The Evolution of Collective Labour Law with ‘Chinese Characteristics’?

‘Crossing the river by feeling the stones’?

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The expression of ‘crossing a river by feeling the stones’ (mozhe shitou guo he), popularised by Deng Xiaoping, is commonly evoked by Chinese policy-makers to promote a cautious, gradual, and selective approach to reform that takes into account ‘Chinese characteristics’ (zhongguo teshe). Over the past three decades, the framework for regulating collective labour relations in China appears to have evolved in this manner. However this approach may not be able to respond to the rapidly changing currents of China’s new market economy that have generated conflicting interests between labour and capital. The continued absence of genuine collective labour representation mechanisms at the workplace/enterprise level has seen the escalation of labour disputes in various forms and on different scales. The implementation of the International Labour Organization’s (ILO) fundamental principles and rights at work concerning freedom of association and collective bargaining would constitute an important step towards addressing the structural deficiencies in China’s collective labour relations framework by providing a vehicle for worker voice and for a fairer distribution of economic gains. This would strengthen the foundation for sound labour market governance based on a new approach of ‘crossing the river by building a bridge’ (dajian qiaoliang guo he).
1 INTRODUCTION

Over the past three decades, China’s shift from a centrally planned economy to a market economy with ‘Chinese characteristics’ has transformed the foundations of its labour market and the relationship between the state, labour, and capital. These changes saw the dismantling of a state-organised labour administration system based on the so-called ‘three old irons’ of lifetime employment, fixed wages and controlled appointments, towards a flexible and competitive labour market that would meet the demands of foreign and domestic capital. As this transition saw the widening of economic and social inequalities and conflicting interests between different labour market actors, labour disputes on various levels and scales have witnessed explosive growth. A legal and institutional framework governing collective bargaining (or ‘collective consultation’¹) has evolved under the banner of promoting the Chinese Party-state’s goal of ‘harmonious’ labour and social relations.

This paper examines the so-called ‘Chinese characteristics’ of an evolving legal regime regulating collective labour relations in China. I situate the current collective labour law regime in its historical context. ‘Collective’ labour law has been conventionally referred to as a component of the labour law discipline that addresses the legal relationship between a collectivity of workers on the one hand, and on the other hand, a single employer or collectivity of employers. ² ‘Individual’ labour law typically comprises of regulations concerning the individual employment relationship, such as the terms and conditions of an individual employee’s contract of employment. In many jurisdictions, the realms of ‘collective’ and ‘individual’ labour law intersect to govern diverse aspects of work relations. For the purpose of clarification in this paper, collective labour law specifically refers to the set of legal rules and institutions that regulate those activities and processes associated with workers and employers’ rights to form, associate with, and participate in trade unions/employer associations, collective representation, consultation, and bargaining, and collective disputes and industrial action.

My main argument is that legal institutions capable of regulating collective labour relations in an increasingly complex, segmented, and precarious labour market in China have been slow to evolve. Collective labour law reforms have been based on a ‘crossing the river by feeling the stones’ approach of cautious and selective experimentation. Despite recent

¹ The official term used in the Labour Law is ‘collective consultation’ (jitixieshang) rather than ‘collective bargaining’ (jiti tanpan). Use of the term ‘consultation’ seems to avoid a strong connotation of conflict or confrontation.
strengthening of formal laws and institutions, there remain significant deficiencies in collective representation mechanisms in the workplace that could address the growing numbers, scales, forms and sources of labour disputes. This argument builds on Kai and Brown’s insights on the problematic transition from ‘individual’ to ‘collective’ labour relations in China’s emerging market economy, where the legal treatment of collective labour relations is presently fragmented and largely incomplete. The lack of clarity in Chinese collective labour law is especially critical with respect to workers’ and employers’ collective organising rights and the conduct of industrial action. It should be noted at the outset that a salient feature of China’s labour law structure is the complex relationship between different levels of government in their legislative and enforcement powers and practices. At a national/central level, laws are commonly framed in general terms that subsequently depend on local implementing regulations by provincial and city-level authorities and the enforcement of labour laws at the county-level administrative level.

In making its contribution to the special volume of the Bulletin of Comparative Labour Relations on ‘China and ILO Fundamental Principles and Rights at Work’, this paper seeks to provide an important contextual understanding of the historical transformation of China’s labour law regime. National industrial and labour relations systems are, to varying degrees, rooted in historical traditions and shaped by local legal, economic, political, social and cultural factors, institutions, and dynamics. Notwithstanding actual and/or perceived characteristics of local systems, international norms and standards such as the ILO’s Fundamental Principles and Rights at Work play an important role in buttressing national labour law regimes to respect, promote, and protect the basic human rights of all workers. The ILO’s Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention 1951 (No. 98) can provide a normative framework for the evolution of China’s collective labour law regime to promote industrial and social harmony. This is particularly important in the context of the rise and rise of interest-based disputes where Chinese workers are demanding their fair share of the economic wealth they have created. Collective labour laws and institutions that are capable of providing workers with greater voice and the ability to genuinely bargain with employers can have a longer-term, systemic impact for labour relations in China, on the basis of ‘crossing the river by building a bridge’.

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This paper is structured as follows. In section 2, an overview is given of the transition of China’s labour law regime from a state-controlled labour administration system to the development of laws governing individual employment contractual relationships, to the introduction of the Labour Contracts Law in 2008. Section 3 analyses the shift in regulatory emphasis on emerging collective labour laws and institutions in recent years that reflects a top-down, selective and experimental approach by the Party-state and the All-China Federation of Trade Unions (ACFTU). The institutional capacity of the ACFTU as a vehicle for advancing workers’ interests under the regulatory framework is examined before some concluding thoughts on the relevance of the ILO’s fundamental rights and principles under Conventions 87 and 98 for the evolution of China’s collective labour law.

2 COLLECTIVE LABOUR LAW IN CHINA: A HISTORICAL PERSPECTIVE

In situating the development of collective labour law in the broader regulatory framework of China’s changing labour market and labour relations, there are arguably four identifiable stages in this historical evolution:

1. The ‘three old irons’ of lifetime employment and state-provided welfare, fixed wages, and state-controlled promotions (1950s-1978).
2. The emergence of a flexible labour market with individualised contract-based employment relations (1979-1990s).
3. Regulatory efforts aimed at addressing the increasingly unequal and conflictual labour-management relations through stronger statutory protection of workers’ rights (2000-2007).

This section examines the first three stages up until the introduction of the Labour Contract Law in 2007-2008.

1950s-1978: the ‘three old irons’

When my mother first entered the workplace in 1978, she was given a graduation present from her alma mater in Guangzhou, the South China University of Technology. The present was an iron bowl — simple and unassuming — with no decoration except for a single-line inscription of the university’s name. My mother used this bowl every day at the cafeteria of
her workplace, the Guangdong Fertiliser Research Institute. This image of an ‘iron rice bowl’ has been widely evoked to capture the characteristics of labour relations for the urban workers of China under the former planned economy. Some have referred to an expanded notion of the ‘three old irons’: the ‘iron rice bowl’ of lifetime employment and cradle-to-grave social welfare provided by the state (tie fanwan); the ‘iron wage’ of centrally administered and fixed wages that sought to minimise disparities within and across workplaces (tie gongzi); and the ‘iron chair’ of state-controlled appointments and promotion of managers, generally based on the worker’s tenure of employment and political orientation (tie jiaoyi).  

Almost all enterprises under the centrally planned system were state-owned, and a dual system of Party and management control became the basis of enterprise leadership. The basic institutional structure at the enterprise level consisted of the Party committee, the trade union and the workers’ congress which was led by the trade union. The general manager often served as the Party Secretary and union secretary of the enterprise. All unions belonged to the sole Party-state sanctioned union body, the ACFTU. With a role as the ‘transmission belt’ between the Party and workers, trade unions at the workplace were responsible for ‘educating’ workers and dealing with their grievances. The ‘work unit’ (known as the ‘danwei’) represented the basic-level organisation that linked workers to the Party, and enabled the Party to directly exert political control over workplaces.

Due to the absence of an actual labour market prior to 1978, the regulatory framework could be better described as a labour administration system. Efforts to introduce labour laws were short-lived during this period. For example, the operation of the Labour Union Law 1950 and several labour regulations concerning state-owned enterprises came to an end in 1956. This was apparently due to ideological reasons within the Party — since the interests of workers and those of the enterprise were theoretically aligned in a socialist society, labour disputes would not be an issue. Furthermore, there was a general breakdown in China’s legal system during the Cultural Revolution, with the courts and legislative systems entirely abolished.

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1979-1990s: Towards contractual employment relations in a flexible labour market

As Deng’s proposals for a ‘socialist market economy with Chinese characteristics’ became cemented in official policy, China’s integration into global capitalism fuelled unprecedented growth over the next two decades. The shift to a market-based economy entailed greater decentralisation of state-owned enterprises (SOEs) in their personnel management, along with reforms to break the ‘three old irons’ that were seen to be associated with low labour flexibility and productivity.\(^7\) New policies were introduced largely to promote economic reform and efficiency, with the aim of making labour less rigid to facilitate China’s participation in global competition, thereby meeting ‘a key demand of the foreign capital that led China’s post-reform economic development’.\(^8\)

From the late 1980s onwards, changes in the state’s labour policy resulted in the downsizing of SOEs, removal of the cradle-to-grave social welfare, introduction of fixed-term labour contracts, and the development of new wage systems to reflect performance and skills levels.\(^9\) The pace of labour market reforms accelerated during the 1990s in the lead-up to China’s accession to the World Trade Organisation. A central feature of these reforms has been the creation of a labour contract system whereby workers are engaged on fixed-term contracts, usually between half a year and three years. This fundamental abandonment of the ‘iron rice bowl’ saw the rise of temporary and flexible forms of employment which was encouraged by the state as a specific response to the mass layoffs of workers from the state-owned sector.

This period of economic and labour market reform also saw the dismantling of official barriers to urban labour market access by the rural population. At the heart of China’s rapid industrialisation and urbanisation has been a new labour force of millions of rural migrant workers who moved from villages to the fast-growing cities for employment in the burgeoning private sector. A salient feature of this rural-to-urban migration is the household registration (‘hukou’) system. Without a local urban hukou, these workers and their families were not entitled to reside permanently in their receiving cities. Importantly they could not access, in law and in practice, a range of employment and social benefits that their urban counterparts enjoyed. Rural migrant workers were usually concentrated in the lowest-paid, so-called ‘3D’ (dirty, dangerous, degrading) jobs in the cities. This created a group of

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\(^7\) Ding & Warner, supra n. 4.
‘guestworkers’ who were fulfilling the labour market needs of China’s industrialising cities but without being granted urban citizenship status and entitlements.

A handful of China’s coastal cities were transformed into export hubs as foreign investment poured into the ‘factory of the world’, staffed by a seemingly abundant supply of cheap labour. The labour market policy emphasis on job creation in the private sector generated new problems for labour relations as private employers gain increased autonomy in the workplace. While the economic transformation brought about an increasingly flexible labour market, the pre-reform institutions became ineffectual in governing the new labour relations that weighed heavily in favour of capital. The tension between the pursuit of economic reform and the need to address the issues of an emerging labour market made it difficult for Chinese policymakers to reach consensus on new labour legislation.10

In this context, the Labour Law 1994 was a significant breakthrough as the first national law of its kind in China. This legislation formally established the system of labour contracts as the primary means for regulating employment relationships. Its provisions covered a wide range of matters, including the conclusion, variation and termination of labour contracts, a framework for collective consultation, reasonable working hours, paid leave, anti-discrimination, equal pay and a dispute resolution framework among others. Further regulations pertaining to the Labour Law were promulgated in relation to special labour issues such as minimum wages, labour inspectors and redundancies.

On paper, the standards presented by the Labour Law 1994 did not appear ‘markedly inferior to those of comparable countries and indeed many developed nations’.11 However, the legislative framework and institutions had suffered from significant shortcomings. In its institutional design, as Cooney notes, the disorderly internal structure of Chinese labour law is a ‘major obstacle to its capacity to generate credible labour standards’.12 The complexity of the increasingly segmented, heterogeneous Chinese labour market presented a major challenge to the drafters to frame a law in general terms. The Labour Law 1994 left out significant details. For example, the law largely focused on termination of employment yet did not address contract formation in any detail.

There was also a systemic failure by the state to regulate labour relations in a fair and balanced manner during this period. Acute competition among localities to attract and retain

10 Zhao, supra n. 6, at 410.
11 Sean Cooney, China’s Labour Law, Compliance and Flaws in Implementing Institutions, 49 Journal of Industrial Relations 673, 674 (2007).
12 Ibid. at 675.
investment often led to local authorities relaxing their enforcement of labour standards. Some local authorities did not consider the ‘floating population’ of rural migrant workers as warranting any legal protection.\textsuperscript{13} At the time, regulating labour relations was assigned secondary importance in developing a legal framework for a market economy, especially compared to the principal priority of attracting foreign investment.\textsuperscript{14} As Zenglein argues, employers were given ‘much leeway in establishing an industrial relation system best suiting their needs’.\textsuperscript{15}

Underlying all of this was the state’s reliance on the growth of private sector employment as it was downsizing SOEs. The proportion of state enterprises (including SOEs, township and village enterprises, and collectives) declined from 25 per cent of the labour force in 1996 to only 7 per cent in 2003, with 30 million workers losing their jobs in the SOE sector during this period.\textsuperscript{16} The establishment and formalisation of the labour contract system have been seen by some as a decisive step by the state in ‘smashing the iron-rice bowl’ to facilitate and accelerate economic restructuring.\textsuperscript{17} Not only did the 1994 Labour Law provide for the use of short-term contracts which was perceived as enhancing the efficiency of SOEs, it also legitimised the mass redundancies undertaken by SOEs. As Gallagher argues, ‘the termination of employment at the end of the contract was done using the language of the law’.\textsuperscript{18}

The labour law framework that emerged during this period represented a shift from a state-organised administrative structure to a system where workers are ‘reconceived and reorganised as individual subjects, selling their labour on a labour market’.\textsuperscript{19} If the primary object of labour law in a market economy is to ‘counteract the inequality of bargaining power

\textsuperscript{15} Max Zenglein, \textit{Marketization of Chinese Labor Market and the Role of Unions} 8 (Global Labour University, Working Paper No. 4, 2008).
\textsuperscript{16} Lee, \textit{supra} n. 13, at 4.
\textsuperscript{19} Xu, \textit{supra} n. 8, at 450.
which is inherent and must be inherent in the employment relationship’,\textsuperscript{20} then workers in China have had to rely on laws that are based on the status of an individual party to a contract.

There were few legal provisions pertaining to collective labour relations at the time. Such provisions largely remained as ‘principles’ on paper, largely due to the absence of an institutional framework for their implementation. The 1992 Trade Union Law stipulated the nature and structure of trade union organisations, and the rights and obligations of trade unions and their members. The goal of trade unions under this Law did not include any roles or duties to represent and safeguard workers’ rights and interests, reflecting the pre-reform workplace mentality and ideology espousing only the commonality of interests between workers, management, and the Party in the enterprise. Provisions under the heading ‘Labour Contract and Collective Contract’ in the 1994 Labour Law established the concept of collective labour contracts, but were framed as vague principles without any legal institutions and mechanisms that put them into practice. Chang and Brown argue that the emergence of collective labour relations and the impetus for reform of collective labour law had been slow in the 1990s due to the absence of ‘collective consciousness’ among workers whose ‘position in the new market economy… was still in a process of germination’.\textsuperscript{21}

\textbf{2000-2008: Strengthening legal protection of workers’ and unions’ rights}

China’s accession to the World Trade Organization in 2001 further accelerated the pace of economic restructuring, bringing with it an even more diversified and segmented labour market. Employment relations grew increasingly complex, with different wages and working conditions for heterogeneous labour forces in urban and rural areas. Major deficiencies in the institutional framework for regulating the new market-based labour relations became increasingly apparent. The rapidly escalating trend of labour disputes over this period revealed significant discontent and frustration among workers, particularly over issues of unpaid wages and violation of workers’ rights. In 1996, China’s labour dispute arbitration committees handled 47,951 cases. The number of cases had increased to 350,182 in 2007.\textsuperscript{22} In 2008, the number of labour dispute cases reached 693,000.\textsuperscript{23} While there are no reliable

\textsuperscript{20} Otto Kahn-Freund, \textit{Labour and the Law} (Hamlyn Lecture Series, 1\textsuperscript{st} edition, London: Stevens and Sons).
\textsuperscript{21} Kai & Brown, supra n. 3, at 105.
data on strikes, frequent incidences of wildcat strikes and collective workplace disturbances by ‘unorganised’ workers in the private sector have been on the rise over the past decade.\(^\text{24}\)

This period saw the stepping up of legislative efforts aimed at enhancing the substantive norms and standards of workers’ rights, and addressing the institutional vacuum for collective labour representation and dispute resolution. The reform of China’s labour law in the 2000s started with seemingly minor changes to the Trade Union Law in 2001. Although these revisions did not alter the political environment for unions’ operation or address their representational deficiencies in the workplace, they opened up important institutional opportunities for the ACFTU. First, it incorporated ‘safeguarding the legitimate rights and interests of workers’ as the basic duty of trade unions before protecting the ‘overall interests of the entire Chinese people’ (as stated in the 1992 Trade Union Law). Second, the revised Trade Union Law provided for the establishment of joint trade unions in small enterprises (employing less than 25 workers), expanding the scope for local and sectoral forms of union organising beyond the enterprise. Third, tripartite consultations at various levels were introduced to improve coordination on labour relations among the government, ACFTU and the officially designated employer association, the China Enterprise Confederation (CEC). Since then, the All China Federation of Industry and Commerce (ACFIC), representing the private sector, has played an increasingly important role in official tripartite consultations.

The state increasingly focused its attention on developing a collective consultation and negotiation legal framework that could channel workers’ grievances through legal institutions and manage the growing scale and number of labour conflicts. Several national regulations on collective negotiations and wage negotiations were introduced in the early 2000s. The then Ministry of Labour and Social Security (MOLSS)\(^\text{25}\) issued the Implementation Decree on Collective Wage Negotiations in 2000 which had the aim of promoting collective wage negotiation as a key mechanism for determining wage increases and distribution. Subsequently, revised Provisions on Collective Contracts in 2004 sought to clarify the procedural rules on collective negotiations, including expansion of the contents of bargaining and the introduction of ‘good faith bargaining’.\(^\text{26}\)

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\(^{24}\) Lee, supra n. 13, at 3.

\(^{25}\) The MOLSS changed its name to the Ministry of Human Resources and Social Security (MOHRSS) in 2008.

\(^{26}\) Lee, supra n. 13, at 8.
The next major round of legislative efforts took place in 2007-2008. Several notable labour laws went into effect in 2008, including the Labour Contract Law (LCL), the Law on Labour Dispute Mediation and Arbitration (LLDMA), and the Employment Promotion Law (EPL). The LCL introduced new provisions to strengthen individual labour contracts, impose broad obligations on employers to prevent underpayment of wages, provide for transmission of employee entitlements when a firm restructures, and regulate the increasing use of dispatch labour and agency work. In terms of collective labour law, the LCL increased the rights of unions and workers representatives at the enterprise level (such as requiring employers to consult them on redundancy and dismissal decisions and the drafting of company rules). The law also provided formal recognition of wage negotiations and sectoral and regional bargaining, which had already been taking place in practice.

Meanwhile, the LLDMA focuses on the procedural aspects of labour disputes with the aim of impartial and timely settlement of disputes and protecting the legal rights of workers. It aims to address some of the limitations of the mediation and arbitration system introduced under the 1994 Labour Law. For example, new provisions seek to expedite dispute resolution procedures, improve the qualifications of mediators and arbitrators, extend the limitation period (from 60 days to a year) for workers to lodge complaints, eliminate filing fees for arbitration, and expand the scope of disputes that can be addressed by mediation and arbitration bodies.\(^{27}\) Finally, the EPL importantly expands the grounds of prohibited discrimination in the 1994 Labour Law to include discrimination against migrant workers based on their residential status. Additional national laws and regulations concerning work safety, work injuries and occupational diseases, minimum wages, overtime, and social insurance have been introduced during this period.

These reforms represent a major step forward in the development of legal norms in individual labour relations in China. Questions arise as to the extent to which these laws and regulations are being enforced in practice, how they are enforced and against whom they are enforced. Numerous weaknesses in the structure and implementation of labour law in China have been identified to date, including: gaps in the detail of the law,\(^{28}\) ineffective labour inspectorates,\(^{29}\) serious deficiencies in administrative resources,\(^{30}\) and weaknesses in the

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\(^{28}\) Cooney, *supra* n. 11.

dispute resolution mechanism.\textsuperscript{31} Furthermore, local governments, often charged with the unfunded mandate of enforcement, may be reluctant to enforce labour laws when they are under competitive pressures to attract investment.\textsuperscript{32} It has become apparent that these new laws have raised workers’ expectations about improvement of their wages and working conditions, along with better access for workers to pursue their claims through mediation and arbitration mechanisms. Within the first twelve months since the passage of the labour laws in 2008, official statistics reported a doubling of cases accepted by labour dispute arbitration committees from around 350,182 in 2007 to 693,465 in 2008.\textsuperscript{33} There are considerable regional differences in the number of labour arbitration cases, with a concentration of cases in localities with high economic growth and investment such as Guangdong, Shanghai, and Jiangsu, and increasingly in the fast-growing regional cities of Shandong, Chongqing, and Sichuan. While the majority of cases involve payment of wages and social insurance, there has also been a growing number concerning the signing of labour contracts, termination of employment, working hours and holiday leave, work injuries, and ‘other’ issues.\textsuperscript{34} The nature of labour disputes seems to be increasingly complex and confrontational, and requiring greater resources and time to resolve.

Importantly, there was a significant jump in the official number of collective labour disputes in the year these laws were introduced, from 12,784 cases in 2007 (involving 271,777 workers) to 21,880 cases (involving 502,713 workers) in 2008.\textsuperscript{35} A legal and institutional framework for regulating collective labour relations and for resolving the increasingly complex and larger-scale labour disputes had yet to mature at the time of these legislative reforms. Although the LCL strengthened the legal rights of workers and the LLDMA improved procedures for workers to bring rights-based claims against employers, the capacity of the regulatory regime to effectively deal with the new waves of interest-based labour disputes remains to be seen. As the next section explores, following the introduction of the LCL a surge of collective disputes and industrial action by workers seeking higher wages and the election of their own union representatives has tested the waters of an emerging realm of collective labour law in China.

\textsuperscript{31} Zhao, supra n. 6.
\textsuperscript{32} Josephs, supra n. 14.
\textsuperscript{34} Ibid. 9.1, 9.3 tbl.
\textsuperscript{35} Ibid.
3 THE SHIFT TO COLLECTIVE LABOUR LAWS AND INSTITUTIONS

3.1 Quantitative versus qualitative expansion

Since the introduction of the 2008 labour laws, there has been an accelerated growth of formal workplace institutions, including collective negotiations, wage negotiations, tripartite consultations, and ACFTU campaigns at various levels. The coverage of collective negotiated contracts has rapidly expanded quantitatively as a result of a concerted push by the state and the ACFTU.\textsuperscript{36} Based on ACFTU statistics, in 2008 a total of 1.9 million enterprises signed 1.1 million collective contracts, covering 150 million workers (or 60.2 per cent of workers in the urban workforce. In 2011, these figures had increased to a total of 3.61 million enterprises and 223 million workers (or 62.1 per cent of workers in the urban workforce) covered by 1.79 million collective contracts.\textsuperscript{37}

Table 1: Growth in the Number and Coverage of Collective Contracts in Chinese Enterprises (in millions), 2008-2011.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of collective contracts signed</th>
<th>Number of enterprises covered</th>
<th>Number of workers covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>1.107</td>
<td>1.908</td>
<td>149.54</td>
</tr>
<tr>
<td>2009</td>
<td>1.247</td>
<td>2.112</td>
<td>161.96</td>
</tr>
<tr>
<td>2010</td>
<td>1.407</td>
<td>2.438</td>
<td>184.65</td>
</tr>
<tr>
<td>2011</td>
<td>1.793</td>
<td>3.609</td>
<td>223.23</td>
</tr>
</tbody>
</table>

Source: China Trade Union Statistical Yearbook

\textsuperscript{36} Lee, supra n. 13, at 15.
However, on a qualitative level there has been some but much more limited progress in reforming institutional avenues for workers to express grievances and press for increasingly interest-based demands. Despite promotion of collective negotiations and consultations by the state and the ACFTU, there has been very little participation by workers in the process. Many collective contracts become carbon copies of statutory minima.\(^{38}\) Lee’s research revealed that although workers generally viewed the signing of collective agreements as another bureaucratic exercise by the local union, they showed a significantly greater interest in the conduct of negotiations and the union’s functions when the union was engaged in wage negotiations.\(^{39}\)

There has also been a shifting emphasis from enterprise-level collective contracts to sector and geographical levels (below county-level), as provided for in Article 53 of the LCL. In particular, sectoral collective wage negotiations have expanded over the past five years, particularly since the ACFTU formulated its ‘Guiding Opinion Regarding Actively Launching Industrial Wage Collective Consultation Work’ in 2009. Under the guidelines, sectoral unions are to represent workers in collective consultations with employers’ organisations at the same level with the aim of signing sectoral collective contracts specifically on wage issues. This development has largely come about as a response to the rise in labour disputes over wages in recent years.

Furthermore, the ACFTU has embarked on numerically ambitious campaigns to increase union density and collective contracts coverage in certain parts of the economy. These campaigns have generally targeted large foreign invested enterprises, such as a recent campaign to introduce collective wage negotiations in at least 95 per cent of Fortune 500 companies operating in China.\(^{40}\) However, there are questions over whether the ACFTU’s prioritised presence in foreign enterprises is largely a ‘window-dressing’ exercise and the extent to which (if any) it has enhanced worker representation or advanced workers’ rights and interests at those workplaces. Furthermore, these high profile cases, often involving well-known U.S. multinationals, only cover a small proportion of the foreign-invested sector. This sector is dominated by smaller, less publicly visible Asian-owned companies that are more likely to pursue the ‘sweatshop’ path of exploitative working practices.\(^{41}\)

\(^{38}\) Clarke, Lee & Li, supra n. 5.

\(^{39}\) Lee, supra n. 13, at 13.


3.2. Bottom-up pressures from workers’ collective action

Interest-based collective labour disputes entailing spontaneous industrial action organised by workers without their trade unions have been on the rise, particularly in the sectors and geographical regions with labour shortages that have enhanced these workers’ labour market power. The deficiencies in formal channels of collective representation and negotiation at the workplace to address these interests-based disputes can be gleaned from a wave of strikes at the Nanhai Honda Auto Parts Manufacturing plants in 2010, which were successful in triggering ‘copycat’ strikes in other factories and industries that led to substantial increases in wages. Along with demands for wage increases, the workers at Nanhai Honda also sought to elect their own union representatives to negotiate with management. The credibility of their former enterprise union was severely undermined by its heavy control by management and its inaction in supporting the workers’ wage claims. Grassroots pressures from workers eventually led to direct elections of shop-floor union representatives (which included a number of the strike leaders). The reconstituted enterprise union leadership was able to negotiate and conclude a collective agreement with management that nearly doubled the monthly wage rate.⁴²

Incidences of collective industrial action taken by workers such as the Nanhai Honda dispute have been capable of exerting pressure on employers to meet workers’ demands and on the state to reform the existing legal and institutional framework. Largely in response to this wave of strikes in 2010, the Guangdong Provincial People’s Congress initiated the Regulations on the Democratic Management of Enterprises,⁴³ which provides for the democratic elections of ‘employee representative councils’ and strengthening of collective negotiation rights for workers on the shop floor. The latest (third) draft provisions state that if one-third or more of employees makes a request for wage negotiations, the union shall organise the democratic election of worker representatives to engage in such negotiations. Where no union is set up at a particular enterprise, workers may ask the local union to supervise and guide the election of the negotiating representatives. Management is obliged to respond to the bargaining request within a set timeframe, provide information necessary for the negotiations, and bargain in good faith. If management fails to do so and as a result

⁴³ Since July 2010 and at the time of writing, the Regulation has remained in its third draft form. There has been a series of public consultations on the Regulation which has triggered many divided opinions, with particularly strong objections from foreign chambers of commerce and business groups.
industrial action takes place, the employer may not terminate the striking employees. On the other hand, the draft provisions also prevent workers seeking wage rises from resorting to industrial action before they have lawfully demanded collective consultation or while consultations are ongoing.

This would be the first time that specific legal protection is given to striking workers since the right to strike was removed from China’s Constitution in 1982. Some commentators have stated that the draft regulation in Guangdong represents an attempt by the state and the ACFTU to recognise and regulate what is already happening.44 Despite the legislative absence of a right to strike, Chinese authorities have, in practice, tolerated some forms of local protests by workers. The Shenzhen Municipal People’s Congress was the first local legislature to introduce a regulation in 2008 initiated by the Vice-Chair of the Shenzhen Federation of Trade Union. The Regulation allowed for lawful ‘work stoppage’ after a 30-day mandatory cooling-off period.45 It also empowers local authorities to order management not to take any action and to order workers to return to work. Although this was far from recognition of a right to strike, it represents the first legal acknowledgement that strikes are in fact taking place.46

Overall, new laws and institutions for regulating collective labour relations in China seem to be driven by the state and the ACFTU, largely in response to grassroots pressures from workers who are engaged in increasingly organised industrial action. Some local regulations have provided for limited forms of direct participation by workers in enterprise management, in collective negotiations and resolution of collective disputes.47 Crucially, the ACFTU remains the only organisation officially assigned the mandate of ‘safeguarding the legitimate rights and interests of workers’ under the current labour law framework.

44 Dexter Roberts, Is the right to strike coming to China?, Business Week (New York, 5 August 2010), http://www.businessweek.com/magazine/content/10_33/b4191018611051.htm (accessed 5 April 2013).
46 Lee, supra n. 13, at 8-9.
47 See, for example, Guangzhou City Collective Negotiations Regulations (draft); Guangzhou City Tripartite Negotiations Regulations (draft); Zhejiang Enterprise Democratic Management Regulation 2008; Jiangsu Enterprise Democratic Management Regulation 2008; Shanghai Workers Representative Congress Regulation 2010.
3.3 The ACFTU and the Party-state: a double-edged sword?

When evaluating the role of the ACFTU, it is important to consider the political structure in which it is embedded.\(^{48}\) A key question is whether Chinese unions have truly seceded from their ‘transmission belt’ role and become a workers’ representative organisation instead of ‘an arm of state bureaucracy’.\(^{49}\) Competing enterprise unions independent of the official ACFTU structure are still not tolerated by law. The position of the ACFTU in the Chinese Communist Party-state structure has been described as a ‘double-edged sword’.\(^{50}\) On the one hand, the ACFTU has shown its elevated political influence through its role in pushing for the introduction of 2007-2008 labour laws and the expansion of formal industrial relations institutions to facilitate unionisation, signing of collective contracts and development of tripartite forums. On the other hand, its incorporation under the formal Party-state structure allows the Party-state to exercise direct control over trade unions.

While the Party-state may direct unions to act in the interests of workers, for example, in obliging unions to ensure employer compliance with the labour law, this is not always translated into practice where local officials may be more interested in attracting inward investment.\(^{51}\) There is still a prevailing practice of local union officials being appointed by Party officials, with a tendency for managers to concurrently serve in union leadership positions. According to a China Institute of Industrial Relations survey of 524 trade union chairs in 2007, 49.6 per cent concurrently held leading Party positions, while 34.9 per cent held management positions.\(^{52}\) In these situations, unions’ ability to represent their actual constituency when bargaining with management and their capacity to monitor management decisions and enforce observance with the law become highly compromised. Official unions at the enterprise level commonly lack credibility with workers who perceive these unions as the ‘administrative local union’ or the ‘bosses’ union’.\(^{53}\)


\(^{49}\) Cooney, *supra* n. 11, at 681.

\(^{50}\) Lee, *supra* n. 13, at 16.


\(^{53}\) Taylor & Qi, *supra* n. 48.
Due to the disjuncture between official trade union institutions and workers at the enterprise level, it has been suggested that workers should be viewed as a separate industrial relations actor in China. Chang and Brown describe the split in the so-called ‘organised labour’ between trade unions and workers as ‘two kinds of labor forces and labor movements’, a ‘uniquely Chinese phenomenon’. Ethnographic studies of industrial action taken by rural migrant workers actually reveals the hidden organisation and leadership behind labour protests that are often described as ‘spontaneous’, ‘sporadic’, and ‘unorganised’, some of which extend well beyond a single workplace. Notably, there has been an upsurge of industrial action taken by second-generation migrant workers who are more assertive, more aware of their rights and less tolerant of poor working conditions compared to their parents’ generation.

In order for the ACFTU to develop into a more effective labour market institution to advance workers’ interests and to counterbalance employers’ power, it will be necessary to overcome its limited credibility among workers and further evolve beyond its current functions, structure and operation. Under the 2001 Trade Union Law, the role of unions includes mediating an end to industrial action: ‘When a work-stoppage or slow-down occurs in an enterprise or institution, the trade union shall … assist the enterprise or institution in its work so as to enable the normal production process to be resumed as quickly as possible’. This provision reflects the institutionally challenged role of Chinese trade unions as not only the representative of workers’ interests, but also the reconciler of conflicting interests between the employer and workers.

There have been some promising signs of change in recent years, with the ACFTU and affiliated local branches engaging in selective experimentations that are confined to specific localities and sectors to develop more responsive and worker-led collective labour representation mechanisms. Since the Nanhai Honda strikes in 2010, there have been increasing efforts by some ACFTU local branches to organise and hold elections of union chairpersons and workers representatives who are directly chosen from and elected by workers without interference from management. A case of a ‘direct’ grassroots union election

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54 Chang and Brown, supra n. 3, 22.
56 Taylor & Qi, supra n. 48.
57 Trade Union Law 2001, Article 27.
was at the Japanese-owned multinational, Ohms Electronics, in Shenzhen in May 2012.\textsuperscript{58} There has also been substantial media coverage of upcoming trade union elections in July 2013 at Foxconn, the world’s largest contract electronics manufacturer. Although union elections have been conducted at Foxconn since 2007, the most recent attention concerns the company’s promise to hold a ‘genuinely representative’ election with the intention of increasing the number of ‘frontline’ worker representatives in the union committee.\textsuperscript{59}

Truly democratic elections of grassroots union officials at the workplace remain relatively rare, generally taking place under the supervision and instruction of upper-level unions. It should be noted that the striking workers who successfully re-elected a new union leadership at Nankai Honda were not demanding union representation independent of the ACFTU. They were calling for a worker-elected, worker-led union leadership that could genuinely represent their interests and rights.\textsuperscript{60} Fan and Gahan observed that reform of Nankai Honda’s grassroots unions was associated with active rank-and-file member involvement and a greater level of internal union democracy that strengthened the grassroots unions’ collective representation role. In this way, the ACFTU could find ‘room’ for more autonomous action by a grassroots union while re-creating aspects of their ‘transmission belt’ role under the formal system of Party-state control.\textsuperscript{61}

\subsection*{3.4 The long march towards ILO Conventions 87 and 98?}

Despite these developments, there remains the critical question of whether ACFTU, in its monopolistic representation of Chinese workers, could step up to the challenge of institutional reform without the legal guarantee of fundamental rights under ILO Conventions 87 and 98, neither of which China has ratified. Even without ratification of Conventions No. 87 and No. 98, states are deemed to have accepted these constitutional principles by virtue of their membership of the ILO. Furthermore, these conventions are part of the ILO’s Fundamental Principles and Rights at Work that require universal observance.

\begin{itemize}
  \item \textsuperscript{60} Ronald Brown, \textit{Reform for the Benefit of Workers}, China Daily (14 July 2010), http://www.chinadaily.com.cn/opinion/2010-07/14/content_10102732.htm (accessed 5 April 2013).
\end{itemize}
Under ILO Convention No. 87, the State must respect free exercise of the right of workers and employers to establish organisations and to join organisations of their own choosing, without previous authorisation and subject only to the rules of the organisation (Article 2). In 2001, China ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) but entered a reservation on Article 8.1A that guarantees workers the right to form and to join trade unions of their choice. In the absence of freedom of association, the ACFTU might not face sufficient challenges that could trigger genuine trade union development. While the activities of community legal organisations and labour NGOs have expanded in recent years under the tight scrutiny of the state, structural limitations to their operation in a ‘semi-legal zone’ present substantial obstacles to the extent to which they could informally ‘represent’ workers’ rights and interests.  

ILO Convention No. 98 highlights the obligation of states to take appropriate measures ‘to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations’ to regulate employment relations through collective agreements (Article 4). The quantitative expansion of collective labour laws and institutions such as the number of collective agreements would not be enough to realise this standard if the quality of these mechanisms is neglected. The Convention further stipulates that workers’ and employers’ organisations shall enjoy adequate protection against any acts of interference by each other, and particularly acts which are designed to promote the domination, financing or control of workers’ organisations by employers or employers’ organisations (Article 2). It remains a common occurrence that Chinese trade unions at the enterprise level are under the control and dominance of employers.

Although no ILO Conventions and Recommendations have explicitly stated a right to strike, the ILO supervisory bodies have interpreted the right to strike as an ‘intrinsic corollary’ of the right to organise protected by Convention No. 87. The ILO Committee on Freedom of Association has further stated that the right to strike is a right of workers and their organisations. In China, the absence of a legal right to strike can mean that workers’

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collective ability to exert industrial pressure to advance their interests is institutionally limited. This is particularly problematic in light of trade unions’ legally designated role of mediating an end to strikes.

There remain significant gaps between the collective labour law regime in China and the ILO’s freedom of association and collective bargaining standards. Recent regulatory developments aimed at strengthening the capacity of trade unions to represent workers in collective negotiations at various levels and the direct participation of workers in collective representation in the enterprise could point to the beginning of some promising institutional reforms in Chinese labour relations.

IV. CONCLUSION
Uneven institutional and regulatory developments in the transformation of China’s labour market have profound economic, social, and political consequences for the country. Over the course of three decades, Chinese workers’ legal status has been transformed from being ‘masters’ of the state under the former socialist, centrally planned economy to individual subjects in contractual relationships under a market economy with ‘Chinese characteristics’. More recent efforts by the state to develop and strengthen a regime of collective labour laws and institutions have been in response to the need to regulate the growing number, scale, and forms of collective labour disputes and industrial action taken by workers outside formal systems and structures. In response to bottom-up industrial pressures from workers, interventions by the Party-state and the ACFTU have generally been driven in a top-down and selective manner.

In recent times, there are signs of more systematic reforms to labour market institutions, structure and operation to deal with the challenges of increasingly complex labour relations in China. Promotion of ILO Fundamental Principles and Rights at Work to underpin reforms to the regulatory landscape of collective bargaining and workers’ representation can better enable the ACFTU to provide a meaningful voice for workers and to effectively represent their interests. Instead of ‘crossing the river by feeling the stones’, a new regulatory approach of ‘crossing the river by building a bridge’ is urgently needed for the deep waters of a precarious labour market in China with greater possibilities for social dislocation and instability. This would lay the foundation for a collective labour law regime to become a critical regulatory tool for achieving efficiency and equity objectives in the new
labour market, with wider implications for China’s sustainable economic development and importantly, for the Party-state’s own goals of social harmony and political stability.

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