

Collective Consultation and Labor's Collective Rights in China

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Based on the notice jointly issued by three parties of Tripartite Coordination Mechanism for Labor Relations, i.e. Ministry of Human Resources and Social Security, All China Federation of Trade Unions, and China Enterprise Confederation/China Entrepreneur Association in May, 2010, Rainbow Project of Collective Contract System is required to be implemented nationwide, the implementation is required to focus on wage collective bargaining, and the coverage of collective bargaining agreements is required to reach 80% by 2011. All parts of the country successively introduced implementation plans in order to realize “full coverage”.¹ Although it is nice to take “full coverage” as the goal, if there is no specific method to realize this goal, the “Rainbow Project” may indeed become a rainbow beyond reach in the sky. Moreover, the effective implementation of collective contract system in China has a very important request that the system must be constructed on the basis of three labor rights, i.e. right to organize, right to bargain collectively, and right to dispute.

I. Status of Collective Bargaining in China in Recent Years

Since the promulgation and implementation of Trade Union Law of the People's Republic of China (1992), the Amendments to Trade Union Law of the People's Republic of China (2001) and Labor Contract Law of the People's Republic of China, a collective labor relations coordination system has been initially established to safeguard the rights and interests of workers through equal consultation and collective contract system.² In view of the status that labor disputes and workers' group events happened frequently in recent years, Chinese government clearly stated in the Outline of the 12th Five-Year Plan for National Economic and Social Development of the People's Republic of China published in March, 2011 that, standardized, orderly, fair, reasonable, win-win, harmonious and stable labor relations should established in China and the mechanism dominated by the Party and government for safeguarding the masses' rights and interests should be strengthened and improved, accordingly forming scientific and effective interest coordination mechanism, expression mechanism of interest appeals, mediation mechanism of contradictions, and security mechanism of rights and interests to safeguard the legitimate rights and interests of the masses effectively. In the Outline, labor dispute is listed as the largest one among

¹ Statistical Annual Report on the Development of Human Resource and Social Security for 2009, http://www.gov.cn/gzdt/2010-05/21/content_1611039.htm.

² Zhang Rui & Zheng Li, Wage Collective Bargaining Agreements Cover 1.509 Million Enterprises and Benefit over 100 Million Workers, Workers Daily, November 10, 2011.

five social contradictions that hinder social stability nowadays.³ Strongly advocated by the government and actively promoted by trade union organizations at all levels, the number of collective bargaining agreements increases rapidly. By the end of 2011, wage collective bargaining agreements cover 1.742 million enterprises, up by 56.1% year on year, 2.36 times the growth rate in 2010, as well as 103.892 million employees, up by 37.3% year on year, 1.66 times the growth rate in 2010. According to the data of Ministry of Human Resources and Social Security, provided that there are nearly 300 million workers in modern labor relations in China, 1/3 of them are covered by collective bargaining agreements. However, according to the data of All China Federation of Trade Unions, more than half of workers are covered by collective bargaining agreements. This is impossible in any market economy country.⁴

All China Federation of Trade Unions set the goal that all of the world's top 500 enterprises in China will establish wage collective bargaining systems by 2013 in a document issued in January, 2011. It seems that Chinese workers enjoy the result easily that is realized through long fights and employer-worker games in western countries. In fact, wage collective bargaining has been advanced in the form of movement since 2009. However, at the very beginning, only government departments attached importance to wage collective bargaining while enterprises and employees were not too keen on it, so that it even became the vanity project of government departments and trade unions. Along with wage collective bargaining promoted from top to down, collective labor disputes increased rapidly. From 2001 to 2008, the number of collective labor disputes (more than ten people) grew at an average annual growth rate of 11%.⁵ After Labor Contract Law of the People's Republic of China was implemented in 2008, the number of collective labor dispute cases began to be on the rise and workers from those enterprises that employed workers in an illegal manner in long term began to safeguard their legitimate rights and interests collectively through legal channels. In recent years, there were even a number of extreme collective labor dispute cases happened. After 2009, influenced by global financial crisis, many enterprises faced with difficulties in operation and management, resulting in an increase in the instability of labor relations. Collective labor disputes arising from shutdown, insolvency, back salary, enterprise reformation, buy-out offer, demanding overtime wage and social insurance premium in arrears, and mass layoffs increased sharply across the country, up by above 80% on a year-on-year basis.⁶ In the first half of 2010, labor dispute arbitration institutions at all levels received 286 collective labor dispute cases in total, 44% of which were major collective labor dispute cases (above 50 people).⁷

In the summer of 2010, a string of strikes were concentrated in Pearl River Delta, Yangtze River Delta, Dalian, and Beijing-Tianjin Area in China. In Dalian

³ Xinhua News Agency, March 16, 2011.

⁴ In market economy countries, trade unions just represent their members, so that the rate of collective bargaining agreements just refers to the number of members of trade unions. However, in China, trade unions do not only represent their members, but also represent workers who are not their members, so that the rate of coverage of collective bargaining agreements in China refers to the number of workers.

⁵ The Number of Collective Labor Disputes in China Has Been Increasing Sharply for Eight Consecutive Years, PhoenixNet, finance.ifeng.com/roll/20101022/2751192.shtml.

⁶ Cao Ke'an, Reasons for a Sharp Increase in the Number of Collective Labor Disputes and Countermeasures, China Urban Economy, 2010(1).

⁷ The Number of Collective Labor Disputes in China Has Been Increasing Sharply for Eight Consecutive Years, PhoenixNet, finance.ifeng.com/roll/20101022/2791192.shtml.

Development Area, there were 73 strikes within only two months, involving nearly 70,000 workers.⁸ Nevertheless, the strikes in Guangdong auto industry represented by Nanhai Honda strike attracted the world's attention. It should be noted that, many of enterprises where strikes occurred had signed collective bargaining agreements with employees and even Foxconn where a string of 13 staff suicides occurred also signed collective bargaining agreements in late 2009.

This situation results from many aspects. Although trade unions are legal (administrative) bargaining agents, for the existence of administration and bureaucratization in trade unions, trade unions fundamentally lack of strength and motivation to safeguard workers' rights and interests, so that trade unions have many problems in collective bargaining such as "unwilling to bargain", "afraid to bargain", "incapable to bargain", and "failed to bargain".⁹ The high attention and active intervention of the Party and government can promote the coverage of collective bargaining quickly, but it essentially restricts the promotion of employer-worker self-governance right and employer-worker game playing capability, weakens the process of collective bargaining, controls workers' strengths and motivations to safeguard their rights and interests collectively, and hinders the formation of employer-worker self-governance mechanism in market economic system. Most of collective bargaining agreements signed in this situation exist in name only. The collective contract system that pays much attention to form, quantity, and vanity and less attention to content, quality and actual performance departs from the original tenet of safeguarding workers' rights and interests and regulating labor relations and becomes a vanity project.

The underlying cause for these problems arising from the implementation of collective contract system as a legal system is that the properties and requirements of collective contract system are ignored in the construction of collective contract system. Right to bargain collectively is the core component of collective contract system as a legal system. In other words, collective contract system is a legal form of right to bargain collectively. However, right to bargain collectively is not a right that can be exercised independently and it is a collective right of workers, commonly known as an organic component of "Three Labor Rights", including right to organize, right to bargain collectively and right to dispute. Among the three rights, right to bargain collectively is the core purpose, right to organize is the premise, and right to dispute is a safeguarding measure and also a pressure system. The three rights are collectively known as "Three Labor Rights". As long as right to organize is combined with right to dispute and right to bargain collectively is really implemented, collective bargaining agreement may really reflect workers' interest appeals and make most workers satisfied.

II. Collective Bargaining Must Be Based on Right to Organize

Right to bargain collectively is the most widely used right and also the core right among Three Labor Rights. Besides, it is the key tool and international practice to

⁸ Ru Xin et al., *Analysis and Forecast on Social Situation of China in 2011*, Page 253, Social Sciences Academic Press, January, 2011.

⁹ Answers of All China Federation of Trade Unions to Journalists' Questions Concerning on Advancing "Rainbow Project" of Collective Contract System, <http://gov.rednet.cn/c/2010/06/04/1973752.htm>.

regulate labor relations in market economic conditions. It regulates labor relations through collective bargaining and constitutes the core of system of labor relations in market economic countries. Collective bargaining does not only establish formal rules for labor relations adjustment, but also act as an important mechanism to solve disputes. Collective bargaining can promote employers and workers to make mutual concessions and reach agreements. It is the most cost effective to solve conflicts between employers and workers arising from social transformations or changes through collective bargaining. In Western developed countries, collective bargaining and collective bargaining agreement are basic forms to deal with labor relations. Employer and workers determine the minimum wage standard and working conditions for employees, workers realize the “industrial democratization” system from “participation in decisions” to “joint operation” in the capacity of bargaining representatives, and the wide implementation of “employer-worker codetermination system” guarantees workers’ rights of participation, advances the interest coordination and cooperation between employers and workers, and harmonizes the relations between employers and workers.

The exertion of right to bargain collectively must be based on right to organize. Right to organize, also called right of association, generally refers to the right of workers to form a temporary or permanent association and make the association work to maintain and improve working conditions. Collective bargaining is usually initiated by a trade union, but the trade union exercises the right just as the representative of workers. In accordance with Labor Law of the People’s Republic of China, an enterprise’s employees can sign a collective bargaining agreement with the enterprise on labor reward, working hours, rest and vacation, labor safety and health, and insurance benefits; the draft of the collective bargaining agreement shall be presented to the employee representative congress or all the employees for discussion and approval; the collective bargaining agreement shall be concluded by the trade union, on behalf of the enterprise’s employees, and the employer; for an enterprise without a trade union, the collective bargaining agreement shall be concluded by the representative elected by the employees.¹⁰ This article clearly prescribes that one party of collective bargaining is the employer and the other party is “the enterprise’s employees”. Obviously, employees or workers are the subjects of right to bargain collectively. The trade union concludes a collective bargaining agreement with the enterprise just on behalf of the employees. Besides, this article clearly prescribes that, for an enterprise without a trade union, the collective bargaining agreement shall be concluded by the representative elected by the employees. The idea that workers are the subjects of right to bargain collectively is further clarified.

In the development course of market-oriented economy, the collective strength of workers is the premise of evolvement from individual strike to collective strike and evolvement from conflicting employee-employer relations to equal bargaining employee-employer relations. As experience shows, social harmony and economic development is subject to harmonious employee-employer relations; the power balance between employees and employers is the premise of harmonious employee-employer relations; to realize the power balance between employees and employers, it’s necessary to strengthen the weak party in employee-employer relations, i.e. the power of workers. Therefore, the coordination of

¹⁰ Article 33, Labor Law of the People’s Republic of China (1994).

employee-employer relations needs the intervention of public strength and collective strength and the intervention of collective strength in employee-employer relations must be legitimated on the basis of right to organize.

As workers' right of association, right to organize manifests that workers are entitled to join and organize a trade union and represent and safeguard their rights and interests through the trade union. As clearly prescribed in Trade Union Law of the People's Republic of China, all workers doing physical or mental work in enterprises, public institutions and government organs within Chinese territory who earn their living primarily from wages shall have the right to participate in and form trade union organizations pursuant to the law, regardless of their nationality, race, sex, occupation, religious beliefs or level of education. The meaning of right to organize is that, in the case of power imbalance between employees and employers, individual workers must work in unity to form an organization to achieve a relative balance in employee-employer relations. The exertion of right to organize has two important points: first, the subject of right to organize is workers, but this right must be exercised through workers' collective organization, usually known as a trade union; second, the right of a trade union as workers' organization is derived from workers, so that a trade union needs the authorization of workers (members) in all actions and needs to be responsible to workers (members).

Under market economy conditions, right to organize and right to bargain collectively are inseparable: workers from an organization by exercising right to organize, the main task of which is to conclude a collective bargaining agreement through collective bargaining to coordinate labor relations and safeguard workers' interests; the exertion of right to bargain collectively must base on workers' unity and start from workers' interest appeals and the collective bargaining process requires the participation of workers and needs to be responsible to workers. To achieve this, there is a basic requirement that the trade union that initiates collective bargaining must be workers' trade union that can represent workers' interests.

Unfortunately, the most troublesome problem in Chinese collective bargaining is that, quite a number of enterprise trade unions are not workers' trade unions, but trade unions controlled and interfered by employers. This condition is more common in non-public enterprises. "Today's enterprise trade unions and trade union chairmen are rarely elected by workers, but internally decided by enterprise bosses. Once employee-employer dispute appear, trade unions will not safeguard the interests of workers, but become the spokesmen of enterprise bosses. Trade unions that represent workers' interests mostly exist in name only." Deng Weilong, deputy director of the standing committee of the People's Congress of Guangdong Province and chairman of Trade Union of Guangdong Province, said pointedly.¹¹ It's hard to imagine that such trade unions that will not safeguard workers' interests at all can bargain collectively with employers.

The author's investigation in all parts of the country, especially in Guangdong province, confirms Chairman Deng Weilong's analysis. All trade union chairmen known by the author are administrators of enterprises and these trade union chairmen

¹¹ Chairman of Guangdong Federation of Trade Unions: Most Enterprise Trade Union Chairmen Are Not Democratically Elected, Yangcheng Evening News, July 3, 2010.

internally decided by enterprises are only responsible to enterprise bosses. This behavior that employers control and interfere trade unions is a typical “unfair labor practice” of employers.¹² The generation of such trade union chairmen does not embody workers’ right to organize, but infringe on workers’ right to organize. Just as Chairman Deng Weilong analyzed, “Such trade union chairmen were not democratically elected. In workers’ minds, most enterprise trade unions are only employers’ affiliates. These trade unions usually help needy employees and hold activities and competitions to mobilize employees in order that employees can create more value for their bosses. However, when the conflicts between employees and employers become very sharp, trade unions will only represent the interests of enterprise bosses.”¹³

The existence of such trade unions does not only go against the coordination of labor relations, but also intensify the conflicts between employees and employers. Trade unions that represent the interests of enterprise bosses are naturally objected by workers. In the strikes in 2010 represented by Nanhai Honda Strike, many workers explicitly put forward trade union reformation requirements.¹⁴ For such requirements, Guangdong Federation of Trade Unions gave a positive response. It dispatched a special working group to elect trade unions democratically by taking Nanhai Honda as the experiment unit. This measure was actively upheld by workers.

Collective bargaining must be based on right to organize. In China, in order to carry out collective bargaining, it is required to establish a trade union that can really represent workers’ interests. For this reason, the present “bosses’ trade unions” controlled by employers should be reformed like Guangdong province: pursuant to laws and trade union’s statutes, a trade union shall be elected by workers. “Direct election of trade unions” should be gradually popularized in enterprises. In collective bargaining, a trade union must reflect and represent workers’ requirements. First, the representative of collective bargaining should be approved by workers through legal procedures; second, the trade union shall seek advice from workers on the content of bargaining; third, the draft of a collective bargaining agreement should not be signed until it is presented to the employee representative congress or employee’s conference for approval.

III. Collective Bargaining Must Be Guaranteed by Right to Dispute

Right to dispute, also called right of collective action or right of industrial action, means the right of both parties of employee-employer relations to adopt collective confrontation actions according to law, such as strike and shutout, to block the normal operation of enterprises in order to realize their proposals and requirements.¹⁵ The basic most means that constitutes workers’ collective dispute action is strike, so that right to dispute in narrow sense means right to strike.

¹² Chang Kai et al., *Labor Relations*, Page 443, China Labor and Social Security Publishing House, 2004.

¹³ Chairman of Guangdong Federation of Trade Unions: Most Enterprise Trade Union Chairmen Are Not Democratically Elected, *Yangcheng Evening News*, July 3, 2010.

¹⁴ Open Letter of Bargaining Delegation of Honda Strikers to All Workers and All Sectors of the Society, <http://www.cnlabor.net/html/80-3/3591.htm>.

¹⁵ Jian Weiming & Xu Jifeng, *Employee-Employer Relations and Disputes*, August Edition of National Open University (1999), page 295.

Right to dispute is closely related to right to bargain collectively. Right to dispute is generally exercised in collective bargaining process and caused by disputes arising from the conclusion, performance, or modification of collective bargaining agreements. Collective disputes are different from individual disputes of workers. Individual disputes generally refer to disputes of rights arising between individual workers and employers for the conclusion, performance, or modification of collective bargaining agreements while collective disputes mainly refer to disputes of interests. In market economic countries, these disputes usually happen when collective bargaining breaks down. The purpose of workers' collective dispute actions is to urge employers to continue collective bargaining and accept workers' requirements. In collective bargaining, interest is usually the cause and purpose of collective disputes, generally known as better working conditions.

Under market economy conditions, collective bargaining is an employee-employer bargaining process. In this process, employees and employers should argue with each other and put pressure on each other. Without a specific pressure means, bargaining is a mere formality for workers, i.e. the dependent and passive party, because it will finally be determined by employers, i.e. the dominated and active party. In comparison with capital, workers' strength consists in unifying and mobilizing workers to form an organization. Right to dispute is a pressure means in collective bargaining and it does not only belong to workers. As the same as right to bargain collectively, right to dispute is a mutual right for employees and employers. For employees, it mainly refers to right to strike, but for employers, it mainly refers to right to shut out. Besides, right to dispute can prevent the deterioration of conflicts between employees and employers. It is a rational choice for both employees and employers to start bargaining again to judge and weigh the losses of a strike or a shutout. "Industrial action refers to suspension of any normal work arrangement. This action is initiated by employees (whether through their trade unions or not) or employers unilaterally to present pressure in collective bargaining process." Prof. Michael Salamon, an English scholar, pointed out.¹⁶

Therefore, in the design of collective bargaining system, collective action is an essential element of collective bargaining system. In other words, right to bargain collectively cannot be effectively implemented until it is combined with right to dispute. The exertion of right to dispute such as strikes must be related to right to bargain collectively. That is to say, strikes must be combined with bargaining. In a normative collective bargaining, only when bargaining breaks down, the workers can call a strike. To call a strike, the workers have to inform the employer of the reason, purpose and plan of such strike in advance. Under such circumstance, the employer may consider the workers' requirements and start bargaining again to avoid a strike after weighing the pros and cons. If the employer ignores the workers' appeals, the workers will call a strike. After such strike, the workers and the employer will return to the bargaining table to start a new round of bargaining through the intervention of a third-party mediation institution. As a result, under normative market economy conditions, such collective action as strike is not a purpose, but a means to facilitate collective bargaining between employees and employers. A strike is usually caused by the failure of bargaining while such strike is always the cause of a new round of

¹⁶ Michael Salamon, *Industrial Relations*, (Prentice Hall 1992 2nd Edition), p437.

bargaining.¹⁷ In this sense, collective actions such as strikes will not impact or impede collective bargaining, but facilitate and safeguard the normal proceeding of collective bargaining. As to right relation, right to dispute can safeguard the normal proceeding of collective bargaining.

Rights to dispute such as right to strike and right to shutout are mentioned in labor legislation in China. In accordance with Article 27 of Trade Union Law of the People's Republic of China, if an enterprise or public institution is subject to stop work or slow down measures, the trade union shall represent the employees to negotiate with the enterprise, public institution or other relevant authorities, make known the employees' views and requirements and propose resolutions; the enterprise or public institution shall meet the reasonable requirements raised by the employees; and the trade union shall assist the enterprise or public institution in its work so as to enable the normal production process to be resumed as quickly as possible. This article clearly stipulates that collective actions such as stop work or slow down measures are legal facts protected by law in China.¹⁸ However, the position and disposition of collective actions such as strike and shutout that may occur in collective bargaining are not mentioned in the design of collective bargaining system in China. Besides, in Provisions on Collective Contracts, "no extreme action shall be taken" is regarded as one of principles to be followed by collective bargaining.¹⁹ Although so-called "extreme action" is semantically ambiguous, it actually refers to such collective actions as strike and shutout. Strictly speaking, this provision is inconsistent with the provision in Trade Union Law of the People's Republic of China and it is hard to carry out in reality.

The strikes that happened in the summer of 2010 brought problems in collective bargaining and collective dispute into the real world. The strikes in all parts of the country are mostly caused by wage payment disputes. Quite a number of enterprises where strikes happened had concluded collective bargaining agreements after wage bargaining and the strikes just indicated that such collective bargaining agreements could not meet the demands of workers. For example, the collective bargaining agreement of an enterprise in Guangdong province prescribed an average annual increase rate of 5~7% in wage, but the workers required an increase of 40% in wage in the strike. It should be noted that most of the strikes were solved through collective bargaining. The result of bargaining is an average increase rate of 25~35% in wage. Obviously, some formalistic collective bargaining agreements that cannot represent workers' requirements do not only go against the coordination of labor relations, but also intensify the conflicts between employees and employers. Besides, trade unions that cannot represent workers' interests will become the targets condemned by workers. Nevertheless, all effective collective bargaining is realized under the pressure of workers' collective actions.

In the event of a strike, not only the enterprise has to pay a heavy price, but also the workers have to bear a great risk. So, workers are not encouraged to solve labor

¹⁷ Jian Weiming, *Collective Bargaining and Employee-Employer Relations*.

¹⁸ Chang Kai, *Legal Analysis on the Legitimacy of Strike: Case Study on Nanhai Honda Strike*, October Edition of *Strategy and Management* (2010).

¹⁹ Ministry of Labor and Social Security of the People's Republic of China: *Article 5, Provisions on Collective Contracts* (2004).

disputes by means of strike. However, this does not mean that workers' right to strike is denied. If collective bargaining is not safeguarded by workers' right to strike, it is very difficult to achieve a relative balance of power between employees and employers, because the meaning and value of right to strike consists in the function of "deterrence" and "pressure" in collective bargaining. Thus, to confirm and regulate right to strike in collective bargaining is an important content to improve collective bargaining system and also an important measure to overcome the formalism of collective bargaining. At present, an important cause for formalism of collective bargaining is that trade unions and workers in bargaining adopt no pressure measure that can restrict bargaining rivals. Therefore, even if bargaining representatives can represent workers' interests, without any pressure measure, they could do nothing with the final result.

For this reason, to improve collective contract system, it's urgent to explicitly prescribe the legal value and realistic function of right to strike in solving labor disputes and conciliating conflicts between employees and employers. In Chinese law, there is no provision on forbidding strikes. In accordance with ordinary legal principles, for citizens, what is not prohibited by laws is permitted. Besides, the provision on right to strike in International Covenant on Economic, Social and Cultural Rights joined by China in 2001 is recognized by Chinese government. Article 27 under Trade Union Law of the PRC further confirms the legitimacy of strike. On the resolution of stop work and slow down measures in enterprises, this article puts forward two points: first, the trade union shall represent the employees to negotiate with the enterprise, public institution or other relevant authorities, make known the employees' views and requirements and propose resolutions; second, the enterprise or public institution shall meet the reasonable requirements raised by the employees. However, about how to carry out these two points, there is no specific provision in laws and relevant provisions, so that the resolution of collective disputes and strikes is still unordered at present. Nevertheless, the resolution of spontaneous strikes across China as of 2010 provides us with excellent experience that strikes can be terminated through collective bargaining. This is not only the requirement of development of collective bargaining, but also the most effective way to deal with strikes.