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# A New Deal for China's Workers? Labor Law Reform in the Wake of Rising Labor Unrest

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Labor Law Reform in the Wake of Rising Labor Unrest**

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## **A New Deal for China's Workers? Labor Law Reform in the Wake of Rising Labor Unrest**

*The 2010 Honda strikes in China marked a turning point in its labor relations regime, not because they were unprecedented but because they followed several years of rising labor unrest. In some ways reminiscent of New Deal labor law reforms in the U.S., rising collective labor protest has spurred government efforts both to improve labor standards through direct regulation and to institute more participatory and democratic structures for the resolution of labor disputes. Yet China's leaders generally regard collective activity that is outside of and independent of the state as a threat to political stability and Communist Party control, and as a civic wrong rather than a civic right. So for now there is little prospect of China's recognizing workers' own independent labor organizations. Rather, reform efforts focus on reshaping some features of the All-China Federation of Trade Unions (ACFTU), China's only lawful labor union structure.*

*The main reform proposals call for democratic elections of union officers at the enterprise level and a more robust framework for collective negotiations. These democratizing reforms would represent major steps forward for China's workers; yet they face serious challenges, for they challenge entrenched habits and traditional functions of the ACFTU. If the reforms come to fruition, they seem more likely to stimulate than to satisfy grassroots demands for democratization, and to channel workers' discontent more squarely toward the party-state. The reforms aim to shore up the dominant role of the party-state in directing major social forces and the current system for official representation and control of labor; yet their implementation would likely sharpen the contradictions between that system and China's modernizing market economy. A more promising (but more radical) response to its labor troubles would be for China to transform the role of the state, on the labor front as it largely has on the capital front, from one of directing collective activity to one of regulating otherwise autonomous collective actors.*

### **I. Introduction**

If the workers of the world are united in anything, it may be in the degree to which their working lives and their futures are being shaped by China. By drawing a sizable share of global manufacturing into its vast and countless factories, China has transformed product markets, labor markets, and workers' lives both within and beyond its borders. The sheer size of China's domestic market and labor force, and its sophisticated infrastructure and supplier networks, ensure that what happens in China will affect the world; but those same attributes

may enable China's workers to make demands that other workers in the developing world could not. The continuing evolution of this very large “socialist market economy” is unprecedented in many ways, including the nature and stability of the political regime that has orchestrated that transition.<sup>1</sup> In short, China is both changing the world, and is itself changing, in ways that serious students of labor law, labor relations, and labor history cannot afford to ignore.

So it is worth watching closely as the most populous nation in the history of the world grapples before our 21<sup>st</sup> century eyes (albeit often behind closed doors) with the question of how to define the rights and entitlements of workers and the governance of labor relations. That big question may seem remote from another big question that grips many Western observers: Is economic liberalization leading, inevitably or otherwise, to political liberalization and democratization? But we will contend that the two questions are linked. China’s workers are demanding not only higher wages but a greater voice in their working lives. Whether and how they succeed in those demands will both reflect and reshape the structure of governance and the prospects for political reform in China .

To begin with, it is striking to observe the sheer intensity of debate over labor issues within China, and the centrality of that debate in the overall political economic landscape.<sup>2</sup> Several major labor laws, including the widely-debated Labor Contract Law, were enacted in 2007.<sup>3</sup> (Back in the U.S.A., labor relations have not been at the epicenter of political discourse, nor the subject of major federal legislation, since the 1950s.<sup>4</sup>) More reforms are in the works in the wake of the labor pains that grabbed headlines worldwide during the summer of 2010: the multiple suicides at Foxconn’s gigantic electronics factory complex, which supplies Apple, Dell, and other major electronics brands, and the major strikes that stalled Honda production, and then rippled across other factories nationwide.

These highly publicized incidents, and especially the Honda strike, may have marked a turning point in China’s labor relations regime, not because they were

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<sup>1</sup> Several recent books illuminate the economic and political dimensions of this transition. From MIT alone come two recent rich assessments, divergent but complementary, of China's state-led but capitalist-driven economic development: YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE* (2008); EDWARD S. STEINFELD, *PLAYING OUR GAME: WHY CHINA’S RISE DOESN’T THREATEN THE WEST* (2010).

<sup>2</sup> The debate has been encouraged by the central government and covered extensively in the Chinese media, impliedly giving the public a “yellow light” to participate. Chinese civil society has responded to this government prompting: when comments were allowed on the draft Labor Contract Law in 2007, the central government received over 190,000 submissions in one month. , Jude Blanchette, “Key issue for China's new labor law: enforcement,” *Christian Science Monitor*, July 2, 2007, available at <http://www.csmonitor.com/2007/0702/p11s02-woap.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Recent protests in Wisconsin and elsewhere might suggest that this is beginning to change. But the uproar has been confined thus far to the public sector; and the prospect of labor protest leading to pro-labor reforms in the foreseeable future seems remote.

unprecedented but rather because they followed several years of rising labor unrest. Labor protest in China has been vigorous, frequent, and to a surprising degree tolerated in recent years. For a regime that is devoted to constructing a “harmonious society,” and that still nominally adheres to its founding identity as a “workers’ state,” labor unrest has become a near-existential crisis, and one that clearly cannot be resolved through repression alone. It remains to be seen, however, whether China's workers can leverage the unusual political space they have enjoyed in recent years into more proactive and participatory institutions.

Having largely postponed the labor question in favor of revving up the capitalist engines of growth, China may now stand at the threshold of its own “New Deal.” But if there is to be a New Deal for China’s workers, it will be a New Deal with decidedly Chinese characteristics. The regime’s own preferred New Deal might well entail a “scientific” recalibration of labor's fair rewards<sup>5</sup> – higher wages and other material improvements – without a significant expansion of participatory rights and structures. For the idea of legitimating collective activity that is outside and independent of the state – whether as an expression of freedom itself or as a safety valve and a means of promoting social stability – runs against the grain of China's current political culture to a degree that is jarring for American observers steeped in a pluralist ethos. In particular, the development of independent labor unions is one historical phase of economic development that China’s leaders seem determined to skip altogether.<sup>6</sup>

Yet rising labor unrest has created pressure and some progress in the direction of more participatory and democratic structures for the resolution of labor disputes. In particular, labor unrest has put a bright spotlight on what is perhaps the most distinctive feature of China’s labor landscape: the All-China Federation of Trade Unions (ACFTU), with its many branches and layers, and its monopoly on lawful representation of workers. In the recent years of labor unrest, the ACFTU has heretofore been largely useless to China’s workers, especially its migrant workers in the South and elsewhere. The point was underscored by a township-level ACFTU official who told reporters, in the midst of the recent Honda strike, that the workers’ efforts to secure higher wages was “a matter between labor and employers. It is inappropriate for the trade union to intervene.”<sup>7</sup> We will endeavor to make sense of this remarkable statement. But in the meantime, as labor unrest has risen, the ACFTU has come under growing

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<sup>5</sup> Joseph Fewsmith, *Promoting the Scientific Development Concept*, China Leadership Monitor, N. 11 (2004), available at [http://media.hoover.org/documents/clm11\\_jf.pdf](http://media.hoover.org/documents/clm11_jf.pdf).

<sup>6</sup> The decline of organized labor across most advanced economies of the West probably encourages the belief that this is possible.

<sup>7</sup> “Avid Young Reader of Mao Zedong’s Poetry from the post-1980s generation leads the Honda strike” China News Weekly, June 2, 2010, p. 6. (hereafter, “Mao Ze Dong Reader”) Translated by China Labor Translations, available at <http://www.clntranslations.org/article/56/honda>.

pressure from above, below, and within to reform itself and become a more effective representative (or overseer) of China's unruly workers.

The main reform proposals that have emerged so far would institute more democratic elections for union officers at the enterprise level, and a framework for real collective negotiations over wages. (Both elections and “collective consultation” have existed on paper, but not in any meaningful form.) These reforms within labor law would represent major steps forward for China’s workers; yet they face serious challenges. We argue here that these reforms, if they came to fruition, would likely stimulate bottom-up pressure for democratization at higher levels of the party-state, further politicize labor conflict, and challenge the dominant role of the Chinese party-state in overseeing and directing all major social forces. While aiming to quell labor conflict and to promote social harmony, these proposed labor law reforms would seem likely to put added pressure on some basic features of the political regime.

China’s response to labor unrest thus both reveals, and poses challenges to, crucial features of its political structure. At bottom, the question is whether China can maintain the existing party-controlled system for representation and control of labor (and other social forces) alongside the liberalized market system for movement and control of capital. China has made dramatic progress in transforming a planned, closed economy into a modern market economy, and in transforming the state from overall proprietor and administrator of the economy to regulator of relatively autonomous, collectively-organized economic actors. But it has sought to retain hierarchical control of workers’ organized collective impulses. That effort has not been very successful, as ongoing labor unrest suggests. But the regime does not yet appear prepared to transform the role of the state, on the labor front as it largely has on the capital front, to that of regulator of otherwise autonomous actors. The proposed labor law reforms represent an effort to salvage the current system for official representation and control of labor; yet those reforms, if implemented in earnest, might instead sharpen the contradictions between that system and China’s modernizing market economy.

In Part II, we review the background of these developments, which lie in China’s post-Mao program of economic liberalization and its impact on workers, and even in the preceding era of the state-owned economy. Our focus here and throughout is on labor relations in the private and foreign-invested sectors rather than in the state-owned sector. In Part III, we turn to the ACFTU’s structure and function, and begin to identify some of the major puzzles, paradoxes, and contrasts from the perspective of U.S. labor law. In Part IV we delve more deeply into the central features of the ACFTU that are currently under scrutiny: the nature of collective bargaining and the legal status of strikes, and the problem of management domination and lack of accountability to workers in the enterprise-level union chapters. Finally in Part V we analyze the proposed reforms in both

areas, the tensions they would create with basic features of China's regime, and the likely consequences for the reforms and for the regime.

We analyze China's labor issues and labor reform debates from an American perspective, not only insofar as that may be inevitable for two American scholars, one long steeped in U.S. labor law and one young scholar of Chinese law, but also as a conscious choice. As intellectual interlocutors, we hope to see what is (or seems) familiar, what is (or seems) distinctive, and perhaps what is most interesting, about these Chinese debates and developments to an American audience.<sup>8</sup>

## II. Framing China's Labor Question: Economic Change, Political Stability, Labor Unrest

China's contemporary labor question began to emerge with the liberalization of China's economy in the late 1970s, when Deng Xiaoping and other pragmatists within the Party elite ended Mao's disastrous Cultural Revolution and took charge. The "iron rice bowl" model of permanent employment and comprehensive social provision that had prevailed in China's vast state-owned enterprises (SOEs) under Mao was not based on labor markets or employment contracts; labor was not "commodified."<sup>9</sup> Workers were assigned to a work unit (*danwei*), typically for life, and kept there with a household registration (*hukou*) system that tied nearly all social welfare benefits to one's work unit and place of registration.<sup>10</sup> The "labor contract system" was disparaged, and reserved for the socially marginal rural migrant workers who were drawn, in small numbers, into the bottom floors of China's economy.<sup>11</sup>

With economic liberalization, and especially in the 1990s, the rapid growth of private and foreign-owned enterprises helped drive the rationalization and partial privatization of the SOEs and the demise of the "iron rice bowl."<sup>12</sup> Beginning with Special Economic Zones in the largely-rural Pearl River Delta in the south

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<sup>8</sup> There are obviously other comparative perspectives on China's past and potential future that may be instructive. For example, China's transition, and its labor dimensions, might be more obviously comparable with those experienced in the former Communist countries of Eastern Europe, or with the authoritarian regimes of some of China's neighbors such as Singapore. So, too, the more or less corporatist labor relations structures of many European democracies may suggest more likely avenues for reform than do the pluralist and voluntarist structures of the U.S. But we believe that, for a U.S. audience, the U.S. comparisons will be illuminating in other ways.

<sup>9</sup> Eli Friedman & Ching Kwang Lee, *Remaking the World of Chinese Labour: A 30-Year Retrospective*, 48 *Brit. J. Indus. Rel.* 507, 507-508 (2010), available at <http://www.sscnet.ucla.edu/soc/faculty/CKLee/BJIR2010.pdf>.

<sup>10</sup> *Id.* at 516. The phrase used by Chinese workers to describe this system was "*jin bu qu, chu bu lai*" ("You can't get in, and you can't come out.")

<sup>11</sup> See MARY GALLAGHER, *CONTAGIOUS CAPITALISM: GLOBALIZATION AND THE POLITICS OF LABOR IN CHINA* -- (Princeton U. Press 2005).

<sup>12</sup> The staging and mechanisms by which capitalism took hold in China, and the key role played by foreign direct investment, is brilliantly dissected in GALLAGHER, *id.*

and elsewhere, and spreading through foreign investment, joint ventures, and domestic private firms, “commodified” market-based employment relations came to dominate China’s labor market, even in the large remaining SOE sector.<sup>13</sup> Foreign companies began to beat a path to China’s factories and its low-wage labor market. And China’s impoverished rural peasants, spurred on by poverty and family necessity, dreams of prosperity, and duty to county, began to beat their own tortured paths to those factories. The long hours, low wages, and dangerous and degrading conditions that they found there were apparently, for most migrants, preferable to a rural life devoid of prospects.<sup>14</sup>

#### A. *Labor Pains in China’s Rustbelt and Sunbelt*

The growing private sector was initially concentrated in labor-intensive “light manufacturing” of garments, toys, and other consumer goods; its mostly migrant workers’ rural “household registration” or *hukou* would become a major barrier to fair pay and equal treatment.<sup>15</sup> The SOEs continued to dominate major, capital-intensive sectors concentrated in the northeast; they employed almost exclusively urban-registered workers, albeit in shrinking numbers and with drastically reduced benefits and job security. The two groups of workers -- those from the declining “rustbelt” and those from the booming but brutally exploitative factories of the “sunbelt” -- developed their own characteristic set of grievances.<sup>16</sup>

From the “rustbelt” came the grievances of the urban working class, whose relatively high wages, benefits, and lifetime job security in the SOEs, and their proclaimed standing as “masters of the factory,” were all upended in the more competitive environment that followed liberalization. Some enterprises closed, others were wholly or partly privatized, and efficiencies were wrung out of those that remained.<sup>17</sup> Privatization and “restructuring” often enriched a favored few,

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<sup>13</sup> GALLAGHER, CONTAGIOUS CAPITALISM; STEINFELD, *supra* note --, at ---. By 2004, over 61% of registered companies were private, and by 2006, more Chinese were employed in the private sector than in the state-owned sector. See Song Yue, *Legislation on Regional and Industrial Collective Contracts: Developments and Issues*, paper presented at Renmin University International Symposium of Collective Labor Dispute Resolution and Regulation” (hereafter “Renmin Conference Materials”) at 483 (2011).

<sup>14</sup> In the words of the great 20th century writer Lu Xun, the peasants’ fate was “to suffer until they become stupefied” or “to devote all their energies to dissipation.” Lu Xun, *My Old Home* (1921), available at [http://21stcenturysocialism.com/article/worth\\_looking\\_at\\_my\\_old\\_home\\_by\\_lu\\_hsun\\_01212.html](http://21stcenturysocialism.com/article/worth_looking_at_my_old_home_by_lu_hsun_01212.html)

<sup>15</sup> Reform of the *hukou* system since liberalization has been halting and partial, yet significant. For an excellent overview of those reforms and changes – both bottom-up and top-down in their origins – see Fang Cai, *Hukou System Reform and Unification of Rural-urban Social Welfare*, 19 CHINA & WORLD ECONOMY 33 (2011).

<sup>16</sup> CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA’S RUSTBELT AND SUNBELT* (2007).

<sup>17</sup> The line between private and state-owned enterprises, and the size of the remaining state-owned (or state-controlled) sector, are surprisingly difficult to discern. The state retains effective control of many privatized enterprises through a variety of mechanisms, some decidedly non-

typically drawn from the local party elite, while the workers suffered a precipitous decline in living standards, security, and status.<sup>18</sup> Workers' protests revolved around both the enrichment of the elite few and the crumbling of their own former entitlements.<sup>19</sup>

The predicament of workers in China's SOE sector may recall that of workers in the highly-unionized, capital-intensive industries – especially auto and steel – of our own "rustbelt."<sup>20</sup> Here in the U.S., high wages and benefits and *de facto* lifetime employment became unsustainable in an era of growing global competition, producing waves of layoffs and the decimation of the prosperous unionized working class. Here, too, the shrinking coverage of generous enterprise-based benefits (including pensions and health insurance) has relegated workers to a much thinner social "safety net." And here, too, blue collar workers, once the proud and prosperous core of the New Deal coalition, have lost status and political clout as well as material security.

Of course, Chinese SOE workers were never as prosperous as U.S. steel and auto workers, and faced far bleaker conditions than the latter when their industries contracted.<sup>21</sup> After decades of relying on the SOE-based welfare system, China is

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transparent; while the SOEs generate a good deal of private wealth. See HUANG, *supra* note --, at --; MCGREGOR, *supra* note --, at --. At the same time, those enterprises that have become integrated into global supply chains – that is, the most dynamic companies operating in China – have had to follow the rules of the global economy that have been established by the highest performing Western MNCs. See STEINFELD, *supra* note --, at --.

<sup>18</sup> One statistic, cited by Min Xin Pei, is particularly revealing. Of the 10,000 wealthiest people in China, over 90% are either government officials or the relatives of a government official. MIN XIN PEI, CHINA'S TRAPPED TRANSITION -- .

<sup>19</sup> China Labor Bulletin, *Going it Alone: The Workers' Movement in China 2007-2008*, [Hereafter "Going it Alone"], available at [http://www.clb.org.hk/en/files/share/File/research\\_reports/workers\\_movement\\_07-08.pdf](http://www.clb.org.hk/en/files/share/File/research_reports/workers_movement_07-08.pdf) . According to one leading Chinese scholar, worker protest during the deconstruction of the planned economy did not yet reflect a collective action mentality; rather, workers were responding as jilted "masters of the factory." Chang Kai, *From Individual Labor Relations to Collective Labor Relations*, Renmin Conference Materials, 65 (2011).

<sup>20</sup> Obviously there are many differences. Most obvious is the role of the state. Even after decades of private sector expansion, an estimated 40 % of China's GDP comes from the state-owned sector. As noted above, *supra* note --, delineating these sectors is extraordinarily difficult, as many former SOEs, though privatized in form and having foreign investors, remain under effective government control; and many nominally state or collective enterprises are in fact privately owned and controlled. See YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS (2008), pp. ---. Another major difference lies in China's own rise: While manufacturing has shrunk as a share of the U.S. economy, China has retained a sizable heavy manufacturing sector, albeit in leaner and meaner form, while expanding its private industrial sector.

<sup>21</sup> As was recently made clear by a recent Supreme People's Court judicial interpretation of the Labor Contract Law, former "*xiagang*" SOE employees are not covered by the protections of the new law, by virtue of the fact that their former SOE employer still makes a *de minimus* monthly social insurance contribution. The Supreme People's Court, *The Third Interpretation*

still struggling to construct a non-enterprise-based social "safety net" of welfare benefits and social insurance to replace the "iron rice bowl" (even as its remnants, such as the *hukou* system, impede progress).<sup>22</sup> Though better off than their rural migrant compatriots, laid-off urban workers in China's "rust belt" have landed harder than their counterparts in the U.S.

While China's "rust belt" and its formerly secure SOE workers face serious challenges, the world's attention (and our own) has been largely drawn to China's "sunbelt" and its rapidly expanding "private sector," which includes foreign-owned, jointly-owned, and domestic private enterprises. China's burgeoning private sector economy and its mostly migrant workers may bring to mind two other U.S. analogies, one historical and one contemporary. The first is the pre-New Deal era of laissez faire capitalism; the second is our own large low-wage sector, in which labor standards are poor and chronically underregulated.<sup>23</sup> Poor immigrant workers play critical roles in both periods, much like China's migrant workers (except that the latter are Chinese citizens whose second-class legal status flows largely from the *hukou* system). The struggle for decent labor standards in the U.S. has a long history and a vivid present, both of which may cast light on the challenges facing China's factory workers today.

Both comparisons may seem inapt given the overarching role of the Chinese state, which has both orchestrated the post-Mao rise of capitalist development and retained enormous leverage over private enterprises.<sup>24</sup> Yet effective state *regulation* of the burgeoning factories lagged behind.<sup>25</sup> Labor (and

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*Regarding the Use of Law to Hear Labor Dispute Cases*, published 9/14/2010, available in Chinese at [http://www.court.gov.cn/qwfb/sfjs/201009/t20100915\\_9409.htm](http://www.court.gov.cn/qwfb/sfjs/201009/t20100915_9409.htm) .

<sup>22</sup> In particular, the linking of social benefits to one's *hukou*, or official place of residence, and the privileging of those with urban *hukou*, has greatly impeded the social integration and equality of the overwhelmingly rural migrant workforce of the non-SOE economy. See Freidman, Lee *Supra n. 9* at 516. Reforms to the *hukou* system are ongoing, but have encountered resistance in many local areas. See Cai, *supra* note --.

<sup>23</sup> See *infra* pp. --.

<sup>24</sup> There are many mechanisms of control, both internal to firms' ownership and governance structure, and externally through political controls. See HUANG, *supra* note --, at --; RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS* (2010). One source of leverage lies in the state's ultimate ownership of all land in the country. There is still no private "fee simple" ownership of land; some private leases and use rights are fairly secure while others – especially those of the peasant residents – are notoriously insecure. See Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan*, 19 COLUM. J. ASIAN L. 235, -- (2005); Frank Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 J. INT'L L. & POL. 551, 585-91 (2009).

<sup>25</sup> "Regulation" as we know it (or "law," for that matter) did not exist in the overwhelmingly state-owned economy under Mao. The need for a modern regulatory state grew along with the development of the private sector and the submission to market forces. (This "double movement" toward markets and regulation is one of the great master trends of the last century and a half. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1957).) The development of a modern regulatory state thus lagged behind economic

environmental) standards and even regulatory institutions existed, but enforcement was sorely deficient.<sup>26</sup> An important clue to the seeming paradox of continuing state leverage and lagging regulation lies in the fact that the “capitalists” and the local party-state officials who were in charge of regulating them were often one and the same. High ranking local party members acquired businesses on egregiously favorable terms; and, beginning in 1992, local business owners were welcomed into the party. The lure of profits at the local level thus reinforced central government policies that prioritized economic growth over decent wages and working conditions.<sup>27</sup> For many years, labor standards existed largely on paper, while collective representation was non-existent.<sup>28</sup> What evolved in this regulatory near-vacuum was a bare-knuckled *laissez faire* version of capitalism bearing some resemblance to labor markets and conditions in the era of “liberty of contract” in the U.S.<sup>29</sup> Indeed, some Chinese leaders adhered to a “scientific” understanding of the stages of socialist development that may have foretold, or even prescribed, a period of labor exploitation.<sup>30</sup>

If that is how we see the recent period of rapid industrial development in China, the rise of collective labor unrest over oppressive working conditions and wage levels could come as no surprise, either to us or to China's leaders. Exploitation breeds unrest. Chronically long hours, low wages, and hazardous conditions created tinderbox conditions in which a spark – an industrial accident,<sup>31</sup> a worker's collapse from exhaustion, the discharge of a pregnant worker, or the failure to pay even the promised sub-minimum wages – may

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liberalization, but has proceeded with rather impressive vigor. See DALI YANG, *REMAKING THE CHINESE LEVIATHAN* (2004).

<sup>26</sup> On the evolution of China's labor regulatory framework, see Sean Cooney, *Dynamism and Stasis: Regulating Working Conditions in China*, in SARA BIDDULPH, SEAN COONEY, & ZHU YING, *LAW AND FAIR WORK IN CHINA* (forthcoming 2012).

<sup>27</sup> On this process (and on the tendency of Chinese business owners of both stripes to support the existing regime), see BRUCE J. DICKSON, *WEALTH INTO POWER: THE COMMUNIST PARTY'S EMBRACE OF CHINA'S PRIVATE SECTOR* (2008), pp. ----

<sup>28</sup> The ACFTU largely ignored the south and its migrant labor force, and no other labor organizations were permitted. In fact, the ACFTU did not effectively represent its urban constituency either, as we will see.

<sup>29</sup> On the latter, see Forbath, *The Ambiguity of Free Labor*; see also Friedman, Lee *supra* n. 9 at 507-08.

<sup>30</sup> See Chen Naixin, Lou Jianbing, Chen Mei, *The New Thinking of Stipulating the Right to Strike into the Constitution*, Renmin Conference Materials 98 (2011) (discussing the necessity of exploiting China's natural and human resources for the accumulation of capital, but noting that “scientific development” calls for an end to this type of capital exploitation).

<sup>31</sup> The 1993 Shenzhen Zhili Toy Factory, in which 87 died and 47 others suffered severe injuries, was a turning point for Chinese labor law. The fire's details and impact were both hauntingly similar to the New York Triangle Shirtwaist fire that occurred in 1911, as both tragedies could have been averted had emergency exits not been blocked. See Tan, Shen, *Private Conversations Among Working Women: An analysis from hundreds of letters collected from the remnants of the Zhili toys factory in Shenzhen*, China Academy of Social Sciences, available at <http://www.sociology.cass.cn/english/papers/P020050202560885157529.pdf>.

produce an explosion. There have been many sparks and many explosions in the past two decades.<sup>32</sup> The resulting “mass incidents” – which may involve anywhere from ten individuals to thousands – have become a major preoccupation of the regime. A senior Party source put the number of “mass incidents” in 2008 at 127,467, perhaps one-third of which were labor-related.<sup>33</sup> (The government keeps track of these “mass incidents,” though it no longer publishes the figures.)

As just one illustration of a labor-related “mass incident,” consider this report from the official People's Daily on October 12, 2010:

Lei Yong and Liao Xinglong were two of eight construction workers who went to their employer ... at around 5 p.m. Monday to claim unpaid wages. A fight ensued. Lei and Liao were severely beaten by the company staff. Lei died in hospital on Monday evening. ... Shortly after Lei's death, hundreds of his co-workers blocked Erhuan Road in Dujiangyan City. The furious workers clashed with police and toppled a police vehicle. They dispersed at around 3:30 a.m. Tuesday, [but] they protested again, with more people, a few hours later at the highway exit. The crowd dispersed and traffic resumed at around 11:30 a.m. after [the local police chief] promised the protesters that the criminals would be punished according to law and that unpaid wages would be paid.<sup>34</sup>

The incident is especially noteworthy because it was officially reported within a few days of another event that was quickly erased from public view in China: The announcement of Liu Xiaobo's Nobel Prize. This hints at the government's comparatively tolerant attitude toward labor unrest as compared to some other forms of dissent.

One factor in rising worker unrest is sociological: Many in the first generation of migrant workers, having seen the dire poverty of the 60s and 70s and the paroxysms of the Cultural Revolution, were willing to “let a few get rich first.”<sup>35</sup> Today's migrant workers, most of them born after 1979 in the “one-child” era, are said to be unwilling to “eat bitterness” like their parents did. They do not know how to farm and do not want to go back to the countryside as their

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<sup>32</sup> For a collection of media accounts, letters, and interviews concerning poor factory conditions and workers' responses to them, mainly in the 1990s, see ANITA CHAN, *CHINA'S WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY* (2001).

<sup>33</sup> That would represent a 50 percent increase over the last officially released figure of 87,000 in 2005. China Labor Bulletin, *Protecting Workers' Rights or Serving the Party: The way forward for China's trade unions*, March 2009, p.6, [Hereafter “Protecting Workers' Rights], available at [http://www.chinalabour.org.hk/en/files/share/File/research\\_reports/acftu\\_report.pdf](http://www.chinalabour.org.hk/en/files/share/File/research_reports/acftu_report.pdf).

<sup>34</sup> “Nearly 1,000 people dispersed following wage protest in SW China,” People's Daily Online (English), Oct. 12, 2010, available at <http://english.peopledaily.com.cn/90001/90776/90882/7164113.html>.

<sup>35</sup> A paraphrase of Deng Xiao Ping. See “China Celebrates Deng Centenary,” BBC News, August 22, 2004, available at <http://news.bbc.co.uk/2/hi/asia-pacific/3587838.stm>.

parents did; they want to become homeowners, members of the Chinese urban middle class, dressing and eating well.<sup>36</sup> Moreover, they do not see themselves as participants in a party-led national movement. The new generation, without the experience of desperate poverty, violent social upheaval, or pervasive government intrusion into daily life, may be more disposed to seek gratification of their own desires, and to see their own interests as diverging from those of the rich. For now, these aspirations may be contributing to the rise of collective labor protest; yet one can also discern strains of individualism that may curb those collective impulses and steer discontent into less disruptive channels, at least if material conditions continue to improve.

### *B. The Role of Law in Chinese Labor Protests*

One may be tempted to infer from the proliferation of labor "mass incidents" that there are still no legal channels or remedies for the underlying disputes. But the relationship between labor unrest and the law is more complex than that. As already noted, substantive labor standards have been on the books for decades. In recent years there has been growing emphasis on enforcement through both state labor inspectorates and worker complaints.<sup>37</sup> As part of its effort in the 1980s and 90s to establish a "rule of law," the regime conducted extensive legal education campaigns to inform officials and ordinary citizens of the laws' requirements,<sup>38</sup> and exhorted Chinese workers to "use the law as a weapon."<sup>39</sup>

So workers were encouraged to frame their complaints as violations of the law, and to take their claims to the state and its agencies of adjudication and enforcement. Unfortunately official paths of recourse often proved frustrating.<sup>40</sup>

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<sup>36</sup>This message swept through the Chinese airwaves in the wake of Honda and Foxconn. It is sometimes cast in generous terms that evoke Premier Wen Jia Bao's repeated emphasis on "living with dignity." Consider the concluding remarks of a recent Chinese Central Television expose on the Foxconn suicides.

[T]his isn't just a problem facing Foxconn. Labor intensive industries are our most effective weapon with which to face the [outside] world, but times are changing, people are changing, and their expectations are changing. The age of competing with low wages has slowly left us. No matter the FoxConn incidents or [other] incidents, it reminds us not only that the operation of enterprises, but the society in general should add value to people's health, happiness, and dignity. That age has already arrived.

CCTV Television Expose on Foxconn Suicides (Chinese), available at <http://www.youtube.com/watch?v=DFTtTsKZjeU&feature=related>

<sup>37</sup> See Cooney, *Dynamism and Stasis*, supra note --.

<sup>38</sup> See Benjamin van Rooij, Pufa: Legal Education Campaigns, unpublished paper on file with author (2003).

<sup>39</sup> See GALLAGHER, supra note --, at --; LEE, supra note --, at ---.

<sup>40</sup> GALLAGHER, supra note --, at ---. Both the legal education campaigns and the efforts to encourage workers to demand their legal rights emanated from the top echelons of the party-state. To some degree, both sought to bolster the central regime's popular legitimacy and to assert its control over far-flung local officials whose corruption and coziness with business sometimes

Apart from the vagaries of proof, lack of legal representation, and fly-by-night employers that face many low-wage workers, including in the U.S., Chinese worker-claimants often were unable to prove the existence of an employment relationship, were pressured by the state adjudicator to accept a very partial and inadequate settlement, or were rebuffed by the court simply because of the sensitivity of the dispute or by an internal judicial writ of a higher court.<sup>41</sup> Local officials' receptivity to workers' complaints was compromised both by the fact that those officials, including judges, were evaluated and rewarded by the central government on the basis of their ability to promote local economic growth, and often by economically-rewarding ties between local officials and business owners. When legal recourse proved unavailing, workers sometimes took to the streets to demand their rights.

Rising labor unrest had become a major social issue by 2007, when China enacted three new major labor and employment laws, including the sweeping Labor Contract Law, which sought to beef up both the substance and enforcement of individual labor rights. The result has been an astronomical increase in labor-related complaints through official arbitral and judicial channels.<sup>42</sup> Both types of complaints nearly doubled from 2007 to 2008, with Labor Dispute Arbitration Committees (LDACs) handling over 700,000 cases involving over 1.2 million workers.<sup>43</sup> Deciphering official statistics in China can be challenging, but it appears that, by 2010, the total number of cases (and individual claimants) handled by the LDACs had fallen slightly to 601,000 cases (involving 804,000 claimants), about 35 percent of which were mediated; on the other hand, an additional 685,000 labor cases were handled by various official mediation organs

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conflicted with the regime's policies and priorities. See Van Rooij, *supra* note --. But the actual mechanisms of labor dispute resolution remained in local hands.

<sup>41</sup> See Halegua, *supra* note --, at--. Labor arbitrators in and around Shanghai noted, in conversations with the authors, that workers often lose cases because they cannot produce "reliable" enough evidence to fulfill the new Labor Contract Law's low burden of production; that is, evidence that they had even worked at a particular enterprise.

<sup>42</sup> This is aside from the labor related complaints that were the subject of *xinfang*, or "letters and visits," a distinctive form of petitioning that is rooted in imperial China, continued to serve as a mainstay of the CCP's system of governance, and still operates alongside, and arguably as a rival to, the post-Cultural Revolution legal system. For an excellent overview of the *xinfang* system, see Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006). We do not focus on it here as it is primarily concerned with disputes between citizens and government; although labor disputes do make their way into the *xinfang* system, especially when courts and arbitrators fail to afford relief, it is not a distinctive institution for the resolution of labor disputes or enforcement of workers' rights.

<sup>43</sup> China Labour Bulletin, *ACFTU (2007-2008)*, 14. Beijing alone handled over 73,000 labor disputes, almost all of them individual cases, in 2009. "Disputes Jump as Workforce Grows," THE CHINA DAILY, May 28, 2010, available at, [http://www.chinadaily.com.cn/metro/2010-05/28/content\\_9903314.htm](http://www.chinadaily.com.cn/metro/2010-05/28/content_9903314.htm).

outside the LDACs.<sup>44</sup> That in turn reflects the government's recent massive effort to direct labor (and other) grievances into mediation, and an extraordinary expansion of public mediation institutions, including many dedicated specifically to labor grievances.<sup>45</sup>

Labor disputes have thus exploded in China in recent years, both within and beyond formal legal channels. Unpaid wages were the single most frequent trigger for these collective outbursts, which would often spill onto the street only after one or more visits to the local labor bureau or labor arbitration body in frustrated pursuit of legal recourse.<sup>46</sup> In this and other ways, law shaped both the substance and the expression of labor protests.<sup>47</sup>

The role of law and legal rights in triggering and mobilizing popular protest in China is not confined to the labor arena. Rural protests over land appropriation, pollution, excessive taxation, and corruption also typically take the form of what Kevin O'Brien and Lianjiang Li call "rightful resistance."<sup>48</sup> Protesters appeal to higher authority, sometimes travelling to provincial capitals or beyond, for redress against localized wrongdoing; rather than challenging the established order, they seek to uphold it, retaining an age-old belief that justice can be found in the capital.<sup>49</sup> Labor protesters invoke their legal rights under the labor laws against

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<sup>44</sup> MHRSS 2010 Statistics, available in Chinese at [http://www.molss.gov.cn/gb/zwxx/2011-05/24/content\\_391125.htm](http://www.molss.gov.cn/gb/zwxx/2011-05/24/content_391125.htm). See also "More Arbitrators Needed Amid Soaring Labor Disputes," XINHUANET ENGLISH NEWS, available at [http://news.xinhuanet.com/english2010/china/2011-06/08/c\\_13918102.htm](http://news.xinhuanet.com/english2010/china/2011-06/08/c_13918102.htm)

<sup>45</sup> This was the subject of a week-long set of meetings in which we participated in December 2010. Mediation of disputes hold a multi-faceted appeal for China's decision-makers and judiciary: they reduce dockets and eliminate the possibility of being reversed on appeal or being "reported" (*jubao*) to their Party superiors (factors directly linked to career advancement, salary, and bonuses). A mediation agreement effectively eliminates workers' access to the vast array of administrative and judicial avenues for relief. China's investment in and emphasis on mediation has deep historical roots as well as complex political roots and ramifications. See Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201 (1966); Carl F. Minzner, *China's Turn Against Law* (Feb. 22, 2011), Washington University in St. Louis Legal Studies Research Paper No. 11-03-01. Available at SSRN: <http://ssrn.com/abstract=1767455>. To be sure, mediation in China is very different from U.S. mediation. To begin with, it is not private and is often conducted by those responsible for the adjudication of the dispute; this weakens and confuses the "shadow of the law" under which mediation takes place here. Still, the large and growing institutional capacity for mediating labor disputes is impressive.

<sup>46</sup> See Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1050 (2006); Aaron Halegua, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 BERK. J. INT'L L. 254 (2008); Virginia Ho, *From Contracts to Compliance? An Early Look at Implementation under China's New Labor Legislation*, 23 COLUM. J. ASIAN L. 35 (2009).

<sup>47</sup> The centrality of law in these labor disputes is emphasized in two excellent books, CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT* (2007); and MARY GALLAGHER, *CONTAGIOUS CAPITALISM*, *supra* note --.

<sup>48</sup> KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006).

<sup>49</sup> See Minzner, *supra* note --.

errant business owners or unresponsive local officials. "Rightful resistance," in labor protest and elsewhere, seeks to use law both as a weapon against wrongdoers and as a shield against repression.

Law has rarely played this positive, aspirational role in U.S. labor protests. During the conflict-ridden half-century leading up to the New Deal, workers had few legal rights, as legislation regulating labor conditions or empowering unions collided with the courts' commitment to "liberty of contract."<sup>50</sup> After the New Deal labor legislation put the weight of the law behind peaceful labor activity, most strike activity arose out of "interest disputes" in the collective bargaining context, not "rights disputes."<sup>51</sup> Nowadays, however, we do see protests of "rightful resistance" among the mostly-immigrant workers who populate the large and underregulated low wage labor market in the U.S.<sup>52</sup> Worker advocates have sought to mobilize workers and galvanize public censure against discrimination and various forms of "wage theft," such as failure to pay overtime, misappropriation of tips, or exaction of "off-the-clock" work.<sup>53</sup> Unregulated low-wage work is surprisingly widespread in the U.S. – less so than in China, but more so than in most advanced economies.<sup>54</sup> As in China, it is workers with tenuous legal status – here, undocumented immigrants – who are most vulnerable to these kinds of labor law violations. In both cases, when those workers do mobilize, it is often to demand simple compliance with the law.

For those in China who are trying to illuminate the path to more harmonious labor relations, another comparative point is particularly salient: Whatever may be

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<sup>50</sup> Indeed, frustration with the courts' repeated invalidation of labor standards laws pushed the U.S. labor movement away from the broad-based assertion of public rights and toward a strategy and an ethos of collective self-reliance. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

<sup>51</sup> There were strains of "rightful resistance" in workers' demands for recognition in the face of employers' refusal to bargain from the early New Deal legislation of 1933 until the Supreme Court decision upholding the NLRA in 1937. Until that decision took hold, and even for some time thereafter, employers engaged in massive defiance or circumvention of their new duty to bargain. See IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941* (1969).

<sup>52</sup> These protests exemplify what Benjamin Sachs calls "employment law as labor law." Benjamin Sachs, *Employment Law as Labor Law* 29 *CARDOZO L. REV.* 2685 (2008).

<sup>53</sup> *Id.* at --; see also Benjamin Sachs, *Revitalizing Labor Law*, 31 *BERK. J. OF EMPL. & LAB. L.* 333 (2011)

<sup>54</sup> See RUSSELL SAGE FOUNDATION, *LOW-WAGE WORK IN THE WEALTHY WORLD* (Jerome Gautie & John Schmitt eds., 2010), p. 5. The low-wage labor market in the U.S. is concentrated in the service sector, though it includes a fair share of what remains of mass manufacturing, especially garments and textiles, as well as agriculture and food processing. On the high levels of non-compliance with labor standards especially (though not only) in this low end of the U.S. labor market, see KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT* (2009); STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER* (2009); *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* (Annette Bernhardt, Heather Boushey, Laura Dresser & Chris Tilly, eds., 2008).

the nature of workers' grievances in the U.S., they have generated far less disruptive protest than in China. Is that in spite of or because of the fact that U.S. workers enjoy stronger legal rights to protest and to form a union? U.S. workers won those legal rights largely by disrupting commerce and public order through strikes and protests; the legitimization of unions and collective bargaining was intended partly to secure labor peace.<sup>55</sup> That it largely did: private sector strike activity is at its lowest level in a century.<sup>56</sup> Our own history thus suggests that a possible strategy for securing labor peace might lie, in China as it did in the West, in legitimizing (*and regulating*) independent labor organizations, labor protest, and collective bargaining.<sup>57</sup> But that proposition runs headlong into China's authoritarian system of governance and the ACFTU's official monopoly on worker representation (to which we will return shortly).

### *C. Repression, Toleration, and Appeasement of Labor Protesters*

Much as in the pre-New Deal era in the U.S., the rise of labor-related “mass incidents” in China has come to be seen as a serious threat to economic progress and social stability, and even to political legitimacy. Labor disputes are certainly not the only source of “mass incidents,” but labor protest may be especially threatening to the CCP, given the historic role of workers' rebellions both in the birth of Communist regimes and in their demise (as in Poland). (One trigger for the June 4<sup>th</sup>, 1989, crackdown at Tiananmen Square and beyond was said to be the fact that workers and “unofficial, independent” unions had begun to join and support the student-initiated protests.<sup>58</sup>)

Given the authoritarian character of China's regime, it is not surprising that sheer repression has been one response to these mass incidents; that is the dark side of the regime's commitment to a “harmonious society.” (Then again, it is not only in authoritarian societies that disruptive labor protest has met a repressive government response in the name of social order.<sup>59</sup>) Until recently, repression was likely in China whenever there were identifiable leaders or glimmers of

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<sup>55</sup> This pattern of ameliorative labor reforms in response to serious labor unrest is not unique to the U.S. See Alan Hyde, *A Theory of Labor Legislation*, 38 BUFFALO L. REV. 383 (1990).

<sup>56</sup> See Michael Wachter, *The Striking Success of the National Labor Relations Act*, in CYNTHIA ESTLUND & MICHAEL WACHTER (EDS.), RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW (forthcoming 2012).

<sup>57</sup> On the other hand, our more recent history might suggest that the phase of independent labor movement activism is a temporary one; China's leaders might well wonder whether that disruptive phase can be skipped.

<sup>58</sup> See generally Andrew Walder & Gong Xiaoxia, *Workers in the Tiananmen Protests: The Politics of the Beijing Workers Autonomous Federation*, 29 AUSTR. J. CHINESE AFF. --- (1993).

<sup>59</sup> See IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933* (1960).

organization.<sup>60</sup> The fear was that organized protests might spread or turn political, or even challenge the legitimacy of the regime. Most threatening are labor protests or labor groups that are organized across multiple factories or regions; such organizing is harshly suppressed and extremely rare. In October 2010, for example, a worker activist was sentenced to three years in prison for “organizing more than 380 workers from about 20 [SOEs] to form a labour rights group tasked with overseeing and monitoring SOE restructuring, and reporting corruption and abuses of power.” The group was outlawed by the municipal government of Xi’an, apparently because it sought to organize workers across multiple enterprises in Shaanxi province.<sup>61</sup>

While repression is obviously a real risk for Chinese labor protestors, in recent years labor-related “mass incidents” have instead often drawn solicitude from higher-up officials, and an ameliorative response from local officials who fear the consequences of “mass incidents” for their career. That is the other side of the call for a “harmonious society.” Indeed, labor officials and judges have resorted with surprising frequency to offering cash to protesting workers in the streets to induce them to end their protest!<sup>62</sup> That kind of remunerative response was limited to protests that appeared spontaneous and unorganized; yet it obviously tended to encourage other workers to create a ruckus. The typical strike was thus “organized” simply by spreading word from worker to worker by text message. In the past two years or so, even the hostility to leadership and organization – at least among workers in a single factory – appears to have softened a bit, and has sometimes given way to a pragmatic desire to identify someone with whom to negotiate an end to the strike.<sup>63</sup>

There are several reasons for the partial shift to a more ameliorative response to labor protest. First, party leaders appear increasingly concerned about the unhealthy wealth imbalance between rich and poor, and between regions;<sup>64</sup> about workers’ lack of adequate legal and social security protections; and about wages

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<sup>60</sup> See Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China* (Aug. 11, 2009). Available at SSRN:<http://ssrn.com/abstract=1447131> or <http://dx.doi.org/10.2139/ssrn.1447131>.

<sup>61</sup> China Labour Bulletin, *Worker activist sentenced to three years in jail – scholars demand release*, Oct 22, 2010, available at <http://www.clb.org.hk/en/node/100907>. Zhao would be an unlikely poster child for Western liberals; he is a prominent Maoist who advocates “the restoration of a more egalitarian, fair and just society.” The China Labour Bulletin speculates that “[i]t is perhaps Zhao’s Maoist allegiances ... that led to his relatively heavy sentence on this occasion.”

<sup>62</sup> See He, *supra* note --.

<sup>63</sup> Conversations with Chinese labor scholars, May and December, 2011.

<sup>64</sup> China’s GINI index is nearly 0.5, among the highest in the world. See “Cost of Living Increasingly a Struggle for China’s Poor,” *NYTimes*, December 9, 2010, available at [http://www.nytimes.com/2010/12/10/world/asia/10iht-letter.html?\\_r=1](http://www.nytimes.com/2010/12/10/world/asia/10iht-letter.html?_r=1). Some reports claim that unreported income among the upper classes, if reported, would push China’s GINI index number even higher.

that have not kept pace with growth and inflation. There is growing recognition that workers have legitimate grievances that, if left unaddressed, are likely to fester and to undermine the regime's legitimacy in more insidious ways.<sup>65</sup> Whether the leaders' concerns stem solely from their interest in political stability or also from genuine sympathy with the workers, they have been moved to address workers' grievances. Second, as we have seen, workers are often asking for legal or substantive rights that the law already recognizes: decent wages and benefits, paid on time and in full. Most worker unrest, although troubling, has been deemed a "minor contradiction," not a direct challenge to the regime.<sup>66</sup> Finally, those in the Chinese elite who speak in terms of "scientific development" and "historical determinism" might be unsurprised that rapid industrialization would lead to worker discontent, and to demands for political and social reforms trending towards equality.<sup>67</sup>

#### *D. On Labor Markets and the "Exit" Option*

In the meantime, discontented workers have taken to the streets in large numbers, not only in protest but also in search of better jobs and higher wages. They have, in short, resorted to "exit," the quintessential market response to dissatisfaction, as well as the peculiar hybrid of "exit" and "voice" that is the strike. We focus here on the latter, but the former is worth a few words.

Workers' willingness to migrate to the factories of Guangdong has faltered as they have become fed up with wages and working conditions there, and as development in the interior has begun to create jobs closer to home. Add to that the demographic cliff created by the entry of the "one child" generation onto the labor market, and the result has been widespread labor shortages and rising wages.<sup>68</sup> (The global economic crisis caused a brief hiccup, and a wave of layoffs and plant closings; but growth quickly resumed.) Minimum wage levels have been raised in many areas, and employers seeking to retain experienced workers

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<sup>65</sup> See Liu Xiaoqian & Peng Guanghua, *The Functional Position and the Institutional Structure of the Collective Bargaining Mediation System*, Renmin University Conference Materials 340 (2011): "If [an incident] is not handled in an orderly and positive way, there is an even greater chance for harm to societal harmony and stability. If an incident is repressed, it may seem to have subsided in the short term...but in reality it has just buried an even more destructive force [that will erupt later.]"

<sup>66</sup> See generally MAO ZE DONG, *SELECTED WORKS OF MAO TSE-TUNG* (Vol. 5) (Beijing: Foreign Language Press, 1977), pp. 384-421: "On the Correct Handling of Contradictions among the People."

<sup>67</sup> See supra note --.

<sup>68</sup> These considerations all feature in an explanation of the labor shortage in China's official English language newspaper, Gao Qihui, *What is Behind the Labor Shortage?*, CHINA DAILY (2/25/2010), available at [http://www.chinadaily.com.cn/opinion/2010-02/25/content\\_9505184.htm](http://www.chinadaily.com.cn/opinion/2010-02/25/content_9505184.htm).

have had to pay a wage premium to keep workers from jumping ship.<sup>69</sup> The tight labor market may have done more for China's workers than either government intervention or workers' collective protest; but it has also helped to underwrite both reform and protest. For example, the quick recovery and renewed labor shortages quieted alarmist claims about the "job-killing" Labor Contract Law (though grumbling continues). And the tight labor market has surely emboldened workers to exercise that noisier and more vocal exit option, the strike.

It became evident several years ago that the growing problem of labor unrest called for a more systemic response – one that addressed the causes of unrest in more than an ad hoc manner. So policymakers have reexamined and, to varying degrees, reformed official channels of redress for workers' grievances. The initial focus, and the regime's favored response, was on improving minimum labor standards and the judicial, arbitral, and administrative systems for their enforcement; that generated a flurry of national legislation in 2007, and ongoing local improvements, including a many-faceted push to "mediate" labor (and other) disputes rather than adjudicating them.<sup>70</sup> (Whether the emphasis on mediation is part of a larger turn away from a recognizable rule of law is one of the big questions that will be left unaddressed here.<sup>71</sup>) Attention has now turned as well to the ACFTU and its system of worker representation, which will be our main focus here.

#### *E. The Honda Strikes and the New Urgency of Reform*

To the average Western consumer, perhaps even to the average Chinese urbanite, the plight of Chinese workers and their growing discontent has been known, but rather abstract. But as of 2010, Chinese labor acquired a more human face with the FoxConn suicides and the Honda strikes. Whether because of their duration and the coincidence of their timing, their direct ties to major global brands, or the unusually open coverage in the Chinese media,<sup>72</sup> Foxconn and Honda grabbed national and international headlines for weeks. Each proved an excellent foil for the other: the situation of Chinese workers is *Foxconn* bad, instigating *Honda*-type action; or, Honda shows promise and provides a way

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<sup>69</sup> See "Defying Global Slump, China has Labor Shortages," N.Y. TIMES, Feb. 26, 2010, available at <http://www.nytimes.com/2010/02/27/business/global/27yuan.html>. See also "China's salaries to increase 139% in Five Years," China Bus. News, Jan 7, 2011, available at <http://cnbusinessnews.com/chinas-salaries-to-increase-139-in-5-years/>.

<sup>70</sup> See Qiao, Jian. *Labor Contract Law in China: Changes and Implications*, paper prepared for the international conference "Breaking Down Chinese Walls: The Changing Faces of Labor and Employment in China," Cornell University, September 26-28.

<sup>71</sup> Compare Minzner, *supra* note -- (arguing that the shift to mediation does represent a turn away from law) with Benjamin Liebman, *Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO'S INVISIBLE HAND (ELIZABETH PERRY & SEBASTIAN HEILMANN, eds.) (2010) (considering whether the shift to mediation, among other developments, might represent the emergence of a distinctively Chinese populist version of rule of law).

<sup>72</sup> Widespread coverage within China ceased after a few days of the Honda strike.

forward, where Foxconn shows only hopelessness.<sup>73</sup> While the Honda strikes were most instrumental to pushing forward institutional reforms, and will garner most of our attention here, the continuing discontent at Foxconn underscores two essential points: First, there is real desperation out there; and, second, as things stand, one key to successful worker action is to maximize the amount of embarrassment or trouble (*māfan*) that can be brought to bear on the relevant decision-makers.<sup>74</sup>

In May of 2010, over 1800 workers at the Nanhai Honda component factory went on strike, effectively stopping work in the three downstream Honda assembly plants for nearly two weeks, and costing Honda up to 2.4 billion RMB (about \$350 million) a day.<sup>75</sup> The Nanhai Honda strike was probably the biggest and longest-running strike ever in a foreign-invested Chinese factory, and was followed by strikes at another Honda component factory and several other foreign and domestic automakers.<sup>76</sup> While it is tempting to see the Honda strikes as simply vivid and well-publicized examples of a rising tide of worker unrest,<sup>77</sup> they were in some ways atypical.

First, this was a strike about economic interests, not legal rights: The workers were seeking higher wages and better working conditions. Ironically, one government official of Nanhai Honda's district suggested that it was partly *because* “Nanhai Honda follows the laws so strictly,” especially in limiting overtime to the statutory 36 hours a month, that it has “affected the workers' incomes.”<sup>78</sup> As such, the Honda strike may have underscored the inadequacy of the government's favored reform strategy of improving minimum standards and their enforcement, and the need to consider institutional reforms that enable workers to press their own demands.

The Honda strikers were also unusual in their level of organization and their deliberate and successful advancement of ambitious demands. They were said to be “[w]ell organized, strategic and assertive, demanding sizable wage increases,

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<sup>73</sup> Anita Chan, “Labor Unrest and the Role of Unions,” *China Daily*, June 18, 2010, *available at* [http://www.chinadaily.com.cn/opinion/2010-06/18/content\\_9987347.htm](http://www.chinadaily.com.cn/opinion/2010-06/18/content_9987347.htm).

<sup>74</sup> Recent worker threats at collective suicide at Foxconn's Wuhan factor corroborate these two points. Foxconn's sheer size and name brand clientele would seem to ensure that it will be the subject of domestic and international attention for the foreseeable future. See *The Guardian*, “Xbox assembly workers in China threaten mass suicide over jobs dispute,” Jan. 12, 2012, *available at* <http://www.guardian.co.uk/world/2012/jan/12/xbox-assembly-workers-threaten-mass-suicide>.

<sup>75</sup> *Mao Ze Dong Reader*, *supra* note --, at 6.

<sup>76</sup> “Strike Breakers: Strikes are as big a problem for the government as they are for employers,” *The Economist*, July 3, 2010, *available at* <http://www.economist.com/node/16282233/print>

<sup>77</sup> *Id.* Labor disputes in Guangdong rose over 40% in the first quarter of 2009 and almost 160% in Zhejiang.

<sup>78</sup> *Mao Ze Dong Reader*, 10. Wage disparity between “regular” Nanhai Honda workers and long-term “interns” on the same line also exacerbated worker discontent.

proposing a pay scale and a career ladder, electing their own representatives, re-electing office-bearers to their union branch and demonstrating solidarity and a determination to win.”<sup>79</sup> Non-union worker representatives from each of the factory's five sections of production even participated in negotiations with Nanhai Honda management. ACFTU representatives, while present, reportedly remained largely silent.<sup>80</sup> These negotiations, and the ACFTU's uselessness in them, highlighted the possibility and the necessity of both real collective bargaining and real elected leadership, and raised the prospect that, absent serious reforms within the ACFTU, collective bargaining and elections might happen entirely outside the officially-designated trade union structure.

Also noteworthy was the duration of this high-profile strike, which lasted for over a week, until when the company offered a 24 percent raise (32 percent for interns) and promised future democratic elections.<sup>81</sup> While the strike leaders had initially struggled to convince their fellow employees to join them, a series of blunders by Nanhai Honda's management and the local union inadvertently helped to drive more workers off the lines and into the strikers' ranks.<sup>82</sup>

One near-comical episode during the strike illustrates the odd posture of the party-state to labor-management conflict. In the midst of jockeying and jostling among workers, the union, and management, Zeng Qinghong, the general manager of Guangzhou Auto Group, entered the scene.<sup>83</sup> He walked calmly among the angry workers, handing out his business card (which many tossed to the ground). One might have guessed he was there because his Auto Group was losing millions due to the strike. But Zeng assured workers that he was wearing his other hat: He had been sent by the provincial government in his capacity as representative of the National People's Congress. The official newspaper report glowingly described Zeng as a mediator who “earnestly and patiently won acceptance from the workers,” and who almost single-handedly put the workers back on the lines, forced wrongdoers to apologize, and saw to it that the workers' major demands were met.<sup>84</sup>

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<sup>79</sup> Chan, *supra* n. 57.

<sup>80</sup> *Mao Ze Dong Reader*, 6.

<sup>81</sup> NYTimes, *supra* n. 55

<sup>82</sup> *Mao Ze Dong Reader*, 6. These blunders included: 1) publicly announcing the firing of strike leaders Tan and Xiao, 2) Trying to force workers to sign a hastily drafted pledge never to lead, organize, or partake in slow-downs, work stoppages, or strikes, 3) organizing a teach-in with the heads of the vocational schools that supplied 1/3 of the workforce in an attempt to have their teachers convince them to go back to work.

<sup>83</sup> Zeng was a “redhat” businessman, among those who were welcomed into the CCP after 199-, when capitalism was officially brought under the socialist umbrella. See KELLE S. TSAI, *CAPITALISM WITHOUT DEMOCRACY: THE PRIVATE SECTOR IN CONTEMPORARY CHINA* (2007).

<sup>84</sup> “China's Union Facing Restructuring because of Labor Disputes, some regions trial elections” China News Weekly, June 1, 2010, p. 7. Translated by China Labor News Translations. Original Chinese article, available at: <http://news.cnfol.com/100624/101,1277,7909875,00.shtml>

So management and the Party were on the scene, at least in the singular person of Zeng. But the ACFTU was at first silent.<sup>85</sup> The union said nothing during pre-strike negotiations with worker representatives, when management offered a 55 RMB per month raise (about \$9, or 5 percent of their demands); that paltry offer was the immediate trigger for the work stoppage. Even after the strike began, the union did nothing. Recall the response of the ACFTU official, when asked what the union was doing to help the workers in their negotiations for higher wages: “This is a matter between labor and employers. It is inappropriate for the trade union to intervene.”<sup>86</sup>

When the union finally did begin to “intervene,” they only inflamed the situation. For example, on May 31<sup>st</sup>, more than a hundred union members, sent to the factory by the local government, tried to block workers who were trying to talk to reporters. “They’re mafia,’ fumed one employee, as another showed a long cut on his face that he blamed on the union men.”<sup>87</sup> Reports that two workers had their faces “beaten bloody” by twelve men wearing union badges prompted hundreds of workers who had returned to the lines to leave again.<sup>88</sup> It is little surprise that, according to the Economist, “at the Honda plant, employees fume more about the factory’s trade union than about Japanese managers.”<sup>89</sup>

We associate strikes with labor unions. And indeed, as private sector union density in the U.S. has fallen to perhaps the lowest level in a century, so has the frequency of strike activity.<sup>90</sup> But historically, the ACFTU has had nothing to do with strikes (except for trying to stop them).<sup>91</sup> The ACFTU is not really a labor

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<sup>85</sup> *Mao Ze Dong Reader*, 9. (“In 2009, as soon as Nanhai’s ACFTU branch was established, Tan raised the issue of wage increases several times but got no response from the union.”)

<sup>86</sup> *Mao Ze Dong Reader*, 9.

<sup>87</sup> The Economist, *supra* n. 59. The use of the term “mafia” is quite interesting here. For, while there is no proof that this was the case here, it is quite common, especially in property disputes, for local governments to hire gangs of “hoodlums” to threaten, harass, even injure residents who will not stop speaking out about a particular injustice.

<sup>88</sup> *Mao Ze Dong Poetry Reader*, 7. (Other reports indicate that the thugs were actually police wearing union badges so that they could enter the factory; police have been largely barred from entering foreign factories from early in China’s romancing of foreign capital.)

<sup>89</sup> Economist, *supra* n. 59.

<sup>90</sup> Bureau of Labor Statistics, 2011. Both the number of “major” work stoppages (470) and the number of workers affected (2.75 million) peaked in 1952, around the peak of union density; in 2009, both hit the lowest level since 1947, with just five major work stoppages affecting 13,000 workers. “Major” work stoppages are those affecting more than 1000 workers.

<sup>91</sup> See The Trade Union Law of the People’s Republic of China, Art. 27. “The trade union shall assist the enterprise or institution in properly dealing with the matter so as to help restore the normal order of production and other work as soon as possible.” See also the comments of Guo Jun, director of the ACFTU’s trade union democratic management department, in the *Southern Weekend* shortly after the passage of the Labor Contract Law:

The Labor Law and the Union Law contain a rule we call ‘outstanding incidents.’ This rule mandates that the union must intervene [in strikes], representing a negotiator between the workers and the enterprise. Under the precondition of satisfying reasonable requests of

union as we understand the term; but as the official representative of all of China's workers, it will be central to any official strategy for dealing with the problem of labor unrest. In fact, as we will see, the national ACFTU was quick to respond to the Honda strikes with their own reform proposals. In order to understand those recent reform proposals, however, one must understand what it is that is being reformed. Let us turn to the ACFTU.

### **III. The ACFTU: Arm of the Party, Tool of Management, or Voice of the Workers?**

As at Honda, the union has typically been described as “useless” in workers’ efforts to enforce their rights and advance their interests.<sup>92</sup> That is not because the ACFTU is a weak or beleaguered or under-financed organization. The ACFTU is a nation-wide “mass organization” that is headquartered in Beijing and includes federations at the provincial, municipal, county, rural township, and district levels; as of 2010, it reported having 2.2 million “grassroots” branches at the enterprise level and 239 million members.<sup>93</sup> So why is this gargantuan union “useless” to workers seeking to improve their wages and working conditions?

One answer is quite simple: The ACFTU, while it is the only lawful labor union in China, is not a genuine representative of the workers but a creature of the Chinese Communist Party and a vehicle for promoting party rule and regime stability. There is much that is true and important in that simple answer, but there are also some important complications, contradictions, and changes within the ACFTU. In this part we will briefly review the ACFTU's history, structure, and function within the Chinese political and economic system. In the next part we will focus on some of the complications, contradictions, and changes within the ACFTU that might be illuminated by their intersection or contrast with U.S. labor law and labor relations, at least for scholars and practitioners of the latter.

#### *A. The ACFTU Outside the Enterprise*

The ACFTU, first established in 1921, went through ups and downs during Mao's rule, including virtual hibernation during the Cultural Revolution, before

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workers, we help the enterprise and state-run institutions restart their production sequence. As far as I know, there are over one hundred of these incidents each year.

“After the Passage of the Labor Contract Law, Can the Unions Extend Their Power?” Southern Weekend, July 4, 2007; Complete article available in Chinese at <http://www.infzm.com/content/7939>.

<sup>92</sup> See, e.g., Anita Chan, *Labor Unrest and Role of Unions*, China Daily, 6/18/2010, available at [http://www.chinadaily.com.cn/opinion/2010-06/18/content\\_9987347.htm](http://www.chinadaily.com.cn/opinion/2010-06/18/content_9987347.htm)

<sup>93</sup> Official ACFTU website (English), <http://english.acftu.org/template/10002/file.jsp?cid=63&aid=622>. See also Stanley Lubman, *The New Challenge of the Strikes Won't Go Away*, Wall St. Journal, China Real Time Report, July 14, 2010, available at <http://blogs.wsj.com/chinarealtime/2010/07/11/the-new-challenge-of-the-strikes-wont-go-away/> (citations omitted).

its reestablishment in 1978 on the cusp of economic liberalization.<sup>94</sup> There were brief flashes of independent activism within the ACFTU, but after 1989 (and Tiananmen, and the union-led challenge to communist rule in Poland), it was brought under tighter party control.<sup>95</sup> The ACFTU is one of the Leninist “transmission belts” by which decisions and dictates of party leaders are conveyed down to the “masses,” and the masses’ concerns up to the leaders.<sup>96</sup> But one can imagine that the messages that come from above are often more distinct, and the incentive to attend to them more powerful, than the voices from below. The ACFTU’s particular mission is especially contradictory, or at least ambiguous: It is supposed to both protect worker interests and advance the interests of “the working class as a whole” -- which include maintaining production and promoting economic growth -- all the while “upholding the Party’s cause” and “consolidating the Party’s basis of rule.”<sup>97</sup> In terms often heard today, the ACFTU is supposed to both protect worker rights (*weiquan*) and protect stability (*weiwen*). When the two aims conflict, *weiwen* almost invariably wins out.

At its modern inception in 1978, the ACFTU was adapted to function in a planned economy dominated by SOEs that were managed on behalf of “the worker state,” not shareholders.<sup>98</sup> The union’s constituents were the urban workers whose entire life centered around their “work unit” (*danwei*) and the “iron rice bowl” that went with it. (Even as to those workers, as we will see, the ACFTU functioned essentially as a branch of management, more oriented toward facilitating production than to representing workers’ distinct interests.) The ACFTU retained that character and that limited constituency for many years, even as private and foreign-owned capital and rural migrant workers began to flow into

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<sup>94</sup> For a concise recent account of the history and structure of the ACFTU, see China Labour Bulletin, *Protecting Workers’ Rights or Serving the Party: The Way Forward for China’s Trade Unions*, March 2009 (available at [http://www.clb.org.hk/en/files/share/File/research\\_reports/acftu\\_report.pdf](http://www.clb.org.hk/en/files/share/File/research_reports/acftu_report.pdf)).

<sup>95</sup> See Anita Chan, ---. The shift is seen in how trade unions were officially defined before and after Tiananmen. During the 1980s they were described as “independent social entities, which should not, in terms of organizational affiliation, be equivalent to working departments of the Party.” By contrast, the recent 15th National Trade Union Congress directed the unions to “dedicate themselves to helping consolidate the Party’s basis of rule, to realise its ruling mission and uphold the cause of the Party.” China Labour Bulletin, *Going it Alone: The Workers’ Movement in China (2007-2008)*, 70-71. For a concise account of the changing relationship between ACFTU and the CCP, see Bill Taylor & Qi Li, *Is the ACFTU a Union and Does It Matter?*, 49 J. of Indus. Rel. 701-715 (2007).

<sup>96</sup> On the “transmission belt” function of the ACFTU, see Jude A Howell, *All-China Federation of Trade Unions beyond Reform? The Slow March of Direct Elections*, 196 CHINA QUARTERLY 845 (2008); RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS*(2010), --

<sup>97</sup> See Simon Clarke, Chang-Hee Lee & Qi Li, *Collective Consultation and Industrial Relations in China*, 42 Brit. J. Indus. Rel. 235 (2004).

<sup>98</sup> Id.

China's "sunbelt," and even as the SOEs began to contract and, through restructuring, to mimic their market-driven private counterparts in many respects. In the past decade, the ACFTU has begun to extend its reach to include the migrant workers of the private and foreign-owned sector – to "organize" them (in a peculiar way that we will discuss below). Yet the dramatic transition from a state-controlled economy to a market economy brought no fundamental alteration of either the AFCTU's structure or its official mission.

So the ACFTU's ability to represent workers' interests may be compromised; yet the regime tolerates no alternative institutions of worker representation. The ACFTU's official monopoly is aggressively enforced on the ground. Independent union-like groups that purport to organize workers, especially across factories, are flatly illegal and virtually non-existent (though some see glimmers of independent worker organization in recent strike activity).<sup>99</sup> Even labor NGOs that advocate workers' interests or represent them in legal disputes find only a tenuous and shifting toehold. (We will briefly discuss the labor NGOs' situation below.)

The ACFTU's official monopoly status represents a frontal rejection of the principle of "freedom of association," a core international labor right and a central organizing principle of the International Labor Organization. That long made the ACFTU a pariah within the international labor community. The attitude of Western unions began to change as China's continuing economic growth, integration into the world economy, and impact on global labor standards made some form of engagement look increasingly vital, and as the regime's unflinching resistance to political change on this front discouraged hopes for the development of an independent labor movement.<sup>100</sup> The ACFTU, however flawed a vehicle of worker representation, came to be seen as "the only game in town" in a town that could not be ignored.<sup>101</sup> Many foreign trade union federations have thus looked for ways to engage, critically but constructively, with the ACFTU.

The ACFTU's official monopoly on worker representation, emblematic of the Chinese political system as it is, is particularly jarring when seen through the prism of U.S.-style voluntarist labor relations, where a majority in a particular bargaining unit can choose to be represented by more or less any union it wants, provided it is independent of management. Then again, over 92 percent of private sector workers in the U.S. lack any collective representation at all; we will return below to some reasons for that state of affairs. In the democratic corporatist or quasi-corporatist systems that prevail in most of Europe, by contrast, trade unions operate in closer coordination with the state, and workers are often effectively represented, in economic bargaining and in the polity through "social dialogue,"

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<sup>99</sup> China Labor Bulletin, ACTFU, 34.

<sup>100</sup> See, e.g., "Change to Win Delegates Visit China," available at <http://www.clntranslations.org/article/18/change-to-win-delegates-visit-china>.

<sup>101</sup> See, e.g., Taylor & Li, *supra* note --, at 712.

by a single dominant trade union or federation, whether they choose to be represented by that union, another union, or none at all.<sup>102</sup> Still, China's version of state corporatism remains unusual in its explicit prohibition of any trade union organization other than the one designated by the one-party-state.

At the same time, the formally monolithic character of the ACFTU obscures both crucial distinctions and interesting recent developments within the ACFTU. We have already noted an important distinction between the ACFTU hierarchy outside the enterprises and the enterprise chapters of the ACFTU. While the former is fairly regarded as an arm of the party, the latter typically function (if they function at all) more as an arm of enterprise management (as we will discuss below).<sup>103</sup> But these generalizations, too, risk obscuring important variations and developments, only a few of which we will highlight here.

The ACFTU hierarchy mirrors the organization of the party, from national to provincial and local levels of administration; and ACFTU positions are typically staffed by party cadres whose ACFTU tenure was often a stepping stone in a career within the party apparatus.<sup>104</sup> As a branch of the party-state, the ACFTU is obviously subject to party-state control. Yet control is not complete, and is not simply hierarchical. Party control operates mostly "horizontally," from the national party to the national ACFTU, from provincial party organizations to provincial ACFTU chapters, and so on down to the local level. As many scholars have observed, the sheer size and complexity of China confers a kind of *de facto* local "autonomy" from the national party.<sup>105</sup> The deep roots of this local autonomy are captured in the Chinese aphorism, "the sky is high, and the emperor is far away."

In short, both ACFTU and CCP officials at the local level have often been able to resist direction from the center. That resistance has typically been exerted in the interest of the local businesses that are both the engines of economic growth and often the source of personal enrichment. But it has also created some space for innovation on behalf of workers. For example, the ACFTU and party-state in Guangdong province (in the Pearl River Delta) and their counterparts in Zhejiang province (south-west of Shanghai) have experimented off and on and especially in the last few years, with both direct election of union officials and sectoral

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<sup>102</sup> See, for example, the description of wage bargaining in France in Christophe Vigneau, *Labor Law Between Changes and Continuity*, 25 COMP. LAB. L. & POL. J. 129-141 (2003).

<sup>103</sup> See Chang Kai, *From Individual Labor Relations to Collective Labor Relations*, Renmin Conference Materials, 65 (discussing "local unions' bureaucratization" -- *difang gonghui xingzhenghua* -- and "enterprise union boss-ification" -- *qiye gonghui laobanhua*).

<sup>104</sup> See Taylor & Li.

<sup>105</sup> For example, see YONGNIAN ZHENG, *DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS* (World Scientific, 2008).

collective bargaining.<sup>106</sup> Those experiments, to which we will return, laid a foundation for national reforms.

The horizontal nature of party control of the ACFTU, and the responsiveness to local concerns that this entails, is a double-edged sword for workers. On the one hand, greater central control of the ACFTU would hardly seem likely to enhance its accountability and responsiveness to workers at the grassroots. On the other hand, a centrally-directed ACFTU that is committed to representing workers, raising wages, and reversing trends toward growing inequality could be a powerful ally for workers in their disputes with private and foreign businesses. (Indeed, we suspect that many low-wage U.S. workers might prefer, wisely or not, to have a powerful worker-friendly arm of the state to bargain with employers on their behalf rather than a union that is independent but economically weak.)

In general, the combination of party-state domination *and* the local influence of business interests have made the ACFTU a very poor vehicle of worker representation. At least that has been true in recent decades when the regime's single-minded pursuit of economic growth has trumped both distributional concerns and labor standards enforcement. But as the regime has shifted its attention to the advancement of workers' interests and the improvement of wages and labor standards, the ACFTU could become a powerful ally or advocate for workers in their disputes with private and foreign-invested businesses.

Especially in the wake of the Honda strikes, powerful voices within the ACFTU have questioned the two-way "transmission belt" conception of its function, as well as its role in reconciling the interests of workers and employers.<sup>107</sup> They believe that employers are adequately represented through other channels, and see the ACFTU's function as the more coherent and traditional one (internationally speaking) of representing workers' interests vis-a-vis employers. That does not mean that they see the union's role in the adversarial terms familiar to U.S. and other Western labor relations systems, nor that they seek to arm themselves with the "economic weapons" by which this adversarial

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<sup>106</sup> See Jude A Howell, *All-China Federation of Trade Unions beyond Reform? The Slow March of Direct Elections*, 196 CHINA QUARTERLY 845 (2008). For reports on collective bargaining in Zhejiang, see "Collective Wage Consultation a Breakthrough for Resolving Labor Disputes in Wenling, Zhejiang," China Business Report, October 10, 2008. Translated into English by China Labor News Translations, Original article is available at: <http://www.cbh.com/news/gc/2008/109/08109142531HDBEIAJIC62E2JC8H712.html>. For reports on elections in Guangdong, see "Plans for election of union chair at Nanhai Honda" June 14, 2010. Translated into English by China Labor News Translations, available in Chinese at <http://new.takungpao.com/china/zgyw/79939.html>

<sup>107</sup> See Zhai Yu Juan, "Thoughts on the Labor Side of China's Collective Consultation." Renmin Conference Materials, 606. Prof Juan claims that management domination of enterprise unions and the enterprise's financial hold on many enterprise and local union chapters renders them incapable of adequately defending workers' rights during collective consultation.

contest is traditionally carried out in the U.S. But it is a major change that may both explain and trigger other changes in the ACFTU's structure and conduct.

*B. The ACFTU at the Enterprise Level and the Problem of Management Domination*

The enterprise chapters of the ACFTU, or "grassroots unions," have a rather different character. The enterprise unions are officially assigned the task of representing workers within the enterprise, including through collective bargaining (the nature of which we will discuss below). But their representative function is clouded by their other official functions, including promoting discipline and production. In the words of one prominent scholar, "firm level union branches are weak, non-democratic and subordinate to management."<sup>108</sup> That is partly because unions' incentive to represent workers is rarely backed up by democratic mechanisms of selection; indeed, management has traditionally been able to appoint one of its own ranks, usually a high-level manager who is also a party member, to lead the enterprise union.<sup>109</sup>

Let us pause for a moment to note the irony – at least from an American perspective – of the ACFTU encompassing *both* a massive nationwide wing of the Chinese Communist Party *and* hundreds of thousands of enterprise-level unions that are virtually pawns of profit-seeking capitalist corporations.<sup>110</sup> The contradictory nature of the ACFTU captures something essential about China's political economy since the unleashing of capitalism, and we will return to it. For now, let us focus on the character of those enterprise-level unions themselves.

The subordination of enterprise unions to management is partly a holdover from the SOE era in which ACFTU's present structure and functions were forged, and in which managers' responsibilities ran not to shareholders but to the workers of the enterprise and the "worker state."<sup>111</sup> That legacy turns out to explain a number of puzzles regarding the ACFTU, though it again begs the question why the union structure has not been overhauled to suit the needs of workers within

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<sup>108</sup> See Juan, *supra* note --; Stanley Lubman, *The New Challenge of the Strikes Won't Go Away*, Wall St. Journal, China Real Time Report, July 14, 2010, available at <http://blogs.wsj.com/chinarealtime/2010/07/11/the-new-challenge-of-the-strikes-wont-go-away/> (citations omitted).

<sup>109</sup> Simon Clarke, Chang-Hee Lee and Qi Li, *Collective Consultation and Industrial Relations in China*, 42 BRIT. J. INDUS. REL. 237, 242 (2004).

<sup>110</sup> One clue to the seeming paradox lies in the fact that the enterprise unions come under the jurisdiction and supervision of *local* party officials, who are widely seen as beholden to local businesses, not only by virtue of the commitment to "growth" above all (local cadres' assessment and future careers in the Party being dependent largely on their success in promoting growth), but also through dense and sometimes corrupt connections to local business owners. So one interesting aspect of Anita Chan's recent proposal for reform of ACFTU is to place the enterprise unions under the jurisdiction of higher levels of the party hierarchy, where pursuit of workers' interests as part of the "harmonious society" are less compromised by local corruption.

<sup>111</sup> See Clarke, *supra*, 237.

privately-owned profit-making enterprises. One answer is that, until the last decade, the ACFTU had almost no presence in the private and foreign-owned sector (where rural migrant workers predominated), and found itself mostly struggling to quell the anger and cushion the fall of urban SOE workers whose security, benefits, and status were crumbling in the wake of privatization and “restructuring.”

More recently, and especially in the era of the “harmonious society,” it has become clear to the regime that social harmony and political stability required addressing the concerns and quelling unrest among the millions of mostly migrant workers in the enormous and growing non-state sector. With these marching orders, ACFTU set out with much fanfare to “organize” the operations of large, Fortune-500 firms in China, most famously including Wal-Mart. And it has had some well-publicized success in doing so. By the beginning of 2009, the ACFTU claimed to have unionized more than 83 percent of the headquarters and 85 percent of the subsidiaries of the Fortune 500 companies that do business within China. Many districts now claim near-100 percent unionization rates among their Fortune 500 companies, with unions established in factories and investment banks alike. The ACFTU now has as its stated goal “to establish union organizations in all foreign-invested enterprises in China.”<sup>112</sup> Impressive; but what does it mean for workers on the ground?

Most of the ACFTU's “organizing” of foreign-owned enterprises has followed this pattern: Management gets a call from the local AFCTU office, which announces that the enterprise has been targeted for formation of a union chapter. When management in turn calls its lawyers in a panic, the lawyers deliver the “bad news” and the “good news”: The “bad news” is that management has little choice but to accede to the demand to “organize” an ACFTU chapter, and to channel two percent of the firm’s payroll to the union to fund its activities. The “good news” is that the union's presence will not otherwise make much difference to the firm's operations. That is because, first, management ordinarily can select (or arrange for the election of) the union chair, and can select someone who is not only friendly to management but part of management (albeit perhaps wearing his or her other hat as a CCP cadre). Second, if a union seeks to secure a “collective bargaining agreement,” it will agree to one that does little more than incorporate the law's minimum wage and other labor standards (along with some innocuous worker welfare provisions, like better food and occasional breaks for women workers).<sup>113</sup> Nor are these union chapters likely to foment labor unrest or work stoppages; for ACFTU unions do not back up bargaining demands with strikes, and indeed take seriously their responsibility to avoid work stoppages, as we have

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<sup>112</sup>Andreas Lauffs, *Responding to the Unionization Drive*, available at <http://www.bakermckenzie.com/RRChinaRespondingToTheUnionizationApr10/>.

<sup>113</sup> This “unionization timeline” was recounted in numerous interviews with international law firms in Shanghai and Hong Kong.

seen. Indeed, the ACFTU's ability to prevent strikes in its shops is often a subject of its negotiations with foreign-owned corporations.<sup>114</sup>

There are exceptions to this pattern. For example, there was a flurry of excitement among labor advocates and China watchers when actual grassroots union activists organized the first Wal-Mart store, and struck an unprecedented blow against Wal-Mart's global anti-unionism by winning recognition over management opposition. But excitement soon subsided when subsequent chapters in Wal-Mart stores, and even in that first store, fell back into old habits of compliance and coziness with management. As one source reported:

When Guo Haitao, the union chairman at Walmart's outlet in Nanchang [who had led the grassroots organizing drive,] attempted to add specific clauses to the framework agreement negotiated by the ACFTU and senior Walmart management that would benefit his members, he was simply bypassed by management, who got a union representative from another store to sign the original agreement. Gao resigned in frustration on 9 September 2008.<sup>115</sup>

Wal-Mart now touts its excellent labor relations in China as evidence of its new commitment to social responsibility, while workers still have no organization of their own to fight for their interests.

So why hasn't China overhauled its conception of the unions' role in the enterprise to meet the challenges that workers face within a private for-profit enterprise? We will have more to say about this below. But one answer may be this: The paradoxical toleration of management domination of the ACFTU's enterprise union chapters is emblematic of the paradoxical nature of Communist China's embrace of capitalist-led development. To explicitly acknowledge the existence of a basic conflict of interest between capital and labor within China – and the need for workers to have their own representatives in this conflict – would require a fundamental break from the principles of Marxist-Leninist-Maoist thought that formally underpin the Chinese regime, and from the prevailing dogma that China is in the “beginning stages of socialism.” Yet keeping faith with Communist ideology in this way has contributed to workers' lack of meaningful collective representation and protection against their capitalist employers.

*C. Brief Notes on the Staff and Workers' Representative Conferences, Labor NGOs, and Civil Society in China*

Before turning to a closer analysis of the ACFTU's role and potential future role in labor relations, we point out two minor qualifications to the ACFTU's institutionalized monopoly on worker representation. One of them -- the "staff

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<sup>114</sup> Our discussions with various district and municipal labor union leaders corroborated this fact.

<sup>115</sup> China Labour Bulletin, “Union chair resigns over the imposition of collective contracts at Wal-Mart,” September 23, 2008, *available at* “<http://www.clb.org.hk/en/node/100310>.”

and workers' representative congress" (SWRC) – is officially sanctioned but of questionable significance so far outside the state-owned sector ; the other – the handful of independent labor NGOs – is decidedly unofficial, often vibrant, but highly constrained.

*The SWRCs:* The ACFTU and its enterprise chapters are not the only institutions through which workers can be represented within the workplace. The SWRCs are another vestige of the “mass line” that is struggling to redefine itself in an era of mass markets.<sup>116</sup> SWRCs were originally designed, and constitutionally mandated, to complement the ACFTU and to help secure workers' place as masters of the enterprise in the SOEs.<sup>117</sup> Vested with an array of deliberative, supervisory, and consultative rights, SWRCs were meant to engage the workers more directly than the ACFTU, and to augment the “democratic” prong of democratic centralism.<sup>118</sup> Deng Xiaoping said in the 1950s:

The staff and workers' representative conference under the leadership of the Communist Party committee is a good means of broadening democracy in the enterprises, of recruiting workers and staff to take part in the management and of overcoming bureaucracy. It is an effective method of correctly handling contradictions among the people.<sup>119</sup>

But in the post-Deng era, SWRCs have not lived up to this potential.

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<sup>116</sup> The Chinese term (职工代表大会, or *zhigong daibiao dahui*) has several translations. “Staff and Workers' Representative Congress” perhaps best captures the inclusion of all employees of an enterprise, including workers, technicians, management, and party cadres.

<sup>117</sup> “State-owned enterprises practice democratic management through congresses of workers and staff and in other ways in accordance with the law.” Constitution of the People's Republic of China, Art. 16.

<sup>118</sup> The Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People, Article 52, sets out a comprehensive list of “functions and powers” of the SWRCs regarding factory operations and planning as well as wages, labor conditions, and discipline. Available at <http://www.lawinfochina.com/NetLaw/display.aspx?db=law&sen=rLdDdW4drhdDdWhdrhdTdW4d/LdDdWfd9Dd5dW4d9ddyWud9hdFdWEd/hvdWud/ddTdWud9Dd+&Id=1188&>.

<sup>119</sup> Ma Wen Kuei, “Industrial Management in China – How China's Socialist State-Owned Industrial Enterprises are Managed.” Peking Review, #9, Feb. 26, 1965. Available at <http://www.massline.org/PekingReview/PR1965/PR1965-09k.htm>. In 1980, soon after the Cultural Revolution, Deng reemphasized:

[C]ongresses or conferences of representatives of workers and office staff will be introduced in all enterprises and institutions. That was decided long ago. The question now is how to popularize and perfect the system. These congresses or conferences have the right to discuss and take decisions on major questions of concern to their respective units, to propose to the higher organizations the recall of incompetent administrators, and to introduce -- gradually and within appropriate limits -- the practice of electing their leaders.

Speech on Aug. 18, 1980 to an enlarged meeting of the Political Bureau of the Central Committee of the CCP, as discussed and endorsed by the Political Bureau on Aug. 31, 1980. Available at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1460.html>.

Even within SOEs, the powers of the SWRCs are qualified by the supervisory role of the party-state and the ACFTU chapter in the enterprise.<sup>120</sup> And in the era of liberalization and privatization, effective, functioning SWRCs appear to have largely vanished. The SWRC structures rarely traveled with the former SOE workers into privatized enterprises, and were even less likely to be seen by migrant workers or in foreign factories. The law still requires that changes to corporate by-laws and collective contracts “be submitted to the workers representative assembly or all workers”; but those requirements have been ignored, unenforced, or circumvented.<sup>121</sup> So at least until recently, the SWRCs have not been much discussed by Chinese labor scholars. At a recent conference, a Chinese scholar who predicted that the SWRCs might become important for the protection of worker rights was virtually laughed off the podium.<sup>122</sup>

That may be changing. The very fact that the law provides for a workplace-based worker organization with a bundle of participatory rights is significant, and has recently been exploited by various actors, with varying success. For example, the Foshan Honda strikers elected worker representatives to negotiate terms with management under the auspices of a SWRC.<sup>123</sup> Some multinational firms, under pressure to engage workers in the protection of their rights under codes of conduct, have sought to do so under the aegis of SWRCs.<sup>124</sup>

Policymakers also appears to be giving greater prominence to the role of the SWRCs. Since 2003, several provinces (and province-level municipalities and

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<sup>120</sup> Except for bi-annual SWRC meetings, the day-to-day functions of the SWRCs are basically carried out by the ACFTU chairs. *Supra* n. -

<sup>121</sup> See Labor Law of the People's Republic of China, Art. 33; Labor Contract Law of the People's Republic of China, Arts. 4, 51. These provisions, governing nearly *all* workplaces, require that collective contracts and changes to by-laws “be submitted to workers' representative committees or all workers.” Thus far, as courts and arbitration commissions have been unwilling or unable to enforce these provisions, and employers have felt little need to adhere to them. Moreover, sophisticated enterprises may include provisions in their employee handbooks that construe employee silence in the face of notice of changes to by-law or collective contract provisions (on a bulletin board, e.g.) as consent under these provisions.

<sup>122</sup> This occurred at a conference attended by one of the authors. To be sure, a claim that the ACFTU could become a viable representative of workers might meet the same reaction.

<sup>123</sup> “Foshan Honda Worker Representative Committee Letter,” *available at* <http://www.socialistbulletin.com/international/foshanhondaworkersrepresentativecommitteeletter> .

<sup>124</sup> One recent study found that SWRCs in foreign-invested enterprises were more successful at raising workers' wages and working conditions than SWRCs at domestic workplaces, perhaps because the former were more likely to be created according to law, while the latter are often controlled by managers or their relatives. Shi Xiuyin, *The Transformation of the Enterprise Power Structure*, Renmin Conference Materials, 473. See also Wang Shaobo, *A Case Study on the Workers' Rights Protection Mechanism during the Reform of a State-Owned Company*. Renmin Conference Materials, 532 (claiming that the SWRC of a SOE-turned-private enterprise was ineffective in consultations with management because it was packed with management representatives; frontline workers were unable to put themselves up for election).

autonomous regions) have issued dedicated regulations on SWRCs.<sup>125</sup> For example, Shanghai in 2010 required “all enterprises, public institutions and privately-run non-enterprise units and other organizations” to “establish the Workers Congress System.”<sup>126</sup> Shenyang’s new collective consultation legislation requires that collective contracts must receive the approval of the SWRC.<sup>127</sup> In Henan, in response to large-scale protests over the privatization of SOEs, the provincial standing committee stated that any SOE conversion that takes place without consulting the enterprise SWRC will be rendered invalid.<sup>128</sup>

It is difficult to predict the eventual role of SWRCs in China. Even though the law affords some powers to the heretofore-latent SWRCs, it does not necessarily protect worker advocates who use such structures to challenge current policy and party-state authorities.<sup>129</sup> Still, SWRCs may offer workers a politically benign, legal route to enterprise-level participation. They also offer to reform-minded party-state and ACFTU officials, and even to multinational corporations pursuing socially responsible supply chain practices, considerable room to experiment with worker participation within private enterprises without necessarily raising the spectre of independent union activity. The SWRCs are deserving of fuller treatment than we can give them here; we set them aside to focus on the ACFTU.

*Labor NGOs and Civil Society:* The ACFTU’s monopoly leaves a narrow opening for some small groups that help individual workers, or occasionally small groups of workers, with social or legal problems. Such “labor NGOs” have proliferated in recent years, but are closely monitored lest they overstep their permissible bounds. To that end they are formally required to “register” or “attach themselves” (*guakao*) with the local ACFTU chapter or some other branch of the party-state, thus submitting themselves to the authority of the party and officially maintaining the single channel of worker representation. The willingness of many labor NGOs to do so, and the toll it takes on their independence, led one scholarly

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<sup>125</sup> The ten jurisdictions include provinces, province-level municipalities, and autonomous regions.

<sup>126</sup> Regulations of the Shanghai Municipality on the Workers Congress, arts. 2, 3. Available at <http://www.labour-daily.cn/web/NewsDetail.aspx?IssuanceID=224757>. Like the Shanghai Regulations, most of the other provincial regulations explicitly require that all enterprises shall establish the SWRC system. However, the Shanghai Regulations are unique in that, when defining the functions and powers of SWRCs, they do not treat SOEs and private enterprises differently.

<sup>127</sup> Qiao Jian, *Exploring the New Policy of Harmonious Labor Relations*, Renmin Conference Materials, 438.

<sup>128</sup> Wang Shaobo, *A Case Study on the Workers’ Rights Protection Mechanism during the Reform of a State-Owned Company*. Renmin Conference Materials, 53,

<sup>129</sup> “A Brief History of a Workers’ Rights Group in China.” China Labour Bulletin. Available at <http://www.china-labour.org.hk/en/node/100560>.

critic to label those organizations as “anti-solidarity machines.”<sup>130</sup> The level of monitoring and enforcement of the registration requirement varies over time and across regions, but it appears to have intensified in the past two years.<sup>131</sup>

So labor NGOs are of two types in China: those that accept the constraints and the benefits that go with official legitimacy, and those that try to operate independently. In the first group, some labor NGOs find or create space for worker and community engagement while maintaining relatively positive relations with local labor department or ACFTU officials. After all, local party-state officials control access to much of what workers need. Moreover, the draw of governmental approval is a powerful force in Chinese society, and is actively sought by many in the labor NGO world as a source of legitimacy. This is understandable in a society in which independence from the state is often equated with opposition; the difference between *feizhengfuzuzhi* and *fanzhengfuzuzhi* (“non-governmental” and “anti-governmental” organization) is as subtle politically as it is linguistically.

The situation is more tense for the relatively few NGOs that seek to remain independent. These NGOs usually attempt to register as businesses to avoid the entanglement entailed by registration with the local ACFTU or Labor Department. Yet even if they manage to retain a business license, they may still meet many bureaucratic hurdles and pitfalls, ranging from an ill-fated run-in with a local official with a grudge to concerted pressure from many departments in response to local, provincial or central government policy.

The general sense in centers of labor NGO activity like Guangdong is that the space for NGOs, including labor NGOs, has steadily narrowed from 2006 to the present.<sup>132</sup> Even in this more repressive environment, however, there are interesting cross-currents, especially in Guangdong. While various departments are tightening their grip, some ACFTU officials are reaching out to NGOs, presumably because they have something the ACFTU needs: knowledge of how to reach and win the allegiance of workers. Consider the recent experience of one

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<sup>130</sup> Ching Kwan Lee & Yuan Shen, *The Anti-Solidarity Machine: Labor NGOs in China*, paper presented at conference on “The Changing Face of Chinese Labor and Employment”, Cornell ILR, Sept. 26-28, 2008.

<sup>131</sup> Labor NGOs in Beijing were “reminded” in 2009 of their obligation to register with the ACFTU; and those in Guangzhou were invited to meet with local ACFTU officials, who touted the advantages of formal affiliation (but did not demand it). In Shanghai, the authors know of no independent labor NGO that has managed to operate for any significant amount of time before being forced to leave. *See also* “Investigative Report of Guangdong Province on the Question of ‘Professional Citizen’ Legal Agents” Guangdong Provincial Committee on Politics and Law of the Chinese Communist Party, January 2009. Translated by China Labor News Translations, available at [http://www.clntranslations.org/file\\_download/94](http://www.clntranslations.org/file_download/94).

<sup>132</sup> Some of the pressure stems from general effort to “tidy up” and “ensure stability” in the run-up to events drawing foreign attention -- not only to the Beijing Olympics in 2008, but also the Asian Games in Guangzhou in 2009 and the International Collegiate Games in Shenzhen in 2011.

Guangdong labor NGO and its director: Even as five different local departments were trying to pressure the landlord to evict him and his organization, local and provincial ACFTU leaders approached him in 2011, asking to study his worker training and outreach methods. This shows, once again, that the Chinese party-state is not a monolith; and yet the overwhelming sense among NGO representatives is that local ACFTU cadres who might speak up in support of labor NGOs are greatly overmatched by those committed to government control of civil society.

The party-state's treatment of the labor NGOs is thus one site for a major struggle within the regime over divergent strategies for maintaining political stability – what one insightful and outspoken Chinese scholar calls “flexible stability” versus the prevailing strategy of “rigid stability.”<sup>133</sup> For the ACFTU's hierarchical structure and its monopoly on lawful representation of workers is not unique to the labor context. It is emblematic of China's version of “state corporatism,” in which there is a single hierarchically-organized, officially approved channel for representation of group interests – for women, lawyers, religious organizations, and youth as well as for “workers” – under the overall supervision and control of the CCP.<sup>134</sup>

Early in the post-Mao era, the regime's deep commitment to this single-channel model of interest representation, so strikingly at odds with Western pluralist conceptions of civil society, was nearly unbending:

[W]hen two national associations of calligraphy connoisseurs emerged in the 1980s, Beijing decreed that one and only one could be legally registered, and ordered that they therefore needed to merge into one national association. [Similarly,] when fans of a popular soccer team in the city of Shenyang in the late 1980s spontaneously organized themselves into two fan clubs encompassing two different social constituencies, the city authorities demanded that even fan clubs had to be legally recognized and that the two clubs would accordingly need to merge, since only one could be recognized and registered.<sup>135</sup>

In many ways, Chinese civil society has come a long way since the 1980s. Innocuous, non-political associations devoted to calligraphy or soccer do not raise

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<sup>133</sup> Yu Jianrong, “Maintaining a baseline of social stability,” Speech to the Beijing Bar Association, December 26, 2009. Translated on China Digital Times website; <http://chinadigitaltimes.net/2010/03/yu-jianrong-maintaining-a-baseline-of-social-stability-part-i/>.

<sup>134</sup> See Anita Chan, *China's Trade Unions in Corporatist Transition*, in JONATHAN UNGER (ED.), *ASSOCIATIONS AND THE CHINESE STATE: CONTESTED SPACES* (Armonk, NY: M.E. Sharpe, 2008), pp. 69-85.

<sup>135</sup> Jonathan Unger and Anita Chan, *Associations in a Bind: The Rise of Political Corporatism in China*, in JONATHAN UNGER (ED.), *ASSOCIATIONS AND THE CHINESE STATE: CONTESTED SPACES* (Armonk, NY: M. E. Sharpe, 2008), pp. 48-68.

much concern these days. Yet this rather recent history underscores the strong anti-pluralist currents that have so palpably inhibited the development of civil society.<sup>136</sup>

The hostility to autonomous associational activity is strongest, of course, as to overtly political associations: While many Chinese citizens feel quite free to speak their minds as individuals these days, even on political matters, there is virtually no freedom to join with like-minded others to pursue political aims.<sup>137</sup> Liu Xiabo, the imprisoned Nobel Laureate, spoke his mind in China for many years; but when he helped to circulate a petition in support of freedom and democracy, he crossed the line from speaking to organizing, and became a “criminal.”<sup>138</sup> Labor groups occupy an interesting and distinct middle ground: politically sensitive, and thus kept under close watch and narrow constraints; and yet resonant with official Communist ideology, and thus afforded a modicum of toleration within those constraints, and sometimes able to push back against those constraints.

#### **IV. The ACFTU and the Elision of Labor-Management Conflict**

Let us return to the ACFTU. The foregoing account raises many “labor law” questions -- about the legal status of the strike, the nature and legal framework for collective bargaining, and the structure of the union. But behind these “labor law” questions is a unitary, “state corporatist” view of the interests of labor, management, and the state that originates in the era of the planned economy but that continues to have a powerful hold in China. With the expansion of the private

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<sup>136</sup> Consider the struggle of Chinese Catholics with the only officially-sanctioned Catholic organization in China, The Chinese Patriotic Catholic Association, which denies Vatican authority to appoint clergy, among other things. As in the labor context, China's response has been measured as to the average Catholic, but harsh as to the leaders of any attempt to undermine the CPCA's monopoly; several of the latter have been sentenced to decade-long prison terms. See “Another Underground Priest Arrested in Fujian,” Asia News, March 24, 2010, *available at* <http://www.asianews.it/news-en/Another-underground-priest-arrested-in-Fujian-17965.html> .

<sup>137</sup> This model was recently defended in a NYTimes op-ed, which argued that China is wise to allow “greater popular participation in political decisions if and when it is conducive to economic development and favorable to the country’s national interests”; that “political rights...should be seen as privileges to be negotiated based on the needs and conditions of the nation;” and that, conversely, behavior that is deemed contrary to national interest may be legitimately suppressed, sometimes violently, as with the “decisive..put down” at Tiananmen in 1989. Eric Xi, “Why China’s Political Model is Superior,” NYTIMES, February, 16, 2012, *available at* <http://www.nytimes.com/2012/02/16/opinion/why-chinas-political-model-is-superior.html>.

<sup>138</sup> See The Beijing Municipal High People's Court Appeal Decision in Liu Xiaobo's Case, *available in English at* [http://www.hrchina.org/public/contents/article?revision\\_id=173999&item\\_id=173783](http://www.hrchina.org/public/contents/article?revision_id=173999&item_id=173783) (“Regarding Liu Xiaobo’s grounds for appeal and counsel’s defense, through reviewing, the evidence in the case has provided sufficient proof of Liu Xiaobo’s use of Internet features to incite subversion of our country’s state power and the socialist system by using the methods of publishing slanderous essays and extensively collecting signatures online. Liu Xiaobo’s actions have conspicuously overstepped the bounds of free speech and constitute a crime.”)

economy and the subjection of the SOEs to market forces, the Chinese party-state shifted from conceiving of firms' management as an integral component of the party-state to a more familiar (to us) conception of firms as relatively autonomous actors whose activities needed to be regulated in the interest of society but not directly managed. But the regime has yet to make that shift with respect to labor. The ACFTU continues to reflect a conception of organized labor as an integral component of the Party-directed system of governance, as opposed to a set of relatively autonomous, self-organized groups whose activities need to be regulated. Labor law in the U.S. exemplifies the latter view – with mixed results from the standpoint of labor.

#### *A. Collective Bargaining and the Right to Strike*

Strikes have gotten a good deal of attention recently within China; and so has the idea of strengthening mechanisms for collective bargaining, and making it a real force for improving workers' wages and working conditions at the enterprise level. What is still largely missing is any direct link between collective bargaining and strikes. Strikes have never been part of the ACFTU's repertoire; on the contrary, the ACFTU is charged with maintaining the continuity of production and avoiding work stoppages. And there is no active discussion of changing that.

This leads to the question of what will impel employers to agree to, or even consider, a union's collective bargaining demands. In a recent article in the official China Daily on the ACFTU's call to strengthen collective bargaining, an ACFTU spokesperson addressed the question:

Currently, there is no law in China requiring companies to sign collective contracts with their employees, which explains why there is little incentive for enterprises to do so. “But if we made it mandatory and stepped up punishment for violators, I think workers would be placed in a much stronger position.”<sup>139</sup>

Perhaps so. But would the law also mandate a decent contract?<sup>140</sup> That is not generally how collective bargaining has worked historically in the West.<sup>141</sup> It is not legal compulsion but economic pressure, primarily based on the capacity to interrupt production, that historically has been the linchpin of workers' bargaining power through the history of organized labor. Without a legal right to strike, what clout does the union have behind its economic demands (even if it were somehow structured and motivated to make such demands)?

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<sup>139</sup> Qian Yanfeng, “Collective contracts sought for workers,” China Daily, July 9, 2010, available at [http://www.chinadaily.com.cn/china/2010-07/09/content\\_10084430.htm](http://www.chinadaily.com.cn/china/2010-07/09/content_10084430.htm).

<sup>140</sup> The answer could be yes – in the form of compulsory interest arbitration. See *infra* pp. ---.

<sup>141</sup> There are exceptions, of course, in the form of interest arbitration; that has been largely limited to the public sector in the U.S., but is more widespread in Canada; more on this below). A far more extensive form of interest arbitration has occupied center stage in Australian labor relations in the form of the “award system.” The Australian case thus offers a potentially useful source of learning to Chinese law reformers.

Some Chinese labor scholars and trade union officials are asking that same question, and contending for some legitimation of strike activity. For strikes, though common, are not currently legal (or illegal) in China.<sup>142</sup> A leading Chinese labor law scholar, Chang Kai, has been particularly vocal in his support for legal recognition (and reasonable regulation) of strikes.<sup>143</sup> The vice-chairman of the Shenzhen Federation of Trade Unions, Wang Tongxin, recently commented that strikes were nowadays “as natural as arguments between a husband and wife.” He called for a more relaxed approach to strikes, which were “the inevitable result of market economics and something society would have to learn to accept.”<sup>144</sup> This public statement by a leading ACFTU official offers some evidence that the role of strikes in the “harmonious society” may be changing (though Guangdong Province, where Shenzhen is located, and Shenzhen in particular are known for their exceptionalism, politically, economically, and culturally).

Still, most discussion of “the right to strike” in China is more fraught with anxiety. That is partly *because* strikes in China today are unauthorized and take place wholly outside of any organizational structure. Three hundred major strikes took place in the summer of 2010; all were “organized” by the workers themselves, such as they were organized at all.<sup>145</sup> Not surprisingly, in the absence of lawful and open leadership, these strikes were rather chaotic -- and hardly congenial to the pursuit of the “harmonious society.”

When we picture a strike in the U.S., by contrast, we may envision a small group of workers holding picket signs, perhaps marching in a loop on public property at the periphery of the job site, perhaps watching and shouting as striker replacements cross the picket line to take their jobs. A picket line can be a lively and loud affair, even mildly alarming to bystanders unaccustomed to public shouting. But there is rarely any risk of disorder or violence, for the “right to strike” is surrounded with prohibitions and limitations on the number of pickets, their slogans, and the content of their picket signs, limitations that union officials are compelled to enforce under the potential threat of punishment and liability.

One lesson from the U.S. might be this: When strikes are lawful but regulated, and organized by entities that are capable of being held legally accountable for infractions and that have coffers to protect, they pose very little threat to social order even if they do interrupt the employer’s operations. Indeed, many strikes in the U.S. often do not manage to do even that. Although the strike

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<sup>142</sup> See *supra* fn. 77

<sup>143</sup> See Chang Kai, How the Government Deals with Strikes (Aug. 2010), available at China Labor News Translations, <http://www.clntranslations.org/article/62/strike+law>.

<sup>144</sup> See *Protecting Workers' Rights*, *Supra*, 78.

<sup>145</sup> Chang Kai, *From Individual Labor Relations to Collective Labor Relations*, Renmin Conference Materials, 67.

is still enshrined in U.S. law as the primary legitimate “economic weapon” in labor’s arsenal for pressing its bargaining demands, the surrounding limitations have rendered the strike largely futile for most workers. Two limitations in particular are often held responsible for the futility of most strikes: the employer’s right under U.S. labor law to permanently replace (though not to fire) strikers engaged in a lawful, “protected” economic strike; and the prohibition on “secondary” pressures against other firms that do business with the target but are deemed legally “neutral” in the dispute. Therein lies another lesson from the U.S.: A legal “right to strike” leaves much room for restrictions that may render the strike quite ineffectual.

We can extend the point: Nowhere in the world, as far as we know, is there a right to strike without boundaries that define some strikes and some strike conduct as illegal. Unfortunately, one can imagine that those boundaries might be particular confining and aggressively policed in China. So while the prospect of legalizing the “right to strike” is chilled on one side by visions of violent disorder, some labor advocates fear something like the opposite: They worry that a “right to strike” in China would inevitably come with sharp-edged limitations that would define most actual strikes and strike activity as illegal, and would do more to embolden their repression than to legitimate them.<sup>146</sup> They are reluctant to clarify the legally ambiguous character of the strikes that are taking place now, and that are manifestly getting results for many workers, lest clarity facilitate repression.

The Honda strikes quelled some of these concerns and fed others. On the one hand, the strikers appear to have been both more organized and more orderly than most strikers in the past, though accounts vary.<sup>147</sup> That might help to enable reformers to portray the strike as a legitimate form of labor protest rather than a descent into mass criminality. On the other hand, the Honda strike and its aftermath might reinforce the conviction that workers in China have gotten much of what they have gotten precisely by making trouble on the streets, and that the current legal ambiguity surrounding the strike has perhaps allowed them to do that with less police and regulatory intervention than they are likely to get with a legally-defined and circumscribed “right to strike.”

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<sup>146</sup> See Feng Tongxiang, *The Sensitive Issues and Rational Solutions to Collective Labor Disputes in China*, Renmin Conference Materials, 197 (claiming that the current system of the ACFTU coming in to mediate disputes between striking workers and management is working); China Labor News Translations, *Should China create a law on strike?* (July 20, 2011), available at <http://www.clntranslations.org/article/62/strike+law>. Not unlike what happened with the much-lauded Beijing Protest Zones during the 2008 Olympics. See “Beijing’s protest zones: Apply at your own risk,” *NYTimes*, August 13, 2008. Available at <http://www.nytimes.com/2008/08/13/world/asia/13iht-protest.2.15242827.html>.

<sup>147</sup> Prof Chang Kai claims that the major strikes of 2010 were similarly orderly and non-violent, and involved no significant criminal activity. Chang Kai, *From Individual Labor Relations to Collective Labor Relations*, Renmin Conference Materials, 67.

Interestingly, two major proponents of the legalization (and regulation) of strikes in the wake of Honda, were Chang Kai, a prominent labor law scholar who represented the striking workers in some discussions, and Zeng Qinghong, the many-hatted manager of the Guangzhou Automobile Group and National People's Congress member whose role as "mediator" of the disputes was so celebrated in the Chinese press.<sup>148</sup> The latter's support for more forthright legal treatment of strikes can only fuel the anxiety with which many labor advocates confront such a prospect.

### *B. Union Structure and Management Domination*

Fundamental labor law questions are also raised by the character of ACFTU's enterprise unions and their domination by management. The issue has three related facets: *De facto* management domination, the lack of a robust electoral system for choosing union leaders, and managerial employees' membership in the union alongside production workers.

For a U.S. observer, these enterprise unions resemble "company unions." Company unions were popular with some U.S. companies in the 1920s and early 1930s, largely as a device to fend off independent union organizing, but were outlawed by the NLRA in 1935 and have since been largely extinct.<sup>149</sup> There has been a much discussion among U.S. labor law scholars and reformers about whether the NLRA's ban on "company unions" goes too far, and whether it should be amended to permit some forms of employee representation that are initiated and supported by management in workplaces where employees are not represented by an independent union. But there is no serious challenge to the idea that employees have a right to choose independent union representation, and that trade unions should be elected by employees and independent of management.

So the extent of management domination of the enterprise unions, and the resemblance to old-style "company unions," is striking from a U.S. perspective. A Chinese labor law scholar alluded to the analogy recently in the *China Daily*:

Unlike their Western counterparts, which are independent of management, China's labor unions get most of the funds from their companies, Li Xiaoping said. "That undermines the independence of labor unions, whose leaders find themselves in an awkward position. While they are supposed

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<sup>148</sup> See China Labor News Translations, Should China create a law on strike (July 20, 2011), available at <http://www.clntranslations.org/article/62/strike+law>.

<sup>149</sup> While old-style "company unions," or formally constituted employee representation plans, are largely extinct in the U.S. since the 1930s, less formal employee representation schemes appear to be surprisingly common given their probable illegality. See John Godard & Carola Frege, *Union Decline, Alternative Forms of Representation, and Workplace Authority Relations in the United States*, Unpublished paper, available at --- (34% of non-union employees surveyed in 2009 reported that their employers had established a system in which employee representatives met with management about workplace issues, often including wages and benefits).

to defend workers' rights, they do not dare offend company management that pays their salaries."<sup>150</sup>

But the funding issue is only the beginning. As of 2006, according to an ACFTU report, "the proportion of union chairmen serving concurrently as corporate officers at private domestic and foreign invested companies in [Guangzhou] was as high as 98.7 percent."<sup>151</sup> Until recently, it was typical for a firm's head of human resources to also serve as chair of the union.

That pattern has changed. The Chinese labor academy has begun to rally around the notion that workers need their own representatives free from management control.<sup>152</sup> And official ACFTU policy now prohibits executives, deputy executives, human resources managers, and partners of an enterprise, as well as their close relatives, from serving as chair of the enterprise union; that policy appears to be taking hold on the ground.<sup>153</sup> That is one step -- and yet only one step -- in the direction of reducing management domination of the enterprise unions.

The role of managerial employees in the enterprise unions is partly a product of the comprehensive definition of the "employees" of an enterprise that are represented by the union: Supervisors and managers are not only "employees" entitled to ACFTU representation; they are also part of a single all-inclusive "bargaining unit" (a term they do not use) with the lowest-paid rank-and-file workers. We will return to that issue. Of course the latter greatly outnumber the former, and would seem to be able to outvote the managers in any election for union leadership. As noted above, however, elections have thus far been easily manipulated by management when they occur at all.<sup>154</sup> A number of factors contribute to that result: the lack of a clear mandate for democratic elections from the center; the lack of any official machinery or rules governing such elections; the high turnover and extreme educational and economic disadvantages of rural migrant workers, especially in the early decades of their influx into the factories; and pressure from local party officials (who oversee enterprise-level unions and elections, as Lubman notes above) to placate local business interests.<sup>155</sup>

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<sup>150</sup> Qian Yanfeng, *supra* fn. 101.

<sup>151</sup> China Labour Bulletin, "Protecting Workers' Rights," 26, fn. 39 (Citing "Unions: The gap between ideal and reality). Sino-Foreign Management), 2006, No. 10, 28-29).

<sup>152</sup> Perhaps most vocal has been Professor Chang Kai of Renmin University. See Chang Kai, Lun Zhongguo De Tuanjie Quan Lifa Jiqi Shishi [Coalition (or Associational) Rights in China: Legislation and Implementation], 121 Dangdai Faxue [Contemporary Law Review] 46 (2007).

<sup>153</sup> The current legislation, the Trade Union Law of the People's Republic of China, Chapter II, Article 9, outlaws relatives of executives, but not executives themselves. But several knowledgeable interlocutors informed us that ACFTU policy prohibited managers themselves from serving as union chairs.

<sup>154</sup> See Howell, *supra* note --.

<sup>155</sup> *Id.*

Management control can sometimes be cloaked in election-like trappings. In one large U.S. multinational company, for example, management chooses both nominees and "electors."<sup>156</sup> Representatives of management say to a working group, "We think workers X, Y, and Z would be good representatives of this group; anyone who disagrees please raise your hand." No one disagrees. The management-chosen electors then vote on the management-nominated candidates, e.g., knocking two candidates off the slate of nine. The seven who remain are then assigned roles on the union board.

There has been a good deal of discussion lately, however, about requiring real elections for union leadership within the enterprises, and some experimentation with elections by ACFTU itself. A 2008 posting on the ACFTU's official website illustrates what may be the new line on elections:

Dalian Economic Development Zone has introduced a new electoral practice: Direct election by the rank and file. [For example, the] trade union chairperson of a joint venture company in Dalian Economic Development Zone ... sought a second term, but the trade union council in the development zone refused to confirm him in office. The reason: The majority of workers were dissatisfied with his performance during his tenure. *It is reported that since direct election was introduced in 2003, 13 trade union chairpersons have come up for re-election but not a single one of them got elected.*<sup>157</sup>

So real elections do matter, even if managers are part of the union and eligible to hold office, and even if elections are still vulnerable to management manipulation. The more educated and rights-conscious migrant workers of today – at least if they are backed by the local party and by a tight labor market – may be able to overcome managerial pressure to choose a management-friendly leader. There are some, yet unconfirmed, reports that the Dalian experiment may be spreading, and that up to 20 percent of enterprise unions in Zhejiang province have held direct elections for their union leaders.<sup>158</sup> We will return to the question and the form of elections, which play a major role in recent reform proposals.

There remains the puzzling notion that high-level managers and production workers belong in the same union. From a U.S. perspective, it seems obvious that managers and lower-ranking production workers have fundamentally different interests; managerial employees seem likely to side with "the employer" on many issues of concern to the latter, and in any case simply do not share the same

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<sup>156</sup> This procedure was described to us in a confidential interview in June, 2011.

<sup>157</sup> ACFTU website (English language version), available at <http://english.acftu.org/template/10002/file.jsp?cid=57&aid=405> (emphasis added).

<sup>158</sup> These reports were garnered in discussions with labor scholars and lawyers on a recent trip to the Yangtze Delta region

conditions of employment.<sup>159</sup> The conflicting interests of different groups of employees are reflected in U.S. labor law both in the exclusion of managers and supervisors from the definition of covered "employees," and in the concept of a "bargaining unit," the members of which are supposed to share an indivisible "community of interest." But in China, all of the employees in the enterprise – wall to wall and top to bottom – are effectively in one bargaining unit.<sup>160</sup>

Part of the explanation for the comprehensive scope of the ACFTU's constituency lies, again, in the ACFTU's historical origins in the SOE-dominated state socialist economy. In the heyday of the "iron rice bowl" model, there was a real sense in which the SOEs were run for the benefit of all the workers, both as citizens of the enterprise and as citizens of the Chinese state, which owned the enterprise and received any surplus proceeds.<sup>161</sup> Egalitarian rhetoric was accompanied by relatively egalitarian pay and benefits, and workers' social status and economic security rivaled that of managers.

We do not mean to romanticize Maoist social structure; apart from considerations of political morality, overwhelming repression and rampant inefficiencies made it both politically and economically unsustainable. But the relatively egalitarian character of the pre-1978 Chinese economy may render comprehensible the notion that the participants of an enterprise were all in it together and required no separate representation. The question, though, is how that notion has managed to survive in the decades since the advent of the "labor contract system" and the commodification of labor, the introduction and growth of private profit-making enterprises, and the spectacular economic inequalities that have followed.

Perhaps it is just a matter of time. Clashes between the interests of workers and bosses in private firms have been on daily display; and the question of how to steer those conflicts into peaceful channels is one of the most pressing challenges facing the regime. To some extent the current patterns may reflect a perception that workers are not sophisticated enough to perform union board duties to the satisfaction of either management or their fellow workers. But report after report

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<sup>159</sup> The exclusion of supervisors from union representation and collective bargaining in the U.S. is more controversial, and more reflective of management's desire to maintain control of the workplace than of unions' suspicion of supervisory loyalties.

<sup>160</sup>*See* Trade Union Law of the People's Republic of China, Chapter I, Art. 6 ("The basic duties and functions of trade unions are to safeguard the legitimate rights and interests of workers and staff members. While protecting the overall interests of the entire Chinese people, trade unions shall represent and safeguard the legitimate rights and interests of workers and staff members.")

<sup>161</sup>*Id.* at Art. 5 ("Trade unions shall organize and conduct education among workers and staff members in order that they shall, in accordance with the provisions of the Constitution of the People's Republic of China and other laws, give play to their role as masters of the country and participate in various ways and forms in the administration of State affairs, management of economic and cultural undertakings and handling of social affairs...")

of able, sophisticated worker leaders in many recent high-profile labor disputes would seem to belie this theory.

Labor relations cognoscenti in the U.S. might surmise that the comprehensive wall-to-wall, top-to-bottom definition of ACFTU's constituency within the enterprise, and the concomitant denial of deep conflicts between labor and management, is an outdated artifact of the socialist era that is due to be corrected in the next wave of labor law reforms. But that does not seem to be the case. The ACFTU does appear to be refocusing its mission on the representation of workers and not employers, and backing that up with the election of enterprise union officials. Still, the notion of explicitly recognizing conflicting interests among workers or between workers and managers – either through a redefinition of the "employees" who are covered by collective bargaining at all or by something like separate "bargaining units" within the enterprise – has gained little traction even among forward-looking Chinese policymakers and scholars in the labor field. These ideas are no more appealing to Chinese reformers than the idea of unions organizing and using strikes as an "economic weapon." Even now, the ACFTU's two-pronged mandate to both *weiquan* (protect worker rights) and *weiwen* (protect stability) is on the lips of nearly every union representative with whom one speaks. And it seems clear that when push comes to shove, the union's duty to protect stability trumps the protection of worker interests.

Resistance to the notion of institutionalizing conflict within enterprises runs deep. More than simply a remnant of the planned economy, it may speak to something essential about the "Chinese characteristics" of its labor relations system, and indeed about the regime's overarching aspiration toward a "harmonious society." Even in an era of widespread labor conflict, the idea of recognizing and institutionalizing conflict through distinct organizational outlets meets deep-rooted skepticism, even puzzlement. The ACFTU, with its wall-to-wall and top-to-bottom conception of interests in the enterprise, and its unitary nationwide hierarchy, still represents the prevailing view: Among and within the legitimate social relationships and actors in the society – which now include capitalist corporations – "contradictions" can and should be mediated within comprehensive institutions, not expressed and fought out between contesting ones.<sup>162</sup>

U.S. labor law assumes that there are different and often conflicting interests, both among different groups of workers and between workers and "the employer"; *and* that peaceable resolution of those conflicts requires that they be recognized and expressed through adversarial bargaining by agents that are loyal to and chosen by those whom they represent. That has led to fairly vigorous and

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<sup>162</sup> For a powerful minority view, see Yu Jian Rong's idea of "flexible stability," that the widespread protection of worker rights will secure flexible, and more robust, stability. Yu Jian Rong, *supra* note ---.

effective representation, and significant economic gains through collective bargaining, for the shrinking minority of U.S. workers who are represented by unions. It has also helped to generate aggressive managerial resistance to union organizing and market pressures on unionized operations in competitive sectors. And it has probably contributed to the limited appeal of unions to many American workers, who appear to have little appetite for open conflict with their employers, and who express a decided preference for more cooperative structures of worker representation even if that means less powerful representation.<sup>163</sup> It seems that many U.S. workers would prefer a more harmonious society, provided that they have an effective opportunity, through some collective mechanism, to speak and to be heard. On the other hand, there is deep and broad support in the U.S. for the notion that workers have a right to form their own union -- to go into opposition, as it were, against employers who treat their workers badly.

By contrast, Chinese labor law and the structure of the ACFTU still accord no explicit recognition of conflicts of interest even between production workers and top managers, and has generally allowed the latter to dominate at the enterprise level. That has led to a widespread perception among workers and many of their allies in China that the ACFTU is "useless" in pressing workers' concerns at the enterprise level.<sup>164</sup> At the same time, and not just coincidentally, one sees relatively little managerial resistance to ACFTU's organizing efforts, allowing for rapid membership growth in the last few years.<sup>165</sup> In short, the ACFTU's recent organizing successes may stem as much from the union's

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<sup>163</sup> Among non-union, non-supervisory employees in the U.S., 30 to 40 percent say they would like to have a union. RICHARD FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 87 (2006). But over 80 percent say they would like to have jointly-run employer-employee committees of a sort that violates federal labor laws (id.:84). Workers said they preferred an organization with which management cooperated even if it had no power to an organization that had more power but that management opposed by a margin of nearly three to one (63 to 22 percent) (id.).

<sup>164</sup> Anita Chan *supra*, See also Jonathan Soble, *Toyota Affiliate Hit by Strike in China*, FINANCIAL TIMES, June 18, 2010 ("The workers, who have dismissed the ACFTU as "useless" and "a traitor", are representing themselves in the talks. 'We don't know much about this - it's a company matter,' said a township propaganda official, as he covered up reports of the strike lying on his desk."). Available at <http://www.ft.com/cms/s/0/316bf294-7a71-11df-9cd7-00144feabdc0.html#axzz1Gpb87uUB>.

<sup>165</sup> "Chinese Trade Unions Make Progress in 2010," ACFTU English Press Release, Jan. 31, 2011 ("Devoting major efforts to strengthening the unionization and the membership growth work. By the end of September of 2010, the number of countrywide union members had reached 239 million, an increase of 13.613 million during the year, with the rate of trade unions reaching 50.9% and the membership rate reaching 74.7%. 8.398 million migrant workers were recruited into trade unions during the year, with the number of union members totaling 88.547 million.

Stimulating enterprises to conduct collective wage bargaining according to law and making effort to facilitate the formation and improvement of the wage joint determination mechanism, the regular wage growth mechanism and the wage guarantee system among various kinds of enterprises. By the end of September of 2010, 1.408 million collective contracts had been signed nationwide, covering 2.439 million enterprises and 185 million workers.") Available at <http://english.acftu.org/template/10002/file.jsp?cid=68&aid=621>.

weakness – its failure to challenge management or to increase labor's share of revenues – as from its strength – which lies in its party backing, not in workers' support and solidarity.

By the same token, if the ACFTU follows through on its shift toward a more worker-centered and adversarial conception of its mission, it is likely to confront greater managerial resistance to its organizing efforts. (It is also likely to come into conflict with the unelected officials in the local and provincial ACFTU chapters; for there is no talk yet about extending elections beyond the enterprise unions.) For now, the power of the CCP on which ACFTU can draw may be enough to overcome that managerial resistance. But employers, too, have their fingers on levers of power in the party, especially at the local level. Moreover, bare party power is increasingly disciplined by the regime's efforts to promote "rule of law," or at least "rule by law." Now may be a good time for labor advocates in China to reexamine the law governing union organizing, and to construct rules that enable workers to choose to be represented by ACFTU (or not?) even in the face of employer opposition.

The complex and contradictory nature of the ACFTU has produce sharply contrasting assessments among close and knowledgeable observers. On one view, the ACFTU remains an instrument of the party and a tool of party control. Its recent "organizing" campaign simply extends the party-state's reach into the relatively dynamic and free-wheeling private business sector, and postpones the advent of genuine freedom of association and democracy. This is a view that may find adherents among many American liberals, or neo-liberals, as well as among U.S. (and other foreign-owned) corporations, who would prefer to organize their Chinese operations without the interference of union and party officials.<sup>166</sup> That coincidence may raise some questions whether this is the best view of the ACFTU from the perspective of improving workers' welfare.

The second view of the ACFTU departs from a similar premise but arrives at an opposing prescription: Bill Taylor and Qi Li argue that the ACFTU is not a union as we understand the term; but that it nonetheless may be Chinese workers' best ally today. As a relatively worker-friendly arm of the powerful CCP, the ACFTU is "the only organ with the capacity or interest to do anything for labour on a nationwide systematic basis."<sup>167</sup> Chinese workers "are not oppressed by anyone else but their employers,"<sup>168</sup> and are desperately in need of powerful

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<sup>166</sup> Indeed, while Western multinationals have been relatively receptive to many of the substantive changes manifest in the Labor Contract Law, they have been far more reserved regarding their opinions on the increased union organization.

<sup>167</sup> Bill Taylor & Qi Li, *Is the ACFTU a Union and Does It Matter?*, 49 J. of Indus. Rel. 701-715 (2007)

<sup>168</sup>Id. at ---. "[T]he real cause of the problems confronting labour in China result from the development of Chinese capitalism and the way 'socialism' is bastardized to act as a veneer to authoritarianism in support of capitalist accumulation."

allies. The ACFTU, with its close links to the CCP, is a crucial advocate in closed-door government policy discussions in which worker interests are considered; in that capacity they helped gain the enactment of the Labor Contract Law in 2007. Taylor and Li thus argue that it might be counterproductive for workers to dismantle the ACFTU's party ties – though all the more important to combat its domination by employers at the enterprise (and local) level. This is a hard view for democratic-minded Westerners to wrap their minds around, for it accepts the inability of Chinese workers to form their own organizations, and indeed finds advantages in the ACFTU's status as an arm of the party for China's workers in their struggle for decent wages and working conditions.

The third view of the ACFTU – perhaps a more optimistic and diplomatic version of the second – comes from Anita Chan, a leading scholarly critic of China's labor policies.<sup>169</sup> In an opinion piece in the *China Daily* – notable as much for its official publication site as for its content – she argued that the ACFTU can become an effective voice for workers with two structural reforms, neither of which presents a frontal challenge to the party-state's conception of the ACFTU: First, union leaders at the enterprise level should be directly elected by the workers they supposedly represent. Second, the enterprise chapters of the ACFTU should be put under the direction of higher levels of the CCP rather than the local party organizations, which are notoriously intertwined with local business elites.<sup>170</sup> With these two reforms, says Chan, ACFTU could transform itself into a more genuine representative of the workers and a real force for the promotion of a “harmonious society,” in keeping with its essential role within the party-state. The first of these proposals is already on the agenda of the ACFTU; the second is widely viewed in China as a non-starter.

It is noteworthy that Chan put forward these modest proposals in response to recent labor protests at Honda, in which some observers saw signs of a long-awaited independent workers' movement and a challenge to the ACFTU's monopoly position. There is no doubt that the recent strikes were organized outside of the ACFTU structure; but most close observers concluded that the goal of the strike leaders was not to form their own unions but to elect union leaders within the ACFTU framework who would genuinely represent their interests vis-à-vis management.<sup>171</sup> At least that is what they would have said so as to avoid bringing down the wrath of the party-state on their nascent organizing efforts.

Let us now turn to the official reform proposals that emerged in response to the 2010 strikes, with an eye to understanding what the ACFTU is likely to

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<sup>169</sup> See ANITA CHAN, *CHINA'S WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY* (2001).

<sup>170</sup> Anita Chan, “Labor unrest and the role of unions.” *China Daily*, June 18, 2010. Available at [http://www.chinadaily.com.cn/opinion/2010-06/18/content\\_9987347.htm](http://www.chinadaily.com.cn/opinion/2010-06/18/content_9987347.htm)

<sup>171</sup> *Id.*

become and whether it is likely to help China, and Chinese workers, to resolve their labor troubles.

## **V. On the Fate of the Proposed Reforms: Can Democracy Be Confined to the Grassroots?**

Recall some of the lessons of the Honda strikes. First, these were strikes over economic interests, and not over legal rights; and additional strikes for higher wages followed in their wake. That suggested that the regime's preferred strategy for quelling labor unrest -- improving minimum standards and their enforcement - - might not meet workers' demands; it suggested the need for institutional reforms such as genuine collective bargaining that allow workers to press their own demands. Second, the unusual sophistication, organization, and deliberation of the Honda strikers and their leaders highlighted the possibility of real collective bargaining and real elected leadership. Third, the ACFTU's uselessness in the Honda situation made it obvious that, without serious internal reform, the ACFTU was at risk of being bypassed by workers themselves, and the regime was at risk of losing control of workers' self-organizing impulses.

The sympathetic response to the strike from Beijing was followed up with reform proposals from the ACFTU. Among the resolutions adopted by the AFCTU Executive Committee at a July 2010 meeting on "further enhancing enterprise trade union work" were the following structural reforms:

(2) Democratic procedures must be carried out for the election of trade union chairpersons and the elected chairpersons should represent workers, speak and act for workers and safeguard workers' rights and interests....

(3) Efforts should be made to facilitate the establishment of collective bargaining mechanisms and collective contract systems among all enterprises at large. Wages should be determined in a scientific and reasonable way and formation of the joint-decision mechanism of collective wage bargaining ... should be stepped up in an all-round way with a view to ensuring that wages of workers, particularly wages of workers at the production line, increase with the economic benefit of enterprises and with the economic and social development.... The collective contract system should be set up at large in unionized enterprises by 2012.<sup>172</sup>

In simpler terms: Some kind of democratic election of trade union chairs, and some kind of collective bargaining (though only in the private and foreign-owned sector not in the SOE sector), with an eye toward raising wages.<sup>173</sup> One other

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<sup>172</sup> From the ACFTU website (English), available at <http://www.acftu.org.cn/template/10002/file.jsp?cid=23&aid=606>.

<sup>173</sup> Other resolutions concerned (1) continuing efforts to unionize foreign-owned and smaller private enterprises; (4) "democratic management systems" and consultation with worker and trade union representatives; (5) "solicitude ... for workers' production and for their lives and their

resolution is also of interest, for it casts light on what elections and collective bargaining mean for the ACFTU:

(6) Labor disputes should be handled properly. Labor dispute mediation committees of enterprises should be set up and enhanced and trade union chairpersons should act as directors of the committees. Labor disputes should be tackled impartially and punctually and the contradictions from industrial relations should be diminished within enterprises. .... Guidance should be provided to workers in expressing their interest aspirations according to law and in a reasonable and orderly way. Enterprise trade unions should set about going into the midst of workers to find out the causes of the collective labor disputes and group accidents immediately after they happen, reflect workers' aspirations with a clear-cut stand and, at the same time, they should make reports to higher trade unions and safeguard workers' legitimate rights and interests and prevent contradictions from becoming acute through collective consultation.<sup>174</sup>

One could write a whole essay parsing this paragraph. It highlights the difficulty local ACFTU branches will have in fulfilling their contradictory mandate to both *weiquan* and *weiwen* – to protect both workers' rights and social stability.<sup>175</sup> But one question is this: Why would democratically elected enterprise union leaders have to "set about going into the midst of workers to find out the causes of the collective labor disputes"? Wouldn't they know already?<sup>176</sup> Perhaps this reflects too little understanding of how elected union leaders differ from appointed ones, or perhaps it reflects an all-too-prescient understanding of how little they are likely to differ in reality, given how elections have worked in the past.

#### A. *Collective Bargaining (and the Strike Again)*

The new official ACFTU line on proper handling of labor disputes still reflects no notion that the union should be leading the charge, or that strikes would be part of the union's arsenal in the newly-prioritized collective bargaining process. Indeed, there is not a word here about the strike as a legitimate labor tactic.<sup>177</sup> So although the Honda strikes put significant reforms on the ACFTU's

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spiritual and cultural needs" ("trade union cadres should serve as bosom friends of workers"); and (6) proper handling of labor disputes. *Id.* The last is further discussed below.

<sup>174</sup> *Id.*

<sup>175</sup> *Supra* fn. 113. As mentioned above, we have heard these two concepts of "protecting rights" and "protecting stability" repeated often in our meetings with local ACFTU officials. Readers familiar with "The Three Supremes" campaign in the Chinese judiciary will no doubt see a similarity in both the lyrical and hopelessly contradictory natures of the two campaigns.

<sup>176</sup> Indeed, this "search for someone to bargain with" is a problem that has increasingly vexed government officials who have attempted to appease protesting workers (and other discontented citizens), as recounted by numerous law scholars to the authors in our study tours through China.

<sup>177</sup> As noted above, that might reflect a view that the ACFTU should wait for strikes to occur organically, and then swoop in to settle the problem. That is the view of Feng Tongqing (*supra*

agenda, they do not seem to have put strikes themselves on the agenda (at least at the national level). By contrast, in academic circles in China, the legal protection and regulation of the strike is squarely debated.

As for the shape of collective bargaining, much is up for grabs, and much is likely to be resolved at the provincial level. Even terminology is contested. Chinese lawmakers use the term “collective consultation” (or “negotiation”) in all legislation, though some Chinese union officials and academics have begun to use what they regard as the more adversarial term “collective bargaining.” The terms have historic resonance. In the pre-revolutionary Republic of China, “collective bargaining” was the favored term, and presumably carried roughly the same meaning as it did in the West. The term “collective consultation” was adopted after the Revolution to connote new China’s break from the worker-capital contradictions of the past. Retention of the latter term today may be another symbolic bow to continuity with Maoist ideology. But it may also signify the crucial distinction between private ordering and public oversight of labor-management relations. As one labor lawyer put it succinctly, “The difference between the two lies in this: in *jiti tanpan* (“collective bargaining”) the labor and capital lead the process, in *jiti xieshang* (“collective consultation”) the government leads.”<sup>178</sup>

The structure of bargaining -- enterprise-based versus sectoral bargaining -- is also up in the air, though early indications are that it might take multiple forms. For example, Guangdong provincial officials have vowed to institute bargaining at the enterprise level for large foreign enterprises; but for the bulk of smaller enterprises, bargaining will likely take place at the municipal and sectoral level. If that plan takes hold, elected worker representatives in most enterprises (even if genuine elections do take place) will not directly engage in collective bargaining; rather, those elected representatives will have to present their views to the next (unelected) level of the ACFTU, who will conduct “consultations.” That may create one kind of conflict to which we will return.

At whatever level collective bargaining takes place, the other big question is what will happen when the union and employers fail to reach an agreement. What is the threat, or endgame, that impels the parties toward agreement? There is currently no intimation that unions will back up their demands with the threat of a strike (even if the workers do).<sup>179</sup> Rather, bargaining will likely take place under the shadow of mandatory mediation. But then what?

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note --), who believes that the ACFTU and government did a relatively effective job in mediating labor disputes once they occurred.

<sup>178</sup> “The alternative means of survival of one labor lawyer.” *Caixin*, January 30, 2012, available at [http://china.caixin.com/2012-01-30/100351642\\_4.html](http://china.caixin.com/2012-01-30/100351642_4.html).

<sup>179</sup> Not surprisingly, recent studies suggest that collective contracts in China are more robust when they emerge from the initiative of workers (or management) rather than government decree.

Some Chinese reformers seem to be banking on the idea of imposing a duty to bargain on employers. On this point, however, China might consider U.S. experience with the longstanding “duty to bargain in good faith” under the NLRA. That does not include the duty to reach an agreement, and there are no monetary sanctions for employers who fail to reach agreement. The result is a serious problem of “surface bargaining,” which has grown worse as the strike weapon has grown weaker, and which is greatest in first-contract situations involving newly-elected unions.<sup>180</sup> As a result, U.S. unions recently lobbied vigorously, though unsuccessfully, for the Employee Free Choice Act (EFCA), a major provision of which would have mandated mediation and interest arbitration if bargaining failed to produce an agreement within a set period of time.<sup>181</sup> Interest arbitration entails an arbitrator’s imposition of a “reasonable” collective bargaining agreement when the parties cannot actually agree. EFCA’s provision for interest arbitration, though limited to first-contract situations, was probably the part of EFCA to which employers were most profoundly opposed.

If China abjures the use of “economic weapons” to resolve bargaining impasses -- and all indications are that it will do so -- then it may have to consider the interest arbitration model, not only in “first contract” situations but in general. On that model, government officials would exert strong pressure for an agreement, backed by their own power to impose one if bargaining and mediation fail. The interest arbitration strategy would be in keeping with the regime’s historically rooted and recently much-emphasized preference for “voluntary” resolution of disputes – even if under strong pressure – over both adversarial adjudication and open contestation. It would enable the government to maintain control over the resolution of labor disputes. And it would avoid legitimizing strikes, with their attendant disorder.

On the other hand, the interest arbitration strategy might raise the political stakes when (unauthorized) strikes nonetheless occur. Interest arbitration would put the party-state on the hot seat, at the very center of heated collective labor conflicts. If the decisionmakers are local labor arbitrators, one must wonder about the role of ties to local business and policymakers that have often impeded

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Chen Kuijin, *Problems and Discussion of China’s Regional Collective Bargaining System*, 81. The author finds that collective contracts have historically been signed under three general scenarios, (1) after a strike, (2) at the behest of management, or (3) at the command of local government. In the first two scenarios, contracts with real substance emerged. But in the third, the collective contracts quickly fell into disuse, apparently because local governments were most concerned with collective contract “coverage,” not with meeting the true interests of the parties.

<sup>180</sup> For the canonical account, see Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

<sup>181</sup> See Employee Free Choice Act, H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2007). Historically, interest arbitration in the U.S. has been largely limited to the public sector. Interest arbitration is somewhat more widespread in Canada, and is used quite extensively in Australian labor relations in the form of the “award system.” The Australian case thus offers potential lessons for Chinese law reformers.

workers' vindication of their legal rights so far. And if unsatisfactory contract terms result, workers' discontent would then be squarely directed against local officials, not just the employer. ACFTU officials may find themselves on both sides of those conflicts. If elections at the enterprise level are meaningful, then workers' discontent might be shared, even spearheaded, by elected grassroots union officials who press forward with economic demands that employers and local officials oppose. But most negotiations will be conducted by unelected sectoral and local ACFTU officials; if they are not seen as pressing workers demands vigorously enough, they may be among the targets of workers' discontent.

Given China's political economy, it is no surprise that local and national governments wish to retain control of the economic reins in any new collective bargaining structure. But this means that, if worker demands are not met – either because unelected ACFTU officials fail to press them or because government-appointed arbitrators reject them – workers' ire will be redirected from their private employers to the government and the official union. Moreover, workers will yet again be relegated to the role of petitioners rather than participants in the process, subject to the government's “scientific” determination of what levels of wages and benefits are fair and reasonable. Workers know this role well, and also know that pressure, whether through official or unofficial channels, is often the only way to make sure their interests constitute any sizable portion of scientific calibrations.

In the meantime, the ACFTU may be seeking a way to square the circle -- to reconcile its continuing unwillingness or inability to carry out strikes with its growing recognition of their usefulness. In several recent episodes, spontaneous worker-organized strikes were followed by ACFTU-led “mediation” and collective negotiations.<sup>182</sup> That sequencing of events both makes use of the economic power that workers can exercise by striking and maintains the ACFTU's official role as “mediator” rather than contestant in labor-management conflicts. If the ACFTU does manage to effectively mediate labor disputes and secure wage gains for workers, that could help to rehabilitate the ACFTU in workers' eyes. On the other hand, it remains to be seen (and examined below) whether the ACFTU can effectively mediate hotly contested labor disputes without overhauling its image among workers as “useless” on their behalf; workers would seem unlikely to be guided back to work by a union whose legitimacy they do not accept. Moreover, it is difficult to see how the enterprise union chapters, as opposed to the local ACFTU branches, could play a useful role in these conflicts given their domination by management. So the answer to the

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<sup>182</sup> See Feng Tongxiang, *supra* note --; Chen Kuijin, *Problems and Discussion of China's Regional Collective Bargaining System.*, 81.

problem of strikes may be found partly in the fate of elections, to which we now turn.

### *B. Will Elections Ensure Accountability to Workers?*

Whether the enterprise unions actually do push for strong contract terms (and thus put local officials on the hot seat through forced mediation or interest arbitration) will depend partly on whether elections are in fact democratic and insulated from both managerial and local party manipulation. If they are not, then we can expect “collective consultation” to produce agreements that are not much more substantial than what has come out of the purely formalistic bargaining that has existed up to now. (And it is hard to see how such a process could actually quell labor unrest.)

History is instructive here. Elections at the enterprise level have been discussed and tried off and on in various provinces and localities over the last two decades or more, with very disappointing results. Without a strong and consistent mandate from the center and without clear rules that ensure democratic election procedures, meaningful elections have been rare.<sup>183</sup>

A look at how elections of enterprise union officials are currently conducted may give some clue to what ACFTU officials mean when they propose the expansion of direct elections. In Zhejiang, for example, enterprise union elections currently take three different forms. The first two are both more of a “de-selection” than an election. Management, the chair of the enterprise's party committee, and local ACFTU officials confer and nominate candidates -- usually one or two more than needed to fill the available positions (e.g., nine candidates to fill eight positions). In the most common type of election, workers simply vote off the least popular nominee; those who remain are then assigned specific board positions by the management, party, and ACFTU officials. In the second type of election, union board positions are assigned on the basis of vote totals, with the highest vote-getter becoming union chairperson. Only in the third type of election, the so-called “*haixuan*” or “sea-election,” do the workers themselves choose the nominees.<sup>184</sup> *Haixuan* elections are exceedingly rare in Chinese enterprises; we were told that one teachers' union in southern Zhejiang was experimenting with *haixuan* elections. Crucially, union and party officials choose the election method.

According to one scholar with whom we spoke, factory management has often told him, “We’re most afraid that either we’re not going to like their guys, or that they’re not going to pick our guys.” Most elections appear designed to

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<sup>183</sup> See Howell, *supra* note --.

<sup>184</sup> “Sea elections” started in rural village elections in which nearly all villagers, not only CCP members, may be candidates. But that experience has shown that other barriers to democracy remain; candidates are often “discouraged” from running, removed from the ballot, or simply not allowed to campaign.

avoid both of those fears, with management and government overseeing nearly every step in the process to ensure that the “right guys” are selected.

Is this likely to change with the new push from above for "democratic elections" at the enterprise level? So far, it is unclear what form union elections will take or what kind of worker control or choice will be required to deem an election democratic. The one point on which close observers quietly agree is that *haixuan* elections will not be required, and are unlikely to be instituted, at least among blue collar workers.<sup>185</sup> It thus seems inevitable that worker choice will continue to be guided, coaxed, or controlled in some form or another. As in Zhejiang, the ACFTU, managers, and party officials are trying to create institutions that are just representative enough that workers will accept their leadership within the factory (and stay off the streets), but that are far from genuinely democratic.

Events on the ground seem to be running ahead of the planned scope of reforms. There are scattered reports of workers simply conducting their own elections in the course of a strike, and of both management and party officials acceding to their choice of leadership given the fraught circumstances.<sup>186</sup> The current policy push for "democratic elections" may ease the way for that sort of spontaneous grassroots impulse to succeed, at least in the short term. If elections do produce grassroots union leaders who are responsive to workers' still-pent-up demands, such leaders would presumably put pressure on the unelected local union officials and local party-state officials that sit above them on the “transmission belt.” Such leaders might challenge management authority and threaten to put a dent in profits. With that possibility in mind, both powerful local union and government officials and employers can be expected to use what levers they have to bring about the “election” of friendly or at least moderate worker representatives -- unless workers are sufficiently unified, committed, and organized to demand their own leaders.

At the same time, giving workers the right to vote at all, and to elect their own leaders, sends a powerful, and potentially empowering, message to workers that may not be so easy to contain. The Dalian experience, in which elections led to the ousting of incumbent union chairs, suggests that direct elections have the potential to shake up the ACFTU at the “grassroots.” Democratization at the

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<sup>185</sup> In addition to reasons given above, many Chinese scholars and government leaders believe that the *suzhi* (character) of Chinese workers is not yet mature enough for unbridled elections. This is a debate commonplace to any discussion of democracy in China, be it of the workplace variety or otherwise. See Chen Kuijin, “Problems and discussion of China’s Regional Collective Consultation System,” Renmin Conference Materials, 82, 89 (discussing the fact that many Chinese workers’ “*suzhi* is so low that” they are not even aware that they are being exploited, and therefore are unsuitable candidates to participate in collective consultation. According to Chen, regional and trade-level collective consultation is thus advisable in those cases.)

<sup>186</sup> Conversations with Chinese labor law scholars, December 2011.

lowest level, even if it does not transform labor relations, may have ripple effects on the citizens' attitudes and capacities with regard to democratization at higher levels of the polity. Democratic processes foster "civic skills" and, in a society with relatively few participatory opportunities, perhaps civic demands for greater voice. Even frustrated forms of democratic voice may create pressure for further democratization.

One of the big unknowns here is how hard and how successfully China's leaders will push for higher wages, whether through legislation or collective bargaining processes. China's leaders may be hoping to buy off workers' demands for voice and dignity through bigger paychecks. Certainly significant wage increases may go a long way toward satisfying workers' demands, at least if those increases manage to keep pace with inflation and to narrow the burgeoning gap between rich and poor. But if workers really do want a genuine voice in their working lives, then the regime's strategy may succeed only in pushing labor conflict up one level, and into the political system, where it would seem to pose a more fundamental sort of "contradiction."

### *C. What Is the Path to Labor Peace in China?*

The tensions and dilemmas that lie ahead on the path of labor law reform in China are not unique to labor law. They are endemic to the regime's basic model of governance -- what one scholar has called "consultative Leninism."<sup>187</sup> Leninism's characteristic "transmission belt" mechanisms for carrying the views and interest of the "masses" up to the leadership proved inadequate with the dismantling of the planned economy and the rise of a modern market economy. For one thing, "the masses" are far from an undifferentiated mass or class (if they ever were); the increasingly varied and divergent social interests within China cannot easily be carried up through a single channel. So in recent decades the regime has sought to expand the sources and mechanisms of popular input into policymaking both within and beyond the Party hierarchy. Party leaders remain committed to their monopoly on governmental power, but have sought to secure that monopoly, and to preempt demands for electoral democracy, in part by making the party-state more receptive and accountable to the citizens' opinions, demands, and concerns. The experiments with village elections and intraparty democracy are part of China's own brand of "democracy," and the consultative side of "consultative Leninism."

But "consultative Leninism," like the two-way "transmission belt" metaphor itself, prescribes no ready solution when the people's needs and desires transmitted from below conflict with the party line that emanates from above. Both old-style Leninism and its consultative version contemplate a wise and

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<sup>187</sup> Steve Tsang, *Consultative Leninism: China's New Political Framework*, 18 J. CONTEMP. CHINA 865 (2009).

benevolent party leadership whose eventual prescriptions will reflect and advance the people's needs and desires. But what if people remain unsatisfied, even after they have been consulted? And what if the people's needs and desires come to include greater autonomy and self-determination, collective and individual? The need for more democratic mechanisms of consultation has become increasingly pressing as social contradictions multiply; yet the more democratic the mechanisms of consultation, the sharper and more open may be the contradictions with the still-unelected party-state leadership.

For reasons such as these, the current crop of reform proposals seems unlikely to solve the simmering problems of labor unrest. Yet neither does the solution lie in retreating from the proposed reforms. It may instead lie in moving forward along the path toward greater collective autonomy for workers, subject to reasonable public-regarding regulation of labor activity. That trajectory should sound familiar, and not only because it bears some resemblance to the path taken in Western democracies in the mid-20th century. That is also the path China has taken with regard to much of its economy in the era of "reform and opening" that followed Mao's death. China energetically pursued the gargantuan project of rationalizing, restructuring, and privatizing much of the state-run economy, of introducing competition by and with many SOEs and former SOEs, and of developing regulatory institutions to deal with the externalities and coordination issues raised by the newly (and incompletely) autonomous economic actors.<sup>188</sup>

Something like that transformation may be needed in the labor arena. As in the case of productive enterprises, this need not entail a total dismantling of the current state-led entities (in this case, the ACFTU); it may rather involve giving those entities greater autonomy while subjecting them to competition from non-governmental entities. Competition from independent unions might help drive more thoroughgoing reforms within the ACFTU as well as giving workers a viable alternative voice. The many questions of institutional design, not to mention the political questions, raised by such a reform agenda are beyond the scope of this article. But they may be on the agenda of Chinese reformers if workers continue to demand a more authentic voice than the ACFTU is capable of becoming.

## **VI. Conclusion**

The past few years have seen China's workers receiving an ever-more lucrative bundle of substantive rights, at least on paper, with central government promises of social security and health care reforms, as well an astounding pledge of twenty percent increases in the minimum wage each year for the next five years. When individual rights are violated, workers have myriad formal channels through which to address their grievances, and they are making use of those

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<sup>188</sup> See Dali Yang, *supra* note --; Gallagher, *supra* note --.

channels in ever-increasing numbers, with a relatively high degree of success. When formal channels have proven unsatisfactory, workers have taken to the streets, staged protests, and engaged in some surprisingly sophisticated strike actions. Some of these actions have been suppressed, but often workers have encountered a sympathetic public, and reluctant, but often responsive, local governments and ACFTU leadership—at least when enough pressure is applied from above, below, or both.

What does all of the appeasing, cajoling, and satiating of workers (and all the money spent to those ends) add up to? It is tempting to depict these developments as signs of a nascent “pluralism with Chinese characteristics,” tolerated or even encouraged by the central government. But they may be better understood not as an embrace of pluralism, but simply as a growing plurality of grievance mechanisms, all still geared towards identifying and correcting “social contradictions” and fortifying the regime's hold on power.

In the corridors of power and behind closed doors, competing social interests are quite obviously being debated and weighed. The resilience of China's undemocratic regime depends on its doing so, and doing so cleverly. As societal “contradictions” have become more pronounced, and citizens more demanding and outspoken, in a number of policy arenas, the central and local governments have been more vigorous in culling the opinions of stakeholders, assembling relevant information, and consulting the experts to the end of making a “scientific” determination of the proper balance. The culling, assembling, and consulting phase seems to entail a wider ambit for freedom of expression, and even a bit more room for associational activity and civil society, than has been customary in China – at least for a class known as the “selectorate,” the political, economic, and social elites of New China. However, once the proper balance is struck, pronounced, and embodied in policy, it is officially presumed to be the correct result and to serve the interest of all Chinese. Further public agitation on behalf of one's own interests thereafter risks being cast as anti-social and anti-socialist, or at least, anti-harmony and anti-stability.

In the labor arena, the contradictions are unusually sharp and public, the debating and weighing of competing interests of labor and capital is unusually open and in flux, and the balance appears to be tilting somewhat in workers' favor, at least with regard to their material interests. At this moment, many Chinese workers have been afforded considerable space to voice their complaints, an unusual multiplicity of channels through which to do so, and even some room for open contestation in the midst of the “harmonious society.” None of the existing channels is quite satisfactory, but China's workers appear quite adept at switching channels when one or another proves disappointing.

Now, by government proclamation, there is to be another official channel for workers to address their concerns: a revamped trade union structure. National and

provincial level calls for collective bargaining and enterprise union democratization have given lower-level bureaucrats a mandate that requires results, and so yet another top-down initiative has begun. Perhaps not surprisingly, officials are reporting great success at the local level.<sup>189</sup> Major strikes were reportedly dramatically down in 2010 versus 2009 (though that is very hard to believe). Democratic union elections are sweeping the country, according to ACFTU officials. At present there is no way of verifying the substance of this purported mass democratization of the enterprise unions, though there are reasons to be skeptical.

It is worth noting again that democratization is not being instituted for its intrinsic virtues, nor even just because workers want it. Rather, grassroots democratization is seen as a strategy for fostering stability in arenas that have threatened to become unmanageable by the Chinese bureaucracy. But as workers gain experience and fluency in the language of democracy and participation, it seems inevitable that there will be conflict between democratically elected grassroots unions and higher level unelected ACFTU officials and their policies.

In the labor law arena, and perhaps elsewhere in China, the upshot of these tensions may be either the frustration of democratic reforms (perhaps accompanied by mollifying economic concessions) or their extension to higher levels of governance. Indeed, the labor arena may end up serving in part as a gigantic laboratory in which to test competing views within China's leadership over the best strategy for maintaining political stability, and over the right mix of control and flexibility, repression and responsiveness, cooptation and democratization. Behind these competing views lie different theories about what Chinese workers want, and what will ultimately quell their discontent. Will workers be content with material improvements -- better pay and conditions -- or will they hold out for a meaningful voice in their working lives? The former may be achievable through top-down policy structures. The latter may require real change in those structures.

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<sup>189</sup> Chinese officials have often proven adept at producing statistics demonstrating the successful accomplishment of high-priority goals. The most tragic example was during the Great Leap Forward in 1958-60, when false reports of miraculous production gains obscured mass starvation.