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Collective labour rights and collective labour relations of China

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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.

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*) ⁵instead 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 centralism⁶ 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 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 significantly 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 institutional 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 Article 173 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.

