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## Judging Collective Labour Disputes in People's Courts: Is There a Right to Strike?

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# Judging Collective Labour Disputes in People's Courts: Is There a Right to Strike?

SUN Xiaohan

*To mitigate collective actions arising from labour disputes, the Chinese central authority has promoted reforms regarding trade unions and the judicial system. The author examines court judgements of collective labour disputes involving strikes and finds that these reforms have led the courts to deny the right to strike through informal institutionalisation. In conjunction with the fact that political centralisation impeded trade union reforms, these reforms have not effectively enhanced the authoritarian regime's resilience.*

## INTRODUCTION

Since worker-driven labour unrest has increased steadily, the Chinese authorities recognise the positive significance of continuously improving multiple labour dispute resolution mechanisms to promote the modernisation of the national governance system and to consolidate the governance base of the Communist Party of China (CPC).<sup>1</sup> As a result, China has devoted significant attention to resolving collective labour disputes by promoting mediation, top-down unionism and state-led collective bargaining, among other means, to mitigate workers' collective actions.<sup>2</sup> However, these measures have not served to maintain social stability.<sup>3</sup>

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<sup>1</sup> Kuruvilla Sarosh and Zhang Hao, "Labour Unrest and Incipient Collective Bargaining in China", *Management and Organization Review* 12, no. 1 (2016): 183; Chris King-Chi Chan and Elaine Sio-leng Hui, "The Development of Collective Bargaining in China: From 'Collective Bargaining by Riot' to 'Party State-led Wage Bargaining'", *The China Quarterly* 217 (2014): 221; Jonathan Unger and Anita Chan, "China, Corporatism, and the East Asian Model", *The Australian Journal of Chinese Affairs* 33 (1995): 31–52.

<sup>2</sup> Wang Junyang, "Gaige kaifang yilai yukongxing zongzhicelue de qingqi" (The Rise of Pre-emptive Strategy to Maintain Social Stability in Post-reform China—Evidence from 315 Central Documents), *Shehui kexue (Journal of Social Sciences)*, 4 (2019): 35–7.

<sup>3</sup> Zhuang Wenjia and Yue Jinglun, "Cong fating zouxiang jietou—datiaojie heyi jiang gongren weiquan xingdong jichu zhiduhua qudao" (From the Courts to the Streets—How the Great Mediation Has Pushed Workers' Collective Actions out of Institutionalised Processes), *Zhongshan daxue xuebao (Journal of Sun Yat-sen University)* 54, no. 1 (2014): 146–7; Qiu Zeqi, "Quntixing shijian yu fazhi fazhan de shehui jichu" (Mass Events and the Social Foundation of the Development of Ruling by Law), *Yunnan daxue xuebao (Journal of Yunnan University)* 3, no. 5 (2004): 54–9.

After Chinese President Xi Jinping came to power in 2013, he explicitly promoted several judicial and trade union reforms. Xi stressed that maintaining social stability is the basic objective of the legal system.<sup>4</sup> Moreover, he demanded that trade union reform should focus on de-administration and de-bureaucratisation to fulfil trade unions' function to represent and protect workers.<sup>5</sup> These reforms seek to mitigate collective disputes by improving the state's capacity for social governance.

Prior studies have primarily focused on workers' collective actions from a sociological perspective. However, few studies have explored the judicial system's engagement in the institutionalisation of collective actions from a socio-legal perspective. In this article, the author examines the courts' decisions involving collective bargaining and strikes, and seeks to understand the relevant actors' (such as judges, employees and employers, trade unions and government) understanding of strikes. Interpreting and analysing the rationale of the courts' opinions can contribute to understanding the performance of the judicial system in mitigating labour conflicts. More specifically, in the absence of clear rules regarding the legality of the right to strike, the author attempts to investigate the following research questions. Do the relevant actors understand the right to strike? What are the factors that could influence a judge's legal thinking when making a decision on a collective labour dispute accompanied by strikes? How do the courts regulate collective actions through institutionalisation? Does institutionalisation ultimately reinforce the resilience of the authoritarian regime?

## BACKGROUND AND LEGAL FRAMEWORK

Chinese labour laws established the basic framework of the collective labour dispute resolution system that sets up different resolutions according to workers' rights claims and interest claims. In brief, employees' economic interest claims (i.e. wage increases or improvement of working conditions) can be resolved through collective bargaining, while rights claims (i.e. unpaid wages, social security, overtime pay or severance pay) can be resolved via mediation, arbitration and litigation in the Chinese collective

<sup>4</sup> Xi Jinping, "Jianchi fazhi guojia fazhi zhengfu fazhi shehui yitijianshe" (Insisting on Building the State, Government and Society Under the Rule of Law), in *Xi Jinping tan zhiguo lizheng* (*The Governance of China*) (Beijing: Foreign Languages Press, 2014), p. 148.

<sup>5</sup> Xi Jinping, "Xi Jinping Talks to the New Leadership of the All-China Federation of Trade Unions" (Xi Jinping tong Zhonghua quanguo zonggonghui xinyijie lingdao banzi jiti tanhua), 23 October 2013; Xi Jinping, "Xi Jinping Hosted the 18th Meeting of the Central Leading Group for Comprehensively Deepening Reform" (Xi Jinping zhuchi zhaokai zhongyang quanmian shehua gaige lingdao xiaozu di shibaci huiyi), 9 November 2015; Xi Jinping, "Xi Jinping Talks to New Leaders of the All-China Federation of Trade Unions in Zhongnanhai and Makes an Important Speech" (Xi Jinping zai Zhongnanhai tong Zhonghua quanguo zonggonghui xinyijie lingdao banzi chengyuan jiti tanhua bing fabiao zhongyao jianghua), 29 October 2018.

labour dispute system.<sup>6</sup> Moreover, collective bargaining is necessary whenever either party seeks to modify or terminate the collective bargaining agreement.<sup>7</sup> However, strikes inevitably have occurred before or during collective bargaining. Some strikes have occurred to prompt employers to bargain collectively, while others happened during collective bargaining because the bargaining had reached an impasse. Therefore, workers prefer to settle their claims through both strikes and the judicial process.<sup>8</sup>

As strikes continue, employers dismiss strikers. Although the right to strike is not regulated in the Constitution and the right to organise strikes is not authorised for grassroots trade unions, workers' right to strike is not prohibited by law.<sup>9</sup> Thus, some scholars argue that strikes for rights claims should be prohibited as they can be resolved through quasi-judicial means or the judicial system, while economic strikes should be allowed by law.<sup>10</sup>

Since strikes frequently occurred before or during collective bargaining, the employer often discharged the strikers. In this way, although interest disputes cannot be adjudicated and do not fall under the jurisdiction of the courts, controversies related to dismissals arising from interest disputes are adjudicated.<sup>11</sup> Therefore, in order to understand the performance of the judicial system in mitigating labour conflicts and to determine the relevant participants' understanding of rights strikes and economic strikes, the present study uses Wolters Kluwer China Law & Reference—an online legal research service and proprietary database for lawyers and legal professionals to search rules, regulations and court cases. The study searched for “collective bargaining” and “strike” as keywords, and found a total of 228 verdicts related to dismissed strikers. Highlighting workers' claims in strikes, the author categorised the sample cases into disputes with rights strikes and disputes with economic strikes in order to examine the relevant actors' awareness of collective labour disputes involving strikes. Workers who demanded pay for reduced wages, severance pay, overtime pay and annual leave

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<sup>6</sup> Article 28 of the Trade Union Law of the People's Republic of China (Zhonghua renmin gongheguo gonghui fa), 1 January 2022; Eli Friedman and Lee Ching Kwan, “Remaking the World of Chinese Labour: A 30-year Retrospective”, *British Journal of Industrial Relations* 48, no. 3 (2010): 510–33; Aaron Halegua, “Getting Paid: Processing the Labour Disputes of China's Migrant Workers”, *Berkeley Journal of International Law* 26, no. 1 (2008): 269–70.

<sup>7</sup> Article 40 and Article 41 of the Provisions on Collective Contracts (Jiti hetong guiding), 1 May 2004.

<sup>8</sup> Su Yang and He Xin, “Street as Courtroom: State Accommodation of Labour Protest in South China”, *Law & Society Review* 44, no. 1 (2010): 157.

<sup>9</sup> The right to strike is unclear following the constitution and labour laws. The state ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2001. The state placed reservations on the application of the right to strike in Article 8.1 (a) of the Covenant to the People's Republic of China (PRC). Article 8.1 (a) of the International Covenant on Economic, Social and Cultural Rights, 27 October 1997.

<sup>10</sup> Tian Silu and Kong Lingming, “Quanli zhengyi bagong: zhengdangxing foudinglun” (Labour Disputes on Rights Strike: The Denial of Legitimacy), *Dangdai faxue (Contemporary Law Review)*, 4 (2017): 110–21.

<sup>11</sup> Article 2 of the Labour Dispute Mediation and Arbitration Law of the People's Republic of China (Zhonghua renmin gongheguo laodong zhengyi tiaojie zhongcaifa), 1 May 2008.

pay from their employer are considered to be involved in rights strikes, whereas workers who demanded wage increases and a year-end bonus are deemed to be involved in economic strikes.

Of the sample size of 228, nine cases were prior to 2013 and 219 cases occurred in the 2013–2021 period (see Table 1). It should be noted that the sample did not cover all cases as some judicial decisions were not open to the public.<sup>12</sup> The number of undisclosed verdicts, as well as the specific reasons for not disclosing the results, are uncertain. However, since China is a unitary state in which the central government holds exclusive power, its legislative system is centralised with a unified leadership and a certain degree of decentralisation in which local legislation generally has the responsibility of implementing the central laws and regulations.<sup>13</sup> Thus, to some degree, these sample cases enable the evaluation of the judicial system's performance in mitigating labour disputes and portray the predicament of the recognition of the right to strike in China. The sample contains more cases in Shanghai and Guangdong than in other places as they are the first pilot areas for judicial reform.<sup>14</sup> Prior studies note that the Shanghai courts display confidence in submitting their judicial decisions to the public for scrutiny.<sup>15</sup>

Workers in these sample cases were all from the working class in two main industries, manufacturing and transportation, located in Shanghai, Guangdong, Zhejiang, Jiangsu, Sichuan and Liaoning. Treatment of these workers, with low wages and inadequate social security, was generally poor. Qin argues that China's decades-long economic growth has come at the cost of sacrificing the human rights of the working class.<sup>16</sup> Strikes have frequently occurred in the manufacturing and transportation sectors. According to the China Labour Bulletin strike map, a total of 13,694 collective actions, of which 24 per cent and 16 per cent were from the manufacturing and transportation sectors respectively, occurred from 2013 to 2021.<sup>17</sup> The common practice for employers following a strike is to discharge the strike leaders. Some of these dismissed strikers filed suit with the labour arbitration committees and the courts, claiming that the employer had violated the law in discharging them.

While the legality of a strike is unclear, Table 1 indicates that nearly all of the courts held that the employers' dismissal of the strikers was lawful. The judicial decisions have revealed that workers have a different view of the right to strike, when

<sup>12</sup> For example, *Li Changde v. Kaily (Shanghai) Packing Labour Disputes* in the second trial is not available to the public.

<sup>13</sup> Tong Zhiwei, *Guojia jiegou xingshilun (On the Structure of the State)* (Beijing: Peking University Press, 2015), p. 161.

<sup>14</sup> "Cui Yadong, President of Shanghai High Court: Court Reforms", Renmin wang (People.cn), 24 April 2015, at <<http://shzw.eastday.com/shzw/G/20150424/u1ai148173.html>> [31 August 2022].

<sup>15</sup> Wang Tianyu and Fang Lee Cooke, "Striking the Balance in Industrial Relations in China? An Analysis of Court Decisions of 897 Strike Cases (2008–2015)", *Journal of Industrial Relations* 59, no. 1 (2017): 27.

<sup>16</sup> Qin Hui, "Youmeiyou 'Zhongguo moshi?'" (Is There a Chinese Model?), *Zhongguo shichang (China Market)*, 24 (2010): 21.

<sup>17</sup> China Labour Bulletin, Strike Map, at <<https://maps.clb.org.hk/>> [31 August 2022].

compared with the other relevant participants involved, including employers, trade unions, governments and judges. By analysing the perceptions of strikes by the relevant participants, the author further explains the dilemmas and challenges facing workers' right to strike in contemporary China and examines the judicial system's performance in mitigating labour conflicts.

TABLE 1  
STRIKERS DISCHARGED THROUGH COURT DECISIONS, 2003–21

	Years 2003–12				Years 2013–21				Total
	Strikes for Interests Claims		Strikes for Rights Claims		Strikes for Interests Claims		Strikes for Rights Claims		
	Lawful	Unlawful	Lawful	Unlawful	Lawful	Unlawful	Lawful	Unlawful	
Shanghai	0	9	0	0	0	0	104	11	124
Guangdong	0	0	0	0	31	1	50	0	82
Zhejiang	0	0	0	0	6	0	0	0	6
Jiangsu	0	0	0	0	1	0	0	0	1
Sichuan	0	0	0	0	2	0	0	0	2
Liaoning	0	0	0	0	10	0	3	0	13
Total	0	9	0	0	50	1	157	11	228

Source: Wolters Kluwer China Law, at <<https://maps.clb.org.hk/>> [31 August 2022].

## RELEVANT ACTORS AND THEIR OPINIONS REGARDING STRIKES

### *Employers, Employees and the Government*

The sample cases demonstrate that employers tend to be more consistent in their opinions regarding strikes. Employers generally agree that strikes not only violate employees' basic contractual obligation to provide work, but also have severe and negative impacts on the company's production and operations. Given that employers have already incorporated clauses of no work stoppage or slowdown into the workplace rules, strikers in fact violate these employer workplace rules and regulations when carrying out strikes. If workers continue to strike, employers will normally contact local labour supervisors, trade unions and local governments to intervene and coordinate employees' return to work.<sup>18</sup> The employer then informs the aforementioned local departments and trade union about the work stoppage in the plant, and the investigation record of these departments will be concrete evidence that workers have taken strike action.<sup>19</sup>

<sup>18</sup> Zhou Li v. Guangzhou Lushan Company, Huangpu District People's Court, Civil Dispute on Labour Contract (Zhouli yu Guangzhou Lushan xincailiao youxian gongsi laodong hetong yishen minshi panjueshu), 10 May 2017.

<sup>19</sup> He Zhouchun v. Guangzhou Fanyu Xinsheng Rubber and Plastic Company, Guangzhou Intermediate People's Court, Civil Dispute on Labour Contract (He Zhouchun yu Guangzhou Fanyu xinsheng xiangjiao suliao youxian gongsi laodong zhengyi ershen panjueshu), 11 November 2014.

Unlike their employers, workers exhibit a more complex attitude towards strikes. As portrayed in the sample cases, workers strike in a moderate manner. Generally, they tend to resort to the following approaches: not showing up for work; refusing to return to work; wandering around the plant or food court, or clocking in but not offering to work; and posting notices in the plant to express their demands.<sup>20</sup> Workers gather together as a group on the basis of a grievance against their employer for a common claim. Generally, collective actions were proposed and organised by senior workers, and none of the cases examined in this article indicates that workers are assisted by unofficial labour organisations. In some of these sample cases, workers mentioned that their collective actions to request claims were inappropriate.<sup>21</sup> In other cases, workers regard strikes as an approach to increase the possibility of obtaining a real bargain. For example, in cases involving interests claims, as the work stoppage strike continued, the employer informed the representative of employees and the trade union that the company would like to initiate collective bargaining.<sup>22</sup>

At the beginning, workers did not consider their strike as illegal, but as the strike continued and the government administrative departments became involved, workers recognised that their right to strike had diminished. For example, in one case, at the start of the strike, workers conducted a sit-in to request the employer to initiate bargaining with them.<sup>23</sup> Workers said that not all the employees were informed of the sale of the subsidiary company. This caused workers to be anxious about their uncertain labour protection and their rights, and upheld their belief that they were not slaves and did not want to be sold off in the same manner as the subsidiary company.<sup>24</sup> However, as the strike continued, the labour administrative department persuaded the strikers, explaining to them that there is no legal basis for striking which flouts labour contract obligations. On hearing this opinion, some workers returned to work.

The local government and its administrative departments failed to distinguish the differences in the grievance procedures between rights and interests claims. The labour administrative department stated that employees whose legitimate rights and interests are infringed could dispute their claims through appropriate legal channels, such as complaints, labour arbitration and litigation. Workers are also encouraged to

<sup>20</sup> Zhou Li v. Guangzhou Lushan Company, Huangpu District People's Court; He Zhouchun v. Guangzhou Fanyu Xinsheng Rubber and Plastic Company, Guangzhou Intermediate People's Court.

<sup>21</sup> Ren Tengfei v. Shanghai Gongxing Transportation Company, Shanghai Putuo District People's Court, Civil Dispute on Labour Contract (Ren Tengfei yu Shanghai Gongxing banchang yunshu youxian gongsi laodong hetong jiufen yishen minshi panjueshu), 30 January 2018.

<sup>22</sup> Lin Xiaomei v. OMRON (Guangzhou) Automotive Electronics Co., Ltd., Guangzhou Huangpu District People's Court, Civil Dispute on Labour Contract (Lin Xiaomei yu OMRON qiche dianzi youxian gongsi laodong hetong jiufen yishen minshi panjueshu), 25 November 2019.

<sup>23</sup> In 15 judicial decisions, workers confirmed that they participated in the work stoppage, but workers also gave objective reasons for not being able to work instead of subjectively refusing to return to work. Lin Xiaomei v. OMRON (Guangzhou) Automotive Electronics Co., Ltd., Guangzhou Huangpu District People's Court.

<sup>24</sup> See <<https://maps.clb.org.hk/file//files/strikes/field-screenshots/11688/10-10.PNG>> [31 August 2022].

initiate collective bargaining with their employer regarding their labour rights and interests in accordance with the law. The government emphasised that it does not support collective actions, such as work stoppages and slowdowns. Workers should return to work immediately to resume normal work as required by the employer; if they do not do so, the employer will have the right to dismiss strikers who had severely flouted the law and workplace rules.<sup>25</sup> While governmental departments emphasise resolving workers' claims through collective bargaining, the reality is that the collective bargaining system is unable to resolve these claims. The sample cases show that employers refuse to give their employees a wage increase when they ask for it. They would rather recruit more workers than increase the wages of their current employees; such practice indicates their tough attitude regarding the demands of workers.<sup>26</sup>

### *Trade Unions*

Institutionally, in defining the relationship between the trade unions and the government, trade unions are subordinate to the CPC's propaganda system at all levels. Prior to the reform of trade unions, the unions assisted the local government in its propaganda. However, in 2015, Chinese President Xi Jinping launched the trade union reform, emphasising that the trade unions' substantive assignments must shift from promulgating propaganda to "sharing the worries of the Party" and being "representatives of workers".<sup>27</sup>

In light of Article 28 of the Trade Union Law, trade unions play two objectives in their role when workers strike: (i) representing workers to bargain collectively and (ii) maintaining social stability.<sup>28</sup> Trade unions have a dual identity as a state apparatus and a labour organisation. However, trade unions must obey the will of the state whenever there is a strike, and this generally implies that their identity as a labour organisation is directly erased.<sup>29</sup> If an employer suffers through a work stoppage, Article 28 of the Trade Union Law notes that the trade union must assist the employer to resume normal production processes as quickly as possible.<sup>30</sup> Thus, trade unions tend

<sup>25</sup> Lin Xiaomei v. OMRON (Guangzhou) Automotive Electronics Co., Ltd., Guangzhou Huangpu District People's Court.

<sup>26</sup> Zhou Li v. Guangzhou Lushan Company, Huangpu District People's Court.

<sup>27</sup> Xi Jinping, "Speech by General Secretary Xi Jinping at the Working Group Working Meeting of the Central Party" (Xi Jinping zongshuji zai Zhongyangdang de quntuan gongzuo huiyishang de jianghua), 7 July 2015.

<sup>28</sup> Article 28 of the Trade Union Law of the PRC.

<sup>29</sup> Chen Feng, "Between the State and Labour: The Conflict of Chinese Trade Unions' Double Identity in Market Reform", *The China Quarterly* 176 (2003): 1006–28.

<sup>30</sup> Article 28 of the Trade Union Law of the PRC.



to persuade employees to return to work whenever a strike occurs.<sup>31</sup> The employer and the union have strongly encouraged strikers to return to work, motivating them with incentive pay.<sup>32</sup> The Trade Union Law (amended 2021) also further strengthens the educational function of trade unions. Articles 5 and 32 of the Trade Union Law stipulate that the trade union, together with employers, should educate employees to take good care of the property of the state and of the employer.<sup>33</sup>

The trade unions' motivation for collective bargaining is derived mainly from a campaign-style drive whereby unions conduct the annual month-long collective bargaining campaign. Trade unions should aim to achieve the annual collective wage bargaining objective according to the top-down plan. However, a signed collective agreement without a real bargain lacks the actual participation of the workers and has nothing to do with the workers' demands.<sup>34</sup> Thus, a collective bargaining agreement does not seem to help workers resolve collective labour disputes and workers still back their claims by collective action (Table 2).<sup>35</sup>

TABLE 2  
COLLECTIVE ACTIONS, 2013–21

Year	2013	2014	2015	2016	2017	2018	2019	2020	2021
Collective Actions for Rights	311	943	2,394	2,312	1,131	1,458	1,267	762	953
Collective Actions for Interests	136	182	169	82	52	105	46	15	18

Source: China Labour Bulletin, Strike Map, at <<https://maps.clb.org.hk/>> [31 August 2022].

Moreover, relevant laws involving collective bargaining indicate that dispute settlement has relied largely on the administrative power.<sup>36</sup> For example, the courts are unable to issue a bargaining order to request an employer to bargain in good faith. A grassroots trade union could only seek help from a government agency to urge an employer to bargain.<sup>37</sup>

<sup>31</sup> Wu Yongjun v. Ruiweng Company, Guangzhou Intermediate People's Court, Civil Dispute on Labour Contract (Wu Yongjun yu Ruiweng huagong Guangzhou youxian gongsi laodong hetong jiufen ershen minshi panjueshu), 27 July 2017; Li Yongxiang v. OMRON (Guangzhou) Automotive Electronics Co., Ltd., Guangzhou Huangpu District People's Court (Li Yongxiang yu OMRON Guangzhou qiche dianzi youxian gongsi laodong hetong jiufen yishen minshi panjueshu), 25 November 2019.

<sup>32</sup> Zhu Shuanglin v. OMRON (Guangzhou) Automotive Electronics Co. Ltd., Guangzhou Huangpu District People's Court (Zhu Shuanglin yu OMRON Guangzhou qiche dianzi youxian gongsi laodong hetong jiufen yishen minshi panjueshu), 25 November 2019.

<sup>33</sup> Article 5 and Article 32 of the Trade Union Law of the PRC.

<sup>34</sup> Wu Qingjun, "Jiti xieshang yu guojia zhuyixia de laodong guanxi zhili—zhibiao guanli de celue yu shijian" (Collective Consultation and the Governance of Labour Relations Under State Dominance: The Strategies and Practice of Index Management), *Shehuixue yanjiu (Sociology Studies)* 66, no. 3 (2013): 66; Simon Clarke and Tim Pringle, "Can Party-led Trade Unions Represent Their Members?", *Post-Communist Economies* 21, no.1 (2009): 85–101.

<sup>35</sup> See China Labour Bulletin, Strike Map, at <<https://maps.clb.org.hk/>> [30 August 2022].

<sup>36</sup> Article 53 and Article 54 of the Trade Union Law of the PRC.

<sup>37</sup> Article 54 of the Trade Union Law of the PRC.

Although the Trade Union Law stipulates that trade unions are mass organisations of the working class that have the status of legal persons of social organisations, union staff also treat local unions as government departments or quasi-government departments, rather than as representative organisations of the workers.<sup>38</sup> Chinese trade unions apply the approach of democratic centralism, emphasising the subordination of lower-level organisations to those at higher-levels, that of individuals to organisations and that of the minority to the majority.<sup>39</sup> The Chairman of the All-China Federation of Trade Unions (ACFTU) is the Vice Chairman of the Standing Committee of the National People's Congress (NPC); the deputy director of the local NPC Standing Committee or the deputy secretary of the Party group serves as the chairman of local all-level federations of trade unions.<sup>40</sup> In addition, many local unions procure their funds from administrative organs, thus exacerbating their dependence on the administrative institutions.<sup>41</sup>

Grassroots unions regard themselves as the employer's employees rather than representatives of the employees.<sup>42</sup> In some of these sample cases, workers questioned the legality of the enterprise's administrative vice president as the representative of the grassroots trade union.<sup>43</sup> However, the court held that the grassroots trade union was established with the approval of the upper trade union, so the issue of the legality was not within the scope of the civil lawsuit.<sup>44</sup> The judicial system precludes the possibility of workers' lawsuits against the legitimacy of the top-down union. In fact, the court's opinions were not unanimous on the identity of trade unions. In cases where union staff sued the union, the Fourth Circuit Court of the Supreme People's Court held that the union was an administrative agency, while another court held the contrary view.<sup>45</sup>

<sup>38</sup> Article 2 and Article 15 of the Trade Union Law of the PRC; China Labour Bulletin, "Zhonghua quanguo zonggonghui gaige guancha bagao" (All-China Federation of Trade Unions Reforms Report), December 2019, at <<https://clb.org.hk/sites/default/files/中华全国总工会改革观察报告202001.pdf>> [30 August 2022].

<sup>39</sup> All-China Federation of Trade Unions, Constitution of Chinese Trade Unions (Revised in 2018) (Zhongguo gonghui zhangcheng), 26 October 2018.

<sup>40</sup> See <<https://www.acftu.org>> [30 August 2022].

<sup>41</sup> China Labour Bulletin, All-China Federation of Trade Unions Reforms Report.

<sup>42</sup> Ibid.

<sup>43</sup> The chief manager or partner of an enterprise or any close relative thereof shall not be the nominees of the enterprise for trade union committee members. Article 24 (3) of the Provisions on the Work of Enterprise Trade Unions (for Trial Implementation) (Qiye gonghui gongzuo tiaoli (shixing)), 6 July 2006.

<sup>44</sup> Li Guiyuan v. Nokia Dongguan Branch and Nokia Company, Guangdong Higher People's Court, Civil Petitions for Retrial (Li Guiyuan yu Nokia tongxin youxian gongsi Dongguan fengongsi Nokia tongxin youxian gongsi laodong hetong jiufen shensu shenqing minshi caiding shu), 18 September 2015.

<sup>45</sup> Yang Yuzhen v. Luoyangshi Zonggonghui, Fourth Circuit Court of the Supreme People's Court, Administrative Applications for Retrial (Yang Yuzhen su Luoyangshi zonggonghui an), 4 August 2017; Xiao Ju v. Hunan Province Trade Union, Changsha Intermediate People's Court, Administrative Ruling (Xiao Ju Hunansheng Zonggonghui ershen xingzheng caidingshu), 12 October 2020.

In conclusion, trade unions' identity as a state apparatus has not only impeded their reform, but also hindered their ability to support workers in collective actions. This, in turn, weakens their duty of protecting workers' rights. One of the sample cases indicates that workers criticised the union for not standing with them when they strike and for not representing them in a case at bar.<sup>46</sup> The ACFTU, on the other hand, explains the definition of protecting workers' rights as follows. Trade unions should regulate the behaviour of rights protection in accordance with the law through rational and lawful approaches.<sup>47</sup> When workers approach the union for help, trade unions pay greater attention to protecting workers' rights even though the union always plays the role of a neutral third party. For example, the union provides legal services by engaging attorney services for employees who are involved in a labour dispute or it suggests that workers seek help from the local administrative department and the judicial system.<sup>48</sup>

In fact, in the light of labour laws, trade unions rarely represent workers by filing a lawsuit in the judicial system, even though workers are covered by a collective bargaining agreement.<sup>49</sup> Whether employees can sue their employer based on the collective bargaining agreement remains a controversial issue. Some courts held that employees could not sue in court, while other courts held that this was possible.<sup>50</sup> Further, the majority of courts held that a collective bargaining agreement should never be a substitute for an employment contract.<sup>51</sup> Normally, workers file lawsuits individually rather than collectively as the authorities enhance individual rights, but restrict collective rights.<sup>52</sup> An employer is obliged to sign an employment contract with workers although the plant is covered by a collective bargaining contract. This encourages workers to file lawsuits individually. The sample cases

<sup>46</sup> Deng Xiaoli v. Ningbo Zhonglin Company, Ningbo Intermediate People's Court.

<sup>47</sup> Zhao Jianjie, "Gonghui weiquanguan: neizai jiegou jiqi bianzheng guanxianjiu" (The Concept of Protecting Workers' Rights: Inherent Structure and Dialectical Relations), *Zhongguo laodong guanxi xueyuan xuebao* (Journal of China Institute of Industrial Relations) 22, no. 1 (2008): 16–23.

<sup>48</sup> China Labour Bulletin, "Jianya gonghui gaige chengxiao: gonghui xu tupo zhangai daibiao gongren weiquan" (To Examine the Effectiveness of Trade Union Reform, Unions Need to Break Through Barriers to Represent Workers), March 2022: 12–3.

<sup>49</sup> The author asked a General Secretary of the Trade Union, who said that there is a rare precedent; as for the specific reasons, the latter did not directly explain, indicating only that it is difficult. Article 56 of the Labour Contract Law of the People's Republic of China (Zhonghua renmin gongheguo laodong hetong fa), 1 July 2012; Article 55 of the Provisions on Collective Contracts.

<sup>50</sup> Zhao Hantao v. New China Life Insurance Co. Ltd. (Guangdong Branch), Guangzhou Intermediate People's Court, Civil Dispute on Labour Disputes (Zhao Hantao Xinhua renshou baoxian gufen youxian gongsi Guangdong fengongsi laodong zhengyi ershen minshi caidingshu), 22 June 2020.

<sup>51</sup> The judges emphasise that a collective bargaining contract is not a substitute for a labour contract. Rong Quansheng v. Shouyang County Furuixiang Hotel, Shanxi Jinzhong Intermediate People's Court, Civil Dispute on Labour Disputes (Rong Quansheng shouyangxian Furuixiang fandan laodong zhengyi ershen minshi panjueshu), 20 May 2020.

<sup>52</sup> Patricia Chen and Mary Gallagher, "Mobilization without Movement: How the Chinese State 'Fixed' Labour Insurgency", *ILR Review* 71, no. 5 (2018): 1029–30.

have shown that an employee can sue his/her employer individually in court with the help of a lawyer under his/her employment contract instead of under a collective bargaining contract. In some sample cases, workers queried whether the verdict they received was identical to other cases even though their cases had been heard and adjudicated by different judges.<sup>53</sup>

### *Judges*

Judges, as adjudicators in collective labour disputes including strikes, have not attempted to differentiate strikes for rights claims and strikes for interests claims. Instead, the courts have referred to them commonly as strikes in their judicial decisions. In the following discussion, the author categorises the sample cases into disputes with rights strikes and disputes with economic strikes to examine judges' acknowledgement of strikes.

In the cases that concern rights strikes, judges are able to adjudicate certain rights claims according to the labour laws and evidence. For example, the judge is able to adjudicate unpaid or deducted wages, overtime pay and annual leave pay.<sup>54</sup> These rights claims are not affected by the judge's perception of the strike. However, the judge's perception affects the workers' rights claim over severance pay. If the judge's perception of the legitimacy of the strike is negative, the strike is considered a serious violation of labour discipline or workplace rules, and the employer can discharge the strikers without providing severance pay. The sample indicates that judges generally have a negative attitude towards the right to strike cases, and it is lawful for an employer to discharge strikers without providing severance pay in most cases.<sup>55</sup> Only 11 cases indicate that a rights strike triggered a dismissal that was unlawful as the employer had insufficient evidence.<sup>56</sup> For example, the Shanghai courts noted that workers should maintain production and working order, and should not refuse to provide

<sup>53</sup> Yang Wenli v. Shanghai Hatichi Cable Trading Co. Ltd., Shanghai No. 1 Intermediate People's Court, Civil Disputes on Labour Disputes (Yang Wenli su Shanghai Rili dianxian youxian gongsi laodong hetong jiufen ershen), 26 November 2015.

<sup>54</sup> Overtime pay often comes with many limitations, for example, filing a lawsuit within the limitation of actions and the burden to provide evidence. Workers are often unable to obtain support from the courts due to lack of evidence. Li Changde v. Kaily Shanghai Packaging Company, Shanghai Songjiang District People's Court, Civil Disputes on Labour Disputes (Li Changde yu Jiayi Shanghai baozhuang zhipin youxian gongsi laodong hetong jiufen yishen minshi), 30 August 2019; Gu Chuang v. Coca-Cola Liaoning (South) Beverage Company, Jinzhou Intermediate People's Court, Civil Disputes on Labour Disputes (Gu Chuang Liaoningnan Coca-Cola yinliao youxian gongsi laodong Zhengyi zaishen shencha yu shenpan jiandu minshi caidingshu), 20 November 2018.

<sup>55</sup> Li Changde v. Kaily Shanghai Packaging Company, Shanghai Songjiang District People's Court.

<sup>56</sup> Unlawful Discharged Cases: Shanghai Zhongxing Wright e-motors Company v. Wu Xiaoxia, Shanghai Songjiang District People's Court, Civil Disputes on Labour Disputes (Shanghai Zhongxing Wanli diandongche youxian zeren gongsi yu Wu Xiaoxia laodong hetong jiufen yishen mishi panjueshu), 29 August 2019. Lawful Discharged Cases: Zhou Li v. Guangzhou Lushan Company, Huangpu District People's Court.

work and should not undertake any acts that negatively affect the order or stability of society.<sup>57</sup> The Guangdong courts held that strikers had seriously violated labour discipline and workplace rules when strikers disrupted the production and working order of the employer.<sup>58</sup> The Liaoning courts held that the workplace rules did not violate laws and regulations and that the strikers flouted the workplace rules.<sup>59</sup>

In the case of economic strikes (i.e. strikes for interests claims), the judge's perception of the strike widely influenced the judicial decisions regarding dismissals triggered by an economic strike. Moreover, the judge's perception revealed subtle changes. For instance, prior to 2013, Shanghai judges displayed a more lenient attitude towards economic interests strikes. The judge emphasised that although the workers' collective actions were improper, workers should be given reasonable latitude. In these cases, the courts maintained the view that employees reasonably exercised their right to bargain collectively, and the employer failed in the duty to bargain in good faith.<sup>60</sup> Moreover, the court required the employer to provide adequate evidence that the company endured serious economic losses. If this evidence was not provided, the employer could not fire the strikers.<sup>61</sup>

From 2013 onwards, judges have not recognised strikes pertaining to economic interests.<sup>62</sup> Judges generally denied the legitimacy of an economic strike and held that employees should observe workplace rules. It is lawful for an employer to fire strikers who broke the workplace rules.<sup>63</sup> In only one case, considering the employee's physical rehabilitation, did the court maintain that the employer had discharged the striker unlawfully, but the court emphasised that the strike was still a violation of

<sup>57</sup> Li Changde v. Kaily Shanghai Packaging Company, Shanghai Songjiang District People's Court; Yang Wenli v. Shanghai Hatichi Cable Trading Co., Ltd., Shanghai No. 1 Intermediate People's Court.

<sup>58</sup> Li Guiyuan v. Nokia Dongguan Branch and Nokia Company, Guangdong Higher People's Court; Chen Yuhua v. Guangzhou Nanbu Engineering Plastics Company, Guangzhou Intermediate People's Court, Civil Disputes on Labour Disputes (Chen Yuhua yu Guangzhou nanbu gongcheng suliao youxian gongsi laodong hetong jiufen), 7 November 2016; Huang Deke v. Hengtong Rubber Products (Shenzhen) Company, Shenzhen Intermediate People's Court, Civil Disputes on Labour Disputes (Huang Deke yu Shenzhen Hengtong xiangjiao zhipin youxian gongsi laodong zhengyi ershen minshi panjueshu), 20 October 2014.

<sup>59</sup> Gu Chuang v. Coca-Cola Liaoning (South) Beverage Company, Jinzhou Intermediate People's Court.

<sup>60</sup> An anonymous employee v. an anonymous company, Shanghai No. 1 Intermediate People's Court, Civil Dispute on Labour Dispute (Jia mou yu jia gongsi laodong hetong jiufen shangsu an), 15 December 2011; an anonymous wind-power equipment company v. Sun, Shanghai Songjiang District People's Court, Civil Dispute on Labour Dispute (Shanghai mou fengdian shebei zhizao youxian gongsi yu Sun mou laodong hetong jiufen an), 11 October 2011.

<sup>61</sup> Ibid.

<sup>62</sup> Liu Xiaorong v. Guangzhou Dayou Car Seats Company, Guangzhou Intermediate People's Court, Civil Dispute on Labour Dispute (Liu Xiaorong yu Guangzhou Dayou qiche zuoyi youxian gongsi laodong hetong jiufen ershen minshi panjueshu), 10 October 2014.

<sup>63</sup> Li v. Shenzhen anonymous company, Shenzhen Longgang District People's Court, Civil Dispute on Labour Dispute (Li moumou Shenzhen moumou youxian gongsi laodong hetong jiufen minshi yishen panjueshu), 26 September 2021.

labour discipline.<sup>64</sup> In most cases, the court advocated that workers should exercise their rights through reasonable and lawful ways and that they should not claim their rights by conducting strikes that affect the normal production and operation of the employer. These collective actions not only violate the workplace rules and discipline, but also severely affect the production and operation of the employer.<sup>65</sup> Moreover, the employees' refusal to fulfil the basic obligation to provide labour was considered a serious violation of labour discipline or workplace rules.<sup>66</sup> The Sichuan courts maintained that the strikers' conduct constituted an unreasonable complaint when they congregated to make improper demands via improper words and actions.<sup>67</sup> The Liaoning courts stated that strikers had severely violated labour discipline when the union did not agree or authorise workers to strike.<sup>68</sup> It is paradoxical that the law does not grant unions the right to organise strikes. How can workers then go on strike with the union's consent? A grassroots trade union had received support from the higher-level trade union, and the higher-level union requested approval for workers' protests from the municipal Party committee. However, the municipal Party committee rejected the request to protest.<sup>69</sup>

In sum, the right to strike, as one of the basic human rights, is inseparable from the right to collective bargaining, and the right to collective bargaining is difficult to enforce without the right to strike.<sup>70</sup> Many countries have their own legal system

<sup>64</sup> Zeng Hongping v. Guangzhou Dayou Car Seats Company, Guangzhou Huangpu District People's Court, Civil Dispute on Labour Dispute (Zeng Hongping su Guangzhou Dayou qiche zuoyi youxian gongsi laodong hetong jiufen yishen minshi panjueshu), 31 March 2014.

<sup>65</sup> Zhou Li v. Guangzhou Lushan Company, Huangpu District People's Court.

<sup>66</sup> Wu Yongjun v. Ruiweng Company, Guangzhou Intermediate People's Court; Zhou Li v. Guangzhou Lushan Company, Huangpu District People's Court; Liu Xiaorong v. Guangzhou Dayou Car Seats Company, Guangzhou Intermediate People's Court; He Zhouchun v. Guangzhou Fanyu Xincheng Rubber and Plastic Company, Guangzhou Intermediate People's Court; Lin Xiaomei v. OMRON (Guangzhou) Automotive Electronics Co. Ltd., Guangzhou Huangpu District People's Court; Chen Minzhen v. Wuxi Wangtong Mining Machinery Company, Wuxi Intermediate People's Court, Civil Dispute on Severance Compensation (Chen Minzhen yu Wuxi Wangtong kuangye jixie youxian gongsi jingji buchangjin jiefen ershen minshi panjueshu), 15 April 2016; Tang Haiding v. Ningbo Linggang Company, Ningbo Beilun District People's Court, Civil Dispute on Labour Dispute (Tang Haiding yu Ningbo Linggang tanhuang youxian gongsi laodong hetong jiufen yishen minshi panjueshu), 13 August 2020; Deng Xiaoli v. Ningbo Zhonglin Company, Ningbo Intermediate People's Court.

<sup>67</sup> Zhang Ruixian v. Sichuan Guangyun Company, Guangyuan Intermediate People's Court, Civil Dispute on Labour Dispute (Zhang Ruixian yu Sichuan Guangyun jituan youxian gongsi changtu qichezhan Sichuan Guangyun jiti gufen youxian gongsi laodong zhengyi jiufen ershen minshi panjueshu), 18 April 2016.

<sup>68</sup> Jiang Haiyuan v. Dalian Fomas Company, Dalian Economic and Technological Development Zone People's Court, Civil Dispute on Labour Dispute (Jiang Haiyuan yu Dalian Fomas youxian gongsi laodong hetong jiufen yishen panjueshu), 20 May 2015.

<sup>69</sup> Chen Feng, "Between the State and Labour: The Conflict of Chinese Trade Unions' Double Identity in Market Reform", pp. 1006–28.

<sup>70</sup> Chang Kai, "Bagong quan lifa wenti de ruogan sikao" (Some Thoughts on Legislation on the Right to Strike), *Xuehai (Academia Bimestris)* 4 (2005): 51.

to regulate the right to strike, although with significant variations in protecting the right to strike.<sup>71</sup> For instance, the Labour Courts in Germany and Poland assess collective actions in the light of the principle of proportionality to verify the lawfulness of the collective action.<sup>72</sup> However, economic and security reasons are increasingly being used to undermine the right to strike.<sup>73</sup> Chinese judicial decisions present considerable challenges regarding the recognition of the right to strike and such decisions have gradually developed into a conservative approach in the judiciary to deny the right to strike.

Although China's Labour Law and the Constitution stipulate that workers should abide by labour discipline, the laws do not explain its definition.<sup>74</sup> Moreover, controversial differences remain between labour discipline and workplace rules. Some scholars argue that overlapping commonalities exist between labour discipline and workplace rules.<sup>75</sup> Others argue that as labour discipline is different from workplace rules, the violation of labour discipline will no longer be a factor to dismiss an employee.<sup>76</sup>

The sample cases indicate that judicial documents are not necessarily consistent with the laws and judicial interpretation, and these documents break through the principles or framework of existing laws and create new rules.<sup>77</sup> Local judicial documents have increased the obligations of workers to obey labour discipline without explaining the definition of labour discipline. For example, the Shanghai judicial document states that the employer can hold workers liable for violation of obligations even though the employer's workplace rules are invalid.<sup>78</sup> The Zhejiang judicial document states that the employer may dismiss a worker for serious violation of labour discipline in the absence of an explicit employment contract or workplace rules.<sup>79</sup>

<sup>71</sup> Federico Fabbrini, "The Right to Strike", in *Fundamental Rights in Europe* (Oxford: Oxford University Press 2014), p. 153.

<sup>72</sup> *Ibid.*, pp. 151–3.

<sup>73</sup> Edlira Xhafa, "The Right to Strike Struck Down?", *Friedrich Ebert Stiftung Briefing* (May 2016): 2–18.

<sup>74</sup> Article 53 of the Constitution of the People's Republic of China (Zhonghua renmin gongheguo xianfa), 11 March 2018; Article 3(2) of the Labour Law of the PRC (Zhonghua renmin gongheguo laodong fa), 29 December 2018.

<sup>75</sup> Qian Yefang, "Laodong hetongfa xiugai zhizheng ji xiufa jianyi" (Labour Contract Law Controversy Over Amendments and Proposals for Amendments), *Faxue (Law Science)*, 5 (2016): 54.

<sup>76</sup> Dong Baohua, "Laodong hetongfa de shida shiheng wenti" (Ten Major Imbalances in Labour Contract Law), *Tansuo yu zhengming (Exploration and Free Views)*, 4 (2016): 12–5.

<sup>77</sup> Wang Shucheng, "The Judicial Document as Informal State Law: Judicial Lawmaking in China's Courts", *Modern China* 48, no. 3 (2022): 633; Wang Xiaoying, "Difang fayuan sifa jieshixing wenjian de falü diwei tanjiu" (The Legal Status of the Judicial Documents in the Local Courts), *Falü fangfa (Legal Method)* 27, no. 2 (2019): 165.

<sup>78</sup> Shanghai High People's Court, "Shanghaishi gaoji renmin fayuan guanyu shiyong laodong hetongfa ruogan wenti de yijina" (Opinions of Shanghai High People's Court on Several Issues Relating to the Application of Employment Contract Law), 3 March 2009.

<sup>79</sup> Zhejiang High People's Court, Zhejiang Labour Dispute Arbitration Committee, "Yinfa guanyu shenli laodong zhengyi anjian ruogan wenti de jieda wu" (On the Issuing of the Answers to Several Questions on the Trial of Labour Dispute Cases [V]), 21 June 2019.

The sample cases demonstrate that some courts held the view that strikers violate labour discipline and their refusal to provide labour violates workers' basic obligations, while other courts maintained that strikers violate the workplace rules.<sup>80</sup> As such, striking is considered a serious violation of labour discipline or the workplace rules, and such opinions demonstrate that judges have more room to exercise discretion. In other words, judges have applied judicial activism to restrain collective actions through adjudication.

## JUDICIAL ACTIVISM WITH POLITICAL RESILIENCE

Chinese President Hu Jintao promulgated the "harmonious society" doctrine when he was at the helm and that principle encouraged the rise of informal justice. The state had promoted mediation as an informal form of justice since 2010, whereby grassroots organisations and non-judicial institutions mediated labour disputes.<sup>81</sup> At the time, the Supreme People's Court also required courts at all levels to exercise caution when accepting cases and to suspend sensitive cases that are not expressly provided for by law. For example, Guangxi High People's Court issued internal documents to clarify the 13 types of cases that are temporarily not accepted, including labour disputes caused by enterprise restructuring.<sup>82</sup> However, there often exists a wide gap in compensation awards between mediation and litigation, indicating that the mediation approach normally requires workers to make a concession in mitigating collective labour disputes.<sup>83</sup> Since collective actions have continuously increased, the central authority noted that improper resolution of workers' collective actions could

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<sup>80</sup> Li v. Shenzhen anonymous company, Shenzhen Longgang District People's Court; Tang Haiding v. Ningbo Linggang Company, Ningbo Beilun District People's Court; Lin Xiaomei v. OMRON (Guangzhou) Automotive Electronics Co. Ltd., Guangzhou Huangpu District People's Court; Li Changde v. Kaily Packaging Company, Shanghai Songjiang District People's Court; Gu Chuang v. Coca-Cola Liaoning (South) Beverage Company, Jinzhou Intermediate People's Court; Ren Tengfei v. Shanghai gongxing Transportation Company, Shanghai Putuo District People's Court; Wu Yongjun v. Ruiweng Company, Guangzhou Intermediate People's Court; Zhou Li v. Guangzhou Lushan Company, Huangpu District People's Court; Chen Yuhua v. Guangzhou Nanbu Engineering Plastics Company, Guangzhou Intermediate People's Court; Zhang Ruixian v. Sichuan Guangyun Company, Guangyuan Intermediate People's Court; Chen Minzhen v. Wuxi Wangtong Mining Machinery Company, Wuxi Intermediate People's Court; Yang Wenli v. Shanghai Hatichi Cable Trading Co. Ltd., Shanghai No. 1 Intermediate People's Court; Li Guiyuan v. Nokia Dongguan Branch and Nokia Company, Guangdong Higher People's Court; He Zhouchun v. Guangzhou Fanyu Xinsheng Rubber and Plastic Company, Guangzhou Intermediate People's Court; Zeng Hongping v. Guangzhou Dayou Car Seats Company, Guangzhou Huangpu District People's Court.

<sup>81</sup> Zhuang and Yue, "From the Courts to the Streets—How the Great Mediation has Pushed Workers' Collective Actions Out of Institutionalized Processes", p. 155.

<sup>82</sup> Wu Yingzi, "Sifa de xiandu: zai sifa nengdong yu sifa kezhi zhijian" (The Limits of Justice: Judicial Activism and Judicial Restraint), *Faxue yanjiu* (Legal Studies) 5 (2009): 119.

<sup>83</sup> Zheng Guanghuai, "Laogongquan yu anfuqing guojia—yi Zhujiang sanjiaozhou nongmingong weili" (Labour Rights and the Propitiatory State—The Case of Migrant Workers in the Pearl River Delta), *Kaifang shidai* (Open Times), 5 (2010): 32–3.



erode the legitimacy of the authority.<sup>84</sup> Therefore, maintaining social stability requires formal rules that lead collective labour disputes into an institutional framework.<sup>85</sup>

Chinese President Xi Jinping upholds law primarily as an instrument of the Communist Party of China.<sup>86</sup> He proposed the implementation of a combination of the rule of law and rules of morality. Laws and regulations should enable the establishment of a distinct orientation to promote virtue, morality and law enforcement, and the judiciary should also embody the requirements of socialist morality. In short, laws, regulations and the judiciary should all incorporate core socialist values.<sup>87</sup>

In response, the Chinese academic community highly encouraged a shift from legal formalism to legal pragmatism.<sup>88</sup> However, if the central authority cannot guarantee that the judicial system is implemented with “rational and reasonable” legal pragmatism, irrational legal pragmatism promotes qadi-justice (*Kadi-justiz*) dominated by the authority.<sup>89</sup> China’s constitutional system strictly constrains judges from formulating rules. Even if judicial activism is essential, it should be exercised with caution.<sup>90</sup> The predicament of the application of legal formalism in contemporary China is largely because the rules are unclear.<sup>91</sup> The foundation of legal formalism is that the law should contain rules that are as detailed as possible, rather than a large number of fuzzy standards with discretionary factors.<sup>92</sup>

However, in collective labour disputes, the interests of the state, capital and labour are difficult to balance through legislation. Workers had expressed their desire to retain the right to strike in the legislative process of the Constitution (1982), but the central authority believed that strikes would destroy production and stability in a socialist country at the time.<sup>93</sup> Employers are strongly and continuously opposed

<sup>84</sup> All-China Federation of Trade Unions and the Supreme People’s Court, “Guanyu zai bufen diqu kaizhan laodong zhengyi duoyuan huajie shidian gongzuo de yijian” (Opinions on the Pilot Project of Multiple Dispute Resolution in Labour Disputes in Some Regions), 20 February 2020.

<sup>85</sup> Su and He, “Street as Courtroom: State Accommodation of Labour Protest in South China”, pp. 181–2.

<sup>86</sup> Moritz Rudolf, “Xi Jinping Thought on the Rule of Law”, *SWP Comment* 2021/C 28, pp. 3–6 (22 April 2021).

<sup>87</sup> Xi Jinping, “Jianchi yifa zhiguo yu yide zhiguo xiangjiehe” (Adhere to the Combination of Rule of Law and Rule by Morality), Renmin wang (People.cn), 9 December 2016, at <<http://theory.people.com.cn/n1/2018/0103/c416126-29742944.html>> [31 August 2022].

<sup>88</sup> Feng Lixia, “Daguo biange shidai de fazhi gongshi—zai guize yueshu yu shiyong daoxiang zhijian” (The Consensus on China’s Rule of Law: Rule-centred Rule of Law and Pragmatic Rule of Law), *Huanqiu falü pinglun* (Global Law Review), 2 (2019): 25–7; Xin Chunying, “Zhongguo shifou xuyao sifa nengdong zhuyi” (Does China Need Judicial Activism?), *Renmin fayuanbao* (People’s Court Daily), 22 October 2002.

<sup>89</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Los Angeles, CA: University of California Press, 1978), pp. 812–4.

<sup>90</sup> Hou Shuwen, “Sifa hengping yishu yu sifa nengdong zhuyi” (The Art of Judicial Equilibrium and Judicial Activism), *Faxue yanjiu* (Chinese Journal of Law), 1 (2007): 58.

<sup>91</sup> Hans-Bernd Schäfer, “Rule Based Legal Systems as a Substitute for Human Capital: Should Poor Countries Have More Precise Legal Norms?”, *Supreme Court Economic Review*, 14 (2006): 130–4.

<sup>92</sup> Ibid.

<sup>93</sup> Xu Chongde, *Zhonghua renmin gongheguo xianfashi* (The History of the Constitution in the People’s Republic of China) (Xiamen: Fujian Renmin Press, 2003), p. 723.

to the right to strike. For instance, in the process of revising the provisions of the Guangdong collective contract (draft), the employers strongly opposed the terms related to collective bargaining, stipulating however that if an employer does not bargain in good faith, workers have the right to strike and the employer cannot fire the strikers.<sup>94</sup>

The application of judicial activism allows the judiciary that formulates informal laws to respond to the will of the authorities to increase the political resilience of authoritarian regimes when the formal law is inadequate to mitigate labour conflicts.<sup>95</sup> More specifically, judges directly choose an interpretation to produce the best results in a case, which is not based on the best results for the overall “public interest”, but rather on a case-by-case basis regarding “political and social effects”. The courts actually put political effects and employers’ economic interests ahead of the interests of the workers.<sup>96</sup>

Local courts acquiesce in applying judicial activism in order to solve the thorny problem of their political task. The courts are bureaucratic by nature and have a political obligation to maintain stability.<sup>97</sup> In 2016, the General Office of the CPC Central Committee and the General Office of the State Council promulgated a document stating that local courts, under the leadership of the Party committee and the local government, should participate in the task of social security maintenance.<sup>98</sup> The local courts absorb and transmit social governance policies through the bureaucracy. Alternatively, the courts should also provide feedback to the local Party committees through the bureaucracy to promote the adjustment and improvement of the social governance of the courts.<sup>99</sup>

In addition, the existing hierarchy of the local courts exercises strong control over judges. The promotion of judges is highly dependent upon the Party group of the court, the president of the court and the chief judges.<sup>100</sup> Since stability maintenance is related to the performance of local officials’ promotion assessment (one-vote veto), courts and local governments have shown a strong preference for maintaining social

<sup>94</sup> See <[https://www.guancha.cn/FaZhi/2014\\_05\\_15\\_229839.shtml](https://www.guancha.cn/FaZhi/2014_05_15_229839.shtml)> [31 August 2022].

<sup>95</sup> Andrew J. Nathan, “China’s Changing of the Guard: Authoritarian Resilience”, *Journal of Democracy* 14, no. 1 (2003): 6–17.

<sup>96</sup> Wang Tianyu and Fang Lee Cooke, “Striking the Balance in Industrial Relations in China? An Analysis of Court Decisions of 897 Strike Cases (2008-2015)”, p. 38–9.

<sup>97</sup> Ng Kwai Hang and He Xin, *Embedded Courts: Judicial Decision-making in China* (New York: Cambridge University Press, 2017), pp. 20-1.

<sup>98</sup> The General Office of the CPC Central Committee and the General Office of the State Council, “Zhonggong zhongyang bangongting guowuyuan bangongting yinfa jianquan luoshi shehui zhian zonghe zhili lingdao zerenzhi guiding” (The Regulations on the Implementation of the Responsibility System for Comprehensive Management of Social Security), 27 February 2016.

<sup>99</sup> Liu Lei, “Xianyu zhili yu jiceng fayuan de zuzhi xingtai” (County Governance and the Organisational Form of the Grassroots Courts), *Huanqiu falü pinglun* (*Global Law Review*) 41, no. 5 (2019): 189.

<sup>100</sup> Liu Zhong, “Ge zhi ji yu jingzheng shanggang—fayuan neibu zhixu de shenceng jiegou” (Cybernetic Hierarchy—The Deep Structure of the Court’s Internal Order), *Qinghua faxue* (*Tsinghua University Law Journal*) 8, no. 2 (2014): 146–63.

stability.<sup>101</sup> The relationship between China's judicial system and policies is unique. Policy impacts China's judicial system and the courts are required to implement those policies. The lower-level courts must implement the policies of the higher courts due to the former's position in the hierarchical court system.<sup>102</sup> A grassroots judge said that judicial reform enhances the power of the higher courts, which may exacerbate the latter's improper interference in the lower courts.<sup>103</sup> If judges are not concerned with the adjudication in force in the higher courts, the court's decision can easily be reversed or even be confirmed as an incorrect decision, resulting in an investigation of the trial responsibilities for judges by the disciplinary committee.<sup>104</sup> The sample cases indicate a similar situation in which the judicial decision of a superior court affirmed the lower court's judicial decision and was not reversed on appeal.

This therefore creates a unique configuration. Judges must adhere to the leadership of the Party to implement political tasks, although the Constitution stipulates that the courts are not subject to interference by administrative institutions.<sup>105</sup> The Party group actually makes judicial decisions on complicated cases although the law provides that the judicial committee is the highest judicial organisation within the court.<sup>106</sup> The president, other leaders of the court and the chief judge may request that the judges report the progress and deliberation results of the cases involving mass disputes that may affect social stability, and request approval level by level.<sup>107</sup> Normally, the president and other leaders of the court form the Party group of the court.<sup>108</sup> Moreover,

<sup>101</sup> Chen Baifeng, "Quntixing shefa naofang ji fazhi" (Mass Petitions and Rule of Law), *Fazhi yu shehui fazhan* (Law and Social Development) 19, 4 (2013): 23–4.

<sup>102</sup> Li Yongjun, "Sifa gaige zhong de tizhixing chongtu jiqi jie jue lujing" (Institutional Conflicts in Judicial Reform and Resolutions), *Fashang yanjiu* (Study in Law and Business), 2 (2017): 18–9; Meng Rong, "Zhongguo fayuan ruhe tongguo sifapan jue zhixing gonggong zhengce—yi fayuan guan che 'shehui zhuyi hexin jiazhiguan' de anli wei fenxi duixiang" (How Chinese Courts Enforce Public Policy), *Faxue pinglun* (Law Review), 3 (2018): 184–96.

<sup>103</sup> "Focus on Judicial Reforms: Key Points Towards De-administration and De-localisation" (Jujiao sifa gaige: qu xingzhenghua qu difanghua maichu guanjian bufa), *Banyue tan* (China Comments), 11 June 2015, at <[http://www.xinhuanet.com/politics/2015-06/11/c\\_127905093\\_2.htm](http://www.xinhuanet.com/politics/2015-06/11/c_127905093_2.htm)> [31 August 2022].

<sup>104</sup> Sun Haibo, "Leian jiansuo zai hezhong yiyi shang youzhuyu tongan tongpan" (In What Sense Does the Retrieval of Similar Cases Contribute to Same Case Same Judgement?), *Qinghua faxue* (Tsinghua University Law Journal) 15, no. 1 (2021): 96; The Supreme People's Court Supreme People's Procuratorate, "Zuigao renmin fayuan zuigao renmin jianchayuan yinfa guanyu jianli faguan jianchaguan chengjie zhidu de yijian shixing" (Notice of the Supreme People's Court and the Supreme People's Procuratorate on Issuing the Opinions on Establishing the Disciplinary System for Judges and Prosecutors [for Trial Implementation]), 12 October 2016.

<sup>105</sup> Article 131 of the Constitution of PRC.

<sup>106</sup> Liu, "Xianyu zhili yu jiceng fayuan de zuzhi xingtai" (County Governance and the Organisational Form of the Grassroots Courts), p. 184.

<sup>107</sup> The Supreme People's Court, Opinions of the Supreme People's Court on the Implementation of the Judicial Accountability System (for Trial Implementation) (Zuigao renmin fayuan sifa zerenzhi shishi yijian shixing), 1 August 2017.

<sup>108</sup> Liu, "Xianyu zhili yu jiceng fayuan de zuzhi xingtai" (County Governance and the Organisational Form of the Grassroots Courts), p. 183.

the Party group of the court communicates and coordinates with the local Party committee and government in complicated cases.<sup>109</sup> Sometimes senior judges assert that they have no choice, even though some judges know that they should not be too subservient to local governments.<sup>110</sup>

The judiciary directly participates in social governance problems in the area of collective labour disputes requiring judges to incorporate policies issued by the Party and the state into their judicial opinions.<sup>111</sup> The sample cases indicate that the changes in the court's opinion towards dismissed strikers are closely related to the state policy. When the state encouraged collective bargaining, the court held that the employer has a duty to bargain in good faith and that the employer had unlawfully discharged strikers.<sup>112</sup> When the state emphasises building core socialist values, the courts hold that workers are expected to observe labour discipline and fulfil their labour obligations. More specifically, the CPC has placed tremendous emphasis on the construction of the core ideology of socialism and issued the Opinions on Cultivating and Practising the Core Ideology of Socialism in 2013.

In response, in 2015 and 2021, the Supreme People's Court issued corresponding judicial documents to implement the policy from the central authority.<sup>113</sup> The Supreme Court stated that maintaining social stability is an important duty of the courts.<sup>114</sup> The core socialist values are an important guide for restraining a judge's discretion in understanding the legislative intent and legal principles. These values became a judicial standard for the "morally righteous". Thus, dedication, as a part of the core socialist values, is the "morally right".<sup>115</sup> Dedication is manifested as a devoted attitude towards work by adherence to the labour discipline.<sup>116</sup> As such, a series of reforms has allowed the courts to apply judicial activism to formulate informal rules with a goal of strengthening the regime's political resilience.

<sup>109</sup> Ibid., p. 184.

<sup>110</sup> Ng and He, *Embedded Courts*, p. 20.

<sup>111</sup> Zheng Zhihang, "Dangzhi tizhi suzao sifa de jizhi yanjiu" (A Study of the Mechanism of Shaping the Judiciary in the Party-Government System), *Huanqiu falü pinglun* (Global Law Review), 6 (2020): 15–6.

<sup>112</sup> An anonymous wind-power equipment company v. Sun, Shanghai Songjiang District People's Court.

<sup>113</sup> The Supreme People's Court, "Zuigao renmin fayuan guanyu zai renmin fayuan gongzuozhong peiyun he jianxing shehui zhuyi hexin jiazhi guan de ruogan yijian" (A Notice on the Guidance on Further Promoting the Integration of the Core Socialist Values into the Interpretation of Judgment Instruments), 12 October 2015.

<sup>114</sup> Ibid.

<sup>115</sup> The Core Socialist Values comprise three levels: (i) National level: prosperity (*fuqiang*), democracy (*minzhu*), civility (*wenming*) and harmony (*hexie*); (ii) Social level: freedom (*ziyou*), equality (*pingdeng*), justice (*gongzheng*) and the rule of law (*fazhi*); (iii) Individual level: patriotism (*aiguo*), dedication (*jingye*), integrity (*chengxin*) and friendliness (*youshan*).

<sup>116</sup> Yan Tian, *Zhongguo laodong xianfa* (China's Labour Constitution) (Beijing: Peking University Press, 2022), p. 164.

## IMPLICATIONS AND CONCLUSIONS

From the above analysis, it can be seen that the central authority recognised the imperative to resolve collective actions arising from labour conflicts in order to avoid a negative impact on the legitimacy of the regime. In order to alleviate workers' collective actions, the authority engaged in trade union reforms to strengthen their role in representing workers. However, politically, trade unions align themselves with the leadership of the Party and, institutionally, lower-level trade unions follow the leadership of those higher up. The dual identity of trade unions as state apparatus and social organisations impedes the social organisational attributes of trade unions in collective bargaining. In other words, political centralisation cannot promote the reform of trade unions and it obstructs trade unions' functions as social organisations.

Alternatively, the central authority institutionalised collective actions to inhibit the increasing number of workers' collective actions. The authority acquiesces to allow the local courts to formulate informal rules via judicial documents and the authority encourages judicial activism to institutionalise collective actions. At the same time, the authority emphasises the rule of morality as a complement to the rule of law. Judicial adjudication is integrated into core socialist values to achieve political and social goals consistent with the requirements of the power. As adjudicators, courts should adhere to the Party leadership politically and superior courts should guide the lower courts' trials so as to flexibly and effectively respond to the requirements of the authority. In adjudicating cases of collective action, the judges' legal consideration is subject to extrajudicial factors: the judges consider the politics and social effects and the consequences. The judges' legal thinking reflects the dominant consideration of political and social effects, and Chinese courts' top-down approach in execution of policy. Hence, the right to strike is denied in the judicial process through informal rules.

The current institutionalisation of collective action allows employers to terminate the employment of strikers, thereby deterring workers from launching such action. The authorities expect that institutionalisation could reduce the number of strikes and maintain social stability; however, the approach has pushed unsolved legal issues back to society. Data from the China Labour Bulletin indicate that workers actually do not adhere to "the informal rules made by the judges" as their obligation, and workers still initiate strikes spontaneously (see Table 2). The informal rules have not reduced the likelihood or occurrence of workers' collective action.

Collective action remains a major challenge for the authorities. The constantly expanding stability maintenance system inevitably results in the suppression of unofficial social organisations, while constantly increasing the cost of public security maintenance. Xu's research argues that local governments' public security expenditures have increased due to surveillance.<sup>117</sup> A Tsinghua University research group argues that stability

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<sup>117</sup> Xu Xu, "To Repress or To Co-opt? Authoritarian Control in the Age of Digital Surveillance", *American Journal of Political Science* 65, no. 2 (2021): 309–25.

maintenance expenditures have become a fairly significant and a regular feature of local government expenditures.<sup>118</sup> Exercising the right to strike is closely related to exercising the right to collective bargaining. Strikes are workers' approach to avoid employers' refusal to bargain and to avoid the scenario of the latter bargaining in bad faith. Thus, collective actions should be regulated through formal laws rather than informal rules. It is imperative that the institutionalisation of collective actions recognises that the right to strike is a precondition as well as the protection of collective bargaining rights. Otherwise, the limits of regime institutionalisation would not be able to enhance the authoritarian regime's resilience.<sup>119</sup>

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<sup>118</sup> Tsinghua University Research Group, "Yi liyi biaoda zhiduhua shixian changzhi jiu'an" (Institutionalising the Expression of Interests to Achieve Long-term Peace and Security), *Xuexi yuekan* (Study Monthly) 23 (2010): 28.

<sup>119</sup> Bruce Gilley, "China's Changing of the Guard: The Limits of Authoritarian Resilience", *Journal of Democracy* 14, no. 1 (2003): 19.