Collective labour rights and collective labour relations of China

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List of Abbreviations

ACFTU:	The All-China Federation of Trade Unions
ACFIC:	The All-China Federation of Industry and Commerce
CCP:	Chinese Communist Party
CEC:	China Enterprise Confederation
CEDA:	China Enterprise Directors' Association
CFA:	Committee on Freedom of Association
CLW:	China Labour Watch
CSR:	Corporate Social Responsibility
CTC:	Central Union of Cuban Workers
CR:	The Czech Republic
ERC:	Employee Representative Council
FTU:	Federation of Trade Unions
GDP:	Gross Domestic Product
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICFTU:	International Confederation of Free Trade Unions
ILO:	International Labour Organisation
ITUC:	International Trade Union Confederation
LFTU:	The Lao Federation of Trade Unions
MNCs:	Multinational Companies
MOHRSS:	Ministry of Human Resources and Social Security
MOLSS:	Ministry of Labour and Social Security
NGOs:	Non-Governmental Organisations
NPC:	National People's Congress
PRC:	People's Republic of China
VGCL:	Vietnam General Confederation of Labour
SACOM:	Students and Scholars Against Corporate Misbehaviours
TUFTFT:	Trade Unions Federation on Trade, Finance and Tobacco
WTO:	World Trade Organisation

Table of Figures and Tables

1 Introduction

1.1 Political and economic backgrounds

(1.1) After its reconstitution as the People's Republic of China (PRC), China brought about the collectivisation of its enterprises and proceeded to follow the communist command economic model as a path to development. In accordance with this model, all decisions regarding the market were made by the central government in a top-down manner. The highly centralised command economy enjoyed some early success, but its drawbacks gradually became apparent as modern industry took root. "Although lifelong employment and an egalitarian remuneration system were regarded as the key to socialism in Mao's era, they led to overstaffing, lack of work incentives, and low productivity in state-owned enterprises" (Ngok, 2008: 46). Then, during the ten-year Cultural Revolution (1966-1976), development halted. In 1976, China was pushed towards a transition by the passing of Zedong Mao, and years later, the national policy of "reform and opening to the outside world" (*gaige kaifang*) was issued by Xiaoping Deng in the 3rd Plenary Session of the 11th Central Committee of the Chinese Communist Party (CCP). Under the leadership of Deng, China found "the so-called 'third way' between the failed command economies and the capitalist alternative" (Zhu and Fahey, 1999: 173). In 1992, the 14th National Congress of the CCP established the goal of building a "socialist market economy".

(1.2) The aim of this round of economic reform was to stimulate economic growth and eliminate poverty. Various measures were taken to achieve these purposes, including decentralisation of some economic decision-making power by transferring it to the provincial level, replacement of government control with enterprises' right to operate independently, and deregulating markets. In the late 1970s and early 1980s, the de-collectivisation of agriculture began and foreign investment and private and township enterprises also gradually emerged. This reform effort stagnated at the end of 1980s, however, but policies put forward in a speech by Deng during a tour of southern China in 1992 restored the momentum, and state-owned enterprises were reorganised and many state-owned industries privatised. The private sector and foreign investment, being promoted by the Chinese government, began to grow rapidly. At length, the socialist market economy took shape, reaching a milestone in 2001 when China joined in the World Trade Organisation (WTO).

(1.3) In 2003, a change in the central leadership ushered in policy changes as well. Jintao Hu shifted the emphasis towards social justice, social harmony and environmental protection in order to correct the eco-social problems caused by the efficiency-driven economy of Deng's era. Hu put forward what was termed a "scientific concept of development" (*kexue fazhan guan*). This policy required the balanced development of urban and rural areas, of China's eastern and western regions, and it emphasised trade in addition to environmental protection. The Chinese economy suffered during the crisis of 2008, which made clear its reliance on exports. In the aftermath, Hu sought to establish a domestic consumer-driven economy through such measures as scaling back growth in the gross domestic product (GDP) and increasing wages. During Hu's tenure, many regulations and proclamations regarding social welfare and labour protection were issued. Overall, Hu's policies were successful in easing social tensions.

(1.4) Jinping Xi came to power in 2013 and has since been working to address the issue of income inequality in China. Following Hu, Xi has continued to rein in the pace of economic development; thus annual GDP growth was reduced to 6.7% in 2016, the lowest rate in 26 years.[1] Since 2013, Xi has issued several requests for increases in the minimum wage and other measures intended to foster harmonious labour relations. Enormous effort has also been invested in an anti-corruption campaign designed to combat collusion between local governments and businesses.

1.2 The evolution of labour relations

(1.5) The change from a planned economy to a socialist market economy in China has generated repercussions in labour relations, in particular in the emergence of collective labour actions (Chang and Brown, 2013: 104; Chang, 2013a: 92; Brown, 2016). According to the definition of Chang and Brown (2013: 104), "collective labour relations refers to the social relationships generated through processes of consultation and negotiation, over working conditions, labour standards and other employment issues, between, on the one hand, the workers' collective or their representatives and, on the other hand, the employers or employers' organisation. It encompasses collective bargaining, collective disputes and employee participation in management". Viewed from this perspective, four periods can be distinguished in the evolution of labour relations in China (also see Chang 2013a; 2015: 20; 2016a; Chang and Brown, 2013; Zou 2014).

1 The data quoted here are from the National Bureau of Statistics of China, available at http://www.stats.gov.cn/english/PressRelease/201701/t20170120_1455922.html, last visited 17 July 2017.

(1.6) The first of these periods began in the late 1970s and ended around 1990. A labour contract system was placed on the legislative agenda following the 1983 Notice of the Ministry of Labour and Personnel for Actively Promoting Labour Contract System (*laodong renshi bu guanyu jiji shixing laodong hetong zhi de tongzhi).* State-owned enterprises were given some freedom to operate independently in an effort to decentralise the economy and stimulate development, pursuant to The Temporary Rule of State Council on Further Enlarging Autonomy Rights of State-owned Industries and Enterprises (*Guowuyun guanyu jinyibu kuoda guoying gongye qiye zizhuquan de zanxing guiding*, 1984). The emergence of the non-state economy (i.e. the privately- and foreign-owned economy) promoted a diversification of employers.

(1.7) The second period lasted from roughly 1990 to 2000. The policies announced by Deng in 1992 increased both the extent and the pace of economic reform in China. During this period, state-owned enterprises were, as mentioned, compelled to undergo re-organisation. The former tradition of lifelong employment relations – or "iron rice bowl" (*tiefanwan*), to use the Chinese expression – was gradually eroded, and along with it lifetime social benefits. Many workers were made redundant in 1998 to pave the way for a modern enterprise system. Contractual employment relations became the norm, though in the absence of written contracts. The ownerships of enterprises become increasingly diversified during this period. Rural migrant workers were released from the land and began to become involved in the market economy on a large scale.

(1.8) The third stage in the evolution of modern labour relations in China extended from the beginning of 2000s to 2008. China's accession to the WTO in 2001 escalated the reform of labour relations, which became more complex owing to the boom in the non-state economy and included the revelation of conflict between individual workers and industrial employers. As Lee (2009: 2) reported, in 1978, almost all workers worked in public sector or on rural, collective-owned farms, but by 2005 more than 80% of employment was in the non-state economy. This period witnessed the building of a legal framework to regulate the marketization of labour relations and resolve labour disputes. Individual labour relations in particular were highly regulated. The 2008 Labour Contract Law represented a large-scale effort to protect individual rights. While it has to be sure often been enforced loosely, this legislation certainly made Chinese workers more aware of their rights, as the number of labour disputes increased dramatically, from 48,121 in 1996 to 693,465 in 2008.[2]

2 The source of the data is the *China Statistical Yearbook*, which is compiled by the National Bureau of Statistics of China. The electronic version of this source can be found at http://www.stats.gov.cn/ENGLISH/Statisticaldata/AnnualData/, last visited 17 July 2017.

(1.9) In 2008, the transition from individual to collective labour relations began as a result of the top-down reform and the growth in the labour force (for further explanation, see Chang 2013a: 100-104; Chang and Brown, 2013: 109-110). A spontaneous strike by workers at the Honda Foshan plant in Guangdong in 2010 was a turning point. Rather than merely venting their rage (e.g. by breaking machines), the striking workers pursued a rational strategy, demanding higher salaries. This approach represented a marked improvement over earlier strikes, most of which were triggered by such rights-based labour disputes as wage arrears. The Honda strike, together with the near-contemporary suicides of several Foxconn workers, challenged the dominant image of the Chinese worker as "docile, diligent and dirt cheap".[3] The Chinese government also responded to the strike rationally by defining it as a "labour dispute" and encouraging dialogue between Honda and the workers. With the help of local governments, non-governmental organisations (NGOs) involved in labour, and scholars, an agreement was reached (see Chan and Hui, 2012; Lyddon *et al*., 2015). Following this strike, greater effort was invested in trade union reform and collective bargaining. The "two universal" (*liangge pubian*) policy indicated the determination of the national union to promote collective agreements. Subsequently, following the adoption of the Rainbow Plan for Further Promoting the Implementation of the Collective Contract System (*guanyu shenru tuijin jiti hetong zhidu shishi caihong jihua de tongzhi*) in 2010, collective bargaining contracts came to cover 60% of enterprises in China in 2010 and 80% by 2011.

1.3 The tension between relevant legislation and collective labour relations

(1.10) The transition from individual to collective labour relations has posed a challenge to labour law, which was mainly designed to govern individual labour relations and to protect individual rights. In China, collective rights have not been adequately protected (as discussed further in chapter 2). The tension between law and collective labour relations can be clearly observed, one example being the increasing number of collective labour disputes.

(1.11) Collective labour disputes in China include those involving more than 10 workers with shared grievances and those arising in connection with collective labour contracts (Article 7 of the Law of the People's Republic of China on Labour-dispute Mediation and Arbitration, 2008; Article 5 of the Rules of Handling Cases Related to Labour and Human Resources Labour Disputes Arbitration, 2017). Two categories of regulatory mechanisms for resolving collective labour disputes pursuant to the present legal system co-exist (similar categorisation, see Ye, 2016: 254). The first concerns direct

3 The Economist (2010), "China's labour market: The next China", available at http://www.economist.com/node/16693397, last visited 17 July 2017.

regulatory procedures, such as arbitration and litigation, and the second deals with indirect regulatory procedures, specifically dialogue between industrial actors such as collective bargaining, trade union activities and workers' collective actions. Statistics, both official and unofficial, serve to illustrate this tension.

(1.12) The numbers for disputes involving arbitration and litigation procedures have been compiled in the *China Statistical Yearbook*. Figure 1 demonstrates the numbers of collective labour disputes and of workers involved from 1996 to 2008: collective disputes increased nearly six-fold from 3,150 to 21,880, while disputes involving workers increased from 92,203 to 502,713.[4] Figure 2 illustrates the number of labour disputes (both individual and collective) and workers involved and sheds significant light on changes in the nature of these disputes. In this case, the increase was nearly fifteen-fold over a longer time period, from 48,121 in 1996 to 813,859 in 2014, while the number of workers involved increased from 189,120 in 1996 to 1,159,687 in 2015, with a pronounced spike in 2008, possibly owing to the implementation of the Labour Contract Law that went into effect in that year.

Figure 1: The number of collective labour disputes and workers involved (1996-2008)
Source: *China Statistical Yearbook*

4 There are no clear regulations stating that Chinese judges and arbitrators are obligated to define a labour dispute that involves more than 10 workers sharing a claim as a collective dispute. In practice, these labour disputes are usually split up into smaller cases (Chen and Xu, 2012: 93). For these reasons, the data collected by *China Statistical Yearbook* does not accurately reflect the status quo in China. Also for these reasons, the tendency in collective labour disputes since 2008 has been to diverge from other sorts of labour disputes. Hence, the official data of collective labour disputes post-2008 was not worth referring to.

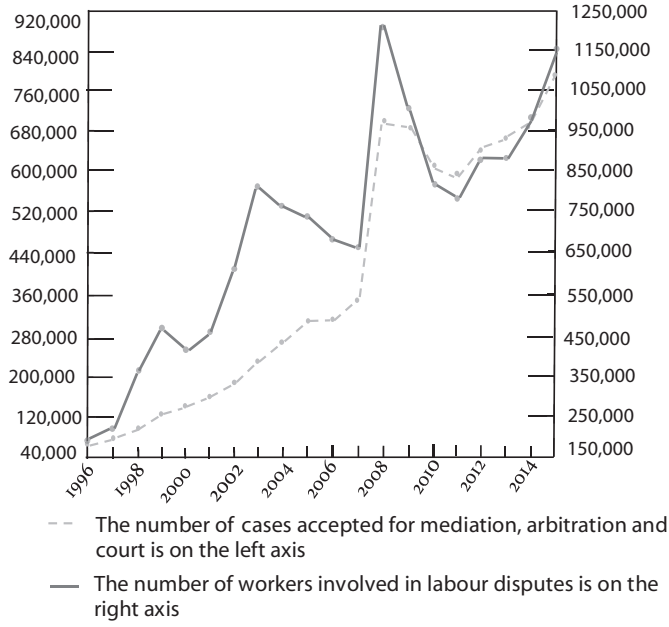

Figure 2: The number of labour disputes and workers involved (1996-2015)
Source: *China Statistical Yearbook*

(1.13) However, the official statistics fail to provide exact numbers about strikes in China,[5] in part because many collective labour disputes have been settled through the interference of an administrative power. For instance, the government has often looked to the streets as courtrooms of a sort for resolving industrial actions (Su and He, 2010). It is therefore not easy to enumerate the number of collective labour disputes that have not issued in a judicial procedure. Figure 3 offers two unofficial records from websites in an effort to fill this gap. The website, called *China Strike*,[6] provides valuable information on strikes for the period from March 2004 to December 2012; the other, *Strike Map*,[7]is a well-recognised and constantly up-dated record of strikes that have taken place since 2011. These two resources complement each other, and their figures for 2011 and 2012 overlap.

5 Strikes mentioned in this thesis refer to all collective actions undertaken by workers including but not limited to forms of sit-ins, work stoppages, demonstrations, marches, and protests.

6 The website of *China Strike* is https://chinastrikes.crowdmap.com/main, last visited 17 July 2017.

7 The records available on *Strike Map* are in both English and Chinese. The website is http://maps.clb.org.hk/strikes/en, last visited 17 July 2017.

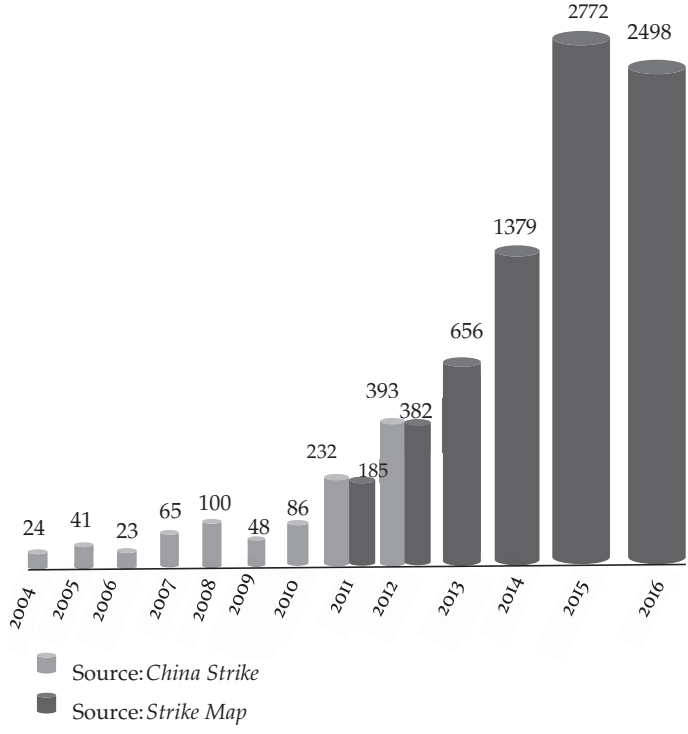

Figure 3: The number of worker collective actions (2004-2016)

(1.14) Before 2010, the number of worker collective actions had increased slowly, with a clear uptick from 2007 (65) to 2008 (100), statistics that are consistent with the official data cited above. The number decreased again in 2009 (48), presumably owing to the crisis in 2008, before nearly doubling in 2010 (86). Thereafter, the number began doubling annually, reaching 2,772 strikes across the country in 2015. There was, however, an approximately 10% decrease in 2016 (to 2,498) that is perhaps attributable to the arrest of activists from several labour NGOs at the end of 2015.

(1.15) Workers' collective actions have been particularly frequent in certain regions of China, as can be seen in the statistics for 2011-2016 represented in Figure 4. Most of the labour activism was concentrated in the coastal areas, including Guangdong, Jiangsu, Zhejiang, Shandong and Shanghai. These regions are home of the most developed industries and are where the fastest growth has taken place in China's non-state economy. The regular outbreaks of labour unrest in Guangdong have been associated with companies based in Japan, Taiwan, Hong Kong, South Korea, and other foreign jurisdictions. Less-developed areas of China have also experienced strikes, though, including Fujian, Henan, Hebei, Sichuan, Chongqing and Hubei Provinces, and the labour insurgence in these areas has occurred at enterprises owned variously by the state and non-state entities.

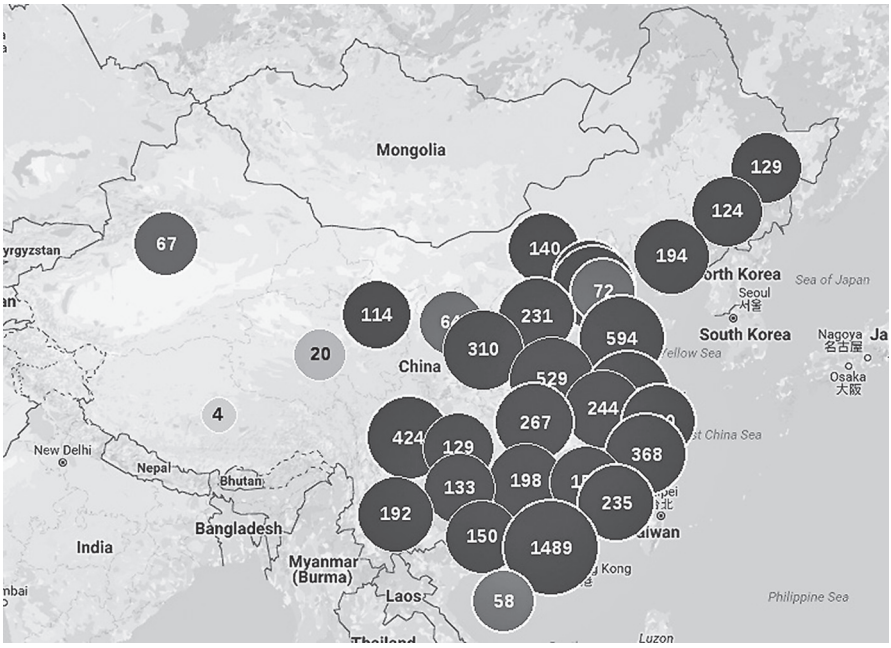

Figure 4: Strike map throughout China (1 January 2011 to 31 December 2016)
Source: *Strike Map*

(1.16) The tactics used in the strikes have varied, including, as mentioned, worker stoppages, sit-ins, protests, demonstrations, blocking highways and gathering in front of government buildings. Some strikes have been accompanied by violence, including suicide, illegal imprisonment, the murder of managers and imprisonment of governmental officials. By way of specifics, several Foxconn workers committed suicide (see Chan and Pun, 2010; Chan, *et al.*, 2013); workers at the state-owned Tong Steel Holding Company Jilin City beat a general manager to death;[8] workers at the Lin Steel Company in Henan Province illegally imprisoned a senior government official for some 90 hours;[9] and over 1,000 workers at a state-owned textile company marched from Baoding City to Beijing along the route of a national highway.[10] Such actions made manifest the tension between workers and managers and its potential to escalate into confrontations between workers and government officials (see further Wu and Xu, 2010: 63; Cook, 2013).

8 See the Guardian, July 27, 2009, "Chinese steel workers beat takeover boss to death over job cuts", available at https://www.theguardian.com/world/2009/jul/27/china-steel-workers-boss-beaten, last visited 6 November 2017.

9 For more details, see Sina, 2009, "The event of Lingang (in Chinese)", available at http://henan.sina.com.cn/news/2009-12-14/15009957.html, last visited 17 July 2017.

10 Sina, 2009, "Several thousand workers of an enterprise of Hebei Baoding Marching to Beijing (in Chinese)", available at http://news.sina.com.cn/c/2009-04-03/201417544705.shtml, last visited 17 July 2017.

(1.17) The occurrence of such unrest, especially the radicalisation of conflicts associated with collective labour, also made clear the failure of the Chinese labour law. Industrial conflict between labour and employers is inevitable in a market economy, but the lack of effective protections for workers' rights has complicated the situation in China. At times, government interference has transformed antagonism related to labour relations into social tensions between government officials on the one hand and workers on the other. For example, the involvement of policemen has on at least one occasion served to catalyse conflict. The issue is a crucial one because the radicalisation of industrial conflict is detrimental to both social stability and economic development. Several regulations have been passed in the area of labour law, many of which are pro-labour, but most concern individual labour relations. A durable solution to mitigate industrial conflicts, however, would involve "full respect for the right of workers to establish organisations of their own choosing, promotion of collective bargaining and creating of appropriate mechanisms where industrial disputes can be resolved through dialogue" (ILO, CFA Case 3184, para.242). From this perspective, current labour law in China remains considerably underdeveloped in terms of its capacity to regulate collective labour relations, falling far short of international standards. The existing legislation must accordingly be revised in order to provide an adequate framework for resolving collective labour disputes and balancing industrial relations.

1.4 Main research questions and structure of the thesis

(1.18) The main research question of this thesis concerns ways to regulate collective labour relations in China. The increase in collective labour disputes, as observed, has revealed the tension between law and labour and the need for regulatory reform in order to adapt to the changing conditions. Collective labour rights and collective labour relations are thus the two core topics of this thesis. Practical suggestions for legislation must be founded on a full understanding of the flaws within the law and collective labour relations in China, and such an analysis on the flaws is undertaken in this thesis. In addressing collective labour rights and relations, this thesis includes five sub-questions that are answered in five corresponding chapters; two each address laws and relations respectively and the last focuses on the connection between them. These questions are as follows (1.4.1-1.4.5).

1.4.1 Does China observe the fundamental collective labour standards set by the ILO?

(1.19) China has not ratified either ILO (International Labour Organisation) Convention C087 (the Freedom of Association and Protection of the Right to Organise Convention) and C098 (the Right to Organise and Collective Bargaining Convention). Nevertheless, the country is obligated to respect

the two conventions in good faith based on the ILO's Declaration on Fundamental Principles and Rights at Work (1998). ILO reports conclude that China fails to observe the fundamental collective labour standards of the two core conventions. Chapter 2 takes up the question of whether these reports are accurate in their conclusions and provides an overview of the progression of and flaws in the relevant existing legislation.

1.4.2 How do the trade union systems of socialist countries compare?

(1.20) Unlike the unions in the developed capitalist countries of the West, the trade union system in China is rooted in the single party political regime. For comparative analysis, socialist countries that have political and trade union systems similar to those in China thus seem better suited. Chapter 3 accordingly includes a comparative study of legislation pertaining to the trade union systems in socialist China, Vietnam, Cuba and Laos. Relevant legislation from before and during the economic transformation of these countries is analysed with an eye to similarities and differences. The chapter also includes an evaluative discussion of whether these systems observe the ILO standards, whether the ILO standards are suited to the political and economic realities of post-socialist countries, and ways in which these systems might be revised in order to respond better to economic changes and to resolve labour disputes more effectively.

1.4.3 What are the roles of Chinese trade unions in carrying out their regulated protection functions and mediating labour unrest?

(1.21) Chapter 4 explores the roles of workplace trade unions in practice, using Foxconn as a case study. Foxconn has become the largest foundry enterprise in the world as a supplier to big brands, such as Apple, and as such is representative of worker unrest caused by harsh working conditions. Since 2010, the suicides of Foxconn workers have been frequently reported by media. In this study, the roles of trade unions in protecting workers at Foxconn are explored through a comparison between Foxconn's Chinese and Czech operations. This case study exemplifies how workplace trade unions function in the context of non-state companies in China generally and helps to make clear the implications of workers' struggles for legislation.

1.4.4 What explains the effectiveness of the worker representation mechanisms in Chinese industrial relations?

(1.22) Trade unions represent the only lawful mechanism for worker representation in collective bargaining, though other mechanisms have also appeared in practice outside the context of existing law. The Honda strike of 2010 is a prime example of the crisis in the lawful worker representation mechanism. In chapter 5, the evolution and the effectiveness of represen-

tation mechanisms is explored in the context of illustrative cases, and the reasons why some are more effective than others are considered through an analysis of the interests of various industrial actors. This chapter also continues the discussion of the possibilities of and challenges involved with promoting more effective representational mechanisms.

1.4.5 What is the impact of workers' collective actions on the law?

(1.23) The wave of strikes in 2010 demonstrated that the power of workers was re-shaping the collective bargaining system in China, as they became increasingly involved in the system. Chapter 6 offers a discussion of how, after 2010, the labour movement gradually and incrementally pushed for legislative reform. A survey of factors that influenced this effort is followed by an exploration of how state power made an institutional compromise to the workers' power in the context of collective bargaining. The successes and setbacks on the upward path towards the institutionalisation of workers' involvement in collective bargaining, along with the implications of this path for future industrial relations, are the last two topics taken up in this chapter.

1.5 Research methodology

(1.24) This thesis draws on the fields of law, sociology and politics by incorporating 1) analysis of legal texts, 2) analysis of the literature, 3) comparative study, 4) data analysis and 5) a case study.

1.5.1 Analysis of legal texts

(1.25) The analysis of legal texts is a primary and necessary part of legal research, especially when it comes to identifying inherent flaws within legislation. This method is mainly used in chapters 2 and 3. The legal texts cited include domestic legislation from China, Vietnam, Laos, Cuba and the Czech Republic as well as ILO regulatory documents (including conventions, recommendations and reports, which can be found on the ILO website). English translations of legal texts from these other countries are usually available on official websites or websites linked to the ILO website; a few translations have been quoted from other websites. Most of the translations of Chinese legal texts (including normative documents) are from either the On-line Database of Laws and Regulations of the National People's Congress (NPC)[11] – the highest legislative agency in China – which provides official translations of national legislation, or, in the many cases in which legal texts at the local level are missing from the NPC database, the

11 The database of law and regulation provided by the NPC can be found at http://www.npc.gov.cn/englishnpc/Law/Frameset-page.html, last visited 19 July 2017.

Peking University (PKU) Law Database – which is generally regarded as the main channel for 'unofficial' English translations and includes all categories of legal documents of China – has been used.[12] The remaining material that cannot be found on these two databases has been translated by the author as literally as possible.

1.5.2 Analysis of the literature

(1.26) Legal literature is analysed throughout this thesis. This method is crucial for three reasons. First, when a law is vague, previous research can help to interpret it. Second, since this thesis involves no practical research, existing studies provide the empirical evidence. Third, previous literature also provides a theoretical basis for the thesis. The relevant literature here includes the writings of scholars in mainland China, Hong Kong, the West, some of whom are "immigration writers", who were born and raised Chinese and have migrated to Western countries. Of course, scholars are subject to various biases; in general, mainland Chinese scholars tend to be less critical, presumably because their awareness of problems is limited by their limited access to relevant information, for which reason they find it difficult to compare China's labour law system with that of another country. Research by expatriate scholars, on the other hand, which is sponsored by countries sharing different political systems from China, often fails to appreciate the true nature of the Chinese situation. Such scholarship tends to emphasise negative aspects of the Chinese economic system and to downplay its strengths. Research conducted by immigration writers and western scholars may also contain biases, depending on their own background knowledge. Taken together, the existing literature produced by these various types of scholars provides a variegated picture of collective labour law and relations in China, and one of the aims of this thesis is to make sense of this research in order avoid errors that arise from an incomplete understanding of China's labour system. In other words, by balancing these various perspectives, this thesis seeks to provide a more objective account of law and labour in China.

1.5.3 Comparative analysis

(1.27) Comparative analysis is an important tool in efforts to improve a domestic legal system in light of analogies with other countries. The comparative study of the trade union systems and labour movements in China and other representative (post-) socialist countries occupies the second and third chapters of the thesis. As discussed, China is compared with Vietnam, Cuba and Laos. These countries and China share trade union systems that are rooted in single-ruling party political systems. Comparison

12 The link for this database is http://www.lawinfochina.com/index.aspx; it can be accessed directly from the Leiden University Library website.

will inform the suggestions for reform by helping to identify impractical recommendations. Chapter 4 also includes a comparison of trade unions in China and the Czech Republic since, first, both union systems evolved under similar historical conditions and, second, as has been seen, Foxconn employs workers under similar working conditions in both countries yet the courses of worker struggles at the two plants have been different.

1.5.4 Data analysis

(1.28) Data analysis is used to provide evidence regarding a general phenomenon, and this research method is mainly employed here in the introduction and in chapter 6. The official and unofficial data that are analysed here, though they have limitations, provide complementary information. As already mentioned, the official data is drawn mainly from the *China Statistical Yearbook* compiled and published by the Chinese National Bureau of Statistics in both Chinese and English.[13] The official data provides fairly authoritative information, but there are disadvantages. For instance, these data do not indicate any details behind the figures, as is especially apparent when looking at the coverage of collective bargaining and trade unions: the official data includes the exact number of contracts that have been signed and how many workers have joined a trade union, but it provides no information concerning the collective bargaining process involved. In addition, some of the official data, e.g. the number of collective labour disputes (as explained earlier), do not exactly reflects the status quo, depending on the preference of judges and arbitrators in defining such disputes. Thus, while authoritative, the official data may lack objectivity. There is the further drawback that only those labour disputes that have been channelled into lawful institutions, i.e. collective contracts, collective negotiations and trade unions are documented, while any indication of unlawful instruments is missing from the official data, e.g. unsanctioned strikes and unapproved worker organisations.

(1.29) The unofficial data used here come from the aforementioned *China Strike* and *Strike Map* websites. *China Strike* is compiled by Manfred Elfstrom at Cornell University in the United States,[14] and its information is constantly updated, while *Strike Map* is a widely-cited record of the numbers in China.[15] However, it is important to recognise that these unofficial records may underreport the number of strikes owing to the fact that the unofficial data is collected through mass media reports or internal channels, which are likely to miss some labour actions. In addition, these records may not be

13 The electronic version of the *China Statistical Yearbook* can be found at http://www.stats.gov.cn/ENGLISH/Statisticaldata/AnnualData/, last visited 19 July 2017.

14 The website of this record is https://chinastrikes.crowdmap.com/main, last visited 19 July 2017.

15 The website of this record is http://maps.clb.org.hk/strikes/en, last visited 19 July 2017.

entirely objective. Despite these drawbacks, though, the unofficial data can serve to document at least some of actions that take place outside of lawful channels, especially when it comes to reporting the numbers of striking, so as to help compensate for the drawbacks associated with the official data.

1.5.5 Case study

(1.30) In general, data analysis is insufficient to indicate the processes at work behind statistical figures. A case study, on the other hand, is conducive to understanding the situation behind the data. As discussed in chapter 4, a case study is the research method used to gain a deeper understanding of the roles of trade union roles at a specific factory in China, the aim being to indicate the scope of trade union roles at foreign-owned enterprises generally.

(1.31) In sum, five methodologies are used in this thesis. An analysis of legal texts is carried out in chapters 2 and 3, and a comparative study is carried out in chapters 3 and 4. A case study is also explored, mainly in chapter 4, and the use of this method in combination can lessen the potential drawbacks associated with the data analysis. An analysis of the relevant literature is the main research method employed in chapters 5 and 6, though previous studies are cited throughout this thesis as part of an on-going academic dialogue. The other important methodology used here is data analysis, which is performed primarily in chapter 6. The aim of using these five methodologies is to provide a picture of Chinese labour law and labour relations on both the micro and macro levels.

1.6 Literature review

(1.32) There has been a considerable amount of research on the two topics of study over the past two decades and especially since 2010. An overview of this research is presented here; more detailed reviews of specific topics can be found in the individual chapters.

1.6.1 Literature involving legal research

(1.33) Most studies of legislation pertaining to labour relations in China have been conducted by Chinese scholars, mainly because analysis of legal texts requires absolute mastery of the language. The general view supported by existing research is that, as alluded to a number of times above, current legislation is concerned primarily with the protection of individual rights, and that the regulations governing collective labour relations have been slow to develop and are riddled with problems (e.g. Ye, 2016; Chang, 2004 and 2015: 63; Zou, 2014:56; Chen, 2007; K. Chen, 2010: 103-118; Cooney, 2007: 674).

(1.34) A few Western scholars have explored trade union systems in socialist countries. Pravda and Ruble (1986) made a significant contribution to the literature with their comparison of trade unions in nine countries that they defined in terms of "Classic Dualism" and distinguished from the unions in Western capitalist countries. More recently, Anita Chan, Irene Nørlund, Tim Pringle, Simon Clarke, Simon Fry and Chang-Hee Lee are among those who have conducted comparative research on party-led unions in China and Vietnam and with Russia and Laos. Generally speaking, these studies have concentrated on industrial relations while giving scant attention to the law.

1.6.2 Literature on collective labour relations

(1.35) The bulk of earlier work concerning collective labour relations has been conducted from a sociological and political perspective and can be usefully categorised as pertaining mainly to either industrial relations, trade unions, collective bargaining, or the collective actions of workers.

(1.36) The tripartite nature of negotiations in Western countries differs from the quadripartite negotiations (*sifang tanpan*) that evolved in China. This difference is explicable, in the first place, in terms of the separation between unions and workers in China, so that four parties are usually involved in industrial relations, namely governments, trade unions, workers (or independent workers' organisations) and employers (or employer organisations) (Taylor, *et al.*, 2003:122).

(1.37) Previous research into Chinese trade unions has focused on their identities and roles. The research of Chen (2003:1006) has been particularly influential; he argued that a Chinese trade union has a dual identity as both a state apparatus and a labour organisation and classified unions as either representing, mediating or pre-empting. National-level trade unions in general play rather active roles in lobbying for pro-labour laws and promoting workers' participation in enterprise management. Nevertheless, the activities of the All-China Federation of Trade Unions (ACFTU) are constrained by political, institutional and organisational forces, and as such this organisation is prevented from acting independently (Clarke and Pringle 2009: 98; Liu *et al*., 2011: 283-286). There is broad agreement among scholars that Chinese trade unions are inactive when it comes to representing workers owing to dependence on enterprise management and to "inner inertia: (Clarke and Pringle, 2009: 99; Clarke, *et al*., 2004: 251; Chen, 2009: 680-684). There have thus been very few cases in which workplace trade union leaders have organised strikes or actively represented workers (e.g. a strike in Walmart, see Li and Liu, 2016).

(1.38) It is also widely agreed that collective bargaining in China tends to be quite formalistic. Scholars usually use the term "collective consultation" to refer to formalistic collective bargaining (Chan and Hui, 2014; Clarke, *et al.*,

2004: 251; Wu and Sun, 2014; Kuruvilla and Zhang, 2016). Formalistic collective bargaining or collective consultation often implies a lack of significant negotiation between the representatives of employers and workers (Clarke, *et al.*, 2004: 250). Collective contracts are usually conducted according to a top-down, quota-driven pattern (Wu and Sun, 2014). Most scholars agree that collective bargaining in China is transforming from "collective consultation as a formality" through "collective bargaining by riot" and towards "party state-led collective bargaining". These three evolutionary stages co-exist in China owing to the lack of uniform attitudes among officials and uneven economic development (Chan and Hui, 2014).

(1.39) Research into labour unrest has also been conducted mainly from a political and sociological perspective. Two scholars have been particularly influential on this topic. Ching Kwan Lee (2007) argued that labour unrest is characterised by "targeting local officials, cellular activism, fragmentation of interests, and legalistic rhetoric" (2007: 238). Taking a different approach, Ngai Pun explained worker struggle as a symbol of the awakening of the Chinese working class (Pun, 2005; Chan, 2013; Chan *et al.*, 2013; Pun and Chan, 2013; Butollo and Brink, 2012). In terms of detailed accounts of the unrest, it has been reported that workers have increasingly taken the offensive with their demands during strikes (e.g. Butollo and Brink, 2012; Elfstrom and Kuruvilla, 2014); strikes are becoming more rational and organised (Chan and Hui, 2014; Pringle 2013: 197) and that administrative power often becomes involved in settling strikes (Su and He, 2010).

1.6.3 Literature review on the interaction between collective labour relations and the law

(1.40) The flaws in the legislation governing collective labour relations are considered responsible for the increase in the incidence of strikes, which in turn are increasing pressure for trade union reform (Estlund and Gurgel, 2013; Chan and Hui, 2012; Friedman, 2013 and 2014). In addition, labour unrest has also promoted policy changes at the national level. Chang (2015) argues that two types (top-down and bottom-up) of labour movement co-exist in China. Friedman (2014: 18-25) argues that the labour movement in China largely remains at the stage of an insurgent moment.

1.7 Contributions

(1.41) By researching collective labour rights and collective labour relations of China, this thesis stands to make four main contributions to the literature on these crucial issues.

1.7.1 Introducing the Chinese labour law system to a wider audience

(1.42) Chinese legislation regulating labour relations in marketization appeared in 1990s. Several Western scholars have introduced Chinese labour issues to the wider world, e.g. Sean Cooney, Alan Neal, Ronald C. Brown, William Brown and Eli Friedman. Some Chinese scholars have also endeavoured to do so, among them Kai Chang, Baohua Dong and Jingyi Ye. Nevertheless, much remains to be done. Chapters 2 and 3 offer further introduction and discussion of the relevant Chinese legislation, and the country's collective labour relations are the subject of chapters 4, 5 and 6.

1.7.2 Acquainting Western audiences with the trade union systems of post-socialist countries

(1.43) This thesis also endeavours to provide an account of the trade union systems of (post-) socialist countries to those living in developed Western capitalist states. Following Pravda and Ruble, several other scholars have concentrated on the evolving trade union systems in China, Vietnam and Russia, e.g. Simon Clarke, Tim Pringle and Anita Chan, but the issues involved remain unfamiliar to most Westerners. This thesis tries to fill in this gap. An exploration of the trade union systems in all post-socialist countries is naturally beyond the scope of this thesis, but the relevant legislation of four – China, Vietnam, Laos and Cuba – that have retained socialist political systems while moving toward market economies has been selected for study. Part of the aim here is to convince more scholars to conduct research on these issues and to put forward their suggestions for improving these trade union systems.

1.7.3 Analysing labour issues in China

(1.44) This thesis also presents a complete analysis of the problems relating to Chinese labour law and labour relations. As discussed, chapters 2 and 3 investigate drawbacks of present legislation and chapters 4 and 5 address collective labour relations. Chapter 5 goes further by analysing the interests of each industrial actor and identifying reasons for variation in the effectiveness of representation. Chapter 6 examines problems relating to both the legislation and collective labour relations.

1.7.4 Putting forward realistic suggestions for legislative reform

(1.45) Rather than simply proposing that Chinese enterprises comply with international labour standards, this thesis puts forward realistic suggestions to address the drawbacks of the existing Chinese legislation and to regulate collective labour relations. Altering the current trade union system is a daunting task owning to the fact that trade union system in China is deeply rooted in the country's single-ruling party political system. The

political and institutional restrictions also indicate that suggestions must be compatible with the current political system; otherwise they are unlikely to be considered by legislators. Chapters 3, 4, 5 and 6 outline some basic principles for regulatory reform. Suggestions for future legislative reform are further discussed in the conclusion of the thesis.

2 Review of the legislation and analysis of China's compliance with the ILO's fundamental collective labour standards

Abstract

(2.1) China's shift from a planned economy to a socialist market economy has created challenges for its legal system. Labour law serves to resolve disputes and to protect workers' rights and interests, and China has made great progress in this respect in the past two decades. Nevertheless, Report NO.380 of CFA Case 3184 from 2016 restates conclusions drawn many years ago, that Chinese labour legislation violates the ILO's core conventions on collective labour standards. A review of Chinese legislation is a necessary prerequisite for an exploration of whether these conclusions have merit. By analysing the relevant legal texts, this chapter provides a close look at each labour standard and insight into its flaws, interprets vague articles and summarises the progress and the problems relating to this legislation. It is concluded that collective labour standards regulated in Chinese legislations are different from those stipulated in ILO core conventions, and a complete compliance may not be feasible within the political and social contexts of China.

Keywords: China; legislation; ILO; collective labour standards

2.1 Introduction

(2.2) Since 1978, tremendous change has taken place in China's economy. The policy of "reform and opening to the outside world" (*gaige kaifang*) was formulated in the 3rd Plenary Session of the 11th Central Committee of the CCP in that year. A few years later, in 1984, a planned commodity economy was proposed in the 3rd Plenary Session of the 12th Central Committee of the CCP, and the policies establishing a socialist market economy were finally implemented in 1992.

(2.3) As the scope of marketization has expanded, industrial conflict between employers and workers has gradually emerged, and the labour law system has been designed to resolve such disputes. So far, as discussed in chapter 1, China has concentrated on regulating the individual rights of workers, as shown by the adoption of the Labour Contract Law. Cooney (2007: 674) went so far as to argue that the individual labour standards established in China "are not markedly inferior to those of comparable countries and indeed many developed countries". In any case, regulations concerning collective labour rights have developed slowly by comparison.

(2.4) The "collective labour rights/standards" mentioned here include the rights to organise, bargain and strike. They are based on the fundamental collective labour standards of the ILO regarding the freedom of association and the right to engage in collective bargaining. Although this the right to strike is not specifically mentioned in C087 (the Freedom of Association and Protection of the Right to Organise Convention) or C098 (the Right to Organise and Collective Bargaining Convention), it is nevertheless an "inevitable corollary of the right to freedom of association" (Bellace, 2014; Tapiola, 2016; Zhang, 2016).

(2.5) An investigation of China's collective labour standards was launched and led by Kai Chang (2004) of Renmin University of China in the 2000s. He referred to the standards as "workers' three labour rights" (*laodong sanquan*) and established a theoretical foundation for research into China's collective labour law and collective labour relations. F. Chen (2007) and K. Chen (2010: 103-120) also discussed Chinese regulations in relation to the ILO standards. However, it is important to note that China has undergone significant change since this research was conducted, in terms of both the legal framework and legal practice. In recent years, scholars have been more interested in exploring industrial relations than legislation; as mentioned earlier, most of this work has been done in mainland China, though the focus has been more on the right to engage in collective bargaining and on labour dispute settlement mechanisms than on freedom of association (e.g. Chen, 2006; Cheng, 2004; Wang and Yan, 2015; Hou, 2013; Su, 2014; Zou, 2016). This preference is probably attributable to Chinese scholars' awareness of the difficulties involved in altering China's single trade union system. Also as

mentioned, research conducted by mainland Chinese scholars tends to be quite conservative in its orientation (e.g. Hong, 2014; Wang, 2009; Ye, 2016; Liang, 2006; Chang 2004 and 2007; Cheng, 2005); for example, they rarely comment directly on whether China is in violation of ILO core conventions. As a consequence, little research has specifically discussed China's three collective labour standards since that of Chang (2004), F. Chen (2007) and K. Chen (2010). Broader, and more objective, research is needed that takes into account the recent political and economic changes in China. The aim of this chapter is to help meet this need. In addition, a review and analysis of legal texts are offered in this chapter that explore the progress and setbacks of this branch of Chinese law.

(2.6) The following discussion explores the attitudes of the ILO towards China's compliance with the ILO's collective labour standards. The evolution of relevant legislation is discussed in section 3, and section 4 provides a closer look at each labour standard. An evaluation of the legislation pertaining to collective labour standards is presented in section 5, and the last section summarises conclusions regarding China's compliance with the ILO standards.

2.2 Sources and Methodology

(2.7) Legal normative analysis and literature analysis are the main methodologies employed in this chapter. The former method is essential for investigating how collective labour standards are integrated into the Chinese legislation. This method requires texts, and, as mentioned in chapter 1, the English translations of the Chinese laws are taken from two databases. One is the Online Database of Laws and Regulations of NPC,[1] the country's most authoritative legislative agency; the second is the Peking University (PKU) Law Database, which is generally regarded as the best source for unofficial English translations.[2] Any texts unavailable on either one of these two databases have been translated by the author as literally as possible. Literature analysis is also essential, especially for situations in which legal texts are vague or inherently contradictory.

1 The database of laws and regulations provided by the NPC can be found at http://www.npc.gov.cn/englishnpc/Law/Frameset-page.html, last visited 17 July 2017.

2 The English version of this database is http://www.lawinfochina.com/index.aspx, and it can be accessed directly from the Leiden University Library website.

2.3 The attitude of the ILO regarding the incorporation of fundamental collective labour standards into Chinese domestic legislation

(2.8) Four categories of labour standards were defined as fundamental pursuant to the ILO Declaration on Fundamental Principles and Rights at Work in 1998 (hereafter, the 1998 Declaration). They cover child labour (in Conventions 138 and 182), equity (in C100 and C111), forced labour (in C029 and D105) and the freedom of association & collective bargaining (in C087 and C098). According to the 1998 Declaration, all members of the ILO should respect these fundamental labour standards in good faith, regardless of whether all members ratify them.[3]

(2.9) China had ratified 26 ILO conventions by December 2016, of which 22 are in force. Among the ratified conventions, four are core conventions, including two on equity (C100 and C111)[4] and two on child labour (C138 and C182).[5] The principles of the ratified conventions have been more or less integrated into domestic legislation. The government is also discussing ratification of another fundamental labour standard, the one regarding forced labour. Compliance with the mandate to respect freedom of association and the right to collective bargaining presents the most complexities for the Chinese government, mainly because this category of fundamental labour standards touches on key aspects of China's political system (Tapiola, 2014:14).

(2.10) The Committee on Freedom of Association (CFA) is a special mechanism of the ILO that supervises observance of the fundamental collective labour standards in its member states. Before 2016, the CFA had heard six cases relating to China. In Case No. 1652, Case No. 1930, Case No. 2031 and Case No. 2189, the International Confederation of Free Trade Unions (ICFTU) alleged that China had violated C087 and C098 both in law and in practice. The Chinese government countered that the freedom of association and the right to collective bargaining were both guaranteed in China because several articles of the Trade Union Law (1992) and Labour Law (1994) explicitly protected these rights.[6] Nevertheless, the CFA concluded that many provisions of the Trade Union Law were contrary to the freedom of association, such as Articles 4, 11 and 13, and amounted to the imposition

3 The 1998 Declaration stipulates that "Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realise, in good faith".

4 China ratified C100, the Equal Remuneration Convention (1951), in 1990 and C111, the Discrimination (Employment and Occupation) Convention (1958) in 2006.

5 China ratified C138 the Minimum Age Convention (1973), in 1999, and C182, the Worst Forms of Child Labour Convention (1999), in 2002.

6 CFA Case 1930 (China), Interim Report-Report No 310, para. 324-331.

of a trade union monopoly.[7] The CFA repeatedly requested that the Chinese government to amend the legislation to guarantee workers' freedom of association; it also urged the government to provide updates regarding the practical application of collective bargaining.[8]

(2.11) In the considerable time since Case No. 2189, the CFA has not heard any other cases concerning China. There are two possible reasons for this. First, the Chinese courts simply may not have found any leaders of workers to have acted illegally in the interim, which is possible given that the central government under Chairman Hu requested lower governments to handle "public order incidents", presumably to prevent the conflict from intensifying. The second possible reason is that labour activists or members of other international organisations, such as the International Trade Union Confederation (ITUC), were unable, unwilling or unsuccessful when it came to filing lawsuits against China. In this context, the ILO has begun devoting greater attention to the promotion of collective bargaining and the settlement of industrial disputes in China (Tapiola, 2014:15). These latter processes are also key aspects of the freedom of association. This attitude is further reflected in other ILO reports (e.g. 2015a: 30 and 2015b: 15).[9] Meanwhile, the ILO has also documented the development of tripartite discussions and collective wage negotiation in China in recent years pursuant to these two reports.

(2.12) In February 2016, the CFA heard another case from the ITUC on China (Case No. 3184). In this case, the ITUC alleged that eight advisers and paralegals had been arrested and sentenced to a fixed term of imprisonment by the Chinese government because they had provided workers with advice regarding the resolution of labour disputes. The government replied that these individuals had belonged to illegal organisations and had mainly been sentenced for the crime of "gathering a crowd and disturbing the social order" in accordance with Chinese criminal law. In Report No. 380 of this case, the CFA did not come to a conclusion regarding the validity of the ITUC's allegations, rather but asked the government to provide more evidence. When evaluating the relevant Chinese law, the CFA restated the conclusions that it had reached 24 years earlier, in Case No. 1652, namely that many articles and provisions in the Chinese legislation impeded the freedom of association and some were outright contradictory to this freedom.[10]

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7 CFA Case 1930 (China), Interim Report-Report No 310, para. 343 and 344; cf. CFA Case 1652 (China), Interim 286th Report, para. 713-717; CFA Case 2189, Report 330, para. 465; CFA Case No. 2031 and 321st Report, para. 165.

8 CFA Case 1930 (China), Interim Report-Report No. 316, para. 378(a) (b)(c).

9 The ILO report (2015b) stated that "the ILO will provide policy advice, based on International Labour Standards and comparative experiences, on modern legal frameworks for collective bargaining and the settlement of collective interest disputes".

10 CFA Case 3184 (2016), Interim report 380, para. 233.

The ILO, then, is insistent that Chinese labour law violates C087. It is, however, the case that significant changes have occurred in Chinese labour law over the past 24 years, in particular the adoption of a series of pro-labour laws in 2008. Research is required to settle the issue; and indeed mention of the CFA report offers a good transition to an overview of Chinese legislation and an evaluation of whether China indeed fails to respect the ILO's fundamental collective labour standards.

2.4 The evolution of Chinese regulations relating to collective labour standards

(2.13) A transition in labour relations has also been observed in China following the transition from a planned economy to a socialist market economy, which occurred through what can usefully be distinguished as four stages (see chapter 1). The relevant legislation also evolved over this period.

(2.14) The Trade Union Law adopted in 1992 was the first legislation concerning collective labour relations. It was also the first regulation specifically designed to address trade union rights in the post-marketization context and the first to mention the term "collective contract" – though no clear definition was provided[11] – and it included a provision, Article 3, stipulating the right of workers to organise and join trade unions. Next, in 1994, the Labour Law was drafted, which defined the scope and status of collective contracts (Articles 33-35) and regulated rights relating to several trade unions (Article 30) and workers' freedom to organise and join trade unions (Article 7). The Provisions on Collective Contracts (the Provisions, hereafter) were enacted by the Ministry of Labour in the same year; this legislation provided definitions of "collective contract" and "collective negotiation" (Articles 5 and 7) for the first time and also, regulated bargaining principles, described the process for signing collective contracts and broadened the scope of collective contracts. Omitted, however, were instructions for the election of the representatives for bargaining parties from the Provisions. Also in 1994, the ACFTU formulated a three-year plan for developing collective contracts,[12] thereby indicating that the collective contract system had become a significant part of the federation's purview. In the following year, the ACFTU enacted the Trial Measures for Trade Union Participation in Equal Negotiation and Signing of Collective Contract,

11 Article 18 of the Trade Union Law (1992).

12 The Legislation Law does not grant the ACFTU the right to make law. However, documents enacted by it have a normative effect on its lower organisations, even if they cannot be categorised as "law". Following K. Chen (2010) and Cooney (2007), this thesis refers to these as "legal normative documents" (*guifanxing falv wenjian*).

among which measures were details regarding the participation of trade unions in collective bargaining. Then in 2000, the Ministry of Labour and Social Security (MOLSS) drafted the Trial Methods of Collective Consultation on Wage, which emphasised the role of collective negotiation in resolving collective labour disputes over wages and established the concept of specific collective contracts in China. The Trade Union Law was revised in 2001, as part of which tripartite collective negotiation above the workplace level was added. MOLSS issued a new Provisions on Collective Contracts in 2004 and replaced the old one, broadening the scope of collective contracts and further elaborating the rules and procedures for collective bargaining, including those governing the electing of representatives of bargaining parties.

(2.15) The next stage in the evolution in Chinese labour law occurred in 2008 with the adoption of several important labour regulations, including the Labour Contract Law (2008), Employment Promotion Law (2008), and Law of the People's Republic of China on Labour-Dispute Mediation and Arbitration (2008). Although no specific regulation concerning the collective labour standards was included, the Labour Contract Law specifically stipulated the collective contract system. These measures created a favourable environment for the implementation of collective standards in China.

(2.16) A further round of regulation began in 2010, when the ACFTU proposed its campaign of the "two universals" (*liangge pubian*), the aim of which was to increase trade union density and the coverage of collective agreements. Working with the Ministry of Human Resources and Social Security (MOHRSS) and the China Enterprise Confederation (CEC)/ China Entrepreneur Association, the ACFTU outlined the Rainbow Plan on Further Promoting the Implementation of the Collective Contract System *(guanyu shenru tuijin jiti hetong zhidu shishi caihong jihua de tongzhi)* in the same year. Pursuant to this plan, the goals for collective contract coverage were 60% in 2010 and 80% in 2011. In 2011, the ACFTU enacted the Work Plan of the ACFTU on Further Promoting Wage Collective Negotiation in 2011-2013 (*shenru tuijn gongzi jiti xieshang gongzuo guihua*) to develop wage collective negotiations through 2013. This document also included goals for collective agreement coverage within different types of enterprise, and in 2014 the ACFTU drafted several similar documents: The Work Plan of the ACFTU on Deepening Collective Negotiation (2014-2018) (*zhonghua zonggonghui shenhua jiti xieshang gongzuo guihua* 2014); ACFTU's Opinions Regarding the Enhancement of the Quality of Collective Consultation and the Effect of Collective Contract (*zhonghua zonggonghui guanyu tisheng jiti xieshang zhiliang zengqiang jitihetong shixiao de yijian 2014*). Taken together, these documents are a measure of the ACFTU's effort to promote collective bargaining.

2.5 Legislation analysis regarding the standards

(2.17) The foregoing discussion provides a basic framework for the evolution of the laws regulating collective labour relations. An analysis of the relevant standards will provide a better understanding of China's compliance with the ILO standards.

2.5.1 The freedom of association

(2.18) Though China has not ratified either Convention 087 or Convention 098, it did ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2001. Freedom of association is stipulated in Article 8 (1a) of the ICESCR, but, when it ratified this convention, China restricted the implementation of Article 8 (1a) to "within the parameters of the Chinese Constitution, Trade Union Law and Labour Law". This restriction indicated that China would comply with this article only to the extent that doing so did not contravene its domestic legislation. Thus an important part of analysing the relevant domestic legislation is determining whether Chinese workers do indeed enjoy the freedom of association.

(2.19) The freedom of association is protected by Article 35 of the Constitution of China (hereafter, the Constitution). However, it is widely agreed that the Constitution provides political principles rather than applicable procedures. There is in addition no penalty specified for violating the Constitution nor any special monitoring mechanism. Moreover, by tradition the Constitution cannot be invoked directly in judicial practice, as can be seen in two judicial interpretations by the Supreme People's Court.[13] This being the case, no constitutional freedom in China, including the freedom of association, comes with a judicial remedy.

(2.20) Article 3 of the Trade Union Law (2001 amended version) and Article 7 of the Labour Law (1994) also regulate the right to organise freely. However, the Trade Union Law sets barriers to exercising this right, in particular the directive that higher-level trade unions must approve the establishment of lower-level unions. A single trade union system is assumed in the Chinese legislation, and independent workers' organisations are not approved unless they accept the leadership of ACFTU, pursuant to Article 10 of the Trade

13 The first document was issued in 1955; in it, the Supreme People's Court directly rejected citation of the Constitution during the sentencing phase of criminal judgments. In the second document, from 1986, the Supreme People's Court listed all legal sources that could be directly used in judicial practice, and the Constitution was not included in this list. The Constitution was in fact cited during one court case in China (Case QI Yuling), but the Supreme People's Court forbade further citation of it in lawsuits. For more detail, see Zhu (2014).

Union Law (the 2001 amended version).[14] The ACFTU for its part is statutorily subordinate to the ruling party (Article 4 of the same law).[15] Thus, this regulated, single trade union system results in all trade union organisations within China under the party-led ACFTU's leadership.[16]

(2.21) With regard to the process of establishing workplace trade unions, while granting workers have the right to organise, the law also affirms that higher-level trade unions can lawfully intervene in the establishment of workplace trade unions.[17] Two conflicting rights thus co-exist in this regulation, a worker's right to organise freely and a higher-level union's right to direct workers to organise unions. Which right is superior is unclear under this law. Nevertheless, only the right to join trade unions is admitted by the Constitution of Chinese Trade Unions (1993; amended 2008) enacted by the ACFTU, which in effect subordinates the right to organise to the top-down leadership of the party-led, single trade union system. In other words, even if workers' organisations are willing to accept the leadership of the ACFTU, they may not necessarily receive approval, since the ACFTU only affirms workers' right to join trade unions.

(2.22) The right to organise is remediable in theory, for Article 50 of the Trade Union Law (2001 amended version) lists two possible approaches, administrative rectification and criminal remedies, the latter of which are only available when the violation of this right touches on Chinese criminal law. According to the law, the remedy mechanisms for labour disputes over the violation of this right include conciliation, mediation, arbitration and litigation. In practice, however, the disputes concerning this right are usually either terminated by the intervention of administrative power or courts refuse to hear them (M. Chen, 2014). The website China Judgement Online[18] also indicates that no litigation concerning the right to organise has been heard by courts since 2013.

(2.23) In short, the law is inherently paradoxical concerning the right to organise, protecting it while at the same time establishing restrictive recognition procedures and enforcing a single trade union system. Consequently, the right to organise is subordinated to the current trade union system, and independent workers' organisations remain in general unlawful in China.

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14 Article 10 (para. 5) of the Trade Union Law (2001 amended version).

15 Article 4 of the Trade Union Law (2001 amended version).

16 The Chinese "trade unions" mentioned in this thesis have all been recognised by the ACFTU; spontaneous organisations of workers that have not receive approval from higher-level trade unions are here referred to as "independent workers' organisations".

17 Article 11 (2) of the Trade Union Law (2001 amended version).

18 China Judgement Online is an official website on which all cases after 2013 heard by judges can be found except for those in trials in which the privacy of the parties was an issue.

In addition, the law gives enormous space for other industrial actors, especially higher-level trade unions and employers, to influence the establishing of workplace trade union organisations. As a result, only workers' right to join trade unions can be achieved in practice. Numerous independent workers' organisations have been rejected by higher-level ACFTU branches. [19]

(2.24) Similar opinions have been expressed, mainly by overseas or Hong Kong scholars, or Chinese scholars who publish in English (F. Chen, 2010: 103; Chan and Hui, 2014; Tapiola, 2014; Kuruvilla and Zhang 2016:160). As discussed, mainland Chinese scholars are generally less critical when addressing this problem. For instance, Chang (2004: 230; 2007: 47), Cheng (2004:123) and Wang (2009: 131) merely mentioned that China relies on a single trade union system without venturing an opinion as to whether Chinese workers enjoy freedom of association. Li [20] and Wu[21] did argue that a regulated single trade union system is a violation of the freedom of association, but the former at last insisted that China's single trade union system is a historical development and as such does not violate the right of freedom of association.

2.5.2 The right to bargain collectively

(2.25) Collective bargaining is a negotiating process, the goal of which is to reach agreements;[22] it usually involves representatives of workers and employers.[23] The following discussion addresses three relevant legal issues: terminology, the bargaining process and collective agreements.

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19 Also relevant in this context are the ICFTU's comments on the first report submitted by the PRC in its implementation of the International Covenant on Economic, Social and Cultural rights, 1966: 3 (2005).

20 For more details, see Li, Lin (2010), "The Freedom of Association: The Rights and Guarantee of Organise and Join Trade Unions of Workers (in Chinese)", available at http://class.chinalawedu.com/news/2004_10/14/1358325727.htm, last visited 7 July 2017.

21 For more details, see Wu, Zuolong (2002), "The Freedom of Association of Workers-The Research on the Chinese Declaration Towards Article 8 of International Covenant on Economic, Social and Cultural Rights (in Chinese)", available at http://article.chinalawinfo.com/ArticleHtml/Article_1712.shtml, last visited 14 July 2017.

22 Pursuant to Recommendation 91 of the ILO, collective agreements are defined as "all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other".

23 Article 2 of ILO Convention 154 (Promoting Collective Bargaining Convention) states that "collective bargaining extend to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for determining working conditions and terms of employment; and/or regulating relations between employers and workers; and/or regulating relations between employers or their organisations and a workers' organisation or workers' organisations".

2.5.2.1 Terminology

(2.26) The institution governing collective bargaining activities and collective agreements in China is known as the "collective contract system" (*jiti hetong zhidu*) in Chinese legislation rather than "collective bargaining system". This choice of terms indicates that legislators placed greater emphasis on the outcome of the bargaining than on the bargaining process. Similarly, "collective bargaining" (*jiti tanpan*) is rarely used in the legislation,[24] being replaced by "collective consultation" (*jiti zixun* or *jiti xieshang*). A widely accepted explanation for the use of this terminology is that "collective bargaining" sounds confrontational and as such is incompatible with the goal of "building a harmonious society" and the policy of "maintaining social stability". By contrast, "collective consultation" seems more moderate and is therefore more frequently used in legislation (also see F. Chen 2010: 114; Chan and Hui, 2014). Correspondingly, the term "collective agreements" (*jiti xieyi*) has more or less replaced "collective contracts" (*jiti hetong*) in legal documents. In order to be consistent with academic and international conventions, this thesis also uses the terminology of "collective bargaining" and "collective agreement" except when quoting legal texts.

2.5.2.2 Labour rights relevant to the collective bargaining process

(2.27) The collective bargaining system in China developed rather late and slowly, and within it many relevant rights are either omitted or are fraught with significant problems. The following discussion addresses the rights to workplace representation, to initiate collective bargaining and to approve collective agreement drafts.

A. Right to workplace representation

(2.28) The right to representation in collective bargaining involves the empowerment of actors to act in the interests of a constituency. In China's single trade union system, the right to represent workers, as has been seen, belongs to the ACFTU and its branches. In enterprises with trade unions established, the unions enjoy a exclusive right to represent workers.[25] In enterprises without trade unions, the issue of who has the right to represent workers in negotiations with employers remains a source of a debate among various legislative agencies. The 1994 Labour Law (Article 33), enacted by the standing committee of NPC, and the 2004 Provisions on Collective Contracts (Article 20) enacted by MOLSS, grant this right to organisations that receive the support of more than half of rank-and file workers.

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24 One exception is Article 44 of the Measures of Shenzhen Municipality on Implementing the Law of the People's Republic of China on Trade Unions (2008).

25 Article 33 of the Labour Law (1994); Article 20 of the Trade Union Law (2001 amended version) and Article 51 of the Labour Contract Law (2008).

However, the legal document enacted by the ACFTU in 1995 excludes the direct involvement of workers in collective bargaining.[26] The conflict between MOLSS, ACFTU and the standing committee of the NPC was finally settled by the 2008 Labour Contract Law issued by the latter; Article 51 of the Labour Contract Law stipulates that only workers who have been elected under the auspices of higher-level unions have the right to represent workers in enterprises where trade unions have not established. This article creates obvious space for higher-level unions to influence the election of workers' representatives at lower levels. Generally speaking, workers prefer to elect representatives who are active, militant and enjoy a good reputation. Higher-level trade unions, by contrast, favour docility, excluding militant or active workers in order to prevent workers' collective actions from becoming uncontrollable. In this thesis, representatives who have been elected under the auspices of higher-level unions are referred to as "unionised representatives".

(2.29) Under these circumstances, regardless of whether a trade union has been established at their enterprise, workers do not have the right to represent themselves in workplace-level collective bargaining. It is therefore reasonable to conclude that the Labour Contract Law (2008) tightens the ACFTU' s control on workplace representation compared with previous regulations. In other words, workers or independent workers' organisations have no legal authority to represent themselves in collective bargaining because they are supposed to be represented by official institutions (i.e. workplace trade unions or unionised representatives).

B. The right to initiate collective bargaining

(2.30) Under existing law, either party is allowed to initiate collective bargaining.[27] However, because the legislation fails to define the phrase "either party" clearly, it remains uncertain whether workers have the right to request collective bargaining directly. In addition, there is no national legislation stating that a workplace trade union is obligated to initiate collective bargaining when a constituency requests that it do so. Thus, although the Provisions on Collective Contracts (2004) stipulate that both parties are to bargain in good faith,[28] employers can lawfully refuse to bargain for "justifiable reasons".[29]

26 Article 4 of the Trial Methods of Trade Unions' Participation in Equal Consultation and Signing Collective Contract (enacted by the ACFTU, 1995).
27 Article 32 of the Provisions on Collective Contracts (2004).
28 Article 5 of the Provisions on Collective Contracts (2004).
29 Article 32 of the Provisions on Collective Contracts (2004).

(2.31) Some local regulations favour workers more than the national legislation does owing to the various competencies of local legislative agencies. Article 28 of the Regulations of the Shenzhen Special Economic Zone on the Promotion of the Harmonious Labour Relations, for instance, stipulates that neither party shall decline the other's request to engage in bargaining. The Provisions on Collective Contracts of Guangdong Province (2015), on the other hand, obligate trade unions to request collective bargaining when more than half workers of the workplace propose to do so (Article 18). Local regulations, then, can compensate for flaws in the national legislation by obliging trade unions to initiate bargaining and employers to engage in bargaining with workers.

C. The right to approve drafts of collective agreements

(2.32) Collective agreements drafted by two negotiating parties must be submitted to an employee representative council (ERC) for discussion and approval.[30] The ERC is intended to be an institution through which workers exercise democratic management and have opportunities to become involved in the bargaining process.[31] The Provisions on Collective Contracts (2004) describe several options for approving the draft of collective contracts.[32] However, pursuant to these regulations, "employee representatives" can lawfully approve drafts of agreements without the participation of rank-and-file workers in the ERC. The legislation is unclear when it comes to regulating the process of electing employee representatives,[33] who may turn out to overlap with the trade union cadres – being usually junior managers, loyal workers and other such interested parties. An authentic process for approval of collective agreement drafts has thus proved difficult to realise, for which reason the approval process could potentially be formalised.

2.5.2.3 Legal debates involving collective agreements

(2.33) The limitation on freedom of association is a further source of debate regarding the parties to collective agreements. The right of trade unions to represent workers in collective bargaining is not empowered by the latter, but by legislators. Thus, it is unreasonable to expect workers to be bound by collective agreements that they have not had part in negotiating. It also remains unclear whom the collective agreements that trade unions and

30 Article 51 of the Labour Contract Law (2008) and Article 36 of the Provisions on Collective Contracts (2004).
31 Article 13 (2) of the Provisions on the Democratic Management of Enterprises (2012).
32 Article 36 of the Provisions on Collective Contracts (2004).
33 Article 9 of the Provisions on the Democratic Management of Enterprises (2012).

employers sign in fact do bind.[34] In other words, there is uncertainty regarding precisely which workers are the actual parties to collective agreements under the present legislation.

(2.34) Currently, there are three main approaches this issue. Scholars such as Dong (2000: 159) have argued, based on the theory of contractual laws, that trade unions are parties to collective agreements in which workers are mere stakeholders. This line of interpretation, however, ignores the difference between collective labour contracts and other forms civil contracts. Other scholars have held that workers are the direct parties to collective agreements based on Article 33 of the Labour Law (1994) and Article 3 of the Provisions on Collective Contracts (2004), among them X. Zhang (1997) and Y. Zhang (2015). This approach seeks to justify the role of workers in collective bargaining but neglects the role of trade unions in representation. A third argument is that both workers and trade unions are parties to collective agreements; for instance, Chang (2004: 254-268; 2015: 21) contended that trade unions are "the body of form of labour", while workers are "the body of will of labour".

(2.35) Based on the issues discussed in this chapter, the third argument, that both workers and trade unions are parties to collective agreements, seems most persuasive. The notion that workers should be parties to collective agreements is clearly articulated in Article 33 of the Labour Law (1994) and Article 3 of the Provisions on Collective Contracts (2004), though Article 51 of the Labour Contract Law (2007) also give roles to trade unions in representing workers when collective agreements are concluded. Based on these three articles, then, collective agreements should involve the distribution of rights and interests between workers and employers. A trade union is thus simply a representing agency with no independent interest in the bargaining process, while workers are "the body of the will of labour". However, trade unions are also empowered to represent workers in various activities, such as concluding collective agreements with employers and supervising their implementation of them. In this respect, the roles of trade unions in collective agreement can be described as "the form of the will of labour". Trade unions and workers, approached this way, together constitute the party of "labour". Workers may reasonably be expected not to feel bound by collective agreements, as just observed since the right of trade unions to represent them is not empowered by them. Addressing this problem requires the participation of workers in trade unions, which can be realised

34 It is important to note the existence of problems associated with representing agencies on the employer side on both the industrial and regional levels of collective bargaining. Many areas of China lack local CEC branches, and some employers do not feel bound by collective agreements that "employers' representatives" sign with trade unions, since the former are usually not elected but rather appointed by government officials. For further discussion, see Cheng (2004: 106-107).

by allowing them to elect trade union leaders directly or at least granting some form of participation in trade union activities.

2.5.3 The right to strike

(2.36) Although, as has been seen, China has not ratified either C087 or C098, it has ratified the ICESCR, Article 8 of which recognises the right to strike. China did not express any reservations regarding this right when ratifying the covenant. Relevant domestic law, however, involves a complicated process.

(2.37) Four successive constitutions have been enacted since the establishment of the PRC, in 1954, 1975, 1978 and 1982. The right to strike did not appear in the first of these, but central leaders at that time showed tolerance for strikes. For instance, Chairman Mao oversaw the publication of the Instructions for Handling the Problems of Strikes and Students' Strikes in 1957,[35] in which strikes by workers and students were attributed to bureaucratism and governmental officials and CCP members were asked to make self-corrections in order to prevent strikes. The instructions thus acknowledged, in a negative way, the existence of political strikes.

(2.38) The freedom to strike was protected explicitly in the second and third constitutions.[36] It has been argued that this change was a product of far-left thinking associated with the Cultural Revolution of 1966-1976 (see further Chang and Cooke, 2015; Dong, 2012). To begin with, the third constitution of 1978, in regulating the freedom to strike, also regulated the "free exercise of public debate" (*daming, defang, dabianlun*) and "large-character posts" (*dazibao*), i.e. the wall-mounted posters that were widely used at the time to attack 'political enemies'. Second, there should have been no conflict between workers and employers, and therefore no need to regulate workers' strikes before 1978, since almost all enterprises were state-owned and workers were regarded as the masters of the country. For these reasons, the regulations on the freedom to strike in the third constitution seem to have been guided by political considerations.

(2.39) The freedom to strike does not appear in the fourth constitution, which was adopted in 1982 and is still in effect. The reason for its removal was unclear. It could be understood as a retreat from extreme leftist thought; it is also possible that legislators were preparing for China's impending transition to a market-economy and were concerned that labour activity could impede economic growth. This much is suggested by the ubiquity of the slogan "Development is an unyielding principle" (*fazhan caishi yingdaoli*) in the era of Xiaoping Deng.

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35 See http://laborlaw.com.cn/archives/5846.html, last visited 15 July 2017.

36 Article 28 of the Constitution (1975); Article 45 of the Constitution (1978).

(2.40) Currently, the term "strike" (*bagong*) appears only rarely in official documents. In a political sense, strikes are described as "public order incidents" (*zhian shijian*), "sudden incidents" (*tufa shijian*) or "mass incidents" (*qunti xing shijian*).[37] In labour law, such terms as "work stoppage" (*tinggong*) or "slow-down" (*daigong*) are used instead.[38] This choice of terminology reflects political influence in defining workers' collective actions. For instance, "mass incidents" are defined as "internal contradictions among the people" in the Opinions on the Work of Actively Preventing and Appropriately Handling Mass Incidents (2004). This definition lacks clarity and fails to distinguish workers' strikes from other collective actions. The term "work stoppage" is distinguished from "mass incidents" for the first time in the 2015 Opinions on Building Harmonious Labour Relationship, marking one step forward in the incremental progress toward recognition of the right to strike in China.

(2.41) While specific regulation on the right to strike is absent from current legislation, several relevant articles can be found in various legal branches, such as constitutional,[39] administrative,[40]criminal[41] and labour law,[42] though the interpretation of such articles remains open for debate. The relevant arguments take two basic forms. Scholars such as Chang (2013b) and Zhou (2008), on the one hand, contend that strikes are lawful in China because, first, Article 8(1d) of the ICESCR requires that ratifying countries guarantee the right to strike and China did not reserve this article when ratifying this convention; second, because Article 27 of the Trade Union Law (2001 amended version) explicitly regulates the role of trade union in mediating in strikes, which amounts to a kind of negative recognition by legislators of the legitimacy of striking (Chang 2013b: 138-139); and third, because workers' collective actions represent self-remedies or the exercise of contractual rights when employers fail to negotiate with workers in good faith (Yang, 2008). On the other hand, some scholars, such as Hou (2013) and Dong (2012),[43] argue that strikes violate individual labour contracts

37 For instance, the Public Security Regulations for Handling Mass Public Order Incidents, created by the Ministry of Public Security in 2000, and the Law on Responding Sudden Incidents of China (2007), enacted by the standing committee of NPC.

38 See Article 27 of the Trade Union Law (2001 amended version).

39 Article 8 of the Law of the People's Republic of China on Assemblies, Processions and Demonstrations (1989).

40 The fieldwork of Deng (2016) shows that, sometimes, governments detain or fine striking workers according to Article 23 (1) and (2) of the Public Security Administration Punishments Law of the People's Republic of China (2005, 2012 Amendment).

41 Article 291 of the Criminal Law (1997) regulates the criminal responsibility of "gathering a crowd to disturb public order". Elfstrom and Kuruvilla (2014: 454) also mention this Article.

42 Article 27 of the Trade Union Law (2001 amended version).

43 Also see He, Li (2010), 'A Collective Action Which Violates Laws but Acquired Praise-An Short Evaluation on the Honda Strike (In Chinese)', http: / /employment.yingkelawyer.com /2010 /06 /01 /2130.html, last visited 15 July 2017.

and law. By this interpretation, because strikes can bring a halt to production, and completing production is usually an essential obligation of workers in individual labour contracts, strikes may amount to breaches of labour contracts. Second, because applications are, pursuant to Article 8 of the Law of the People's Republic of China on Assemblies, Processions and Demonstrations (1989), required before such collective actions as assemblies and demonstrations can be carried out, any strikes not approved by government officials are unlawful.

(2.42) The effort has been made in this chapter to interpret these articles as literally as possible. Trade Union Law (2001 amended version) has indeed recognised the existence of strikes because it regulates trade union duties in coping with work stoppages or slow-downs, however, it can accordingly be concluded that the legislation only negatively admits the existence of wildcat strikes and not the right to strike more broadly. There are three reasons. To begin with, no legal text explicitly states that striking is protected in China. Second, the ICESCR cannot be directly invoked in Chinese jurisprudence. Lastly, Chinese domestic law is similarly unclear in regard to implementing the right to strike, being silent on such key considerations as who should enjoy this right (trade unions or workers), the conditions under with the right to strike can be exercised and the responsibilities in relation to improper strikes. However, it is also true that workers' spontaneous strikes violate individual labour contracts and other constitutional law, such as the Labour Contract Law (2008) and the Law of the People's Republic of China on Assemblies, Processions and Demonstrations (1989). This being the case, the existing legislation lacks coherence when it comes to issues relating to workers' strikes. As has been seen, this chaos is a consequence of the unclear definition of striking/workers' collective actions. In short, then, Chinese workers continue to lack clear protections with regard to this right because details regarding the nature of lawful strikes are absent from existing legislation.

2.6 The overall evaluation

(2.43) The above analysis discussed the regulations for each collective labour standard and the associated academic debates. In what follows, the labour standards are approached from a macroscopic perspective, specifically in terms of the progress that China has made and the associated problems.

2.6.1 The progress

(2.44) As alluded to earlier, China has made some progress in protecting collective labour rights in legislation that has been adopted since the marketization, including the elaboration of a basic legal framework for the

regulation of collective labour relations through the Provisions on Collective Contracts (2004), Trade Union Law (2001 amended version), Labour Law (1994) and Labour Contract Law (2008). Although they lack sufficient concreteness, these regulations show increased concern for the collective rights of workers. Many changes have occurred regarding the right to engage in collective bargaining and dispute-resolution mechanisms (also see Biddulph, 2012; Zheng, 2014). The legislation has come more and more to concentrate on the details of the collective bargaining process, including the election of bargaining parties and the monitoring of collective agreements. Legislators have also begun to show concern for the quality of collective agreements. Industrial-level collective bargaining has been established as part of an effort to compensate for the current drawbacks of workplace collective bargaining, and the ACFTU has moreover expanded collective agreement coverage by adopting a series of normative documents. A change in legislators' attitudes regarding workers' collective actions has also been observed. Since 2008, legislators have devoted increasing attention to establishing mechanisms for settling labour disputes, enacting several regulations, e.g. the Law of the People's Republic of China on Labour-Dispute Mediation and Arbitration (2008), Labour Dispute Mediation and Arbitration Law of the People's Republic of China (2011) and Provisions on the Negotiation and Mediation of Enterprise Labour Disputes (2011). The re-framing of the freedom of association has been less pronounced than has been the case with the other two standards owing to the deep roots of the traditional conception of it in the present political system, but there has been some limited progress here as well. The ACFTU is endeavouring to increase trade union density and to promote reform, especially at the workplace level, and has drafted several documents encouraging workers' involvement in enterprise management.

2.6.2 Problems with regulations governing collective labour rights

(2.45) Despite these improvements, there are several problems with the legislation, six of which are described in the following subsections.

2.6.2.1 Lack of clear procedures regarding the integration of international conventions into Chinese law

(2.46) There are currently no provisions explicitly governing the integration of international labour standards into Chinese law, nor any legal document establishing the legal hierarchy of international law (for relevant debate within academia, see Li, 2008). As a consequence, Chinese judges have been cautious about invoking international conventions, preferring to adopt domestic regulations and to ignore international ones, even those ratified by China, for instance, the ICESCR, Article 8 (1d) of which admits the right to strike, in order to avoid exposure to accusations of having applied the incorrect legal principles. A survey by Wang (2015) demonstrates that no

judge has referred to Article 8 (1d) of the ICESCR in settling cases involving strikes. As such, international conventions pertaining to labour law cannot be applied directly in China.

2.6.2.2 Legislators continue to be influenced by the thinking patterns of the planned economy

(2.47) Another problem is that Chinese legislators continue to be more or less under the influence of the thinking patterns of the planned economy when promoting the application of international labour standards in China. More specifically, quota-driven thinking remains in force. Examples include the Notice of the Rainbow Plan on Further Promoting the Implementation of the Collective Contract System (2010), the ACFTU's Working Planning on Deepening Collective Negotiation (2014-2018) (2014) and its Opinions Regarding the Enhancement of the Quality of Collective Consultation and the Effect of Collective Contract (2014) and Article 9 of the Trade Union Law (1992). The provisions in these documents indicate that legislators allow higher-level governmental agencies or ACFTU branches to set quotas for the lower levels when increasing trade union density and collective agreement coverage. The process through which the quotas are to be reached has not defined but, inevitably, they can be achieved only in quantity and not in quality, for the simple reason that these legal documents do not create substantial labour rights. The thinking pattern behind these legal documents is, then, historically dislocated from the market economy. Without empowering industrial actors with relevant collective rights, such top-down management can only bring superficial developments, but nothing sufficient to resolve labour disputes fundamentally. In the market economy, industrial actors are supposed to be allowed to engage in autonomous dialogues (Chang, 2004). The establishment of trade unions, and collective bargaining in general, would proceed more profitably in a bottom-up direction at the two parties' free choosing rather than in accordance with a top-down quota-driven pattern.

2.6.2.3 The politicisation of relevant legislation

(2.48) While collective labour standards have not been systematically protected or regulated, they have long been politicised by Chinese legislators. One of the functions of the single trade union system (as discussed in chapter 3) is to implement the policies of the ruling party. The term "collective consultation" is generally recognised as a re-framing of "collective bargaining" in a manner consistent with the ideology of the party-state, and the legislation relating to the right to strike has been similarly re-framed. Given that the labour movement has, since the establishment of the ruling party in 1920s, been connected closely with political purposes of the party (Friedman, 2014: 29-61), it is understandable that legislators remain cautious when it comes to regulating collective actions. Nevertheless, because most

strikes undertaken by workers in the current market economy are associated with economic disputes, the politicisation of workers' strike is not beneficial, for which reason industrial actions should be governed by labour law.

2.6.2.4 The separation of trade unions from workers

(2.49) One obvious problem for industrial relations in China is the separation of workers from trade unions, which is a consequence of the single trade union system. Under the current legal regime, the establishment of workplace trade unions can be lawfully dominated by higher-level unions and management. In the absence of meaningful participation by workers, a trade union is naturally less motivated to represent their interests. Consequently, workers have to fight for the right to represent themselves in collective bargaining. Therefore, even in the absence of a legal identity, workers or independent workers' organisations could be permitted to become involved temporarily in collective bargaining. In this way, four parties would be involved in collective bargaining: governments, trade unions, workers (or their independent organisations) and employers (or their organisations) (Taylor *et al.* 2003: 122).

2.6.2.5 Lack of protection for workers' participation in collective bargaining

(2.50) The direct participation of workers in collective bargaining is obviously an important precondition for ensuring that collective agreements reflect the will of the workers and also that workers feel bound by the agreements. Such affairs are not, however, guaranteed under the current legislation, either through trade unions, the only lawful agencies for representing workers, or through bargaining procedures. The right to request collective bargaining also remains the exclusive right of trade unions pursuant to national-level legislation, so that agreements can be lawfully passed without workers' direct participation in an ERC, circumstances that reinforce the preference for "collective consultation" over "collective bargaining".

2.6.2.6 The collective bargaining system is not based on the freedom of association and right to strike

(2.51) The collective bargaining system in China is not based on the freedom of association and explicit protection on the right to strike. In most countries, by contrast, the labour movement starts with workers striking for the right to organise and ends with the institutionalisation of this right (Chen, 2007: 66). Chinese legislation is paradoxical in this respect. Without the freedom of association, workers or their independent organisations cannot lawfully participate in collective bargaining owing to their lack of a recognised status. Empowering the ACFTU, a state-corporatist and semi-official institution (Chan, 1993), to represent workers is unlikely to lead to

worker-led collective bargaining, since this institution connects closely to the interests of the party-state, particularly its concern for political stability. The right to strike should, however, be a legitimate means for workers to defend their economic and social rights and interests.[44] This right is also widely regarded as the most powerful weapon for workers to force employers to compromise during collective bargaining, and its absence underscores the improbability of worker-led collective bargaining in China.

2.7 Conclusions and discussion

(2.52) Through an analysis of the relevant legislation, it can be seen that China is making progress, albeit slow, in protecting the collective rights of workers by creating an environment conducive to the conduct of collective agreements. Considerable attention has been given to increasing trade union density and collective agreement coverage, and what progress there has been is indicative of the Chinese government's efforts to ensure labour rights and to meet international labour standards. Nevertheless, application of the collective labour standards of the ILO has followed a distinctive path in China because of the country's single trade union system, within which workers can only exercise the right to join in trade unions organised by higher-level unions or by management. The right to strike is a precondition to guaranteeing the existence of collective bargaining. However, the act of striking has not yet been clearly defined in Chinese law. Until 2015, labour-related strikes were distinguished from other "mass incidents". The lack of a clear definition has led to regulatory chaos, but also to the impression striking is not forbidden in China, despite the absence of clear protections for it. By implication, the collective bargaining system in China is not founded on the principles of freedom of association and freedom to strike. As long as workers do not participate meaningfully in trade unions and other bargaining mechanisms, it remains unclear how collective bargaining can be conducted effectively between workers' official representative agencies (i.e. trade unions) and employers.

(2.53) It is important to observe that trade union plurality does not necessarily make sense for every ILO member state, for each country has a distinctive political system, history and culture. The issue here is that it is not apparent how a country with single ruling party can guarantee the rule of law (for more details on the rule of law in China, see Peerenboom, 2002). Under such circumstances, the recognition of independent workers' organisations does not automatically mean that workers' voices will be heard. Without the backing of state power, Chinese workers' organisations may be at a disadvantage relative to employers in the non-state economy.

44 ILO CFA Case 3184, interim report 380th, para. 236.

In other words, until and unless the rule of law is fully guaranteed in China, workers may not necessarily benefit more from the right to organise freely than in the context of the single trade union system. Nevertheless, granting workers this right could provide industrial actors with at least the possibility of engaging in autonomous negotiations and achieving industrial balance. Revision of the existing legislation is therefore also imperative. This chapter has provided an overview of the nature of China's compliance with the three labour standards, but the issue of implementing such international standards within the constraints of the Chinese political system by means of revising existing legislation remains to be addressed. This process of accommodation is more significant and more challenging than simply determining whether China has complied with the standards, as will be seen in the chapters that follow.

3 A comparative study of the trade union systems in socialist China, Vietnam, Laos and Cuba[1]

Abstract

(3.1) This chapter presents an analysis of legislation that explores systematically the modifications of the "Classic Dualism" trade union model that are operative in socialist China, Vietnam, Laos and Cuba. According to this analysis, legislators in these four countries, though they started with the same model, pursued divergent regarding the independence and representativeness that were granted to trade unions. The trade union systems of all four countries are inconsistent with the ILO labour standard on the freedom of association, but they are in harmony with the political environments in which they developed and are therefore shall persist, though aspects unsuited to the economic climate are expected to undergo change.

Keywords: Classic Dualism; trade unions; legislation; freedom of association

1 This chapter is based on a conference paper presented at the International Labour Process Conference (ILPC) 2016 in Berlin, and I offer my sincere thanks to Dr. Xuebing Cao of Keele University and Dr. Mingwei Liu of Rutgers University for their comments on an earlier version.

3.1 Introduction

(3.2) In 1991, the Soviet Bloc collapsed, and many Eastern European countries withdrew from the socialist camp. Communist countries almost ceased to exist. However, 26 years on, communist parties continue to govern China, Vietnam, Laos, North Korea and Cuba. These five countries have also developed considerable economic might and are indeed, with the exception of North Korea, experiencing an economic transformation. In what follows, "the four socialist countries" will refer to China, Vietnam, Laos and Cuba. In Eastern Europe, the shift from command to market economies coincided with the collapse of political structures in dramatic and sudden ways. The economic transformation in the four socialist countries, by contrast has occurred rather peacefully, with the various political regimes remaining almost intact as before the transformation. Amid the deepening reform in the four countries, the attitudes of the ruling parties toward the non-state economy have evolved from toleration to recognising its legal status and at last to positive encouragement of further development. With the diversification of enterprise ownership, there has also been an inevitable transition from a climate of industrial harmony to one of industrial conflict. Under these circumstances, the organisation of worker-dominated trade unions is expected to counterbalance the power exercised by employers.

(3.3) Pravda and Ruble (1986) have made significant contributions to the study of trade union systems in communist states. They defined the trade unions in communist states as "Classic Dualism", which they distinguished from the systems of the developed capitalist countries of the West. Following the lead of these scholars, Anita Chan, Irene Nørlund, Tim Pringle, Simon Clarke and Chang-Hee Lee have conducted comparative research into party-led unions in China, Vietnam, Russia and Laos (e.g. Chan and Nørlund 1998; Clarke, 2005 and 2006; Clarke *et al.*, 2007; Pringle and Clarke, 2011). Some scholars have concluded that the trade union systems in China and Vietnam are fundamentally similar but have diverged increasingly as economic reforms have taken hold (Chan and Nørlund, 1998; Chan, 2011; Lee, 2006). Pringle and Clarke (2011) and Zhu and Fahey (1999 and 2000), by contrast have found greater similarities between China and Vietnam in terms of industrial relations. Fry (2012) and Fry and Mees (2016) have taken a close look at the Laotian trade union system in comparison with those of China and Vietnam. In the case of Cuba, Ludlam (2009 and 2013) and Lee (2016) have helped to explain labour rights and the trade union system of that country to the wider world.

(3.4) There are, however, three obvious shortcomings to the previous literature. To begin with, existing research has concentrated more on industrial relations than on legislation, despite the clearly significant role that the latter plays in shaping industrial relations. Research conducted from a legal perspective is naturally called for to identify any flaws in the legislation.

Second, previous comparative research has frequently neglected Cuba, which as observed shares a similar political regime and trade union system with China and Vietnam. Third, most of the existing literature compares the trade union systems in socialist countries to those of capitalist countries, in particular Russia, but such comparisons across economic systems may result in impractical suggestions for reform, e.g. detaching unions from the single ruling party systems that are deeply rooted in their political regimes. Evenson and Ludlam (2011: 4) have also argued that "narrowing the frame of reference to a free-market, multi-party system not only poses the theoretical dilemma of presuming no other possibilities; as a methodology, it also lends itself to false comparisons and conclusions that impede rather than engender more profound examination". In light of these considerations, realistic solutions seem more likely to issue from comparative research involving countries with similar political regimes.

(3.5) This chapter represents an effort to fill in these three gaps in the literature, offering a comparative study of legislation pertaining to trade unions in China, Vietnam, Cuba and Laos. Pravda and Ruble's Classic Dualism model, being the most widely accepted for describing the nature of trade unions in un-reformed communist regimes (Fry, 2012: 37; Nørlund, 1996: 89; Howell, 2008), will serve as the theoretical basis for assessing the underlying assumptions, characteristics and applications of legislation in the four socialist states before their economic transformation. There follows an investigation of ways in which the legislation relating to trade unions has undergone modification during the economic transformation. In the next section, the current trade union systems of the four countries will be evaluated in terms of their compliance with the ILO's fundamental collective labour standards. Then it evaluates of whether the relevant legislation is suited to the economic and political backgrounds of the various countries and includes suggestions for future legislative reform.

(3.6) The materials used in this chapter have been accessed mainly through three channels. Firstly, there are numerous citations of legal texts of domestic legislation of the four countries. An obvious difficulty regarding this kind of research is that not all countries make available official English translations of domestic legal documents. In an effort to maintain objectivity, the sources are provided when the legal texts are quoted for the first time, and, in order to compensate for the scarcity of English translations, this chapter also supplies quotations from previous literature concerning trade union systems for the relevant period. Previous literature is also referred to for the purposes of analysing the background of the law. There is of course always the possibility of bias in existing studies; for instance, work by native scholars may be insufficiently critical enough owing to a lack of knowledge about other countries. The work of external scholars, by contrast, though it may bring a broader perspective to bear and be conducted with greater freedom, may undervalue or criticise harshly the

trade union systems in socialist countries. In order to draw a complete and realistic picture, then, this chapter refers to the literature from both native and international writers. Reports and observations made by and cases heard by the CFA of the ILO constitute the third source. These materials can shed a light on the inconsistencies between fundamental ILO fundamental labour standards and the current political regimes in the socialist countries.

3.2 'Classic Dualism': introduction and the application to the four countries prior to the economic transformation

(3.7) Pravda and Ruble (1986: 3-6) found similarities among communist unions in terms of structure, organisation and function – and close adherence to the Leninist model that informed Soviet trade unions in the 1920s – that informed their "Classic Dualism" model. From this perspective, the unions of communist states are insignificant and idiosyncratic organisations that have little in common with their Western analogues. The following discussion offers a basic introduction to Classic Dualism and its application to the socialist countries before the economic transformation.

3.2.1. Classic Dualism

(3.8) The three characteristics of "archetypal Classic Dualism" are trade union functions, organising principles and their relations with management, governments and communist parties.

(3.9) To begin with, Pravda and Ruble argued that trade unions in communist states have both a *production function* concerned with the mobilisation of labour production and a *protection function* concerned with defending members' rights and interests. The production function can be further divided into education in the area of management and ideology and the maintenance of labour discipline and helping members to achieve higher productivity. The two functions are based on the assumption that no social conflict exists within a socialist society.

(3.10) The second characteristic of Classic Dualism concerns trade union organising principles, in particular, *production principle* and *democratic centralism*. According to the production principle, all individuals employed in a given sector of an economy should be eligible for membership in the same union whether they are workers or managers. The democratic centralism principle refers to a highly centralised, bureaucratic system of decision-making.

(3.11) Third, unions become subject to outside control by communist parties at all levels, meaning that the majority of all union executives are party members. This control also enables unions to fulfil their designated role as "conveyor belts" between communist parties and the general population,

transmitting party policies to labour and information from the shop floor to the party.

(3.12) To summarise, according to Pravda and Ruble (1986), Classic Dualism is based on the assumption that no conflict of interest exists within a society. Trade unions have two functions: production function and protection function. Trade unions retain a centralised, hierarchical structure defined by the interconnection of production and democratic centralism. The intimate relations between trade unions and communist parties indicate trade unions' conveyer belt role in transmitting messages.

(3.13) The dual function and the party-union relationship are two essential features of the trade union model. The dual function implies that trade unions in socialist countries have the double identity of a state bureau and a labour organisation. The identity of a state bureau involves managing workers in the political and economic spheres. This production function is inconceivable for Western trade unions because it requires trade unions to act in the interests of enterprises, which conflicts with the function of protecting workers' rights and interests. The two identities and functions are, however, compatible in the typical socialist countries where there is often an absence of conflict. A close relation between trade unions and political parties, is not uncommon world-wide; the distinction is that there is only one ruling party in each socialist country mentioned here, thus the unions in these countries have no opportunity to cooperate with other political organisations.

(3.14) Scholars who have fully or mostly embraced Classic Dualism include Warner (2008), Li (2010: 69), Nørlund (1996), Howell (2008), Fry (2012) and Chan (1993). Others, however, have rejected Pravda and Ruble's template and terminology in favour of their own models of the changing nature of socialist and post-socialist unions. For instance, Clarke *et al.*, (1993: 95) argued that Pravda and Ruble's template is "based on the 'formalistic' view of soviet trade unions, which focuses on their constitutional and legal functions, to the neglect of their actual operation in the everyday life of the enterprise" (also see Pringle and Clarke, 2011; Clarke and Pringle, 2009; Ashwin and Clarke, 2002). In point of fact, however, the other interpretations are more or less consistent with the essence of Classic Dualism. For instance, Clarke (2005:5) also argued that trade unions in China and Russia have two roles. Given these considerations, the Classic Dualism model has been chosen as the approach best suited to analysing the fundamental nature of trade unions in the four socialist countries.

3.2.2 Classic Dualism in the four socialist countries before the economic transformation

(3.15) After communist parties seized power in the four countries, they imposed planned economies. Within this context, enterprises were owned

by the state, while workers were defined as the legal owners of the countries. In other words, the interests of employers and workers were considered to be the same, so that there could be no industrial conflict. Striking was therefore inconceivable.

(3.16) The characteristics of trade unions in China (Wilson, 1986) and Laos (Fry, 2012) before the economic transformation have been specifically discussed in previous studies, the conclusions of which are consistent with the definition of Classic Dualism by Pravda and Ruble. However, there has been little research into whether Vietnamese trade unions before the reform can be described in terms of Classic Dualism, and the research on Cuban trade unions has been similarly limited. The following discussion accordingly goes into some detail regarding the characteristics of trade union regimes in these two countries; it also touches on the characteristics of Laotian and Chinese trade unions in brief.

(3.17) China's establishment of a trade union system was characterised by unabashed borrowing from the Soviet model (Wilson, 1986: 228), which means that China began adopting the Classic Dualism model before its economic transformation. Trade unions in this earlier period served the dual function just discussed, being regarded, on the one hand, as administrative co-managers charged, along with the state with mobilising workers to achieve production quotas and consolidating political regimes[2] and, on the other hand, being also expected to protect workers' rights and interests in matters of social welfare and in signing collective contracts.[3] As in the Soviet system, Chinese trade unions were organised according to a production principle and held together by democratic centralism.[4] After being created by the Chinese communist party in 1920s, the ACFTU enjoyed close relations with the party. Although the party-union relationship was not explicitly regulated in the Trade Union Law of the PRC (1950), the ACFTU was by no means allowed to function independently of the ruling party; two attempts to secure greater freedom from party control, in 1956-57 and in 1966, failed (Chan and Nørlund, 1998: 175; Chan, 1993: 33; Friedman, 2014: 40-48).

(3.18) Before the economic reform, the essential features of trade unions in Vietnam were also consistent with the Classic Dualism model. First, the unions that formed at that time had the two main functions of promoting production and protecting workers' interests. Under North Vietnam's Trade Union Law (1957), trade unions were charged with economic management of both the state and of enterprises (Nørlund, 1996: 89; 2004: 111). Article 5 of the same law also regulated trade unions' representational role in

2 Article 9 of the Trade Union Law of the PRC (1950).
3 Articles 5, 6, and 8 of the Trade Union Law of the PRC (1950).
4 Articles 2 and 3 of the Trade Union Law of the PRC (1950).

concluding collective contracts. During the Vietnam War (1964-1975), trade unions were also assigned the task of evacuating workers to the countryside and securing basic living conditions (Chan and Nørlund, 1998: 174). The dual function of trade unions returned to standard Classic Dualism after the reunification of the country in 1976, again mobilising workers to achieve production goals and protecting workers' rights and interests.[5] Second, trade union organisations in Vietnam also followed the principle of production and democratic centralism, resulting in highly centralised and hierarchical structures (Edwards and Phan, 2008: 206; Zhu and Benson, 2008). Like the ACFTU in China, the Vietnam General Confederation of Labour (VGCL) was not only closely associated with the anti-colonial struggle of the time but was also closely linked with the communist party. However, the party's control of Vietnamese trade unions was weaker than was the case in China, in part because of the Vietnam War, during which the communist party in the North was less able to impose an authoritarian bureaucratic system. The national union thus had stronger ties with its constituency than did the Chinese national union with its constituency (see Chan and Nørlund, 1998: 175-176; Edwards and Phan, 2008). Overall, then, prior to the economic transformation, trade unions in Vietnam functioned more or less as predicted under the Classic Dualism model, allowing for some slight adjustments concerning their functions and relations with the communist party.

(3.19) Fry's (2012: 39-43) detailed study of the Laotian trade union system describes it in terms of Classic Dualism both before and during that country's economic transformation. The Lao Federation of Trade Unions (LFTU) was created by Lao People's Revolutionary Party in 1956. After the revolution, the party disbanded other unions, leaving the LFTU as the sole union for the country. The LFTU also complied with the principle of democratic centralism. Union duties were characterised as transmitting socialist ideology to all organisations and said "to be a bridge which firmly joins the Party with the working people" (Fry, 2012: 40).

(3.20) The main characteristics of the Cuban trade union system before the reform were also consistent with the Classic Dualism model. The Central Union of Cuban Workers (CTC) was founded in 1939 and taken over by Cuban Communist Party in 1959. The CTC and its branches had dual function in the socialist system of protecting both the economic, political and social interests of the country as a whole and also the rights of Cuban workers and enhancing their standard of living.[6] The organisational principles of trade unions in Cuba also followed the doctrine of democratic centralism (Thale and Boggs, 2013: 7). The close relationship between the Cuban communist party and the CTC is reflected in Cuban legislation. Article 5

5 Article 10 of the Constitution of Vietnam (1959, 1980).

6 See Articles 16 and 17 of the Cuban Labour Code (1985, No. 49).

of the Constitution of Cuba (1992)[7] stipulates that the communist party is the main guiding force in both society and the state and that the CTC and national unions must adhere to its policies (see Evenson and Ludlam, 2011).

(3.21) Prior to economic transformation, then, the trade union systems of the four socialist countries were all consistent with the Classic Dualism model, allowing for some slight adjustments to account for the peculiar historical situation of Vietnam. This much is consistent with the expectations of Pravda and Ruble (1986: 9-10), who designed the model to be adaptable to distinctive cultural and historical contexts.

3.3 Changes in trade union regulations brought by the economic transformation

(3.22) The highly centralised command economy model promoted economic progress at first, but drawbacks gradually became apparent. Pursuing equality and job security inevitably resulted in decreased production efficiency and, in order to compensate, the leaders of the four countries decided to bring about economic transformation. China adopted the policy of "reform and opening to the outside world" (*gaige kaifang*) in 1978, and in the mid 1980s Vietnam and Laos, and after 1990 Cuba, followed suit. In the latter case, reform under Fidel Castro was slow, though the pace of economic reform has accelerated since Raúl Castro came to power in 2006. The economic changes were accompanied by modifications to the laws. The following discussion explores relevant legislation from the four countries in an effort to determine whether this new economic era preserved the dualistic trade union systems.

(3.23) In China during the economic transformation, most characteristics of Classic Dualism have remained unchanged, though several small adjustments have been made. First, with regard to the roles of trade unions, the production function continues to be regulated: unions are mandated to assist enterprises in achieving production quotas and the party-state in managing and educating workers with regard to the ruling ideology.[8] At the same time, however, the protective role of trade unions has been strengthened, especially in regard to representing workers in collective contracts and protecting their welfare.[9] Meanwhile, the role of mediating wildcat strikes has been given to unions in the modified labour law.[10] This new

7 See http://www.cubanet.org/htdocs/ref/dis/const_92_e.htm for the English version of the Constitution, last visited 7 July 2017.

8 Articles 5 and 7 of the Trade Union Law of the PRC (2001 amended version).

9 Article 51 of the Labour Contract Law of the PRC (2008); Articles 6 and 30 of the Trade Union Law of the PRC (2001 amended version).

10 Article 27 of the Trade Union Law of the PRC (2001 amended version).

role demonstrates that legislators have taken the step of recognising the existence of industrial conflict in China, though the law affords no clear protections to the right to strike. With regard to the union-party relationship, the ACFTU's third attempt to secure greater independence from the ruling party failed like the first two, so that the federation remains firmly under party lead (Friedman, 2014: 40-48; Clarke and Pringle, 2009: 86; Chan, 1993; Cooke, 2011a: 113). [11] Overall, the present legislation represents only a small step toward increasing the representativeness of Chinese trade unions.

(3.24) Of the four countries under comparison here, Vietnam has gone the furthest in its adjustment of the Classic Dualism model during its economic transformation. While trade unions are still expected to act as co-managers with the state, their role in mobilising production to achieve a higher productivity has been eliminated. In addition, trade unions have been granted the right to make decisions regarding strike actions. The law even distinguishes rights-based strikes from interest-based strikes.[12] Another obvious reform is that Vietnamese trade unions have been given the rights to join international organisations and to accept funding.[13] Despite this progress, however, the VGCL is still required to follow the lead of the party-state, as detailed in Article 1 of the Law on Trade Union of Vietnam (2012). In short, Vietnamese trade unions have enjoyed a far more pro-labour legislative regime than those in the other three countries as a result of the reform, which is apparent in the removal of the role of mobilising to achieve production, the addition of the role of organising strikes and the loosening of the party-union relationship. In these respects, trade unions in Vietnam are characterised by relatively greater independence and representativeness.

(3.25) Turning to Laos, from the beginning of the economic reform, trade unions in that country have also been granted some measure of independence and representativeness for their members. The protective function of trade unions has been clearly stated in Laotian law,[14] and more recent legislation has expanded this function.[15] In addition, worker stoppages

11 Article 4 of Trade Union Law of the PRC (2001 amended version).

12 See Articles 205 and 206, the new Labour Code of Vietnam 2012; for the English version, see https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/91650/114939/F224084256/VNM91650.pdf, last visited 15 July 2017.

13 Articles 8 and 26 of the Vietnamese Law on Trade Union (2012).

14 See Article 2 of the Law on Lao Trade Unions (2007), the English version of this Law can be found at http://asean.org/storage/2016/06/L1_LAw-on-Lao-Trade-Unions-2007.pdf, last visited 15 July 2017.

15 See Article 165 of the Labour Law of Lao (2013); for the English version, see the ILO website http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/96369/113864/F1488869173/LAO96369%20Eng.pdf, last visited 15 July 2017.

have been permitted,[16] as has cooperation with other international organisations.[17] Nevertheless, the production function remains almost unchanged from before the economic transformation;[18] the separation of Laotian trade unions from the ruling party is less than is the case in Vietnam.[19]

(3.26) Compared with the trade union regimes in the other three countries, that in Cuba has undergone less change; the new labour code (2014) restates most of the trade union rights that were previously in existence.[20] It does, however, provide some extra space on recovering labour discipline,[21] a change adopted in an effort to boost production efficiency. Moreover, the right to organise volunteer work has been taken away from unions, a change reflecting a shift from moral to material incentives (Ludlam, 2013). In addition, certain aspects of working conditions have been opened up to negotiations between unions and employers. Nevertheless, the new code does not follow Vietnam, Laos and China in recognising the existence of industrial conflict. Cuban trade unions are neither granted the right to organise strikes nor empowered to mediate work stoppages. The slow pace of the modification of legislation is largely a result of the slow pace at which Cuba has been undertaking economic reform.

(3.27) The legislation concerning the trade union systems in the four countries has, then, been amended to various extents, as illustrated in Table 5, in which 0 indicates legislation that has undergone almost no change; 1 indicates complete modification; 0.5 indicates revision of approximately half of the body of labour law and 0.25 indicates slight revisions. As can be and has been seen, during the economic transformations of the four countries, two features of Classic Dualism have remained almost unchanged (0): trade unions continue to act as co-managers with the state in educating workers and also to maintain the same organising principle. With regard to other features, only Vietnam has removed from unions the role of mobilising workers in production (1). Still all four countries have created more space for trade unions to be more representative of workers in such key activities as collective negotiations and promoting workers' welfare; since unions'

16 Article 154 of the Labour Law of Laos (2013) conditionally permits strikes by stating "In cases where a labour dispute is still in the process of resolution as stated in Article 148 of this law, the employee must continue work as normal and the employer must make the workplace available, except in very serious cases or in the event that a tripartite organization agrees to a work stoppage to avoid damage that may occur. In case a labour dispute cannot be resolved, a strike could be organized based on law and regulations."

17 Article 8 of the Lao Law on Trade Unions (2007).

18 See Article 165.1of the Labour Law of Laos (2013) and Article 21 (3) of the Lao Law on Trade Unions (2007).

19 Article 2 of the Lao Law on Trade Unions (2007).

20 For the Spanish version of this code, see the ILO website, available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96404/113996/F288013741/CUB96404.pdf, last visited 16 July 2017.

21 See Articles 14(c), (f) and 15(b) of the Cuban Labour Code (2014).

representative role is not sufficiently detailed, the changes are quantified as 0.5. With regard to the right to strike, which is also one embodiment of protection function, only in Vietnam and Laos has there been explicit regulation (1). The Chinese legislation negatively admits the existence of wildcat strikes (0.5), but it neither explicitly protects nor prohibits this right. Cuban legislation, by contrast, has not progressed at all in this respect, reflecting the unique evolution of the dual functionality of trade unions in Cuba; so it is that the new labour code places greater emphasis on labour discipline and production efficiency (-0.5). Finally, in terms of the party-union relationship, there has been some relaxation in Vietnam (0.5) and a little less in Laos (0.25), with almost no change in China or Cuba from before the economic transformation.

Table 5: Comparison of steps towards increased independence and representativeness in the trade union systems of the four countries

Item \ Country			China	Vietnam	Laos	Cuba
Dual function	Production	Removing the role of educating as state co-managers	0	0	0	0
		Removing the role of mobilising to achieve production tasks	0	1	0	-0.5
	Protection	Representing (e.g. collective negotiation on enlarging topics)	0.5	0.5	0.5	0.5
		Organising (e.g. the right to strike)	0.5	1	1	0
Organising principles			0	0	0	0
Separating union-party relations			0	0.5	0.25	0
Overall			1	3	1.75	0

(3.28) Table 5 indicates that the legislators in the four countries have demonstrated various levels of willingness to move towards more representative and independent trade unions. Among those countries, Vietnam has reformed the most (with an overall score of 3) by adopting such measures as granting trade unions the right to initiate strikes, removing the role of mobilising production, and allowing trade unions to separate from the ruling party to some small degree. After Vietnam, Laos has made the second greatest progress (overall score of 1.75): the right to strike has been regulated and trade unions have been separated from the ruling political party to a certain extent. Such separation remains unimaginable in China, though, as shown by the ACFTU's consistent failure to acquire greater independence. Compared with those in Vietnam and Laos, legislators in China have not shown much willingness to promote more representative and independent trade unions (overall score of 1); the existence of wildcat

strikes has been acknowledged, but the right to strike has not been clearly protected. Finally, in the case of Cuba, its lowest overall score (0) among the four countries is an indication that trade unions are heading in two different directions as a result of the slow pace of economic reform. In short, in the new economic era, trade unions in the four countries, which started from roughly the same position, have undergone some progress towards greater representativeness, though to different degrees. Those in Laos and Vietnam have also started on a path towards greater autonomy.

3.4 Do the current trade union systems comply with ILO core conventions?

(3.29) Trade union systems are closely connected with the freedom of association. This labour standard is articulated in ILO Convention 087 (Freedom of Association and Protection of the Right to Organise Convention) and Convention 098 (Right to Organise and Collective Bargaining Convention). Through an analysis of the relevant legislation, the following discussion assesses the compliance of the present trade union systems in the four countries with the ILO core conventions.

(3.30) Among the four countries, only Cuba has ratified both conventions. Nevertheless, according to the ILO Declaration on Fundamental Principles and Rights at Work (1998), the freedom of association is binding on all member states as well as those that have not ratified the two conventions. This right is also regulated by Article 8 (1a) of the ICESCR, which only Vietnam and China have ratified (in 1982 and 2001, respectively). The freedom of association is in any case clearly regulated in the domestic law of each country.[22]

(3.31) In the context of regulating the freedom of association, the domestic legislation of the four countries also stipulates a single trade union system – the ACFTU in China, the VGCL in Vietnam, the LFTU in Laos and the CTC in Cuba. Article 10 of the Trade Union Law of the PRC (2001 amended version) only allows for the recognition of the ACFTU. Article 13 of the Cuban Labour Code (2014) protects the right to associate voluntarily and to form trade unions; however, the exercise of this right is required to conform with foundational unitary principle, which refers to the CTC and its affiliates (Ludlam, 2013: 14). Workers in Vietnam also have the right to participate in, establish and operate trade unions, but again the practice

22 This domestic legislation includes Article 13 of new Labour Code of Cuba (2014); Article 44 of the Lao Constitution (2003 amended version); Article 3 of the Trade Union Law of China (2001 amended version) and Article 5 of the Law on Trade Union of Vietnam (2012).

of these rights must comply with the relevant provisions in the Charter of Vietnamese Trade Union, Article 8 of which stipulates the single unified trade union system. The Laotian trade union also follows a strict pyramidal structure according to Article 14 of the Lao Law on Trade Unions (2007). As such, the single trade union system regulated in the domestic law is inconsistent with the freedom of association, meaning that a plurality of trade unions in these countries impossible.[23]

(3.32) Political concerns predominate in the regulation of a single trade union system. In general, authoritarian governments develop special relationships with selected associations (Unger, 2008: 7); in the case of trade unions, such relationships serve to sustain a "legalized and institutionalized labor movement depoliticised, controlled, and penetrated by the state" (Collier and Collier, 2002). This phenomenon is observable in all four socialist countries. The ACFTU, LFTU and VGCL grew in step with the ruling parties of their respective countries during the various wars fought by Asian countries against imperialist powers. The Chinese and Laotian unions were established directly by the national communist parties even before communist regimes came to power and, in performing the role of mobilising workers for the war effort, have served a party-oriented, political purpose from their inception (see Friedman, 2014: 29-33; Edwards and Phan, 2008: 201-203; Fry, 2012). After the wars, trade unions in the four socialist countries were supposed to act as state bureaus, educating workers regarding Marxist-Leninist ideology and national policies. During this transformation, all four countries have witnessed the development of a non-state economy, within the context of which party-led unions are supposed to maintain a socialist path and social stability in the workplace, as is evidenced by unions' statutory role as co-managers alongside the ruling parties.[24]

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23 In CFA Cases (Case NO. 2258 and Case No. 1961), Cuban governments did not recognise trade unions such as the CUTC (Single Council of Cuban Workers), CTDC (Confederation of Democratic workers of Cuba) or the CONIC (Independent National Workers' Confederation). The Cuban court judged many unionists for engaging in criminal acts, such as inciting public disorder. Many worker independent organisations in China were rejected, including the Beijing Workers' Autonomous Federation in CFA Case 1652 (1992), the Workers' Forum in Shenzhen, the FLUC (The Free Labour Union of China) and LPRWP (the League for the Protection of the Rights of Working People) in CFA Case 1930 (1997) and the independent workers' organisations in Heilongjiang, Liaoning and Sichuan Provinces in the CFA Case 2189 (2003). Many trade unionists from these organisations were charged with committing criminal acts, such as engaging in activities endangering state security, providing information to foreign countries, accepting foreign funds and hooliganism.

24 The relevant articles include Article 5 of Trade Union Law of the PRC (2001 amended version); Article 11 of the Law on Trade Union in Vietnam (2012), Article 14(e) of the Labour Code of Cuba (2014) and Article 10 of the Lao Law on Trade Unions (2007).

(3.33) Under these circumstances, the freedom of association mandated by the ILO appears to be incompatible with the political regimes of the four countries. When defining legitimate trade union activities, the CFA pays more attention to their content than to their funding sources. For instance, the CFA declares that "it is for these organizations to decide whether they shall receive funding for legitimate activities to promote and defend human rights and trade union rights" (ILO CFA Cuba Case 2258, Report 332, para. 515). This attitude is prevalent in many cases heard by the CFA.[25] However, the CFA's criteria are simply unacceptable to socialist countries such as China and Cuba,[26] which are concerned that capitalist countries may exploit independent workers' organisations to spread capitalist ideologies. This concern is not ill-founded; in Cuba, for instance, the U.S, government has channelled millions of dollars a year to dissidents through "democracy promotion" programs for the stated purpose of "regime change" (Thale and Boggs 2013: 10; Evenson and Ludlam, 2011: 14). On the other hand, even in the absence of foreign influence, independent organisations remain outside the law in these countries because of the potential threat that they pose to the current political regimes. The Worker Autonomous Federation, by way of example, was intertwined with the politics of the 1980s, and a few workers within this federation ever demanded the formation of an independent political party, meaning a multi-party system (Chan, 1993: 57). The VGCL and LFTU have been allowed to co-operate with international organisations, but only to a very limited extent,[27] since such co-operation is obliged to follow the principles of respecting "national sovereignty and independence, and conformity with the laws of Vietnam".[28] In addition, the two trade unions are still compelled to follow the leadership of the corresponding ruling parties.[29] To put a fine point on it, no cooperation between the VGCL or LFTU and an international organisation may compromise the close union-party relationship. As such, the freedom of association is not only incompatible with the Chinese and Cuban political systems but also with the close party-union relationship prevalent in Laos and Vietnam.

25 In handling with Case 1930 (Report 310, para. 360), the CFA contended that "the Committee would recall that it has always considered that all national organizations of workers and employers should have the right to receive financial assistance from international organizations of workers and employers respectively, whether or not they are affiliated to the latter". For similar statements, see Case 2031 (Report 321, para. 360).

26 For instance, the Cuban government responded to the accusation of the CFA (Case No. 2238, para. 421 of Interim Report 334) that "The Cuban authorities are of the view that, in this matter, the Committee is motivated by obviously political interests, depriving of any credibility, objectivity and impartiality."

27 Article 8 of the Lao Law on Trade Unions (2007).

28 Article 8 of the Vietnamese Law on Trade Union (2012).

29 Article 2 of the Law on Lao Trade Unions (2007) and Article 1 of the Vietnamese Law on Trade Union (2012).

(3.34) To summarise, the trade union systems of the four countries are incompatible with the freedom of association demanded by the ILO, but this fact must be considered in the context of their historical backgrounds and political climates. As argued by Clarke (2005: 2), "the specificity of their historical legacy makes it inappropriate to conceptualise post-socialist trade unions within theoretical frameworks developed through the analysis of trade unions that have grown up in capitalist societies". The fundamental concern is political. The freedom of association is an essential ingredient of the Western trade union model, which was shaped in developed capitalist countries by multi-party political regimes and spontaneous market economies. The socialist countries' concern that independent workers' organisations may be the tools of hostile countries or organisations and that complete compliance with the ILO standard may undermine the existing political order are reasonable because they are surrounded by countries with different ideologies. Independent workers' organisations naturally have fewer reasons to show loyalty to ruling parties than party-established trade unions. Hence, to consolidate their positions, the socialist ruling parties have come to rely each on a single recognised union (the ACFTU, LFTU, VGCL and CTC) to manage and educate their workers.

3.5 Does the legislation concerning trade union systems fit the economic and political situations in these countries?

(3.35) As observed, while the economies of the four countries discussed here are undergoing transformation, their political regimes have remained almost unchanged. Labour legislation must suit the political and economic environments of the countries in which it is enacted if it is to cope successfully with the growing number of labour disputes and the potential for social disturbances. The following discussion assesses the extent to which the relevant legislation conforms to the economic and political circumstances in each of the four countries.

3.5.1 Fit between legislation and economic situation

(3.36) During their economic transformations, the four countries have adopted similar measures, including granting state-owned enterprises autonomy, allowing the private economy to develop and attracting foreign investment. China, Vietnam and Laos worked to build socialist market-oriented economies. China's success in this regard was evident in 2001, when it joined in the WTO. Vietnam embarked on the path to a market economy in 1999[30] and joined the WTO in 2007. The agriculture-based

30 For more details, see Lawrence, W. Reed, "Free markets Blossom in Vietnam", available at http://fee.org/freeman/free-markets-blossom-in-vietnam/, last visited 17 July 2017.

economy of the Lao People's Democratic Republic has also grown rapidly in recent years while shifting from a centralised, planned economy towards a more open, liberalised and market-oriented system;[31] Laos joined the WTO in 2013. Cuba has been a member since 1995 and, though its economy remains dominated by state-owned enterprises, these enterprises have been given greater autonomy, and the private economy is also increasing in Cuba.

(3.37) Amid the economic transformation, a separation among workers, enterprises and governments has been observed within each of the four countries. Most state-owned enterprises have been instructed to separate from the state, and the non-state economies have enjoyed remarkable growth. Under these circumstances, a fundamental assumption of Classic Dualism, the absence of social conflict, cannot be fulfilled. In general, in market economies, employers seek to maximise profits while workers pursue better working conditions – a situation that is not amenable to a Marxist-Leninist ideological explanation for why workers should tolerate harsh working conditions. The diverging interests of the various industrial actors thus challenge the traditional Classic Dualism model.

(3.38) The dominant definition of a trade union remains the one put forward by Webb and Webb (1920: 1): "a continuous association of wage earners for the purpose of maintaining or improving the conditions of their working lives". Approached this way, trade unions in a market economy are supposed to fulfil the role of protecting workers' rights and interests rather than acting on behalf of employers. This definition is rooted in market economies in which industrial conflict has always existed. As the economic reforms in China, Vietnam and Laos have taken effect, industrial conflict has also appeared, and can be expected to do so in Cuba. Within the Classic Dualism model, the role of mobilising workers to realise production tasks is in contradiction with the protection function because, as has been stated repeatedly, the former role requires trade unions to fight for the interests of employers while the latter demands that they protect workers' rights and interests. In the four countries, this mobilising role has had to be eliminated once industrial conflict began occurring, though this has only occurred in Vietnam; in the others, the relevant legislation still admits of this role.[32] Reform along these lines may not necessarily result in greater representativeness for the trade unions, but it can at least remove from unions any legal basis for subordinating workers' interests to those of employers.

31 For more details about the economy of Laos, see Lao Economic Overview, available at http://www.laocci.com/index.php?option=com_content&view=article&id=59&Itemid=41&lang=en, last visited 17 July 2017.

32 See Article 14 (c) of the Labour Code of Cuba (2014); Article 7 of the Trade Union Law of the PRC (amended version in 2001) and Article 163 (1) of the Lao Labour Law (2013).

3.5.2 Fit between legislation and political background

(3.39) As just observed, in the reform era, the political systems of the four countries have remained almost as before, with single communist ruling parties. Trade unions continue to fulfil the role of educating and managing workers. Their reliance on party-state prevents unions "from acting as a voluntary organisation representing social power arising bottom-up from civil society" (Chen, 2009: 664). It also reduces the possibility for trade unions to act independently or to co-operate with other organisations. In other words, strong union-party affiliations have the potential to undermine attempts to improve workers' standing, since the ruling parties' policies are inevitably at odds with a union's function of protecting worker's rights and interests; "the policies cannot but at times go sharply against the immediate material interests of the workers" (Harper, 1969: 88).

(3.40) At the same time, separating trade unions from the ruling parties may come at a cost. Thus unions could implode, as did the Russian Union Federation when it was abandoned by the Russian Soviet Party (Taylor and Li, 2007: 711). The relationship between the single ruling party and single union in each socialist country is complicated. The four recognised unions are defined by statute as co-managers of the states in which they operate. However, these ruling parties have been cautious about granting unions corresponding rights, again out of concern that they may challenge the existing regimes, as happened in Poland in the 1980s. Thus, even if these unions were to accept the leadership of the ruling parties, they still would not be fully empowered. Within this context, it is in fact unclear how the trade unions could exercise strong countervailing power to represent workers' rights and interests in the face of pressure from employees if they were separated from the ruling parties. Chen (2009: 670) has argued along these lines that it is the state power that the unions have acquired that allows them to advance pro-labour legislation or policies. Separated from the communist party, the four unions might then face a significant challenge in efforts to establish branches at the workplace level; and, without party backing, the voice of the unions could also be weakened.

(3.41) At the workplace level, as explained by Taylor and Li (2007: 709), workers do not request assistance from trade unions is not because of any ideological distaste, but "simply because the unions are generally incompetent or incapable of acting on the workers' behalf". Obviously, for rank-and file workers, Marxist-Leninist ideology and communist party rule are superfluous, mere political slogans; their distrust of trade unions is largely due to their dependence on enterprise management. At workplaces, by contrast, the subordination to the ruling party may provide trade unions leverage to counter-balance the alliance between employers and lower-level governmental agencies. It may therefore not necessary, or necessarily even advisable, to disconnect workplace-level unions from the ruling parties.

(3.42) In short, the connection with state power, then, prevents the four unions from acting independently, but, under single party political systems, the Western trade union model may bring workers fewer benefits than the Classic Dualist model. The power deriving from close party-union relations could in turn allow unions to be more assertive, in which case the educating function of this trade union model is compatible with the current political environments.

3.6 Suggestions for legislative reform

(3.43) Any reform of the legislation governing trade unions must acknowledge the prevailing political and organisational constraints; proposals that do not account for these constraints lack seriousness. In light of the potential drawbacks of the existing legislation, the following discussion puts forward a suggestion for promoting a more protective trade union system, specifically trade union democracy at the workplace level. This measure can serve to integrate workers' power into trade unions that serve workers' interests. The argument here concerns only the promotion of democracy in so-called "recognised" trade unions. The recognition of independent workers' organisations may also promote democracy in workplace unions, but such organisations are incompatible with the current political climate in the four socialist countries.

(3.44) Measures for fostering this level of democracy include granting workers the rights to organise trade unions, to elect trade unions leaders and to participate in other trade union activities. The legislation in China, Vietnam and Laos is problematic in regard to regulating these matters. The rights to organise and to elect trade union representatives have clearly been regulated in these three countries, but based on the principle of democratic centralism.[33] As discussed earlier, this means that the organisation of workplace trade unions is subject to the guidance of higher-level trade unions.[34] It seems inherently paradoxical to guarantee democracy and centralism simultaneously in this way. Given the consolidation of state power within the three countries, centralist principles are likely to prevail over democratic ones. In other words, it is simply impossible to guarantee workers the right to establish and direct workplace trade unions democratically. Regulations in the three countries grant union members the right to democratic

33 See Article 9 of the Trade Union Law of the PRC (2001 amended version), Article 7 of the Charter of Vietnamese Trade Union and Article 13 of the Lao Law on Trade Unions (2007).

34 See Article 11 of the Trade Union Law of the PRC, Article 7.1 of the Charter of Vietnamese Trade Union and Article 13 of the Lao Law on Trade Unions (2007).

participation in other union activities,[35] but this grant is largely symbolic in nature. Trade unions in Cuba also follow this organising principle, for which reason that country may also face similar problems in fostering trade union democracy in the workplace.

(3.45) It stands to reason that workplace trade unions established under the auspices of a higher-level union are likely to remain disconnected from frontline workers. Without giving them the autonomous power to be involved in workplace trade unions, it is difficult to gain workers' trust. Howell (2008: 863) asserted that "any significant move forward with direct elections is only likely to happen when there is a shift in the political context, either because of regime crisis or because of political liberalization". It is argued here that democratic trade unions at the workplace level can be achieved without substantial political changes. The ruling parties of the socialist countries are for their part likely to spare no effort in attempting to retain their political power, which they could do by associating strongly with trade unions at the national and regional levels. These regimes' concern about workplace-level trade unions is, however, misplaced. This is due to that frontline workers' primary demands relate more to better working conditions, democratically-founded and -run trade unions at the workplace level have little in the way of purely ideological objectives and are thus unlikely to make any move to subvert a political regime. From this perspective, workplace union democracy is consistent with the existing political regimes and deserves encouragement. This form of democracy requires the election of workplace trade union leaders; for workers will not place their trust in organisations in which they have little say. Such has already been the case in China, where trade unions have on occasion been kept in the dark until after wildcat strikes have already started,[36] and in Vietnam, where, as Schweisshelm has argued, "if the situation remains unchanged and the VGCL does not deal with changing labour relations, workers will nevertheless fight for better working conditions and render the trade unions obsolete."[37]

(3.46) In the late 1980s, some reformers in China implemented a pilot program designed to promote workplace union democracy, but it did not spread to other areas of the country and gradually degenerated into a mere

35 See Article 26 of the Constitution of Chinese Trade Unions (2008 amended version); Article 4 (2) of the Charter of Vietnamese Trade Union and Article 21.2 of the Lao Law on Trade Unions (2007).

36 For further detail, see F. Chen (2010:114).

37 See "Trade unions in Transition- Changing in Industrial Relations in Vietnam", https://www.fes.de/gewerkschaften/common/pdf/2014_09Vietnamese_TU_in_Transition.pdf, last visited 17 July 2017.

formality for the companies concerned.[38] The slow march toward direct union elections in China is a result of resistance from other industrial actors (Howell, 2008; Wen, 2014). Apart from the resistance of the party-state, governments and employers, there is also that of the ACFTU itself; Howell (2008: 850-862) concluded that the gradual bureaucratisation of the ACFTU over half a century had resulted in institutional inertia for trade unions and that many conservative trade union officials at higher levels were simply waiting for rank-and file workers to struggle for direct election rather actively promoting it.

(3.47) Despite this failure, promoting workplace democracy, then, is a feasible approach for achieving representative trade unions because it is compatible with the political regimes of socialist countries. The failure of the pilot scheme in China suggests that, in socialist countries with highly-bureaucratised trade unions, achieving democracy at the workplace level unions requires clear guidelines from legislators; otherwise, efforts at reform may be offset by the inertia of the existing trade union system and the influence of other industrial actors.

3.7 Conclusions

(3.48) It has been argued that economic transformation has brought with it industrial conflict in the four socialist countries. The changes within these countries' economies are also reflected in the law regulating trade unions. An analysis of the relevant legislation has shown that the legislators of the four countries, despite beginning with the same basic trade union model, have different levels of willingness to allow trade unions greater representativeness and independence. Vietnam and Laos have taken the process of reform significantly further than China and Cuba in this respect, while Cuba has undergone the least economic reform, which is inseparable from its latest economic reform. Moreover, while close party-union relations are an essential characteristic of socialist trade unions, the ruling parties in Laos and Vietnam show some inclination to allow trade unions to operate independently. In Vietnam, unions have the right to co-operate with international organisations and even to accept foreign funds; here even a relatively modest separation has already had a significant effect. By contrast, the ruling parties in China and Cuba still keep trade unions under their lead.

38 For more details, see Hui, Elaine Sio-ieng (2012), "How direct are the "direct elections" of trade union officials in China" http://column.global-labour-university.org/2012/10/how-direct-are-direct-elections-of.html, last visited 16 July 2017.

(3.49) The trade union systems of the four countries evolved differently from collective fundamental labour standards set by the ILO conventions. It is simply impractical to impose this standard on socialist countries without taking into account their political realities. The close party-union relationship prevents unions in these countries from being fully representative of the workers; whatever its drawbacks, the support of the political parties within the four countries gives the unions real power. Therefore, during the economic transformation, the trade union model inherited from the command economies remains suitable for the most part. However, the mobilising role to achieve a higher production efficiency of state-sponsored trade unions has become obsolete and should be eliminated due to the change to economies. Finally, the law should allow workers to participate democratically in trade unions, since this measure can help to resolve collective labour disputes while remaining compatible with the prevailing political frameworks.

4 A comparative analysis of the protective role of trade unions and of industrial actions by Foxconn workers[1]

Abstract

(4.1) Taking unions at Foxconn as an example, this chapter examines trade unions' protective roles in practice and labour unrest in China. This unrest began attracting worldwide attention in 2010 with the suicides of a number of Foxconn's Chinese workers. Previous scholars have suggested a variety of reasons for these events, but the focus has rarely from legal consideration. By comparing Foxconn's Czech and Chinese branches, it is argued that defective legislation at the national level together with the shelter for infractions committed by employers that local governments provided were two major factors in the ineffectiveness of workplace trade unions at the firm's Chinese branches. These unions experienced a crisis of legitimacy in the eyes of workers. The seemingly irrational actions of Foxconn's Chinese workers, including suicides and rioting, were probably attributable to an absence of effective remedies. The labour unrest thus created triple losers: the workers, Foxconn, and the Chinese government. The situation regarding trade union roles and labour unrest at Foxconn in China reflects the situation generally in the country, and it draws attention to the need to revise the law that regulates industrial relations.

Keywords: Foxconn; trade unions; the freedom of association; labour movement; right to strike; legislation

1 I would like to thank the detailed suggestions of Dr. Rutvica Andrijasevic of Bristol University on an earlier version of this chapter.

4.1 Introduction

(4.2) In China's trade union model, which was inherited from the former Soviet Union, unions serve two functions, production and protection (see chapter 3). Domestic legislation in China sheds some light on the two functions. The production function involves educating workers in accordance with the ruling ideologies and mobilising workers to realise production goals.[2] The protective function involves representing workers in negotiating collective contracts,[3] defending their rights and interests,[4] and mediating work stoppages.[5] The manner in which trade unions fulfil their regulated protective roles in particular deserves exploration. Taking Foxconn as an example, this chapter explores the implementation of this function in practice and worker reactions.

(4.3) Foxconn was chosen as an example for a number of reasons. To begin with, this firm is representative of enterprises engaged in labour-intensive industries in China. The working conditions at Foxconn are reported to be harsh; employees have even complained that are compelled to work faster than machines (CLW, 2010a). The firm is also famous for its military-style management. Second, Foxconn takes steps to discourage the formation of relationships among workers, for instance adopting a dormitory regime that separates individuals from the same home towns and the same production lines. As a consequence, Foxconn employees suffered from loneliness,[6] which had the effect of increasing their desire to form alliances. Third, the labour protests at this factory were radical. Between January and May 2010, 13 Foxconn workers at two facilities in Longhua and Guanlan districts of Shenzhen City committed suicide by jumping from factory buildings; these were the 13 'chain suicide jumpers' reported on and discussed by scholars and in the media. The role of trade unions will thus be taken into consideration in discussing why workers resorted to such radical actions. Fourth, Foxconn, which ranked 25th among the Fortune Global 500 in 2016, is the largest electronic contract manufacturing company in the world, being the chief component maker and final assembler for Apple and provider of components for '7C' products to such other major brands as Dell, Nokia,

2 Articles 4 and 7 of the *Trade Union law* (2001 amended version).
3 Article 51 of the *Labour Contract Law* (2008) and Article 20 of the *Trade Union Law* (2001 amended version).
4 Articles 6, 21, and 22 of the *Trade Union Law* (2001 amended version).
5 Article 27 of the *Trade Union Law* (2001 amended version).
6 In the words of a worker interviewed by Pun and Liang (2011:39), "before I came to Foxconn, I worked at many informal factories.. .. At informal factories, [I can] still find someone to talk to when feeling upset. At Foxconn, I cannot [find friends with whom to communicate]. [I] will be insane if I stay Foxconn for a long time".

HP, Sony, and Xbox One.[7] The role of workplace trade unions in such a well-known and large multi-national company can thus include acquainting the consumers of the big brands with the situations of the workers who make their products. Lastly, because Foxconn has branches all over the world, it is possible to conduct comparative research involving the firm's branches in different countries. For all of these reasons, then, Foxconn is well suited to serve as a representative case for investigating the roles of workplace trade unions in foreign-owned enterprises that operate in China.

(4.4) Ngai Pun, Chris King-Chi Chan, and Jenny Chan are among the scholars who have tracked Foxconn's Chinese workers over periods of several years and who possess a deep understanding of global capital, relationships between Foxconn, the state, and Chinese workers. These researchers agree that the exploitation of global capital and the government's partiality are stirring the new working class to action, and they cite the labour unrest at Foxconn as the prime example (e.g. Pun and Chan, 2008; Pun and Chan, 2012; Chan, *et al*., 2013). Andrijasevic and Sacchetto (2016) have focused on the labour issues at Foxconn's Czech branches, including comparing them, though not in a detailed way, with the firm's Chinese branches.

(4.5) This earlier research is, however, compromised in three significant ways. First, apart from the work of Andrijasevic and Sacchetto, there have been few comparative studies of Foxconn workers across countries. There is a need for such research because it has the potential to offer useful perspectives on the domestic situation in China. Second, even Andrijasevic and Sacchetto gave only brief attention to trade unions and labour movements in their comparison of Foxconn branches in the two countries. Lastly, current literature is in favour of sociology or politics, but less from legal considerations. Legislation, however, can play a crucial role in balancing the needs of employers and workers by defending the less powerful. Taking previous research as a starting point, this chapter will work to fill this gap in the literature by offering a comparative study of the role of trade unions and the labour movement at Foxconn's branches in China and the Czech Republic (CR) in detail and with attention to legal issues. This chapter attempts to generalise the findings by discussing the implications of this case study for legislative reform in China.

(4.6) In what follows, a brief comparison of the working conditions experienced by Foxconn workers in the two countries is presented. After that, this chapter explores the responses of trade unions to such conditions and the motivations behind them. In the next section, Foxconn workers' labour

7 So-called '7C' products include computers, telecommunications, consumer electronics, car electronics, digital contents, channel business, and health care products (Foxconn CSER Annual Report, 2010: 6).

movement in the context of present dispute-resolution procedures is examined, including the impacts of the movement on other industrial actors. To conclude, this chapter insights into the possibilities and dilemmas involved with revising the legislation governing collective labour rights in China, using the Foxconn experience in the CR in particular as an example.

(4.7) The materials used in this study were obtained through four distinct channels. One of these is the mass media; because it is a well-known enterprise, Foxconn has been the subject of frequent reporting in the popular press, especially following the suicides in 2010. These reports, both international and domestic, provide a basic picture of working conditions at Foxconn. Another channel is represented by the previous studies that were consulted for this chapter, in particular the survey conducted by the 'new generation migrant workers concern programme' research team, which consisted of teachers and students at Peking University, Wuhan University, Huazhong University of Science and Technology, Hong Kong Polytechnic University, the University of Hong Kong, the Chinese University of Hong Kong, and other colleges and universities,[8] and the comparative work by Andrijasevic and Sacchetto on Foxconn's branches in the CR and Turkey. These studies offer greater detail and more in-depth analysis than the media reports are able to provide. Legal texts were also analysed for this study in order to identify flaws in current law and barriers to implementing new ones. Lastly, previous literature on Chinese industrial relations also provides useful perspectives on trade unions and the labour movement.

4.2 Working conditions

(4.8) By 2015, Foxconn had established branches at thirty-five industrial parks in mainland China and two branches in the CR (one in Pardubice in 2000 and the other in Kutna Hora in 2007). Among Foxconn's frontline workers in China's branches, more than 85% were second-generation rural migrant workers.[9] At its Czech branches, frontline workers included two groups, core workers, usually Czech nationals, who had direct contract with Foxconn, and non-core workers contracted through temporary work agencies who were mainly migrants, including Slovaks, Poles, Romanians, Bulgarians, Ukrainians, Vietnamese, and Mongolians (Sacchetto and Andrijasevic, 2015: 217).

8 For the report of this team, see Somo (2013), "The Report On Foxconn Trade Union Research", available at https://www.somo.nl/wp-content/uploads/2013/05/Foxconn-trade-union-research.pdf, last visited 17 July 2017.

9 Chinese News (2010), "Foxconn Spokesman Respond to "9 Consecutive Jumps" and Admitting the Problems with The Management" (in Chinese), available at http://www.chinanews.com/sh/news/2010/05-20/2293000.shtml, last visited 17 July, 2017.

In this chapter, only the core workers at the Czech branches are compared with Chinese Foxconn workers.[10]

4.2.1 Salary structure and working hours

(4.9) All frontline workers at Foxconn in the two countries were paid by the hour. At the firm's Chinese branches, workers received a basic wage plus overtime. According to the survey conducted by the aforementioned 'new generation migrant workers concern programme' research team, the basic salary of Foxconn workers in January 2013 was only 1800 CNY (the average monthly expense is 1647 CNY). The salary structure at Foxconn's Chinese branches was thus such that it was almost impossible for workers to save money while living on their basic salaries. In order to support their families back home, they had no alternative but to work massive amounts of overtime. It is therefore unsurprising that 60% of workers' income was earned through overtime work, representing 136 hours a month, far in excess of the maximum legal limit of 36 overtime hours per month under Article 41 of the 1994 Labour Law.[11] The conditions for Czech Foxconn workers were no better at Foxconn's Czech branches. For core workers, the hourly wage was around 3-3.5 EUR for a total of 550-600 EUR per month. This is also rather lower than the average monthly expense. As in China, the shifts at Czech branches lasted for 8 or 12 hours (Andrijasevic and Sacchetto, 2014: 395).

4.2.2 Work pressure

(4.10) Foxconn workers in China and the CR experienced similar pressures on the job. Chinese workers complained that they were required to work faster than machines (CLW, 2010a), as noted above; one stated that "whether [we should] use left hand or right hand first in each step, and what we should do in a specific second, are all regulated" (Cheng *et al.*, 2011: 62). Foxconn continually increased production quotas and pushed workers' efficiency limits under the assumption that there was always room for improvement (Cheng *et al.*, 2011: 62). At Foxconn's Czech branches, workers were similarly required to perform each operation with 40 to 60 seconds (Andrijasevic and Sacchetto, 2014: 401).

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10 Agency workers suffered more than core workers owing to their inferior immigration status (i.e. as non-EU citizens). It is therefore difficult to assess the motivations behind agency workers' struggles. For more detail, see Bormann and Plank (2010); Pechová, Eva, "A Meeting in Kolín – Vietnamese workers in the Czech Republic", see the link http://www.migrationonline.cz/en/a-meeting-in-kol, last visited 16 July 2017.

11 For further detail, see Tan, Lidu, "How overtime working is 'volunteered'" (in Chinese), available at https://wenku.baidu.com/view/a3bc360c52ea551810a687a1.html, last visited 16 July 2017.

(4.11) All workers at Foxconn's Chinese and Czech branches were required to stand on the job except when performing a few specific tasks (CLW, 2011; Andrijasevic and Sacchetto, 2014: 401). Those who sat or leaned on the assembly line without permission faced fines (Andrijasevic and Sacchetto, 2014: 402), and those who took even short breaks risked failing to complete their quotas on time.[12] Maintaining concentration while standing for 12 hours challenged these workers' physical strength; 'We are extremely tired and feel tremendous pressure,' was their general sentiment after a 12-hour shift (CLW, 2010a and 2010b). Such severe conditions were responsible for Foxconn's reputation as a 'sweatshop' (CLW, 2010b).

4.2.3 Dormitory regimes

(4.12) In a test conducted by a trade union officer in China, most of the Foxconn workers interviewed were unable to name their roommates.[13] This lack of socialising was a consequence the dormitory regime that Foxconn imposed at its Chinese branches. The migrant workers whom Foxconn employed could hardly afford to rent living quarters outside the factories, so the firm offered them the minimal necessities of life within the enclosed world of the plant at its Chinese branches. In general, 12 workers shared a single room filled with bunk beds only a few feet part. Private space was limited to a worker's own bed behind a self-made curtain. Cooking, children, and friends of the opposite gender were not allowed in the dormitories. Workers from different home towns, with different jobs, or from different shifts were housed together in the same dormitory. Friendships were unable to develop under such a regime, and the workers experienced loneliness,[14] remaining strangers to their roommates.

(4.13) According to Andrijasevic and Sacchetto (2014), dormitories were also used by Foxconn in the CR to manage and control workers. Unlike those in China, however, the dormitories at the Czech branches were not arranged so as to group workers randomly; rather, there was a clear hierarchy among them, since they were allocated based on a worker's skills, professional experience, nationality, and employment agency. Thus German media published reports of 4 Vietnamese workers sharing a 32-metre-square apartment and eighty people living on a single floor sharing on kitchen and

12 See Bosen Ralf (2013), "Foxconn accused of exploiting workers in Europe", http://www.dw.de/foxconn-accused-of-exploiting-workers-in-europe/a-17132689, last visited 19 July 2017.

13 Chinese News (2010), "Foxconn Spokesman Respond to "9 Consecutive Jumps" and Admitting the Problems with The Management (in Chinese)", available at http://www.chinanews.com/sh/news/2010/05-20/2293000.shtml, last visited 17 July 2017.

14 For more information about Foxconn's random dormitory regime, see, New Internationalist magazine (2011), "I Slave", available at http://newint.org/features/2011/04/01/islave-foxconn-suicides-workers/, last visited 19 July 2017; also Chan, 2013: 90; Pun and Chan, 2012: 402.

only a few showers and toilets.[15] Moreover, children and family were not allowed to live with workers at these branches, and no privacy was guaranteed, just as was the case in China. Nevertheless, the accommodations available to Foxconn's workforce in the CR, even for the migrants, were less crowded and more comfortable than those at the Chinese dormitories.

4.2.4 Military-style management

(4.14) In order to improve production efficiency, Foxconn has managed its Chinese workers in a quasi-military style. This form of management was manifested in various ways, including the fostering of a culture of absolute obedience, the inhumane punishment, and violent security guards.[16] Quotations from Foxconn's CEO, Terry Gou, hung throughout the firm's factories, one of which was 'Outside the lab, there is no high-tech, only execution of discipline' (Chan, 2013: 89.) These quotations reinforced the atmosphere of radical obedience cultivated in the so-called 'Foxconn Empire'. The firm enforced its own punishment regime, according to which workers who made mistakes, even minor ones, might receive demerits or be compelled to do volunteer work, to make promises, to perform public self-criticism, or even to copy out one of Terry Gou's hundreds of times (Chan, 2013: 90). The Foxconn Empire was also notorious for heavy-handed security at its Chinese branches. As a worker at the Shenzhen Guanlan complex explained, "Foxconn is a violent institution, like a state with its own army and police".[17] Physical confrontations between workers and security guards were not uncommon, even at Foxconn's Beijing plant.[18] There is, on the other hand, no indication that such a military regime was enforced at Foxconn's Czech branches.

(4.15) As such, workers at Foxconn's Chinese and Czech branches were, then, toiling under similar working conditions, receiving low salaries and enduring intense on-the-job pressure. To meet production quotas, these workers had to perform repetitive tasks with machine-like rapidity over 8- to 12-hour shifts while standing, leaving them bored and exhausted. In addition, for the Chinese workers, a dormitory regime under which workers were assigned randomly to crowded living quarters served to impede the formation of friendships and to create an atmosphere of isolation, while

15 Wölbert, Christian and Tim Gerber, "Shenzhen an der Elbe Das System Foxconn funktioniert auch in der EU" (in German), c›t Magazin, http://www.heise.de/ct/artikel/Shenzhen-an-der-Elbe-1960336.html, last visited 19 July 2017.

16 For other aspects of military management, see SACOM (2013), "Workers as Machines: Military Management in Foxconn", available at http://sacom.hk/workers-as-machines-military-management-in-foxconn/, last visited 17 July 2017.

17 John Chan (2010), "China: Report exposes Foxconn's oppressive work regime", http://www.wsws.org/en/articles/2010/11/foxn-n04.html, last visited 19 July 2017.

18 See Fan, Junmei (2010), 'Foxconn confirms guards beat up workers', http://www.china.org.cn/china/2010-05/21/content_20091811.htm, last visited 19 July 2017.

their behaviour was controlled through the imposition of a quasi-military management style. In general, Foxconn's Chinese workers were less accustomed to urban life than the workers at its branches in the CR.[19] Organising was therefore attractive to these workers as a means to secure a sense of solidarity, to help and be helped, to forge social networks, and to provide for self-protection in an urban environment that they often found unfamiliar, unfriendly, and unfair.

4.3 The responses of trade unions

(4.16) When workers' rights are infringed upon and when they face harsh working conditions, it is trade unions' duty to protect their rights and interests. This section discusses the real-world responses of trade unions to the stresses imposed on Foxconn workers in China and the CR.

4.3.1 The response

(4.17) According to Foxconn's 2013 Corporate Social and Environmental Responsibility (CSER) report, workplace trade unions at its Chinese branches had received a total of some 394,000 employee complaints over the year, with a case conclusion rate of 100%. It has been reported that trade unions created a hotline to solve workers' problems – the number for which, '78585', signifies 'please help me, help me' (*qing bang wo bang wo*) in Chinese – that 89.8% of Foxconn workers were familiar with the hotline but only 32.5% had ever used it, and that, of these, 56.1% stated that their issues were 'seldom' or 'never' solved, while 47.4% reported retaliation from superiors after calling the hotline.[20] Complaints regarding production arrangements, shift work, wages, and treatment were almost all rejected by the trade unions with the excuse that such issues were internal concerns for the production department. In the report just mentioned, the trade unions were unmoved by employees' demands for increased pay. The normal excuse was that 'the workers' basic salary can be maintained within 1,500 to 1,600 CNY as long as it is not violating the labour law'. Obviously, workers had little trust in the trade unions; thus only a third of them had ever asked a union for help. Workplace trade unions at Foxconn's Chinese branches were more concerned about employers' demands, being hesitant to defend workers' rights and interests, especially when they clashed with those of the employers. An example of the unions' indifference was their response to

19 As explained by a manager at Foxconn who was interviewed by Chinese News (2010), 'Foxconn Spokesman Respond to "9 Consecutive Jumps" and Admitting the Problems with The Management (in Chinese)', available at http://www.chinanews.com/sh/news/2010/05-20/2293000.shtml, last visited 17 July, 2017.

20 'The new generation migrant workers concern programme' research team was introduced previously.

the abuse of overtime at Foxconn's Chinese branches, which became widely known after the scandal of 2010, but was not criticised by the ACFTU until nearly five years later.[21] Since even the national trade union hesitated to raise such issues with enterprises like Foxconn, it seemed unconceivable that workplace trade unions would do so.

(4.18) At Foxconn's branches in the CR, a common complaint was that core workers had little interest in trade unions and little understanding of their importance, in part owing to links between the unions and the former socialist state (Myant, 2010: 50; Sacchetto and Andrijasevic, 2015: 219). Even so, Czech unions endured hostility from Foxconn, a situation not uncommon in the CR. Thus, when asked about relations between the unions and management, one worker reported that "The management summoned us all to tell us that the unions are a threat to the company" (Myant, 2010: 49; Bormann and Plank, 2010: 44). The impression was thus that, while trade unions in the CR were not on Foxconn's side either, their efforts were instead focused on reaching collective agreements, increasing wages, and improving working conditions. A union member said that: 'What we are most proud of is having been able to raise wages even in times of the crisis' (Andrijasevic and Sacchetto, 2014: 405).

(4.19) It is thus clear that Foxconn's boasts about workers' involvement in trade unions in China and an improbably high resolution rate for labour disputes inaccurately represented the situation on the ground. The fact was that Chinese trade unions at Foxconn's branches had made little effort to ameliorate the harsh conditions endured by workers, who for their part considered these unions to be in the service of the firm's management rather than its employees. At Foxconn's Czech branches, by contrast, although core workers had little interest in trade unions, the unions were nevertheless more effective in protecting workers' interests than their counterparts at the firm's Chinese branches.

4.3.2 Seeking reasons from labour law and industrial relations

(4.20) The failure of trade unions at China's Foxconn branches to represent workers needs to be understood against the backdrop of the country's industrial relations and labour law. Rather than being independent organisations, trade unions in China are subordinated at various levels to various other industrial actors.

21 See South China Morning Post (2016) 'Chinese trade unions slams Taiwan tech giant Foxconn for "overworking" staff', available at http://www.scmp.com/news/china/article/1700269/chinas-official-trade-union-criticises-electronics-maker-foxconn, last visited July 17 2017.

(4.21) The relevant legislation is unclear regarding the process by which workplace trade unions are to organise, and this lack of clarity affords to employer room to manoeuvre. The right to conduct collective bargaining belongs to workplace trade unions (or, in enterprises without trade unions, to workers' representatives recognised by the upper-level union, see chapter 2).[22] The decision whether to respond to workers' requests or complaints is generally at the discretion of the unions and, so long as working conditions do not fall below the statutory standards, they are generally reluctant to question employers' decisions. Nevertheless, even though policy-makers are aware of the shortcomings of workplace trade unions, independent worker independent organisations are not recognised under Chinese law.[23] In the CR, by contrast, ILO Conventions 087 and 098 were ratified in 1993 and freedom of association is guaranteed in the country's domestic regulations,[24] as is trade union pluralism.[25] It is therefore possible for Foxconn workers at Czech branches to give voice to their discontent lawfully by organising themselves.

(4.22) Multiple factors were at play in the ACFTU's delayed response to the unrest at Foxconn. The fact that any response at all was forthcoming indicated at least some willingness to defend worker rights and interests, but the ACFTU remained constrained by other actors. Since the institution is state-run (Chan, 1993: 35), the party-state naturally uses it as a means to control and educate workers.[26] Under such circumstances, the ACFTU was bound to be less than vigorous in challenging companies like Foxconn that were receiving high praise from governors for their contributions to economic growth and concomitant decreases in unemployment.

(4.23) In addition to being governed by flawed legislation at the national level, trade unions in China also face challenges owing to the frequent alliance of businesses with local governments. Following the economic reforms, economic decision-making has been decentralised and entrusted to local governments, including the drafting of local regulations and issuing of policies. In order to entice Foxconn, local governments engaged in a 'race to the bottom' in offering favourable terms. The alliance between local governments and Foxconn became particularly evident after 2010, when the firm began moving its operations from coastal cities to the inner provinces, which as usual competed in their efforts to lure Foxconn (Pun and Xu, 2012).

22 Article 51 (2) of the Labour Contract Law of China (2008).
23 See Articles 4 and 10 of the Trade Union Law (2001 amended version), which are discussed in detail in chapter 2.
24 See Article 20 of the Charter of Fundamental Rights and Freedoms of the Czech Republic (1993).
25 See Article 27(2) of the Charter of Fundamental Rights and Freedoms of the Czech Republic (1993).
26 Article 4 of the Trade Union Law (2001 amended version).

The employer-friendly environment created by local governments naturally facilitated Foxconn's exploitation of workers since, under such circumstances, workplace trade unions had obvious incentives not to challenge the patronage relationships between local governments and Foxconn, for doing so could go against with the willingness of local governments. The government's influence over the bureaus in Foxconn's Czech branches, by contrast, was less overt than in China. Thus, for instance, the Foxconn factory in the CR was fined half a million Czech crowns (approximately 20,000 EUR) by the local labour inspectorate for violating the regulations regarding workers' rest periods (Bormann and Plank, 2010: 41).

(4.24) In sum, defective legislation at the national level governing workers' involvement in industrial relations was a major reason for the ineffectiveness of workplace trade unions at Foxconn's branches in China. The Chinese trade unions were not designed so as to allow workers to participate democratically in their interactions with the firm's management or to represent workers' interests freely. The alliance of local governments with Foxconn further exacerbated the unfavourable situation for workers.

4.4 The labour activities of Foxconn workers: comparison and analysis

(4.25) As discussed, trade unions at China's Foxconn branches were not genuine unions, since they were unwilling to challenge the employer's decisions. Defective national legislation and local governments' partiality towards employers meant that the workers were in a position of weakness in any conflict with Foxconn, which also used its dormitory regime to prevent workers from organising. Workers were thus driven to despair in their attempts to seek remedies for their grievances; for oppression breeds resistance. The following discussion analyses how Foxconn workers reacted under the existing remedy mechanisms at the firm's Chinese and Czech branches.

4.4.1 Workers' reactions at Foxconn's China's branches

(4.26) Workers' responded to the harsh working conditions and the ineffectiveness of trade unions in China in diverse ways, including suicides, rioting, and concerted actions. Suicide was of course the ultimate individual expression of despair, and the riots usually broke out abruptly and spontaneously; the concerted actions represented the attempts by workers to better their conditions by rational and peaceful means. These three responses symbolise the three periods of struggle engaged in by Chinese workers.

4.4.1.1 The suicides

(4.27) A few Foxconn workers showed their desperation by killing themselves. The first such suicide was in 2009, and from January 2010 to December 2011 more than 24 workers followed suit, including the 13 'chain suicide jumpers' at the Longhua and Guanlan industrial parks at Shenzhen.[27] Most jumped from buildings; others hung themselves or slit their wrists. The tragedy continued; in 2013, two workers jumped to their deaths at the Zhengzhou branch within the space of four days. The immediate motivations for the individual suicides differed. One who survived the attempt, Yu Tian, said that she had been prompted by desperation related to the chaotic financial management at Foxconn (Lin, 2013: 15; Chan, 2013: 90-91). The viciousness of the security guards at Foxconn was another important factor, as was apparent in the suicide of Danyong Sun at Foxconn's Longhua plant on 16 July 2009 after he had been accused of losing one of 16 prototypes of Apple's fourth-generation iPhone and beaten (Chan and Pun, 2010: 25). Three other Foxconn workers who killed themselves, Guoxi Tan, Bo Rong, and Xiangqian Ma, bore scars on their bodies suggesting that they had been bullied before their deaths (Lin, 2013: 26-27). Lingyan Wang, Xin Lu,[28] Chenming Zhu,[29] and Hai Li[30] were examples of workers who were unable to cope emotionally with the isolation, frustration, daily hardships, and lack of hope for the future.[31] For others, suicide represented an act of defiance; thus at one point up to 200 workers on Foxconn's Microsoft Xbox production line in Wuhan threatened to kill themselves if their working conditions did not approve.[32]

(4.28) Living far from their hometowns, in a strange environment, and unable to adapt to the high-speed assembly line, workers grew sensitive and fragile. The random dormitory system exacerbated the situation, since roommates from different regions, shifts, and assembly lines found it difficult to build personal relationships. In the face of such circumstances, some workers expressed their despair in an extreme way. In a survey conducted

27 For in-depth discussion of these suicides, see Pun and Chan, 2012: 393; Chan and Pun, 2010: 19.

28 The seventh of the 13 chain suicide jumpers, Xin Lu dreamed of becoming a professional singer.

29 The eighth jumper, Chenming Zhu dreamed of becoming a super model.

30 The eleventh jumper, Hai Li lost confidence in his future'.

31 The vulnerability of workers at Foxconn is reflected for instance in a poem written by one worker before committing suicide; see Chan, Jenny (2013), "Who Speaks for China's Workers", available at http://www.labornotes.org/blogs/2013/05/who-speaks-china%E2%80%99s-workers, last visited 17 July 2017.

32 On January 3, 2012, up to 200 workers went to the roof of a building and threatened that, if their demands were not met, they would jump. Following a persuasive speech by the mayor of Wuhan, they returned to their duties. For more details, see http://www.telegraph.co.uk/news/worldnews/asia/china/9006988/Mass-suicide-protest-at-Apple-manufacturer-Foxconn-factory.html, last visited 17 July 2017.

by CLW (2010a), 25 workers discussed the suicides. Seventeen of them attributed the deaths to the pressures of the workplace, and 5 complained about a lack of community spirit in terms of communication and a sense of caring at their plants that could provide some relief for those labouring in such a harsh environment. Trade unions are supposed to offer workers with a community in which the pressures of work can be discussed and grievances aired. Effective trade unions should assist workers by pushing for improved working conditions, but the workplace trade unions at Foxconn's Chinese branches were not effective. In this respect, the workers' suicides can be attributed in part to the shortcomings of the unions.

4.4.1.2 Rioting

(4.29) Rioting served as another channel through which Foxconn workers expressed their despair over long hours, on-the-job pressure, and inhumane treatment, including the fact that even those suffering from illness were driven to remain on the production lines. One riot that has frequently been discussed in the literature occurred on 23 September 2012 at Foxconn's Taiyuan branch in Shanxi Province. The episode was touched off by a beating that security officers administered to two workers who failed to show identification; 20 other workers in the area were alerted by their screams and asked the security officers to stop. These officers then departed, but soon a squad of fifty marched into the dormitory, infuriating workers, thousands of whom during the night turned their anger on security offices, production facilities, shuttle buses, motorcycles, and cars, and shops and canteens throughout the factory complex. Police cars were also overturned and set ablaze. After several hours of struggle, a force of some 5,000 local police officers managed to quell the uprising. Forty workers were injured in the riot and the most defiant were placed in detention. The factory responded by granting its workforce one day off (Chan *et al.*, 2003: 108-109).[33]

(4.30) The riot in Taiyuan gave vent to a gradual accumulation of discontent with working conditions even though it was ignited by one incident of inhumane treatment by security officers (Chan *et al.*, 2003: 108-109). It also highlights the shortcomings of the legislation that regulates Chinese workers' ability to engage in activism. In the absence of explicit regulations regarding the right to strike, local governments feel compelled to intervene in response to wildcat strikes, often using the police to do so. Although arrests of rioting workers have decreased in recent years,[34] the possibility

33 For Foxconn workers at Czech branches, see Barboza, David and Keith Bradsher (2012), "Riot At Foxconn Factory Underscores Rift in China", *The New York Times*, available at http://www.nytimes.com/2012/09/25/business/global/foxconn-riot-underscores-labor-rift-in-china.html?_r=0, last visited 10 December 2017.

34 For data about the rates at which striking workers are arrested, see China labour bulletin website, http://strikemap.clb.org.hk/strikes/en, last visited 17 July 2017.

of violent conflict remains so long as the policemen get involved. The interference of administrative power in labour unrest is a double-edged sword. On the one hand, such interference may ease tensions between employers and workers; as some scholars have noted, governments can use the street as a court in the pursuit of worker-friendly settlements (e.g. Su and He, 2010). On the other hand, however, the involvement of local governments in labour disputes may expand what began as a conflict over workers' rights into a conflict between workers and the government, as occurred at Taiyuan in 2012. From this perspective, worker activism could threaten the stability and investing environments of jurisdictions in which large enterprises like Foxconn operate.

4.4.1.3 Concerted Actions

(4.31) On occasion, Foxconn workers engaged in concerted labour actions. Some of these actions took advantage of 'crucial moments' at Foxconn, for instance when there were urgent orders for a new model of a popular Apple product. The tactics employed in such strikes included refusing to work and making defective products. In order to shield the organisers of such actions from retaliation by management, workers who participated would claim all to be leaders or that there had been no discernible leaders. Foxconn, being near the end of the global supply chain, was under such circumstances forced to slow production in order to maintain the quality of its products and protect its reputation (Pun *et al*., 2016: 175-176). As has been seen, however, the random dormitory regime at Foxconn created conditions unfavourable for concerted labour actions and limited their scope.

(4.32) The concerted labour actions indicate that the absence of legislation fails to prevent strikes from happening. On the contrary, the legal ambiguity creates space for workers' peaceful strikes since there are no regulated procedures for workers to follow when striking. Thus enterprises, especially those like Foxconn situated near the end of global supply chains, quickly find themselves in a passive position when faced with a peaceful wildcat strike that can halt production. For Foxconn, it would have proved difficult to maintain production efficiency by hiring temporary replacements, since the striking workers had been trained to work 'faster than machines'. In the face of peaceful wildcat strikes, Foxconn and the local governments that supported it refrained from using force to compel workers to resume production. In sum, the legal uncertainties regarding labour actions created an environment conducive to peaceful wildcat strikes and unfavourable for Foxconn.

(4.33) The three types of worker activism witnessed at Foxconn not only demonstrate that labour unrest in China is becoming more organised and rational; they also draw attention to the three major problems discussed earlier in regard to industrial relations and the labour law in China. To begin

with, workplace trade unions are in general hesitant to defend the rights and interests of workers; as has been seen, their impotency was one factor that drove Foxconn employees to extreme forms of protest. Second, local governments, lacking clear legal guidelines, feel compelled to intervene in labour actions, and while such interference may be effective in the short term, the workforce is likely to be further aggrieved. Third, as just discussed, even in the absence of clear regulations regarding the right to strike, workers can be driven to do so, thereby leaving employers with few options. Legislation is accordingly needed that makes trade unions more responsive to workers' demands and provides clear guidelines for strikes if balance is to be restored to industrial relations in China.

4.4.2 Workers' reactions at Foxconn's Czech branches

(4.34) Foxconn's two branches in the CR have experienced no labour actions that approach those at its Chinese branches in terms of drama or scope (Andrijasevic and Sacchetto, 2014: 404). In fact, the only protest staged by workers in the CR was a 'strike emergency', as a result of which workers' demands were granted, including the restoration of their yearly bonus, because management was concerned about a possible halt in production in the critical period leading up to the Christmas holiday. The Czech workers, who often remained employed with Foxconn for only three or four months, were generally of the opinion that a strike would not change anything but could result in termination of labour contract.[35] Young migrant workers from elsewhere in the European Union were accustomed to high turnover rates and were prepared to seek employment in any EU country (Andrijasevic, and Sacchetto, 2014: 403). These attitudes on the part of Foxconn's Czech workers indicate that their decisions regarding whether to stage a protest took into account, not the existence of a right to strike, but rather the relative effectiveness of strikes and other remedy mechanisms. When Czech workers considered industrial actions an ineffective means of addressing their discontent, they resorted to other rational mechanisms to further their interests.

4.4.3 Comparisons and explanations

(4.35) It is, then, apparent that the activism of Foxconn workers in China was relatively more diverse and militant and that of those in the CR relatively more rational. The labour unrest in China serves as a reminder of unresolved issues regarding the right to strike; for while Chinese law recognises that wildcat strikes occur, it does not explicitly guarantee a right to

35 See Willoughby, Ian, 'Why won't Czech workers take stronger strike action?', available at http://www.radio.cz/en/section/curraffrs/why-wont-czech-workers-take-stronger-strike-action, last visited 19 July 2017.

strike.[36] In the CR, by contrast, this right is enshrined in Article 27(4) of the Charter of Fundamental Rights and Basic Freedoms and Section 16 of Act No. 2/1991 Coll. on Collective Bargaining.[37] In China, the ineffectiveness of workplace trade unions heightened workers' feelings of desperation in the face of low salaries, long working hours, gruelling and repetitive tasks, violent security guards, and fragmented lives, thereby creating a situation in which the accumulated grievances against Foxconn were primed for ignition. Lacking feasible remedies in the form of legislation or assistance from local governments to address their complaints, workers were forced to find their own remedies, staging riots or work slowdowns as expressions of their discontent.

(4.36) Andrijasevic and Sacchetto (2014: 404), whose work has been cited repeatedly here, have argued that strikes were fewer in the CR in part because Foxconn involved local communities in organising and training its workers and that it controlled and managed their behaviour through a system of intermediaries including forepersons, department heads, interpreters, and agency staff. This argument may be compelling, but it is far from sufficient to explain the vast difference between the character of worker reactions at Foxconn's Chinese and Czech branches. At the former, the firm used a random dormitory regime to interfere with workers' social interactions, but wildcat strikes nevertheless occurred. At the branches in the CR, on the other hand, the core workers acted in a rational manner, showing awareness that striking was unlikely to accomplish anything beyond their own dismissal and, owing to the support of a community that provided them with a comfortable environment, they did not experience the feelings of isolation and desperation that afflicted their Chinese counterparts. Moreover, Foxconn workers in the CR were accustomed to individual exit mechanisms, such as quitting, and thus had less reason to form alliances than the Chinese workers. Many of the latter had never been to an urban area before joining Foxconn and were unaccustomed to the high-turnover employment associated with Chinese urban life. A further point of comparison is that, under Czech law, only trade unions are authorised to initiate strikes, while core workers in the CR had little interest in trade unions.

4.4.4 The impact of the labour movement on various industrial actors

(4.37) The collective actions of Foxconn workers in China created what was in effect a lose-lose effect situation for workers and Foxconn alike. The high suicide rate cemented Foxconn's notorious reputation as a 'suicide

36 Although China ratified the International Covenant on Economic, Social, and Cultural Rights in 1997, Article 8 of which acknowledges the right to strike, current domestic legislation does not explicitly regulate this right.

37 However, Section 17(1) of this act only allows trade unions to call for a strike in relation to the conclusion of an enterprise collective agreement.

express',[38] so in response the firm increased employees' basic wage and reduced overtime. At the same time, however, Foxconn increased its production quotas, thereby demanding greater labour intensity,[39] and workers found themselves enduring even more pressure than before. Riots offered workers a source of temporary relief and also further undermined Foxconn's reputation in the global market. Thus, in the incident discussed above, workers' anger erupted seemingly out of the blue, paralysing production at a firm near the end of the supply chain that had been built on prompt delivery to big brands such as Apple. The ever-tightening production cycle increased pressure on workers and managerial staff to the extent that Foxconn's workers at the Taiyuan plant were not allowed even one day off per week. Foxconn at one point changed its component sourcing without notifying Apple, which for its part discovered that its relationship with Foxconn was not easy to control, for which reason it eventually outsourced part of its order to another, smaller company (Pegatron Corporation).[40] As a consequence of this sharp decrease in the production order from Apple, Foxconn was forced to dismiss a significant portion of its workforce; according to the firm's 2014 CESR report, the overall number of employees at Foxconn had decreased to 1.06 million from a high of 1.3 million in 2012. Moreover, the remaining workers lost the opportunity to increase their earnings through overtime; thus, in Chongqing, workers went so far as to strike in response to the loss of these extra working hours (CLW, 2014). In sum, workers' radical and sudden reactions placed Foxconn in a disadvantageous position so that it gradually lost the trust of one of its major clients; major cutbacks followed and some of the workers found themselves without jobs and others without the opportunity to earn overtime, a true lose-lose situation for all involved.

(4.38) Labour actions by Foxconn workers, then, have placed local governments in a kind of trap. When they become involved in strikes, workers' hostility towards employers can transfer over to the governments themselves; thus workers at Taiyuan vandalised police cars. If governments fail to intervene, on the other hand, workers' actions may become increasingly disruptive given the pressures that they are under and may even come to threaten domestic stability and to compromise the investment environment.

38 Chan, Jenny (2013), "A Suicide Survivor: The Life of a Chinese Migrant Worker at Foxconn", available at http://www.truth-out.org/news/item/18391-a-suicide-survivor-the-life-of-a-chinese-migrant-worker-at-foxconn, last visited 10 December 2017.

39 In an interview of Chan (2013: 94), a worker responsible for processing cell phones cases, reported that "The production output was previously set 5,120 pieces per day. In July 2010, it was raised by 25 per cent to 6,400 pieces per day."

40 Dou, Eva, "Apple shift supply chain away from Foxconn to Pegatron," available at http://www.wsj.com/articles/SB10001424127887323855804578511122734340726, last visited 20 July 2017.

If, however, the party-state in China is prepared to break the stalemate, an important step in this direction will be reforming the labour law governing workers' rights to organise and the to strike.

4.5 Discussion and Conclusions

(4.39) Foxconn is representative of labour-intensive industry in China in terms of its relations with its employees. The high-pressure environment and the military-style management at the firm left its workers despairing, frustrated, and emotionally and physically exhausted. It might have been hoped that trade unions at Foxconn's China branches would be stirred by the harsh conditions to greater effectiveness than they showed in their dealings with other companies, but this was not the case. So it is that workplace trade unions in China, especially those at foreign-owned enterprises, have generally failed to fulfil their role of protecting workers.

(4.40) An important measure in the effort to resolve the legitimacy crisis of trade unions and to improve their effectiveness would be to allow workers to participate democratically in unions' functioning. Although the party-state and the ACFTU have acknowledged that the current trade unions do not represent workers effectively, no substantial reforms have yet been forthcoming. The first campaign for democratic elections to union positions at the workplace level was promoted by the party-state in the late 1980s. However, "later on, not only did direct elections not spread to other areas of the country, but over time the so-called direct election only exists as a formality in these companies".[41] There were many reasons for the failure of this initiative, including resistance from governments, conservative trade unions leaders, and employers (Howell, 2008). A second campaign promoting workplace trade unions, this time initiated by multinational companies, also ended with failure (Chan, 2009), and a third attempt also met with resistance from conservative reformers (Wen, 2014). This merits that guaranteeing workers' right to democratic participation in trade unions can serve to rebuild their trust in these important institutions and resolve the legitimacy crisis. Currently, the law provides only vague language about democratic organising principles, again lacking any specifics regarding workers' right to democratic participation in unions or how to balance the goals of democracy and centralisation. So also no mention is made in current law of any mechanism for providing remedies when this right is violated. Future legislation must confront these issues squarely if the legitimacy crisis of trade unions is to be resolved.

41 Hui, Elaine Sio-ieng 2012. "How direct are the "direct elections" of trade union officials in China", see http://column.global-labour-university.org/2012/10/how-direct-are-direct-elections-of.html, last visited 17 July 2017.

(4.41) The labour actions of Foxconn's Chinese workers, then, indicate that the decision to strike is motivated by the unavailability of effective remedies. Indeed, Qinghong Zeng, a delegate to the National People's Congress, has expressed sympathy for this right, arguing that "without regulating economic strikes, proper economic progress cannot be protected and disorderly strikes, stoppages, and slowdowns cannot be restricted.. .. Those who do not understand the relevant regulations correctly are worried that legislation regulating strikes may trigger a wave of them. .. [but] in the history of developed countries, no waves of strikes have been observed in association with the protection and recognition of workers' right to do so. On the contrary, because of the legal protections afforded to striking workers, the industrial relationship is more balanced."[42] Zeng's opinions are partly corroborated by the experience at Foxconn's Czech branches, which shows that mere possession of the right to strike does not mean that workers will do so; thus the Czech workers were able to make rational decisions balancing the likelihood that a strike would be effective with the risk of losing their jobs. Chinese Foxconn workers, by contrast, were still at the stage of using strikes as a means to air their grievances. What the legislature must recognise when drafting labour laws is that neglecting to grant workers the right to strike may undermine industrial harmony. When workers are under severe pressure, their decision to resort to insurgence does not depend on the existence of any legislation protecting them, but rather on whether they can access other remedies to address their grievances. Cautious reformers who fear a wave of strikes unleashed by revised labour regulations must recognise that, from a long-term perspective, strikes cannot be avoided simply by keeping silent about them. In China, as a result of the one-child policy, labour shortages have been occurring in labour-intensive industries since 2004, and such shortages can be expected to affect relationships between labour and capital. The current, second generation of rural migrant workers is more demanding and less willing to tolerate brutal working conditions, and it has already acquired some experience of what is required to stage an effective strike in the aftermath of the scandal of 2010. When workers' wages are insufficient for them to support their families, the risk of strikes naturally increases. Indeed, strikes are inevitable in a market economy in which employers and workers pursue divergent interests. Under these circumstances, properly-designed and -implemented regulations governing strikes can actually reduce workers' propensity to stage labour actions at will. Again, the absence of clear legislation does not promote the development of labour-intensive industry, nor can it prevent or even diminish the frequency or severity of strikes. Legislation that guarantees workers the right to strike is accordingly imperative for promoting

42 See Autoxinmin net, "Regulating the right of economic strike and establishing harmonious labour relationship (in Chinese)", http://auto.sohu.com/20110307/n303994493_1.shtml, last visited 17 July 2017.

the healthy development of labour-intensive industries. Such legislation can also help workers to stage peaceful strikes and to avoid over-reaction and thereby reduce the enormous losses associated with spontaneous strikes for labour and industry alike.

5 The Effectiveness of Worker Representation Mechanisms under Chinese Quadripartite Industrial Relations[1]

Abstract

(5.1) In this chapter, an analysis of representative cases serves to review systematically the evolution and effectiveness of worker representation mechanisms in China. The mechanisms for worker representation in collective bargaining have been evolving gradually over the years from workplace trade unions to independent workers' organisations and then to state-led representation. It is argued that the effectiveness of these mechanisms bears little relation to their legal status but is instead mainly a function of the attitudes of governments and the power of workers. China's industrial relations is state-centred and quadripartite, and the interests of workers are constrained by those of other actors. Only organisations established democratically by workers are motivated to be representative. To recognise and promote this representational mechanism, local governments should exercise their administrative power appropriately and the central government should alter its priorities.

Keywords: China; trade unions; workers; right to representation; democratic representation; quadripartite industrial relation; state power

1 An earlier version of this chapter was presented in the 9th Asian Congress of the ILERA in Beijing and reviewed by Lance Compa of Cornell University and Dr. Wei Huang of Renmin University of China, and I am grateful for their comments.

5.1 Introduction

(5.2) On 17 May 2010, two workers at the Honda Auto Parts Manufacturing Ltd. (CHAM) in Nanhai District, Foshan City, called out to others on the assembly line, "Our wages are so low; let's stop working!" From an initial 50 workers, the strike spread to the whole factory and eventually paralysed Honda's operations throughout China for 17 days, causing the company a loss of ¥ 240 million a day. On 31 May, 100 persons wearing union badges and yellow hats of town- and district-level trade unions were involved in a confrontation at the Nanhai plant in which several workers were slightly wounded. In an effort to reach an orderly resolution to the strike, the local government asked the workers to elect representatives to bargain with Honda, and on 4 June those chosen met with representatives of the company, the local labour bureau, the local government and several labour non-governmental organizations (NGOs) as well as the chairman of the enterprise trade union and Qinghong Zeng, CEO of Guangqi Honda Automobile, to negotiate. In the end, an agreement was reached under which workers' monthly wages were increased from 1544¥ to 2044¥ and intern students' wages from about 900¥ to around 1500¥.

(5.3) The year 2010 was also a turning point in the labour-capital relationship in China (Cooke, 2011b and 2013). The actions of the workers in the strike have shaken the common image of Chinese workers as obedient,[2] and the ensuing wave of strikes highlights the urgency of trade union reform in China (Chan and Hui, 2012 and 2014). The outcome of the Honda strike is also a signal that the Chinese government is making efforts to increase workers' salaries and eliminate low-wage work.[3] Moreover, since the Honda strike, the mass media have become more open about reporting on workers' collective actions. The representational model of the Honda strike is also an important example of an unrecognised, independent workers' organisation breaking the monopolistic representation right of official institutions (i.e. trade unions) in the conduct of collective contracts.

(5.4) There have been numerous case studies of the Honda strike (e.g. Lau, 2012; Lyddon *et al.*, 2015; Chan and Hui, 2012 and 2014; Chang, 2013b; Gray and Jang, 2015). Previous research has generally focused on the reasons that trade unions fail to represent workers, but the diversification of mechanisms for representing workers has not been acknowledged. The existing literature offers three main reasons for the ineffectiveness of Chinese trade

2 The Economist (2010), "China's labour market: The next China", available at http://www.economist.com/node/16693397, last visited 17 July 2017.

3 Ryder, Katherine (2010), "Why is the Chinese government allowing workers to strike?", see http://archive.fortune.com/2010/06/10/news/international/china_labor_strikes.fortune/index.htm, last visited 10 December 2017.

unions, namely the subordination of the ACFTU to the party-state (Bai, 2011: 21; Taylor and Li, 2007), unions' affiliation with management and inertia (Clarke and Pringle, 2009; Clarke, *et al.*, 2004; Pringle and Clarke, 2011) and a combination of these factors. For instance, Liu (2010), based on an analysis of various organising models, argued that differences in the organising patterns of workplace trade unions results in different outcomes for workers, while Chen (2003) suggested that whether or not trade unions represent workers depends on what demands workers have.

(5.5) The failure of trade unions to represent Chinese workers has provided the impetus for the diversification of mechanisms by which workers may achieve the right to representation. This phenomenon has, however, been little explored, so a closer look is offered in this chapter at the evolution and effectiveness of these mechanisms in China and their sources of legitimacy by analysing some typical cases. Three kinds of mechanisms are discussed here: workplace trade unions, independent workers' organisations and state-led worker representation. Next, an interest analysis approach is employed in an effort to explain the variation in the effectiveness of the various mechanisms. The chapter then wraps up with an account of the possibilities and challenges associated with recognising and promoting the democratic representation of Chinese workers and other related conclusions.

5.2 Worker representation mechanisms: evolution, sources of legitimacy, categories and effectiveness

(5.6) Max Weber (1978: 292-299) classified representation patterns into five categories, among which are two opposing types, appropriated and instructed.[4] The former refers to "the chief or a member of the administrative staff [who] holds appropriate rights of representation". According to Weber, the wishes of these staff members are often neglected, for they are not involved in the election of the representatives. The latter category, instructed representation, is extremely democratic: "the elected representatives or representatives chosen by rotation or lot or in any other manner exercise powers of representation which are strictly limited by an imperative mandate at a right of recall". Friedman (2014:22) has elaborated on the definition of appropriated representation, which he identified as descriptive of China, as a situation in which "the state unilaterally grants exclusive right of political representation of an entire class to a particular organization in the absence of substantive or formalistic delegation from membership".

4 The other three categories are estate-type and free representation and agents of interest groups.

This definition fails, however, to account for the fact that, alongside these mechanisms, other worker representation mechanisms are emerging in China, the evolution, legitimate sources, categories and effectiveness of which are discussed in what follows.

5.2.1 Workplace trade unions

(5.7) The workplace trade union (or "unionised representatives" in enterprises where trade unions have been established, for more see chapter 2) is the only official institution explicitly authorised by Chinese labour law to represent workers in negotiating collective contracts at the workplace level. [5] The effectiveness of workplace trade unions varies in practice according to the organisation of the individual unions.

(5.8) Workers' right to vote democratically for grass-roots union leaders is regulated by Article 9(1) of the Trade Union Law (2001 amended version) and Articles 3 and 27 of the Constitution of Chinese Trade Unions (2008 amended version). However, the ambiguity of the legislation regarding the election of trade union leaders leaves employers considerable room to manoeuvre. The predominant view is that workplace trade unions are organised in accordance with a top-down, quota-driven pattern, and that workers have little involvement in the process (Pringle, 2013; Liu, 2010). A survey by Qiao (2010) indicated that only 2.6% of workplace trade union chairpersons were elected through the General Member Assembly after open and competitive screening tests and that direct elections at the workplace level in general only exist on paper. Further, appointed union leaders generally turn a blind eye to employers' violations unless workers seek other assistance or resort to striking. An exception is the Walmart case, during which trade union leaders actively struggled for workers' rights, possibly because their own interests were affected (Li and Liu, 2016). The trade union officials decide for themselves "whether or not to respond to employees' complaints or suggestions, usually depends on whether or not they regard it as 'reasonable', i.e. likely to be accepted to management" (Clarke *et al.*, 2004: 244). Large numbers of cases confirm that workplace unions are generally unable or unwilling to represent workers when their leadership is appointed rather than elected (see Table 6).

(5.9) Prior to 2010, there were two campaigns to promote the direct election of trade union representatives in China. The first, in the 1980s and 1990s, was pushed by state power. The second, in the 2000s, was promoted by multinational companies (MNCs). The former effort was something of a failure owing to resistance from governments, employers and even higher-

5 See Article 51 of the Labour Contract Law (2008), Article 33 of the Labour Law (1994) and Article 20 of the Trade Union Law (2001 amended version) and chapter 2 for further discussion of unionised representatives.

level trade unions (Hui and Chan, 2015; Howell, 2008; Wen, 2014); the pilot program was not extended to other areas of the country, and the elected trade unions were eventually incorporated into the traditional organising structure or co-opted by management. The effort by MNCs was no more successful; as discussed by Chan (2009), it initially gave workers a certain amount of leverage in bargaining with employers, but changes in company management frustrated the elected trade union leaders, as the new managers refused new requests and even retracted some benefits that the elected leaders had achieved. The failure here was inevitable, in the first place because the elected trade union leaders were not independent from management, which controlled their salaries and job security. The second impediment was foreign interference, in that both the government and the ACFTU were very cautious about the interference of external forces in trade union affairs. Third, the MNCs were themselves half-hearted in their effort, which proved to be more of a business strategy than a principle. The lesson to be learned from these failures is that the representativeness of workplace trade unions with elected leaders depends largely on the attitudes of the other industrial actors involved.

(5.10) A third effort to promote the direct election of trade union representatives, inspired by the wave of strikes in 2010, has taken place in the context of the auto industry in Guangdong. In the aftermath of those strikes, employers realised that trade unions could serve as means for mediating or controlling wildcat strikes. As a consequence, management began to show greater respect for workplace trade unions, regarding them as a conduit for information on workers' industrial actions (W. Chen, 2014). Management also began allowing workers to join workplace trade unions directly in the hope that the unions would thereby re-gain worker trust and remain informed about workers' decisions to initiate industrial actions. Many workplace unions in Guangzhou's auto industry were re-organised, in which effort workers were involved to various extents. The re-organised workplace unions promoted collective bargaining in the automobile industry and acquired some benefits for their members in Guangdong Province, including pay increases, a bonus and a reduction in working hours (Deng, 2016; W. Chen, 2014). However, as Deng (2016: 316) and Wen (2014) noted, these reforms were not thorough. In some enterprises, workers were allowed to elect union member representatives and trade union committee members directly but not the chairman, whose selection was subject to the influence of employers and local governments.

(5.11) The foregoing analysis is sufficient to demonstrate the considerable variability in the effectiveness of workplace trade unions in China. Organised in a traditional top-down, quota-driven manner, these unions rarely fight actively for workers' interests. The effectiveness of workplace unions is, rather, largely dependent on the attitudes of the other industrial actors involved. The increased bargaining power of workers is, however, breaking

down this restriction, and the re-organised trade unions are in general more representative. The power of workers is increasing such that neither the government, the ACFTU nor employers can resist it. According to official data, the ratio of job offers to job seekers has since 2010 exceeded 1:1 in China, meaning that there are more jobs than there are workers to fill them (see chapter 6). In addition, it is generally agreed that the second generation of rural migrant workers in China is better educated and more likely to voice discontent with unfair treatment than the previous generation. This situation is an inevitable result of the growing structural labour shortage and the improvement in the quality of the labour force in China.

5.2.2 Independent workers' organisations

(5.12) Outside the official representation mechanism, two categories of independent workers' organisations co-exist in China. On the one hand, some workers have established what will be referred to here as structured workers' organisations, which are independent of the CCP, government agencies and management and thereby stand to break the exclusive right of representation of official mechanisms. In general, these organisations are not connected to specific economic demands. The most prominent has been the Workers' Autonomous Federation, which formed in the 1980s (Chan, 1993); some of its members went so far as to demand democracy and a multi-party regime.[6] This type of organisation remains unlawful, since numerous attempts to obtain official recognition have failed. For instance, requests by taxi drivers in Beijing and Gongguan in Guangdong Province to form their own trade unions were rejected by a higher-level union on the grounds that unions must be organised by management, and the ACFTU rejected a request by female workers at Guangzhou Sumida on similar grounds.[7] The measures taken by governments coping with this type of organisation have been increasingly moderate and reasoned; usually the associations are re-organised and their members incorporated into an official institution. A well-known example is the Yiwu model, in which situation, workers organised a union for the purpose of self-protection and the local government and middle-level trade union branches then worked together to re-organise these workers and include them in official branches (Zhu *et al.*, 2011:136). On the other hand, workers have formed spontaneous organisations in connection with concerted collective actions. The boundary is not clear between the organisations and the actions, but both are usually prompted by the ineffectiveness of workplace trade unions (Chang, 2015:

6 For more detail on this independent trade union, see Case No. 1652 (1992) of the ILO Committee on Freedom of Association.

7 For more details, see Wang, Jiangsong (2014), "Form Being-in-Itself to Being-For-Itself: A Case Study on Sumida Union Election in Panyu, Guangzhou' (in Chinese)", available at http://blog.sina.com.cn/s/blog_4d8d48790102v777.html, last visited 17 July 2017.

11; Friedman, 2014). Spontaneous workers' organisations mainly arise in the context of economic disputes over such issues as working conditions, pay, overtime and work intensity. Such organisations tend to be fairly inchoate, but they have at least the potential to disrupt production and force employers to the bargaining table.

(5.13) The 2010 Honda strike, discussed above, is an example of a situation in which a number of workers formed a covert alliance before a labour action. As was seen, the 17-day strike caused the company enormous losses; this was in part because it was unable in the short term to recruit new staff to replace striking workers. The strike thus forced Honda and the local government to reach a compromise, for which the latter asked the workers to elect their own representatives to engage in the bargaining, thus authorising the spontaneous workers' organisation, an unlawful organisation, to act on its constituents' behalf. This outcome represents an intrusion on the exclusive right of official trade unions to represent Chinese workers in industrial relations. This recourse to a mechanism that is, strictly speaking, outside the law is also, however, indicative of administrative interference in industrial relations. With the help of labour NGOs and after several rounds of negotiations, Honda agreed to increase workers' salaries by around 30%, marking a historical victory for the Chinese labour movement. The decisive factors in this success were the increased bargaining power of workers and their solidarity, which made it impossible for the employer to buy off striking leaders or to deploy a "divide and conquer" strategy to undermine the workers' alliances. The ACFTU and the workplace trade union were also invited to attend this collective bargaining session, but their roles were marginal. In other similar cases, workers have even rejected entirely the participation of workplace trade unions in collective bargaining, so that spontaneous workers' organisations were further able to challenge the ACFTU's monopoly representation rights, as happened in De Li in 2015 (Chang, 2015: 10). However, not all such organisations can be temporarily authorised with the right to represent workers, for in many anonymous cases they have failed to acquire this right.

(5.14) In general, spontaneous workers' organisations have disappeared as quickly as they formed, either because the workers had little incentive to maintain their organisations or because other industrial actors refused to grant them permanent legal status. It is, then, in general quite rare for the power of workers to be incorporated into official structures following an effective strike. For instance, the workers involved in the Honda strike met resistance when they proposed re-organising the existing workplace trade unions so as to defend their rights. The Guangdong Federation of Trade Unions (FTU) and the company's management refused to remove the chair of the existing trade union, who had supported management during the strike, saying that the union leaders deserved another chance (Chan and Hui, 2012). In other words, spontaneous workers' organisations can be

granted temporarily representational authority by the state power and can be effective in achieving workers' economic demands, but it remains difficult for them to obtain permanent legal identities.

5.2.3 State-led representation

(5.15) Although workers' collective actions in China are evolving from unorganised violence to planned actions, wildcat strikes, whether organised or unorganised, have the potential to undermine the investment environment, harm the reputations of local governments and negatively impact local economic growth, and may even endanger social stability by becoming uncontrollable. Neither governments nor the ACFTU are willing to countenance labour activism. Instead, a "state-led representation" mechanism was created to redress the situation that "employers are reluctant to bargain with workers; workplace trade unions dare not to bargain with employees; and employees are incompetent to bargain with the employers".[8]

(5.16) State-led representation is generally dominated by administrative power pursuant to Article 34 of the Trade Union Law (2001 amended version) concerning tripartite negotiation; the ambiguity of the legislation leaves some room for manipulation by the government. This type of representation generally occurs in one of two situations. One is a strike settlement; for instance, in the Dalian cases, a higher-level union was assigned to represent workplace unions in negotiations with employers (F. Chen, 2010). The other is a pre-emptive situation, usually at the regional or industrial level, as occurred in Wenling City (Friedman, 2014; Wen, 2011). Another example of pre-emptive representation took place in Wuhan City in 2011, where low salaries in the catering industry led to a serious labour shortage during the peak season (with 15% of positions going unfilled) and a high incidence of job turnover (around 45%) that naturally slowed the growth of the industry. At that time, no trade union specific to the catering industry had been established. Thus, Wuhan's Trade Unions Federation on Trade, Finance and Tobacco (TUFTFT) was appointed to represent workers in the industry following the established representation pattern of "superior trade unions representing inferior trade unions". On 23 April 2011, prompted by the Wuhan government, the local catering business association (appointed by the Wuhan FTU to represent employers) and Wuhan TUFTFT concluded a collective contract; the negotiations were witnessed by an officer of the ACFTU. This contract covered some 450,000 catering industry workers, for whom it secured a minimum wage 30% higher than the general minimum wage in Wuhan City at that time.

8 See Sina news (2010), http://finance.sina.com.cn/roll/20100812/09398468643.shtml, last visited 10 December 2017.

(5.17) The authorisation pattern in this Wuhan wage negotiation received a great deal of criticism (e.g. Du, 2012). Pursuant to Article 9(5) of the Trade Union Law (2001 amended version), trade union organisations at higher levels are empowered to guide lower-level unions in concluding collective contracts by providing professional knowledge but are not empowered to replace them in bargaining. Thus Wuhan TUFTFT had no right to represent workers from the catering industry, who should have been represented by members directly elected by the rank-and-file. In addition, this pattern, that the Wuhan FTU appointed the representatives of the two opposing sides, also violated the essence of collective bargaining, which is that the two bargaining parties involved should be of the parties' own choosing.

(5.18) This representative mechanism did to some extent promote the healthy development of the catering industry because the agreement was backed by state power. The ACFTU for its part trumpeted the success of the negotiations in raising the minimum wage, but the evidence collected by journalists and scholars indicates that most catering industry workers in Wuhan had received more salary than the amount regulated in the collective contract (Xie *et al.*, 2012). It thus appears that this collective agreement was a simple restatement of something that workers had already achieved and that their interests were not fully represented in this "successful" contract.

(5.19) There have been other cases of state-led representation. In industrial negotiations involving Wenling Woolen industry, despite the fact that the workers' representatives had been appointed by employers, the workers were directly involved in the collective negotiations (Wen, 2011). The Wenling Woollen industrial agreement reflected the workers' wishes to a much greater extent than the Wuhan catering agreement. In the latter, because the workers did not directly participate in the collective negotiations, its "effectiveness" was bound to be limited, for state power usually only seeks to "prevent workers' collective actions, disperse and dissolve workers' spontaneous power" (Chang, 2015: 15) rather than to represent workers effectively. State-led organisations have thus in general been less inclined to represent workers as fully as spontaneous workers' organisations. A state-led representation mechanism also needs to take the interests of the state, which is the source of its legitimacy, into consideration.

5.2.4 Comparison

(5.20) As discussed, worker representation mechanisms in China are evolving from workplace trade unions to independent workers' organisations and then to state-led representation (Table 6). These three mechanisms can also be seen to follow a sequence from "official mechanism" to "worker self-protection mechanism" to "state re-constituted mechanism". Among these three mechanisms, the emergence of the last is a result of previous one.

It is also important to observe that the three representing mechanisms co-exist in various geographic areas and time periods owing to the increasingly decentralised economic decision-making power of local governments and the uneven levels of economic activity and of labour force quality across the country.

(5.21) The various representing mechanisms differ considerably in terms of effectiveness. When the leaders of workplace unions are appointed, they tend to be rather passive in representing workers, whereas elected leaders tend to be more vigorous. As already mentioned, however, their effectiveness is largely on the attitudes of other industrial actors. The incompetence of workplace trade unions naturally fosters the growth of independent workers' organisations: if workers' voices are to be heard, they must cause a disturbance so as to push employers closer to the bargaining table. Independent workers' organisations that are founded on democratic principles have a greater willingness to represent their constituencies vigorously through all possible mechanisms. Backed by strong bargaining power, spontaneous workers' organisations could be institutionalised temporarily as an effective way to answer economic demands. Workers even have the power to democratise existing workplace unions, though doing so would prove difficult. In any case, independent workers' organisations are likely to find it challenging to establish permanent identities. State-led representation was implemented by the government and the ACFTU in an effort to regain workers' trust and prevent any possible insurgency mediated by independent organisations. The collective contracts negotiated by state-led representatives can do little to promote workers' substantial interests unless they are directly involved in the bargaining process. The third representation mechanism privileges the interests of the state over those of workers.

(5.22) With regard to the legitimate sources of power, among the three mechanisms, only the first is enshrined in law. This second mechanism is an indication of the influence of administrative power in Chinese industrial relations and a challenge against the rule of law, in that this mechanism legitimises mechanisms that lack any legal status. The legitimate source of power for the third mechanism is a mixture of legislative recognition and administrative authorisation; and the latter, on occasion, has also created mechanisms beyond the law, such as "superior unions replacing inferior unions".

The evolution of worker representation mechanisms			Selected cases	Legitimacy source	Effectiveness	The categories of the representation	The period of bargaining process
Workplace trade unions	With nominated leaders		Workplace trade unions in Honda and Ascendant elevator factory (Friedman, 2014)	Regulated by legislation explicitly	Less likely to be effective	Appropriated representation	Collective consultation
	With elected leaders		KTS and Shunda Cases (Chan, 2009); Trade unions in Mars factory and the Venus Factory (Deng, 2016); Cases in other auto industries (W. Chen 2014)		Largely depends on the attitudes of other industrial actors. Workers' increasing bargaining power is transcending the limitations.	Semi-instructed representation	Collective bargaining
Independent workers' organisations	Structured workers' organisations						
	Spontaneous workers' organisations		Honda strike (Chan and Hui, 2012 and 2014); Philips strike in 2014 (Tan *et al.* 2014); Li De Event in 2015(Chang, 2015)	Authority's empowerment	Can be very effective in realising workers' instant economic demands, but less likely to integrate workers' power into official structure.	Instructed representation	Collective bargaining
State-led representation	Strike settlement occasions		Dalian strike waves in 2005(F. Chen, 2010)	Regulated by legislation ambiguously, more influenced by local administrative power	Could promote the healthy development of certain industries or regions, but can do little in promoting workers' substantial rights unless workers are directly involved in the representation.	Semi-appropriated representation	State-led collective negotiation / bargaining
	Pre-emptive occasions		Wenling woollen industrial negotiation (Wen, 2011; Friedman, 2014); Rui'an eyeglass industry (Friedman, 2014); Wuhan catering industry (Chan and Hui, 2014; Du, 2012)				

Table 6: The evolution and effectiveness of worker representation mechanisms

(5.23) Concerning the categories of the mechanisms, it is argued here that appropriated and instructed representation co-exist in China. Friedman's (2014) description of Chinese worker representation mechanisms is, as has been seen, limited to trade unions with appointed leaders and therefore fails to reflect the diversity of these mechanisms. When elected, the leaders of workplace trade unions view the power of workers being integrated, which is the essence of instructed representation; however, the power of the state or of enterprises can also be exercised through this mechanism, since democratisation is not complete; for this reason, the best descriptor would be "semi-instructed representation". The characteristics of spontaneous workers' organisations, approximate "instructed representation"; for such a mechanism is generally formed by workers in a democratic way, and representatives are responsible for their own constituencies. State-led representation is closer to appropriated representation, in which state power plays a dominant role, but it differs slightly from trade unions with appointed leaders and thus could be termed "semi-appropriated representation".

(5.24) In short, the closer a mechanism approaches instructed representation, the greater its potential for effectiveness, which has little relation to its legitimacy. Governmental power and the democratic participation of workers are two decisive factors in a mechanism's effectiveness. There are, however, considerable practical obstacles to the recognition and effectiveness of independent workers' organisations. The complicated picture regarding the relative effectiveness of the various mechanisms needs to be understood within the context of China's unique industrial structure; the following discussion accordingly focuses on the interests of the various industrial actors in China.

5.3 Industrial relations in China

(5.25) Industrial relations in China differ significantly from those in Western countries. The assumptions behind the Western tripartite model are inapplicable in China.[9] According to Deery *et al.,* (2001: 13), the two most significant of these assumptions are, first, that power is allocated equally among the main bargaining groups and, second, that state power protects public interests impartially, restricting the stronger power and protecting the weaker. In China, however, workplace trade unions are controlled largely by management, which means that the two bargaining parties are not independent from each other. In addition, governmental power in China rarely plays an impartial role in industrial relations. Under these circumstances, tripartite negotiations do not seem feasible in China.

9 Similar opinions can also be found Ma (2011: 146-147).

5.3.1 The structure of Chinese industrial relations

(5.26) The existing legislation restricts involvement in industrial relations to only three parties. Some scholars have argued, however, that, in practice, Chinese industrial relations have evolved from a tripartite model involving governments, trade unions and employers to a four-party model that includes workers as well (Taylor *et al.*, 2003; F. Chen, 2010). Ma (2011) has argued that six parties are involved – the party-state, the ACFTU, grassroots unions, employer organisations, employers and workers – on both the micro and macro levels, but even this model still fails to explain fully the complicated industrial relations in China in terms of the discrepancy between trade unions' institutional and practical subordination, the roles of middle-level (i.e. between the top and primary levels) unions and the distinction between local governments and the central government.

(5.27) This section represents an attempt to map the structure of industrial relations in China, including actors at both the micro and macro levels and those involved at various stages of collective bargaining. The evolution of worker representation mechanisms discussed here can usefully be divided into the three bargaining periods discussed by Chan and Hui (2014). According to these scholars, collective bargaining in China is transforming from "collective consultation as a formality" through "collective bargaining by riot" and towards "party state-led collective bargaining". In the first of these stages, only employers and workplace trade unions actually participate. During collective bargaining that occurs in response to workers' riots, independent workers' organisations, local governments, employers, workplace trade unions and even middle-level trade unions and the ACFTU may all become involved. Occasionally, the central government may also issue policies or directives to set the tone for collective bargaining. In party-state led collective negotiations, administrative power is the dominant industrial actor, with governments, trade unions and employers (or their organisations) all taking part. From this perspective, more than six industrial actors are involved over the course of the three bargaining stages. In practice, however, only four parties actually participate. Institutionally and theoretically, the ACFTU leads all trade unions in a hierarchical way. State involvement can include the central government (the party-state) and local governments (i.e. all governmental levels below the central government). Employers for their part are involved through the CEC, employers' organisations and individual employing entities. As illustrated in Figure 7, then, the four parties involved in Chinese industrial relations are 1) trade unions, 2) employers, 3) workers and 4) governments.

5.3.2 The interests of industrial actors

(5.28) Following its market reforms, China has witnessed great growth in the non-state economy, in the context of which the interests of industrial

actors have become diversified. The analysis of the interests of industrial actors in the socialist market economy presented here makes clear the extent to which the interests of industrial actors are alternatively contradictory and overlapping and also seeks to explain why no other parties can represent workers effectively except themselves.

(5.29) The following discussion is informed by the interest analysis approach, which was created by Brainerd Currie and has been widely used by him and his successors to assess conflicts of law (e.g. Sedler, 1985: 483; Brilmayer and Lea, 1985: 461-462; Corr, 1983: 653) and has been extended to other types of conflict. Interest analysis provides a framework for arriving at an accurate and complete understanding of the desires and aspirations of conflicting parties. In Chinese industrial relations, there are also conflicts of interest among industrial actors.

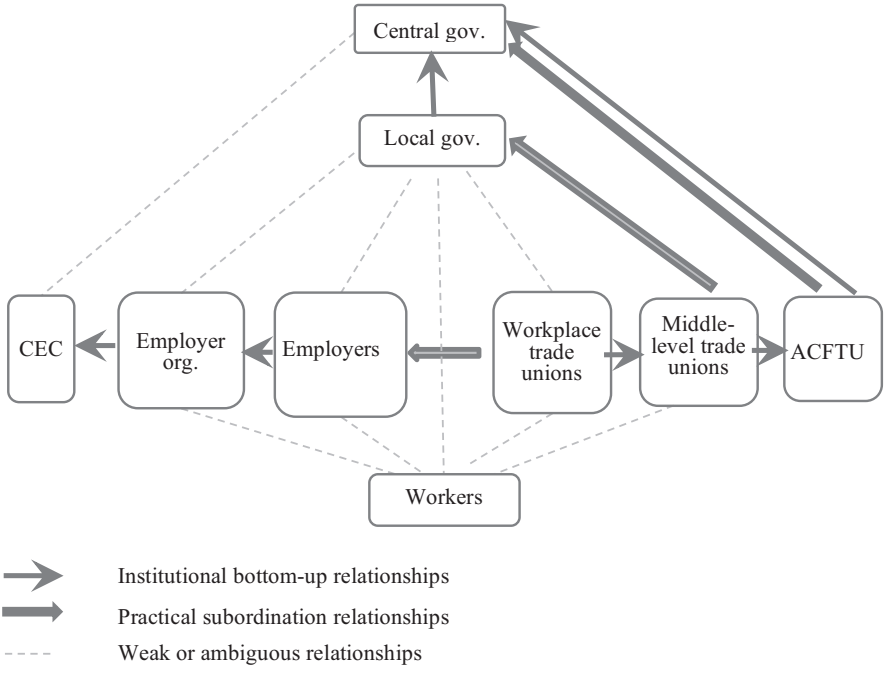

Figure 7: The quadripartite industrial structure of China

5.3.2.1 The many facets and levels of the Chinese state

(5.30) The main roles of governments in industrial relations are, first, to enact legislation, which impacts industrial actors in a direct way and, second, to implement policies, which impacts industrial relations in an indirect way. The interests of the central government and local governments are not always the same in industrial relations, so the following discussion considers them separately.

A. The central government

(5.31) Since the late 1980s, the Chinese central government has prioritised the preservation of social stability, implementing numerous regulations and policies to achieve this purpose, as reflected in the ubiquitous national political slogans "stability before all else" (*wending yadao yiqie*)[10] and "building a harmonious society" (*jianshe hexie shehui*).[11] However, the stability with which the central government is most concerned is essentially political in nature, as is manifested in its reluctance to empower social organisations or other actors in civil society. This attitude connects closely with its development history. In the 1920s, the ruling party at the time began to mobilise workers to engage in labour movements with the goals of securing better salaries and shorter work weeks, but the mobilisation ended up turning workers' anger against the old political regime (Chang, 2015; Friedman, 2014). These developments served the political purpose of "spreading the fire of revolution" from the 1920s to the 1940s. The concern for political stability was also influenced by the events of the 1980s, e.g. the success of the Solidarity union in Poland. Independent unionism and collective actions have accordingly been perceived as potential threats to political stability, and the national law has authorised only the ACFTU with trade union rights. The Labour Contract Law of China (2008) enacted under this ideology similarly fails to grant workers substantive collective rights.

(5.32) The central government also places great emphasis on economic development and has promulgated various documents and policies to stimulate growth, including encouraging the non-state economy and reconstructing the state-owned economy. As a consequence, over the past two decades, the Chinese economy has experienced a sharp increase in productivity and profitability. Since 2010, central governors have worked to slow the economic growth rate, from around 10% to around 7% annually, but the promotion of economic growth remains the central government's secondary target after social stability.

(5.33) Since 2003, following the sequence of social stability and economic growth, the central government has given increasing attention to the protection of workers' rights and interests by promoting a number of pro-labour policies. For instance, the Labour Contract Law (2008) very much supports the individual contract system. At the beginning of 2010, then Premier

10 This slogan was proposed by Xiaoping Deng; see "Stability overrides all else"(in Chinese), http://www.people.com.cn/GB/shizheng/252/5303/5304/20010626/497648.html, last visited 10 December, 2017.

11 This policy was put forward by Jintao Hu. For more details, see people. cn, "The main introduction of comrade Jintao Hu's study on Constructing Socialist Harmonious Society" (in Chinese), available at http://politics.people.com.cn/n/2013/0426/c1001-21285709.html, last visited 13 May 2016.

Jiabao Wen urged better treatment for the nation's vast army of migrant labourers, asserting that "the governments and all parts of society should treat young migrant workers as they would treat their own children."[12] This speech set the tone for the settlement of the strike wave in that year. Later on, Wen also called for working conditions to be improved.[13] In July 2014, the central government requested that the ACFTU and other mass organisations carry out far-reaching reforms designed to prevent and overcome "apparatusisation, administrativisation, aristocratisation and entertainmentisation".[14] It remains unknown whether central officers' pro-labour policies are based on the party-state's concern for political stability, for protecting workers' rights and interests or for both. The top-down reform, despite not being thorough, in any case shows the central government's willingness to ameliorate working conditions.

(5.34) As explained above, the central government's top priorities are, in order, social stability, economic growth and protecting workers' rights and interests. Owing to concern for political stability, the law is relatively less engaged with collective labour rights. This disengagement is a key reason why workers' individual rights in China remain vulnerable, hollow, unenforceable and often disregarded (Chen, 2007). Most Chinese workers, especially rural migrants, are employed in labour-intensive industries characterised by low salaries, long working hours and considerable work intensity and are thus unable to claim their rights and needs to employers in individual negotiations. As a result, the binding nature of pro-labour regulations on individual rights could also be undermined by flaws of relevant legislation regulating collective labour relations. In short, though the central government has had no obvious pro-employer orientation in drafting its ostensibly pro-labour policies, the current labour law nevertheless tends to favour employers' interests.

B. Local governments

(5.35) Compared with the central government, lower-level governments are more focused on developing the local economy, in the context of which patron-client relations are frequently observed (Friedman, 2014: 132; Hart-Landsberg and Burkett, 2007: 25; Bai, 2011). Local governments do not in

12 Asianews (2010), "Honda workers go back to work; Wen Jiabao concerned", available at http://www.asianews.it/news-en/Honda-workers-go-back-to-work,-Wen-Jiabao-concerned-18685.html, last visited 7 May 2016.

13 Watts, Jonathan (2010), "Workers in China grasp the power of the strike", see https://www.theguardian.com/world/2010/jul/04/workers-china-power-strike-communist, last visited 17 July 2017.

14 People.cn (2015), "The Necessary Logic of Reform on Mass organisations" (in Chinese), available at http://opinion.people.com.cn/n1/2015/1215/c159301-27928566.html, last visited 9 May 2016.

general sit at the bargaining table, but their roles in industrial relations are vital in determining the extent to which workplace trade unions support employers and workers (F. Chen, 2010: 118-119). The regulations created by local legislative agencies also exert a significant influence on industrial relations below the central level. The Provision on Minimum Wages (2004) grants local governments considerable autonomy in setting local standards and, under Article 8, provincial labour bureaus are required to negotiate with trade unions and business associations at the corresponding level when setting the minimum salary within a jurisdiction. However, local governments, in general, play the dominant role in drafting local regulations, given that the status, resources and promotion of local bureaus and trade unions are in the hands of government officials at a parallel level. To cater to the interests of the capital, local governments generally lower the minimum wage as far as possible so as to guarantee enterprises sufficient room to exercise despotic autonomy. Moreover, the enforcement of pro-labour legislation at the national level is often conveniently ignored by local governments. During the 2008 crisis, for instance, officials in Guangdong announced "Ten Suggestions" to encourage enterprise development and ensure stable and relatively rapid economic growth, one of which was that enterprise bosses suspected of "normal crimes" need not be arrested.[15] A local government body went so far as to say that employers who violated the Labour Contract Law would "not be fined and will not have their operating licenses revoked".[16] Under these circumstances, "employers who might follow labour laws may fall into a quandary: why spend money to observe labour laws if it does not matter?" (Brown, 2006). Hence, it is more likely that local governments tempt employers to violate the law than that employers will do so on their own.

(5.36) Local governments also place importance on local stability. As alluded to earlier, when worker activism develops quickly, the reputation of the local governments may be damaged, so, in order to protect their images, local governments feel compelled to shift their allegiance to the workers and bow to their demands, forcing employers to make concessions in order to pacify insurgence by workers before it spreads. Failure to do so can attract the attention of the central government, which as has been seen prioritises social stability over economic growth. The rights and interests of workers are viewed by local governors as less important than any of these other considerations.

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15 For more details, see Sina website (2009), "Guangdong stipulates that bosses suspected of normal crimes do not have to be arrested (in Chinese)", available at http://news.gd.sina.com.cn/news/2009/01/07/522702.html, last visited 7 July 2015.

16 See the Finance website (2009), "1/3 of Gongguan enterprises delay re-opening; migrant workers returning to Guangdong have difficulties finding jobs" (in Chinese), available at http://finance.ifeng.com/news/hgjj/20090214/371654.shtml, last visited 7 July 2017.

(5.37) To sum up, the interests pursued by the central government are not identical to those of lower-level governments. The central government prioritises social stability (political stability) over economic growth, while local governments prioritise the local economy. In both cases, workers' interests are the last thing that they take into consideration. The underdeveloped legislation at the national level gives local governors, who emphasise economic growth, some space to manipulate. When it comes to interests that overlap with those of employers, local governments on occasion undermine the binding power of pro-labour national legislation, while others establish regulations that more pro-labour than those at the national level. [17]This latter situation seldom occurs, however, because of local governments' fixation on short-term economic growth. In such an employer-friendly environment, employers are easily trapped in the quandary of observing the regulations. The divergent interests of central and lower governments mean that, even if the central government intends to pro-actively ameliorate labour conditions, patron-client relations between local governments and enterprises are likely to frustrate the efforts of the former (also see Hart-Landsberg and Burkett, 2007:25; Bai, 2011: 15).

5.3.2.2 The various levels of trade unions

(5.38) Theoretically speaking, trade unions in China follow a strictly pyramidal structure (as described in Articles 9 and 10 of the Trade Union Law): the lower-level unions are supposed to be led by higher-level ones. Nevertheless, as generally recognised, trade unions at different levels are in practice subordinated to other industrial actors (Bai, 2011: 15; Liu, 2010; Chen, 2009: 664; Chang, 2015: 11).

(5.39) The ACFTU is not a trade union in the Western sense but rather a "state corporatist institution" (Taylor and Li, 2007; Howell, 2008; Chan, 1993 and 2008), for it is required to follow the leadership of the ruling party (Article 4, Trade Union Law, 2001 amended version). When the ACFTU was established in the 1920s, it engaged in militant actions, including strikes, marches and armed pickets during anti-imperialist war (Friedman, 2014). As has been seen, all attempts by the ACFTU after 1949 to become independent ended in failure (Clarke and Pringle, 2009, Cooke, 2011a; Chan and Nørlund, 1998), and, since the late 1980s, the federation has been particularly closely connected with the party-state. Despite these failures, however, the ACFTU has never ceased representing workers' interests, at least when it comes to lobbying for pro-labour legislation at the national level (Clarke,

17 For instance, the Guangdong Regulation on Collective Contract of Enterprises (2015) not only obligates employers to respond to workers, demands but also provides them with a direct channel to voice them; Article 52 of Shenzhen Special Economic Zone Harmonious Labour Relations Regulations (2008) almost recognises the right to strike.

2005; Clarke and Pringle, 2009; Cooke, 2011a; Chang, 2015). In recent years, it has also been promoting the collective contract system and democratic management of enterprises. However, unlike Western trade unions, the ACFTU also has the production function described earlier (see chapter 3). As such, its interests parallel, first, those of the party-state's leadership and, second, workers' rights and interests and, lastly, economic growth.

(5.40) Middle-level trade unions are influenced by various institutions. The officials of middle-level unions can hardly from escape the interference from local governments, who help determine their position, income and the extent to which they are promoted (Bai, 2011; Li and Liu, 2016: 286). Hence, local governors' directives are usually the primary concern of middle-level unions. The secondary concern is usually the directive from higher-level unions. This is especially embodied in the process of extending trade union organisations at the workplace level, during which the ACFTU established how many workplace trade unions should be established and assigned middle-level trade unions to achieve this quota (Pringle, 2013; Liu, 2010). There are also cases in which middle-level unions have promoted pro-labour local regulations to protect workers' rights and interests. However, the effort ended in failure owing to the constraint of local governments (for special case, see F. Chen, 2010: 120). As such, the interests of middle-level unions follow the sequence of local governors' directives, higher-level unions' orders and, only then, workers' rights and interests.

(5.41) At the primary level, workplace unions are generally seen as "paper unions" (Liu, 2010; Bai, 2011), "listing" or "shelling unions" (Chang, 2015) or "boss-controlled unions" (Clarke and Pringle, 2009: 98; Clarke, *et al.*, 2004: 252; Pringle and Clarke, 2011). These images reflect workplace trade unions' dependence on management (for historical reasons, see Taylor *et al.*, 2003: 103-107). Their secondary concern is orders from local governments. Workplace unions almost always accept the government line when it comes to issues that significantly affect company profits or production (Anwar and Sun, 2015: 82). The influence of management and local governments on workplace trade unions weakens the interactions of the latter with middle-level unions (Liu, 2010). Thus, the directive from higher-level union organisations is in general the third most pressing concern of workplace trade unions, and is ahead of workers' rights and interests when it comes to representing them in collective labour disputes. In short, workplace trade unions have four levels of interests: the orders of management, the influence of local officials, the guidance of higher-level union organisations and, again lastly, workers' rights and interests.

(5.42) The interests summarised here are but a rough reflection of trade unions' political, institutional and organisational constraints. Owing to the various organising patterns of trade unions and the uneven quality of their leaders, some trade union officials are comparatively active, at least within

the limited scope available to them. For instance, Weiguang Chen, a former chairman of Guangzhou FTU, is widely recognised as a fairly open and assertive proponent of trade unions in fighting for workers' rights.

5.3.2.3 Employers (employer organisations)

(5.43) During the economic transformation, a non-state economy has developed in China, and state-owned enterprises have also undergone mandatory re-organisation. As a consequence, the interests of workers, employers and the state are no longer what they once were. Theoretically speaking, enterprises regard the maximisation of profit as their main goal, and reducing the cost of human resources is one of measures that has been used to achieve this goal. The inevitable result is tension between employers and workers, with the latter pursuing better working conditions. The tension between employers and workers varies across different kinds of enterprises. At state-owned enterprises, where workers enjoy more job security and better conditions than workers in the private sector, the contradiction is less obvious, while it is very intense in labour-intensive MNCs, which prefer to locate wherever labour is cheap. MNCs are frequently accused of exploiting the labour force; the well-known case of Foxconn, the largest manufacturing electronic company in the world: the company received sharp criticism both domestically and internationally for its military-style management of workers.

(5.44) In recent years, a campaign for corporate social responsibility (CSR) has been active. The pressure from consumers, international societies and NGOs has compelled MNCs to guard their reputations with care. Decent working conditions are increasing regarded by employers as a business strategy, and they have sought to improve them. While firms still seek to maximise profits, then, to various extents they also take into consideration workers' rights and interests.

5.3.2.4 Workers

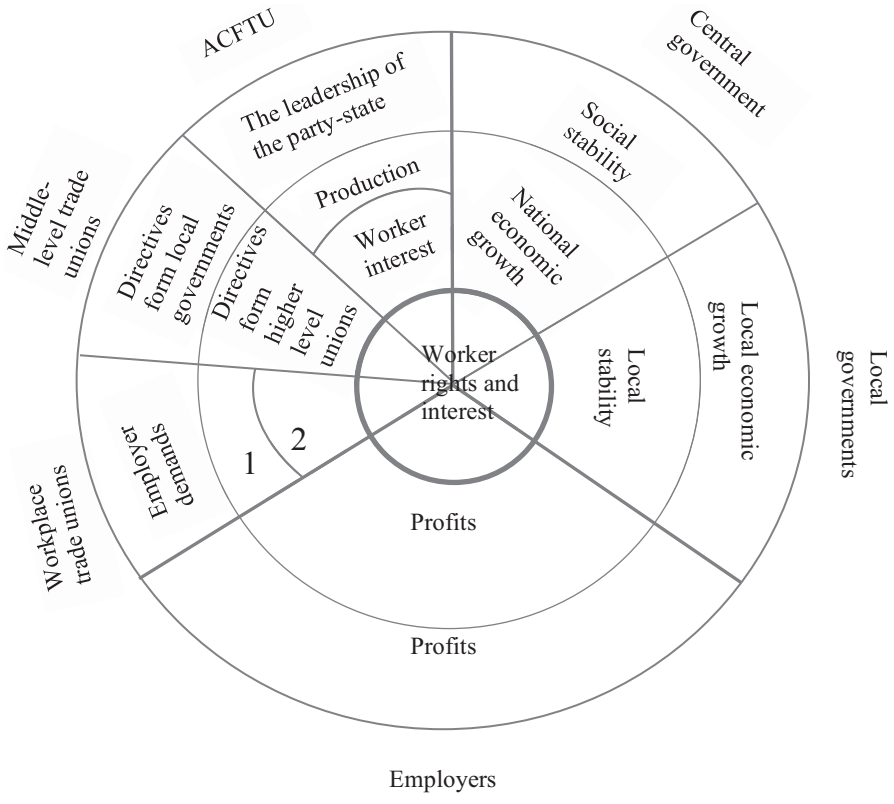
(5.45) Workers' interests in industrial relations tend to be fairly straightforward: better pay and working conditions, job security and so on. Compared with the other three industrial actors involved in Chinese industrial relations, workers are the weakest owing to their lack of a legal identity. Workers are thus playing the weak hand in the labour market and, though they are increasingly aware of their rights and that have the ability to take disruptive actions, they remain unable to bargain effectively because they lack bargaining skills (F. Chen, 2010). A number of labour NGOs in the coastal areas have since the 1990s played an important role in assisting workers with organising collective actions effectively and training their bargaining skills (Chan, 2012; Chan and Hui, 2012), but they have not been legally recognised, and some of them have run afoul of government officials

(He and Huang, 2008; He and Huang, 2015), whose attitudes towards the NGOs have weakened the position of workers in countervailing the pressure of employers.

(5.46) In China's quadripartite structure, then, each industrial actor has its own interests. Employers chase profits but also to some extent take into account workers' rights and interests, while workers pursue better working conditions. The roles of trade unions and governments are more complicated. The various levels of trade unions and governments have a wide array of priorities and preferences. Generally speaking, workplace unions are mostly controlled by employers, and middle-level unions are mainly influenced by local governments, while the policies of the party-state are always the priority for the ACFTU. Central governors assign greatest importance to maintaining social stability, but local governments are most concerned with economic growth.

(5.47) An analysis of the interests of the various industrial actors leads to the conclusion that industrial relations in China are state-centred. At both the national and middle levels, trade unions are more influenced by state power at an equivalent level. Workplace-level unions seem to be more influenced by employers, whereas the directives of local governments can easily shift the stance of workplace trade unions in labour disputes. Independent workers' organisations have not been given legal identity by legislators who are for their part under the lead of the ruling party, the central leaders of which also constitute the key leaders of the central government. Employers are driven to the edge of violating law mainly because of local governments' enthusiasm for developing the local economy.

(5.48) In short, as Figure 8 indicates, Chinese workers' rights and interests are constrained by those of other parties, being the last consideration by all other industrial actors except the ACFTU. None of governments (either central or local) or trade unions (central, middle-level or workplace place) can fully represent workers. State-led representation combines the interests of governments and trade unions, for which reason this mechanism is unlikely to be vigorous in its pursuit of workers' interests. So again, only those representation mechanisms that are based on the democratic participation of workers can represent them effectively. However, various obstacles impede the recognition and promotion of such mechanisms. The following discussion addresses the possibilities and challenges for the promotion of effective representing mechanisms.



1. Directives from local governments
2. Directives from higher level unions

Figure 8: Interests shared by industrial actors

5.4 Discussion and conclusions: possibilities and challenges in promoting effective representation mechanisms for Chinese workers

(5.49) As discussed above, the essence of effective representation mechanisms is workers' democratic participation, which can be achieved in two ways. One is through independent workers' organisations, which are run by workers in democratic ways; however, this mechanism cannot be promoted until it is legalised through the guarantee of the freedom of association. Second, workplace unions can be run through the democratic participation of workers, though the leadership of most Chinese workplace trade unions is appointed by other industrial actors rather than being elected by their constituencies. The following discussion addresses the possibilities and challenges for promoting the two ways.

(5.50) With regard to the first way, there are other obstacles, apart from the unwillingness of national legislators to grant independent workers' organisations legal status. If workers do gain the freedom of association, it is unclear whether their independent organisations can quickly become effective in representing them. For two decades, workers have been accustomed to achieving temporary gains by engaging in rioting, as in the Honda strike; other methods would have consumed more time and resources. In addition, in these past two decades, workplace trade unions have sided with employers so consistently that workers have lost confidence in and enthusiasm for them. Under these circumstances, it will take some time for lawful independent workers' organisations to re-gain the trust of workers. Further, the structured labour shortage provides workers with alternative ways to protect themselves through individual "exit" options rather than seeking help from unions or from collective remedies in general. In addition, a case study by Chan (2009) has demonstrated the depth of the entrenchment of the concept of a pyramidal relationship between trade unions and workers in their belief. Moreover, it is mainly rural migrants who work in labour-intense industries; owing to their lack of education, it is difficult for these workers to grasp the skills involved in collective negotiation. Given the limitations of the Chinese working class, it seems unlikely that independent workers' organisations will be providing workers with effective representation any time soon even if such organisations are recognised. However, the right to organise can lead to the recognition of independent workers' organisations. In the long term, this representation mechanism will represent the optimal approach to representing workers in China given that the country's working class is already aware and is becoming increasingly adept at organising industrial actions. Thus some of the problems that currently compromise the working class could finally be overcome in the near future by improving the quality of the labour force.

(5.51) Compared with recognising independent workers' organisations, the democratisation of official institutions, especially workplace trade unions, is more acceptable to the party-state and the ACFTU, since this approach is compatible with the present political system. Among the various impediments to this approach, the most important remain the various levels of government, such as the overlapping interests of local governments and business and the central government's preoccupation with social stability. As explained above, industrial relations in China are dominated by state power, which influences the performance of the ACFTU and of the capital. The central state's ambiguous attitudes regarding workers' collective rights also undermine the exercise of workers' individual rights. Local governments' focus on economic growth entrenches the pro-employer environment created by the central state. Thus, the resistance of various levels of government is the main obstacle to workers' democratic participation in workplace trade unions in China.

(5.52) At an early stage of collective bargaining, the intervention of governments should not be completely dismissed, at least not too quickly (Chan and Hui, 2014). So also Clegg (1976: 10), after comparing bargaining systems in six countries, contended that "state intervention may also be a powerful influence if it comes at a sufficiently early stage in the development of collective bargaining". Such a situation has already occurred in China. The "street as courtroom" phenomenon is the result of the legal system's limited capacity coupled with the central government's campaign to build a "harmonious society"; governmental influence often brings about a resolution that is favourable to workers, provided that striking is peaceful (Su and He, 2010: 157). Local governments should enjoy a certain measure of despotic autonomous power in so large a country with uneven economic levels and only a short history of bargaining. However, as the old Chinese saying goes, "the sky is high, and the emperor is far away": local governors may by chance find themselves free from the monitoring of the central state, making it possible to perceive that local governments abuse their power. Therefore, improving working conditions requires correcting the abuse of local administrative power; otherwise, "no matter how many good labour laws are passed, these new laws will only do very little to benefit workers" (Bai, 2011: 15).

(5.53) Correcting the abuse of local administrative power can, however, only serve as a short-term solution. Currently, the admitting of workers' participation in collective bargaining by local governments is usually temporary, and the achievements of worker activism cannot be sustained without ensuring their on-going involvement in the official structure of labour relations (i.e. in trade unions). A long-term solution requires central governors to adjust their priorities. Granting the ACFTU the exclusive right to represent workers can only maintain stability in the short term. This empowering pattern, however, is unadvisable in an era in which the bargaining power of workers has increased and labour unrest has proliferated. The democratisation of workplace trade unions is a possible and also a safe way to mitigate workers' insurgence within the context of the current political environment. This solution guarantees workers' participation through a voice mechanism and is also compatible with the legal position of party-led trade unions, making it possible to achieve long-term industrial balance.

6 The institutionalisation of worker's participation in collective bargaining in China: The implications of a bottom-up Path

—Based on collective actions by workers since 2010[1]

Abstract

(6.1) In China, there has since 2010 been a bottom-up effort to increase workers' participation in collective bargaining institution. It is argued in this chapter that state power has begun to make room for the power of workers in state-centred industrial relations, granting a range of concessions from temporary authorisation to statutory empowerment, though these concessions have been experimental in nature and limited, including only a modest recognition of the right to bargain collectively and being confined within a small part of the country where the labour movement has historically been strong. Some local regulations even forbid workers to strike, albeit indirectly. This limited institutional space is, however, insufficient to make the voices of workers heard. As a result, collective actions may be continued to be used as a means to articulate workers' future demands. It is accordingly imperative to revise the labour legislation and develop collective bargaining in order to limit the potential for further labour unrest in China.

Keywords: China; collective actions by workers; institutionalisation; workers' participation; trade unions; collective bargaining

1 An earlier version of this chapter was presented in the 9th Asian Congress of the ILERA in Beijing and was reviewed by Prof. William Brown of Cambridge University, Prof. Sean Cooney of Melbourne University, Dr. Wei Huang and Prof. Kai Chang of China Renmin University and commented upon by Mr. Jian Qiao of China Labour Relations Institute, whose suggestions are much appreciated.

6.1 Introduction

(6.2) Economic growth has been brisk in China since the implementation of the policy of "reform and opening to the outside world". This rapid development is in part attributable to the willingness of the first generation of rural migrant workers to tolerate harsh working conditions in order to remain employed. However, the Honda strike (see Chan and Hui, 2012; Butollo and Brink, 2012) and worker suicides at Foxconn (see Chan and Pun, 2010) in 2010 demonstrated that Chinese workers were becoming more active in fighting for better working conditions, going beyond merely defending their legal rights (Chang, 2015). As discussed in the introduction to the thesis, the number of strikes in China has been increasing.

(6.3) Three broad categories can be distinguished in previous research on worker unrest in China. First, there have been studies that focus on labour activism itself, including the organising patterns and general nature of the labour movement in China (e.g. Butollo and Brink, 2012; Elfstrom and Kuruvilla, 2014; Cooke, 2013). Some scholars have also discussed the political significance of labour protest, for example, Pun (2005); Pun and Lu (2010); Pun and Chan (2008); Chan (*et al*., 2013); Gray and Jang (2015). These studies generally regard workers' struggles as a manifestation of the awakening of the Chinese working class. The second group goes further in supporting the kind of institutional reform pushed by the labour movement, especially in terms of the incorporation of workers' autonomous power into trade unions (e.g. Chan and Hui, 2012; Estlund and Gurgel, 2013). However, these studies have been centred on trade union reform. The third category of research involves work on the institutionalisation of workers' participation in state-centred industrial relations. For instance, Chang (2015) has provided detailed accounts of the development of labour movements in two directions (upward and downward), but without detailing how workers' power is gradually being institutionalised in the collective bargaining system in a bottom-up direction. With reference to the double movement theory of Karl Polanyi (1957), who argued that double movements existed in 19th century in the context of the extension of market organisation and the movement restricting the commodification of labour, land and money in market, Friedman (2014: 18-22) distinguished in workers' movements two intertwined moments, the insurgent and the institutional; the "insurgent moment" is that "in which social groups marginalized in the process of capitalist development engage in disorganized and ephemeral resistance to commodification; and the institutional moment, when durable class compromise is established in the political and economic spheres". From this perspective, Friedman has viewed the labour movement in China mainly as an insurgent moment and noted that the Honda strike involved a push for the political incorporation of trade unions, but he failed to specify its path (Friedman, 2013; 2014: 159). In addition, when discussing the labour movement, neither Chang nor Friedman addressed the law, which is part of a

fairly durable and stable pattern for institutionalising workers' involvement in collective bargaining.

(6.4) As part of an effort to fill these gaps in the existing research, a demonstration is made in this chapter of the manner in which workers' involvement has gradually been subsumed into the process of collective bargaining. The second section of this chapter discusses several driving factors that lead workers to resort to collective actions, that is, why workers choose to voice their demands through activism. These factors include increasing bargaining power, changes in governmental policies, problematic mechanisms for resolving labour disputes and other external factors. The third section explores the three steps through which workers' power has been institutionalised since 2010 regarding collective bargaining. The following section addresses the future of labour unrest and collective bargaining in China from the perspective of the three steps of institutionalisation, and the last section lays out the final conclusions of the thesis.

(6.5) The research materials in this chapter come mainly from four sources. The first is the *China Statistical Yearbook* compiled by the National Bureau of Statistics of China (see chapter 1). These official data register all cases that have progressed to such legal remedies as mediation, arbitration and litigation, but do not include collective actions that have not issued in such procedures. To supplement the official data, this chapter also refers to unofficial records (see chapter 1): *Strike Map*, a well-recognised and constantly updated record the number of strikes that goes back to 2011, and *China Strike*, which provides valuable data on strikes between March 2004 and December 2012. The other source of data for this chapter is previous fieldwork by such scholars as Deng (2016), Lee *et al.,* (2016), which provides detailed information about the ways in which workers made their demands known to employers during collective bargaining in the course of the three steps just referred to.

6.2 Factors driving workers' engagement in collective actions

(6.6) The increased activism on the part of workers from 2010 on is a result of many factors that can be approached from four perspectives. The first is from that of the workers themselves, including the labour shortage and the changing quality of labour. The second perspective is that of dispute-resolution mechanisms, both direct and indirect. The third perspective is that of the changing political and economic environments. This section also takes external factors into consideration, in particular the role of labour NGOs and modern technologies.

6.2.1 The main impetus: workers' increasing bargaining power

(6.7) As previous research has frequently mentioned, the growing labour shortage is an important driver of the increasing number of strikes in China (Cooke, 2011a and 2013; Clarke and Pringle, 2009: 92; Gray and Jang, 2015). The first wave of labour shortages occurred in 2004 in the country's south-eastern coastal regions, where roughly 2 million job vacancies in labour-intensive industries went unfilled.[2] The problem gradually spread to other coastal areas and some large cities further inland. Figure 9 shows the ratio of job offers to job seekers in the labour market clearly. On the graph, a value of 1 indicates that the number of job offers is equal to the number of job seekers; when the number exceeds 1, there are more offers than seekers, and thus a potential labour shortage; when it is less than 1, there are more job seekers than offers, and thus a potential labour surplus. This Figure indicates the official ratio was 0.65 in the first quarter of 2001, and by the fourth quarter of 2015 it had increased to 1:1, with 2010 marking a turning point as the first year in which the number of job offers exceeded the number of job seekers. It is important to note that this data may not exactly reflect the status quo for labour-capital relations in labour markets throughout the country, since that the survey only covers the large cities in China. Still, this data can serve to indicate the basic tendency of labour markets in big cities. This outcome was one of the benefits of the one-child policy. The labour shortage could be translated directly into bargaining power for workers in negotiating with employers, who for their part found it difficult to dissolve strikes by simply dismissing striking workers and replacing them with new ones.

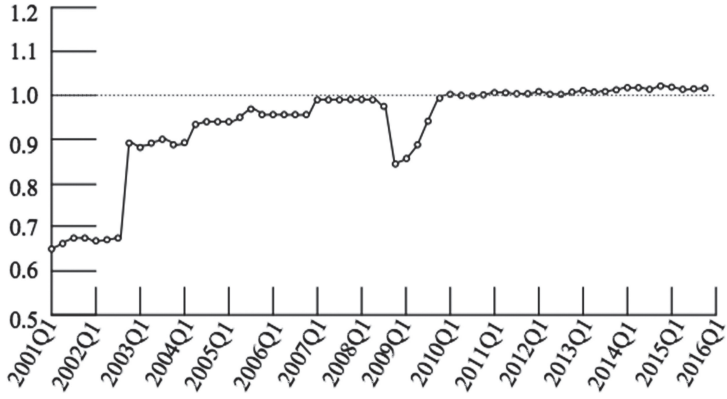


Figure 9. The ratio of job offers to job seekers in the Chinese labour market (2001-2015)
Source: *Official Statistics for job placement services in China*[3]

2 The Economist (2004), 9 October, Vol. 373, no. 8396, p. 69.
3 See http://www.chinajob.gov.cn/DataAnalysis/node_1041.htm, last visited 9 June 2016.

(6.8) It is important to keep in mind that labour shortages and surpluses can co-exist in China in what is often referred to as a "structural labour shortage", meaning one that exists only in certain areas, seasons and industries. In a general sense, the labour supply in China remains overabundant. The rather low official unemployment rate (around 5%) may under-report the actual situation because it does not include the rural migrant workers. The academic unemployment rate is around 10%.[4] An important reason for the co-existence of structural labour shortages and high unemployment rates is that rural workers are less willing to work outside their home provinces primarily because they are unable to access education, housing, hospital, welfare, and so on because of the *hukou* system. [5] It is also debatable whether the reversal of labour-capital relations is permanent, since it is often reported that foreign investment is beginning to leave China and relocating to countries with a cheaper labour force; in fact, however, the improvement in the quality of labour reinforces workers' bargaining power. To be more specific, the current labour force is widely regarded as having more education and greater awareness of its rights than the first generation of Chinese workers in the non-state economy (Pun and Lu, 2010; Cooke, 2013; Chan *et al.*, 2013), as a consequence of which these younger workers are less willing to tolerate harsh working conditions. Workers may prefer to be self-employed rather than suffer from low wages and long working hours. The "Research Group on the New Generation of Migrant Workers" survey supports this viewpoint.[6] An increase in workers' bargaining power is therefore bound to be result from the structural labour shortage and the increasing quality of labour, as the effects of dependably cheap workers in China are being offset by the impact of the one-child policy.

6.2.2 Flawed dispute-resolution mechanisms

(6.9) Industrial conflict is inevitable in any market economy, but if governments make the appropriate resolution mechanisms available, workers can be prevented from resorting to irrational alternatives. There are two types of mechanisms for resolving labour disputes in China, direct and indirect, but both suffer from disadvantages (similar categorising pattern, see Ye, 2016).

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4 See further Matthews, Chris (2015), "What is the Real Unemployment Rate in China, available at http://fortune.com/2015/08/20/china-unemployment/, last visited, 17 July 2017.

5 See Wang, Zhuoqiong (2012), 'More Workers Staying Near Home', available at http://www.chinadaily.com.cn/china/2012-04/28/content_15166329.htm, last visited 17 July 2017.

6 Research Group on the New Generation of Migrant Workers (2011), "The numbers, structures and characteristics of new generation of rural migrant workers" (in Chinese), *Statistics*, 4:68-70.

(6.10) The existing legislation provides for four direct remedy mechanisms to resolve labour disputes: consultation, mediation, arbitration and litigation.[7] The procedures of consultation and mediation reflect legislators' preference for resolving labour disputes peacefully, in keeping with the ruling ideology of "building a harmonious society". Nevertheless, mediation agencies have not yet been established in most enterprises, and where they have, the process tends to be a mere formality (Cooke, 2013). Workers prefer to skip consultation and mediation procedures out of concern that these procedures may be manipulated by management. Arbitration is a compulsory procedure if workers want to seek justice from the court system, but, as the fieldwork of Li and Liu (2016: 295) demonstrated, the arbitration-litigation system of a simple dispute can stretch over two years. In addition, there are other "invisible hurdles" prevent workers from choosing arbitration or litigation. In a lawful remedy process, workers' power is widely dispersed; the courts and arbitration systems would prefer to split collective disputes into individual cases (Chen and Xu, 2012; Friedman, 2014); the data from the *China Statistical Yearbook* indicate that the number of accepted labour disputes has increased, while the number of persons involved in each labour dispute has decreased from 3.93 in 1996 to 1.33 in 2013, as shown in Figure 10. Furthermore, arbitration agencies and courts at the local level are often influenced by corresponding local governments, which tend to exert their administrative power in order to create a pro-business environment (Friedman and Lee, 2010: 518; Cooke, 2013).

(6.11) With regard to indirect remedy mechanisms, the limited effectiveness of Chinese workplace unions in representing workers has created in workers the tendency to eschew the collective bargaining system as a means to address their grievances. Thus they often challenge the legitimacy of workplace trade unions, sometimes even calling for their abolition and labelling them "running dogs" or "traitors" (see chapters 4 and 5). With regard to collective bargaining, it is common in China to observe "collective consultation" or "formalistic collective bargaining" rather than true collective bargaining, since, as was seen in earlier chapters, workplace trade unions are usually controlled by employers (Clarke *et al.*, 2004; Chan and Hui, 2014; Cooke, 2011a and 2013; Kruvilla and Zhang, 2016: 171; Wu and Sun, 2014; Lee *et al.*, 2016). A significant body of fieldwork demonstrates the failure of trade unions to represent workers, and their inactivity has bred workers' distrust in them. A survey by Wong (2011: 884) indicated that only 4.3% of workers would regard seeking help from trade unions as the first option for redress should their legal rights be infringed.

7 Article 5 of the Labour Dispute Mediation and Arbitration Law of the PRC (2008).

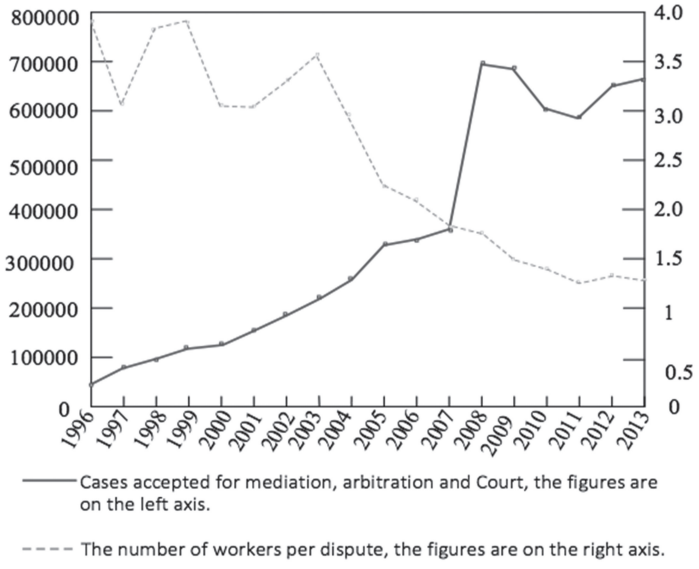

Figure 10: Cases accepted and workers involved in labour disputes, 1996-2013
Source: *China Statistical Yearbook*

6.2.3 Changing governmental attitudes

(6.12) The proliferation of labour unrest since 2010 is inseparable from the changing attitudes of the central and local governments, as has been manifested in the transformation of the economic development strategy and the changing political environment for the labour movement.

(6.13) The rapid speed of marketization since the 1980s has brought attention to many socio-economic issues, such as inequality between rural and urban workers and between eastern and western areas, environmental problems, the lack of social security and a general moral decline. Since the 2000s, the central government has enacted numerous policies to address these issues, for which the 2008 financial crisis provided a major impetus. The crisis highlighted the vulnerability of China's economy to fluctuations in the U.S. market and the value of the dollar in light of its long-term, export-oriented development strategy (Gray and Jang, 2015), and central leaders began to recognise the importance of self-reliance. As a consequence, China began to move towards a consumer-driven economy. Increasing workers' salaries was a crucial part of this effort. In the meantime, some lower-level governments, such as Guangdong Province and Shenzhen City, also shifted their development strategies, for example replacing labour-intensive manufacturers with higher-value heavy industry and services (a policy known as "emptying the cage for new birds to nest in"). These policies served as an indication that governors at both the central and local levels have become increasingly concerned about working conditions in China.

(6.14) The counter-measures against marketization in the economic sphere were accompanied by political measures. The party-state's continued focus on employment relations and working conditions has been apparent from 2000 onwards. The collective negation was placed on the agenda with the enactment of the Interim Measures on Collective Wage Negotiations (2000, issued by MOLSS) and the Regulations on Collective Contracts (2004, also issued by MOLSS). Since 2008, the central state has gone further in re-balancing labour relations[8] by creating a series of regulations, including the Labour Contract Law (2008), Employment Promotion Law (2008) and Labour Dispute Mediation and Arbitration Law (2008). These statutes are evidence of the government's effort to protect labour. Correspondingly, local regulations on collective contracts began to appear at this time. Examples include Liaoning Province, Hunan Province, Heilongjiang Province, Jiangsu Province, Shenyang City, Dalian City and Wuhan City, all of which issued local-level regulations pertaining to collective contracts. The extensive public discussion on social media surrounding the drafting of the Labour Contract Law (2008) helped workers to become more aware of their rights. Thus, while the nature of workers' collective actions remains ill-defined, the central government has strongly favoured resolving disputes through conciliatory means in order to avoid exacerbating industrial conflicts. Following the Honda strike, therefore, there has been a gradually increasing openness on social media towards the reporting of workers' industrial actions. State-controlled social media were also included, e.g. Focus Report (*Jiaodian fangtan*), Legal Report (*Jin ri shuofa*), the People Net, Xinhua Net, China Daily and China Economy. In brief, though the legislation governing industrial relations remains full of shortcomings, the aforementioned activities of the central government indicate its willingness to deal with the labour movement in a rational manner by channelling workers' collective actions into legitimate activities.

6.2.4 External factors

(6.15) Workers' inclination to resort to strikes in order to address grievances has also been influenced by external factors, in particular the development of labour NGOs and the rapid growth of technology. Given the ineffectiveness of trade unions when it comes to protecting workers, some activists have begun to provide additional assistance by establishing NGOs; this has been done in the coastal areas, especially the Pearl River Delta (Chan, 2012). Labour NGOs have played the role of trade unions in recent years by assisting and organising workers, promoting solidarity among them and making information about various professions available (Wen, 2014; Lee, 2007: 193; Chan, 2012). In addition, the development of technology, especially the Internet and mobile smart phones, has helped significantly in making it

8 State power first balanced industrial relations in the 1990s, when a series of labour regulations were adopted.

easier for workers to opt for collective actions. These technologies not only provide workers access to detailed information regarding labour rights, but also serve as an online communication forum. During both the 2010 Honda strike and the union-led strike against Walmart in 2014, workers relied on QQ, a messaging software widely used in China, to plan collective actions (Chang, 2015: 22; Li and Liu, 2016: 299).

(6.16) These factors combine to explain the increased number of strikes since 2010: workers' bargaining power is increasing in China, and many top-down measures have been created to resolve labour disputes and protect worker rights during marketization. The central state has put great effort into developing direct mechanisms to resolve collective labour disputes, but it has been half-hearted in promoting indirect alternatives, especially collective bargaining. The state's starting point is a preoccupation with short-term political stability rather than a long-term social stability, and its half-hearted attitudes are manifest in the fact that workers continue to lack clear protection on the rights to freely organise and to strike. Existing legislation simply does not provide substantial legal room for workers to become involved in collective bargaining; they are supposed to be represented by workplace trade unions, but such unions are usually controlled by management, leaving workers without institutional space for involvement in collective bargaining. Workers tend to be sensitive to the environment created by the central state, as was the case with the softening in the political atmosphere from 2010 to 2015. A consequence of the state's measures is that the power of workers is gradually reshaping collective bargaining institutions in China. The following discussion explores the ways in which workers' involvement become institutionalised in the collective bargaining system.

6.3 Three steps of institutionalising worker participation in collective bargaining

(6.17) This section describes the Chinese labour movement's shift from, to return to earlier terminology, an "insurgent moment" to an "institutional moment". Specifically, the discussion explores the process through which state power gradually came to a durable compromise with the power of workers in the context of a collective bargaining institution. The compromise involved trade unions and the entire collective bargaining process. Three steps were involved in this institutionalisation process. The first step involved a temporary compromise by a local government through the empowerment of an unrecognised independent workers' organisation to represent workers in collective bargaining during the wave of strikes in 2010. The second step has involved reform of the trade union system since 2010 in response to pressure from the labour movement, and the third local regulations that give workers a role in collective bargaining. This section concludes with an overall evaluation of these three steps.

6.3.1 The first step: temporary empowerment during the wave of strikes in 2010

(6.18) Trade unions possess the exclusive right to represent workers in collective bargaining in China. This mode of representation is not problematic for industrial relations in Western developed countries, where trade unions are usually organised based on the free choices of workers. In China, however, workplace trade unions are for the most part organised in a top-down, quota-driven manner. Workers must therefore fight for the right to represent themselves in collective bargaining, and strikes have been their favoured weapon in this fight, despite the fact that striking lacks clear legal protections. A few incidents of strikers being arrested have been reported since 2004, but peaceful strikes have proved to be effective in bringing employers to the bargaining table (Deng, 2016: 238; Li and Liu, 2016).

(6.19) Workers' experience in this struggle has increased with the economic transformation. Prior to 2004, protests were waged primarily by dismissed workers against the reconstruction of state-owned enterprises. More recently, workers have mainly protested against non-state enterprises. Lee (2007) explicated and distinguished these two kinds of labour unrest. That before 2010 was mainly expressed through such actions as destroying machinery, blocking highways, congregating at government buildings, attacking state officials (Lee, 2007; Nang and Pun, 2009) and even violence.[9] Following the reconstruction of state-owned enterprises, the tactics of collective protests have evolved from short-lived demonstrations to effective strikes (Pringle 2013: 197; Chan and Hui, 2014; Deng, 2016:318; Friedman 2014:129).

(6.20) The wave of strikes in 2010 began in Suzhou Industrial Park and spread to the Yangzi and Pearl River Deltas and then to the Dalian Development Zone and other coastal areas. According to the conservative estimate by Chang (2015), at least 200,000 workers were involved in labour unrest in this year and, according to the data provided by *China Strike*, nearly half of these striking workers demanded a pay increase. As mentioned, these actions forever changed the image of Chinese workers as being passive in fighting for their legal rights and interests. The 2010 Nanhai Honda strike was particularly important in this respect, first because the physical confrontation that occurred between township trade unions and Honda workers highlighted the necessity of trade union reform in China, and second because the workers involved in the strike went beyond defending their legal rights to demand a pay increase.

9 See Canaves, Sky, "*Chinese Steelworkers Fight Privatization Effort*", available at http://www.wsj.com/articles/SB124863589915981859, last visited 6 June 2016.

(6.21) Conflicting attitudes between the local and central governments became apparent during the settlement of the 2010 labour unrest. The former was initially on the side of employers (Chan and Hui, 2012), while the central government tended to tolerate collective actions and to side with the workers. This situation was attributable to the facts that, first, the central government had noticed workers' increased bargaining power and, second, that Honda was a Japanese-owned enterprise. The central government was willing to indulge workers' nationalistic sentiments because doing so transformed a class-based conflict (i.e. between the emerging working class and the capitalists) to a nationalistic conflict (Friedman, 2014: 148; Cooke, 2013). Thus the central government allowed the official Chinese media, such as Xinhua Net and People's Daily, to report the strikes. One outcome of the 2010 strike wave was a 20%-30% wage increase for the workers involved, an unprecedented achievement (Chang, 2015). Further, the managers of many enterprises that had not been impacted by the 2010 strikes also increased salaries, at least initially, in an attempt to forestall the spread of the strikes to their factories.

(6.22) Workers' inherently strong bargaining power and their increasingly mature striking tactics were the main reasons that employers and local governments were willing to compromise in settling the 2010 strikes. The central government's tolerance in indulging workers' nationalistic sentiment was another important factor contributing to the success of the settlements. Under pressure from workers and the central government, local governments did not repress workers, as they had usually done in the past, but instead persuaded employers to concede. Despite being unrecognised by law, the independent workers' organisation involved in the Honda strike was also permitted, temporarily, to represent its constituents in the collective bargaining (Chang, 2013b; Gray and Jiang, 2015; Chan and Hui, 2012 and 2014; Kuruvilla and Zhang, 2016). This empowerment pattern indicates the interference of governmental power in challenging the law, i.e. breaking trade unions' exclusive representation right. The empowerment can thus be understood as the first step in the institutionalisation of workers' involvement in collective bargaining, even given the temporary nature of the authorisation. The main force for taking this first step, as argued above, was nevertheless the increasing bargaining power of workers.

6.3.2 The second step: workers' participation in trade unions since 2010

(6.23) Since 2010, under pressure from the labour movement, the central government and the ACFTU have accelerated the pace of reform regarding the regulation of collective labour relations in numerous ways. Measures have included promoting collective industrial negotiations, adjusting minimum wages[10] and extending collective bargaining coverage and trade

10 For more details, see Sohu, "Twenty-four provinces adjust the minimum wage" (in Chinese), http://business.sohu.com/20111230/n330715202.shtml, lasted visited 9 June 2016.

union organisations at the primary level. [11] So far, however, only the quota has been achieved, while the process of concluding collective contracts remains nearly as formalistic as before (Chang, 2015; Cooke, 2011a).[12] The direct election of trade union representatives, on the other hand, is a measure that has significantly changed industrial relations, representing the second step in the incorporation of workers' power into collective bargaining in the wake of the 2010 strikes.

(6.24) The re-organisation of workplace trade unions took place not only at enterprises where the 2010 strikes had occurred but also at factories in Guangzhou and Shenzhen that had been untouched by the unrest. The campaign for direct election was promoted by multiple forces, the main one again being the bargaining power that workers accrued through striking (Lee *et al.*, 2016; Wen, 2014; Hui and Chan, 2015). Other supportive industrial actors, among them the ACFTU, the regional FTU in Guangdong and local governments, also felt the pressure of workers' increased bargaining power. In 2012, Shenzhen FTU announced "that 163 enterprises with more than 1,000 employees shall adopt the direct election system",[13] and Foxconn also promised a direct election process. The practice was adopted in the northern coastal areas of China as well.[14]

(6.25) However, as previous research has shown, the reform of trade unions at the primary level was not yet complete owing to resistance from cautious higher level unions, employers and conservative local officials (Deng, 2016; Wen, 2014; Hui and Chan, 2015; Chan and Hui, 2012). In the form of direct election that was generally adopted, workers could only elect member representatives and members of the executive committee, while chairpersons continued to be appointed or otherwise selected by management or higher-level unions (Deng, 2016; Hui and Chan, 2015; Lee *et al.*, 2016); this is partly due to the flawed legislation. According to Article 9 of the Measures for the Election of the Trade Union Chairman of an Enterprise (2008, for Trial Implementation), the candidates for chair at an enterprise need to secure the approval of higher-level unions and party organisations within the enterprise, giving the latter the right to exclude certain candidates, e.g.

11 In the "Rainbow Plan on Promoting The Collective Contract System", agreed to by four bureaus of the central government in 2010, the aim of collective contract coverage was to reach 80% by 2011. The "two universals" created by the ACFTU promoted the full coverage of trade unions and of wage collective negotiations.

12 Also see legal daily, "The convening of ACFTU on promoting the work of 'two universals'", http://www.legaldaily.com.cn/index/content/2012-07/18/content_3718725.htm?node=20908, last visited 10 December 2017.

13 East Money, 2012, "After the direct election of trade unions" (in Chinese), http://money.eastmoney.com/news/1583,20120918251427566.html, last visited 9 June 2016.

14 ACFTU News, "Dalian Lushun kou fully promoting the direct election of trade union chairpersons" (in Chinese); see http://acftu.people.com.cn/n/2014/0806/c67502-25413144.html, last visited 9 June 2016.

those suspected of militancy or workers who enjoy considerable of popularity among the rank-and-file. Thus inherent limitations in the legislation explain the failure of direct elections after 2010 to deliver anything more than an indirect and quasi-democratic election system (Hui and Chan, 2015).

(6.26) Yet even though this effort has not been entirely successful, workers' rights, awareness and solidarity have nevertheless been strengthened in the process of trade union re-organisation (Chang, 2015; Chan and Hui, 2012). To begin with, to various extents, rank-and-file workers have been allowed to participate; further, the re-organised trade unions no longer simply follow orders but actually try to represent their constituencies. In addition, workers' requests are becoming increasingly demanding at enterprises where trade unions have been re-organised; and workers have pressed demands regarding dignity (Elfstrom and Kuruvilla, 2014), seniority allowances (Lee *et al.*, 2016), working time and protection of female workers (Deng, 2016) as well. It is generally agreed that the re-organised trade unions are in general more vocal in fighting for worker rights and interests than before re-organisation and more representative of workers at the bargaining table (Lee *et al.*, 2016; Deng, 2016; W. Chen, 2014).

(6.27) The auto industry has received particular attention from scholars in this respect (Deng, 2016; W. Chen, 2014; Wen, 2014). Deng (2016) has described the angry demands of workers at one factory that the appointed chairperson be removed from his post for betraying them by revealing their bargaining strategies to management as well as violent incidents at Venus, another auto factory. In a departure from what had been the usual outcome, then, the failed instances of collective bargaining since 2010 have been followed by strikes; and these strikes have been instigated by the re-organised trade unions.

(6.28) The lack of clear regulations regarding the right to strike together with governmental tolerance for peaceful strikes in the period from 2010 to 2015 have, it has been argued, led to the abuse of striking (Deng, 2016; Wen, 2014; Zhai, 2015). A regional FTU official of Guangdong described workers' demands as increasingly unreasonable, particularly in terms of pay (Deng, 2016). Regional FTUs and the Guangdong government have also expressed concern that capital may depart to locations with cheaper labour. According to a survey by *Strike Map*, incidents of labour unrest in Guangdong increased from 54 in 2011 to 414 in 2015. The Guangdong government felt challenged by collective actions by workers and was increasingly incapable of managing such actions.

6.3.3 The third step: institutionalising workers' participation in collective bargaining through legislation

(6.29) On 25 September 2014, Guangdong Province issued the Guangdong Provincial Regulation on Collective Contracts for Enterprises, which went into force 1 January 2015. Although many employee-friendly provisions in early drafts had been removed, this regulation has been widely recognised for providing explicit detail regarding collective bargaining. Compared with national and other provincial legislation, several significant improvements are apparent. First, the Guangdong regulation stipulates various mechanisms for resolving labour disputes (Articles 31-36). Second, it includes specific prohibitions of unfair labour practices (Articles 23-24). Third, it regulates work stoppages in the public sector and essential industries (Article 37).

(6.30) This local regulation also represents progress in regulating trade unions' obligation to initiate collective bargaining (Article 18), about which national legislation and most local regulations are rather ambiguous. The lack of clarity concerning this obligation usually results in the nonfeasance of trade unions when workers propose engaging in collective bargaining. As Clarke *et al.*, (2004) argued, it is in most cases up to trade unions to decide whether to inform employers of workers' demands. Thus, Article 18 is conducive to mitigate trade unions' inactiveness in initiating bargaining procedures.

(6.31) Article 18 also represents the third step in the institutionalisation of workers' participation in collective bargaining. This Article indirectly admits the right to propose collective bargaining of workers. National legislation only grants trade unions and employers the right to initiate bargaining, under the Article, this right is extended to workers. This step, enshrined in statutory law, has greater durability, compared to previous two steps which are usually granted by administrative power and only temporarily.

6.3.4 Evaluation of the three steps towards institutionalisation: developments and constraints

(6.32) The first of the three steps towards the institutionalisation of workers' participation in collective bargaining, then, was taken when a local government temporarily authorised an unrecognised independent workers' organisation to represent its constituents in collective bargaining during the 2010 strikes. In the second step, local governments and higher-level union branches allowed workers to democratise workplace trade unions. In the third step, workers are being empowered to propose collective bargaining, at least at the local level. The major driver of these three steps has been workers' increasing bargaining power (Figure 11).

(6.33) Prior to 2010, state power was at the centre of industrial relations of China (see Chapter 5), and almost none of the top-down reforms during this period gave any right to unrecognised independent workers' organisations to represent workers in collective bargaining, mainly because the primary concern of the central state was to contain labour unrest rather than to promote an authentic collective bargaining system (Chang, 2015; Taylor and Li, 2010; Hui and Chan, 2015). Nevertheless, the structural labour shortage has translated directly into increasing bargaining power for workers in industrial relations, in response to which governments have granted a series of compromises, from temporary authorisation in certain cases to long-lasting empowerment in the form of statutory law. Through these steps, workers' involvement has gradually been incorporated and recognised by state power, meaning that worker power is pressing state power in industrial relations.

(6.34) These three steps have only been taken in Guangdong Province. In other coastal areas, such as the development area of Dalian, the main issue continues to be the democratisation trade unions. Elsewhere in China, where large-scale labour movements have not yet been observed, workers continue to push employers to the bargaining table through strikes, meaning that, from the perspective of this study, the first step has not yet been taken. At the national level, albeit the central government and ACFTU have since 2010 issued numerous decrees intended to promote social stability, only in 2014 did the ACFTU begin to emphasise the quality of collective contracts. In 2014, the ACFTU put forward various notices, suggestions etc. intended to improve the effectiveness of collective negotiation and collective contracts, e.g. the Opinions Regarding the Enhancement of the Quality of Collective negotiation and the Effect of Collective Contract.

(6.35) Moreover, there have been no substantial regulatory changes at the national level that would promote authentic collective bargaining; indeed, "for every worker-friendly move forward by the government and union, there appears to have been a move backward" (Wang and Elfstrom, 2016: 4). This lack of clear progress characterises the state's attitudes towards labour movements in general. [15]The arrest of leaders of labour NGOs in December 2015 in Guangdong [16] is an indication of a tightening of the environment for bottom-up labour movement; this event negatively impacted the labour movement in 2016, during which there were fewer strikes than in 2015.

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15 Also see Kuruvilla, Sarosh and Mingwei Liu (2016), 'The State, The Unions and Collective Bargaining in China: The Good, the Bad and the Ugly', available at http://www.fondazionegiuseppepera.it/wp-content/uploads/2016/02/Kuruvilla-Liu.pdf, last visited 10 December 2017.

16 Xinhua Net, "Disclosing the truth behind the halo of 'the star of labour movement'" (in Chinese), http://news.xinhuanet.com/mrdx/2015-12/23/c_134943761.htm, last visited 6 June 2016.

(6.36) It is important to observe that the three steps do not proceed evenly or in the same sequence in every Chinese province, and that the extent to which workers are given a voice in collective bargaining also varies considerably according to the capability of local administrative leaders. For instance, in 2008, Shenzhen issued the Shenzhen Special Economic Zone on the Promotion of the Harmonious Labour Relationship, Article 52 of which almost recognises the right to strike. In general, there have even been rare instances in which local legislators have institutionalised workers' participation in collective bargaining without taking the three steps.

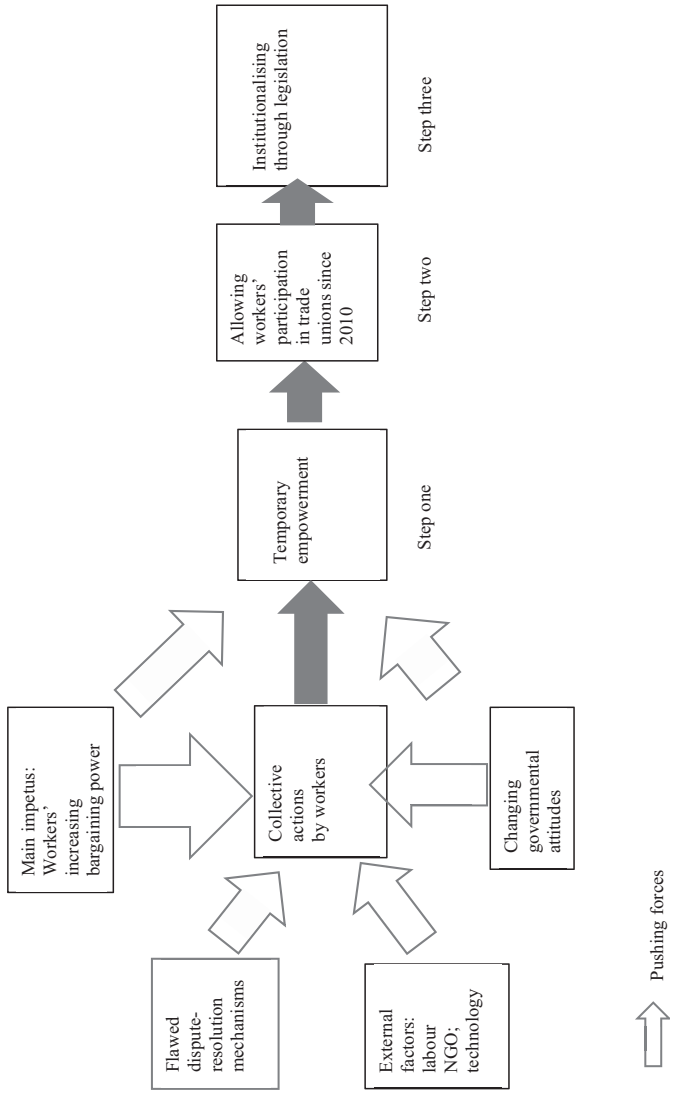

Figure 11: A bottom-up path for institutionalising workers' participation in collective bargaining of China

6.4 Discussion: implications for future labour unrest and collective bargaining

(6.37) Prior to 2010, the legislation governing workers' involvement in collective bargaining was insufficient and poorly implemented, and industrial relations in China remained highly state-centred. Driven by the increasing power of workers, however, the labour movement between 2010 to 2015 forced state power to grant certain concessions, though these were limited and failed to address the crucial collective labour standard, namely the freedom of association. Moreover, the local regulations of Guangdong Province governing the right to strike even took something of a backward step. There is no doubt that the current institutional space for workers' involvement remains far from sufficient for achieving balanced industrial relations.

(6.38) The second generation of workers in China's market economy is less willing to tolerate unfair treatment than the first generation given that the second generation has grown up in a changing era with more opportunities. Workers' economic demands will inevitably become more aggressive in the future. In addition, workers may also desire greater institutional space in collective bargaining. Whether they will continue voicing their demands through collective actions will depend on the availability of effective remedy mechanisms. The existing direct regulatory mechanisms for tackling labour disputes are flawed, so it is likely that workers will continue to have recourse to labour unrest to voice their grievances.

(6.39) Currently, labour unrest in China usually occurs either prior to collective bargaining or after it has failed. In the absence of national legislation detailing employers' obligations to engage in bargaining, workers can be expected to continue engaging in violent actions to push them in this direction. Such actions will mainly happen in enterprises at which workplace trade unions have been re-organised incompletely or not at all. In the case of enterprises at which the trade unions have been more or less re-organised, strikes may be called in order to break deadlocks in collective bargaining.

(6.40) Before 2010, most collective actions by workers were triggered by rights-based labour disputes, for example wage arrears. In the labour unrest of 2010, by contrast, most disputes were interest-based, in particular demands for increased pay. The data from *Strike Map* demonstrate that, since 2010, wage arrears have once again become the most common motivation for strikes (from 22.16% in 2011 to 76.05% in 2015). The implication is that, despite the diversification in workers' demands (e.g. job "details" and "respect", see Elfstrom and Kuruvilla, 2014), strikes have continued to be motivated by rights-based considerations. The high percentage of wage-arrears strikes indicates that right-based disputes will long remain the major impetus for strikes, at least unless effective remedies are provided to resolve this specific kind of conflict.

(6.41) Scholars generally agree that the tactics of Chinese workers in collective actions are maturing, evolving from unorganised and short-term insurgence to better-organised and more effective strikes (Pringle, 2013: 197; Chan and Hui, 2014; Deng, 2016: 318; Friedman 2014: 129). The *Strike Map* data also demonstrate that workers' collective actions vary, including strikes, sit-ins, protests or demonstrations and blocking roads. On rare occasions, as discussed in previous chapters, workers have used extreme methods to express their protest, such as suicide (jumping from the building or bridges), threats, petitions, illegal imprisonment of management officials and destroying machinery. In 2011, most collective actions took the form of strikes (38.92%) and only 8.65% the form of demonstrations. In 2015, by contrast, some 48.05% of actions were expressed through protests or demonstrations and only 12.44% through strikes. These changes in tactics indicate that workers have already grasped that the key to successful collective actions is media influence (Friedman 2014: 137; Cai, 2010: 106; Su and He, 2010). This state of affairs is a consequence of the central government's prioritisation of social stability; for the greater its concern in this regard, the greater will be workers to attract the attention of higher-level governors' eager to prevent a strike from spreading or becoming radicalised. Compared with strikes conducted within the factory, demonstrations tend to be more influential. The current political environment is such that, at least in the short term, demonstrations may continue to be the major tactic used in workers' collective actions.

(6.42) Chan and Hui (2012) predicted in the early 2010s that worker-led collective bargaining was unlikely to be adopted in the near future, but recent fieldwork by Deng (2016) has demonstrated that it is already taking place, at least in auto industry, and further that re-organised trade unions have begun to play a key role in organising collective actions. It is argued in this chapter that worker-led collective bargaining will develop gradually given to increases in workers' bargaining power, though at a slower pace outside the auto industry, in particular considering the changing political environment and downward turn in the national economy since December 2015. In response to bottom-up pressure from workers, state-led industrial or sectoral collective bargaining has already been designed and promoted as part of an effort to regain workers' trust (Lee *et al.*, 2016; Kuruvilla and Zhang, 2016; Friedman, 2014). However, as argued in chapter 5, collective agreements concluded through state-led collective negotiations can hardly be expected to achieve significant advances for workers' interests. In order to improve working conditions fundamentally and to balance industrial relations, worker-led collective bargaining is required, a key element of which is of course employee participation.

6.5 Concluding remarks

(6.43) The year 2010 marked a turning point in Chinese labour history, for since then a shift in power in labour-capital relations has taken place, driven mainly by a structural labour shortage and improvements in labour quality. The power of workers has begun to reshape the present collective bargaining system. Before 2010, the collective bargaining system, having been designed by the state and the ACFTU, provided almost no institutional space for workers' involvement in collective bargaining, but, owning to effective labour militancy, workers have forced state power to compromise by institutionalising their participation in collective bargaining. In practice, however, this institutionalisation has been limited to only the bare recognition of workers' right to have a say in bargaining, with no substantial improvement in terms of guaranteeing their rights to associate freely or to strike. Moreover, the move towards institutionalisation has so far occurred only in a small part of China, the Pearl River Delta. In areas where worker activism is weak, the first step has yet to be taken.

(6.44) Considering the growing power of labour and the limited institutional space for their participation in bargaining, workers can be expected to continue voicing their demands through strikes, at least in the short term. Currently, workers' unrest remains dominated by rights-based concerns in the context of collective labour disputes. As their power grows, however, workers' demands will become more aggressive and more detailed regarding their welfare. State-led collective bargaining has already been used in China and will probably be used more frequently in the future, for the simple reason that this form of bargaining is consistent with the ruling ideology of promoting economic growth while maintaining relative harmony among industrial actors. Yet worker-led collective bargaining, driven by workers' increasing bargaining power, will also gradually spread in China, though the kind of resistance that such efforts are likely to face has become clear since December 2015.

(6.45) In response to the bottom-up pressure from workers, then, there is a pressing need for reform of the legislation governing collective labour rights in China. The greatest challenge for legislators in revising the law is ideological, in that labour protest has been regarded as a potential threat to the existing political order. For this reason, workers have been denied substantial institutional space in the collective bargaining system. Continued enforcement of this ideology is counter-productive in the new economic era, in which labour unrest involves primarily economic demands. The development of authentic collective bargaining mechanisms is a prerequisite for mitigating labour unrest, and future legislation shall allow workers to get involved in workplace trade unions and guarantee their participation in collective bargaining.

7 Conclusions and Discussions

7.1 Summary of the preceding chapters

(7.1) Practical suggestions for legislative reform should be based on a complete understanding of the flaws in the current law and the problems plaguing industrial relations in China, and developing such an understanding has been the aim of the previous chapters. A brief summary of the arguments put forward therein accordingly serves as the basis for a set of proposals for improving the relevant legal regime this thesis concludes.

(7.2) In the current law, Chinese legislators have not entirely ignored the existence of labour conflict, for they have enumerated certain individual labour rights and created provisions regarding disputes. In response to an increase in the number of labour actions, additional measures have been taken to prevent or at least mitigate labour militancy, e.g. the introduction of the collective contract system and efforts to increase trade union density. Nevertheless, legislators prefer to emphasise the judicial procedures of mediation, arbitration, and litigation as means to resolve industrial conflict rather than to grant substantial collective rights to workers so that they and employers can engage in autonomous social dialogue. The right to organise must be exercised within the context of China's single trade union system, which follows the lead of the ruling party. Collective bargaining is not established on the basis of the freedom of association and the right to strike. The ACFTU, China's only recognised national trade union, and its branches enjoy an exclusive right to represent workers in collective bargaining. This means that workers cannot form spontaneous organisations through which to represent themselves. The right to strike is neither explicitly protected nor forbidden in Chinese law at the national level. The Chinese trade union system has its roots in the classic dualistic model of the former Soviet Union. The dual function of these unions, to protect the rights and interests of workers and at the same time to mobilise labour production in the service of the state, is different from the ILO's standard for workers' freedom of association but is suited to the political circumstances in China and other post-socialist countries.

(7.3) Concerning collective labour relations, Chinese workplace trade unions are generally ineffective in representing workers, resulting in a crisis of legitimacy. Multiple representation mechanisms have been observed in social dialogue, with four parties being involved in Chinese industrial rela-

tions, namely workers, employers, trade unions, and government. Within the party-state framework, each industrial actor has its own purview, but the interests of workers are almost the last concern of the other actors. No party can fully represent workers unless it includes representatives elected by the workers themselves through democratic processes. For the most part, collective bargaining has transformed into collective consultation between employers and employer-controlled workplace trade unions. Genuine collective bargaining is mainly pursued by workers following effective concerted actions. State power has begun making institutional room for worker involvement in collective bargaining. Such concessions, however, have been limited to only a qualified recognition of workers' right to engage in collective bargaining, and have been granted in only a small geographical area of China. In the rest of the country, where the labour movement is weak, workers' involvement has not been institutionalised. In the meantime, the rights both to associate freely and to strike have remained almost unchanged at both the national and local levels, with some local regulations even forbidding strikes. This limited institutional space is insufficient for workers to have their voices heard.

7.2 The dilemma

(7.4) Driven by the imperative to maintain social stability, Chinese legislators have attempted to resolve labour disputes without allowing serious confrontations to take place. Striking is not encouraged in China, but there have been frequent reports of worker activism. The drawbacks of the current legislation and the ineffectiveness of the unions have in some instances driven workers to address their grievances by rioting. The government, unwilling to tolerate such unrest, feels compelled to become involved in order to prevent a strike from spreading or endangering social stability. In general, governmental interference is more rapid and effective than legislation when it comes to resolving labour disputes because the government is able to pressure employers. It has thus used the streets as a court to settle labour disputes, a phenomenon that is inseparable from the relative weakness of the 'rule of law' and strength of state power in China. Workers have realised that the key to effective striking is creating a disturbance rather than worrying about the legal status of their actions. Their logic can be summed up as "create a big disturbance, get a big resolution, create a small disturbance, get a small resolution, create no disturbance, get no resolution" (Friedman, 2014: 137). When they become involved in mediating industrial conflict, local governments usually react in proportion to the extent of the unrest and refrain from forcefully suppressing workers in an effort to avoid exacerbating the situation. Large-scale and potentially destabilising actions by workers, therefore, are likely to be effective. In effect, then, the government's concern about social stability is a weakness that workers can exploit, since large disturbances can be expected to lead to rapid acquies-

cence to their demands. It is mainly for this reason that the Chinese labour movement grew so dramatically from 2010 to 2015. The failure of the law to provide effective dispute-resolution mechanisms only strengthens the hand of workers, so the government's only reasonable course of action is to reform the law substantially.

(7.5) The arrest of several activists of labour NGOs in December 2015 indicated a hardening in the government's approach to the labour movement in an apparent attempt to find a different way out of the difficulties caused by the lack of clarity in the law. The activists were convicted on charges of 'gathering people to disrupt public order' and sentenced to several months of imprisonment. In April 2016, The Law of the People's Republic of China on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China was passed, regulating the activities of NGOs in China. Article 5 of this legislation forbids any activities of NGOs that impact the lawful interests of any citizen, legal person, or organisation, which in effect means that the NGOs cannot assist workers because doing so could impact employers' interests. The arrests seem to have had some influence, given that the number of strikes in 2016 decreased compared with previous years. Nevertheless, this approach to handling labour unrest cannot fundamentally resolve labour disputes since the bargaining power of workers is increasing as a consequence of the 'one-child' policy and the improved quality of the workforce. Workers will inevitably become more assertive. Effective legislation to address these issues should allow industrial workers to engage in autonomous social dialogue and genuine collective bargaining.

7.3 Suggestions for re-making the relevant labour law

(7.6) As discussed in chapter 2, relevant domestic legislation concerning collective labour rights is different from what proposed by the ILO conventions, but the real question is how international labour standards can be applied in a Chinese context. Currently at least, the only suggestions likely to receive a hearing by legislators are those that do not challenge the essential characteristics of the political system. The following suggestions for future legislative reform are based on this and other considerations raised in preceding chapters.

7.3.1 General suggestions

(7.7) Any discussion of reforming the laws governing collective labour rights must begin by taking into account both the ideology that underlies the proposed legislation and the form that it will take. The changes occurring in China's economy and society demand complementary changes in the current legal ideology and three legislative patterns are also discussed here in the following context.

7.3.1.1 Altering the ideology behind the law

(7.8) The main task of labour law is to balance the rights of employers and workers, and in this respect the law indirectly affects social and even political stability and economic development. The present law in China stresses the need to protect workers' rights and interests, and even though it lacks provisions regarding enforcement of the legislation, it nevertheless provides workers with a powerful tool in their negotiations with employers in individual labour relations, at least theoretically. The legislative ideology behind the specific law regulating collective relations is rather different. As argued in detail in chapter 4, legislators privilege short-term social stability over workers' rights and interests and thus attempt to resolve industrial conflict while avoiding serious conflict. The ACFTU and its branches are obligated to follow the lead of the ruling party and educate workers regarding the ruling political ideologies.[1] In an effort to prevent potential labour unrest from worsening, the recent document mandates that trade unions intervene at the 'sprout level'.[2] Such actions are unlikely to stem the increase in labour disputes since autonomous social dialogue remains out of the reach of workers.

(7.9) In order to resolve labour disputes in a lasting manner and achieve long-term social stability, legislators must, then, alter the ideology behind the labour law and allow industrial actors to engage in autonomous dialogue. A de-politicisation of workers' collective actions is necessary if legislators hope to manage labour unrest through collective bargaining. For the ruling party from its beginning, collective actions have been regarded more as a means to subvert old political regimes than as a legitimate means for workers to air their grievances in labour disputes. Stuck in this thinking pattern, officials still on occasion interpret workers' collective actions as political events. For instance, in the Wal-Mart strike of 2014, when trade union official contacted external force for help, the local governments and higher trade union branches immediately defined the trade union actions as political events (Li and Liu, 2016). Currently, however, most strikes concern economic issues. Any reform legislation must be in step with the change related to current labour environment, and de-politicisation is one phenomenon that legislators must keep in mind so that strikes that arise in the context of economic disputes will be regulated as a legitimate aspect of industrial relations rather than being interpreted as antagonism between different political classes.

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1 Article 4 of the Trade Union Law (2001 amended version) and Article 28 (5) of the Constitution of Chinese Trade Unions (1993, 2008 amended version).

2 In January 2017, a normative document entitled 'Opinion on the Strengthening of Labour Dispute Arbitration and Improving the Diversified Resolution System' was released. This document fails to make any breakthroughs in granting workers substantial collective rights, but it does require trade unions to become involved in labour disputes at an early stage.

7.3.1.2 Possible legislative patterns

(7.10) In discussing ways in which to restructure the labour law, legislators may find it useful to consider a number of patterns, in particular, including the collective labour standards in China's constitution, drafting a special regulation at the national level, and generalising Guangdong legislative experience. The legislative patterns suggested are in fact complementary, as will now be explained.

A. Integrating collective labour standards into Constitution

(7.11) Some scholars argue that labour rights should be enshrined in China's Constitution (Li, 2009), which is the country's fundamental law, meaning that, in the legal hierarchy, it has priority in cases of conflict over-rides any other regulations.[3] Since the revolution, China has had four constitutions, only the second and third of which regulated the right to strike, which is not stipulated in the current one. Freedom of association is, however, explicitly protected in the current constitution as it was in the previous three, though it is defined as a political freedom rather than a special labour right. Integrating collective labour rights into China's constitution would create an environment more conducive to the protection of worker rights because those rights could not be abridged by other regulations. The Constitution can set the basic parameters for rights that lower-level legislation must observe.

(7.12) However, also as discussed in chapter 2, the absence of a monitoring mechanism from the constitution means that there is currently no way to guarantee the rights that it extends to workers. Indeed, a judicial interpretation has been advanced according to which the constitution should not even be included among the legal sources that can be cited directly in judicial practice. Under such circumstances, infringements of these constitutionally-guaranteed freedoms, including the freedom of association, lack judicial remedies. Effective reform of China's labour law must therefore include a special monitoring system specified in the Constitution.

B. The need for a separate regulation

(7.13) Besides the integration collective labour rights into China's Constitution, a separate regulation is required that elaborates the constitutional articles and addresses a number of key issues, especially given the increase in labour unrest since 2010. There is currently no such separate regulation; the relevant statutes are partial and mainly included in legislation regulating individual labour relations, such as the Labour Law (1994) and Labour

3 Article 87 of the Legislation Law (2015 amended version).

Contract Law (2008). Further, there are several separate regulations that deal with only one aspect of industrial relations, e.g. the Trade Union Law (1992) and Provisions on Collective Contracts (2004), but the bargaining process, which is the core of industrial relations, is not emphasised in present legal framework. The present legal regime is therefore insufficient when it comes to collective labour relations. At the same time, many normative documents in this field have been created by the ACFTU and other ministries that are referred to as 'Plans', 'Notices', 'Opinions', and so on and are vague with regard to their binding power. Driven by thinking steeped in the planned economy, these documents simply set goals to be achieved at lower levels rather than create substantial rights. A separate regulation, however, could create substantial rights and have clear binding force and thus help to bring order to the present legal chaos, which is manifested in frequent contradictions among legal texts, e.g. the law governing strikes and the election of worker representatives in enterprises that lack trade unions discussed in chapter 2. If the principle that 'if there is any discrepancy between special provisions and general provisions, special provisions shall prevail'[4] is embraced, a separate regulation can assist in harmonising the various legal texts that pertain to worker industrial actions.

C. The example of Guangdong

(7.14) Since economic development and labour movements differ across China's provinces, it is difficult to craft a national regulation that would be practical to implement throughout the country within a short time. Workers in the inland provinces tend to be less aware of the legal tools at their disposal than their counterparts in coastal areas. In any country, ineffective or defective legislation may create conditions that foster mass wildcat strikes, as happened in Vietnam in 2005-2006, or cause workers to rely on strikes, as has been the case in Guangdong in recent years. Balancing these considerations, the best path forward appears to be a gradual adoption of collective labour standards across the entire country.

(7.15) Local governments are authorised to make local regulations that elaborate on legislation at the national level. Owing to the varying economic circumstances and skills of local legislators, these local regulations may on occasion go further than national laws in protecting workers. The regulations enacted in Guangdong Province, and in particular in the city of Shenzhen, are an example of this phenomenon. Two documents deserve mention in this context. One is a set of regulations titled the Shenzhen Special Economic Zone on the Promotion of Harmonious Labour Relations (2008), which represents a breakthrough in several respects. To begin with, this document explicitly regulates workers' industrial actions; in one place

4 Article 92 of the Legislation Law (2015 amended version).

(Articles 52-53) it almost allows for a right to strike, and it also stipulates a cooling-off period for decisions about strikes. Moreover, another local regulation of Shenzhen adopt the terminology of 'collective bargaining' (*jiti tanpan*) [5]instead of the more ambiguous 'collective consultation' (*jiti xieshang*) preferred by legislators at the national level. This improvement indicates the local legislator admits the antagonistic cooperation of industrial actors. Another example of local legislation that is favourable towards labour is the Guangdong Provincial Regulation on Collective Contracts for Enterprises (2015), which grants workers involvement in collective bargaining (Article 18). Further innovations in this regulation involve dispute resolution mechanisms (Articles 32, 33, and 35), curbing improper actions (Articles 22-24), and limiting strikes affecting public services industries (Article 37). At the same time, however, the Guangdong legislation indirectly prohibits strikes (Article 24). Although the labour situation in Guangdong Province still has much room for improvement with regard to permitting autonomous collective bargaining and the right to strike, it nevertheless offers a good model for experimentation, suggesting a short-term strategy that could be deployed in anticipation of the national special regulation.

7.3.2. Suggestions concerning the three essential collective labour rights

(7.16) Three collective labour rights have generally been recognised as essential. The ILO core conventions have provided a model, but one that is not compatible with the political system of China. The following discussion, which is keyed to the sub-questions addressed in preceding chapters, offers some suggestions for addressing the flaws in China's current labour regime with respect to these three collective rights.

7.3.2.1 The right to organise

(7.17) Compared with the recognition of independent workers' organisations, workplace union democracy represents a more moderate and acceptable move for the party-state, since it is compatible with the present political regime. As discussed in previous chapters, there have been three attempts by the government to promote democracy in trade unions; the first two ended in failure, but as a result of the third the ACFTU and the government granted some concessions, allowing workers to democratise workplace trade unions to some extent. The 2010 labour movement was the main impetus behind these concessions, but in any case state power yielded to worker demands only to a small extent. All three of these campaigns met resistance from governments, conservative trade union officials, and employers.

5 Article 44 of the Measures of Shenzhen Municipality on Implementing the Law of the People's Republic of China on Trade Unions (2008).

(7.18) Currently, the relevant legislation concerns only the organising principle of democratic centralism[6] without stipulating which aspect should prevail, democracy or centralism, or providing for the practice of democracy in building workplace trade unions. At the same time, this legislation devotes a disproportionate amount of attention to the role of higher-level trade unions in workplace trade unions, especially in regard to the election of the chairperson.[7] In practice, then, centralism over-rides democracy. In addition, while the law prohibits the close relatives of senior managers from candidacy for trade union committees,[8] it fails to specify any monitoring mechanism through which to enforce the prohibition, and as a consequence this kind of nepotism is quite common in the selection of trade union chairpersons. Reform of China's labour law must therefore include changes that guarantee democracy within workplace trade unions.

(7.19) Providing workers with this institutional space in trade unions by law also represents a win-win strategy when it comes to concerns about labour militancy. Higher-level trade unions need to be stripped of the right to choose the candidates for workplace trade chairpersons. Beyond laying out the protections for worker right to choose the leadership for the unions that represent them, reform of the labour law should specify judicial remedies for infringements on the right as well as mechanisms to monitor democracy within workplace trade unions. Since most Chinese workers have little experience with judicial procedures, such a mechanism could ensure that employers do not regain control of trade unions and cause another crisis of legitimacy. Labour bureaus at the local level are ideally suited to playing this monitoring role.

7.3.2.2 The right to bargain collectively

(7.20) Because domestic legislation concerning the freedom of association is inherently paradoxical, collective bargaining is rarely observed unless the workers themselves band together. In legal texts, the expression "collective agreement" has been replaced by "collective consultation" and "collective negotiation". Collective contracts established under this procedure normally simply adopt the minimum labour standards according to the existing regulations. Legislation should, therefore, grant workers mechanisms, such as collective bargaining, with which they can voice their demands and therefore not be tempted to engage in labour militancy. Collective bargaining has three functions (Chamberlain and Kuhn, 1965:113): marketing function affecting the collective sale of labour; governing function, i.e. making rules governing employment; and decision-making function, allowing workers

6 Article 9 of the Trade Union Law (2001 amended version).
7 Article 11 of the Trade Union Law (2001 amended version).
8 Article 9 of the Measures for the Election of the Trade Union Chairman of an Enterprise (2009, for Trial Implementation).

to democratically participate in decisions affecting their lives. Legislating such right would have several additional advantages. First, labour law can hardly be impartial; that which favours labour may be ignored by employers, and that which favours employers may incite workers to protest. In addition, labour law is less flexible than collective bargaining when it comes to creating labour standards, making it difficult to arrive at working conditions suitable to all industries and in all provinces. Collective bargaining, by contrast, is sufficiently flexible to allow for the establishment of standards that meet the needs of labour and employers alike. Given all of these considerations, it appears that effective reform legislation would authorise labour markets to determine labour standards and that the present labour law is lacking with regard to collective bargaining.

A. Workplace representation

(7.21) For true collective bargaining to take place, the participants must legitimately represent the constituencies involved and must be independent of each other. Current legislation exclusively empowers workplace trade unions, which are the primary branches of the only recognised trade union (the ACFTU), to represent workers in collective bargaining, but their inherent inertia and dependence on management mean that they are not truly representative. This is the source of the unions' crisis of legitimacy in the eyes of workers. Inertia has been one of the ACFTU's core bureaucratic characteristics since its inception, and its dependence on management is a result of its top-down, quota-driven organisation and, ultimately, of the failure of the current labour legislation. Making trade unions' willing to representing their constituencies and effective at doing so requires workers' autonomous power within trade unions. This objective can be realised by promoting workplace trade union democracy through legal means, as discussed above. In addition, the law should take away from trade unions the function of promoting production efficiency, which is in conflict with the mandate to defend workers' rights and interests.

B. Granting worker involvement in bargaining procedures

(7.22) Collective bargaining requires an assessment of the interests of workers and employers. As has been seen, the former are supposed to be represented by trade unions, but these organisations are for the most part under the control of management. Because it will take time to democratise workplace trade unions in China, legislation should establish for worker mechanisms for involvement in the bargaining process. Such mechanisms could include procedures for initiating and approving drafts of collective contracts.

(7.23) With regard to starting procedures, the current national law authorises only trade unions and employers to take the step of initiating nego-

tiations.[9] The law at the national level, however, is unclear regarding the obligation of trade unions to begin bargaining in response to requests from workers. As a consequence, the unions, which are again normally controlled by employers, are reluctant to challenge employers' interests by transmitting workers' demands for collective bargaining. The Guangdong Provincial Regulation on Collective Contracts for Enterprises (2015) provides a model for giving workers a role in initiating bargaining procedures in its Article 18, which obligates trade unions to initiate bargaining procedures whenever a majority of workers within a factory so request. Legislation at the national level can refer to this model in the drafting of provisions that establish this role for workers and thereby mitigate the effect of trade unions' unwillingness to challenge employers. In possession of this right, workers will be less likely to force employers to come to the bargaining table. There are two possible ways to legislate this right. One would be to grant workers the right to initiate bargaining directly when a majority of them are in favour of doing so. The other way, which was followed in the Guangdong regulation, would involve relying on trade unions to launch the bargaining procedures following a request by a majority of workers. If this is the path followed in future national legislation, it must include mechanisms that compel unions to fulfil their obligation in this regard.

(7.24) Concerning the approval of collective contracts, as discussed in Chapter 1, the law fails to provide rank-and-file workers with the authority to reject contracts drafted by employers and the employer-controlled trade unions. The law offers two options for approval of contracts.[10] One requires the consent of at least half of 'employee representatives' following discussion in the presence of at least two-thirds of all representatives present on the ERC or employees. The second option requires the consent of at least half of all employees with a quorum of fifty per cent. The law is unclear regarding the election of 'employee representatives'. It is therefore quite possible that the approval procedures will evolve into a mere formality. In future regulatory reform, workers should be granted the authority to reject collective contracts that do not meet with their approval and the procedures for electing 'employee representatives' should be presented in detail.

C. Bargaining in good faith

(7.25) The present legislation attaches more importance to collective contract coverage than to bargaining procedures. Collective contracts in China are mainly concluded in accordance with the quota-driven pattern between employers and employer-controlled trade unions. In general, the result is an increase in the quantity, but not the quality, of these contracts.

9 Article 32 of the Provisions on Collective Contracts (2004).
10 Article 36 of the Provisions on Collective Contracts (2004).

National legislation requires the two parties to negotiate in good faith,[11] but the current law has no power to force a reluctant party to the bargaining table. Rather, employers can lawfully refuse to bargain by asserting a 'justified reason',[12] since the law fails to specify the meaning of this phrase. It is equally insufficient and vague in regard to remedies for violations of this precept.[13] Several local regulations go further in regulating the obligation to bargain by stating that neither party can refuse the other's request to engage in bargaining.[14] In future legislative reform, the national law needs to make clear the penalty and the remedy mechanisms for refusal. The obligation of employers to bargain needs to be especially well delineated, since the primary reason that workers strike is to force employers to the bargaining table (Wang, 2015; Friedman, 2014).

D. Bargaining levels

(7.26) The current labour law mainly regulates bargaining activities at the plant level.[15] The law has covered collective bargaining at the industrial or regional levels since the regulation of tripartite negotiations above county level was established for the first time in 2001,[16] and bargaining in the context of certain industries below the county level has been protected since 2007.[17] Industry-level collective bargaining, then, has already existed in China. Backed by strong state power, such bargaining is more likely than workplace collective consultation to issue in pro-labour collective agreements, since, as alluded to above, collective consultation mainly reproduces statutory minimum labour standards. In addition, bargaining at the industry level can address the problem of workplace trade unions' dependence on management. For these reasons, collective bargaining above the plant level should be encouraged. To be sure, the fact that is there is often a lack of lawful bargaining parties, on the part of both employers and workers. A normal pattern for the representation of workers is that of 'superior unions replacing inferior unions'. Collective contracts that conform to this pattern often fail to represent workers' willingness to negotiate. Thus, when

11 Article 5 of the Provisions on Collective Contracts (2004).
12 Article 32 of above Provisions.
13 The law merely empowers bargaining parties to turn to local labour bureaus for mediation or some other form of settlement when collective bargaining reaches an impasse. Local bureaus are also allowed to initiate intervention when it is deemed necessary. However, the law fails to explain precisely what constitutes a 'necessary' situation. See further Article 49 of above the provisions. The remedy is also unclear should local bureaus fail to perform their duty in this respect.
14 For instance, Article 28 of the Regulations of the Shenzhen Special Economic Zone on the Promotion of the Harmonious Labour Relationship.
15 For instance, the Provisions on Collective Contracts (2004); the Trial Methods of Collective Consultation on Wage (2000); Article 51 of the Labour Contract Law (2008).
16 Article 34 of Trade union law (2001 amended version).
17 Article 53 of the Labour Contract Law (2008).

it comes to regulating industrial or regional bargaining, the law should emphasise the selection of representatives on both sides who truly represent their constituencies.

7.3.2.3 The right to strike

(7.27) Domestic legislation only recognises the existence of wildcat strikes,[18] remaining silent about the procedures involved and about protecting the right to strike.[19] The resulting ambiguity has facilitated workers' efforts to take collective actions. Moreover, currently, the worst outcome for workers who participate in a peaceful strike is the dismissal of those who led the action. This lack of clarity also places local governments in a bind, for if they side with the workers, they run the risk of encouraging further labour unrest and discouraging foreign investment, and if they side with employers, workers may be further radicalised and their grievances politicised. To solve these problems, legislation should regulate workers' collective actions and protect their right to strike.

(7.28) In revising the present law, then, several issues need to be considered. First, in regulating labour actions, it must be specified whether the right to strike rests with trade unions, workers, or both. The ILO and ICESCR alike leave this question to union members' discretion. The European Social Charter gives this right to workers, and the European Committee argues that it should not belong only to the unions (Chang and Cooke, 2015). Such a position is reasonable given that trade unions or works councils in Western countries are usually founded on the notion of worker choice, under which circumstances the interests of labour organisations do not differ significant from those of workers. In China, on the other hand, the dual function of trade unions represents a serious, indeed the greatest, challenge to regulating the right to strike. If future legislation grants trade unions, rather than workers, this right, it may be unable to mitigate labour unrest because workers have already lost faith in the unions; as has been seen, trade unions are for the most part either unable or unwilling to organise workers to strike because of their dependence on management and intuitional inertia. This thesis argues that Chinese workers should be granted the right to strike directly, especially before workplace trade unions are thoroughly democratised. If future legislation does empower workers, it must also specify the means by which the decision to strike should be

18 Article 27 of the Trade Union Law (2001 amended version).

19 There are a few exceptions. Some local regulations include outlines of procedures to restrict strikes. For instance, as noted above, Article 53 of the Shenzhen Special Economic Zone on the Promotion of the Harmonious Labour Relationships (2008) explicitly stipulates a 'cooling-off period' for strikes involving essential industries, though the regulation fails to protect this right explicitly. Article 37 and the Guangdong Provincial Regulation on Collective Contracts for Enterprises (2015) also include some procedures regarding strikes at essential industries.

reached in terms of majorities and quorums. Punitive provisions should also be included in order to prevent workers (or unrecognised organisations) from initiating random, unlawful strikes.

(7.29) Second, legislation should establish practical procedures for staging lawful strikes. Otherwise, workers may bypass the law, as has happened in Vietnam. Legislation in that country granted trade unions the right to organise strikes,[20] but in practice most of the strikes that followed were of the wildcat variety (Chan, 2011; Clarke, 2006; Siu and Chan, 2015). Workers justified these wildcat strikes on the grounds there was no reason to follow the lengthy legal procedures when they could achieve their aims without observing the law (Chan, 2011; Clarke, 2006). Thus, the procedures for striking need to be practical, as concise as possible, and specific in regard to mechanisms to prevent striking at will. The following suggested procedures meet these requirements. To begin with, all strikes should be peaceful and present no threat to social stability. Second, any strike should have the support of the majority of workers as determined by secret ballot, which again would discourage workers from striking randomly. Third, prior notice should be given to employers so that a strike will not infringe on their right to operate their businesses; they should also be able to hire temporary workers to replace strikers on the picket line. Fourth, the right of those not engaged in the strike to continue working should be guaranteed so that they cannot be intimidated by striking workers. Fifth, strikes in essential industries, that is, those that touch on the safety or health of people, should be regulated more strictly than those in other industries, while workers in essential industries in turn deserve multiple remedies to compensate for the limitation of their options for labour action. It is in any event impractical to grant the right to strike only for the purpose of breaking deadlocks in the course of collective bargaining; for, as noted, scholars (e.g. Wang, 2015) point out that a majority of strikes are conducted for the purpose of forcing employers to the bargaining table in the first place, and the law must recognise this reality.

(7.30) A third issue that must be addressed with regard to revising China's current labour law concerns whether it is necessary to regulate both rights-based and interest-based collective labour disputes in order to regulate strikes. Only the regulation of interest-based labour disputes is likely to reduce labour militancy, and this approach is consistent with the Chinese government's on-going efforts to maintain social stability while avoiding conflict. Nevertheless, such an approach can only work in combination with other mechanisms that are effective in resolving rights-based disputes. Several regulations have been passed that encourage workers to solve this type of dispute by judicial means, but they have not proved to

20 Article173 of the Vietnamese Labour Code (1994).

be particularly effective. Therefore, both rights-based and interest-based strikes should be taken into account in future legislation before effective mechanisms to regulate rights-based labour disputes are decided upon.

7.4 Other relevant legal issues

(7.31) In addition to the three collective labour rights just discussed, other legal issues also affect the development of collective labour relations. The reform of labour legislation must take account of these issues as well in order to resolve conflicts between labour and industry and to regulate industrial activities more effectively.

7.4.1 The stance of local governments

(7.32) Given the flaws in China's legislation governing collective labour relations, and because collective bargaining has only recently begun to be practised in the country, the intercession of government is necessary to settle strikes and other industrial activities. Nevertheless, as discussed in chapter 5, the interests of local governments to a large extent overlap with those of employers in that the former is primarily focused on economic growth, often to the neglect of workers' interests. Ever since the economic reform efforts began, local governments have been empowered to make economic decisions and to pass the law regulating economic activities, and in so doing they impact social bargaining in three main ways: by enacting regulations or policies, by intervening in strikes, and by organising tripartite negotiations. It has been observed that local governments in China have challenged the binding power of the national law, even countering its labour-friendly provisions by enacting employer-friendly policies at local level. These actions have included granting workers the right – one that has not been recognised at the national level – to represent themselves rather than being represented by a state-sanctioned union. Against the backdrop of flawed legislation, governmental interference can thus serve as a mechanism for the rapid resolution of labour disputes. The law should thus guide government's role in industrial relations by establishing procedures for local jurisdictions to follow that prevent them from showing partiality or otherwise abusing their power.

7.4.2 Labour NGOs

(7.33) Labour NGOs, most of which receive financial support from external organisations, have been active in China since the 1990s, serving in the capacity of trade unions by assisting and training workers to engage in labour actions, including strikes and collective bargaining (Chan, 2012; Chan and Hui, 2012). The failure of trade unions and governments to defend workers' rights and interests vigorously is directly responsible for the growth of labour NGOs in the country (He and Huang, 2015). However,

the Law of the People's Republic of China on the management of Overseas Non-Governmental Organizations' activities within the mainland of China (2016) has regulated the activities of NGOs and set procedures for them to be recognised. If the trade unions continue to fail in their mission to represent workers, activism among the latter may continue to increase. As observed, democracy in workplace trade unions takes time to achieve. Rather than waiting for democratisation to occur, the law should grant labour NGOs larger institutional space to provide workers with professional advice on negotiating. This step would also be useful in reducing workers' irrational actions and maintain social stability.

7.4.3 Employers' representatives

(7.34) Another of the ambiguities in Chinese labour law concerns the selection of those who represent the employers. Reform is accordingly needed with regard to tripartite negotiations and collective bargaining involving multiple employers and trade unions. Since the 1990s, the semi-official CEC-CEDA has come to represent employers. In addition, the ACFIC, which represents specifically the interests of private employers, has had some authority to participate in tripartite negotiations since 2009. The top-down leadership of these two national employer associations is loosely organised. At the local level, however, employers enjoy greater autonomy from government influence and higher-level organisation than local trade unions do. In the absence of clear legal provisions, employers may not feel bound by agreements that were concluded by 'representatives' of employers who were not elected democratically or to which the employers did not grant consent. Employers naturally prefer to promote collective bargaining and to obey agreements when doing so suits their interests, as was clear in the Wenling Woolen industrial agreement (Wen, 2011). In any case, compared with the plant level, negotiation at industrial level is in general more effective in promoting economic development and social stability and therefore should be encouraged vigorously. As one important step toward achieving these goals, the law should establish procedures for the election of employers' representatives that take into account the issues raised here.

7.4.4 Mechanisms for supervision and for providing remedies

(7.35) China's present labour law is flawed to regulate collective labour relations, but it is also insufficient when it comes to mechanisms for supervision and for providing remedies. There are only a few ways in which workers can compel a trade union to serve their interests. The ERC is empowered to approve collective drafts, but the process of approving can easily degenerate into a mere formality owing to the defective legislation. Local labour bureaus are authorised to assess the validity of collective contracts,[21] and in

21 Article 44 of the Provisions on Collective Contracts (2004).

doing so they take into account the qualifications of the bargaining parties, the bargaining procedures, and the content of the contract at issue. In the latter case, local labour bureaus merely determine whether the content of a collective agreement is consistent with the law and do not feel compelled to consider whether workers are adequately represented. When disputes arise in regard to collective contracts, trade unions have the authority to demand that employers take responsibility or even that they pursue arbitration or litigation.[22] The question again arises, however, as to what mechanisms are available to provide remedies when a trade union fails to do so. The current law says nothing about issue. When the law is reformed, it should accordingly specify judicial or arbitration mechanisms for workers to compel trade unions to perform their legally defined roles.

7.5 Discussion: a long march of regulatory reform

(7.36) Given the country's unique political system, it is impractical to inflexibly impose on China the labour standards defined in ILO C087 and C098, which mainly originated in capitalist countries characterised by spontaneous market economies and multi-party political systems. Instead, the traditional model of trade union dualism, based on the system developed in the former Soviet Union, is better suited to China's economic and political situation, in which the party-state relies on the single national trade union as an apparatus for managing the labour force (Kent 1999: 128-145). Actions by the government since 2015 have strengthened the distance between Chinese practises and international labour standards, and there appears to be no desire on the part of Chinese officials to completely comply with the ILO core conventions soon (Cooney, 2006). Since 2015, the governmental actions have also limited workers' ability to oppose state power in regard to the institutionalisation of worker involvement in collective bargaining. Any legislative reform is, then, more likely to occur in a top-down direction.

(7.37) Chinese legislators have already discerned the existence of conflict between labour and industry and to the legitimacy crisis affecting the trade unions. The collective contract system has been developed in response to increasing labour unrest, and judicial remedies have also been increasingly diversified and strengthened in the effort to settle labour disputes. Although these latter remedies require more time and resources than social dialogue in settling industrial conflicts, they have also made some contribution to curbing labour insurgence. In addition, the ACFTU has issued a series of documents designed to promote employee participation and to improve the quality of collective bargaining.

22 Article 56 of the Labour Contract Law (2008).

(7.38) Discussions of potential legislation must, then, be shaped by the present political constraints. Chinese legislators can probably be expected to continue to make adjustments to the current labour regime in order to limit the potential for labour unrest. Independent workers' organisations, on the other hand, will probably remain unrecognised by the law for a long time, since the freedom of association touches upon the essential characteristic of the present political system. Nevertheless, legislation allowing for the greater involvement of workers in trade unions and in the collective contract system could be achieved through a gradual process. The collective contract system may be effective in channelling labour unrest into lawful mechanisms, regaining the trust of workers, and maintaining industrial harmony. The gradual institutionalisation of workers' involvement in trade unions and collective bargaining is therefore an achievable goal; and indeed collective bargaining has already been recognised in at least one local regulation. Nevertheless, bureaucratic inertia and the dependence of workplace trade unions on management are problems that will require some time to solve. The two impeding factors imply that authentic collective bargaining is less likely to be realised within a short time. Several local regulations have already stipulated some details regarding strikes, but no national legislation in the near future is likely to define a general right to strike. The Chinese workforce is certainly more aware of its rights than ever, but workers are not adept at taking lawful measures to address their grievances and have occasionally even used violence and other irrational methods to express their anger. There is therefore a reasonable wariness that recognising workers' right to strike could result in an immediate wave of labour actions owing to their incomplete understanding of the law. For this reason, legislators will probably remain silent on this right while allowing lower-level governments to experiment. Recognition of a right to strike on the national level is more likely to occur once the Chinese workforce has come to view the lawful tools at its disposal as more effective in furthering its interests than staging labour actions that are large enough to induce the government to yield to workers' demands.

Summary

Collective Labour Rights and Collective Labour Relations of China

The Chinese economy has undergone large-scale changes since the implementation of the "reform and opening to the outside world" (*gaige kaifang*) policy in 1978. This transformation is reflected in collective labour relations, which have evolved from an environment of harmony between labour and employer during the command economy to conflict between these forces in the present socialist market economy. This situation has arisen as a result of the diversification of employer ownership in the course of the economic reforms. Marxist-Leninist arguments are no longer convincing for workers, especially those in the non-state economy who face particularly harsh working conditions. Following the wave of strikes in the summer of 2010, labour relations in China began to take on a more collective character. The increasing number of collective actions by workers is in tension with the labour law system, which was designed mainly to protect and to resolve labour issues involving individuals.

Changes to the law governing collective labour relations in China began in 1992, when the Trade Union Law was adopted in response to an evolving social environment. After that, the central government designed a series of regulations, responding to the increasing number of strikes. This legislation suffers, however, from the drawbacks of being both insufficiently detailed as well as heavily influenced by notions that originated in the planned economy. Lawmakers have attempted to resolve conflicts between labour and industry without encouraging workers to seek justice through such channels as mediation, conciliation, arbitration, and litigation rather than through strikes. Moreover, the binding force of the legislation remains unclear owing to the highly abstract nature of the relevant legal texts. Thus the law that covers collective bargaining – which is supposedly the core of the three collective labour rights recognised by the government – fails to include clear statements guaranteeing the freedom of association and the right to strike. Only one national trade union is recognised by the law, the All-China Federation of Trade Unions (ACFTU), which, as its name suggests, has authority over all union organisations in China. Founded on a preoccupation with social stability, the law only leaves the possibility of wildcat strikes in China and includes no detailed procedures regarding strikes.

The trade union system in China was modelled on that of the former Soviet Union, though unlike that system it did not emerge bottom-up in the neighbourhood of a free market Western economy. Despite starting from the same union model, the law with regard to trade unions in China and

other post-socialist countries went into different directions with regard to the protective function. Trade unions in such countries, in addition to being responsible for protecting workers' rights and interests, are compelled by law to act as co-managers of the states. The single trade union systems that these countries have adopted are not compatible with principles enshrined in Conventions 087 and 098 of the International Labour Organisation. Proper management of relations between labour and capital is not, however, a matter of simply imposing the international labour standards that have been shaped in Western countries on countries with very different political regimes. Trade union pluralism, which is one facet of the dominant pluralist ethos in Western countries, is less likely to be achieved in post-socialist countries under their present political regimes. The factors at play are complex. On the one hand, the subordination of unions to the ruling parties can hinder the ability of the former to fully represent workers. On the other hand, party-union relationships can also allow unions to be vocal and assertive in defending workers' rights and interests. Despite being inconsistent with the ILO conventions, then, the trade union systems in post-socialist countries are compatible with their current political systems. Nevertheless, certain aspects of the trade union model fail to catch up with the changing economies, and should accordingly be adjusted.

Not only the law is flawed in regulating the protective function of trade unions and their role in guaranteeing worker involvement in industrial relations, but also the workplace trade unions are in practice often unwilling or unable to represent workers. This has resulted in a legitimacy crisis of these unions that has increased workers' inclination to engage in apparently irrational protests. The case of Foxconn demonstrates the general ineffectiveness of Chinese trade unions, both nationally and in individual workplaces, in relation to the suffering that workers experience in high-pressure environments. This case also makes clear that labour unrest can occur whether or not the law guarantees the right to strike; the key issue is rather the availability of effective remedy mechanisms. Workers are often driven by desperation and anger to express their discontent in dramatic ways. Given these circumstances, the law is in need of revision so as to guarantee workers involvement in effective trade unions and thereby resolve the legitimacy crisis. In practical terms, enshrining the right to strike in legislation can serve to prevent radical labour actions.

The physical confrontation between the trade unions and workers involved in the Honda Strike in 2010 summer similarly drew attention to the need for trade union reform in China. In this case, the ineffectiveness of workplace trade unions stimulated the diversification of worker representation mechanisms in industrial relations nationwide. These mechanisms evolved from workplace trade unions to worker independent organisations to state-led representation. The development of the latter two mechanisms was understood as a response to the power wielded by the Chinese government in industrial relations, inasmuch as they challenged the exclusive right of official institutions (specifically, ACFTU) to represent workers. The

effectiveness of all three of these mechanisms varies considerably. Most trade unions in China were organised in accordance with a top-down, quota-driven pattern and placed under the management of employers and therefore are hesitant to represent workers. The emergence of worker independent organisations is thus an indication of the failure of existing unions to channel and harness workers' activism. By granting workers the right to being represented in bargaining with employers' representatives, administrative power ever made up the drawback of the law. This representative mechanism was in general better able to fulfil workers' demands in the short term, but could do little to involve them in the official power structure. State-led representation thus consisted of a combination of legal and administrative power. This development can be understood as a response for reason of self-preservation on the part of the party-state. It was designed to overcome workplace trade unions' dependence on management, to regain worker trust, and to mitigate future labour unrest. Backed by state power, this representation mechanism did offer slight benefits to workers in certain industries.

The extent to which these various mechanisms were effective was determined by the various interests of industrial actors, governments, trade unions, and workers. Trade unions in China are no independent organisations, but are subordinated to various organs of the state or employers. This means that the primary concern of Chinese trade unions are interests of other industrial actors, instead of the interests of their members. The central government's emphasis on social stability and that of local governments on economic growth are also contradictory. Workers can only effectively be represented when they have a role in designing their representation. The central state should alter its conception of its interests and start to promote collective bargaining as a long-term strategy for achieving social stability. The interference, or at least participation, of local administrative powers is a necessary response to the insufficiency of the law governing industrial relations and its failure to involve workers in collective bargaining. This exercise of governmental power should also be regulated, however, in order to prevent the formation of patronage relationships involving local authorities and enterprises.

Workers' bargaining power is increasing in China, in part as a consequence of the 'one-child' policy and of the improved quality of labour force. A reversal in labour-capital relations has been apparent since 2010, altering the existing state-centred industrial relations. State power has made some gradual concessions for worker involvement in collective bargaining system, from tolerating worker independent organisations (which have not been recognised by the law) the right to represent, to allowing worker democratic participation in official institutions, and further to recognising worker's involvement in the bargaining process in a form of law. These developments are evidence of a bottom-up effort to institutionalise workers' participation in the collective bargaining system, but they have only been observed in certain coastal areas where the labour movement was

already strong. In the greater other part of China, workers continue to stage strikes merely to express their anger or to achieve short-term goals. The only compromise granted by the government has been permitting them to participate in the bargaining process; their freedom to associate is not guaranteed, and strikes, even indirect ones, are forbidden under a local regulation. The arrest of several activists associated with labour NGOs in December 2015 frustrated the labour movement. As a result, the bottom-up path to improve conditions for workers could accomplish little more than admitting worker's involvement in collective bargaining by local regulations. Thus, workers' institutional space is insufficient to meet their increasingly assertive demands and they may therefore be predisposed to address their grievances by means of labour unrest. If legislators are to prevent such unrest, then, they will need to revise the current law in order to allow industrial actors to engage in autonomous bargaining.

The government's concern to maintain social stability represents a weakness that workers can exploit in order to achieve their demands, a situation that explains the dramatic growth of the labour movement from 2010 to 2015. The collectivisation of labour relations and the failure of the law to provide workers with effective remedy mechanisms are symptomatic of the need for regulatory innovation. The unique nature of China's political system means that the country is in for a long period of adjustment if it is to comply with the fundamental collective labour standards of the ILO. Any legislative reform, however, has to be carried out within the present political framework, creating circumstances that make it impossible for trade union pluralism to be achieved in China under current laws. The integration of collective labour rights into the Constitution of the People's Republic of China would be conducive to stabilising industrial relations. A special regulation at the national level is necessary to overcome the disordered and fragmented nature of the law that currently governs labour relations. As a prelude to enacting such legislation, generalising the experience in some provinces is also an option. Legislators, in order to resolve the tension between the law and the situation on the ground, are advised to alter their way of thinking, to allow workers to democratise trade unions at the primary level, and to encourage industrial actors to engage in collective bargaining. Regulating the right to strike in this way would be beneficial to industrial harmony in the long term, and establishing practical procedures for the exercise of this right is a key aspect of ensuring that labour actions do not take the form of wildcat strikes.

Samenvatting (Summary in Dutch)

Collectieve arbeidsrechten en collectieve arbeidsverhoudingen in China

Sinds in 1978 het beleid is gericht op ''hervorming en opening naar de buitenwereld'' (*gaige kaifang*) heeft de Chinese economie op grote schaal veranderingen ondergaan. Deze transformatie vindt zijn weerslag in de collectieve arbeidsverhoudingen, die zich hebben ontwikkeld van een harmonieuze relatie tussen werkgevers en werknemers ten tijde van de bevelseconomie naar een conflictueuze verhouding tussen deze krachten in de socialistische markteconomie. Deze situatie is het gevolg van de opsplitsing van het eigenaarschap van de werkgever in het kader van de economische hervormingen. Marxistisch-leninistische argumenten zijn niet langer overtuigend voor de werknemers, vooral niet voor de private economie die te maken heeft met bijzonder zware arbeidsomstandigheden. Door de golf van stakingen in de zomer van 2010 kregen de arbeidsverhoudingen in China een meer collectief karakter. Het toenemende aantal collectieve acties van werknemers botste met het arbeidsrechtelijke stelsel, dat voornamelijk was ontworpen om aan individuele werknemers bescherming te bieden aan en hun arbeidsgeschillen op te lossen.

De veranderingen in het Chinese collectieve arbeidsrecht begonnen in 1992, toen de Vakbondswet werd vastgesteld als reactie op sociale ontwikkelingen. Vervolgens stelde de centrale overheid een reeks regels vast in reactie op het toenemende aantal stakingen. Deze wetgeving was echter onvoldoende gedetailleerd en nog te zeer gebaseerd op de uitgangspunten van de planeconomie. De wetgever trachtte conflicten tussen werkgevers en werknemers op te lossen in plaats van werknemers aan te moedigen hun recht te zoeken door middel van bemiddeling, arbitrage en juridische procedures in plaats van door stakingen. Bovendien zijn de wettelijke verplichtingen vaag vanwege het sterk abstracte karakter van de wetteksten. Het recht betreffende collectieve onderhandelingen – dat de kern zou moeten vormen van de drie collectieve arbeidsrechten die door de overheid worden erkend – waarborgt niet duidelijk de vrijheid van vakvereniging en het recht om te staken. Slechts één nationale vakbond wordt erkend door de wet, de All-China Federation of Trade Unions (ACFTU), die, zoals de naam doet vermoeden, gezag heeft over alle vakorganisaties in China. Vanuit een preoccupatie met sociale stabiliteit, regelt het recht in China niet de procedure met betrekking tot stakingen en laat het daardoor slechts de mogelijkheid van wilde stakingen open.

Het vakbondsstelsel in China was vormgegeven naar het model van de voormalige Sovjet-Unie. Maar in tegenstelling tot dat systeem was het hier niet van onderop ontwikkeld en evenmin in de nabijheid van een

vrije westerse markteconomie. Ondanks het uitgangspunt van hetzelfde vakbondsmodel, is het recht met betrekking tot vakbonden in China en andere postsocialistische landen een andere richting uitgegaan met betrekking tot hun beschermende functie. In deze landen zijn vakbonden niet alleen belast met de bescherming van de rechten en belangen van werknemers, maar hebben zij ook een wettelijk geregelde rol als medebestuurder van de staat. De verschillende vakbondsstelsels die deze landen hebben ingevoerd, zijn in strijd met de beginselen van de verdragen 87 en 98 van de Internationale Arbeidsorganisatie (ILO). Het goed regelen van de relaties tussen arbeid en kapitaal is echter niet een kwestie van het eenvoudigweg opleggen van de door westerse landen ontwikkelde internationale arbeidsnormen aan landen met andere politieke regimes. Het pluralisme van vakbonden, als en aspect van in het westen meer in het algemeen heersende pluralistische waarden, zal minder waarschijnlijk worden bereikt in postsocialistische landen onder hun huidige politieke regimes. Hierbij speelt een aantal complexe factoren. Aan de ene kant kan de ondergeschiktheid van vakbonden aan de regerende partijen in de weg staan aan het vermogen van die vakbonden om werknemers volledig te vertegenwoordigen. Anderzijds kunnen de relaties tussen die regerende partijen en de vakbonden de laatste wel in staat stellen om gehoord te worden en de rechten en belangen van werknemers assertief te verdedigen. Hoewel ze niet aansluiten bij de ILO-verdragen, zijn de vakbondsstelsels in postsocialistische landen wel verenigbaar met hun huidige politieke systemen. Bepaalde aspecten van het vakbondsmodel schieten echter tekort om de veranderingen in de economie bij te houden en moeten dientengevolge worden aangepast.

Niet alleen schiet het recht tekort in het reguleren van de beschermende functie van vakbonden en hun rol om werknemers te betrekken bij de arbeidsverhoudingen, maar bovendien zijn de vakbonden in de praktijk vaak niet bereid werknemers te vertegenwoordigen. Dit resulteerde in een legitimiteitscrisis die de neiging van werknemers vergrootte om zich te verlaten op duidelijk irrationele protesten. De casus van Foxconn demonstreert het in het algemeen ineffectieve optreden van Chinese vakbonden, zowel op nationaal niveau als op afzonderlijke werklocaties, ten aanzien van het leed dat werknemers ervaren in gespannen situaties. Deze zaak maakte ook duidelijk dat er arbeidsonrust kan ontstaan, ongeacht of het recht op staking is gewaarborgd; essentieel is eerder de beschikbaarheid van effectieve mechanismen voor de beslechting van geschillen. Werknemers uiten vaak uit wanhoop en woede hun onvrede op schokkende wijze. Gezien deze omstandigheden behoeft het recht aanpassing om de betrokkenheid van werknemers bij effectieve vakbonden te waarborgen en daarmee de legitimiteitscrisis op te lossen. In praktische termen kan het verankeren van het stakingsrecht in de wetgeving ertoe bijdragen om radicalere acties te voorkomen.

De fysieke confrontatie tussen de vakbonden en werknemers die betrokken waren bij de Honda-staking in de zomer van 2010, vestigde eveneens de aandacht op de noodzaak van hervorming van de vakbonden in China.

In dit geval stimuleerde de ineffectiviteit van de vakbonden op de werkplek de verspreiding van vormen van werknemersvertegenwoordiging in de arbeidsverhoudingen over het gehele land. Deze mechanismen evolueerden van vakbonden op de werkplek via organisaties die onafhankelijk waren van de werknemers naar een door de staat geleide vertegenwoordiging. De ontwikkeling van de laatste twee mechanismen werd opgevat als een reactie op de invloed die de Chinese regering uitoefende in de arbeidsverhoudingen, in die zin dat ze het exclusieve recht van officiële instellingen (in het bijzonder ACFTU) om werknemers te vertegenwoordigen, in twijfel trokken. De effectiviteit van deze drie mechanismen varieert aanzienlijk. De meeste vakbonden in China waren van bovenaf georganiseerd op basis van quota. Zij werden beheerst door werkgevers waardoor zij aarzelend optraden bij het vertegenwoordigen van werknemers. De opkomst van onafhankelijke organisaties is dus een aanwijzing voor het falen van de bestaande vakbonden om het activisme van arbeiders te kanaliseren en in te zetten. Door werknemers het recht te geven om zichzelf te vertegenwoordigen teneinde te onderhandelen met werkgeversvertegenwoordigers, namen de bestuurders de tekorten van het recht weg. Dit systeem van vertegenwoordiging was over het algemeen beter in staat om op korte termijn te voldoen aan de eisen van werknemers, ook al werden zij weinig betrokken bij de officiële machtsstructuur. De door de overheid geleide vertegenwoordiging bestond dus uit een combinatie van juridische en administratieve maatregelen, waarvan de invoering kan worden opgevat als een door streven naar zelfbehoud ingegeven antwoord van de kant van de partijstaat. Dit is bedacht om de afhankelijkheid van ondernemingsvakbonden van de bedrijfsleiding weg te nemen, teneinde het vertrouwen van werknemers terug te winnen en om toekomstige arbeidsonrust te beperken. Gesteund door de staatsmacht bood dit stelsel van vertegenwoordiging wel enige vooruitgang voor werknemers in bepaalde bedrijfstakken.

Bij de mate waarin deze verschillende systemen effectief zijn, hebben verschillende partijen in het bedrijfsleven belang: regeringen, vakbonden en werknemers. De vakbonden in China zijn geen onafhankelijke organisaties, maar ondergeschikt aan verschillende staatsorganen of werkgevers. Dit betekent dat voor deze vakbonden de belangen van de andere bij het bedrijfsleven betrokken partijen een grotere zorg zijn dan die van hun achterban. De nadruk van de centrale overheid op sociale stabiliteit en die van lokale overheden op economische groei is ook tegenstrijdig. Geen enkele instantie zal werknemers effectief kunnen vertegenwoordigen indien zij geen rol hebben bij de vormgeving daarvan. De centrale overheid wijzigde intussen de definiëring van haar belangen en bevordert nu collectieve onderhandelingen als een langetermijnstrategie voor het bereiken van sociale stabiliteit. De inmenging, of op zijn minst deelname, van plaatselijke bestuurslichamen is een noodzakelijk antwoord op de ontoereikendheid van het recht met betrekking tot arbeidsverhoudingen en het tekortschieten in het betrekken van werknemers bij collectieve onderhandelingen. Deze uitoefening van overheidsmacht moet echter ook worden gereguleerd om te

voorkomen dat tussen plaatselijke autoriteiten en ondernemingen protectionistische verhoudingen ontstaan.

De onderhandelingspositie van werknemers in China neemt toe, deels als gevolg van het 'één kind'-beleid en van de verbeterde kwaliteit van de beroepsbevolking. Sinds 2010 is er sprake van een omslag in de veerhouding tussen arbeid en kapitaal, die de tot dan bestaande op de staat gerichte arbeidsverhoudingen wijzigde. De staatsmacht heeft geleidelijk enkele concessies gedaan voor de betrokkenheid van werknemers bij het stelsel collectieve onderhandelingen, van het verlenen van vertegenwoordigingsrecht aan onafhankelijke werknemersorganisaties (wat niet wettelijk is erkend), via het toestaan van democratische deelname van arbeiders aan officiële instellingen tot het toelaten van betrokkenheid van werknemers bij onderhandelingen als een soort recht. Deze ontwikkelingen getuigen van een inspanning om van onderaf de participatie van werknemers in het collectieve onderhandelingsstelsel te institutionaliseren. Maar zij zijn alleen waar te nemen in bepaalde kustgebieden waar de arbeidersbeweging al sterk was. In het grootste deel van China blijven werknemers stakingen uitvoeren om hun woede te uiten of korte-termijndoelen te bereiken. Het enige compromis dat door de regering werd toegestaan, was toestemming om deel te nemen aan het onderhandelingsproces. Hun vakverenigingsvrijheid is echter niet gegarandeerd en stakingen, zelfs indirecte, zijn volgens lokale regelgeving verboden. De arrestatie van verschillende activisten verbonden aan arbeids-ngo's in december 2015 frustreerde de arbeidersbeweging opnieuw. Dientengevolge zou de verbetering van onderop voor werknemers weinig meer kunnen bereiken dan dat lokale regelgeving toelaat dat werknemers worden betrokken bij collectieve onderhandelingen. De institutionele ruimte voor de arbeiders is daarmee onvoldoende om aan hun steeds assertievere eisen te voldoen en daardoor kunnen zij ervoor ontvankelijk zijn om hun klachten te uiten door middel van arbeidsonrust. Als wetgevers dergelijke onrust willen voorkomen, moeten ze het huidige recht herzien om het de actoren in de bedrijfstak mogelijk te maken autonoom onderhandelingen te voeren.

De zorg van de regering om de sociale stabiliteit te handhaven, levert een zwakte op die werknemers kunnen uitbuiten om hun eisen te bereiken. Deze situatie verklaart de dramatische groei van de arbeidersbeweging tussen 2010 en 2015. Collectivisering van arbeidsverhoudingen en het falen van het recht om werknemers te voorzien van effectieve methoden van geschilbeslechting zijn symptomatisch voor de behoefte aan vernieuwing van de regelgeving. Het unieke karakter van het Chinese politieke systeem betekent dat het land een lange aanpassingsperiode nodig heeft om aan de fundamentele collectieve arbeidsnormen van de ILO te voldoen. Elke hervorming van de wetgeving moet worden uitgevoerd binnen het huidige politieke kader, dat juist omstandigheden in het leven roept die het onmogelijk maken om het pluralisme van de vakbonden in China te verwezenlijken. Het opnemen van collectieve arbeidsrechten in de grondwet van de Volksrepubliek China zou bevorderlijk zijn voor het stabiliseren van de

arbeidsverhoudingen. Een speciale regeling op nationaal niveau is noodzakelijk om de wanordelijke en gefragmenteerde aard van het recht dat momenteel de arbeidsverhoudingen bepaalt, te overwinnen. Als opmaat voor het uitvaardigen van dergelijke wetgeving, is ook het bundelen van de ervaringen in sommige provincies een optie. Om de spanning tussen het recht en de situatie op de werkvloer op te lossen, wordt de wetgever geadviseerd om zijn manier van denken te veranderen, om werknemers in staat te stellen vakbonden op het basisniveau te democratiseren, en om partijen in de bedrijfstakken aan te moedigen om collectieve onderhandelingen te gaan voeren. Het op deze manier reguleren van het stakingsrecht zou de harmonie in het bedrijfsleven op de lange termijn ten goede komen. Het vaststellen van praktische procedures voor de uitoefening van dit recht is de sleutel om ervoor te zorgen dat collectieve acties van werknemers niet de vorm aannemen van wilde stakingen.

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Relevant Chinese Labour Law

Relevant legislation and Articles, listed according to categories and legal hierarchy[1]

1 Constitution and Constitutional regulations[2]

1.1 Constitution of the People's Republic of China (1982, 2004 amended version)

Article 35 Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.

1.2 Law of the People's Republic of China on Assemblies, Processions and Demonstrations (1989)

Article 8 (para.2) For the holding of an assembly, a procession or a demonstration for which an application has to be made under this Law, the responsible person(s) must submit an application in writing to the competent authorities five days prior to the date of the activity. The application shall specify the purposes of the assembly, procession or demonstration, how it is going to be conducted, the posters and slogans to be used, the number of participants, the number of vehicles, the specifications and quantities of the sound facilities to be used, the starting and finishing time, the places (including places where the participants assemble and disperse, the route, and the name(s), occupation(s) and address(es) of the person(s) responsible for the assembly, procession or demonstration.

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1 The criterion adopted here is based on the legal hierarchy regulated by Legislation Law of PRC (2000). It follows the sequence of Constitutional acts, Law (basic and non-basic), administrative rules, local regulations. Although the ACFTU does not have the legislative right, the documents it made contain binding power to its branches, thus, the normative documents enacted by the ACFTU are also listed here. The standard for categorizing here is borrowed from the NPC, the highest legislating agency of China.

2 Official translations from On-line Database of Laws and Regulations of National People's Congress (NPC).

1.3 Trade Union Law of the People's Republic of China (1992, 2001 amended version)[3]

Article 1 This Law is enacted in accordance with the Constitution of the People's Republic of China with a view to ensuring the status of trade unions in the political, economic and social life of the State, defining their rights and obligations and bringing into play their role in the socialist modernization drive.

Article 2 (para.1) Trade unions are mass organizations of the working class formed by the workers and staff members on a voluntary basis.

(para.2) The All-China Federation of Trade Unions and all the trade union organizations under it represent the interests of the workers and staff members and safeguard the legitimate rights and interests of the workers and staff members according to law.

Article 3 All manual and mental workers in enterprises, institutions and government departments within the territory of China who rely on wages or salaries as their main source of income, irrespective of their nationality, race, sex, occupation, religious belief or educational background, have the right to organize or join trade unions according to law. No organizations or individuals shall obstruct or restrict them.

Article 4 (para.1) Trade unions shall observe and safeguard the Constitution, take it as the fundamental criterion for their activities, take economic development as the central task, uphold the socialist road, the people's democratic dictatorship, leadership by the Communist Party of China, and Marxist-Leninism, Mao Zedong Thought and Deng Xiaoping Theory, persevere in reform and the open policy, and conduct their work independently in accordance with the Constitution of trade unions.

Article 6 (para.1) The basic duties and functions of trade unions are to safeguard the legitimate rights and interests of workers and staff members. While protecting the overall interests of the entire Chinese people, trade unions shall represent and safeguard the legitimate rights and interests of workers and staff members.

Article 7 Trade unions shall mobilize and organize workers and staff members to take an active part in economic development and to strive to fulfil their tasks in production and other work. Trade unions shall educate workers and staff members constantly in the need to improve their ideological, ethical, technical, professional, scientific and cultural qualities, in order

3 The NPC defines this Law as a constitutional regulation, instead of social law, or labour law.

to build a contingent team of well-educated and self-disciplined workers and staff members with lofty ideals and moral integrity.

Article 9 (para.1) Trade union organizations at various levels shall be established according to the principle of democratic centralism.

Article 9 (para.2) Trade union committees at various levels shall be democratically elected at members' assemblies or members' congresses. No close relatives of the chief members of an enterprise may be candidates for members of the basic-level trade union committee of the enterprise.

Article 9 (para.3) A trade union organization at a higher level shall exercise leadership over a trade union organization at a lower level.

Article 10 (para.1) A basic-level trade union committee shall be set up in an enterprise, an institution or a government department with a membership of twenty-five or more; where the membership is less than twenty-five, a basic-level trade union committee may be separately set up, or a basic-level trade union committee may be set up jointly by the members in two or more work units, or an organizer may be elected, to organize the members in various activities. Where female workers and staff members are relatively large in number, a trade union committee for female workers and staff members may be set up, which shall carry out its work under the leadership of the trade union at the corresponding level; where they are relatively small in number, there may be a member in charge of the female workers and staff members on a trade union committee.

Article 10 (para.5) The All-China Federation of Trade Unions shall be established as the unified national organization.

Article 11 (para.1) The establishment of basic-level trade union organizations, local trade union federations, and national or local industrial trade union organizations shall be submitted to the trade union organization at the next higher level for approval.

Article 11 (para.2) Trade union organizations at higher levels may dispatch their members to assist and guide the workers and staff members of enterprises to set up their trade unions, no units or individuals may obstruct the effort.

Article 20 (para.2) Trade unions shall, on behalf of the workers and staff members, make equal consultations and sign collective contracts with enterprises or institutions under enterprise-style management. The draft collective contracts shall be submitted to the congresses of the workers and staff members or all the workers and staff members for deliberation and approval.

Article 27 In case of work-stoppage or slow-down strike in an enterprise or institution, the trade union shall, on behalf of the workers and staff members, hold consultation with the enterprise or institution or the parties concerned, present the opinions and demands of the workers and staff members, and put forth proposals for solutions. With respect to the reasonable demands made by the workers and staff members, the enterprise or institution shall try to satisfy them. The trade union shall assist the enterprise or institution in properly dealing with the matter so as to help restore the normal order of production and other work as soon as possible.

Article 34 (para.1) The people's governments at or above the county level may, through meetings or by other appropriate ways, inform the trade unions at the corresponding levels of their important work programmes and administrative measures related to trade union work, analyse and settle the problems as reflected in the opinions and aspirations of the masses of the workers and staff members conveyed by trade unions.

Article 34 (para.2) The Administrative departments for labor under the people's governments at various levels shall, together with the trade unions at the corresponding levels and the representatives of enterprises, establish trilateral consultation mechanisms on labor relations and jointly analyse and settle major issues regarding labor relations.

Article 50 Any organization or individual that, in violation of the provisions of Articles 3 and 11 of this Law, obstructs the workers' and staff members' from joining or organizing of trade unions in accordance with law or the effort made by trade unions at higher levels to assist and guide the workers and staff members in establishing trade unions shall be ordered to by the administrative department for labor to make rectification; if it refuses to do so, the said department may apply to the people's government at or above the county level for solution; where grave consequences are caused as a result of the use of such means as violence and threat in obstruction and thus a crime is constituted, criminal responsibility shall be investigated according to law.

Article 51 (para.1) Any organization that, in violation of the provisions of this Law, retaliate the functionaries of trade unions who perform their duties and functions according to law by transferring them to other posts without justifiable reasons shall be ordered by the administrative department for labor to rectify and reinstate the functionaries; if losses are caused therefrom, compensation shall be made to them.

Article 51 (para.2) Anyone who humiliates, slanders or inflict injuries upon the functionaries of trade unions who perform their duties and functions according to law, which constitutes a crime, shall be investigated for criminal responsibility according to law; if the case is not serious enough

to constitute a crime, he shall be punished by the public security organ in accordance with the regulations on administrative penalties for public security.

2 Law[4]

2.1 Social Law

2.1.1 Labour Law of the People's Republic of China (1994)

Article 7 (para.1) Labourers shall have the right to participate in, and organize, trade unions in accordance with the law.

Article 33 (para.1) The staff and workers of an enterprise as one party may conclude a collective contract with the enterprise on matters relating to labour remuneration, working hours, rest and vacations, occupational safety and health, insurance and welfare. The draft collective contract shall be submitted to the congress of the staff and workers or to all the staff and workers for discussion and adoption.

Article 33 (para.2) A collective contract shall be concluded by the trade union on behalf of the staff and workers with the enterprise; in an enterprise where the trade union has not yet been set up, such contract shall be concluded by the representatives elected by the staff and workers with the enterprise.

Article 34 Upon conclusion of a collective contract, it shall be submitted to the administrative department of labour. If no objections have been raised by the administrative department of labour within 15 days from the date of receipt of the text of the contract, the collective contract shall go into effect automatically.

Article 35 A collective contract concluded in accordance with the law shall be binding on both the enterprise and all of its staff and workers. The standards of working conditions and labour remuneration agreed upon in labour contracts concluded between individual labourers and the enterprise shall not be lower than those stipulated in the collective contract.

2.1.2 Labor Contract Law of the People's Republic of China (2008)

Article 51 (para.1) The employees of an enterprise as one party and the employing unit as the another may, through negotiation on an equal basis,

4 Official translations from On-line Database of Laws and Regulations of National People's Congress (NPC).

conclude a collective contract on matters relating to labor remuneration, working hours, rest and vocation, occupational safety and health, insurance, welfare benefits, etc. The draft collective contract shall be submitted to the worker's congress or to all the employees for discussion and adoption.

Article 51 (para.2) A collective contract shall be concluded by the trade union on behalf of the employees of the enterprise with the employing unit. In an enterprise where a trade union has not yet been set up, such a contract shall be concluded with the employing unit by the representatives elected by the workers under the guidance of the trade union at a higher level.

Article 53 In regions at or below the county level, industry-wide or region-wide collective contracts may be concluded between the trade unions and the representatives of the enterprises engaging in such industries as construction, mining and catering service.

Article 54 (para.1) After conclusion, a collective contract shall be submitted to the administrative department of labor and it shall become valid if the department raises no objection within 15 days from the date it receives the text of the labor contract.

Article 54 (para.2) A collective contract concluded in accordance with law is binding on the employing unit and the workers. An industry-wide or region-wide collective contract is binding on the employing units and the workers engaged in a given local industry or a given region.

Article 56 Where an employing unit breaches the collective contract and infringes upon the labor rights and interests of the workers, the trade union concerned may, in accordance with law, demand that the employing unit assume liability. If a dispute arises over the performance of the collective contract and cannot be resolved through consultation, the trade union may apply for arbitration or bring a lawsuit in accordance with law.

2.1.3 Law of the People's Republic of China on Labor-dispute Mediation and Arbitration (2008)

Article 5 Where a labor dispute arises and the parties are not willing to have a consultation, or the consultation fails, or the settlement agreement reached is not performed, they may apply to a mediation institution for mediation. Where the parties are not willing to have mediation, or the mediation fails, or the mediation agreement reached is not performed, they may apply to a labor-dispute arbitration commission for arbitration. Where they are dissatisfied with the arbitral award, they may initiate a litigation to a people's court, unless otherwise provided for in this Law.

Article 7 Where the party in a labor dispute consists of 10 workers or more, and they have a common request, they may choose one worker to represent them in mediation, arbitration or litigation.

2.2 Criminal Law

2.2.1 Criminal Law of the People's Republic of China (1997)

Article 291 Where people are gathered to disturb order at railway stations or bus terminals, wharves, civil airports, marketplaces, parks, theaters, cinemas, exhibition halls, sports grounds or other public places, or to block traffic or undermine traffic order, or resist or obstruct public security administrators of the State from carrying out their duties according to law, if the circumstances are serious, the ringleaders shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention or public surveillance.

3 Administrative regulations[5]

3.1 Provisions on Collective Contracts

Article 3 The term "collective contract" as mentioned in the present Provisions refers to the written agreement concluded between an employing entity and the workers of this entity on matters relating to labor remuneration, working time, rest and vacations, occupational safety and health, professional training and insurance and welfare through collective negotiation in accordance with laws, regulations and rules. The term "special collective contract" as mentioned in the present Provisions refers to the special written agreement concluded between an employing entity and the workers of this entity on a specific matter in accordance with the laws, regulations and rules.

Article 5 When conducting a collective negotiation or signing a collective contract or special collective contract, the parties concerned shall abide by the following principles:
(1) Abiding by the laws, regulations and rules and the relevant provisions of the state;
(2) Respecting mutually, negotiating equally;
(3) Keeping good faith, conducting fair cooperation;
(4) Taking into consideration the legitimate rights and interests of both parties; and
(5) Not taking extreme actions.

5 The translations are from PKU Law Database.

Article 32 (para.1) Either party of the collective negotiation may make a written request for collective negotiation to the other party about the conclusion of a collective contract or special collective contract and the related matters.

Article 32 (para.2) Where a party makes a request for collective negotiation, the other party shall give it a written reply within 20 days from the day when it receives the request, and shall not refuse to conduct collective negotiation without justifiable reason.

Article 36 (para.1) The draft of collective contract or the draft of special collective contract agreed on by the representatives of both parties shall be discussed by the employees representative assembly or all the employees.

Article 36 (para.2) When the employees representative assembly or all the employees discuss the draft of collective contract or the draft of special collective contract, at least two thirds of the members of the employees representative assembly or of all the employees shall be present. The draft of the collective contract or the draft of the special collective contract shall not be adopted unless it is agreed upon by at least half of the members of the employees representative assembly or of all the employees.

Article 44 The administrative department of labor and social security shall examine the validity of a collective contract or special collective contract submitted to it according to the following items:
(1) Whether the qualifications of subjects of both parties of the collective negotiation are in line with the laws, regulations and rules or not;
(2) Whether the procedures for the collective negotiation is in violation of the laws, regulations and rules; and
(3) Whether the content of the collective contract or special collective contract is contrary to the provisions of the state.

3.2 Public Security Administration Punishments Law of the People's Republic of China (2005, 2012 Amendment)

Article 23 Where a person commits any of the following acts, he shall be given a warning or a pecuniary penalty. If the circumstances are serious, he (she) shall be detained for not less than 5 days but not more than 10 days and may be fined 500 yuan:
(1) He (she) disturbs the order of any organ, social organization, enterprise or public institution and makes it impossible for the work, production, business, medical services, teaching or scientific research to proceed normally, but has not caused any serious loss;
(2) He (She) disturbs the order of any bus station, port, dock, civil airport, emporium, park, exhibition hall or any other public place;

4 Local regulations[6]

4.1 Regulations of the Shenzhen Special Economic Zone on the Promotion of the Harmonious Labor Relations (2008)

Article 28 One party of a collective consultation may request in writing the other party to have the collective consultation on the matters stipulated in the second section of Article 26 of these regulations. The other party shall reply in writing within 10 days from the date of receiving the request for the collective consultation, and shall not decline the collective consultation.

Article 52 If labor disputes cause the collective stop, slowdown of work, labor unions shall represent laborers in the negotiation with employer units, report the opinions and requests of laborers, and propose a settlement. Employer units shall satisfy the reasonable requests of laborers. If a labor union has not been established when the situation referred to in the previous section takes place, the labor union at a higher level shall represent laborers according to the division of duties in the negotiation with the employer unit or assign employee representatives to the negotiation.

Article 53 If labor disputes cause the collective stop, slowdown of work, and shutdown of factories, etc. in the employer units of water supply, power supply, gas supply, public transportation, etc., and lead or may lead to one of the following consequences, the municipal, district governments may, in accordance with the actual situation, issue orders requesting employer units or laborers to stop the acts and to restore the normal order:

(1) to endanger public security;
(2) to jeopardize the normal order of society and economy and the order of urban residents' life;
(3) the other consequences which seriously jeopardize public interests. 30 days from the date of issuing the orders shall be regarded as a coolingoff period, both employer units and laborers shall not take any acts to intensify the conflicts within this period. The department of labor, labor unions, and related trade associations shall continue to organize the negotiation, mediation within this period in order to facilitate the reconciliation between employer units and laborers.

6 The translations are from PKU Law Database.

4.2 Measures of Shenzhen Municipality on Implementing the Law of the People's Republic of China on Trade Unions (2008)[7]

Article 44 For worker representatives involved in collective bargaining with labour contract coming to an end, the term of labour contract shall automatically extend to when the representing duty is finished, except when the worker representatives is under any of the circumstances as described in Article 39 of Labour Contract Law, losing the worker ability or shall be retired according to the law.

4.3 Guangdong Provincial Regulation on Collective Contracts for Enterprises (2015)[8]

Article 13 (para.2) The representatives of workers shall be dispatched by trade unions or produced by the workers in an election organised by trade unions. The head of worker representatives shall be the person who is in charge of the trade union. In enterprises where trade unions have not been established, worker representatives shall be produced by workers democratically in the election organised by relevant regional trade unions, and agreed by more than half workers of the enterprise. The head of the representatives shall be elected by the representatives themselves.

Article 18 (para.2) When workers regard it is necessary to negotiate with the employer, they should forward this proposal to trade unions. Enterprise trade unions can decide whether to request collective negotiation from the employer according to the demands of the workers and the detailed situation of the enterprise concerned. When more than half of the all workers or more than half of representatives of employee representative council propose, trade unions should request the employer to negotiate collectively. In enterprises without trade unions, the workers concerned can put forward the demand of collective bargaining to regional trade unions. When acquiring the agreement of more than half of the workers or more than half of the representatives of employee representative council, the relevant trade unions shall request the employer to bargain collectively.

Article 24 During the process of collective negotiation, workers can not display the following conducts: (1) violating individual labour contracts and failing to complete work tasks; (2)violating labour disciplines, or using various measures to force other workers to leave their working posts and (3) impeding, obstructing or blocking the entrance of enterprises, blocking staff or goods from entering in, breaking the equipment of enterprises, tools, or breaking the normal production order and public order.

7 Translated by the author.
8 Translated by the author.

5 Other normative documents (Made by the ACFTU)

5.1 Provisions on the Democratic Management of Enterprises (2012)[9]

Article 9 Representatives of the employees' congress shall consist of workers, technicians, managers, and leaders of the enterprise and other employees. The number of managers at or above the middle level and leaders of an enterprise shall generally not exceed 20% of the total number of employees' representatives. Enterprises with female employees and employees dispatched for labor shall have appropriate proportion of representatives of the female employees and employees dispatched for labor.

Article 13 The employees' congress shall perform the following functions: (2) deliberate and adopt collective contract drafts, plans for the use of employee welfare funds collected in accordance with the relevant provisions of the state, plans for adjusting the payment proportion and time for the housing provident fund and social insurance premiums, recommended model workers and other major matters;

5.2 Trial Methods of Trade Unions' Participation in Equal Consultation and Signing Collective Contract (enacted by the ACFTU) in 1995[10]

Article 4 Collective contracts are written agreements concluded by trade unions, who representing workers, and employers concerning labour remuneration, working hours, rest and holiday, labour safety and hygiene, insurance and welfare, etc.

5.3 Measures for the Election of the Trade Union Chairman of an Enterprise (2009, for Trial Implementation) [11]

Article 9 The Party organization of an enterprise and the trade union at the next higher level shall examine the candidates for the trade union chairman of the enterprise, and make adjustments on those who do not satisfy the conditions for office.

9 The translations are from PKU Law Database.
10 Translated by the author.
11 The translations are from (PKU) Law Database.

5.4 Rainbow Plan on Further Promoting the Implementation of the Collective Contract System[12]

Targets: trying to promote collective contract system in all enterprises within three years (2010-2012); reaching the ratio of 60 % concerning collective contract coverage by 2010; 80% by 2011; improving the ratio of collective contract coverage in small-size enterprises without trade unions via signing regional or sectoral collective contracts; perfecting the mechanisms for collective negotiation and enhancing the effectiveness of collective contracts.

5.5 The Work Plan of the ACFTU on Deepening Collective Negotiation (2014-2018)[13]

Section 2 (1) Work Plan: Further consolidating the ratio of collective contract building. In enterprises with trade unions, the ratio shall keep being higher than 80%, if there are more than 100 workers in the enterprises, the ratio shall remain higher than 90%.

12 Translated by the author. This Plan was made by the ACFTU with MOHRSS and CEC/CEDA.

13 Translated by the author.

Curriculum Vitae

Xiang Li was born on 1 January 1988 in Henan Province, China. She obtained her L.L.B. (2010) and L.L.M. (2013) degrees from Northwestern Polytechnical University, China, under the supervision of Prof. Huimin Guo.

In September 2013, she was admitted as a PhD candidate at the Department of Labour and Social Security Law, Institute of Public Law, Leiden University, the Netherlands, supervised by Prof. dr. G.J.J. Heerma van Voss and Prof. dr. B. Barentsen. Her PhD project was funded by the Chinese Scholarship Council. Her research areas include labour law, industrial relations, and women labour rights. She visited the International Labour Organisation (ILO) in 2016, during which she attended a series of symposiums organised by the research department of the ILO, and benefited from exchanging thoughts and opinions with the ILO officials and experts. She has authored several publications on topics related to labour law and relations in academic journals and books, and also been invited as a speaker in several international conferences including the 9th Asian Regional Congress of the International Labour and Employment Relations Association (ILERA) in Beijing in 2016, the 34th International Labour Process Conference (ILPC) in Berlin in 2016, and the International Conference on the New Frontiers for Citizenship at Work in Montreal in 2014.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2017 and 2018:

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