

**Research and Translation for *China Law and Society Review* Special Edition**

by

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## Introduction

Starting from December 2020, I have applied for the Research Assistant position at International Institute to work on the PRC Labor Contract Law project at the University of Michigan. With Professor Mary Gallagher as supervisor and primary advisor, I've conducted multiple reports on guiding cases about labor disputes, governmental speech, statistics and policy implementation, etc.

My first report was on a Chinese 996 working schedule, an overtime working schedule to require workers to work 12 hours a day (from 9 am to 9 pm) and 6 days per week, which was fiercely discussed on Chinese social media through the years 2020 and 2021. After the “the 996 report,” I started to work on the translation of Professor Dong Baohua and Professor Chang Kai's journal articles about Labor Contract Law and will later be published in *China Law and Society Review*. The main translation work was completed in Spring 2021; I continued working on the translation of annotations and references by checking with valid scholars and news sources, as well as providing explanatory footnotes for both articles. Later that year, we also arranged zoom meetings to clarify certain terminologies, definitions, and arguments, especially for Prof. Dong Baohua's article. In order to better understand the two articles, I've also conducted more research to dig up the background information, key events, and following implementation and dispute cases of the Labor Contract Law.

My translation work includes articles from representatives of both Pro-Capital and Pro-Labor campaigns<sup>1</sup>. Dong Baohua, Professor at East China Normal University, is a determined

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<sup>1</sup> It is crucial to understand the Pro-Labor and Pro-Capital campaigns in China do not imply any extreme ideologies, and Pro-Capital does not refer to implement the “pure” capitalism or neoliberalism. The two campaigns are arguing under the solid Socialist system with Chinese Characteristics. Notably, Dong and Chang have also been recognized respectively as “Shanghai (Southern) campaign” and “Beijing (Northern) campaign”. Their beliefs are also closely related to the geographic location and the political and economic dynamic behind.

Pro-Capital advocate and actively engages in different Labor Contract Law-related cases. In his work “Conflicts of ideas and Institutional Adjustments of Labor Law,” we can see a more detailed report and explanation of how LCL should be revised as a law that can represent both parties from labor and capital. Chang Kai, Professor at Renmin University, is a representative of Pro-Labor who supports collective labor relations. In his work “China’s Transition to Collective Labor Relations: Top-Down and Bottom-Up Mechanisms,” we can have a better understanding of Chinese workers' lives and their spontaneous formed labor movement and Party-state led union movement. Both works heavily depend on 2008 LCL and general understanding of Chinese economic system, thus, it will require readers to have some knowledge about the relevant topics to better comprehend authors’ arguments.

### **996 Report**

The 996 working schedule refers to a flexible working schedule system: employees have to work 12 hours (9 am to 9 pm), 6 days a week due to some “moral coercion” from coworkers or implicit terms stipulated by companies.

According to Labor Law of the People’s Republic of China,

“Article 36: The state shall practice a working hour system wherein laborers shall work for no more than eight hours a day and no more than 44 hours a week on average.

Article 41: The employer can prolong work hours due to needs of production or businesses after consultation with its trade union and laborers. The work hours to be prolonged, in general, shall be no longer than one hour a day, or no more than three hours a day if such prolonging is called for due to special reasons and under the condition that the physical health of laborers is guaranteed. The work time to be prolonged shall not exceed, however, 36 hours a month.”

And in Article 44, the law clearly stipulates that overtime pay should be higher than those for normal working hours through different percentages. In the implementation of the Labor Law, working units or employers tend to encourage workers to work overtime for higher

productivity and efficiency. Meanwhile, many tech companies (the main battlefield to protest 996) have enough financial resources to pay workers with overtime remunerations. Thus, not all workers or employees opposed such working schedules, particularly due to its generous compensation for overtime. Based on such situations, before 2020, the anti-996 movement was only voiced by a small portion of workers from tech companies. Jack Ma, the founder of Alibaba, considered the 996 is a “huge blessing 福报 (fubao)” for Alibaba employees, simply because Alibaba can afford tons of overtime compensation:

“I personally think the 996 is a huge blessing. How do you achieve the success you want without paying extra effort and time?..... if you want to work at Alibaba, you should be prepared to work 12 hours a day if you want to succeed. Or why bother joining? We don't lack those who work eight hours comfortably (Yang 2019).”

Although it's been a long time since the anti-996 movement had been launched, the sudden death of Ping Duoduo (PDD) employee “Runfei<sup>2</sup>” became the last straw of public consensus. Runfei's case renewed people's outrage toward the 996-overwork culture, more importantly, her accident revealed 996 was not simply a blessing but also a death curse.

On December 29, 2020, 22-year-old Runfei collapsed suddenly while walking home from work at 1:30 am with colleagues and died hours later in the hospital. Runfei was originally working at PDD's Shanghai HQ; she later volunteered to relocate and work on a group-buying program in an inland city to guarantee a possible promotion opportunity. One former PDD employee also revealed that employees at Shanghai HQ must follow unwritten rules to work at least 300 hours every month; those who work for the group-buying program in Shanghai need to fulfill at least 380 working hours every month (Wang 2021). In two weeks, PDD programmer

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<sup>2</sup> Runfei is the nickname of the girl who died accidentally at Pinduoduo. All Pinduoduo employees use their nicknames instead of real names during work. The follow-up media coverage also used nickname for Runfei.

Tan committed suicide because of overtime work and heavy workload, including a “24 hours on-duty system” (Huang 2021)<sup>3</sup>.

Runhui’s incident resulted in a heavy condemnation of 996 working schedules through the internet and caused attention from the legislature and judiciary. In August, the Ministry of Human Resources and Social Security of the People’s Republic of China (MOHRSS) and Supreme People’s Court jointly released “Guiding Cases of Labor Dispute Issues (II),” in the document, “996” working schedule is classified as the violation of the Labor Law. The memos regarding the 996 dispute cases clearly reject 996 as working culture as well:

“There is nothing wrong with advocating individual striving. However, it cannot become an excuse for working units to seek loopholes and avoid legal responsibilities. When seeking enterprise development and shaping working culture, the enterprise must abide by the bottom line of not violating legal provisions and infringing on the legitimate rights and interests of workers. (The Supreme Court 2021)”

The way that Supreme People’s Court handled 996-related dispute cases may inspire us to look at the implementation of the Labor Law from various perspectives. First, the Pro-labor legislation of Labor Law somehow worsened the tension in capital-labor relations; the working units tend to seek loopholes in Labor Law (and Labor Contract Law) in order to protect their interests, and the rights and interests of workers are seriously violated during this process. Second, even though the legislation was set the undertone of capital-labor relations that enhance the Pro-Labor tendency in the LCL, when it comes to implementation, judicial organs might have different interpretations of the law depending on various dispute cases to remedy possible loopholes created by legislation. Third, the numerous life-threatening accidents related to 996

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<sup>3</sup> 24 hours on-duty system refers to Pinduoduo’s another work system that ask each group to have employees on-duty in 24 hours and separate it to daytime (12hrs) and nighttime (12hrs). With heavy workload intensity, employees are often required to work 20 hours constantly.

made the public recall the most infamous “Foxconn suicides (2010-2016)”<sup>4</sup>. In both cases, we can see that workers’ health cannot be guaranteed, due to extensive overtime work and lack of intervention from workers protection organizations (All-China Federation of Trade Union and its subordinate branches). All these discoveries will be reexamined during the translation of Prof. Dong and Prof. Chang’s articles.

### **Labor Law and Labor Contract Law of PRC**

During the Maoist and post-Mao era, the “iron rice bowl” is always considered as the best job that people can get, which is referred to as highly stable employment without risks of laying off that provided by State-Owned Enterprises (SOE). In the 1980s, the Reform Era did not only provide a chance for Chinese economic development but also accelerated a drastic change in the structure of employment, which further facilitated the promulgation and implementation of Chinese Labor Law. A massive influx of foreign direct investment and foreign-owned enterprises made the authorities aware that workers were just like vegetarian sheep in the world of carnivores. Along with the enactment “Provisions on Labor Management in Chinese-Foreign Equity Joint ventures (1983),” the life-long tenured “iron rice bowl” was no longer guaranteed, foreign enterprises or joint enterprises could either employ or dismiss employees through labor contracts with employees and provide relative fair regulations, job benefits, labor protection or incentives and disincentives to improve employee’s competitiveness and ultimate benefit enterprises’ achievements.

In 1995, the Labor Law of the People’s Republic of China came into effect as China moved from a planned economy to a more market-oriented economy. Based on Article 1, the

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<sup>4</sup> From 2010 to 2016, more than 20 migrant workers committed suicide at Foxconn, the manufacture factory of Apple Inc. in China mainland, due to heavy overwork requirements and severe miliarial management, which including public punishment and humiliation.

legislative purpose has shown the 1995 Labor Law as the most Pro-Labor Labor Law in the world:

“This Law is formulated in accordance with Constitution in order to protect the legitimate rights and interests of laborers, regulate labor relations, establish and safeguard a labor system suited to the socialist market economy, and promote economic development and social progress.”

Through the legislature, 1995 Labor Law constructed relatively safeguards for workers, which established the fundamental rights of workers to be paid in full and on time, receive overtime payments, paid leave, and to be represented by a trade union. In addition, the 1995 Labor Law also brings China into line with international standards and facilitates the country’s participation in global economic entities such as the World Trade Organization.

In 2008, the Labor Contract Law of the People’s Republic of China (LCL) was issued and enforced. As the subordinate law for Labor Law, 2008 LCL specifies that workers are entitled to detailed written employment contracts in employment relations. And the employers will be fined if rejected to sign written employment contracts with their employees according to 2008 LCL. In addition, the LCL put forward “open-ended labor contracts” for those employees who have worked in the same companies for more than ten years, and employers cannot lay off employees without a reason. The open-ended labor contract was understood as the new “iron rice bowl” after the reform era by the public. Such strict clauses caused intensive and controversial debates even during the drafting process and caused attention and representatives from the domestic and international communities.

Two different opinions have emerged Pro-Labor and Pro-Capitals. Pro-Labor advocates believed laborers/employees are usually at a disadvantage compared to capitals/employers so the LCL should stand with laborers and protect their rights and interests. Pro-Capitals argued that LCL provided abundant benefits and employment securities for workers, which may lead to their

loss of competitiveness. And if the capital/employers were restricted too tightly, their performance would affect Chinese economic development; and the LCL's strict law regulation also might force small/medium-sized enterprises to file bankruptcy. After the law was implemented, many employers sought possible loopholes to avoid compliance. And one strategy was to lay off old employees who had the ability to sign an open-ended labor contract and then immediately rehired them as new employees to sign fixed-term employment contracts.

### **State Intervention or Employer Autonomy?**

In this section, I'm planning to explain some key takeaways from the article by Professor Dong Baohua "Conflicts of Ideas and Institutional Adjustments of Labor Law". I would like to provide and enhance Professor Dong's argument and help readers to understand professional topics thoroughly by elaborating on how Dong composed the contemporary Chinese labor issues related to Labor Law and Labor Contract Law and possible solutions in general.

According to Dong, the current legislature and provision in the Chinese labor law area are focusing on two nexuses: Labor Law (1995) and Labor Contract Law (first implemented in 2008, revised in 2013). Although the two laws have similar names, they have completely different functions. For example, the Labor Law (1995) implemented under the background of the Reform Era, emphasized the importance of flexibility under a market-oriented economy that can be self-adjusted through patterns of the market. In contrast, after years of implementation of Labor Law, the LCL (2008) was drafted as a branch law and attempted to strengthen the state's intervention over employment modes and other labor-related issues. Dong's article used these two laws as two nexuses to explore the push-and-pull between market and state in four time periods based on the statistics of labor disputes and GDP growth rates in PRC (1998-2018).

In Dong's article, he divided the timeline into four periods in chronological order. From 2003 to 2008, it's Phase 1 that caused the first conflict by the drafting process of LCL. In this section, he mainly discussed the reasons that facilitate the implementation of LCL as well as the introduction of the legislature principle of unilateral protection vs. bilateral protection. In the first section, he particularly included the period of 1998-2007, a period in which Labor Law (1995) played a crucial role to regulate labor relations. By indicating the tendency of labor dispute cases from 1998 to 2007, Dong revealed a relatively positive period (or golden period) that had higher employer autonomy and minimum state intervention which led to the rapid growth of labor development in China. In the following section, Dong considered the 1998-2007 period should have been taken seriously because of its high flexibility and encouragement of employer autonomy under the implementation and enforcement of Labor Law (1995). Dong also introduced the shift of institutional logic from bilateral (preferential) protection in Labor Law (1995) to unilateral protection in LCL (2008). Such transition brought fierce debates between the pro-labor campaign and pro-capital campaign even during the drafting period of LCL. According to Dong's analysis, the shift occurred because two well-known incidents emerged in 2007 and 2008. The first incident is when the former Premier Wen Jiabao helped rural migrant workers to pursue wage arrears. The second incident is the Black Brick Kiln scandal, which is also called the Chinese slave scandal: thousands of Chinese people, including many children were forced to work as slaves in illegal brickyards, and many were tortured and threatened through different physical and language abuses. Dong believed that these two incidents led to a kind of moral coercion by public opinion, which caused the transition of institutional logic of the LCL legislature: discarded the former Labor Law's bilateral protection and adopted a unilateral protection method. Dong was concerned that unilateral protection would lead to a rigid

employment mode that restricted labor’s mobility; he also argued that current unilateral protection only protects higher- and middle-class workers, and neglects lower-class workers because of LCL’s higher labor standard. Please see Chart 1 for a more detailed comparison between bilateral protection and unilateral protection.

Chart 1. Comparisons between Bilateral and Unilateral Protection

	<b>Bilateral Protection 双保护</b> <b>(Preferential Legislature 倾斜保护)</b>	<b>Unilateral Protection 单保护</b>
<b>Definition</b>	<ul style="list-style-type: none"> <li>- Admit workers as vulnerable group (based on preferential protection), but also provide protection for enterprises</li> </ul>	<ul style="list-style-type: none"> <li>- Protect workers’ legitimate interests and rights at all costs</li> </ul>
<b>Theoretical Support</b>	<ul style="list-style-type: none"> <li>- The relation between enterprises and workers should be relatively equal based on <b>contract theory</b></li> <li>- Right to Subsistence Theory should fall into Public Law, LCL in China is in Private Law, there should have no overlapping</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Right to Subsistence Theory</b> (for workers)</li> <li>- Use tort theory to replace contract theory</li> <li>- Emphasize the relationship between state – individual; strength state intervention when individual’s right to subsistence is infringed</li> <li>- Weaken enterprises’ equal position to workers</li> </ul>
<b>Disputes Settlement Mechanism</b>	<ul style="list-style-type: none"> <li>- <b>Rights-based mode</b></li> <li>- Labor disputes come from mistrust between workers and enterprises</li> <li>- To settle disputes, both parties should negotiate on their interests and restore consensus over labor contract</li> </ul>	<ul style="list-style-type: none"> <li>- <b>Power-based mode</b></li> <li>- Seeking state intervention as a method to settle disputes</li> <li>- Transfer labor relations to tort and criminal relations to seek state intervention</li> </ul>
<b>Legislative Concepts</b>	<ul style="list-style-type: none"> <li>- Low standard</li> <li>- Wide coverage</li> <li>- Strict enforcement</li> </ul>	<ul style="list-style-type: none"> <li>- High standard</li> <li>- Narrow coverage</li> <li>- Lax enforcement</li> </ul>
<b>Results</b>	<ul style="list-style-type: none"> <li>- By lowering the standard of current LCL, it will ultimately lead to the protection of all workers, as well as stricter enforcement for the judicial institutions.</li> <li>- Increasing employer autonomy will also increase</li> </ul>	<ul style="list-style-type: none"> <li>- Current unilateral protection values state intervention leads to rigid employment modes</li> <li>- When seeking help from state/external methods, workers will cut off their contracts with employers completely and cannot</li> </ul>

	competitiveness among workers	maintain labor contracts. Although they may get compensation, they cannot maintain labor contracts.
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In Phase 2 (2008-2013), the period before the first amendment of LCL, Dong talks about the secondary conflicts caused by CLA (Commission of Legislative Affairs)-SCNPC and members of NPC and CCPC (mainly through entrepreneurs’ voices). In both Phase 1 and Phase 2, Dong argues that LCL (even after revision) shows “high standards, narrow coverage, lax enforcement” and he calls for “low standards, wide-coverage, strict enforcement through significant reforms for Labor Contract Law. The high labor standards are demonstrated by “labor law that protects aristocracy (*gui zu hua* 贵族化)<sup>5</sup>”. Dong and his fellow researchers collected information and conducted some comparisons among Chinese LCL and other Labor laws from foreign countries, the results indicated that Chinese LCL has relatively higher standards in overtime hours, overtime compensation, holidays, sick and medical leaves as well as protection of dismissal (Dong 2006). By lowering the labor standard (*ping min hua* 平民化), Dong believes it can make LCL cover more workers, including migrant workers from the rural area, layoff workers from SOEs, and workers in the gig economy. Therefore, lower standards lead to the wider coverage of lower-class workers who were not getting enough protection through Labor Law and LCL. Meanwhile, the high labor standards in the legislation often lead to lax enforcement from the judiciary, and further, make the LCL unenforceable.

According to some scholars, labor standards are correlated to productivity. The current PRC cannot reach high productivity compared to developed countries; however, it stipulates

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<sup>5</sup> The “aristocracy” here refers to some managerial positions including managers and supervisors. Dong also mentioned workers in SOEs, foreign enterprises, and a few private enterprises, are already benefited from Labor Law (1995). But current LCL failed to protect lower-class workers.

labor standards that are even higher than developed countries. Hence, there are many illegal phenomena that violate the high labor standards protection. During the enforcement, the judiciary cannot apply strict enforcement, which may lead to bankruptcy of enterprises and an increase in unemployment. Such kinds of lax enforcement are also part of inevitable selective enforcement (Huang 2021), which offers the power to the judges or judiciary to choose whether or how to punish a person who has violated the law when enforcement is discretionary. Dong specifically points out the expression of selective enforcement in LCL is the bilateral protection principle in the judiciary (2009-2011). When it comes to the living conditions of micro-, small, and medium-sized enterprises (MSMEs), the judiciary has to think about how to punish them more carefully. And when settling labor disputes cases, the judiciary tends to use rights-based models (align with the bilateral protection principle) to emphasize the importance of contrast and the basis of trust between employers and employees. Such methods caused conflicts with the unilateral protection principle that was used in the LCL legislature and have been condemned by CLA-SCNPC and ACFTU.

In Alisah C. Holland's famous piece "Forbearance," she introduced an important concept called forbearance, or the "intentional and revocable nonenforcement of law" due to resource constraints or inadequate control of the bureaucracy (Holland 2016, 232). The concept of Forbearance indeed demonstrates certain situations in developing countries where politicians decided how to enforce the law for electoral support. However, China's labor law-related issues are more complicated considering the legislature organ's special relationship with ACFTU, the People's Supreme Court's effort to reduce labor disputes, and, as Dong argued, how high labor standards in Labor Contract Law simply produce obstacles for law enforcement. From the legislative organ and ACFTU's perspective, they for sure attempt to provide the best protection

for workers in order to achieve social stability. And the so-called “bilateral protection principle” from the judicial organ (People’s Supreme Court, municipal and local courts) is more like an inevitable coping mechanism produced objectively to save some enterprises as well as job positions. Based on this particular foundation, we can say that the state never gives up the chance to enhance Labor Contract Law’s enforcement simply because the results are heavily involved in CCP’s ruling position. This is also the reason why Dong calls for a lower labor standard and a more flexible market to increase economic development and labor mobility, and he considers the current pull-and-push between state intervention and employer autonomy should be paid attention to.

In order to better understand the conflicts between entrepreneurs (judiciary department from 2009-2011) and legislature CLA-SCNPC and ACFTU, Dong introduced an economic and labor disputes development model: procyclical model and anti-cyclical model. For the procyclical model, labor disputes and the economic cycle move in the same direction; during economic growth, the numbers of labor contracts increase and the default of contracts also increases over the same period. Under this model, enterprises can fulfill the standards stipulated in the LCL through economic development, and if labor disputes occur, workers tend to settle disputes through a rights-based mode to negotiate interests and rights in a relatively equal position. For the anti-cyclical model, labor disputes and the economic cycle move in opposite directions; during the economic downturn, enterprises cannot provide enough resources and finances to keep the promise to workers, thus, the numbers of labor disputes increase and workers seek help through power-based mode by state regulation.

It is crucial to understand the procyclical model and anti-cyclical model (see Chart 2) because the adjustment to labor relations and LCL revision are based on them. Facing the

increasing numbers of labor disputes and debates about flexible labor relations (open-ended labor contracts and labor dispatch), the essential controversy is whether to achieve greater employer autonomy or increase state intervention. According to Dong’s discovery and analysis of the current phenomenon, the LCL 2008 and the amendment of LCL in 2013 used unilateral protection as a principle, which provides state intervention as the main method for workers to seek help when their rights are infringed by the employers. Following the anti-cyclical model, when it comes to the economic downturn, state intervention forces enterprises to offer compensations that they cannot afford. Under such circumstances, the enterprises tend to build more flexible or non-standard labor relations with workers (such as labor dispatch) to increase labor mobility and competitiveness in working environments. However, some legal scholars and policymakers consider non-standard labor relations may affect the inherent stability of labor relations stipulated by the LCL. As a result, the amendment of LCL further enhances the standardization and regulation of labor dispatch at the end of 2013.

Chart 2. Comparisons between Procyclical and Anti-Cyclical Model

	<b>Procyclical Model</b>	<b>Anti-Cyclical Model</b>
<b>Tendency</b>	Economy ↑ Labor Disputes ↑	Economy ↓ Labor Disputes ↑
<b>Principle</b>	Bilateral Protection	Unilateral Protection
<b>Disputes Settlement Mechanism</b>	Rights-based mode: negotiation of interests between employers and workers	Power-based mode: state intervention to protect workers’ rights

In Phase 3 (2013-2018), Dong has shown us the state’s awareness of the rigidity of the current market but failed to adjust relevant clauses in the Labor Contract Law. After the implementation of LCL, the most obvious phenomenon is the drastically increasing labor costs. But the rise of labor costs not only failed to bring overall harmony to all labor relations, it actually brought up many social problems in accordance with increasing labor dispute cases.

According to the primary data and changes in labor dispute cases, Dong points out that state-level officials stood out and promoted increasing market flexibility to reduce the costs of labor. However, the attempt to revise the LCL was put on hold due to the ACFTU having opposed the revision determinedly. The conflict between legislative unilateral protection and judicial bilateral protection resurged again. Compared to Phase 2, the judicial bilateral protection in Phase 3 had developed and brought out plenty of detailed approaches for Courts to make their own interpretation and enforcement based on current LCL. Dong separated these approaches into two areas: one is labor relations in traditional business and employment relations in new business. Labor relations in traditional business still follow the bilateral protection principle in Phase 2, the arbitration institutions and local courts should make slight adjustments when interpreting LCL and adopting selective enforcement based on specific circumstances. On the other hand, it is worth discussing some of the claims that the Supreme Court and State Council have announced on employment relations in new business. Professor Dong indicates it is a process of removing these new sectors from the jurisdiction of the LCL. In the rest of his essay, he talked about a dual-track system that involves labor relations and employment relations (removal of labor relations<sup>6</sup>) and the institutional frictions that may trigger social problems.

Chart 3. Dual-Track System

<b>Employment Mode</b>	<b>Civil Relations</b>	<b>Labor Relations</b>
<b>Examples</b>	Employment Relations, removal of labor Relations	Labor relations constructed through labor contracts
<b>Law</b>	Civil Law	Labor Law/Labor Contract Law (Private Law)
<b>Applicable area</b>	Sharing Economy, Gig Economy,	Traditional Business, State-Owned

<sup>6</sup> The original Chinese of “removal of labor relations” is “去劳动关系化”. In the U.S. context, one similar example is independent contractor.

	Foreign/joint enterprises	Enterprise
<b>Characteristics</b>	Flexible Employment	High Restriction
<b>Main Beneficiary</b>	Enterprises, capitals, and some workers in gig economy	Workers, especially workers in traditional business

In the rest of his essay, instead of continually focusing on intragovernmental disagreements and conflicts about protection principles, Dong further introduced current debates of labor relations and why it is important for the state to increase its awareness of the significance of market flexibility. As Dong distinguished, the current employment modes should be categorized into (traditional) standard labor relations and civil relations, including employment relations and removal of labor relations. The standard labor relations in China often refer to labor relations conducted through labor contracts. There has been a clear boundary between labor relations and employment relations in 1980s and early 1990s<sup>7</sup>, workers in SOEs were assigned the labor relations and workers in foreign-invested and joint ventures were assigned employment relations. After LCL was implemented, the standard labor relations were further distinguished from removal of labor relations. Workers in traditional business still stick with standard labor relations; and in the newly developed sharing and gig economy, people choose to use removal of labor relations in order to gain more profits, nevertheless, the choice of removal of labor relations also means a lack of labor protections. From Dong’s perspective, removal of labor relation is more like an inevitable product due to the disadvantages of rigid standard labor relations under current circumstances. One example is labor dispatch (labor subcontracting), which is assigned to civil relations and agency workers that fall under the protection of Civil Law. Nowadays, employers and employees prefer to choose non-standard

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<sup>7</sup> This is the exact transition period since the policies of Reform and Opening Up first put forward and before the implementation of 1995 Labor Law. In Dong’s paper, the differentiation between employment relations and labor relation is the beginning of the “dual-track” system.

labor relations or removal of labor relations in order to gain as much profit as they can. But when workers experience incidents or get injured during employment, they look for confirming formal labor relations in order to gain employment injury insurance. This phenomenon has shown the institutional frictions from the current dual-track system. And Dong anticipates that the only way to reduce labor dispatching and protect workers is to adjust the standard labor relations and increase mobility for workers. Only through this approach, workers will choose standard labor relations willingly and can also use labor contracts to protect themselves.

In Dong's essay, we can see disagreements between different state organs and branches. The conflicts between unilateral protection and bilateral protection are significant and lasting for a long time, starting from the drafting process and later between legislative and judicial organs. However, conflicts and debates originate from the same desire to protect workers' rights from either the short-term or long-term. Undoubtedly, the push-and-pull between state intervention and employer autonomy will remain in further research of labor laws.

### **Collective Labor Relations: Grassroots Workers' Power**

In this section, I'm planning to clarify some terminologies that Professor Chang Kai used in his article "China's Transition to Collective Labor Relations: Top-Down and Bottom-Up Mechanisms," as well as give a clear structure to help readers understand what the two mechanisms are, and how these two mechanisms form a complementary and competitive relationship through time. In Professor Chang Kai's opinion, these two mechanisms not only have embodied the transformation of Chinese individual labor relations into collective labor relations (also known as collective bargaining in Western concept) but also played a significant and profound role in the development of China's labor relations.

In Chang's essay, we can have a general impression of the development of China's labor relations since the Reform Era. Although the essay focuses on the transformation of labor relations in the market-oriented economy, we cannot neglect the historical development of labor movements in China as a foundation for workers, government, and party's understanding of the main principle of labor relations. It is especially important for foreign readers to have background knowledge of the trade union principle in Marxism-Leninism and how such principles localized in the Chinese context later produced trade union principles based on the Communist Party of China. It should be considered that the core of the transformation of collective labor relations that Chang Kai argued is always following the theory of trade unions according to Marxism-Leninism and CPC's trade union principle. And it will be unable for readers to comprehend Chang Kai's argument if we situate the trade union in a completely capitalist society.

In order to better understand the terminologies and Chinese historical development of labor relations, I will provide some definitions from the *Dictionary of Chinese Industrial History*, which was issued under Chang Kai's general editorship in 1990 (Chinese Industrial History Writing Group 1990). The dictionary covers all the events, organizations, meetings, conferences, periodicals, laws and regulations, scholarly works and main characters before 1987. It can be used as a major tool to understand Chang Kai's arguments and proposals for the present and future development and transformation of China's labor relations.

The main purpose of "China's Transition to Collective Labor Relations" is to introduce the crucial transformation from individual labor relations to collective labor relations. If we can recall Professor Dong Baohua's essay, his main argument is to increase employer autonomy and reduce state intervention, which will be achieved if the government and policies encourage

individual workers and employers to conduct labor contracts and negotiate individual workers' legitimate labor rights and interests through labor contracts. But from Professor Chang Kai's understanding, there is a clear differentiation between individual labor relations and collective labor relations:

“The individual labor relation is a subordinate relation (compared to collective labor relation), which is shared by unequal parties; collective labor relation is the rectification of the individual labor relations. It is a relation in which the subjects of both parties are independent and relatively balanced... (in a market-oriented economy) the laborers are the subordinate party in labor relations, in order to protect and strive for their own interests, they can only achieve a relative balance between labor and capital through unification and formation of organized forces (Chang 2016).”

It may sound familiar—the inevitable transformation from individual to collective labor relations is actually an idea from Marx when he discussed the relation between labor and capital:

“Capital is concentrated social power, while the worker has only his individual labor power at his disposal. Therefore, the agreement between capital and labor can never be based on just terms, just not even in the sense of a society that places on one side the possession of the material means of life and production, and on the opposite side sets down the live productive forces. The only social force possessed by the workers is their numerical strength (Marx 1966).”

This paragraph explains Marx's views on the past, present, and future of trade unions, which was adopted at the Geneva Congress of the First International in 1866. By taking a close look, we may have a sense that the transformation of collective labor relations has direct causality with the establishment of trade unions. With that in mind, we might say all union-led collective activities can be considered collective labor relations, but not all collective labor relations are led by trade unions (which is especially the case during the Reform Era). Chang suggests the work-led, bottom-up movement served as the ultimate motive to transfer individual relations to collective relations; the labor movement, especially strikes (as collective behavior), also directly constitutes the contents of the transition. The Labor movement, as Chang Kai put it,

is the bottom-up force using strikes and other collective action to protect and strive for labor's legitimate rights and interests. He also intentionally avoids the revolutionary purpose of the labor movement that was stated as a final step in Marxism (Marx 1966), which he will demonstrate in detail in the section on the top-down force of trade union's administration work.

Sticking with the bottom-up labor movement, Chang described an early stage of the labor movement as "the revival" after a socialist period. From the 1980s to 2005, during the transition from a planned economy to a market-oriented economy, most industrial action presented a scene of "sporadic, dispersive and spontaneous but non-collective consciousness from workers". Chang used the word "revival" due to the characteristics of the early-stage labor movement from the 1980s to 2005 is similar to the stage from the mid-19<sup>th</sup> century to the early 20<sup>th</sup> century (Opium War to May Fourth Movement). In the early stage of the labor movement, when workers were treated unequally and exploited by the capital, they would form certain kinds of labor organizations to improve their working conditions. This kind of protest is completely based on "instincts" to protect workers' own rights.

In the summer of 2010, a series of strikes occurred across the country, which became a huge milestone in the history of the PRC after the Reform Era. It is also called the 2010 Strike Wave. Even though it mainly occurred in foreign-invested factories, the 2010 Strike Wave set an example for the whole country: not only for employees and workers in manufacturing and automotive factories but also sparked the attention of the All-China Federation of Trade Union (ACFTU) and facilitated its "union work" on the transformation of collective labor relations. Chang believed that the 2010 Strike Wave facilitated the workers to organize mature and rational collective bargaining with employers. Workers' appeal also transformed from rights to interests; the interests-based appeal for labor's collective movement is the main symbol of the operation of

collective labor relations. More importantly, workers' self-image and self-consciousness began to change — they see and experience “labor awareness”. Workers are no longer the most important leading class (主人翁), but now they are hired labor under a market-oriented economy.

### **Collective Labor Relations: The Special Role of All-China Federation of Trade Union**

Chang pointed out that another force to advance the collective labor relations is top-down “trade union work” from ACFTU to grassroots workers. In China, all enterprise unions must be affiliated with the one legally mandated body, the All-China Federation of Trade Unions (ACFTU). Chang firstly explains ACFTU's position in China and its obligation to workers and collective labor relations in both the socialist period and a market-oriented economy. He then focused on the top-down “trade union work” that has been deployed since 2010: through sophisticated and tedious bureaucratic procedures, the ACFTU set the goal to carry out two quotas for enterprises to establish trade unions and require enterprises to sign collective labor contracts with workers. Although two quotas put pressure on local and municipal trade unions to urge enterprises to set up trade unions and sign collective contracts, the quota system easily led to formalistic work and couldn't achieve the original goal to protect workers' rights through collective efforts. For instance, in order to establish enterprises' trade unions as much as possible, the trade unions (in local and municipal) will contact the management of each enterprise directly to establish some kinds of “yellow union,” which will not represent workers' voice but will assist management to suppress workers' collective labor movement.

Before moving on more to comprehend Chang Kai's arguments, it is crucial for readers to learn more about a brief history of ACFTU. Along with the transition from a planned economy to a market-oriented economy, the All-China Federation of Trade Union also has to

experience challenges when dealing with labor unrest, overtime work, infringement of workers' rights, etc. Although the ACFTU is defined as “trade unions” in its organizational title, by analyzing its nature and functions, scholars argued that the ACFTU is not an independent union (Li and Taylor 2007). By stating that, it also proves that the ACFTU has separated itself from the mass of the working class for a long time, which led to some serious issues that the ACFTU and Chinese workers have suffered (You 2010). Even though ACFTU is not considered a trade union, its closely subordinated relationship to the Chinese Communist Party needs people to pay attention to its function. In other words, the special state organ nature makes ACFTU still affect workers' working and living conditions in all aspects. Thus, we cannot separate and isolate ACFTU's role when attempting to explore the solutions for infringements of workers' rights and interests.

Established in 1925, the ACFTU took the responsibility to mobilize working-class masses to engage in different activities primarily to defeat foreign imperialism under CCP's leadership before the Republican Era. Undeniably, these mobilization efforts sometimes were for broader political struggles. As Chang Kai mentioned, the development of the CCP was established on the foundation of the workers' movement, most of the early leaders of the CCP also had the experience of leading and participating in workers' movement and mobilization. And the political struggles have always been the main content of ACFTU's main mission, while the collective bargaining and economic strikes under the market economy (even before 1949) had rarely been involved.

After the founding of the PRC in 1949, some leaders in ACFTU also advocated for establishing alternative unions or changing ACFTU's constitution. One key figure in postrevolutionary time is Li Lisan, the vice-chairman of ACFTU from 1948 to 1952, who

advocated for greater union autonomy: “the management committee is an administrative organization, the trade union is a mass organization, the Communist Party is a Party organization. These three organizations are independent and none of them can command any of the others (Li 1987).” Due to Li’s expectation of constructing greater union autonomy, he was condemned for “errors of principle” in 1951 and forced to step down from his position in 1952. In 1952, the following chairman of the ACFTU Lai Ruoyu argued that the union should side with workers under all circumstances. After Lai’s death in 1958, he was condemned because he “intentionally placed the ACFTU in opposition to the Party,” which was considered as a new form of syndicalism by the Party. Such kinds of condemnation and punishment by the Party led to a serious consequence, party cadres and ACFTU officials tend to remain silent when it comes to the real problems that workers have suffered. Thus, ACFTU also has this defining characteristic to keep an awkward balancing between striking workers and Party-leadership, which continues to exist even today.

When the separation from masses is considered as a chronic disease for ACFTU, some scholars also consider ACFTU plays a crucial role to influence the promulgation of Labor Law and Labor Contract Law. In Prof. Dong’s article, he points out the ACFTU has a deep relationship with the legislature of LCL. The invincible relationship also leads to the LCL having the characteristic of unilateral protection that is only offered to workers.

Next, I would like to present how the political obligation assigned to ACFTU somehow limited the development of the labor movement in China. When we see the ACFTU’s obligation and position at present, we cannot simply understand it as a “socialist residual” but also have to relate its obligation directly with the current political environment. According to the trade union principle of Marxism, “revolution” is one main characteristic of labor movement and trade

unions; and the ultimate result for trade union and its organized collective efforts should promote the “abolition of the very system of wage labor,” by achieving this goal, the collective labor movement must fulfill its role in political and social struggles. But after the socialist state (PRC/USSR) was established, the trade unions and collective labor movement kept part of their “original” purpose to exist, but also developed different obligations under the socialist era in accordance with Leninism. Thus, the trade union became a linkage to maintain and balance the relationship between state and party. Under these circumstances, workers in socialist countries were protected by the trade unions, which abided by the Trade Union Law (the original one published in 1950). In the post-Reform Era and market-oriented economy, we see a reversed requirement for workers to abandon their mindsets of “working class is the leading class” and have to re-accept waged-worker mindsets that were supposed to be eliminated by CCP as early as in 1950. But in this reverse process, the political struggles embedded in the collective labor movement are permanently exiled. Only Party-state led political struggles are allowed, otherwise, all non-legitimized collective movements will be considered as “foreign hostile forces” with the intent to disrupt or even destroy the socialist system in China. Even if the trade union wants to help workers pursue better living conditions, as long as it did not follow Party-State leadership, it would be considered as “trade unionism” that planned for subversion (details refer to Li Lisan’s unionism). In Chang’s essay, we therefore can see he promotes the legality of the grassroots collective labor movement repeatedly. By depoliticalizing the bottom-up labor movement and clarifying ACFTU’s leading position, it seems the only way to construct a cooperation relationship between ACFTU and grassroots workers so as to achieve collective labor relation transformation nationwide. As he depoliticalized the labor movement, he also called for proper legality to assign to the bottom-up labor movement. In this way, not only the

workers who joined the labor movement will not be harmed, the bottom-up labor movement can use its legality and legitimacy for CCP to pursue their own good.

In the post-Reform Era, some dilemmas that ACFTU has faced also hang in the balance. After the policy of Reform and Opening Up was implemented, the Trade Union actually needed to redefine its position. The 1992 Trade Union Law was a result of reflection and reimagination — “the new conditions of the new era put forward new demands of the trade unions' work (Shi 1993)”. One simple word in the 1992 Trade Union Law has reflected ACFTU’s urgent dilemma:

“Article 1: This Law is formulated in accordance with the Constitution in order to **protect** the position of 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 modernization.”

Compared to the 1950 Trade Union Law, Article 1 in 1992 indicates the significance of trade unions: state and legislature definitely realized certain dilemmas and difficulties that trade unions may experience in a “new era”. The 1992 Trade Union Law also clarifies and assigns the rights for trade unions (especially ACFTU), an important one that has been reflected through the drafting process of Labor Law and Labor Contract Law (Trade Union Law 1992, npc.gov.cn 2009):

“The views of trade unions shall be listened to when national economic and social development plans formulated and draft laws and statutory rules, and regulations by the State Council involving important issues relating to the rights and interests of workers.”

It is clear that ACFTU has a pivotal position, not only in representing collective power for the working class, but also can affect the direct legal acts and documents that can be used to protect workers. In the *Dictionary of Chinese Industrial History*, Chang and his fellow editors also gave a definition of the position of trade unions:

“Under the circumstances of capitalism, the trade unions are in a relatively opposed position, and are expressed and excluded from a political perspective. Under the circumstances of socialism, the position of trade unions has changed fundamentally; it became the foundation of people’s democratic dictatorship led by the working class, a

significant component of the socialist political system, and the most important social-political organization in the socialist era (Chinese Industrial History Writing Group 1990).”

For now, the ACFTU has to face the dual doubts from both capital and laborers. In Dong Baohua’s essay, ACFTU manipulated the Legislative Affairs Committee through “moral coercion” to increase state intervention and reduce employer autonomy. In Chang Kai’s essay, ACFTU failed to protect workers’ rights and interests, instead, it is in collusion with capital and enterprises to fulfill political goals. It seems quite contradictory that ACFTU has to suffer criticism from both sides, but we need to ponder the deeper meaning: will ACFTU change (reform) and advance under the current system? Or does it care to change and advance? Clearly, the ACFTU won’t disappear in the near future because it represents the working class. But if we still keep an optimistic attitude toward possible cooperation between ACFTU and grassroots workers, how can we anticipate such cooperation under another “new era,” which emphasizes Party’s leadership and only puts “protect workers’ rights” in fourth place (Li 2019)?

## **Conclusion**

Professor Chang Kai’s essay provided us with a general sense of the current objectivity of the two forces that consist in the transformation of collective labor relations. He called for cooperation between the two forces but also pointed out the challenging reality that people have to face when they want to conduct such cooperation. Compared to Professor Dong Baohua’s opinion, Professor Chang Kai set the fundamental tone of the position and obligation of ACFTU. Two well-known scholars conducted their labor law and labor movement research from different angles, but still attempted to reach the same goal—to protect Chinese workers in a better and effective way, from either short-term and long-term goals. After more background research on

these two articles, I realized we cannot separate labor-related issues in a simple way: having different emphasis might be a good approach to solve the current problems; however, it requires us to see a bigger picture and how the ACFTU, workers (collective and individual), enterprises, Party-State and Labor Law itself have embedded with each other. Instead of simply classifying scholars into two campaigns that created endless agreements, I see there is a possibility of scholars learning from each other and closing the gap in order to deal with the larger problem in the near future. Still, we have to take a careful look into how state organs, institutions, officials and scholars try to fit their idea into a socialist society with Chinese characteristics. It might be a process of self-castrate and self-query, but we should also figure out how the “frame” itself can benefit all in a more important way.

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