REGULATION OF TRADE UNIONS IN THE PEOPLE'S REPUBLIC OF CHINA

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[*Since the implementation of market reforms in China, trade unions face new challenges in creating a meaningful role for themselves. This article evaluates the capacity of trade unions to represent worker interests, especially where there may be the possibility of conflict with state policy and the production goals of management. To do so, the article first examines the background and legal framework governing trade union organisation and activity. The authors then examine the regulation of four areas of union activity where there is great potential for conflict between worker interests, management and state policy.*]

INTRODUCTION

Since 1978, the People's Republic of China ('P.R.C.') has radically reformed its economic system.[1] A policy of liberalisation has seen state restrictions on foreign investment and private ownership relaxed while rural and industrial enterprises have been given greater autonomy. The implementation of this policy is supported by an evolving legal infrastructure. The introduction of these market reforms — often officially described as 'socialism with Chinese characteristics' — poses many problems for a state which remains politically committed to communist ideology.

One area in which the contradiction between socialist rhetoric and capitalist economic forms has become acute is labour relations. In this article, we examine how this contradiction is reflected in the legislative framework regulating trade unions. We consider to what extent unions may promote workers' interests even where they conflict with management or state policy. The first two sections discuss the development of the union movement and the context within which trade unions currently operate. The first section examines the changed basis of employment relations in China which poses new challenges for the union movement. The second section discusses the political and historical constraints on the movement and outlines the theory governing relationships between workers, unions and the Party-state. The remainder of the paper considers how the tensions are manifested in particular aspects of labour legislation. We examine the legislative principles regulating union activity and the provisions affecting union structure. We then analyse four areas in which conflict between worker and

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[1] For an overview of the changes see Watson, A. (ed.), *Economic and Social Change in China* (1992).

management interests is likely to occur. Our argument is that the legislative framework reflects the ambiguous role of unions in Chinese industrial relations. Their legal responsibility is not simply to act on behalf of workers, but to ensure that workers comply with enterprise and Party-state policy.

This article will focus on two industry sectors — state-owned enterprises ('SOEs') and foreign-invested enterprises ('FIEs'). Other sectors include collectively-owned enterprises and private enterprises. The information on these is comparatively sparse and only brief reference will be made to them.

1. *THE NEW EMPLOYMENT SYSTEMS*

Before discussing the role of unions in the P.R.C., it is important to describe the legal framework governing the relationship between workers and enterprise management. The nature of this framework has fundamentally changed over the last fifteen years, requiring trade unions to redefine their industrial relations role. Prior to the commencement of the Open Door policy in the late 1970s, the employment relationship was based on administrative arrangements rather than contract. This was particularly so in the SOEs which were the key employers in the industrial sector.[2] Employees were assigned to these enterprises by the relevant administrative authorities. They had no real right to refuse their posting.[3] The large majority of these workers were 'permanent employees', that is, they could expect to hold their jobs for life. Dismissals were rare,[4] as were lay-offs, and labour mobility was minimal.[5]

As well as job tenure, SOEs provided a wide variety of goods and services which were otherwise difficult to obtain. These included housing, subsidised food, ration coupons for clothes and other necessities, welfare payments, and medical and childcare facilities.[6] This led to workers becoming heavily dependent on their workplaces to maintain their living conditions — SOEs became 'mini welfare states.'[7]

Alongside the privileged permanent employees, there were and are various categories of 'temporary workers' employed for a fixed term only. They perform tasks which permanent employees are reluctant to do or cannot be spared to do.[8] This category of workers cannot in most cases attain permanent status. They are generally not entitled to old-age pensions,[9] have minimal accident compensation entitlements and are unlikely to receive severance pay.[10] They are often excluded from welfare facilities provided by the enterprise.[11]

2 Walder, A., *Communist Neo-Traditionalism: Work and Authority in Chinese Industry* (1986) 32-5.

3 Tsien, T.H., 'China' in Blanpain, R. (ed.), *International Encyclopaedia for Labour Law and Industrial Relations* (1985) 31-2; White, G., 'The Politics of Economic Reform In Chinese Industry: The Introduction of the Labour Contract System.' (1987) 111 *The China Quarterly* 365, 366.

4 Tsien, *op. cit.* n.3, 45-6; White, *op. cit.* n.3, 366. White indicates that in 1983 96.8 percent of the state workforce were permanent employees.

5 Walder, *op. cit.* n.2, 68-81.

6 *Ibid.* 59-68.

7 *Ibid.* 11-7, 81-4; White, *op. cit.* n.3, 366; Vause, W.G. and Vrionis, G.B., 'China's Labor Reform Challenge: Motivation of the Production Forces', (1988) 24 *Stanford Journal of International Law* 447, 459.

8 Howard, P., 'Rice Bowls and Job Security: The Urban Contract System' (1991) 25 *Australian Journal of Chinese Affairs* 93, 96; Walder, *op. cit.* n.2, 48-59.

9 See Walder, *op.cit.* n.2, 44-5 (Table 3) and 54 for full comparison of benefits.

10 *Ibid.*

11 *Ibid.*

1.1 *Employment Law Reforms in the Private and State Sectors*

The decision of the Central Committee of the Chinese Communist Party at its Third Plenary Session in December 1978 to concentrate on the policy of economic modernisation and to attract foreign investment[12] marked the beginning of radical changes to this dual employment system. As a consequence of this decision, legislation applying specifically to foreign investment was passed which led to a bifurcation of the Chinese legal system. Different laws, including labour laws, applied to enterprises depending on whether they were in the state-owned or foreign-invested sectors. The government was obliged to draft legislation concerning relations between foreign management and the Chinese workforce. The legislation allowed investors to employ all staff on a contract basis: they obtained the power to recruit, discipline and dismiss their workers.[13] During the 1980s, further legal measures were implemented to increase FIE management autonomy in employment relations.[14]

In the light of the perceived economic success of the system of contract employment in FIEs, members of the government moved to introduce the system as part of a series of reforms to the SOEs.[15] The alleged inefficiency and lethargy of workers[16] were to be overcome by enabling SOE management[17] and employees

[12] This decision was affirmed in the 1982 Constitution, Article 18. See also Cynar, C.P., 'Laws of the People's Republic of China which Affect Labor-Management Relations in Foreign Investment Enterprises' (1988) 3 *Detroit College of Law Review* 803, 815.

[13] Zheng, H. R., 'An Introduction to the Labor Law of the People's Republic of China' (1987) 28 *Harvard International Law Journal* 385, 387-91 and Cynar, *op. cit.* n.12 (with accompanying translations). The relevant laws are Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, passed 1 July 1979 by National People's Congress (N.P.C.); Regulations on Labour Management in Joint Ventures using Chinese and Foreign Investment, approved by the State Council 26 July 1980; Regulations on Special Economic Zones in Guangdong Province, passed by N.P.C. Standing Committee 26 August 1980; Interim Provisions for Labour and Management in Enterprises in the Special Economic Zones of Guangdong Province, approved by Guangdong Provincial People's Congress Standing Committee (G.P.P.C.S.C.) 24 December 1981; Provisional Regulations of the Shenzhen Special Economic Zone on Labour Management In Foreign Investment Enterprises, promulgated 1 August 1987 by Shenzhen Municipal People's Government; Labour Regulations Governing the Special Economic Zones in Guangdong Province, adopted by G.P.P.C.S.C. 12 August 1988; Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, promulgated by State Council 20 September 1983; Provisions for the Implementation of the Regulations on Labour Management in Joint Ventures Using Chinese and Foreign Investment, promulgated by Ministry of Labour and Personnel 19 January 1984; People's Republic of China Sino-Foreign Cooperative Joint Venture Law, passed by N.P.C. 13 April 1988; Law on Enterprises Operated Exclusively with Foreign Capital; Detailed Rules for the Implementation of the People's Republic of China on Wholly Foreign-owned Enterprises, approved by State Council 28 October 1990.

[14] Encouragement of Foreign Investment Provisions, passed by State Council 11 October 1986; The Regulations on the Right of Autonomy of Foreign Investment Enterprises in the Hiring of Personnel and on Employee's Wages, Insurance and Welfare Expenses, Promulgated by the Ministry of Labour and Personnel 10 November 1986; and Opinion on Implementation of the Right of Autonomy of Foreign Investment Enterprises in Their Use of Personnel, approved by State Council 25 April 1988.

[15] See generally, Korzec, M., *Labour and the Failure of Reform in China* (1992) ch.3; and Han, J. and Morishima, M., 'Labor System Reform in China and its Unexpected Consequences', (1992) 13 *Economic and Industrial Democracy* 233; White, *op. cit.* n.3, 369-74. See White generally on the policy development process.

[16] Vause and Vrionis, *op. cit.* n.7, 447-9; Josephs, H.K., 'Labor Reform in the Workers' State: The Chinese Experience' (1988) 2 *Journal of Chinese Law* 201, 206-8.

[17] SOE management had, during the 1980s, gained considerable autonomy from the state bureaucracy: Sha, Y., 'The Role of China's Managing Directors in the Current Economic Reform' (1987) 126 *International Labour Review* 691; Saich, T., 'Workers in the Workers' State: Urban Workers in the PRC' in Goodman, D. (ed.), *Groups and Politics in the People's Republic of China* (1984); *Beijing Review*, (Beijing) 8 January 1990.

to determine their employment conditions. The 'iron rice bowl' of permanent employment was to be smashed, allowing greater flexibility, incentives, job mobility and hence productivity.[18]

In 1986, the State Council promulgated four sets of Regulations introducing the system of employment contracts. The key provisions are the Provisional Regulations on the Implementation of the System of Contracts of Employment in State-run Enterprises (the 'Employment Contract Regulations').[19] These require the contract system to be applied to all workers recruited for what were formerly permanent positions in SOEs.[20] These workers must enter into an employment contract of at least one year's duration.[21] Contracts must be in writing and contain provisions dealing with production tasks, probation, duration, working conditions, remuneration, labour discipline and penalties.[22] They are to be based on the principles of 'equality, voluntariness and negotiation'.[23] The Employment Contract Regulations set out provisions dealing with recruitment,[24] termination,[25] wages, benefits[26] and retirement.[27] In order to counter suggestions that contract workers may be treated less favourably than existing permanent employees, there is an express stipulation that both categories of worker are to enjoy the same rights in relation to employment, work, study, participation in industrial democracy, awards and rewards.[28] The Employment Contract Regulations also require temporary workers to sign contracts, but this would not appear to convert them into 'contract workers' for the purposes of the new system.[29]

The Employment Contract Regulations are supplemented by three sets of regulations dealing with recruitment and probation, dismissal and unemployment benefits.[30] The Dismissal Regulations, for example, expand on the termination powers given to employers under the Employment Contract Regulations[31] so that dismissals are possible where employees 'act contrary to the interests of clients'.[32] These laws now mean that new employees no longer have job security. They

18 Howard, *op. cit.* n.8, 93-5; Leung, W. Y., *Smashing the Iron Rice Pot: Workers and Unions in China's Market Socialism* (1988).

19 Promulgated by the State Council 12 July 1986. International Labour Organisation Legislative Series 1986 China-1.

20 Article 2. See Josephs, *op. cit.* n.16, 219-42; Vause and Vrionis, *op. cit.* n.7, 460-4; Chang, T.K., 'Breaking the Iron Rice Bowl: The New Labor Regulations' (December, 1986) *East Asian Executive Reports* 9.

21 Article 2. A contract may continue for in excess of five years.

22 Articles 7 and 8.

23 Article 9.

24 Chapter II.

25 Articles 12-7.

26 Chapter IV.

27 Chapter V.

28 Article 3.

29 Article 2; Josephs, *op. cit.* n.16, 232.

30 Provisional Regulations on the Recruitment of Workers in State-run Enterprises, promulgated by the State Council 12 July 1986; Provisional Regulations on the Dismissal of Workers and Employees Who Have Violated Rules of Labour Discipline in State-run Enterprises ('Dismissal Regulations'), promulgated by the State Council 12 July 1986; Provisional Regulations on Unemployment Insurance for Workers and Employees in State-run Enterprises, promulgated by the State Council 12 July, 1986. These are translated in the International Labour Organisation Legislative Series 1986 as China — 2, 3 and 4.

31 Article 12, Employment Contract Regulations.

32 Article 2, Dismissal Regulations; Josephs *op. cit.* n.16, 245-7; Chang, *op. cit.* n.20, 14-5.

provide in theory for much greater job mobility and endow employers with considerable dismissal powers.

The intention of the state is to underpin these regulations with a comprehensive piece of legislation to be called the Labour Law. At least twenty-seven drafts have been prepared over the past fourteen years and a final draft has now been submitted to the State Council.[33] At present, the bifurcation of the legal system together with the generation of supplementary legal instruments under various titles by different agencies at the national, provincial and local level have created an exceptionally complex web of labour legislation.[34]

1.2 *Problems with Contract Employment*

The breakdown of the permanent employment system has given rise to many difficulties for workers.[35] As a result of the reforms, there are two employment categories in FIEs and three in SOEs. In both the FIEs and SOEs, there are contract workers and temporary workers. In addition, there are still many permanent workers in the SOEs.[36]

Despite the 'equality' stipulation that contract workers must not be treated differently from permanent employees, there have been complaints that the former have been assigned to the most unpleasant work, excluded from unions and industrial democracy procedures, and discharged when ill, contrary to the new regulations.[37] It appears that contract workers are often equated with temporary workers and are therefore disdained.[38] The absence of an effective mechanism to enforce the equality stipulation renders helpless employees faced with discrimination.[39] The significant increase in labour turnover arising from the removal of job security[40] has resulted in some workers losing seniority. This may affect their entitlement to housing, other welfare benefits and wage rises.[41] Moreover, the

33 *Renmin Ribao* (People's Daily) 8 January 1994. See also, Liu Guanxue and Liang Jianfei, 'Determining a "Labour Law" with Chinese Characteristics,' *Zhongguo Laodong Bao* (China Labour News) 18 March 1993 and copied in *Zhongguo Renmin Daxue Shubao Ziliao Zhongxin* (China People's University Centre for Printed Materials) D41 (1993) 4 *Faxue* (Legal Science) 97; Liu Guanxue, '*Woguo "Laodong fa" Lifa de Jingji Benchu he Zhuyao Renwu*'(The Economic Basis and Basic Tasks of our Country's Labour Law Legislation) (1991) 6 *Faxue Zazhi* 2-3 and copied in *Zhongguo Renmin Daxue Shubao Ziliao Zhongxin* (China People's University Centre for Printed Materials) D41 (1992) 1 *Faxue* (Legal Science) 108-9.

34 One author goes so far as to describe this as 'administrative lawlessness': Korzec, *op. cit.* n.15, Chapter 1.

35 See generally Han and Morishima, *op. cit.* n.15.

36 The statistical breakdown of the working population according to the Chinese press is not always clear. However, there appears to be a total workforce of over 550 million people, of which over 146 million are employed in the non-agricultural sector. Around 108 million of the latter are employed in SOEs, 35 million in collective enterprises and 3 million are in FIEs. About 19 percent of employees in SOEs were employed under the contract system. In March 1993 there were 75 million permanent workers, 21 million contract workers and approximately 12 million urban temporary workers: *China Daily* (Business Weekly), 9 May 1993. A gradual increase is projected until permanent employment is eliminated. 95 percent of regular employees are projected to be on contracts within 20 years: *China Daily*, 1 February 1991 and 1 March 1991. More than 50 percent of FIE employees are temporary workers: *China Daily*, 26 February 1992. There are around 51 million women workers, representing 37 percent of the total industrial workforce, and more than 50 percent of the workforce in FIEs: *Beijing Review*, (Beijing) 11 March 1991. Women constitute 70 percent of urban unemployed: *China Daily* 28 March 1992.

37 Howard, *op. cit.* n.8, 101-2.

38 *Ibid.*

39 *Ibid.*

40 5 percent according to Josephs, *op. cit.* n.16, 260, but as high as 50 percent in some areas of Guangdong Province, according to Howard, *op. cit.* n.8, 105.

Contract Regulations provide contract workers with reduced cover for non-work-related illness.[42]

The reforms do not seem to have assisted temporary workers. While some have been converted to contract workers, many remain outside the 1986 Regulations.[43] Of particular concern are those temporary workers in the SEZs and Guangdong Province generally, where there are a high concentration of FIEs.[44] Reports of high turnover rates, excessive overtime, appalling working conditions (more than 70 percent of joint ventures in Guangdong expose workers to serious health risks[45]), arrears in payment and even beatings reflect their vulnerable status.[46]

The reforms have had a particularly detrimental effect on women workers.[47] Industries with a particularly high concentration of women, such as textiles, are often those with the worst safety conditions.[48] Employers, reluctant to pay for the cost of child care and maternity leave, have been discharging a disproportionately high number of women,[49] some going so far as to question the right of women to participate in the workforce.[50]

It may be concluded that, apart from male skilled workers who, because they are in demand, can negotiate favourable working conditions,[51] workers are in many ways disadvantaged by the reforms. The tenuous position of temporary workers has not substantially changed and the limited unemployment insurance cannot adequately compensate contract employees for the loss of the wide range of benefits in SOEs if they lose their jobs. The pressure on vulnerable workers is increased by the massive unemployment problem. Unskilled workers can be easily replaced.[52]

What role do Chinese trade unions have in protecting the position of workers in the face of these difficulties? It should not be assumed that trade unions in China, a developing nation with a Marxist political system, function in a similar way to those in liberal democracies or that Chinese unions are the only (or even the primary) institutions supporting workers.[53] In the next section, we examine

41 Josephs, *op. cit.* n.16, 238-40 and 261.

42 *Ibid.* See Article 21, Employment Contract Regulations.

43 Howard, *op. cit.* n.8, 99-100.

44 According to the *Beijing Review* (Beijing), 13 May 1991, there were at the end of 1990 757 FIEs in Shenzhen, 411 in Zhuhai, 174 in Shantou, 220 in Hainan and 272 in Xiamen (Fujian).

45 *China Daily*, 9 February 1992. These firms failed to import dust and poison prevention facilities.

46 Howard, *op. cit.* n.8, 99-100.

47 Leung, *op. cit.* n.18, 79-86; *China Daily*, 27 March 1990 (a Ministry of Labour official states that the situation is improving), 28 August 1990 and 10 December 1990.

48 *China Daily*, 10 December 1990 and 1 March 1991.

49 Leung, *op. cit.* n.18, 79-86; Howard, *op. cit.* n.8, 102; Josephs *op. cit.* n.16, 243-5.

50 Leung, *op. cit.* n.18, 85-6; *China Daily*, 10 December 1990 and 3 May 1991. Almost half of the FIEs fail to obey the protection laws: *China Daily*, 26 February 1992, and non-compliance is widespread in the SOEs as well: *China Daily*, 22 July 1993. See also Miljus, R.C. and Moore, W.M., 'Economic Reform and Workplace Conflict Resolution in China' (1990) 25 *Columbia Journal of World Business* 49, 52. The state has tried to address these problems; the National People's Congress, China's highest legislative body, passed the Law of the People's Republic of China on the Protection of Rights and Interests of Women (draft translation available only) at the same time as the Trade Union Law. Many provisions of this Law apply to workplaces, for example, Chapter IV — Rights and Interests Relating to Work. However, as is usually the case with legislation enacted by the N.P.C., the Law lacks effective enforcement mechanisms.

51 White, *op. cit.* n.3, 281-3.

52 *Ibid.* 284-5.

53 See Deery, S. and Mitchell, R., *Labour Law and Industrial Relations in Asia* (1992) Chapter 1.

the status of Chinese trade union organisations and consider the pressures for changing this function brought about by market reforms and recent political developments.

2. *TRADE UNIONISM IN THE PRC*

Trade unions in China operate within powerful historical and political constraints. The Chinese labour movement began in the context of national disorder where the control of industry lay in the hands of the foreign industrialists. In 1925 the All-China Federation of Trade Unions (A.C.F.T.U.) was established under strong communist influence.[54] However, the new trade unions were soon crushed. In April 1927 Nationalist forces attacked Communist strongholds in the cities, leading to the massacre of at least 40,000 communist labour leaders.[55] The Nationalist government enacted restrictive labour laws, which reduced the number of trade union members from three million in early 1927 to 30,000 in 1929.[56]

The defeat of the unions had long-term consequences on their influence in the Chinese Communist Party (C.C.P.). The main focus of the Party was henceforth to organise a revolution through the peasants rather than through urban workers. The communists established detailed labour protection laws in the zones under their control[57] but the unions were heavily dependent on the Party. They were thus unable to exercise a strong independent voice in the C.C.P. when it came to power in 1949.[58]

2.1 *The 'Transmission Belt' Theory.*

Once the C.C.P. was in government, it regulated union activity in accordance with Communist theory. According to the precepts formulated by Lenin and later developed by Stalin, trade unions in a communist society play the role of 'transmission belts' linking the Party to the working classes. The union movement is formally separate from the Party and functions as a mass organisation embracing the working class in accordance with the principles of democratic centralism. In practice, the leadership is controlled by Party members as the Party identifies union activists and draws them into its structure. Through them, its directives are communicated down to the workers and they are educated in Party policy.[59]

What remains unclear in this theory is the extent to which the transmission belt

54 Leung, *op. cit.* n.18.,9.
55 *Ibid.* 12; Tsien, *op. cit.* n.3, 17.
56 *Ibid.* 18.
57 *Ibid.* 19.
58 Leung, *op. cit.* n.18, 17-9.
59 Harper, P., 'The Party and the Unions in Communist China' (1969) 37 *The China Quarterly* 84, 85-8. For a discussion relating the 'transmission belt' theory to models of communist corporatism, see Chan, A., 'Revolution or Corporatism? Workers and Trade Unions in Post-Mao China' (1993) 29 *The Australian Journal of Chinese Affairs* 31, 35-9. Chan cites Philippe Schmitter's definition of corporatism from 'Still a Century of Corporatism?' in Pike, F. and Stritch, T. (eds), *Social-Political Structures in the Iberian World* (1974) 85:

> Corporatism can be defined as a system of interest representation in which the constituent units are organised into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.

works both ways. It is accepted that union officials should report on the implementation of Party policy among the workers. However, problems arise when union activists seek to represent workers' interests which are at variance with Party policy. On the one hand, if the activist pushes the Party view too strongly at the expense of workers' immediate interests, she or he may alienate them. On the other, if the activist opposes the Party too forcefully, she or he may be removed.[60]

During the 1950s, this theory was put into effect with the drafting of the first Trade Union Law.[61] The A.C.F.T.U. constituted the transmission belt. However, political developments in the late 1950s and 1960s weakened the A.C.F.T.U.[62] It was eventually abolished during the Cultural Revolution and replaced by the All-China Red Workers Rebel General Corps, under the leadership of Jiang Qing, head of the 'Gang of Four'.[63]

2.2 *The Union Movement 1978–1993*

The A.C.F.T.U. was rehabilitated in 1978 under the post-Mao regime and resumed its transmission belt role. It performed the twin role of motivating workers and providing for their welfare. They organised 'model worker' campaigns, educated workers in production techniques, set up social clubs, credit unions and recreational facilities, as well as employment support services. Generally, these responsibilities posed no threat to productivity or Party control as unions provided services otherwise unavailable in China, which lacked a social security system.[64] Importantly though, a number of serious industrial accidents in 1979 resulted in the A.C.F.T.U. taking an active part in supervising occupational health and safety in enterprises, despite potential clashes with management.[65]

During the 1980s, the C.C.P. permitted an increasing degree of union autonomy.[66] However, in the aftermath of the 1989 Tiananmen protests, the Chinese Party-state has shown that it will maintain control over official union structures. During the protests, the A.C.F.T.U. was generally supportive of the students, though not of the attempt to set up rival unions.[67] After the massacre, there was an attempt to orient the A.C.F.T.U. in a more conservative direction, and its Vice-President, an advocate for increased union autonomy, was removed.[68] Attempts during the 1989 protest period to set up trade unions outside A.C.F.T.U. and thus outside C.C.P. control were crushed. Workers in Beijing, Shanghai and Guangzhou formed 'Autonomous Federations'.[69] The fundamental principle of these organisations was to 'address workers' political and economic demands . . .

60 Harper, *op. cit.* n.59, 88-9; Saich, *op. cit.* n.17, 162.

61 Trade Union Law of the People's Republic of China (adopted by the Committee of the People's Central Government on 28 June 1950).

62 Zheng, *op. cit.* n.13, 396; Leung, *op. cit.* n.18, 22-3.

63 Leung, *op. cit.* n.18,; Saich, *op. cit.* n.17, 162-3.

64 Leung, *op. cit.* n.18, 54-7, 65.

65 *Ibid.* 55.

66 See, *e.g.*, *Far Eastern Economic Review*, 3 November 1988.

67 Wilson, J.L., '"The Polish Lesson:" China and Poland 1980-1990' (1990) 23 *Studies in Comparative Communism* 259, 274-5.

68 *Ibid.* 276-7.

69 For an extensive discussion of the emergence of Beijing Workers' Autonomous Federation, its relationship with the student protesters and its significance, see Walder, A. and Gong, X., 'Workers in the Tiananmen Protests: The Politics of the Beijing Workers' Autonomous Federation' (1993) *Australian Journal of Chinese Affairs* 1.

not just remain a welfare organisation'. While not opposing the role of the C.C.P. in controlling government, they argued that the A.C.F.T.U. did not adequately represent workers' concerns.[70] A number of the Beijing Autonomous Federation's leaders were in Tiananmen Square on 4th June 1989 and were killed. On 8th June the government declared the Beijing Autonomous Federation to be a counter-revolutionary organisation and ordered the arrest of its leaders. Many activists are believed still to be in detention.[71]

These events have a clear message for organised labour in China. Its capacity to act independently is determined by the Chinese Party-state, and diminishes when there has been a reassertion of central control, as there was in 1989. The union movement is not in a strong position. This situation is worsened at present by unfavourable labour market conditions[72] and by a problem of language: in order to advocate workers' rights and interests, the union movement must resort to terms (such as 'exploitation') which are often seen by workers as part of the discredited rhetoric of the Maoist era, even though the terms now have real content.[73] Despite these obstacles, current economic and political pressures do allow the A.C.F.T.U. — though not independent unions — significant scope to strengthen the 'bottom-up' operation within the transmission belt and, at least, to be seen to more clearly support worker rather than simply state interests. Anita Chan has argued that changes in workforce composition, terms and conditions of employment, income distribution, workplace arrangements and worker education have led Chinese workers to perceive more clearly the conflict between their own interests and those of the government.[74] A sufficiently powerful state apparatus could suppress these concerns and, as the Tiananmen events indicate, can indeed do so to some extent. However, the C.C.P. itself is internally divided between Party conservatives and 'technocratic-managerial social engineers', the advocates of economic liberalisation.[75] Neither of the groups are supportive of the working classes in so far as they seek to be organised through independent trade unionism. The latter faction, although sometimes associated with the pro-democracy forces, is often elitist and views workers' institutions as impediments to market-based reforms.[76] In the aftermath of Tiananmen, the conservative faction has been strengthened but in order to secure its position, it has needed to gain the support of alienated workers. Unless the state allows greater scope for the bottom-up operation of the transmission belt, the A.C.F.T.U. as the official union structure risks being dismissed by workers as a vehicle for their interests, just as the Eastern European official trade union institutions were dismissed.[77] The conservative

[70] *Ibid.* Further information supplied by Australia Asia Worker Links, including 'Provisional Memorandum' of the Beijing Workers' Autonomous Federation 28 May 1989.

[71] *Ibid.*

[72] See O'Leary, G., 'Redefining Workers' Interests: Reform and the Trade Unions', in Watson, *op. cit.* n.1, 39.

[73] Chan, *op. cit.* n. 59.

[74] *Ibid.*; see also Howard, *op. cit.* n.8, 113- 4.

[75] Chan, *op. cit.* n.59, 46.

[76] *Ibid.*, 46-8; Li, C. and White, L.T., 'China's Technocratic Movement and the World Economic Herald' (1991) 17 *Modern China* 342, 374. This accounts for the hostility between the autonomous unions in the Tiananmen protests on the one hand and the reform faction and students on the other: Walder, *op. cit.* n. 69, 17.

[77] Chan, *op. cit.* n.59, 60. Contrast the impact of the independent Solidarity in Poland: Wilson, *op. cit.* n.67.

forces have not followed up their pressure on A.C.F.T.U. leadership with a purge of the organisation.[78] Instead there have been uneasy attempts to restate both aspects of the transmission belt role. Ni Zhifu, the former head of the A.C.F.T.U., called for trade unions to protect workers' interests in the face of the reforms[79] while government leaders such as Premier Li Peng seem to envisage a more docile function:

> Workers should support the ongoing reform in all fields, including reform in the system of enterprise management, housing, social welfare, labour and wage policies.[80]

2.3 *Implications for Labour Legislation*

Given the ideological and political position of unions in the P.R.C., the introduction of the employment contract system creates considerable problems for state regulation of industrial relations. The state must maintain control over the union movement while enabling the movement to support workers' interests to the extent necessary to avoid being discredited. Secondly, in order to promote its economic restructuring agenda it must maintain the system of market reforms as advocated by the powerful technocratic-managerial faction while empowering unions to address to some extent the negative consequences the reforms have had for workers. Thirdly, it must balance the retention of a communist ideological framework, as propounded by the conservative faction, with both the reality of market-based reforms and the concerns of workers who no longer see state interests as being one with theirs. In the remainder of this paper, we examine the tensions that these conflicts have produced in most important piece of legislation affecting organised labour — the Trade Union Law — and consider in detail some specific duties of unions.

3. *THE REVISED TRADE UNION LAW: UNION PURPOSE AND ORGANISATION*

3.1 *Scope and Principles*

On 3 April 1992, the new Trade Union Law ('the Law') was adopted at the 5th Session of the 7th National People's Congress (N.P.C.). This is the most fundamental law governing union activities. It is a substantial revision of its 1950 predecessor.[81] The 1992 Law is more extensive[82] and includes a new chapter on trade union structure.[83] However, the object of the Law is not to reform existing practice. Rather, it is to ensure that the fundamental law governing trade union activities reflects that practice, as well as the wider legislative framework regulating labour.[84]

[78] *Ibid.* 277.
[79] *China Daily*, 9 April 1992.
[80] *China Daily*, 30 April 1991. The government's commitment to the contract system was reinforced in the Eighth Five-Year Plan, see extract in *Beijing Review*, 13 May 1991.
[81] The 1950 Law was annulled when the 1992 Law came into force: Article 42.
[82] It contains forty-two articles compared with twenty-six in the 1950 Law.
[83] Chapter II.
[84] On the drafting of the Law see: *Xin 'Gonghui Fa' Xuexi Baiwen* (100 questions about the study of the new Trade Union Law) (1992) 224-31.

The Law applies to all workers performing physical or mental work in establishments within Chinese territory and who primarily earn their living from wages.[85] The distinction in the 1950 Law between temporary and permanent workers has been removed.[86] This reflects the introduction of the contract system. The Law applies to all categories of enterprises including SOEs and FIEs[87] but in some instances makes distinctions between them.

During the N.P.C. Session at which the Law was adopted, Wang Hanbin, Deputy Head of the N.P.C. Standing Committee and Head of its Legal Work Committee outlined the purpose and operation of the Law. Such speeches have the equivalent weight to a binding interpretation of the law — more than a Minister's Second Reading Speech in the Australian system.[88] Wang's speech reflects the contradictory pressures on Chinese unions. He acknowledged that the need for reform of the 1950 Law springs from the changes brought about in society and the working masses since the 1979 economic reforms. Whereas the 1950 Law had as its main aim the education and encouragement of workers to implement socialism and the people's democratic dictatorship, there is now a recognition that, although at the general level the interests of workers and the whole people are identical, there may arise contradictions between the interests of particular groups in society. This recognition provides some opportunity for an overt acknowledgment that the interests of workers in a particular enterprise may be different to or even opposed to those of management and the whole people, who are in theory the owners of the enterprise. According to Wang, the new law makes it clear that the importance of the representative role of the unions has increased:

> Corrupt practices and bureaucratism harm the interests of the masses. So the broad mass of workers need to go through their own organisation to protect and express each of their interests.[89]

At the same time, the top-down aspect of the transmission belt theory is still operative. Trade unions are viewed as forming the 'link and bridge which joins the Party and government with the masses' in accordance with the principles of democratic centralism.[90] Wang describes the intended operation of this link:

> It is necessary that the trade unions often report the masses' views to the Party and government to help the Party and government to improve their work. At the same time through the practical work of the unions they can educate and lead the workers to decide for themselves to subordinate their individual interests to those of the state, and subordinate the interests of groups to that of the whole and immediate interests to long term interests.[91]

Wang's speech also shows the tensions between market reforms and communist ideology. The trade unions must observe twin national goals. On the one hand, they must support economic reform and 'opening up'. On the other hand, they must implement the four basic principles ('socialist modernization construction,

85 Article 3.
86 Article 1, 1950 Trade Union Law.
87 Article 3. The term 'enterprise' includes state-owned, collective and private firms, as well as foreign-invested equity joint ventures, contractual joint ventures and wholly foreign owned enterprises.
88 There are three forms of the interpretation of laws — legislative (which is the case here), judicial and administrative. The highest form of interpretation is legislative.
89 *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.85, 224 *ff.*
90 *Ibid.*
91 *Ibid.*

the leadership of the C.C.P., the direction of Marxism, Leninism and Mao Zedong Thought and following the socialist road').[92]

These policies are reflected in Chapter I of the Law, which sets out the Law's basic principles.[93] Article 1 sets out the purpose of the Law. It is to 'protect the position of the trade unions in state, political, economic and social life, to clarify the rights and obligations of trade unions and to enable them to play their proper role in the development of China's socialist modernisation.' The transmission belt theory is most clearly reflected in Article 6 which provides:

> While upholding the overall rights and interests of the whole nation, trade unions shall, at the same time, safeguard the rights and interests of workers.
>
> A trade union must liaise closely with workers, listen to and reflect their views and requirements, care for their livelihood, assist them in overcoming difficulties and serve them wholeheartedly.

The first paragraph of this article highlights the tension between the dual responsibilities of unions within the transmission belt theory. The use of the expression 'listen to and reflect' (*tingqu he fanying*) in the second paragraph contemplates a weaker obligation to workers than is implied by other terms such as 'represent' (*daibiao*).

Succeeding provisions in Chapter I do not explicitly address potential conflict between the interests of workers and management. Article 7 refers to the unions' role in industrial democracy.[94] Articles 8 and 9 deal with unions' educative and exhortative functions. A trade union must 'organise workers to conscientiously complete production and work assignments . . . [and to] improve work productivity rates and economic performances.'[95] Although such a role will often be in the worker's interests, there will be cases where these obligations may be inconsistent with the maintenance of workers' conditions, most seriously in matters of industrial health and safety.[96] This potential conflict is neither recognised nor addressed in these articles, nor elsewhere in Chapter I.[97]

Article 10 requires the A.C.F.T.U. to maintain relations with trade union organisations of other countries. However, this must be done in accordance with the principle of 'mutual non-interference in internal affairs', a common phrase in China's international diplomacy, suggesting that China will not necessarily be bound by international practices, such as those forming the basis of International Labour Organisation Conventions. In fact, although China was a founding member of the I.L.O.,[98] the most significant Conventions affecting union organisation have not been ratified by the C.C.P. government. These include the Convention Concerning Freedom of Association and Protection of the Right to Organise,[99]

92 *Ibid.*

93 The principles in Chapter I are reiterated in the A.C.F.T.U. Charter, which was last amended at the Twelfth Trade Union Congress in October 1993. At the time of writing the text of the amendments was not available: see People's Daily, 24, 25, 28 and 30 October 1993.

94 *Infra* Section 4.3.

95 Article 8.

96 *Infra* Section 4.1.

97 Indeed, health and safety are not explicitly referred to in the 'General Principles' at all. It is presumably included in the reference to safeguarding workers' interests in Article 6.

98 See Bowman, M.J. and Harris, D.J., *Multilateral Treaties, Index and Current Status* (1984) Treaty 56 (revised in *Eighth Cumulative Supplement* (1991)).

99 Convention 87, 1948. These Conventions are reproduced in Blanpain, R. (ed.), *International Encyclopaedia for Labour Law and Industrial Relations*, Codex, ILO Section.

the Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively[100] and the Convention Concerning Occupational Safety and Health and the Working Environment.[101] One effect of Article 10 therefore is to inhibit Chinese unions from criticising domestic legislation on the basis of such international standards.

3.2 *Union Organisation*

The principles in Chapter I apply to union structure. Trade unions are defined as 'working class mass organisations formed by workers of their own free will.'[102] Workers in all categories of enterprises have the right to form and to participate in unions,[103] and their unions enjoy state protection.[104] Trade unions enjoy guaranteed funding and access to facilities and state protection.[105] While these provisions suggest a recognition of freedom of association, Article 11 heavily qualifies this freedom. It states that unions are organised on the principle of democratic centralism. This principle means that lower level unions are subordinate to and under the supervision of higher level bodies.[106]

More detailed provisions regulating the structure of the official trade union movement are set out in Chapter II of the Trade Union Law. This establishes an hierarchical system. The base unit is the enterprise union. If it has at least 25 members, it may form a 'primary trade union committee'; unions with less may elect an organiser.[107] The next level of organisation is constituted by a dual system of industrial[108] and regional unions (within which there are further divisions) so that enterprise unions federate both according to their geographical location and according to the nature of their industry.[109] At the highest level is the A.C.F.T.U.[110]

[100] Convention 98, 1949. On 11 October 1962, the Republic of China on Taiwan, purporting to act as the legitimate government of China proper, ratified Convention 98. This was cancelled by the ILO Director-General on 21 September, 1984: Bowman and Harris, *op. cit.* n.98, notes to Treaty 235. See also Convention Concerning the Promotion of Collective Bargaining, Convention 154, 1981, which China also has not ratified: Bowman and Harris *op. cit.* Treaty 803.

[101] Convention 155, 1981. Parties to these Conventions are listed in Bowman and Harris, *op. cit.* n.98, Treaties 219 (Convention 87), 235 (Convention 98) and 804 (Convention 155).

[102] For a comment on the corresponding provision in the 1950 Law (Art 1), see Zheng, *op. cit.* n.13, 402-5.

[103] Article 3.

[104] Article 4. This applies of course only to officially sanctioned unions — see text *infra*.

[105] Chapter V of the Law regulates union finance. Sources of trade union funds include membership dues, government subsidies and, in non-private sector enterprises, an allocation from the enterprise of 2 percent of the total wage bill: Article 36. In addition, union facilities, equipment and office space are to be provided by both the relevant level of government and by the enterprise: Article 38. The position in the private sector is governed by legislation other than the Law, which broadly speaking confers similar benefits: Article 36. Generally, they must set aside adequate facilities for the union, including office space and, as is the case in the state sector, contribute an amount equal to 2 percent of the payroll to union funds: see, for example, Detailed Rules for the Implementation of the Law of the People's Republic of China on Wholly Foreign-owned Enterprises 1990, article 71; Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment 1983, article 99. The Law provides that unions are relatively autonomous in the determination of their budget and accounting system, although they are all required to establish 'fund inspection committees': Article 37. However, the primary use of funds must be 'to educate workers at the grass-roots level and . . . to arrange other activities': Article 36. It is not clear what the 'other activities' are, but it would seem that the educative focus is predominant. The A.C.F.T.U. is empowered to formulate more detailed measures on the use of funds.

[106] Article 11.

[107] Article 12.

[108] These can be either local or national.

[109] Article 12.

[110] Article 12.

whose policy decisions bind all organisations lower in the hierarchy. The establishment of a union at any one level requires the approval of the union at the next highest level.[111] This effectively prevents the creation of any union outside the A.C.F.T.U. structure.[112]

At each level, the union structure is governed by a committee elected by and responsible to general or representative assemblies.[113] It would appear that incumbent executives have considerable power to control nomination and voting methods for these assemblies[114] as do Party members or (at enterprise level) management.[115] This further ensures a top-down control of decision-making.

The Law entitles regional and national union structures to be heard and to participate in research work whenever the government organ at the corresponding level formulates policy or laws relating to the rights and interests of workers.[116] This does not of course require the government body to accede to union demands.

In some ways, the Law has enabled Chinese trade unions to operate very effectively. The movement has been able to organise throughout the country and its unionisation rate of around 75 percent compares favourably with most countries.[117] The link between an enterprise union and the industry/regional unions may permit small unions to make use of resources and skilled personnel not available within the enterprise.[118] The entitlement of the A.C.F.T.U. and its branches to participate in government allows it formal access to policy-making at various levels of government.

Potentially, then, unions can offer their members a wide range of services and represent them not just in the enterprise, but in the wider political sphere. Some unions have succeeded in doing this under similar provisions in the previous Trade Union Law. In the enormous Wuhan Steelworks, for example, there were in 1987 between 600 and 700 full-time union officials with special departments for women workers, labour protection and other union concerns. This powerful union, along with others in the Wuhan Municipal Federation of Trade Unions,

111 Article 13.

112 Note, however, that the specific provision to this effect in the 1950 Law (Article 4) is absent from the 1992 revision.

113 Article 11. The 1988 A.C.F.T.U. Charter specifies the nature of these assemblies. In the case of the two higher levels, these convene every five years (Chapters 3 and 4) whereas primary level assemblies convene every year (Chapter 5).

114 Zheng, *op. cit.* n.13, 403-4.

115 Leung, *op. cit.* n.18, 113-4; Moore, W. M., 'China Industrial Relations: Amid the Conflict of Tradition and Reform' (1989) 40 *Labor Law Journal* 747, 753.

116 Articles 28 and 29.

117 See, *e.g.*, the rates of unionisation in several other Asian countries which are referred to by the various authors in Mitchell, *op. cit.* n.53. The rates, with corresponding page references from Mitchell, are as follows: Malaysia — 11 percent (64, 81); Singapore — 17 percent (100); South Korea — 24 percent (148); Japan — 26 percent (194); The Philippines — 25 percent (231, but this is unverified); Thailand — less than 1 percent (242, 245); Republic of China on Taiwan — 29 percent (272). At present, the official trade union movement has approximately 104 million members: *China Daily*, 24 April 1992. It employs around 470,000 full time officials. The A.C.F.T.U. has eight specialised departments including those concerned with the economy, women workers and technology and labour protection. Union federations exist in all provinces, autonomous regions and self-governing municipalities: *Beijing Review*, 13 February 1989 and 17 July 1989. See also Warner, M., 'Labour-Management Relations in the People's Republic of China: the Role of the Trade Unions' (1991) 2 *International Journal of Human Resource Management* 205 and *Gong hui gongzuo dabaike* (Complete book of Trade Union Work) 87-90.

118 It is not clear to what extent this occurs in practice. Note however that primary unions have access to legal consultancy services from county-level federations.

has been able to defend the comparatively high standard of working conditions and welfare, while influencing government policy effectively.[119] Apparently, then, some parts of the official union movement can operate from a position of strength.

However, in other respects, the Law does not ensure trade union effectiveness. While union access to government could compensate to some extent for lack of full trade union independence (which, as we have seen, is not an option), this would only be the case if unions retain some real degree of autonomy, especially at the grass-roots level where contact with the average worker is greatest. It may be possible to achieve this in a manner consistent with democratic centralism and the transmission belt theory if primary unions were subject only to the direction of their members and to the union structure at the next level. This would mean that they would remain free from interference from management, in particular, but also from Party officials within the enterprise. At present, the Trade Union Law does not guarantee this. The 1950 Law prevented management from interfering in meetings and activities[120] but this provision has been removed.[121] Further, members of management are not prevented from being union members. This means that union decision-making may take place under employer surveillance. There are also no prohibitions against discriminatory treatment towards employees on the grounds of their participation in legitimate union activities.

Another matter relevant to union autonomy which the Law does not address concerns union election procedures. Management are not prevented from participating in elections. There is no requirement for secret ballots. The absence of these provisions may increase the risk of intimidation.[122] Moreover, where union officials fail to hold an election, or hold a sham election, members are unable to challenge their decision.

The Law also provides little protection for workers in non-unionised workplaces. It was seen that workers in small private enterprises are among the worst treated. The Law does not confer a right of entry on officials in the union federations which would empower them to assist workers in these firms. Moreover, it is unclear whether workers in firms too small for an organised union (or indeed for an organiser[123]) may liaise directly with the relevant federation.[124]

It may be concluded from this examination of union organisation that unions, particularly primary level unions, have limited capacity to act autonomously. They are subject to state demands relayed through higher level unions and have little protection from management and Party interference within the enterprise. This weakens their capacity to promote worker concerns when these are in conflict with management or Party policy.

119 Leung, *op. cit.* n.18, 47-9.
120 Article 18.
121 Although no individual may make use of union funds granted by the state: Article 39.
122 Leung, *op. cit.* n.18, 113.
123 It is not clear how effective organisers are in those firms too small to have a union.
124 As major Laws of the N.P.C. are often supplemented by implementing regulations promulgated at a later date.

4. *THE REVISED TRADE UNION LAW: RIGHTS AND OBLIGATIONS OF TRADE UNIONS*

In this part, we discuss the way in which unions are empowered to carry out their functions. We examine the key provisions from the Trade Union Law and other relevant legislation in order to further develop our argument that trade unions are not empowered to act unambiguously on behalf of workers.

The relevant provisions in the Trade Union Law are to be found in Chapter III which concerns the 'Rights and Obligations' of trade unions. Its provisions are a practical elaboration of the General Principles in Chapter I. They recognise more explicitly potential conflicts of interest in the workplace. There are four areas dealt with where the tension between protecting workers' interests and carrying out enterprise state directives is most apparent: health and safety requirements,[125] negotiating terms and conditions of employment,[126] dispute resolution[127] and industrial democracy.[128] The remaining provisions, which we will not examine extensively, concern the union's educative function[129] as well as its consultative role in government.[130] The four areas of union work discussed below are each governed by systems of regulation which predate the revised Trade Union Law. The relevant provisions of the Trade Union Law reflect at a general level the existing regulatory regimes.

We distinguish in what follows between the state and foreign invested sector, since, as has been seen, the legal regulation of labour in each differs and this has an effect on the way in which unions may operate.

4.1 *Health and Safety*

The Trade Union Law makes provision for union involvement in 'labour protection', that is, occupational health and safety.[131] Article 17 deals generally with a union's role in addressing a violation of labour standards. Articles 23 and 24 specifically concern health and safety issues. The characteristic feature of all these provisions is that they confer no powers to compel an employer to remove a safety hazard. Article 17 enables a union to 'request' that an infringement of the legal rights and interests of workers be rectified. Article 23 permits a union to 'put forward views' on working conditions, and an employer must 'conscientiously endeavour' to meet its requirements. Article 24 deals with situations in which

125 Articles 17, 23 and 24.
126 Articles 18 and 26.
127 Articles 19-22.
128 Article 16.
129 Article 27. Unions are required to organise events so as to 'improve the cultural and occupational quality of the workers' as well as recreational activities.
130 Articles 28 and 29
131 The national policy for labour protection emphasises safety and prevention. The policy is expressed as *anquan diyi, yufang weizhu* (safety number one, prevention as the main point): Chen Wenyuan (ed.), *Laodong Baohu Fa Shou Ce* (Handbook of Labour Protection Law) (1987) 185.

workers face immediate health risks. The terminology used here is that unions 'have the right to suggest' a resolution. For example:

> On discovering a situation where the personal safety of workers is jeopardised, a trade union shall have the right to suggest to the enterprise's administrative authority that the workers abandon the dangerous site and the said authority must decide promptly on measures to resolve the matter.

These provisions suggest that unions have no means of compelling employers to address occupational health and safety issues.[132] The A.C.F.T.U. policy on labour protection is consistent with this. It emphasises prevention and comprises three main components — supervision of the implementation of labour protection regulations; assistance in drafting new laws and policies and the introduction of new technology; and education and training of workers in safety training.[133] Supervision generally does not imply enforcement, except by moral or psychological pressure.[134]

A comprehensive, though by no means complete, system of labour protection legislation and mechanisms for its implementation exist. There are three levels of state regulation concerning worker health and safety.[135] At the first level are laws passed by the supreme organs of state power, the National People's Congress and its Standing Committee, such as the Law of the People's Republic of China on Mine Safety.[136] The absence of a Labour Law[137] means that there is no overriding national framework for safety standards. This first level of laws set out general

[132] Note that article 26(6) of the A.C.F.T.U. Charter requires that trade unions '. . . have concern for the improvement of workers' labour conditions, protect the safety and health of workers in the course of production, supervise the implementation of relevant state laws and regulations and rules concerning labour protection, safety technology, industrial sanitation . . . carry out safety instruction amongst workers, supervise the administrative aspects of resolution of questions concerning the health and safety of workers, participate in safety inspections and the investigation and handling of accidents involving injury or death.'

[133] The policy of the trade union movement for implementation of labour protection is *yufang wei zhu qunfan qunzhi* (prevention as the main point, the masses to prevent and regulate). The methods used by the trade unions to implement labour protection policies of the state and party are: supervision, assistance and education. Supervision includes: 1. ensuring that the enterprise administration implements state law and policy on labour protection, struggling against bureaucratism which results in breach of or ignoring labour protection laws; 2. carrying out supervision of production safety of a mass nature, where there are hidden dangers or hazards, criticise and make suggestions to the administrative authorities and encourage them to make timely rectification; 3. supervising the inclusion of labour protection clauses in labour contracts and their performance; 4. supervising the allocation of labour protection funds and ensuring labour protection plans are determined and implemented; 5. participating in and ensuring that new technology and equipment includes labour safety features; 6. participating in the investigation and handling of accidents involving worker injury or death, where there has been dereliction of duty which has caused loss to property or life, pursuing administrative or legal responsibility; 7. supervising the improvement by administrative organs of women's protection. Assistance means: 1. participating in the study and formulation by government and administrative departments of labour protection laws, representing and reflecting the hopes and requests of the working masses; 2. organising safety production competitions and combining these with economic benefits such as bonuses; 3. helping to introduce new technology, especially in areas where there have traditionally been safety problems. Propaganda and education work means: 1. cooperating with enterprise management to conduct safety training; 2. using union propaganda channels to conduct production safety education, exhibitions and discussions; 3. using the union press to publish books on work safety; 4. praising model units and encouraging workers to conduct self education on safety. Zheng Wenchuan (ed.), *Gonghui Gongzuo Dabaike* (Encyclopedia of Trade Union Work) (1992) 359.

[134] *Ibid.*

[135] *Ibid.* 361

[136] Passed at the 28th meeting of the 7th Standing Committee of the N.P.C. on 7 November, 1992 . This defines the role which the unions play in overall safety regulation in mines in the same terms as that in arts 23 and 24 of the Trade Union Law: *Renmin Ribao* (People's Daily), 13 November 1992.

[137] *Supra* n.33 and accompanying text.

principles and in theory forms the basis of more detailed laws and regulations which implement the spirit of these laws. The second level consists of regulations passed by the State Council and its Ministries, such as the Ministry of Labour and the Ministry of Health, and local People's Governments.[138] The third level comprises State and Ministry labour protection standards.[139] These laws, regulations and standards form the legislative and normative basis of the labour protection work carried out by the unions at all levels. The content of laws affecting state and foreign investment sectors differs in some cases.

4.1.1 *State Sector*

The national system of supervision of health and safety regulation in the state sector is carried out at three levels: by the state, through its labour safety and health departments, by administrative management, through the management organs of enterprises and the government departments in charge of those enterprises[140] and by the masses, through the trade unions.[141] The significance of trade union supervision being classsified as supervision by the masses, in contrast to the other forms of supervision, is that it usually only involves the right to make criticisms and suggestions which may be acted upon by the relevant authorities.[142] With some exceptions, the capacity of unions to ensure compliance by enterprises with health and safety laws, regulations and standards is thus constrained, as their primary duty is to make criticisms and give opinions.

The trade unions supervise implementation of the system of worker health and safety through a tiered system of Labour Protection Supervision and Inspection Committees (*laodong baohu jiandu jiancha weiyuanhui*). The Labour Protection Supervision and Inspection Committees were established by the A.C.F.T.U. at its 63rd meeting in January 1985 in three sets of regulations.[143] These regulations are also binding on Ministries and Committees involved in the administration of worker health and safety.[144] The Provisional Regulations require each union

138 There are over 300 such labour protection regulations. For example, Factory Health and Safety Regulations; Construction, Installation and Engineering Safety Technology Regulations and the Regulations on Reporting Accidents Involving Worker and Staff Death and Injury, passed by the State Council on 25 May 1956. Zheng Wenchuan, *op. cit.* n.133, 363.

139 There are more than 100 of these. For example, Industrial Enterprise Health Design Standards (*Gongye Qiye Sheji Weisheng Biaozhun*); Zheng Wenchuan, *op. cit.* n.133, 363.

140 The Production Safety Committee of an enterprise is an administrative organ headed by the factory head: Zheng Wenchuan, *op. cit.* n.133, 360-1; Chen Wenyuan, *op. cit.* n.131, 302-3.

141 Zheng Wenchuan, *op. cit.* n.133, 357.

142 *Dabaike Quanshu: Faxue* (Complete Encyclopedia: Legal Science) (1984) 674.

143 They are the Provisional Regulations for Trade Union Labour Protection Supervision and Inspection ('Provisional Regulations') (*Gonghui Laodong Baohu Jiandu Jiancha Zanxing Tiaoli*): Chen Wenyuan, *op. cit.* n.131, 85-7; Work Rules for Basic Level (Workshop) Trade Union Labour Protection Supervision and Inspection Committees ('Workshop Committee Rules') (*Jicheng (Chejian) Laodong Baohu Jiandu Weiyuanhui Gongzuo Tiaoli*): *ibid.* 82-3; and the Work Rules of Trade Union Small Group Labour Protection Inspectors ('Small Group Inspector Rules'): *ibid.* 87-9. See also alternative translations by International Labour Organisation Legislation Series (1985), China.

144 The regulations passed by the A.C.F.T.U. technically bind only union members and officials. Their scope of applicability was broadened when they were transmitted by the State Production Safety Committee (*Guojia Anquan Shengchan Weiyuanhui*), a state organ, to all its lower level Production Safety Committees with instructions to abide by and implement the regulations. A joint notice was also issued by the Finance Committee (*Jingwei*), the Labour Personnel Ministry and the Health Ministry transmitting the regulations to all their subordinate departments with instructions to assist the unions to implement them: Zheng Wenchuan, *op. cit.* n.133, 359.

federation at municipal level and above to establish a Labour Protection Supervision and Inspection Committee which is to appoint inspectors.[145] Safety committees and representatives operate at the grass-roots level.[146] Inspectors have wide powers to monitor and examine the workplace for hazards. For example, inspectors may support or organise the cessation of work where there is a serious threat to health and management has not complied with a recommendation that work be stopped. Inspectors are also to ensure that workers be paid during that period.[147] It appears that the powers exercised by the Inspectors are intended to be more than merely consultative, though that is also an aspect of their work.[148] The Provisional Regulations also attempt to provide some safeguards against retaliatory action being taken by enterprise management against an Inspector for performing his or her duties.[149] The system of labour safety inspectors began with the appointment of 800 specialised inspectors. Statistics to the end of 1989 showed the numbers of safety inspectors at the level of city and above had risen to 1816.[150]

One source refers to two forms of Notice instituted nationally by the A.C.F.T.U. The Notices are intended to implement procedures by which the Inspectors have powers to require that dangerous situations in the workplace be dealt with. These are the 'Notice to Resolve Problems within a Limited Amount of Time' (*Xianqi Jiejue Wenti Tongzhi Shu*) and the 'Notice to Abandon a Hazardous Worksite' (*Cheli Weixian Zuoye Xianchang Tongzhi Shu*).[151] It appears that these Notices may be issued only in exceptional circumstances. In ordinary circumstances where a workplace hazard of the type referred to in the notices is discovered, an oral or other written form of notice may be given requesting that the hazardous situation be rectified.[152] The Provisional Regulations and the Trade Union Law do not refer specifically to either of the notices so there is some uncertainly about the legislative basis for their issue.[153]

145 Provisional Regulations, article 2. See also n.143 *supra*.

146 *Ibid.*

147 Provisional Regulations articles 3(4) and (5).

148 The powers exercised by the inspectors in the implementation of the labour protection system have been described as the unification of supervision by the state and the masses, which indicates that the Inspectors also exercise some coercive powers: Zheng Wenchuan, *op. cit.* n.133, 358. The intention of the A.C.F.T.U. that the system of health and safety supervision be effective in practice is demonstrated in the Provisional Regulations which require that, in order to be appointed, an inspector must have high levels of political and technical training. That is, a person who actually has the capacity to perform the required tasks.

149 Zheng Wenchuan, *op. cit.* n.133, 358. See also Chen Wenyuan, *op. cit.* n.131, 300; Provisional Regulations articles 4 and 5.

150 Zheng Wenchuan, *op. cit.* n.133, 360.

151 *Ibid.* n.133, 360. These Notices are not referred to in any other source we referred to and are not explicitly contained in any of the laws or regulations establishing the system of Health and Safety Inspectors and Committees, nor in the Trade Union Law.

152 Zheng Wenchuan, *op. cit.* n.133, 360. See also Trade Union Law, articles 17 and 24.

153 The 'Notice to Resolve Problems within a Limited Amount of Time' can be issued where the 'work conditions are abominable, where there are serious hazards in the workplace, where there are hidden dangers of a serious accident in the production equipment and process, or where the enterprise administration has not taken seriously the opinion of the union that rectification should be made': Zheng Wenchuan, *op. cit.* n.133, 360. Article 3(3) of the Provisional Regulations enables inspectors to make recommendations on production and labour safety measures and see that problems are solved within reasonable time limits. It reflects generally the types of matters which might be the subject of such a notice. The 'Notice to Abandon a Hazardous Worksite' may be issued in the circumstances which are also specified in reg. 3(4) of the Provisional Regulations. The 'Notice to Abandon a Hazardous Worksite' can be issued in any of the following circumstances: where the management, in

The consequences of issuing either of these notices are considered to be very serious. Inspectors will be guilty of dereliction of duty and bear responsibility for a wrongful failure to issue a notice. They will also be subject to penalties for wrongful issue of a notice which results in disruption and loss to production.[154]

In addition to the inspectors, Labour Protection Supervision and Inspection Committees must be established by basic level unions with over 300 members and workshop level unions with over 500 members. Union small groups may elect labour protection officials who are not released from their ordinary duties.[155] The head of the committee is usually the union head. According to 1989 figures, nationally there were 457,853 basic level (workshop) health and safety Labour Protection Supervision and Inspection Committees.[156] Their tasks in the workshop or enterprise are basically the same as those of the Labour Protection Supervision and Inspection Committees and fall within the general guidelines of trade union health and safety policy.[157] One condition of carrying out work on implementing safety measures is that it must be carried out at the same time as implementing the economic responsibility system. This requirement that improvement of workers' labour conditions be conditional on increases in productivity seriously com-

breach of rules and regulations, directs or orders workers to undertake risks, or if distinct and hidden dangers exist in the production process which jeopardise workers' life or safety, where improvements which should have been made were not, where there is a serious accident, or after an emergency where there are toxic consequences and the hazardous situation has not been removed and the required safety measures have not been adopted, for enterprises which are newly constructed, expanded or undergoing technical restructuring, where they have not adopted safety measures which may cause serious harm to the health and safety of workers: Zheng Wenchuan, *op. cit.* n.133, 360, and referred to in general terms in articles 23 and 24 of the Trade Union Law. The Regulations refer to cases where enterprise management fails to comply with an inspector's recommendation. Where this occurs, the inspector may organise the workers to abandon the site without loss of salary.

154 Although we could obtain no figures on the numbers of notices which had been issued, it could be envisaged that the guideline that they may only be issued in extraordinary circumstances, coupled with the risk of penalty for disrupting production, would discourage Inspectors from using the notices where they are also could issue an oral or written warning.

155 Zheng Wenchuan, *op. cit.* n.133, 360-1; Chen Wenyuan, *op. cit.* n.131, 302-3. The basic level and workshop level supervisi on and inspection committees conduct their work under the supervision of the same level union and the higher level Labour Protection Supervision and Inspection Committee. Article 4 of the Workshop Committee Rules provides that the committee be democratically elected and that the committee should comprise between seven and fifteen people with one head and one or two deputy heads.

156 Zheng Wenchuan, *op. cit.* n.133, 360.

157 Their main tasks are to: 1. educate workers to obey discipline and safety regulations and state labour protection policy; 2. supervise and assist the enterprise to carry out labour protection laws and regulations, resolve production problems involving safety and health, improve work conditions; 3. supervise and inspect the implementation of labour safety plans and expenditure; 4. supervise the labour protection aspects of enterprises which have new technology, reform and new enterprises; 5. frequently inspect the labour safety situation, and if there is a problem, report it immediately; 6. encourage the enterprise administration to implement safety measures at the same time as implementing the economic responsibility system; 7. encourage the enterprise to implement, abide by state laws and regulations concerning safety equipment, work hours and rest times; 8. collaborate with the women's committee to do work on protection of women's safety and encourage implementation of state laws on women's protection, especially during menstruation, pregnancy, childbirth and lactation; 9. participate in investigations of accidents involving death or injury, help discover the reasons and give views about how to deal with the situation; 10. where workers are directed or forced to work in dangerous situations in breach of laws and regulations, where there are distinct or hidden dangers in the production process, where it may harm workers lives and may damage loss to state property, they have the power to represent their views to the management that the workers stop work until the problem is dealt with, if that is ineffective they may immediately support and encourage the workers to stop work and leave the dangerous site, with salaries to be issued as before: Zheng Wenchuan, *op. cit.* n.133, 360.

promises the capacity of unions to act as strong advocates for workers' rights and interests.[158]

At the next level down the hierarchy, the trade union small group may elect a safety inspector according to its needs, who will conduct his or her activities under the leadership of the trade union small group leader.[159] The small group safety inspector carries out tasks of a similar nature to those of the higher level committees and inspectors which include education, frequent inspection of equipment and safety facilities, anti-dust and smoke equipment, reporting risks and accidents and helping to find solutions to problems. They may also evacuate workers from sites where there is an obvious risk of a serious accident which may endanger the life and safety of workers or state property. On 1989 figures there were 3,114,637 such inspectors.[160] In addition to the system of health and safety inspectors and committees, a number of training institutes and programs have also been established.[161]

What has been the effect in practice of the Chinese system of labour protection? It would seem that there are still severe problems. The rate of work related illness, injury and death has worsened since the introduction of economic reforms and especially since 1985 when the present health and safety regulations commenced operation.[162] Despite official recognition of the problem, a report of figures for worker fatalities in 1992 released by the Ministry of Labour reveals that 15,146 workers were killed in industrial accidents.[163] The recent increases in worker injury have been attributed to changes brought about by economic reform. They include factory managers valuing increased production over worker safety,[164] failure to include provisions concerning safety in labour contracts,[165] failure to implement safety measures, workers frequently being directed to work in breach of safety regulations, failure to give adequate safety training to the large numbers of contract workers who have entered new jobs and a decrease in the technical training given to workers.[166] A recent front page newspaper article highlighted the concern of government at the ever increasing amount of loss of lives and property occurring as the result of industrial accidents. The increase in accidents was attributed to a number of factors including the loosening of safety standards in production and the reduction of the numbers safety personnel in the process of enterprise reform, as well as the willingness of leaders to encourage increased production at the expense of the enforcement of safety standards. The incomplete legislative regime for supervision of safe methods of production and the lack of coercive power of safety inspectors were further nominated as exacerbating the problem.[167]

158 *Infra* Section 4.2; c.f. *supra* Section 3.3.
159 Small Group Inspector Rules, article 2. See n.143 *supra*.
160 Zheng Wenchuan, *op. cit.* n.133, 361.
161 *Beijing Review*, (Beijing) 17 July 1989.
162 Chen Wenyuan, *op. cit.* n.131, 184.
163 *China Daily*, 23 April 1993.
164 Chen Wenyuan, *op. cit.* n.131, 184.
165 *Ibid.* See *China Daily*, 1 June 1993, which indicates this problem is particularly serious with private enterprises. Private entrepreneurs are reportedly unwilling to spend the money required to invest in labour protection and welfare. Labour contracts in those types of enterprises often provide for monthly salary but "fail to stipulate that the firms will pay the medical expenses and provide welfare services to workers injured in industrial accidents."
166 Chen Wenyuan, *op. cit.* n.131, 184.

It may be concluded that the present regulatory scheme is unable to implement fully national health and safety policies and objectives. The legal framework, as well as the attempt by the A.C.F.T.U. to implement the scheme, is one step towards introduction of a comprehensive work safety system in that it establishes a clear, well-staffed structure at a number of levels, which, in theory, can implement the safety inspection system on a large scale. Potentially, unions could have a pivotal role in occupational health and safety. However, this structure is undermined in five ways. First, unions — and workers generally — have limited power within the workplace to prevent workers from being required to work in hazardous conditions. Second, there is no legislative base enabling workers or their unions to enforce through legal or administrative channels either the consultation provisions in the Trade Union Law, or the A.C.F.T.U. Regulations.[168] For example, inspectors lack clear authority to issue Notices compelling enterprises to rectify dangerous workplace conditions. Third, implementation of safety measures must be undertaken at the same time as the introduction of the economic responsibility system, so that measures to protect worker health are conditional upon and may be subordinated to production targets. This exacerbates the problem of management disregard of worker safety standards. Fourth, the health and safety inspectors and committees operate only in unionised plants, leaving other workers unprotected. Fifth, the overall legislative framework, including adequate mechanisms for enforcement of standards for protection of health and safety, is incomplete and so enterprise management can ignore the existing health and safety regulations with impunity.

4.1.2 *Foreign Investment Enterprise*

The position of unions in FIEs is worse than in the state sector. This is because, aside from the general articles in the Trade Union Law[169] there is no clear legislative statement applying the system of health and safety inspectors, or appropriate alternative, to FIEs. The A.C.F.T.U. regulations are not expressly limited to the state sector,[170] but this appears to be their principle field of operation. Some of the regulations specifically relating to FIEs do refer to labour protection.[171] However, they do not mention what role unions have in ensuring that standards are complied with. The legislative silence on union involvement in workplace safety in FIEs may be contrasted with the emphasis in stipulations in FIE laws requiring unions to organise educational, sporting and political activities.[172] This emphasis upon education and inculcating workers with the goals of

167 '*Ba Anquan Shengchan Dangzuo Tuchu Dashi Lai Zhua*' *Renmin Ribao* (People's Daily) 31 October 1993.

168 These provisions could possibly be enforced indirectly through governmental labour bureaux. However, where these are unwilling to assist, unions do not appear to have any other recourse.

169 Articles 17, 23 and 24: see *supra* n.131 and accompanying text.

170 The Provisional Regulations apply to unionised institutions (Article 8): See *supra* n.143. It is unclear if these include FIEs.

171 See Interim Provisions for Labour and Management in Enterprises in the Special Economic Zones of Guangdong Province, articles 12-4, *supra* n.13; Provisional Regulations of the Shenzhen Special Economic Zone on Labour Management in Foreign Investment Enterprises, Chapter V, *supra* n.13; Provisions for the Implementation of the Regulations on Labour Management in Joint Ventures Using Chinese and Foreign Investment, articles 14-7, *supra* n.13.

172 Regulations for the Implementation of the Law of the People's Republic of China on Joint

the Open Door policy could be seen as having the effect of diverting the union's resources and priorities away from enforcement of worker safety standards.[173] Reports that the death toll from industrial accidents in Shenzhen, Zhongshan and Zhuhai increased by 173, that is 47 percent in one year,[174] raise serious questions about the efficacy of the system for protection of health and safety in SEZs where FIEs are concentrated. According to a report in the *China Daily*, only 26 percent of joint ventures in Guangdong province were found by the provincial health authorities to be complying with occupational health standards:

> Ministry of Public Health officials even complained of local leaders trying to prevent them carrying out checks on factories and workshops, because they feared foreign investors would be frightened off.[175]

The newspaper also claimed that most foreign funded firms did not conduct regular monitoring on working conditions. But health experts said that the lack of proper legislation made it very difficult to carry out health inspections.[176] Unions which wish to improve safety conditions for their members have little effective legislative support.

4.2 *Collective Bargaining*

In this section, we discuss the capacity of unions to negotiate employment conditions on behalf of workers. It was seen that contract has become the basis of the employment relationship in China. To what extent do unions participate in determining the terms of these contracts?

Article 18 of the Trade Union Law provides:

> A trade union shall assist and provide guidance to workers signing labour contracts with the enterprise or public institution's administrative authority.
>
> A trade union may represent workers in signing a collective contract with an enterprise or public institution's administrative authority. The draft of a collective contract shall be submitted to a meeting of employee representatives or the complete body of employees for discussion and adoption.

This article refers to 'labour contracts' and 'collective contracts'. Labour contracts are individual contracts of employment, and collective contracts are contracts applicable to many or all of the workers at a particular enterprise. The provision suggests that unions have a role in the signing of both labour and collective contracts. This role is now considered in detail.

Ventures Using Chinese and Foreign Investment ('EJV Implementation Regulations'), article 97, *supra* n.13; Detailed Rules for the Implementation of the People's Republic of China on Wholly Foreign-owned Enterprises ('WFOE Implementation Regulations'), article 71, *supra* n.13.

173 These activities are further defined in the Provisional Regulations on the Provision of Political Ideological Activities for Chinese Employees of Sino-foreign Joint Equity and Sino-foreign Co-operative Enterprises, jointly promulgated by A.C.F.T.U., State Economic Commission, C.C.P. Central Committee Propaganda Department and Organisation Department and the Communist Youth League, 11 August 1987. The Regulations may not apply to WFOEs. They do not apply to non-unionised FIEs. The trade union is required to work with the Party organisation within the enterprise, to educate workers in such matters as 'mass-based spiritual and cultural development activities' and the open-door policy: Articles 3 and 6. If there is no C.C.P. branch within the firm, the union is responsible for ideological teaching: Article 6.

174 *China Daily*, 14 January 1993.

175 *China Daily*, 26 February 1992.

176 *China Daily*, 9 February 1993. The report indicated that more than 70 percent of joint ventures in Guangdong are exposing workers to serious health risks. More than 70 percent did not import dust and poison prevention facilities and only 26 percent were found to comply with occupational health standards: see also *People's Daily*, 8 February 1993.

4.2.1 *State Owned Enterprises*

Collective contracts in SOEs are usually entered into by the chairman of the union and the factory head after workers' congresses[177] have approved a draft version.[178] Non-unionised enterprises are thus not able to enter into a collective contract with their workers.[179] The basic purpose of the collective contract is to achieve the operations and production objectives of the enterprise and to improve the work and living conditions of the workers, to clarify the duties and responsibilities of the enterprise head, the trade union and the workers' congress. Collective contracts have been described by Chinese commentators as the legal form by which the labouring masses protect their participation in the democratic management of the enterprise, while at the same time encouraging the development of enterprise production.[180] It seems clear though that improvements in workers' workplace and living conditions which may be gained under a collective contract are conditional upon increased efficiency and production. Collective contracts have reportedly been instrumental in increasing production.[181] There has been recent emphasis upon the work of enterprise trade unions in entering into collective contracts with the local enterprises.[182] There have been reports that over 97,000 collective contracts have been entered into up to 1989.[183] The use of collective contracts thus seems to be increasing, though there is little information about the extent to which collective contracts have resulted in improvement of the conditions of workers.

Chinese commentators indicate that the terms of a collective contract are both binding on and enforceable by all workers in the enterprise.[184] Collective contracts are protected under both the law and the plan, as they implement enterprise production objectives. The collective contract can be enforced in the People's Courts. According to Chinese writers, the terms of a collective contract prevail over those of a labour contract.[185] However, these views are not specifically supported in any applicable legislation. The regulations establishing the system of labour contracts are likewise silent about collective contracts and their relation-

177 *Infra* Section 4.3.

178 *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.84, 143-4.

179 Zheng Wenchuan, *op. cit.* n.133, 705.

180 *Xin 'Gonghui Fa' Xuexi Baiwen op. cit.* n.84, 144.

181 Warner, M., 'Labour-Management Relations in the People's Republic of China: the Role of the Trade Unions' (1991) 2 *International Journal of Human Resource Management* 113.

182 Anita Chan suggests that the reason for the authorities encouraging the formation of collective contracts is that giving workers more power to negotiate their wages is an attempt to alleviate the situation of workers where the management have in fact become bosses. She doubts how effective collective contracts will be in practice to alleviate worker discontent: Chan, A., 'Revolution or Corporatism? Workers and Trade Unions in Post-Mao China' (1993) 29 *Australian Journal of Chinese Affairs* 31, 58.

183 Warner, *op. cit.* n.181, 213. 75,000 work units had signed collective contracts at the end of 1987 and at the end of 1988 the numbers had risen to 85,000. Wang Chidong (ed.), *Gonghui Tongji Cidian* (Dictionary of Trade Union Statistics) (1989) 328.

184 *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.84, 143-4; Zheng Wenchuan, *op. cit.* n.133, 705. We can detect no reference in the applicable legislation to whether a collective contract is applicable to non-unionists in a unionised enterprise, although non-unionised workers may participate in drafting the contract when it is before the Congresses, since membership of these is not confined to trade unionists: *infra* Section 4.3.

185 *Xin 'Gonghui Fa' Xuexi Baiwen op. cit.* n.84, 146-7; Zheng Wenchuan, *op. cit.* n.133, 704.

ship to the labour contract, so that apart from Article 18 of the Trade Union Law, collective contracts would seem to have no legislative basis.

Article 18 also provides that trade unions shall provide assistance and guidance to workers signing labour contracts.[186] The Employment Contract Regulations do not however require the employer to consult with the union when negotiating such a contract. The Employment Contract Regulations contemplate the parties to the labour contract as being the enterprise and the 'recruited' worker.[187] No mention is made of the union in the articles dealing with the contents and duration of the contract.[188] In fact, the only involvement of the union in the employer/employee relationship, according to these Regulations, is in matters of employment termination, where the employer is obliged merely to 'consult' with the union before terminating a worker's employment.[189]

There is, then, a lack of detailed regulation concerning the contents of collective contracts as well as a lack of any reference to collective contracts in the legislation setting out the scope and function of labour contracts. This suggests that there is uncertainty as to the force of collective contracts and their relationship with labour contracts. Chinese writers argue that labour contracts cover areas which are perceived to deal with matters personal to the employee and relate to individual labour conditions[190] while collective contracts deal with collective labour issues such as production goals, workers' livelihood and welfare objectives.[191] However, an examination of model collective and labour contracts shows their contents to be substantially the same.[192] In practice, the main difference would appear to be the 'exhortative' function of collective contracts — they emphasise the educational and political work of the unions and their role to encourage workers to work hard to fill production quotas.[193]

186 Trade Union Law, article 18.

187 Employment Contract Regulations, article 7.

188 Employment Contract Regulations, articles 8 and 9.

189 Article 17. See also Section 4.4, *infra*.

190 The contents of a model labour contract include: contract period, production tasks, work conditions (which includes labour protection equipment, labour discipline, remuneration, comprising salary and bonuses, insurance and welfare benefits, education and training, amendment, recision, termination and extension of the labour contract, liability for breach of contract and dispute resolution): Yang Yansui, Zhang Zhuguang *et al.* (eds) *Laodong Zhengyi: Tiaojie; Zongcai* (Labour Disputes: Mediation; Arbitration) (1992) 24-9.

191 *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.84, 143-4.

192 Labour contracts set out individual production targets and refer to work conditions, such as food allowance and safety equipment which should be provided by the enterprise. These are also the subject matter of collective contracts. The form of a model collective contract reveals that its purpose is to bind workers collectively to achieve production gains and to restate the union's duty to inspire workers to meet their production targets. The enterprise management is also under an obligation to improve management techniques and improve the technological level of the enterprise. Both the collective contract and the labour contract for employees in the state sector contain provisions under which the employer agrees to submit to and abide by democratic supervision by workers' congresses and enterprise unions, thus entrenching in contract form the legal obligations of the enterprise. Both types of contract deal with issues of worker education, both political and occupational, and training. Matters such as insurance, welfare benefits and benefits for sick and injured workers which are contained in the labour contract are only referred to in general terms in the collective contract: Zheng Wenchuan, *op. cit.* n.133, 706; Yang Yansui, *op cit.* n.190, 24-9. A report in the *China Daily* indicates that there is a significant problem of private enterprises failing to include these types of provisions in labour contracts, providing only for monthly salary: *China Daily*, 1 June 1993.

193 For example, the standard collective contract set out in Zheng Wenchuan, *op. cit.* n.133, 706, contains the following text as the 'responsibilities and measures to be adopted by each of the parties to ensure fulfilment of the obligations in the contract':

This impression of the collective contract is strengthened by the absence of legislative reference to collective bargaining in the Trade Union Law or the Employment Contract Regulations. Neither of these establishes a legal structure through which unions, acting solely on behalf of workers, can negotiate employment conditions with the SOE management. Such a structure would recognise that worker-management interests may diverge. There has as yet been no specific acknowledgement of this possibility.

The state therefore appears to use collective contracts primarily as a means of restating economic goals to workers, emphasising not only production targets, but also the union's obligation to encourage workers to meet them. In such an environment, it is difficult to see how unions can bargain for workers' interests effectively where they are inconsistent with management objectives.

If however, market reforms and privatisation are to continue — and according to a recent meeting of the C.C.P. Central Committee the reforms will be accelerated[194] — the pressure to introduce a stronger collective bargaining system may increase.

4.2.2 *Foreign-Invested Enterprises*

Laws governing FIEs enable unions to conclude employment contracts with management on behalf of employees. The regulations governing equity joint ventures and wholly foreign-owned enterprises[195] provide that trade unions 'have the power to sign labour contracts with the enterprise on behalf of the staff and supervise the execution of those contracts.'[196] This right is expanded in relation to Joint-Equity Enterprises ('EJVs') in the 1984 EJV Labour Management Implementation Regulations which refer to the formation of collective contracts through 'consultation' with the union.[197] Where there is no union, a collective contract may be signed by a staff representative.[198] Both parties to the contract must consent to any amendments.[199]

> The enterprise is to strengthen and employ modern management techniques, improve the technology and range of new products, improve internal allocation of labour, training of workers, recreation facilities of workers, support the work of the union and the workers' congress in implementing a system of democratic management; the union is to educate and inspire workers to meet production targets, improve workers' sense of responsibility at being the masters, organise workers to participate in production competitions to achieve production targets, organise group heads to conduct technical training in a planned fashion, fulfil their tasks to organise workers to participate in democratic management of the enterprise and conduct democratic supervision, be concerned for the workers livelihood and welfare and protect the lawful rights of workers, carry out a wealth of cultural and sporting activities; the workers have the responsibility to love their work, observe enterprise morality, complete their work with the mentality of masters of the enterprise, fulfil their production tasks, obey directions of the leaders, observe labour discipline and relevant rules, diligently study politics and improve technical skills, actively participate in labour competitions and democratic management of the enterprise, improve the enterprise efficiency according to the plan.

194 *The Guardian Weekly*, 21 November 1993.

195 EJV Implementation Regulations; WFOE Implementation Regulations.

196 WFOE Implementation Regulations, article 70; EJV Implementation Regulations, article 96: Zheng, *op. cit.* n.13, 413-4.

197 Provisions for the Implementation of the Regulations on Labour Management in Joint Ventures Using Chinese and Foreign Investment, promulgated Ministry of Labour and Personnel 19 January 1984 ('EJV Labour Management Implementation Regulations'), article 5, *supra* n.13.

198 *Ibid.*

199 *Ibid.*

These laws establish only a limited scheme for union involvement in the formation of collective contracts. The use of the word 'consultation' rather than 'negotiation' suggests that the union has little scope to influence contractual terms. This impression is reinforced by the scope of matters which can be determined by mutual agreement between employer and employee. The 1986 FIE Encouragement and Autonomy Regulations make the determination of wage levels and bonuses, as well as dismissals, management prerogatives.[200] Workers' Compensation, retirement pensions, unemployment benefits, welfare and housing matters are controlled by government regulation.[201] These are the only terms and conditions required to be included in the employment contracts.[202]

Arguably, the parties could negotiate on other terms and conditions such as the duration of contracts, additional leave entitlements, hours of work and the duties of the employee. However, there is no provision requiring employers to deal with unions in relation to these matters. The State, therefore, greatly restricts worker capacity to participate collectively in determining their terms and conditions of employment in FIEs.[203]

4.3 *Industrial Democracy*

The minimal legislative recognition of collective bargaining may be partly explained, at least in the state sector, by China's highly developed model of industrial democracy. In this section, we examine the trade union's role in this model.

4.3.1 *State Owned Enterprises*

Article 16 of the Constitution of the People's Republic of China provides that state enterprises have decision-making power in operation and management within the limits of law and state planning. It further provides that 'state enterprises practice democratic leadership through congresses of workers and staff and in other ways in accordance with law.' The legislative instrument establishing congresses is the People's Republic of China Law on Industrial Enterprises Owned by the Whole People (the 'SOE Law').[204] The SOE Law provides for the establishment of workers' congresses to 'represent and protect the interests of employees and to operate independently according to law'.[205] As a result of pressure from the A.C.F.T.U. and other parties, the draft SOE Law was amended to reflect workers' role as 'masters of the state',[206] a stipulation counterbalanced with the requirement that employees 'observe labour discipline'.[207] The Trade Union Law

200 Encouragement Provisions, article 15, *supra* n.14; Autonomy Provisions, article 2(1), *supra* n.14; Cynar, *op. cit.* n.12, 840.
201 Autonomy Provisions, articles 2(2) and 2(3), *supra* n.14.
202 WFOE Implementation Regulations, article 67; EJV Implementation Regulations, article 91.
203 The current laws are contrary to the 'current international practice' to which the State Council appeals in its 1988 Employment Opinion affecting FIEs. The provisions of the I.L.O. Conventions on collective bargaining have not been implemented.
204 Passed at the 1st Session of the 7th N.P.C., 13 April 1988.
205 SOE Law, article 11.
206 Leung, *op. cit.* n.18, 120-1. SOE Law articles 9 and 50.
207 *Ibid.*

sets out the role and duties of the trade unions in workers' congresses. In contrast to the provisions relating to health and safety, collective bargaining and dispute resolution, the Trade Union Law sets out the union's role in organising and supporting workers' congresses in relative detail. This may be an indication of the importance placed upon this function. The key provision is Article 30:

> The representative assembly of the workers [i.e. the workers' congresses] of an enterprise owned by the whole people shall be the primary structure through which the enterprise executes democratic management as it is the body through which the workers may exercise their rights to democratic management in accordance with the provisions of the [SOE Law].[208]
>
> The trade union committee of an enterprise owned by the whole people shall be the working body of the workers representative assembly and shall be responsible for the daily affairs of the representative assembly and for inspecting and supervising the implementation of resolutions of the representative assembly.

The workers' congresses would seem to provide a vehicle for worker participation in enterprise management. However, an analysis of the operation of congresses suggests that rather than facilitating trade union support for worker interests they may in fact divert unions from this task.

Workers' congresses were re-established in 1981[209] and consist of representatives elected by employees, with one-fifth coming from management.[210] The trade unions of an enterprise are responsible for organising the workers to participate in democratic management and supervision of the enterprise.[211] The congresses meet at least every six months although special meetings can be called at the initiative of the enterprise union, the enterprise director or one third of the representatives.[212]

The trade union and the workers' congress have been described by Chinese commentators as having identical tasks and purposes in carrying out democratic management of the enterprise.[213] Employees participate through their congresses in the democratic management of enterprises by proposing opinions on production and work practices, receiving directors reports, and evaluating cadres.[214] They can examine and 'approve or reject' wage adjustment plans, bonus distributions, labour protection measures, awards and penalties.[215] Importantly, congresses have control over welfare funds and can, with the concurrence of government departments, elect enterprise directors.[216] Almost all state enterprises had set up congresses by the end of 1986.[217] At the end of 1988 there had been 382,882 worker congresses established, with around 289,000 in wholly owned enterprises and around 94,000 in collectively owned enterprises.[218]

In essence, the union acts as the secretariat for the congresses. In SOEs, it is

208 Cf SOE Law, article 10.
209 *Beijing Review*, (Beijing) 7 September 1981. Workers' congresses were originally established during the Maoist era: Miljus, *op. cit.* n.50, 53.
210 Zheng, *op. cit.* n.13, 399, 406-9.
211 Trade Union Law, article 7.
212 Zheng, *op. cit.* n.13, 407.
213 *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.84, 119.
214 SOE Law, articles 49, 51 and 52.
215 Article 52(ii).
216 Article 52(iii) and (v).
217 Leung, *op. cit.* n.18, 109.
218 Wang Chidong, *op. cit.* n.183, 326.

responsible for the daily work of the congress and for inspecting and supervising implementation of the congress's resolutions.[219] As the congresses meet infrequently, the role of the union in carrying out the day to day work of the congress and supervising implementation of congress resolutions becomes very important.[220] The union organises the agenda for congress meetings and arranges for the election of representatives. It supervises the implementation of congress resolutions.[221]

The powers of the congresses appear extensive at first glance. Many do exercise their powers to appoint and dismiss managers.[222] In addition, the Vice-chairman of the A.C.F.T.U. called for unions to be involved in the negotiation between the state and SOEs of enterprise management contracts, many of which are now up for renewal. He stated that the new contracts should be approved by workers.[223]

However, the real authority of congresses in many enterprises is subject to legislative and practical limitations. Congresses are required to 'support the director in exercising his or her powers of office',[224] which restricts their capacity to object to management decisions. The SOE Law provides no means for congresses to enforce their decisions so that expressions such as 'approving or rejecting' wage plans confer no real power if management refuses to accept the congress's decisions. On the other hand, the SOE Law requires enterprises to implement the management responsibility system and gives management the power, within state guidelines, to determine wages and to dismiss employees.[225] The government's intent and the current practice appear to be that management should listen to workers but not defer to them.[226] In numerous cases, therefore, the influence of the congress is determined by the willingness of managers to allow industrial democracy[227] and despite the election provisions many, if not most, managers do not owe their positions to their workers.[228] There are instances where congresses are ignored or where their consent is treated as a formality.[229] Some commentators say that the key decision makers in enterprises are still the C.C.P. committee and the enterprise director.[230] Both trade unions and workers congresses are dismissed as providing very weak protection of workers' interests because they fear contra-

219 Trade Union Law, article 30.

220 Warner, *op. cit.* n.181, 212.

221 Morris, R., 'Trade Unions in Contemporary China'(1985) 13 *The Australian Journal of Chinese Affairs* 51, 58; Zheng, *op. cit.* n.13, 408; SOE Law, Article 51.

222 Report on 115 Managers in Liaoning Province dismissed by Congresses 1988-1989: *China Daily*, 30 October 1989. See also: Leung, *op. cit.* n.18, 109, on the election of managers in Wuhan; Saich, *op. cit.* n.17, 165-9.

223 *China Daily*, 31 October 1990.

224 SOE Law, article 54.

225 Articles 7, 30 and 31.

226 See speech of Premier Li Peng, reported in the *China Daily*, 30 April 1991. See also Walder, M., 'Industrial Relations in the Chinese Factory' (1987) 29 *Journal of Industrial Relations* 217, 221-4.

227 Leung, *op. cit.* n.18, 110.

228 A 1985 survey indicates that 91 percent of managerial appointments were by the local bureaucracy. Of these, 30.7 percent involved consultation with staff and 4.4 percent were chosen by election: Huang, Y., 'Web of Interests and Patterns of Behaviour of Chinese Local Economic Bureaucracies and Enterprises During Reforms' (1990) 123 *The China Quarterly* 431, 433. However, the *China Daily* reports that some 50 percent of renewed contracts have been signed on behalf of the whole staff, who then appointed the managers.

229 Leung, *op. cit.* n. 18, 110-1; Morris, *op. cit.* n.221, 58-9; Moore, W.M., 'China Industrial Relations: Amid the Conflict of Tradition and Reform' (1989) 40 *Labor Law Journal* 747, 753.

230 Miljus, *op. cit.* n. 50, 54.

dicting the Party and the enterprise director.[231] The management's legal entitlement to participate in congresses may partly explain this fact. Industrial democracy appears mostly to enjoy the support of the State where it leads to increased production. The official press contains reports of congresses revising production targets upward but is relatively silent on whether the reverse occurs.[232]

Another problem with the congresses is that many tend to advocate the interests of permanent employees at the expense of contract and temporary workers as well as women who depend on welfare benefits such as child care centres. Representatives may recommend the closure of services to increase profits or support the unfair distribution of bonuses.[233]

The congresses, then, are of limited effectiveness as vehicles for industrial democracy. This makes the role of the unions in congresses problematic. As secretariat of the congress, they are expected to make them function for both workers and management. The nature of congresses and union's participation in them divert union focus from worker rights to a more general consideration of the welfare of the enterprise as a whole.

In addition to the formation of workers' congresses, industrial democracy is promoted in the Trade Union Law through participation of union representatives in management meetings. Article 32 provides:

> Trade union representatives shall participate in the management committee of an enterprise owned by the people.
>
> Trade union representatives shall participate in meetings convened by an enterprise owned by the whole people to discuss matters, such as wages, welfare, production safety, labour protection and labour insurance, which involve the personal rights and interests of workers.
>
> The factory head (manager) of an enterprise owned by the whole people [SOE] shall support the trade union carrying out its work pursuant to the law and the trade union shall support the factory head (manager) in performing his or her powers of office pursuant to the law.

This is potentially a far-reaching provision. We do not have information as to how it operates in practice. The last paragraph may, however, be instructive. It suggests that the union representative's presence at management meetings is not likely to be more effective than the operation of the congresses, since she or he will be bound to support any lawful management actions, regardless of whether they necessarily benefit workers.

4.3.2 *Foreign Invested Enterprises*

The Congress system does not apply to FIEs. Workers' congresses are peculiarly a reflection of the ideology that workers are the masters of the state and as such are entitled to have their views on management issues heard. The same logic does not apply to FIEs, although, despite the absence of a legal requirement, some FIEs in a number of cities have introduced congresses. The extent of this practice is uncertain.[234] However, trade unions do have the right to attend management board meetings as non-voting members. Article 33 provides:

231 Han and Morishima, *op. cit.* n. 15, 255-6.
232 See interviews in *Beijing Review*, (Beijing) 13 February 1989.
233 Howard, *op. cit.* n.8, 100; Leung, *op. cit.* n.18, 110-1.
234 *China Daily*, 1 May 1991.

> A Sino-foreign joint equity enterprise [EJV] or Sino-foreign cooperative [CJV] enterprise researching and making decisions on matters, such as wages, welfare, production safety, labour protection and labour insurance which involve the personal rights and interests of workers shall heed the views of its trade union.
>
> The trade union of a sole foreign investment enterprise may put forward suggestions on matters such as wages, welfare, production safety, labour protection and labour insurance which involve the personal rights and interests of its workers and shall negotiate and resolve such matters in conjunction with the enterprise's administrative authority.[235]

This article reflects the EJV and Wholly Foreign-Owned Enterprise ('WFOE') Implementation Regulations. The EJV Implementation Regulations in fact allow such participation in questions of production.[236] Where union representatives attend board meetings, management is required to 'pay attention to the opinions of the trade union for its cooperation'.[237] The trend though is for union representatives to have less and less say. This can be illustrated by considering a union's role in the termination of an employee. In the 1980 EJV Labour Management Regulations,[238] trade unions were empowered to object to dismissals and could send a delegation to management to consult. If this failed, then the matter would be referred to arbitration.[239] This right has been gradually removed. The 1984 EJV Labour Management Implementation Regulations allowed the union to intervene but stipulated that the final decision lay with management.[240] The 1986 Encouragement Regulations emphasised management's determinative authority in dismissals.[241] This was strongly reinforced in the State Council's 1988 Employment Opinion which stipulates that where an employee is discharged in accordance with the employment contract, 'no department, work unit or individual may interfere' on pain of administrative sanction.[242] Unions have no special consultation rights over terminations in the 1990 WFOE Implementation Regulations. The trade union's power in WFOEs are restricted to the putting forward of views, negotiating and resolving matters in conjunction with enterprise management.[243]

These developments reflect the State's concern with increasing the foreign investor's autonomy in employment matters. Foreign investors complain that union 'interference' will inhibit their management operations[244] and the government has responded favourably to them. The effects are reflected not only in the legislation but in industrial practice. Leung reports that union participation in board meetings is restricted to 'when it becomes necessary' and can be prevented altogether in WFOEs when meetings are held offshore.[245] There are reports that some FIEs in Shenzhen hold their board meetings in Hong Kong and so union representatives cannot attend.[246]

235 Cf. WFOE Implementation Regulations, article 71; EJV Implementation Regulations, article 98.
236 EJV Implementation Regulations, article 98.
237 WFOE Implementation Regulations, article 71; EJV Implementation Regulations, article 98.
238 Regulations on Labour Management in Joint Ventures using Chinese and Foreign Investment, *supra* n.13.
239 *Ibid.* article 6.
240 Article 10.
241 Article 15; Cynar, *op. cit.* n.12, 840.
242 Articles 5 and 8.
243 Trade Union Law, article 33.
244 Gelatt, T.A., 'New Rules for Investors' (March-April 1990) *The China Business Review.*
245 Leung, *op. cit.* n. 18, 180-1; Moore, *op. cit.* n.229, 753. Note press claims that most employees in the zones are casual: *China Daily*, 1 May 1991.
246 Chan, J.C.M., Li, N.Y. and Sculli, D., 'Labour Relations and the Foreign Investor in the Shenzhen Special Economic Zone of China' (1989) 14 *Journal of General Management* 53,

FIE unions themselves are cautious in supporting employees. As in the state sectors, unions are expected to educate members to 'observe labour discipline and exert themselves to fulfil the productive tasks of the enterprise'.[247] Reports in the official Press, while approving union intervention to protect workers where management 'goes too far', stress unions' double responsibilities for protecting workers' rights and expanding business.[248] The A.C.F.T.U.[249] describes a union's function as that of 'go-between'. It should not challenge 'western style hire-fire management' enough to deter investment.[250]

4.4 *Dispute Resolution*

In the course of this paper, we have repeatedly commented on the absence of effective enforcement provisions in relation to many trade union functions involving the protection of workers rights and interests. There are, however, specific mechanisms available to resolve workplace disputes. We consider the basic dispute resolution tasks of trade unions under the Trade Union Law and within the Regulations of the People's Republic of China for Handling Enterprise Labour Disputes (the 'Dispute Regulations')[251] generally, in order to determine the extent to which they can be used against employers who fail to observe legal provisions relating to safety, the determination of wages, industrial democracy and other matters. The new Dispute Regulations increase the scope of labour disputes which may be resolved by mediation and arbitration organs and provide detailed procedures for the conduct of arbitrations which were previously lacking.

However, the place of unions in the dispute resolution scheme is ambiguous. The Dispute Regulations and the Trade Union Law do not specifically require them to actively represent the worker's position, or to act as an advocate of worker interests in mediation or arbitration.[252] The fact that there is a distinction drawn between worker and union members of the mediation committee suggests they have different aims. The parties to the dispute are formally treated as though equal[253] and the mediators and arbitrators as though impartial. The formal equality of the parties to the dispute means that they have equal capacity to request mediation, responsibility to adduce evidence, enter debate, carry out negotiation, accept or reject the views of the mediators and perform the mediation agreement.[254]

Many accounts indicate that the number of labour disputes have noticeably

57: the article comments that as a result, '. . . workers are not as free to interfere with the running of the company to the extent that the regulations appear to allow them.'

247 EJV Implementation Regulations, article 71; WFOE Implementation Regulations, article 97. See Horsley, J.P., 'The Chinese Workforce' (May-June 1988) *China Business Review* 50, 52-3, who indicates that most foreign investors have found that 'unions function more as social clubs than as antagonists.'

248 *China Daily*, 1 May 1991; 23 December 1990 (on Beijing Trade Union Federation); 12 August 1990 (on Xiamen Joint Venture Trade Union Federation).

249 *China Daily*, 5 February 1991; Leung, *op. cit.* n.18, 173-8 (on SEZs).

250 *China Daily*, 5 February 1991.

251 Passed and promulgated by the State Council on 11 June to take effect on 1 August 1993: *Renmin Ribao* (People's Daily) 21 July 1993.

252 Trade Unions are required to support and assist employees if they initiate litigation: Trade Union Law, article 21.

253 Dispute Regulations, article 4(3).

254 Yang Yansui, *op. cit.* n.190, 83; Zheng Wenchuan, *op. cit.* n.133, 722-5.

increased since more autonomy has been given to enterprise management. Disputes have arisen because some enterprise managers break relevant labour rules or make up their own local policies (*tu zheng ce*).[255] One cause of disputes is that the rules of enterprises and work units relating to salary, bonuses and punishments are often in conflict with state standards and rules.[256] Increasing discontent with exploitative management activities such as imposing harsh labour discipline and penalties and raising production targets have lead to strikes,[257] go slow campaigns and absenteeism.[258] However, conditions in urban and large SOEs and large collective enterprises are generally better than those in foreign-owned, collective and private enterprises.[259] Work conditions are especially poor in some foreign related and private enterprises[260] and in township collectively-run enterprises, where conditions have been described as 'like flashbacks to a nineteenth-century Dickensian industrial revolution'.[261] Industrial unrest though is more likely to occur in the state-owned sector, where workers are better educated and informed.[262]

Articles 19–22 of the Trade Union Law deal with disputes in all forms of enterprises. Article 19 concerns the dismissal and discipline of employees. It empowers a union to 'put forward its views' if it believes that a dismissal is 'inappropriate'. Article 20 provides for the participation of the union in the dispute resolution process. Article 22 empowers a union to provide legal consultancy services to workers and lower level unions. The central provision relating to dispute resolution is, however, Article 21:

> If an enterprise infringes on the work rights or interests of an employee, the trade union may put forward its views on mediation and handling of the matter. If an employee initiates legal proceedings with a people's court, the trade union shall give its support and assistance.

From the wording of this provision, one possible interpretation is that: (1) a dispute may arise whenever an employer violates the rights and interests of an employee; (2) if such a dispute arises, the union should support the employee; and (3) disputes can be brought before the relevant court. If this were the effect of the provision, it could arguably enable unions to act unambiguously for the employee. However, it would seem from an analysis of the Dispute Regulations and from Chinese dispute resolution practice that it would be misleading to place such an interpretation on this article.

255 *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.84, 151.

256 Zheng Wenchuan, *op. cit.* n.133, 695. According to an account of the Trade Union Law, the majority of disputes concern: dismissal, wages, bonuses, accommodation, retirement pensions, medical expenses and welfare benefits, with a smaller number concern worker breach of contract or discipline: Xin 'Gonghui Fa' Xuexi Baiwen, *op. cit.* n.84, 151.

257 Chan, *op.cit.* n.59, 42. Article 5 of the Trade Union Law requires the trade union to negotiate a resolution of worker demands with the enterprise management where there is a stop work or slow down.

258 Chan, *op. cit.* n.59, 55.

259 *Ibid.*, 43.

260 *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.84, 194.

261 Chan, *op. cit.* n.59, 43.

262 *Ibid.* 43.

263 Ross, L., 'The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong' (1989) 26 *Stanford Journal of International Law* 15, 15-33; Josephs, *op. cit.* n.16. 205, 230-54; Hunter, D., 'Chinese Labour Dispute Arbitration Procedures: An Early Review in Zhejiang Province' (1990) 11 *Comparative Labor Law Journal* 340, 340-6. See also Dispute Regulations, articles 4(a) and 6.

As with disputes in China generally, the tendency in resolving labour conflicts is to favour informal methods such as mediation.[263] The Dispute Regulations institutionalize such a system which encourages parties to resolve labour disputes firstly by negotiation. If negotiation fails, the parties may submit the dispute to mediation and/or arbitration. An appeal against an arbitration decision lies to the People's Courts.[264] The trade unions play a substantial role in this process.[265]

The Dispute Regulations apply to a broad range of disputes involving labour contracts and dismissals.[266] They replace the Provisional Regulations on the Handling of Labour Disputes in State Enterprises ('SOE Dispute Regulations')[267] and incorporate the modifications made subsequently to those regulations. Article 2 of the Dispute Regulations makes them applicable to all labour disputes between workers and enterprises located within the territory of the People's Republic of China.[268]

The types of labour disputes[269] which fall within the scope of the Dispute Regulations are those relating to:

(1) termination, rescission, removal of name and resignation;[270]

264 Dispute Regulations, article 6.

265 Dispute Regulations, article 6.

266 Dispute Regulations, article 2. These include disputes such as those arising out of change or termination of a collective contract, alteration or determination of a labour contract, employment, transfer or dismissal of a worker, labour remuneration, work and rest times, holidays, labour health and safety, employment conditions of women workers or employment of underage children, labour insurance and welfare, technical training, encouragement or punishment of workers: *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.84, 150. Workers may be involved in a dispute either on an individual or collective basis: Dispute Regulations, article 5.

267 Passed by the State Council on 31 July 1987.

268 Article 39 of the Dispute Regulations provides that labour disputes between workers and state organs, non-enterprise work units (*shiye danwei*) and social organisations, as well as between private enterprises and their helpers and between scholars, should also be handled with reference to these regulations.

269 The scope of the regulations will also be affected by the degree to which worker complaints are characterised by them as disputes. Given the workplace consultation mechanisms already in place — the union, congresses and the Party — workers may be slow to bring their grievance under the Regulations. The ideology that workers in the state sector are 'masters of the enterprise' to the extent that it is believed, may also discourage workers from characterising their grievances as disputes.

270 Disputes concerning dismissal (*citui*), termination (*kaichu*) and removal of the name from the register (*chuming*) prior to the Dispute Regulations were dealt with separately from other labour disputes. The grounds for dismissal are set out in article 2 of the Dismissal Regulations. They include serious breaches of work discipline affecting the maintenance of order in production or work; violations of operating rules which result in damage or waste and cause economic loss; extreme disrespect to customers; refusal to acept normal work order; corruption theft and gambling, disturbances or fighting that lead to serious breaches of the peace: Josephs *op. cit.* n.16, 274. The enterprise may terminate the employment of the worker where she or he has seriously breached labour discipline and has failed to reform after repeated education and is considered to be unsuited to continuing to work in the enterprise. This is considered to be the most serious administrative measure which the enterprise may take against the worker and the decision must be both approved by the workers' congress and reported to the local Bureau of Labour: Zheng Wenchuan, *op. cit.* n.133, 723. The grounds for termination and the procedures to be followed are set out in the Enterprise Employee Rewards and Punishment Regulations, passed by the State Council on 10 April 1982 and rendered aplicable by article 2 of the Dismissal Regulations. An employee may have her or his name removed from the books if she or he is absent from work for a continuous period in excess of 30 days without good reason: *Qiye Zhigong Jiangze Tioali* (Enterprise Employee Rewards and Punishment Regulations), article 18: Zheng Wenchuan, *op. cit.* n.133, 723. The Dismissal Regulations provide that an employee dissatisfied with a decision to dismiss, terminate or have her or his name removed from the books should submit the dispute directly to arbitration within 15 days of the decision. Art. 16. *C.f.* article 23 of the Dispute Regulations which allows a party to seek arbitration within 6 months from the date that the party knew or ought to have known his or her rights had been infringed. Article 30 of the Dispute Regulations provides that if either party does not accept the result of arbitration they may bring an action in the People's Court within 15 days of receiving the arbitration decision. See also Zheng Wenchuan, *op. cit.* n.133, 723. There is no separate provision in the Dispute Regulations which

(2) implementation of salary, insurance, welfare, training and labour protection;
(3) the performance of labour contracts; and
(4) other labour disputes which other laws and regulations require to be dealt with in accordance with these regulations.[271]

The primary mechanisms for dispute resolution set out in the Dispute Regulations are mediation, in Chapter 2, and arbitration in Chapter 3.[272]

The Dispute Regulations, at article 5, designate disputes as being collective where the dispute involves more than three employees.[273] In collective disputes, employees should nominate representatives to act on their behalf in mediation and arbitration procedures.[274] The provision does not however specify the number or nature of the representatives but they could presumably be union officials. These provisions indicate that there is some scope for unions to represent workers in disputes. However, the primary role for union representatives as members of the mediation committee and the arbitration committee as set out in the Dispute Regulations does not encompass representation of worker interests in a particular dispute. Their role is to facilitate resolution of the dispute independently.

The Dispute Regulations permit the establishment of mediation committees within the enterprise.[275] The Committees consist of representatives of workers (nominated by the worker's congress), of the union (nominated by the union committee) and the employer (nominated by the factory director or manager).[276] The head of the mediation committee is to be the union representative and the office of the mediation committee is to be established in the trade union.[277] Where an enterprise has no union, the head of the mediation committee is to be determined by agreement between the representatives of the workers'congress and management.[278]

The union representative is seen as being distinct from the worker representative. Article 7 specifies that the total number of employer nominated representatives may not exceed one third of the total number of members of the mediation committee. Although the composition of the mediation committee recognises the differing interests represented by the mediators,[279] the mediation committee itself is intended to be an independent organ with its main purpose to resolve disputes rather than represent different interests.[280]

requires these types of disputes to be submitted directly to arbitration, though the parties may choose not to submit their dispute to mediation. Even though there is no provision in the Dispute Regulations to override prior inconsistent regulations, as disputes concerning dismissal, termination, removal of the name from the books and voluntarily leaving work are dealt with in the same way as other types of labour disputes, it may be that those types of disputes may now be also be handled by mediation.

271 Dispute Regulations article 2. Under article 41 of the Dispute Regulations, the governments of Provinces, autonomous regions and self governing cities have the power to pass rules to implement these regulations: *Xin 'Gonghui Fa' Xuexi Baiwen*, *op. cit.* n.84, 150. Responsibility for interpretation of the Regulations lies in the Department in charge of labour administration of the State Council: Dispute Regulations, article 42.

272 The *China Daily*, 9 August 1993, reports that there have been one million labour disputes arbitrated in the last six years.

273 Dispute Regulations, article 5.

274 *Ibid.*

275 *Ibid.*, article 7.

276 *Ibid.*

277 *Ibid.*, article 8.

278 *Ibid.*, article 9.

279 Article 7 of the Dispute Regulations provides that the number of enterprise representatives on the mediation committee may not exceed one-third of the total number of mediators.

280 Its alleged formal independence rests on three bases: 1. the basis for dispute resolution are the

However, the limits to the 'independence' of the committee are acknowledged, as the extent of the success of the mediation committee's work is seen as being dependent upon the cooperation of the enterprise.[281] One report of labour dispute mediation indicated that the mediation committee was forced to resort to a mass workers' meeting, a 'workers democratic consultation meeting', as the only way in which the workers' grievances could be aired where the manager in question had refused to cooperate in the dispute resolution process.[282]

laws and regulations of the state, not the will of the enterprise management, or of the masses; 2. the mediation committee is established to resolve disputes between workers and management and protect the lawful interests of both parties; 3. mediation is to be conducted according to the legally defined procedures and no interference is permitted from other individuals or organisations. The labour dispute mediation process comprises investigation by the mediation committee of the circumstances of the dispute, clarification of the facts and determination on the basis of the law and the relevant contract of the responsibilities of each of the disputing parties. When conducting mediation, the committee is also required to listen to views from the enterprise leadership, the basic level party organisation and the working masses about the relevant facts and responsibility: Yang Yansui, *op. cit.* n.190, 79. The mediation committee then carries out legal and political education of the disputing parties. It encourages the parties to recognise their mistakes and voluntarily accept responsibility. For an example of this process, see text of the case study, *infra* n.282. Only then can the parties be encouraged to resolve their dispute and to seek unanimity between themselves: Yang Yansui, *op. cit.* n.190, 82-3.

281 Yang Yansui, *op. cit.* n.190, 79.

282 The case report is summarised in the translation below. The manager of a factory workshop during the *Ying Ya Yun* activities (Advance Asia Movement: a movement set in place especially for the Asian Games), required his workers to work continuously for 25 days, and did not allow them to rest even on Sunday. Regardless of the excuse he deducted RMB 10 per day from their salary if they were absent. The workers were disgusted and considered that this decision of the manager was contrary to the relevant laws and regulations of the country concerning rest times. Tens of workers requested that the enterprise mediation small group conduct mediation in order to protect the lawful interests of the workers.

The mediation result

The workshop mediation small group understood the workers views, but owing to the special requirements of the *Ying Ya Yun* they had not directly reported this situation to the superior levels and actively sought out the workshop manager to discuss the matter. They hoped that he would be able to correct this mistaken determination himself, but having done this work many times they were still unsuccessful.

After the mediation small group had conducted its investigation, they convened a workshop democratic consultation meeting and allowed the workers to bring up their views face to face. Everyone reported that because of these 25 days without rest, their health could not stand it, their household disputes had increased, and in all respects there were problems. The mediation small group thought that it was good that the workshop manager's motivation was to let everyone do more work to contribute to the *Ying Ya Yun*, but that his specific method was in breach of the relevant state laws concerning workers' rest times and infringed worker's lawful interests.

After conducting consultation and mediation, the workshop manager recognised his mistake, corrected his mistaken decision and moreover apologised to the workers.

Analysis

The analysis of the case attributed the fault of the manager to good motives and concluded that his actions were not blameworthy. It also acknowledged the effect of the manager's decision on the workers. The process of mediation was considered correct as issues were aired in a face to face meeting.

The result of the mediation was approved because it protected the lawful interests of the workers and allowed 'everyone to make greater contribution to the enterprise with ease of mind'. At the same time it prevented the expansion of the dispute into a collective dispute. The workshop manager learned a very good lesson but still managed to protect his leadership position and not lose face by having a resolution imposed on him: Yang Yansui, *op. cit.* n.190, 90.

The mediation agreement is not legally binding. Article 11 of the Dispute Regulations indicates that the mediation committee should 'observe the principle of voluntariness of both parties'. If the parties reach an agreement, 'both parties should willingly implement [it]'. If one party does not perform the agreement, the other party may request arbitration, but may not seek enforcement of the mediation agreement by the People's Courts: Yang Yansui, *op. cit.* n.190, 82. The mediation committee should encourage the parties to perform the mediation agreement. They cannot however, compel either party to perform: Yang Yansui, *op. cit.* n.190, 89.

The mediation must be completed within 30 days from the date when one party either orally or in writing requests mediation of a dispute. If the dispute has not been resolved within 30 days from the

The Dispute Regulations make detailed provisions for accepting, investigating, hearing and determining cases. The work of arbitration committees up till now has been hampered because of the lack of clear legal provisions concerning these matters. Arbitration committees are established at the level of counties, cities and districts under the control of the municipal government.[283] An arbitration committee is composed of representatives from the labour bureau, the enterprise and the relevant union.[284] The union representative is drawn from the local federation at the same level.[285] There have been 2,800 arbitration committees and 220,000 enterprise level arbitration councils established.[286] Arbitration committees may also comprise expert and academic members to assist the work of the arbitration committee.[287]

Unless the matter is simple, in which case a single arbitrator will conduct the arbitration, an arbitration panel comprises three people. Where the dispute is complex or difficult, the whole arbitration committee shall discuss and decide the matter. The arbitration panel must determine the dispute in accordance with the decision of the arbitration committee.[288]

The detailed procedural requirements provide a high degree of certainty to the parties to the dispute, the worker and the enterprise[289] that mediation and arbitration should be carried out within time limits and procedural guidelines. The

date of the request for mediation, then it is considered to be unsuccessful: Article 10, Dispute Regulations; Zheng Wenchuan, *op. cit.* n.133, 723. If mediation is unsuccessful, a party can submit a petition to the local arbitration committee, which is established under the auspices of the local labour bureau: Dispute Regulations, article 11.

283 Dispute Regulations, article 12.

284 *Ibid.*, article 13.

285 Zheng Wenchuan, *op. cit.* n.133, 723.

286 *China Daily*, 9 August 1993.

287 Dispute Regulations, article 15.

288 *Ibid.*, article 16. This manner of handling difficult or complex disputes mirrors the work of the adjudication committee established within each of the People's Courts. For a further discussion of the system of adjudication supervision, see Woo, M.Y.K., Adjudication Supervision and Judicial Independence in the P.R.C. (1991) 29 *The American Journal of Comparative Law* 95.

Jurisdiction of the arbitration committee is based on the location of the dispute: Dispute Regulations, articles 17 and 18. Parties to the dispute may appoint one or two lawyers to represent them: Dispute Regulations, article 19, which also sets out the manner in which the representatives should be appointed. Third parties may seek to participate, or may be brought in by the arbitration committee where that party's rights are affected: Dispute Regulations, article 22. A party may apply for arbitration within six months of the date when that party knew or ought to have known that he or his rights or interests had been infringed: Dispute Regulations, article 23. Some time limits exist for handling an application for arbitration and making a decision. These are: the committee must decide whether to accept the application for arbitration within 7 days of receiving the application. If it refuses to accept the application, then reasons must be given: Dispute Regulations, article 25. The respondent must reply within 15 days of receipt of the originating application: Dispute Regulations art. 25. The originating application is sent by the arbitration committee when it decides to accept the application for arbitration. The arbitration panel should notify both parties four days prior to the hearing date. If either party fails to appear without good reason, then, in the case of the applicant, the proceedings will be dismissed and in the case of the respondent, a determination will be made against that party: Dispute regulations, article 26. The arbitration committee should first attempt mediation, then, if that is unsuccessful, formal arbitration is commenced: Dispute Regulations, article 27. The arbitration must be handled within 60 days of forming the arbitration bench. If the facts are complex, an extension may be granted for a period not exceeding 30 days: Dispute Regulations, article 32.

Arbitration committee members who have an interest in a dispute must disqualify themselves: Dispute Regulations, articles 35 and 36. An appeal from a decision of the arbitration committee lies to the local People's Court: Dispute Regulations, article 30. During the hearing of the appeal the court may conduct further mediation and a *de novo* hearing: Law of Civil Procedure of the People's Republic of China (adopted by N.P.C., 9 April 1991) article 85 and Part 12 generally. The People's Court may also be asked to enforce performance of both a mediation agreement signed and delivered in the course of arbitration, or an arbitration determination: Dispute Regulations, article 31.

289 Dispute Regulations, article 3.

requirement that reasons must be given by the arbitration committee if it refuses to accept an application indicates that it is less possible for arbitration to be refused on arbitrary grounds.

There is no requirement that the arbitrators reach an unanimous decision[290] but it is also clear that arbitrators are expected to act independently and resolve disputes on the basis of applying the law to the facts.[291] If anything, the penalty provisions reinforce the interpretation that the Dispute Regulations require arbitrators to adopt, at least nominally, an independent position in the dispute resolution proceedings.[292] Article 38 provides for a range of punishments of arbitrators for various types of misconduct which include practicing favouritism, malpractice, abuse of position and receiving bribes.

The task of representing the interests of parties is clearly given to lawyers and not to members of the arbitration panel. The work of unions in representing workers' interests in arbitration hearings is thus arguably confined to the advice which their legal service organisations may give if appointed as a representative by the worker.

Apart from being represented as a member of the arbitration committee, the trade union may be involved in a decision to dismiss or give a penalty in two ways. If the union considers the decision to dismiss or give a penalty to a worker is inappropriate, it may give its views. A decision by a state-owned or collectively owned enterprise to terminate or remove the name from the books of an employee must first be notified to the trade union by enterprise management together with its reasons for the decision. The trade union may request that the matter be reinvestigated and dealt with anew if the enterprise has breached laws, regulations or the relevant contract.[293] If the employer refuses, the union can have the matter dealt with under the Dispute Regulations.[294]

If an employee commences a legal action alleging her or his rights have been infringed, the trade union is required to provide support and assistance.[295] The A.C.F.T.U. has established legal consultancy offices across the nation with both an educative and advocacy function.[296] The Trade Union Law authorises the trade union federations at county level and above to provide legal consultancy services to affiliated unions and workers.[297] It could be anticipated that if workers increasingly avail themselves of legal channels to assert their rights, then the demand upon legal consultancy services will increase dramatically. Up until the present, though, the trade unions have concentrated their efforts on the creation of labour dispute mediation committees at the basic level.

290 Article 29 of the Dispute Regulations requires that despite the subordination of the minority view to that of the majority, different views of members of the arbitration panel must be recorded.

291 Dispute Regulations, article 4(2).

292 The Dispute Regulations permit the arbitration committee to criticise and educate or warn parties to correct their behaviour if they disrupt proceedings, provide incorrect information or hinder those trying to obtain it, intimidate or retaliate against parties or arbitrators. They also provide that relevant administrative and even criminal punishments be given when the situation is serious: Dispute Regulations, article 37.

293 Trade Union Law, article 19.

294 *Ibid.*

295 Trade Union Law, article 21.

296 *Beijing Review*, (Beijing) 13 February 1989.

297 Article 22.

When read in this context, therefore, Article 21 of the Trade Union Law does not, except where it requires the union to provide legal consultancy services, indicate that the union's primary obligation is to represent the interests of the worker. The formulation that the trade union is to 'put forward its views' on dispute resolution where a workers rights have been infringed means that the primary task is to resolve the dispute rather than represent and defend the rights of the worker. This is consistent with the self perception of many union officials who see their role as defusing conflicts between workers and management.[298]

5. *CONCLUSION*

We have examined the main elements in the legislative framework which define and confine the capacity of trade unions to represent the rights and interests of workers. The most significant recent piece of legislation in industrial law in the People's Republic of China is the revised Trade Union Law. We have analysed the context in which the Law was drafted and now operates.

In particular, economic reforms have had a dramatic effect upon the Chinese industrial workforce. The fundamental direction of the reforms has been to reformulate the regulation of labour relations on a contract rather than an administrative model and to transfer control from the state bureaucracy to enterprise management. The changes have increased flexibility in choosing employment, and in some cases increased income. However, many of the economic reforms have not necessarily benefited workers. We have seen especially in the area of health and safety and security of employment that labour conditions have deteriorated in many areas. The challenges for the trade unions in this changing environment are enormous. Not only are the unions struggling to define their role in the protection worker rights and interests, but also to preserve their own relevance.

In responding to the changes, Chinese unions must operate within a 'transmission belt' theory, which requires them not only to advise the government of workers' concerns, but also to ensure that workers follow Party-state policy. When applied in the context of economic reforms, the theory demands that unions meet a number of potentially contradictory objectives. These objectives are reflected in the principles of the Trade Union Law. The most fundamental problem for unions is that in order to respond to workplace reforms, they must strengthen the 'bottom-up' operation of the transmission belt — assuring workers that they genuinely represent their interests — while maintaining a commitment to the overall direction of policy. This problem recurs from the national to the enterprise level.

The substantive provisions of the Trade Union Law suggest that the state is uncertain as to how much autonomy unions should have. This affects both the regulation of union organisational structures and the particular tasks they are expected to perform. The four specific areas of union activity — health and safety, collective agreements, industrial democracy and dispute resolution — reflect the tensions, and show that they are reflected not only in the Law but in the wider

[298] *Beijing Review*, (Beijing) 13 February 1989. See also the case study of the mediation of the dispute over lengthening of work time: *supra* n.282.

regulatory regime affecting union activity in those areas. The Trade Union Law does not cure the defects in those areas. These are the lack of effective enforcement mechanisms and a failure to distinguish adequately between the tasks of the unions which require them to represent worker interests and those tasks which are carried out for the collective welfare of the enterprise, workers and Party-state. There is evidence that the unions are aware of the dangers associated with their current functions.

The revised Trade Union Law is, then, only a limited response to the changed situation of Chinese workers. Further detailed legislation is required to increase its effectiveness, particularly the enactment of a Labour Law. However, the deep problems in the regulation of Chinese industrial relations will continue until there is an explicit legislative recognition of conflict between worker, state and managerial interests which ensures that workers' needs are not subordinated to short term economic gains.