

# THE LEGISLATION OF COLLECTIVE CONTRACTS IN CHINA: PREDICAMENTS, REASONS AND THE WAY OUT

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The rights of employees can be understood in terms of statutory standards, corporate rules, collective contracts, and labor contracts. In recent years, the labor contract system in China has made remarkable progress, especially after the Labor Contract Law came into force in 2008. This law has been put into practice rapidly since then. Heated public debates on the labor contract system and abundant cases revolving around it have made this law useful to the Chinese legal system and increasingly important in defending employee rights. At the moment, Chinese labor law is mostly focused on individual labor relationships coordinated by labor contracts.

Compared with the attention paid to the development of the labor contract system, the collective contract system still lacks a meaningful presence in Chinese labor law legislation. However, frequent collective labor disputes, or so-called labor emergencies,<sup>1</sup> call for the law to change its attitude towards collective contracts. A collective labor system is urgently needed to satisfy the requirements of social justice. In support of this goal, this article discusses labor contract and collective contract theories, discerns between these two systems, and advocates for the independent legislation of a collective contract system conducive to China's national conditions. This article also examines legislation in other legal systems on collective contracts and identifies key elements that should be incorporated into the collective contract system of China.

### I. PAST ATTEMPTS TO LEGISLATE A COLLECTIVE AGREEMENT ACT IN THE REPUBLIC OF CHINA

There are two major approaches to legislating a collective contract system. One is to draft a general labor law code that exhaustively covers the specific needs of a collective contract system. The Labor Code of France (*Le Code du Travail*) is a popular example. The other approach is to introduce the basic contents via

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<sup>1</sup> In theory, a lawful strike carried out by workers should meet several requirements, a qualified subject being one of them. In other words, a strike is legal only when it is organized by a labor union. In China, without the endorsement of a union, work stoppage by laborers does not meet the legal requirements to be considered a strike. Hence, such striking is understood as "unofficial strikes" or "labor-emergencies" in China.

independent legislation, such as the Collective Agreement Law of Germany.

The Collective Agreement Act of the Republic of China was the first concrete attempt at independent legislation of the collective agreement system in Chinese legislation history. Although much time has since passed and both the social and economic circumstances have changed, the system created then still has much to teach us today.

The Collective Agreement Act, which came into effect in 1932, consisted of 31 articles, including general provisions and restrictions, as well as enforcement, duration and supplementary provisions. The first article stated that a collective agreement is a written contract signed by employer groups and employee groups, both with the status of a legal entity, for the sake of establishing labor relationships.<sup>2</sup> That the two parties concerned must be individuals or groups with the status of a legal entity distinguished this law from a normal labor contract law. The contracting parties of the employee groups were workers who were supposed to contract with their employers individually. Any negotiation was limited because the content of a collective contract was defined within the scope of regulating a bilateral labor relationship. By prescribing this limit, interference induced by strikes in support of other striking workers (and not resulting from direct grievances against an employer) and other issues irrelevant to the labor relationship could be avoided. Only a collective contract in written form was accepted.

In the articles covering enforcement, Articles 16 to 18, the Collective Agreement Act provided for the connection between the enforcement of collective agreements and labor contracts. In light of these regulations, the stipulated labor constituted the content of the labor contract. Parts of the labor contract that contradicted the collective agreement were invalid and had to be replaced by the relevant provisions of the collective contract. During the interval between the old and new collective contracts, the replaced contract would function as the content of the labor contract if there was a conflict. Rights, once endowed by a collective agreement, had to be preserved, and employees who claimed these rights could not be fired because of this requirement.

Confined by circumstances, the Collective Agreement Act was never put to full use since its adoption in 1932. Nonetheless, if we look back on the law from a modern perspective, there are still elements of it that were ahead of its time. Among these advances, the

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<sup>2</sup> Shi Shangkuan (史尚宽), *Laodong Fa Yuanlun (劳动法原论)* [The Theory of Labor Law] 100 (1934).

most significant one is that it stresses labor autonomy at the institutional level. Collective agreement autonomy means labor autonomy. To let employer and employee groups reach a collective agreement spontaneously and regulate their own working conditions can free legislators from all-inclusive state intervention. "Thus the state need not get involved in everything. Instead, both employers and employees make stipulations by themselves, and evaluate the requirements to demand or accept. That also lightens government's burden."<sup>3</sup>

Another inspiration that can be drawn from the Collective Agreement Act is that, despite the close relation between collective agreements and labor contracts, the two are different in operating the principles, values and level of their effect. Such differences require a clear division in legislation. The Collective Agreement Act and the Labor Contract Act were published at the same time. Although the latter never actually took effect, it initiated a legal doctrine that imposed certain influences on Chinese legal practice. Thus, together with the Collective Agreement Act, the Labor Contract Law formed a set of relatively complete rules on labor-capital relations. The difference between collective agreements and labor contracts lie in their different concerns. While labor contracts concentrate on the distribution of rights and obligations in labor-capital relationships, the collective agreement system is designed to rule collective labor relations by regulating their contract content, bargaining procedures, means of dispute resolution, and level of effect, while also creating a sound system of collective labor relations. The latter guarantees labor unions *de facto* equal statuses as their employers in collective bargaining. Such is the basis for both labor and capital to go further to be self-governed and free from intervention or control by the government.

The regulated objective of the collective contract system is to create a system of collective labor relations. The approach and target of the regulation has essential differences from individual labor relations. However, Chinese labor law has long neglected the regulation of collective labor relations and there is an apparent disjoint between the law and practical demands.

## II. COLLECTIVE LABOR RELATIONS: ESSENCE AND FUNCTION

According to leading scholars, collective labor relations refer to social relations centering on collective bargaining and establishment

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<sup>3</sup> Yang Tongxuan (杨通轩), *Jiti Laogong Fa Lilun yu Shiwu* (集体劳工法理论与实务) [Collective Labor Law: Theory and Practice] 26 (2007).

of a collective contract.<sup>4</sup> They are based on individual labor relations and require the protection of the right to organize. Historically, collective labor relations came into being when labor relations developed to a point at which the interests of labor and capital became so divided as to be irreconcilable. At the early stage of capitalistic wage labor, laws, abiding by formal equality, regarded laborers as abstract and equal natural persons with independent personalities.<sup>5</sup> Laws were not only against legislative support for laborers who were subjugated to an inferior position in the workplace, but also against laborers self-organizing to negotiate with employers through collective bargaining. Such an act was condemned as conspiracy and resulted in criminal punishment. With the development of the capitalist mode of production and new highly specialized industrialization, laborers had no choice but to endure the exploitation of their capital as the homogeneous source of the labor force. They were “too free to own”<sup>6</sup> and were allowed only to sell their own labor. The free contract principle did not offer support for laborers to improve labor conditions; rather, it helped employers use their economic advantage to trap laborers into a subordinate position. To reverse their weak position, laborers self-organized and negotiated with employers as a group to win more beneficial labor conditions. The legal adjustment of collective labor relations, which is based on the acknowledgement that the interests between labor and capital are contradictory, therefore, regulates the bargaining behavior of the two parties in the form of law to correct the power imbalance, promote peaceful negotiation, and balance the interests of the two parties.

In practice, collective labor relations, with the core pursuit of concluding collective labor contracts, are part of a legal system that includes the right to organize, bargain collectively, and negotiate disputes collectively. In essence, collective labor relations have the following features:

1. The necessity of group organization. In collective labor relations, the two parties of labor and capital, especially the former, come to the bargaining table as individual groups. As such, a right to

<sup>4</sup> Xie Decheng & Wang Tianyu (谢德成、王天玉), *Jiti Laodong Guanxi de Falü Mubiao ji Guifan Zhongdian* (集体劳动关系的法律目标及规范重点) [*Legislative Purpose and Key Points of Regulation of the Collective Labor Relations*], 2 DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.] 112, 112, (2010).

<sup>5</sup> Zhao Hongmei (赵红梅), *Sifa yu Shehuifa: Disan Fayu Zhi Shehuifa Jiben Lilun Fanshi* (私法与社会法——第三法域之社会法基本理论范式) [*Private Law and Social Law: Three Paradigms of the Basic Theory of Social Law*] 32 (2009).

<sup>6</sup> KAER MAKESI (卡尔·马克思), *ZIBEN LUN* (资本论) [THE CAPITAL THEORY] 139 (Compilation and Translation Bureau of the CPC Central Committee (中共中央马克思恩格斯列宁斯大林著作编译局) trans., 1987).

organize is a prerequisite for collective labor relations to function. The right to organize refers to the right by which laborers or employers can organize unions to protect or expand their interests in the labor relations.<sup>7</sup> It is generally acknowledged that the right to organize contains elements of the right to life and the right to work. Therefore, it not only derives from, but also transcends, freedom of association. Moreover, Germany and Japan explicitly stipulated a right to organize in parallel with freedom of association.<sup>8</sup> The organization of labor groups is a prerequisite to collective labor relations<sup>9</sup> because without an organization, an individual worker will have no way to make a claim, and there will be no justification for signing a collective contract.

2. The manifestation of collective negotiations between labor and management. The objective of having collective labor relations is to ensure workers' equal positions with their employers during a negotiation, obviating employers' peremptory decisions on working conditions. To achieve this, efficient laws about collective labor relations are made, requiring both sides to discuss labor conditions from equal positions of power and then sign a collective contract to turn the outcome of their discussion into legal rights. In this way, the parties practice autonomy of labor and management. It can be seen from this that collective labor relations are an effective support for the two sides to successfully resolve conflicts of interest.

3. The right to dispute. During a collective negotiation, if labor and management cannot reach an agreement, then a collective dispute will commence. In order to bring the employer back to the table or force the employer to give in, workers may need economic weapons other than collective actions, such as strikes and slowdowns. As a result, the right to strike is fundamental to labor groups, being a major tool for them to pressure employers to compromise and crucial for avoiding an imbalance of power between labor and management. If there were no right to dispute, employers would behave haughtily and peremptorily, making workers ask for negotiations as if "no more than beggars".<sup>10</sup>

When the interests of labor and management are in conflict, a collective contract system provides an efficient antidote to adjust each party's share of bargaining power. In particular, building a

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<sup>7</sup> Shi, *supra* note 2, at 153.

<sup>8</sup> See Cheng Yanyuan (程延园), *Laodong Sanquan: Gouzhu Xiandai Laodong Falü de Jichu* (劳动三权：构筑现代劳动法律的基础) [*Three Powers of Labor: The Basis of Constructing Modern Labor Law*], 2 ZHONGGUO RENMIN DAXUE XUEBAO (中国人民大学学报) [J. OF RENMIN U. OF CHINA] 102, 103 (2005).

<sup>9</sup> *Id.*

<sup>10</sup> Huang Yueqin (黄越钦), *Laodong Fa Xinlun* (劳动法新论) [New Discussion of Labor Law] 306 (2003).

collective contract system serves several functions in adjusting labor relations and maintaining proper operation of a market economy.

First, a collective contract system helps balance the power of labor and management in the fight for reasonable payment and treatment, which is a key function of the system. Because labor relations imply subordination and personality, management naturally is stronger than labor, and workers generally cannot become powerful enough to fight with their employers. However, through the collective contract system, workers combine their power and express their individual wills as a group. In this way, the original pattern of negotiating is changed so that workers are able to communicate their common interests to employers with a single voice in order to win better working conditions and treatment for themselves. As a result, virtual inequality under the private-law autonomy model is prevented and social justice is achieved.

Second, a collective contract system helps to make up for flaws in labor laws and imperfections in labor contracts<sup>11</sup> so as to protect the legal rights of laborers. Labor law cannot do everything for workers. It can only focus on universal and fundamental standards and cannot attend to the labor standards at every enterprise in China. Hence, as the economy develops, workers themselves must ensure higher labor standards. Moreover, contracts signed by an individual worker with his employer can hardly be applied to all workers. However, a collective contract system can enable workers, represented by a labor union, to negotiate with employers about workers' legal rights, sign collective contracts, and force employers to comply with their duties, thus ensuring workers' rights are protected. As Professor Huang Yueqin has stated, "Most industrially developed countries leave ample room to let labor and management act as fellows, deciding on labor conditions through group agreements. Only in lagging-behind countries are labor-management affairs directly interfered with and controlled by a national power, where the nation utilizes imperative regulations on labor standards and disables both sides to decide on certain labor conditions in the form of a group agreement."<sup>12</sup>

Third, labor contract systems, by creating a platform of conversation, help mediate conflicts of interest between labor and management. They thus become a mitigator during conflicts, stabilizing the labor-management relationship and at the same time, maintaining normal social and economic order. This stabilizing function demonstrates itself, by facilitating communication between labor and management and helping the democratic management

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<sup>11</sup> Laodong he Shehui Baozhang Faxue (劳动和社会保障法学) [Labor and Social Security Law] 128 (Zheng Shangyuan (郑尚元) et al. eds., 2010) [hereinafter Zheng Shangyuan (郑尚元)].

<sup>12</sup> Huang, *supra* note 10, at 254.

system<sup>13</sup> of enterprises. This enables relatively disadvantaged workers to more easily appeal for their interests instead of having to resort to extreme measures such as suicides and fasting<sup>14</sup> that might cause instability in the labor-management relationship. Moreover, as long as conflicts can be dealt with between the two parties under the umbrella of the labor contract system, neither party will have to bring the conflicts outwards, and “thus huge social danger is avoided at the least cost, avoiding a social crisis by minimizing the cost.”<sup>15</sup>

Finally, a collective labor contract system allows human resources to be obtained using a reasonable market pricing mechanism, which is conducive to the interests of employers and employees alike.<sup>16</sup> Also such a system contributes to the sustainable development of enterprises and sustainable economic and social prosperity, while also providing necessary support. In the current pattern of power distribution between capital and labor, the workers’ abilities to participate in the distribution of social wealth is comparatively weak, leading to the price of labor in the current market not being effectively reflected.<sup>17</sup> This not only causes seriously uneven distribution of resources in our society, but also restricts the upgrading of China’s economic development model. At present, China’s economic restructuring has entered a crucial stage because the previous measures to obtain a competitive advantage by reducing labor costs have been unsustainable. To promote this development paradigm, we must cultivate a healthy workforce pricing mechanism, so that labor costs are properly reflected in the cost of production of enterprises, contributing to the necessary change and revolution of the development model. Through the collective contract system, workers have consultation and negotiation channels to fight for their interests and also have a more free market labor force to get the appropriate price for their work. The use of such resources supports sustainable development of enterprises and improves social and economic structure, all of which contribute to a stronger development model.

<sup>13</sup> See *Jiti Hetong Guiding* (集体合同规定) [Provisions on Collective Contracts] (promulgated by Ministry of Labor & Social Security, Jan. 20, 2004, effective May. 1, 2004) art. 8 (Chinalawinfo).

<sup>14</sup> See e.g. *Wu ge Yue nei Fushikang Shiyi Ming Yuangong Tiaolou* (五个月内富士康11名员工跳楼) [In Shenzhen Foxconn Group, 11 Employees Committed Suicide within a Five Month Period Due to the Job Stress and Poor Working Conditions], SOHU.COM (May. 25, 2010), <http://it.sohu.com/20100525/n272343130.shtml>.

<sup>15</sup> Zheng Shangyuan (郑尚元), *supra* note 11, at 128.

<sup>16</sup> Ding Jian'an (丁建安), *Laogong Jiti Weiquan Jizhi Tanxi* (劳工集体维权机制探析) [Analysis of the Protective Legal Regime for the Rights of Employees], 4 DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.] 124, 126 (2011).

<sup>17</sup> According to statistics, capital held 74.27%, 73.41% and 72.58% of GDP, while labor only held 10.57%, 10.76% and 11.03% of GDP in 2004, 2005, and 2006, respectively.



From what I have mentioned, it could be concluded that the collective contract system fits the reality of China's current labor and socio-economic situation. Moreover, the discussion so far demonstrates the system's superiority in practice, supporting a country's labor relations as well as economic and social development through the creation of a legal regime, which has important practical significance.

Keeping the characteristics of labor relationships in mind, if we observe the frequent appearance of the so-called "unexpected labor events," we would find that these phenomenon reveal that the labor collectivization trends in our society still differ in the normative sense from collective labor relations theory in the West. This difference between China and the West is reflected by the absence of labor organization, the wrong sequence of bargaining and strikes (in China strikes usually occur before bargaining), confusion about whether disputes concern rights or interests, and many other controversies. According to scholars, the current moment in our society's collective labor relations, history should be understood as "groups of labor relations."<sup>18</sup> Labor's trend of grouping together reveals a lack of a clear legal regulatory regime, which threatens the normal order of society. Therefore, at this stage, there are urgent needs for the strengthening of legal regulation of group labor relations and the completion of the shaping of collective labor relations.

### III. LEGAL REGULATION OF COLLECTIVE LABOR RELATIONS: PRESENT SITUATION AND REFLECTION

After the establishment of the People's Republic of China ("China"), China started by practicing economic central planning. Allocation of labor resources was administratively handled and little room was left for market mechanisms. At this stage, by shaping a highly centralized and integrated society from political, economic and cultural aspects, "the government constrained its members through the mass social organizations that were strictly administratively controlled into a tight fabric of unity"<sup>19</sup> Individual

<sup>18</sup> Xie Tianchang (谢天畅), *Jiti Laodong Guanxi Yihuo Qunti Laodong Guanxi: Xianzhuang, Genyou yu Jinlu* (集体劳动关系抑或群体劳动关系：现状、根由与进路) [*Collective Labor or Group Labor Relationships: Current Situation, Origins and Paths for the Future*], 6 DONGNAN XUESHU (东南学术) [SOUTHEAST ACAD. RES.] 157, 159 (2012).

<sup>19</sup> Fang Tongyi (方同义), *Duoyuan Liyi Qunti de Liyi Biaoda yu Hexie Shehui Jianshe* (多元利益群体的利益表达与和谐社会建设) [*Diverse Interest Groups' Expressions of Interest in the Establishment of a Harmonious Society*], 6 ZHEJIANG SHEHUI KEXUE (浙江社会科学) [ZHEJIANG SOC. SCI.] 10, 10 (2006).

interests were completely absorbed by national interests, so the conflicts between the interests of employers and workers did not stand out. Although at this stage strikes did exist, the government did not treat these as labor relation issues but as an “internal contradictions between members of society” (人民内部矛盾).<sup>20</sup> The government concluded that some leaders were “infected by bureaucratic habits, which lead to incorrect management of problems.”<sup>21</sup> While the solution to the problem lies in an “adjustment of the internal relations of socialist society problems”, the priority was to “overcome bureaucracy and expand democracy”.<sup>22</sup> To summarize, at this stage in history, any adjustment of labor relations was mainly made administratively, and the way to resort to labor law was never taken into consideration.

After the Reform and Opening-Up Policy, with the movement towards a market-oriented economy, China's individual interests started to separate from community interests. The formation of social relations was no longer the charge of administrative instruction but was driven by personal autonomy. Especially after the market-oriented revolution in labor relations, workers entered the labor market as the owners of their own human resources. They chose to enter into employment contracts that were allocated by the market. China witnessed a new wave of industrial development in employment relationships. In this process, the interests of workers and employers inevitably separated and changed.

Responding to the needs of market-oriented economics, China in 1994 promulgated the Labor Law. The third chapter of this law stipulates labor contracts and collective contracts in parallel. Articles 16 to 32 are provisions concerning labor contracts, while Articles 33 to 35 are the only three provisions concerning collective contracts.

Although provisions on collective contracts in the Labor Law are extremely abstract, they have still provided a necessary legal basis for our country to regulate collective labor relations in practice. Based on the stipulations of the law, the former Ministry of Labor and Social Security promulgated the Regulation on Collective Contracts in 2004, thus providing a further basis for the development of the collective contracts system. However, the provisions of this departmental regulation still remain too abstract, and their operability is weak. The defects of this regulation include a lack of specific rules

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<sup>20</sup> See *Zhonggong Zhongyang guanyu Chuli Bagong, Bake Wenti de Zhishi* (中共中央关于处理罢工、罢课问题的指示) [*Chinese Communist Party Central Committee Instructions for Dealing with Strikes and Strike Issues*], XINHUA NET (Mar. 25, 1957), [http://news.xinhuanet.com/ziliao/2005-01/05/content\\_2418443.htm](http://news.xinhuanet.com/ziliao/2005-01/05/content_2418443.htm).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

with respect to some key aspects, such as procedures for disputes when collective negotiations open or break down, and a lack of binding legal obligations on employers who refuse or are reluctant to negotiate. All these defects have restricted rational development and the smooth operation of the collective contracts system in our country.

In the Labor Contract Law promulgated in 2007, the relevant content of the collective contracts system is incorporated as one part of the “Special Provisions” together with a newly added stipulation on industry-specific collective contracts and regional collective contracts. These changes expand the scope of the collective contracts system. After the promulgation of this law, some scholars immediately criticized its provisions on collective contracts, saying that “the so-called collective contracts are not a type of contract in the Contract Law, but a special system which was invented by developed capitalist countries to deal with labor relations”<sup>23</sup> and that it is a misunderstanding of the collective contracts system to stipulate it in the Labor Contract Law.<sup>24</sup>

Based on the full knowledge of the nature of the collective contracts system, we can see that the collective contracts system should be articulated in a separate law that runs parallel to the law of labor contracts. The collective contract and labor contract systems can go hand in hand and do not contradict each other. The relevant provisions on collective contracts in the Labor Law and the Labor Contract Law should be bundled into a single piece of legislation. However, if we adopt a pragmatic attitude, carefully examine our specific national conditions and the reality of labor law legislation, and carefully go into the causes behind this phenomenon, it must be admitted that the current approach is the most realistic where more effective choices are lacking. In reality, this is the only way for a collective contracts system to be reflected in legislation. The main causes of this phenomenon of disparate concepts being legislatively bundled together are the following aspects:

First, the most fundamental reason for this phenomenon is that industry behavior has not been completely developed. Since the completion of the socialist transformation in 1956, the space for industry behavior has always been stifled by control by administrative means, resulting in industry behavior that has not been developed accordingly on our soil. This trend has not stopped even

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<sup>23</sup> Liang Huixing (梁慧星), *Laodong Hetong Fa: You Shenme Cuo? Weishenme Cuo?* (劳动合同法: 有什么错? 为什么错?) [*The Labor Contract Law: What Is Wrong with It? Why Is It Wrong?*], CHINALAWEDU, (Jun. 6, 2013), <http://www.chinalawedu.com/new/216024000/2009831ji006913890020.shtml>.

<sup>24</sup> *Id.*

after the Reform and Opening-Up Policy because of the significant inertia of the regime. In this process, the government, on the one hand, actively made rules which could protect individual labor relations, trying to improve the working conditions of workers. On the other hand, the government alienates labor unions by making them assistants of the government to maintain political and economic stability. For quite some time in the past, China had a structure of a highly-centralized planned economy, in which most economic activities were undertaken by administrative instruction. Labor unions were originally administrative organizations with a strong official nature. Their main role was to help the government and enterprises manage and take charge of the education and welfare of workers. Hence, the conflict between labor and capital did not exist in such a case. From this social context, the labor unions in China dissimilated into administrative organizations with strong official nature. In the present time, the main role of the labor unions tends to be helping the government and enterprises to manage and take charge of the education and welfare of workers. Under such a circumstance, despite the strong demands of workers for their interests in their labor relations, the measures they take to settle disputes usually manifest themselves as spontaneous, sporadic mass disturbances that lack organization and procedural awareness, rather than actions planned and orchestrated by organized labor. It is an unrealistic fantasy to require the legislature to make perfect laws when the development of the social reality remains fairly rudimentary. It is like “climbing up a tree to find a fish.”

Second, an important reason fueling the legislative bundling of disparate concepts is the ambiguity of legal terms used. The term “collective contracts”, by using the word “contracts”, makes it difficult for people to disassociate collective contracts from traditional labor contracts. To the majority of people who are not familiar with labor laws, it seems quite natural and appropriate as a matter of course that labor contract law and collective contract law be merged into one law.

However, deliberation on the legal term “collective contracts” will reveal that either the word “collective” or the word “contract” contradicts the actual meaning of the system.<sup>25</sup> The so-called collective contracts system in our country is consistent with the collective agreement systems of Western market-economy countries. The original meaning of a collective agreement is an agreement on

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<sup>25</sup> See Zheng Shangyuan (郑尚元), “Jiti Xieshang” yu “Jiti Hetong” Ciyi Bian ( “集体协商” 与 “集体合同” 词义辨) [*Differentiating the Meaning of Collective Negotiation and Collective Contracts*], 3 BEIJINGSHI GONGHUI GANBU XUEYUAN XUEBAO (北京市工会干部学院学报) [J. BEIJING FED’N TRADE UNIONS CADRE C.] 16, 17 (2005).

labor conditions reached by both employers and employees after confrontational collective negotiations. The wording “collective contract”, in the context of labor laws in our country, has not only blurred the element of collective agreements requiring organization by labor unions, but also directly equated agreements reached by employers and employees with “contracts” defined by law, so that the connotation of this system is not reflected accurately.

The ambiguity of the legal term has also led to the deformation of this system in terms of implementation. The confrontational nature of interactions between the two sides, employers and employees, has been artificially tempered, and the employee right to collective dispute settlement has been deliberately avoided. Both have had negative effects on the construction of the collective contracts system. The term “collective agreement” used in the legislative practice of the Republic of China is more accurate in expressing the full meaning of this system. Moreover, this use can effectively distinguish the collective agreement system and labor contract system for the general public, which makes it even more worthy for legislators to use as a reference.

Thirdly, one reason for this problem is the extensive shortage of China’s legislative resources. After China carried out the Reform and Opening-Up Policy, numerous laws and regulations have been enacted and revised to meet the needs of market economy. It takes great efforts to complete the structural framework of the socialist legal system in just twenty years. The quick progress of the legislative process suggests the extreme shortage of legislative resources. Since so many legislative tasks were completed in the last 35 years in China, only the most urgent needs have been so far addressed. Every enactment of a law means occupying and using precious resources. In terms of the legislative process of labor law, on the one hand, it is difficult to include the construction of the collective contract system within the legislative plan when the soil of the market economy for the system is not yet mature. The reality is that the practice of collective contracts was gradually carried out, and the objective need for legal regulation and adjustment was urgent, and thus relevant provisions in labor law were made to fill the gap. With this background, in order to achieve the construction of the collective contract system into binding legislation, legislators had to cherish the limited opportunity to let its construction hitchhike onto other labor law legislation.

Thinking realistically, we should admit that the bundling in the legislation of labor contract and collective contract laws is a product of the needs of the times. However, it is necessary for the law to be updated and improved to keep pace with social practices. With social and economic developments, China’s labor relations have developed

many new features. In order to get collective labor relations in line with the rule of law, separate legislation of collective agreements need to be finished as soon as possible.

#### IV. THE NECESSITY AND FEASIBILITY OF SEPARATE LEGISLATION OF THE COLLECTIVE AGREEMENT SYSTEM

##### *A. The Necessity of Separate Legislation*

Law is rooted in the needs of the times and should be perfected and improved to keep up with changes over time. Since the Labor Contract Law came into effect, individual labor relations have been almost completely regulated. However, collective labor relations have been subject to unreasonable suppression. And this suppression, to some extent, has caused Chinese employees to face a tough predicament in defending their rights. The widespread presence of these difficulties makes the construction of a collective contract system increasingly necessary.

The challenges faced by Chinese laborers defending their rights are reflected in the increased labor disputes and labor incidents. In recent years, the frequent occurrence of labor conflicts in Chinese society has become an indisputable reality, which has a negative impact on normal economic and social order.<sup>26</sup> This trend is supported by the significant growth of labor dispute cases, which labor arbitrators and people's courts have accepted, and the heightened voice of employees wishing to realize their rights.<sup>27</sup> Although this phenomenon is fueled by the current economic situation, which has intensified conflicts between labor and capital as workers have lost their jobs, it can also cause an outbreak of the accumulated and still accumulating conflict in Chinese labor relations.

What is more disturbing is that, group labor conflicts occupy a considerable proportion of such labor disputes, and some of them tend to be violent and large-scale. News programs constantly broadcast employees defending their rights by sit-ins, marches, strikes and other means. Recent taxi driver strikes in Xiamen and

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<sup>26</sup> According to statistics released by the Human Resources and Social Security Ministry, in 2008, 2009, and 2010, the number of collective labor disputes received by labor administrative departments at different levels was 22,000, 14,000, and 14,000, respectively, and the number of employees involved was 503,000, 300,000 and 300,000, respectively.

<sup>27</sup> In Dongguan, a city known as "factory of the world", from January to May, 2008, the number of labor dispute cases filed reached 6,506, far exceeding those for the whole year of 2007. From May 1, 2008 (when the Labor Dispute Mediation and Arbitration Law came into effect) to June 30, 2008, the court of Dongguan city accepted 4,330 labor dispute cases, more than 100 per day.

Chongqing are just a few examples of this trend.<sup>28</sup> These phenomena all reflect the common problem that the legitimate interests of employees cannot be protected effectively under current legislation.

These phenomena also suggest the urgency of the problem that workers' legal rights cannot be effectively protected in the present situation where the power of labor and capital is unequal. Workers also lack unimpeded and rational methods to solve this problem, which worsens the contradiction between the labor and capital. This contradiction will not only harm the continuous development of society, but also cause considerable damage to the traditional social economic order.

Furthermore, the dilemma for workers to protect their own rights is also embodied in the limited effect of the present rights protection system. The present rights protection system for workers can be clarified by outlining two of its characteristics. The first is that the basic method for workers to safeguard their rights is still as individuals. "The system where workers are effectively connected to protect their rights together is deliberately avoided".<sup>29</sup> Actually, the status quo is that the power of the employer side is much stronger than the power of workers. Under these circumstances, if the workers only fight against the employer side alone, their power is too small to force employers to perform their statutory duties. The result is that some legal rights intended for workers only exist in name. The legal rights protected in the labor law are reduced to admirable instead of actionable tools.<sup>30</sup>

Second, at present, workers' legal rights protected by labor law excessively rely on administrative supervision. Although some institutions are devoted to enlarging the ability to enforce the administrative law, the authorized size and law enforcement capacity of our labor administrative supervision is too small and weak compared with the huge number of the workers in our country. This suggests that the governments' administrative supervision cannot cover sufficient ground because its ability is limited.<sup>31</sup> Due to the limited authorized size, the power of public authority cannot effectively address all of the employer wrongdoings that infringe on

<sup>28</sup> *Chongqing TAXI Weiji Sishiba Xiaoshi* (重庆TAXI危机四十八小时) [48-Hour Crisis of the Taxi in Chongqing], XIN MIN ZHOU KAN (新民周刊) [XIN MIN WKLY.] (Nov. 25, 2008), available at <http://news.163.com/08/1125/10/4RJB66A200011SM9.html>.

<sup>29</sup> Ding, *supra* note 16, at 125.

<sup>30</sup> Zhao Hongmei (赵红梅), *Cong 'Fushikang Shijian' Kan Woguo Laodongzhe Quanyi Baohu Jizhi de Quexian* (从“富士康事件”看我国劳动者权益保护机制的缺陷) [Observations about Our Workers' Rights Protection System from the "Foxconn Incident"], 8 FAXUE (法学) [LEGAL STUDIES] 3, 6 (2010).

<sup>31</sup> At the end of 2010, there were 3,291 labor supervising agencies which had 23,000 full-time inspectors in China.

workers' rights. What is more, "while the Chinese market is experiencing a transition period, the tendency of the labor policy is to enhance economic efficiency and development."<sup>32</sup> Under this direction, when personal rights are against the benefit of the country's economic development, the workers' rights are always where concessions are made. Moreover, law enforcement agencies may lack the motivation to enforce the law strictly, which may lead to deadlock because officers are tired of carrying out the law.<sup>33</sup> Besides, as a third party, the administration can only supervise whether the employers have met the lowest standards for recruiting workers instead of whether the negotiations between labor and capital benefit and improve working conditions. So, we can see that the present rights protection system for workers is stuck in a binary logic, where workers can only turn individually to the government for help, instead of creating a third entity that would best represent their collective interests.<sup>34</sup> For this reason, the present system is not very effective.

Finally, one must admit that in comparison to the laws of countries with a mature market economy, our law concerning the collective contract system is not that elaborate. On the one hand, our collective contract system is too independent and isolated, lacking the ancillary supporting laws, such as laws for labor unions and laws for rights disputes. Besides, the regulation for the collective contract system is too idealistic. While it lists the specific procedure for signing a collective contract, it does not mention the clear legal obligations of the contracting parties.<sup>35</sup> The administration-heavy features listed above also make our collective contract system appear to be too administration-oriented, which will only make the law

<sup>32</sup> Yue Jinglun (岳经纶) & Zhuang Wenjia (庄文嘉), *Zhuanxingzhong de Dangdai Zhongguo Laodong Jiancha Tizhi: Jiyu Zhili Shijiao de Yixiang Zhengtixing Yanjiu* (转型中的当代中国劳动监察体制：基于治理视角的一项整体性研究) [*The Contemporary Chinese Labor Supervision System in the Transition Period: A Holistic Study from a Governance Perspective*], 5 GONGGONG XINGZHENG PINGLUN (公共行政评论) [PUB. ADMIN. REV.], 92, 93 (2009).

<sup>33</sup> Ding, *supra* note 16, at 125.

<sup>34</sup> Dong Baohua (董保华), *Guifan Laodongzhe Weiquan Xingdong de Zhidu Xuanze* (规范劳动者维权行动的制度选择) [*Choosing a Standardized System to Regulate Laborer Actions to Protect Rights*], 1 FAZHI YANJIU (法治研究) [RULE OF LAW STUDIES] 26, 32 (2012).

<sup>35</sup> See Jiti Hetong Guiding (集体合同规定) [Provisions on Collective Contracts] (promulgated by Ministry of Labor & Social Security, Jan. 20, 2004, effective May. 1, 2004) art. 36 (Chinalawinfo) ("The draft of collective contract or the draft of special collective contract agreed on by the representatives of both parties shall be discussed by the employees representative assembly or all the employees. When the employees representative assembly or all the employees discuss the draft of collective contract or the draft of special collective contract, at least two thirds of the members of the employees representative assembly or of all the employees shall be present. The draft of the collective contract or the draft of the special collective contract shall not be adopted unless it is agreed upon by at least half of the members of the employees representative assembly or of all the employees.").



abstract and over reliant on principles, lacking the ability to serve as a practical guideline for specific cases.

To meet the needs of society, the adjustment of the collective contract system is an urgent task for Chinese labor law. China's macro-economic trends and the legal practice in its provinces provide experiences that can help fulfill this aim.

### *B. Viability*

#### 1. A Change in Economic Policies

"The problem of Chinese labor law is rooted in the period of the development of Chinese economy and the developmental strategies."<sup>36</sup> Although the problems China faces are varied, its economic development is and will be the central issue for a fairly long time. So in this special developmental period, we can foresee that the national policies will still lean on the capital interests generally in order to 'make a bigger cake', and this is the crux of various problems present in labor law."

Although currently persevering in the promotion of high-speed economic development provides the best overall protection of laborers' interests, at the same time we have to recognize that it has been increasingly difficult to keep up the old development pattern that simply relies on our demographic dividend at the cost of omitting laborers' interests and that China's transformation and economic growth patterns are also pressing issues. The Outline of the 12th Five-Year Plan for Economic and Social Development states that Chinese should promote development that relies mainly on technological progress, improvement of the quality of the labor force and management innovation, and expedite the establishment of an innovation-oriented state.<sup>37</sup> To promote the realization of this transformation, it is necessary to provide new institutional support for the adjustment of labor relations to help the labor force gain its due value in the market, and to encourage firms to both gradually abandon the old mindset of depending on a comparative advantage in labor costs to gain profits and actively search for new developmental paths depending on technological and management innovation.

<sup>36</sup> Duan Liyue (段礼乐), *Laodong Guanxi de Xuanzhexing Ganyu yu Jiti Laodong Guanxi de Zhidu Luoji* (劳动关系的选择性干预与集体劳动关系的制度逻辑) [*The Systematic Logic between the Selective Interruption of Labor Relationship and Collective Labor Relationships*], 5 *ZHONGGUO LAODONG GUANXI XUEYUAN XUEBAO* (中国劳动关系学院学报) [J. CHINA INST. INDUS. REL.] 19, 24 (2011).

<sup>37</sup> See *Zhonghua Renmin Gongheguo Guomin Jingji he Shehui Fazhan Dishi'er ge Wunian Guihua Gangyao* (中华人民共和国国民经济和社会发展第十二个五年规划纲要) [*Outline of the Twelfth Five-Year Plan for Economic and Social Development*] (promulgated by the Nat'l People's Cong., Mar. 14, 2011, effective Mar. 14, 2011) (Chinalawinfo).

The adjustment of labor relations will not only affect the distribution of profit between labor and capital, but will also be tied to the entirety of China's social order. This is a problem we must face and fix while developing economically. In order to resolve the dilemma of labor disputes, we should use collective labor relations as a way to solve problems, promote labor autonomy, and make full use of the stabilizing function of the collective contract system. Also, collective labor relations help solve labor disputes and promote smooth progression of the industrial economy while the government remains neutral regarding the final responsibility of social stability.

The collective contract system is fully compatible with our country's goal of having a developed economy, and the promotion of this system can provide beneficial support to our economy.

## 2. Legislative Experience and Regional Practice

Using legislation from the central government as a basis, provinces and cities in China have also progressively explored the collective contract system and accumulated precious experience for the promotion of it. Figures show that 23 provincial peoples' congresses (including autonomous regions and municipalities) have drafted a "collective contract provision" or "collective contract regulation" so far.<sup>38</sup> These regulations all refine the collective contract system based on the framework of the central legislation. In the practice of regional legislation, the Regulations of the Shenzhen Special Economic Zone on the Promotion of the Harmonious Labor Relationship (the "Regulations") and Measures of Shenzhen Municipality on Implementing the Law of the People's Republic of China on Trade Unions (the "Measures") passed by Shenzhen have unique features. They demonstrate the innovations and breakthroughs of regional legislation and provide useful cues for national legislation.

First, they replace "collective negotiation" with "collective bargaining". Article 44 of the Measures prescribes:

If the labor contract of the employees' representatives in the collective negotiation expires in the period when they are fulfilling their duty as negotiation representatives, the term of

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<sup>38</sup> Zheng Qiao (郑桥), *Zhongguo Jiti Hetong Zhidu Falü Jianshe de Sikao: Cong Difang Lifa Kan Fazhan Zouxian* (中国集体合同制度法律建设的思考——从地方立法看发展走向) [*Reflections on the Legal Construction of the Collective Agreement System of China*], 2 *ZHONGGUO LAODONG GUANXI XUEYUAN XUEBAO* (中国劳动关系学院学报) [J. CHINA INST. INDUS. REL.] 8, 11 (2011).

the labor contract shall be automatically prolonged to the day when they fulfill their obligation.<sup>39</sup>

The term “collective bargaining” has been used specifically in this statute, replacing the term “collective negotiation” in the previous laws. It emphasizes the adversarial nature and autonomy of collective labor relations and “has restored the essence of labor relations”.<sup>40</sup> This is a shining point in Chinese collective labor relations legislation.

Second, these laws emphasize mandatory bargaining themes and reinforce the mandatory bargaining duty on both the labor and capital sides. Article 26, Clause 2 of the Regulations prescribes:

Employer units shall have collective consultations with labor unions or employee representatives on the following matters: (1) the matters related to collective contracts such as labor remuneration, labor safety and hygiene, insurance benefits, wage adjustment mechanisms, etc.; (2) the change, revision, or determination of the regulation and rules or major matters directly related to the immediate and vital interests of laborers; (3) the prevention and settlement of labor disputes; (4) the other matters on which both parties think they should consult with each other.

Meanwhile, Article 28 of the Regulations prescribes: “One party of a collective bargaining may request in writing that the other party have the collective bargaining on the matters stipulated in the second section of Article 26 of this Regulation.” The other party shall reply in writing within 10 days from the date of receiving the request for the collective consultation, and shall not decline the collective consultation. Both parties representing labor and capital have the duty to bargain in good faith using written forms and this helps collective bargaining start without difficulties. Besides attempting to guarantee the successful progress of collective bargaining, the Regulations also provide for an employers’ duty to reveal information, which provides strong support to the proceedings of collective bargaining.

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<sup>39</sup> See Shenzhen Shi Shishi Zhonghua Renmin Gongheguo Gonghui Fa Banfa, (深圳市实施《中华人民共和国工会法》办法) [Measures of Shenzhen Municipality on the Implementation of the Trade Union Law] (promulgated by the Standing Comm. Shenzhen People’s Cong., Jun. 27, 2008, effective on Aug 1, 2008) art. 41 (Chinalawinfo).

<sup>40</sup> Hou Lingling (侯玲玲), *Shenzhenshi Jiti Laodong Guanxi Lifa dui Woguo Zhongyang Lifa de Qishi* (深圳市集体劳动关系立法对我国中央立法的启示) [*Inspiration of Our Central Legislature from Collective Labor Relations Legislature in Shenzhen*], 1 FAZHI LUNTAN (法治论坛) [RULE OF LAW F.] 22, 28 (2013).

Third, these laws regulate collective protests. Currently, laying-off employees, strikes and other actions are still lacking specific legal regulations in China, putting these acts in a gray zone blurring what is legal and illegal. Parties are unable to anticipate or predict whether their actions are permitted or protected by the law.

However, the increasing numbers of controversial collective acts demands that labor law take this issue seriously. The regulations in Shenzhen have initially affirmed the legality of collective strikes and sabotage due to labor disputes. Article 53 of the Regulations stipulates that the government has no power to put forward a ban that stops employers' or employees' behaviors unless social order has been dramatically affected by them.<sup>41</sup> In addition, the Regulations have creatively introduced a feature called "the cooling-off period" which says that employers and employees are forbidden from taking measures that intensify a conflict, and that labor administration departments, trade unions and relevant industry associations must keep organizing negotiations and mediations to push the employers and employees towards reconciliation. As a consequence, peaceful settlement of the labor dispute can be advanced. These provisions have formed a relatively complete regulation aiming at controversial collective acts. In this way, law has been established to help organize the collective acts and the reactions of employers and the government, which could advance the collective labor relationships' legality.

Despite the fact that the local legislation led by Shenzhen is varied in the wording of various clauses, the spirit of the local legislation has still showed the tendency to converge to some degree. In conclusion, the local legislation mainly make rules on employers' duties, the contents of negotiations, the disclosure of information about negotiations, and the regulations of collective acts.<sup>42</sup> The local legislations also added some valuable things to the collective contract system. The advanced practice of local legislation offers notable examples to national lawmakers and provides a possible basis for a national legislation on collective labor relationships. From the local experience, we have a more sensible understanding of the collective contract system.

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<sup>41</sup> See Shenzhen Jingji Tequ Hexie Laodong Guanxi Cujin Tiaoli (深圳经济特区和谐劳动关系促进条例) [Regulations of the Shenzhen Special Economic Zone on the Promotion of Harmonious Labor Relations] (promulgated by the Standing Comm. Shenzhen People's Cong., Sept. 23, 2008, effective Nov. 1, 2008) art. 53 (Chinalawinfo).

<sup>42</sup> See Yang Dongmei (杨冬梅), *Difangxing Jiti Hetong Lifa de Tedian ji Fazhan Qushi* (地方性集体合同立法的特点及发展趋势) [Local Collective Contract Characteristics and Development Trends of Legislation], 1 ZHONGGUO LAODONG GUANXI XUEYUAN XUEBAO (中国劳动关系学院学报) [J. CHINA INST. INDUS. REL.] 66, 68–69 (2012).

## V. BUILDING A COLLECTIVE CONTRACT SYSTEM THROUGH SEPARATE LEGISLATION

### *A. The Building of the Subject*

In terms of the legal principle, the practice of a collective contract system calls for guaranteeing that both labor and management have the same ability to negotiate and conclude an agreement, which demands that the trade union remain independent and represented. The system is supposed to allow employees to negotiate with employers and express their demands for rights. In our country, we must attach great importance to the independence and representation of labor unions.

A labor union is a product of the unity of workers. In theory, a labor union has two main characteristics: First, it is a union of workers, so it is self-evident that a labor union is the unity acting in workers' best interest. Second, a labor union is a unity with fighting spirit. A labor union is organized by workers to make more convenient the struggle for promoting their own interests. However, in the reality of China, labor unions differ from those in Western countries in the following two aspects: First, Chinese union leaders are mostly appointed by superiors rather than elected by members. Second, labor unions in China have less fighting spirit compared with those in Western countries. Chinese labor unions rarely organize strikes to promote their members' interests.

After the market reforms began in 1980s, a great number of private enterprises have developed rapidly, resulting in increasingly intensified conflict between labor and capital. The workers need an organized and unified labor union with strong fighting spirit. But in general, the Chinese labor unions are still strongly administrated, and will rarely attempt to struggle against capital using strikes or aggressive bargaining.

Our country is implementing a centralized trade union system. There is only one system of labor unions and labor union leaders are usually dominated by their superiors. The labor union system in China follows a pyramid structure with the All-China Federation of Labor Unions as the highest level. Labor unions are elected at the representative meetings of laborers, but candidates for election are typically picked by the higher level labor unions. In this way, the high level labor unions control the labor unions at the lower level. Therefore, the structure of labor unions should be strengthened so as to improve the working lives of those they represent. Due to China's history as a planned economy, not only do the trade unions in China safeguard laborers' rights and interests, they are also one of the mass groups which are led by the Party and state power with the purpose

of communicating with certain groups of social members such as the workers, women and youths. Nevertheless, if it is seen from the function of the trade unions, it is a group of laborers. It is their essential function to safeguard laborers' rights—the trade unions' function should be simple. Safeguarding workers' rights should be their only function.<sup>43</sup>

Strengthening the labor unions means canceling their function of safeguarding the governments' rights. Labor unions are the representatives of the laborers' rights, while governments are the representatives of the public interest. Influenced by the planned economic system, the function of safeguarding laborer rights in the trade unions is currently not distinct in that laborer and employer rights and interests are absorbed into the state's rights. However, with the market oriented reforms moving forward, the multi-party benefit structure has started to form and the interests of employees have begun to come into conflict with those of employers. Besides, the government exercises macro-level control in order to safeguard society's public interests. As the social group for laborers, the trade union still ought to be controlled consciously by the macro rules offered by the government and safeguards for public stability. But when a collision between the employer and employee rights occurs, the trade union should express and safeguard the laborers' demand for rights legally and independently. The government should not interfere administratively, and the trade union should not safeguard the government's rights.

### *B. Establishing the Duty to Negotiate in Good Faith*

The collective contract system, which by its nature exists to ensure sincere negotiation between employers and employees, is a system where laborers can communicate with employers and negotiate labor relations. Collective contracts signed in the end are merely one way of ending the negotiation process. However, in China, there is still the phenomenon where great importance is attached to the signing rates of collective contracts, while the collective contract negotiation process itself is ignored, which greatly adversely affects the functionality of collective contracts in practice. Therefore, putting more emphasis on the collective contract negotiation process and cultivating the ability of labor and capital to communicate rationally will be the key to the further development of our country's collective contract system.

China would benefit from adopting certain aspects of Western law for regulating collective bargaining. In Western societies, in

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<sup>43</sup> Dong, *supra* note 34, at 32.

order to ensure the negotiation process, labor laws specify that both sides must negotiate certain items in good faith. For instance, in Section 8(d) of the US National Labor Relations Act, the obligation to bargain collectively is defined as: “For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment”.<sup>44</sup> According to the requirement of the law, as long as both the labor side and the capital side are willing to give their own suggestions and the reason for making such suggestions, listen to and consider each side’s advice and reasons thereof, and look for common points of view which can serve as the basis for a written bilateral agreement, they shall be brought to the negotiating table to start negotiations.”<sup>45</sup>

U.S. law requires good faith from both the capital and labor-side of a negotiation. Civil law countries work differently and mainly regulate the other way around. That is, refusing to negotiate in good faith is defined as an improper labor practice, and the corresponding party will bear legal responsibility so that the parties are obliged to negotiate. For example, Article 7, Paragraph 2 of Japan’s Labor Union Law states that, without justification, employers shall not refuse to negotiate with the representatives of the workers they employ.<sup>46</sup> When it comes to whether the employer has performed the obligations, the law requires that the employer “should not only patiently listen to the opinions and demands of the employees, but also provide a detailed reply and conditions which satisfy the reasonable requirements of his workers.”<sup>47</sup> The fact that the employers have the obligation to participate in good faith negotiations shows that the Labor Union Law effectively reverses the collective bargaining power of both sides, requiring the employer to carry out negotiations in good faith when faced with a reasonable request put forward by workers.

In Chinese labor law, the obligation of good faith negotiations is a substantive legal requirement.<sup>48</sup> Compared with other countries,

<sup>44</sup> National Labor Relations Act of 1935, 29 U.S.C. § 158.

<sup>45</sup> See Luobote A-Gaoerman (罗伯特·A·高尔曼), *Laodong Fa Jiben Jiaocheng: Laogong Lianhe yu Jiti Tanpan* (劳动法基本教程——劳动合同与集体谈判) [Basic Text on Labor law: Unionization and Collective Bargaining] 351 (Ma Jing (马静) et al. trans., 2003).

<sup>46</sup> Huangmu Shangzhi (荒木尚志), *Riben Laodong Fa* (日本劳动法) [Japanese Labor Law] 149 (Li Kungang (李坤刚) et al. trans., 2010).

<sup>47</sup> *Id.*

<sup>48</sup> See *Jiti Hetong Guiding* (集体合同规定) [Provisions on Collective Contracts] (promulgated by Ministry of Labor & Social Security, Jan. 20, 2004, effective May 1, 2004) art. 32 (Chinalawinfo). (“Either party of the collective negotiation may make a written request for collective negotiation to the other party about the conclusion of a collective contract or special collective contract and the related matters. Where a party makes a request for collective negotiation, the other party shall give it a written

there are more detailed regulations in China. For example, the time to respond to questions about the issues that are being negotiated is within 20 days<sup>49</sup> and the response must be in writing, which makes this obligation more effective. In a collective contract, however, there is no corresponding regulation. Such weak regulation lowers the effectiveness of the good faith negotiation obligations, since employers face no consequences if they do not obey the law. If employers refuse to negotiate with workers, the relief that workers can seek is based on regulations from Chapter 7 of the Provisions on Collective Contracts<sup>50</sup> and if employers refuse to bargain, the only recourse of employers is to turn to the Department of Labor and Social Security to resolve their concerns. China should establish clear administrative and civil liability of those who refuse to negotiate or maliciously negotiate to make the obligation to negotiate in good faith easier to enforce.

### *C. Regulating the Content of Collective Agreements*

Since collective contracts regulate labor relations, they should consider the distribution of rights and obligations during the labor relationship's existence. A collective contracts system can only function properly if there are legal limits as to what issues workers are permitted to bargain collectively with employers about. The International Labor Organization, for example, passed Convention C154 in 1981, Article 2 of which categorizes the content of negotiations between labor and capital into three kinds, namely, (1) to decide working and employment conditions, (2) to coordinate the relationship between employers and workers, and (3) to coordinate the relationship between employers or their organizations and one or several worker groups.<sup>51</sup>

Under the legislation of other market economy countries, when workers exercise their right to dispute labor relations by way of strike, sabotage, etc., their actions must be "specific to those targets that can be regulated by the collective contract".<sup>52</sup> For relationships not arising from labor, but from political or religious elements, they shall not be included in the collective contract specification. Otherwise they will be deemed illegal. According to Professor Shi Shangkuang, this legal limitation mainly considers that "most

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reply within 20 days from the day when it receives the request, and shall not refuse to conduct collective negotiation without justifiable reason.").

<sup>49</sup> *Id.*

<sup>50</sup> See *Jiti Hetong Guiding* (集体合同规定) [Provisions on Collective Contracts] (promulgated by Ministry of Labor & Social Security, Jan. 20, 2004, effective May. 1, 2004), Chapter 7 (Chinalawinfo).

<sup>51</sup> Ding, *supra* note 16, at 125.

<sup>52</sup> W·Dutz (W·杜茨), *Laodong Fa* (劳动法) [Labour Law] 239 (Zhang Guowen (张国文) trans., 2005).



industries in our country are still in the infant stage, neither side understands the essence of labor contracts; if we went to extremes, it would definitely go against the employers' and workers' intention, which could hurt both parties' interests, and do great damage to production."<sup>53</sup> Consequently, for collective bargaining negotiations, reasonably determining the boundaries of the content of collective contracts has vital significance.

In China, according to the relevant regulations of the Provisions on Collective Contracts, a collective contract includes provisions related to: (1) labor remuneration, (2) hours of work, (3) rest and vacation, (4) labor safety and hygiene, (5) supplementary insurance and welfare, (6) special protection for female and juvenile workers, (7) professional skills training, (8) labor contract management, (9) rewards and punishments and (10) job cuts.<sup>54</sup>

In addition, employers and workers can also make arrangements for the term of a collective contract, amendments of a collective contract, procedures to rescind a collective contract, dispute resolution, and obligations when breaching a collective contract. The employer and workers can also make arrangements for other items that they deem necessary to include.

#### *D. Regulating the Right to Strike*

When laborers' interests conflict with those of management, the emergence of a strike, sabotage, and other strategies has a certain inevitability. Where conflicts exist, the occurrence of strikes and other collective actions can never be completely prevented no matter how strongly the government desires that they should not occur. As Professor Ding wrote, "First of all, the strike is born from not an issue of legal rights, but an issue of legal facts. As the last resort for workers to fight for their rights collectively, it is neither possible nor necessary to prohibit strikes".<sup>55</sup> Hence, to deal correctly with the objective existence of laborers' collective action, the law should not neglect this problem but should actively deal with it. The law should standardize the behavior of strikes and organized efforts to sabotage production, and provide for procedures and conditions to ensure that workers can predict how to legally organize strikes and other

<sup>53</sup> Shi, *supra* note 2, at 107.

<sup>54</sup> Articles 9–18 of the Provisions on Collective Contracts provide a detailed explanation of these ten items.

<sup>55</sup> Zheng Shangyuan & Li Haiming (郑尚元、李海明), *Lun Laozi Guanxi Jiqi Falü Guizhi—Yi "Bentian Tinggong Shijian" Weili* (论劳资关系及其法律规制——以“本田停工事件”为例) [Discussion on the Regulation of the Labor-Capital Relationship: A Case Study of the Honda Shutdown Incident], 3 XINGZHENG GUANLI GAIGE (行政管理改革) [ADMINI. MGMT. REFORM] 48, 51 (2011).

collective actions and discourage them from resorting to methods that damage society.

In the history of Western law, the attitude towards workers' rights to collective action was first denial, then admission and finally protection. In the 19th Century, actions taken by workers in common law countries for higher pay and improved labor conditions were often seen as collusion and identified as crimes by the courts.<sup>56</sup> Only in the beginning of the 20th century, with the rise of workers' rights movements, did Western legal systems ease restrictions on workers' united actions and did laborers gradually gain the right to act collectively against employers.<sup>57</sup> Since the end of World War II, with the development of the modern enterprise system and the movement toward pursuing substantial justice (实质正义) in society, collective bargaining has gradually become the dominant form of laborer participation in enterprise management and policy making.<sup>58</sup>

At this point, I will introduce the legal definitions of collective actions of several important jurisdictions. These definitions differ from country to country, but the same fundamental principles are articulated in different legal systems to regulate collective action rights. I will identify and examine common elements used in other legal systems to define collective actions and recommend that these elements be adopted by China when it defines legal collective actions in the future.

Article 7 of the Japanese Labor Relationship Adjustment Method stipulates that "controversial action here refers to the passive resistant behavior of one party in labor relations, namely, actions to achieve their goal of strike, sabotage, closing factory, or to affect the normal work of the enterprise."<sup>59</sup> The U.S. 1935 Wagner Act stipulated in Article 7, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".<sup>60</sup>

German labor law provides an abstract definition of collective actions: "the action taken by the employees or the employers to create obstacles for labor relations with the goal of achieving specific targets."<sup>61</sup> According to this definition, we can understand several aspects of the laborers' collective action rights. First, the subject of

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<sup>56</sup> Zheng Shangyuan (郑尚元), *supra* note 11, at 125.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Huangmu Shangzhi, *supra* note 46, at 149.

<sup>60</sup> National Labor Relations Act of 1935, 29 U.S.C. § 157.

<sup>61</sup> Dutz, *supra* note 52, at 227.

this right is the union of workers, and therefore the workers would not be protected by law and would be treated as in breach of labor contracts if they took action to strike or commit sabotage without the organization of a labor union. Second, the purpose of collective actions is restricted specifically by law to forming a collective agreement. Third, collective action is intended to make the performance of labor relationships impossible. This typically involves strikes and sabotage efforts in which the workers are “temporarily collectively organized and plan to stop working and disrupt production in order to achieve, as a behavior of last resort, the conclusion of a collective agreement”.<sup>62</sup> Thus, where collective action rights are sometimes permitted, collective action rights appear to have the connotation of a sort of struggle. The right to strike is a legal right and economic weapon that workers must have before they can be said to have collective rights. Chinese law should be reformed to provide for the right to strike.

Under a market economy, the collective actions taken by workers against employers cannot be eliminated even if made illegal. It is important to understand that strikes do great damage if strict requirements are not set by law to limit the means and actions that may be taken by workers acting collectively. Western legal systems usually have requirements to limit the occurrence of strikes. We should be aware of the devastating effects that actions such as strikes and slowdowns have on enterprises, society, and the workers themselves. Because of this, laws in different countries never deal with these actions carelessly. It is very unusual for a country to have no legal provisions covering the right to strike, as is the case in China. Countries usually set strict requirements to differentiate between legitimate and illegitimate strikes. These requirements are a precondition for collective action rights to be exercised in a way that does not harm society. In this way, the collective action rights are brought into the legal system. China should bring collective action rights into its legal system by promulgating provisions specifically addressing them, so that Chinese workers can be better informed about what actions they should and should not take.

In Germany, scholars tend to regard five elements as essential to a legal collective action: (1) a strike should be organized by the labor union, (2) the aim of a strike should be derived from the collective agreement, (3) a strike should be non-violent, (4) a strike should not be contrary to law, and (5) the principle of equality should be

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<sup>62</sup> Huang, *supra* note 10, at 307.

exercised.<sup>63</sup> In contrast, scholars in Japan hold three elements as essential to legitimate protest: non-violence, reconciling fundamental rights and equal rights.<sup>64</sup> These two systems have several things in common, which can be regarded as key elements of a legitimate strike and should be incorporated into any future Chinese definition of a legitimate strike:<sup>65</sup>

### 1. Qualified Subject

A strike is legal only when organized by a labor union. Since collective action is a way in which workers choose to pressure their employer, the subject of these actions should also be the party of the collective contract. In China, the labor union is also the party representing the workers in signing collective contracts and qualified as the subject of collective actions.

### 2. Legitimate Aim

Collective actions should be for the purpose of agreeing to collective contracts. Specifically, collective contracts should include clauses aimed at improving or maintaining the working or economic conditions of laborers. Collective actions should be regarded as illegal when they are not for the purpose of coordinating the labor relationship (e.g. for political reasons or in sympathy with other workers but lacking a direct interest in the outcome).

### 3. Legitimate Procedures

In view of the devastating effects of collective action, the procedures to start such actions are strictly regulated. Since collective action is the last resort of workers to pressure their employers, it should be adopted only when collective negotiation is deadlocked. Otherwise, the action should be illegal. According to the Labor Law of the PRC, when a dispute occurs in the process of signing a collective contract, local governments should reconcile the interests of the different groups.<sup>66</sup> Thus, the law sets up an

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<sup>63</sup> Dong Baohua (董保华), *Laodongzhe Zifa Bagong de Jili Jiqi Hefa Xiandu* (劳动者自发罢工的机理及其合法限度) [*Principals and Legal Limit of Laborers' Self-Organized Strikes*], 1 GANSU SHEHUI KEXUE (甘肃社会科学) [GANSU SOC. SCI.] 117, 121 (2012).

<sup>64</sup> *Id.*

<sup>65</sup> Chang Kai (常凯), *Bagong Quan Lifa Wenti de Ruogan Sikao* (罢工权立法问题的若干思考) [*Reflections on the Legislation of the Right to Strike*], 4 XUE HAI (学海) [ACAD. BIMESTRIS] 43, 46–47 (2005).

<sup>66</sup> See Jiti Hetong Guiding (集体合同规定) [Provisions on Collective Contracts] (promulgated by Ministry of Labor & Social Security, Jan., 20, 2004, effective May 1, 2004) art. 49 (Chinalawinfo) (“Where both parties fail to settle the disputes arising in the course of a collective negotiation, either party or both parties may file a written application to the administrative department of labor and social security for mediation and settlement. Where no application is filed, the administrative department of labor and social security may mediate and settle the disputes, if it deems necessary.”).

administrative mediation procedure in cases where the collective negotiation breaks down. The workers should comply with the relevant requirements.

#### 4. Reasonable Measures

Regardless of the situation, workers should not use violence to pressure the employer to protect their rights. The law requires that the measures taken by employees not damage the stability and safety of both society and the economy. The interests of the general public and third parties outside the labor relation also should not be harmed. According to German law, collective action should follow the proportionality principle in a narrow sense.<sup>67</sup> This means that only collective actions that minimize social and economic harm should be permitted. Based on this principle, workers should use collective actions only to achieve a more beneficial collective contract and not to achieve other goals, such as political ones, to minimize the impact on society.

Based on these four elements, we can see that Western legal systems do not give unfettered discretion to workers with respect to how to carry out collective actions. On the contrary, they set strict requirements to ensure legitimacy and regulate such actions using laws. Unfortunately, in China these regulations are distributed among different laws rather than as part of a unified whole. Thus, in order to meet the demands of today's realities, China's legal system needs a unified, more detailed legislation on workers' collective actions.

### VI. CONCLUSION

A collective contract system is a mechanism for synthesizing the right of workers to unite, collectively negotiate, and collectively dispute. Such a system would provide China's workers with an effective means to campaign for their collective rights. A collective contract system would help balance the power between labor and capital in our economic system while simultaneously upholding the rights of workers. The social reality in our country has made it necessary and feasible that separate legislation for collective contracts be adopted. Such reforms can be informed by common elements present in existing legislation in other jurisdictions. In this proposed separate legislation, China should emphasize the subject, procedures, content, and regulation of collective negotiation, as well as the regulation of collective dispute rights. Only then can China's collective contract system be a rational one.

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<sup>67</sup> Dutz, *supra* note 52, at 249.

