' union, and the union on behalf of the whole city drivers initiated collective negotiations with the taxi companies' league, and signed collective contracts, in which written some rights and interests of drivers that could only be protected under labor relations according to the law. The public holds the opinion that online car-hailing drivers should be treated equally with traditional taxi drivers, while the platform argues that the law does not require such equality.

In short, every factor of labor policy the administration has to consider is fraught with controversy. Not to mention that many actors, including platform enterprises, local governments, labor organizations and the academy, are trying to lobby the administration. Positions of platform companies and labor organizations are needless to say. The main motivation for local governments to lobby the central government is to protect the platform economy and promote economic development, which is especially important for governments at the regions where platform businesses are located. Scholars are often given the opportunity to advise in the rule-making process of the administration, and they can also use the mass media to make their voices heard. Scholars of employment law generally supports that online car-hailing drivers be protected by the employment law, and even the view that labor relation is established between drivers and the platform enterprise was once prevailed. In contrast, scholars of civil and commercial law and administrative law take a more cautious attitude towards legal intervention in the relationship between the platform enterprise and drivers.

For the administration, in addition to the above consideration of labor policy, industrial policy is also in its consideration. Firstly, the contribution of online car-hailing industry to the employment promotion. There is no denying the fact that this new industry provides part-time opportunities for some office workers. In big cities like Beijing, many commuters choose to pick up a separate order on their way to and from work, earning roughly enough to cover the gas cost of the commute. But the online car-hailing industry has rarely increased

the number of full-time opportunities, with most full-time workers coming from the traditional taxi industry. Secondly, the contribution to the travel convenience. In big cities, due to the government's strict control of vehicle license, the number of traditional taxis is seriously insufficient, which affects citizens' travel. Relaxing controls would not only lead to resistance from traditional taxi companies, but also lead to a surge in taxis and more congested roads. Online car-hailing is a better solution, which does not change the government's policy on vehicle license, and enhances transport capacity by increasing the utilization of existing vehicles rather than increasing the number of vehicles. On the whole, the consideration of industrial policy supports a more relaxed regulation of the industry.

Combining the considerations of labor policy and industrial policy, after intense lobbying and game, the *Interim Measures on the Administration of Operation and Service of Online Car-hailing* was issued. The Article 18 of which stipulates: "The platform enterprise of online car-hailing shall . . . in accordance with relevant laws and regulations, and based on working hours, service frequency and other characteristics, sign employment contracts or agreements with drivers in any variety forms to clarify the rights and obligations of both parties." It is widely believed that the meaning of this provision is that the nature of the relationship between the platform enterprise and drivers should be agreed by both parties rather than mandated by law. Article 18 has attracted much criticism. Firstly, the negotiating power of platform enterprise is often much stronger than that of drivers, so contracts between the two parties are usually drawn up unilaterally by the platform enterprise, which means that the platform can in fact determine the nature of its relationship with the drivers unilaterally. Then the possibility of establishing a labor relation between the two parties is very small, and it is almost impossible for drivers to obtain the protection of employment law. Secondly, the long-term position of the China's administration is that the establishment of labor relation does not depend on the agreement between the two parties, but on the establishment of a series of objective conditions. These conditions include: the party of drivers shall belong to the laborers in the employment law; the party of platform enterprise shall belong the employer in the employment law; drivers shall receive labor management of the platform enterprise (also known as subordinate to the platform enterprise), the drivers provide practical labor for the platform enterprise, and this labor should be paid. The then Ministry of Labor and Social Security issued an announcement in 2005 setting out the conditions for the establishment of labor relations as the above.¹ This position has long been upheld and has been recognized by the judiciary. Why departs from this position after 11 years and makes special provisions for online car-hailing drivers? Many observers think this is because the government's concerns about industrial policy have trumped that of labor policy. This argument is presumed convincing at least from the results.

III.

After issuing the rules aimed at online car-hailing drivers, the online distribution-appointing deliverymen becomes the focus of regulating new occupations in platform economy. Again, the administration needs to consider labor policy and industrial policy at the same time, but the consideration of specific factors of each policy is differ from that in the regulation of drivers. Factors of labor policy mainly include: firstly, online distribution-appointing deliverymen is an occupation with high incidence of traffic accidents. Because delivery times are concentrated in the lunch and dinner periods, deliverymen often have to deliver goods in large quantities in a short time, forcing them to drive at high speeds and even violate traffic rules. Once there is an accident, motorcycle and electric motorcycle can offer very limited protection to the rider. This means that the risk of traffic accident faced by deliverymen is significantly higher than that faced by drivers. In addition, in order to ensure the transport capacity during peak hours, the platform often carries out more strict management

1. Then Ministry of Labor and Social Security, *Announcement Concerning the Establishment of Labor Relations* (2005).

and scheduling on the deliverymen. Many accidents are caused as the result of deliverymen are driving illegally under the urging of the platform, so it seems that the platform should bear more responsibility for the accidents. Secondly, deliverymen are also at the risk of overwork as drivers. However, the vast majority of deliverymen choose to take orders only during lunch and dinner period and have more leisure at other times. Only a small number of deliverymen take orders during breakfast, lunch, dinner and midnight all four periods. In general, the overwork risk of deliverymen is smaller than that of drivers. Thirdly, the occupational nature of online distribution-appointing deliverymen is similar to that of couriers. However, due to the limited protection of employment law for couriers, few people advocate that protecting online distribution-appointing deliverymen in contrast with couriers. It can be seen that in terms of labor policy, the issues that the administration needs to consider are similar to those of online car-hailing drivers, but the specific situations are very different.

The bigger differences lie in industrial policy. First of all, the role of the deliveryman occupation in driving employment is obviously greater than the driver occupation. According to a survey released by the Chinese government, a total number of 3.987 million of deliverymen were paid through Meituan platform in 2019, up 23.3% from 2018.² This means that 929,000 job opportunities were added within a year. China has long been facing a heavy employment pressure. Every year, more than 10 million people should be employed, so the employment opportunities provided by online distribution-appointing deliverymen are precious. Secondly, the employment of the deliverymen has maintained a momentum of strong growth during the COVID-19 epidemic, which is conducive to China's recovery from the impact of the epidemic as soon as possible. According to the statistics of the Chinese government, after the outbreak of COVID-19, from January 20 to March 30, 2020, newly registered and gainfully employed deliverymen on Meituan platform have reached a number of 457,800.³ The epidemic has depressed the manufacturing and service industries, many practitioners are in a state of unemployment or waiting back to positions, if there were no undertaking of online distribution-appointing deliverymen, would very serious economic and social problems be caused. The Chinese government has also issued a special notice, requiring that local governments should instruct platform enterprises to "share employees" with manufacturing and service enterprises, so the later can send employees who are waiting back to positions due to the epidemic to work temporarily as online distribution-appointing deliverymen in the platform and earn money.⁴ From the perspective of industrial policy, the administration is very concerned that the rise of labor costs will affect the development of platform enterprises. In this case, consideration of labor policy may have to take a back seat.

In short, in terms of the regulation of online distribution-appointing deliverymen, although the administration's consideration is different from that of online car-hailing drivers, it involves both labor policy and industrial policy. And because the consideration of industrial policy on online distribution-appointing deliverymen is more prominent, it can be reasonably presumed that in the future, when formulating rules for the deliverymen, the administration of China will still let industrial policy plays the leading role and adopt relatively relaxed regulatory strategies. The government is likely to follow the regulating example of drivers by allowing the platform enterprise and the deliverymen to reach an agreement about the nature of their relationship. Meanwhile, aiming at some prominent problems in the labor policy, especially the high incidence

2. The Ministry of Human Resources and Social Security, "New Occupation - Analysis Report about Present Employment Index of Online Distribution-appointing Deliverymen,"

http://www.mohrss.gov.cn/SYrlzyhshbzb/dongtaixinwen/buneyiaowen/202008/t20200825_383722.html.

3. The Ministry of Human Resources and Social Security, "New Occupation - Analysis Report about Present Employment Index of Online Distribution-appointing Deliverymen,"

http://www.mohrss.gov.cn/SYrlzyhshbzb/dongtaixinwen/buneyiaowen/202008/t20200825_383722.html.

4. General Office of the Ministry of Human Resources and Social Security, *Announcement on Better Guidance and Service for Sharing Employees (2020)*.

of traffic accidents among deliverymen, the deliverymen may be allowed to enjoy several protections from the employment law, particularly to participate in the insurance of work-related injury. However, it is almost impossible for the administration to impose a labor relation between the platform enterprise and the deliverymen. Including online distribution-appointing deliverymen and online car-hailing drivers, new occupations in the platform economy will remain a special zone of China's employment law, and will not affect the overall legal system.

IV.

Then is it possible that the judiciary and the legislature adopt different attitudes and make different rules for the new occupations in the platform economy, in addition to the administration? It is generally impossible. For the judiciary, the main limitation comes from the role this institution plays. According to China's *Constitution* and *Legislation Law*, the judiciary assumes the judicial function and is authorized to interpret the specific application of laws, but it has no power to make rules, let alone making rules differ from those of the legislature and the administration. Honestly speaking, the judiciary also takes into account policies except the law when deciding cases, but such considerations are often not explicitly written into the judgement, which would incur criticism. In 2018, Haidian District Court in Beijing ruled that a deliveryman named Li Xiangguo had a labor relation with the platform that he serviced called Flash Delivery APP, which caused widespread controversy.⁵ The court tried to couple the facts of the case with the elements of the labor relation one by one in an attempt to prove that it made a judgement according to law. However, at the end of the judgment, it also frankly acknowledged that the judgment had taken labor policy into account and believed that denying the existence of a labor relation between Li and the platform would cause too adverse consequences for Li's personal interests. Being aware that its policy judgment was on suspicion of exceeding authority, the court tried hard to limit the impact of the judgment. The judge said Li worked up to 10 hours a day, a rarity among online distribution-appointing deliverymen, meaning his case did not apply to most of his peers. The appeal court promoted the two parties to reach an agreement through mediation. As a result, the judgment of first trial never took effect. Observers speculate that the reason why the appeal court settled the case through mediation rather than judgment was to avoid evaluating the judgment of first trial. This might well indicate that the appeal court did not endorse the practice of deciding cases based on policy of the first trial court. Haidian District Court in Beijing is one of the courts with highest level of labor trial in China, yet it has no authority and ability to make policy judgment, then this kind of judgment can only be left to the administration.

As for the legislature, as mentioned above, the legislative process is rarely initiated until the rules established by the administration have been generally applied and sufficient experience has been accumulated. So in the short term, the digitalization of China's employment law will remain restricted to specific occupations and will remain subject to the administration.



AUTHOR

Tian YAN

Assistant Professor, Law School of the Peking University.

5. Civil Verdict of Haidian District People's Court, 2017, (Beijing 0108, First Trial of Civil Case, No.53634).