

# Bringing Politics Back in: Access to Justice and Labor Dispute Resolution in China

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## Introduction

In a mature legal system, access to justice is commonly defined as the availability, accessibility and affordability of court-centered legal services for the poor and marginalized groups to resolve their justiciable problems (Stephen, 1996; Rhode, 2004). As a result of globalization, and in response to social and economic changes in the developing countries, this law-based and court-centric concept of access to justice has had significant impact in developing countries in the worldwide promotion of rule of law (Carothers, 2006). Within this tradition, social and economic conflicts are converted into justiciable legal disputes and given corresponding judicial solutions; access to justice, in essence, means the effective channeling of the world in which disputes occur and the world in which disputes are resolved (Botero, 2014; Meene and van Rooij, 2008; UNDP, 2008). China has, to a degree, followed this model in legalizing social conflict. Since the late 1970s, China has embarked on a project of continuous legal reform, defined broadly to include the expansion of legal norms, enhancement of legal institutions, and professionalization of legal service providers, with court-centric adjudication playing a pivotal role in dispute resolution (Chen, 2011; Fu, 2009; 2010; Peerenboom, 2002) in spite of the periodic conservative pushbacks (Fu, 2011; Minzner, 2011),

A neglected aspect in the global promotion of rule of law is the political nature of the rule of law. While scholars and practitioners in the field have debated the necessity and feasibility of worldwide rule of law (McCubbins, Rodriguez and Weingast, 2010; Weingast, 2008), they tend to focus on whether, or the degree to which, a developing country meets the “doorstep conditions” for the rule of law as defined in the West. The literature in general marginalizes the political use of law when it is applied in the developing world. In a sense, law is purposively regarded as a technical governance tool, and the politics of rule of law is intentionally taken out of the equation in academic and policy considerations.

This chapter uses labor dispute resolution in China as an example to study access to justice in China’s social and economic transition. The principal argument is that the legal approach to access to justice, with a sharp focus on law and courts, is narrow and fails to explain the wider political horizon on which justice is defined and redefined according to the prevailing sense of justice and the political economy that shapes it. In doing so, this chapter brings politics back to the over-legalized concept of access to justice. The chapter first explores the background in which legal justice emerges in China, and then examines the dominant features of access to justice as it is understood and implemented in China.

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Finally, this chapter discusses the limits of that legalistic approach and future prospects for access to justice.

This chapter makes three arguments in relation to access to justice in the particular Chinese context. First, access to justice is an evolving concept. What is perceived as justice or injustice and institutional designs to provide access to it are subject to political opportunities and institutional constraints. This chapter traces the evolution of three overlapping concepts of access to justice in Chinese factories: in the socialist paternalism of the Maoist era; in the rule of law reform in the post-Mao era, and in the more recent workers' mobilization. Employment relations have moved through tremendous changes since the early 1980s as economic reform moves forward. Associated social and economic changes have shaped and re-shaped both workers' demand for justice and the state's responses to those demands.

Second, access to justice is fundamentally a political concept, reaching beyond well-meaning lawyers who provide legal assistance to the deserving poor. Access to justice is an immensely political process that involves domination and resistance at a structural level. Since the early 1990s in particular, the government has resorted to legal remedies to deal with side-effects of the reform of state owned enterprises (SOEs) and the massive rural to urban migration, offering assistance on a case by case basis to restore subsistence standards for workers. The legal process attempts to convert farmers who are newly arrived in cities, and workers in general, into individual legal subjects who have freewill in entering into legal relationships. Yet it largely ignores both workers' fundamental interests as a collective and the underlining structural barriers that restrict workers' access to justice. At the receiving end of legal assistance, workers come to realize, slowly but steadily, the intrinsic limit of law in their struggle for their fundamental interests within the existing political and legal framework. Workers have thus become more political in dealing with their grievances and are developing a new sense of collective justice that is larger than the aggregate of their individual claims.

Finally, the institutional design for access to justice is contingent on historical forces. The prevailing model of justice in China, i.e., the court-based adjudication of individuals and the prioritization of legal remedies over preventing violation and making structural improvements, is a highly contentious issue and a result of a dynamic process of control, struggle, and compromise. The individualized legal regime for labor disputes was created in the particular historical background of the mid-1990s when workers' group identity was weak and workers lacked capacity to organize. With the enhancement of a strong collective identity for workers and their enhanced capacity for collective action, the future shape of workers' access to justice remains to be identified.

### **The Collapse of Socialist Paternalism and the Emergence of Rights**

Workers' rights are meaningful only when considered in a larger political context. Three key issues shaped workers' access to justice in the Maoist era.

First, prior to China's open door policy and economic reform, justice for workers was grounded in the constitutional principle that workers were the master of the state (as they still are theoretically). In this understanding, politically, China practiced democratic dictatorship based on the alliance of workers and peasants, with the Communist Party in a perpetual leadership position. Economically, China practiced central planning with SOEs playing the dominant role in the national economy. With workers as the masters of the state, there was an alignment of fundamental interest among state, the SOEs, and workers. Indeed, since workers were the masters of the state and owners of SOEs, their participation in production was regarded as an exercise of their ownership rights. The law, wherever it existed, merely reflected the will of the working class and necessarily protected workers' interests.

Second, there was mutual dependence between SOE management and the workers in the socialist state. Under central planning, the state not only planned production but also delivered a paternalist welfare system. As such, the SOE management wielded significant control over workers' lives through what Lee (1999) refers to as "organized dependence". As representatives of the state in managing state assets, the SOE managers provided cradle-to-grave welfare for the workers. Since the planned economy bound workers to an enterprise virtually for life, workers could not opt out of this paternalistic design. The SOE management's control over workers was indeed entrenched and overwhelming.

However, workers' status as the masters of the state also counter-balanced the power of this management, which was placed in a precarious position to manage workers who were hard to discipline and impossible to dismiss. Some argue that there was a social contract between workers and the state (represented by the management) where workers would demonstrate their political loyalty to the state in exchange for socialist paternalism (Chen, 2000, 2007). Chen (2000: 43) captures this mutual dependence succinctly:

Under such a system, the state was paternalistic, binding workers to their work units for life but guaranteeing them a wide range of material and nonmaterial resources not readily available through market channels. Put another way, a tacit social contract existed between the state and workers, by which workers consented to the political order in exchange for guaranteed life-long employment, social security, health care and roughly egalitarian wages.

Third, under the planned economy, the conceived unity of interest, and socialist paternalism, disputes between workers and enterprises were captured by the state through the process of central planning. Where disputes did occur among workers, they were effectively suppressed or absorbed within the enterprises (Lubman, 1967). Since workers shared their entire life living and working with each other in gated communities, disputes were internalized and resolved within the institutional boundaries and were settled internally according to institutional logic. External norms such as legal norms, and external institutions such as courts, had little relevance to the dispute resolution process. Outside involvement in an internal dispute necessarily indicated lack of capacity on the part of the factory and showed the inability of its management. Only in extraordinary cases were outside actors called in for dispute resolution. The key feature of workers'

access to justice in the socialist planned economy was that disputes were either prevented through central planning or largely containable within a workplace when they occurred.

Workers' unions played a limited role in dispute resolution under the planned economy. Indeed, since workers were cast as the masters of the state, there was little need for unions to articulate and represent the workers' interests. Unions in Communist states, according to the classic dualism, were characterized by state corporatism and bureaucratic welfarism (Chen, 2003; Howell, 2008). The imperative of state corporatism necessitated a rigid overall political control over unions and the imperative of welfarism demanded unions to take care of the interest of individual workers. In essence, because of state ownership and central planning, unions became a marginal arm of the state and served the purpose of disciplining workers and at the same time looking after their interest on behalf of the state.

### **Rule of Law, Access to Justice and Legal Aid**

The socialist planned economy collapsed eventually, together with the socialist paternalism. Market reform necessitated restructuring the SOEs and privatizing the public sectors, which eventually ended the "iron rice bowl" style of socialist welfarism (Hurst, 2009). By the mid-1990s, the reform, pushed through harshly by then Premier Zhu Rongji, had led to massive insolvency and made redundant millions of former SOE workers, leading to a sudden and deep subsistence crisis. In spite of the political challenges, the state broke the social contract that prevailed in the planned economy and forced workers into the labor market (Gallagher, 2005). With living standards of many workers' families dropping below subsistence level, coupled with increasing corruption among managers, workers took to the streets, sending a shockwave of industrial action through Chinese cities (Chen, 2008; Lee, 2007).

Another shockwave was also riveting through Chinese cities, this one caused by the creation in these cities of a massive manufacturing sector, run mainly by overseas Chinese and other Asian investors, that has eventually become the world's factory. While the government was making redundant millions of SOE workers, it simultaneously relaxed rural to urban social mobility and allowed millions of migrant workers from the countryside to seek employment in Chinese cities. Those migrants, with high desires to work and low expectations for return, eventually made the Chinese economic miracle possible (Gallagher, 2014). However, the new 'world factory' was built in a rush without proper design. Migrants were recruited into factories without a sound labor law system to safeguard workers' rights and interests, leading to unprecedented decades-long human sufferings that continue to the present day (Chan, 2001).

How did the government handle disputes and contentions surfacing as a result of market reform? In particular, how has the government handled grievances of disfranchised former SOE workers and newly arrived migrants? As mentioned, the market reform in China caused a paradigm shift in China's labor relations, and the drive to market reform in the 1980s and 1990s broke the social contract between the state and workers,

generating a massive number of labor conflicts.

At that historical junction, the Chinese government created a new labor law regime and a new dispute resolution mechanism to respond to the profound changes in employment relations (Gallagher and Dong, 2011; Halegua, 2008) and to solve a political crisis through legal regulations. At a macro-level, the creation of a market economy with a thriving private sector naturally leads to diversification of interests among the state, enterprises and workers. In promoting a socialist market economy, the state is bound to give enterprises, including the SOEs, the autonomy that they need in production and in management of labor relations to enable them to compete effectively in the marketplace. Even in China's developmental state where the state plays an instrumental role in shaping industrial policies, promoting economic growth, and managing conflict, the state has to step outside increasingly complex labor relations and opt to regulate these relations under law instead of remaining a party with a vested interest. As a result, a series of labor legislation was promulgated in the mid-1990s to protect enterprises' autonomy and to leave labor disputes to employees and employers to sort out themselves according to legal rules (Ibid).

At the micro-level, market reform has induced a decisive shift away from the state's provision of cradle-to-death care under Mao-era socialist paternalism to the present socialist market economy that relies on contract and legal rules in general to regulate labor relations. Within a short time span, contract began to govern China's labor relations in both the SOE sector and the private sector, with varying degree of success. Worker entitlement in the post-paternalistic era is firmly anchored in a legal regime, and, with some variations, that contract-based regime applies, gradually and steadily, to both SOE workers and workers in the emerging private and foreign sectors (Gallagher, 2014). In this newly assembled legal regime, individual workers are identified as isolated individuals bearing legal rights and obligations and who can freely enter into a contractual relationship with their respective employers. They are presumed to have the capacity to resort to legal institutions for remedies when they believe their rights are infringed upon. The legal regime converts the social and economic problems that workers encounter into legal problems with corresponding legal solutions (Josephs, 1995). With promulgation of the first Labor Law in 1994 and subsequent legislation that applies to workers uniformly – with little regard for their residence, status or type of employment – a new and common legal identity was constructed for workers. As Lee (2002, 197) points out, the emerging legalism “incorporates workers into a market and contract driven system by conceding to them certain legal rights and interests.”

Having broken the Mao era social contract with workers by smashing their iron rice bowls, the government imposed a legal contract on workers with terms and conditions to tie individual workers as employees to their specific employers. A worker who has the civil law capacity and the freedom to enter into that legal employment relationship can be a party to an employment contract. Instead of socialist paternalism, the market economy relies on specifying the legal rights and obligations of both employee and employer in the employment contract. Under the new labor law regime, all recognized labor rights including minimum wage, working hours, compensation, social security and other

employment conditions, are specified in standard legal terms. Within the labor law framework, rights of workers are either written in the contract and are then applied and enforced through legal procedures (Chen, 2007; Hurst, 2014; Gallagher, 2014).

Given the size of the private and foreign sectors among China's labor forces, contemporary socialist China decisively follows a private model in enforcing labor rights, a model that relies on workers to initiate legal action to enforce labor standards (Biddulph, 2014). This type of private action is reactive and arises only after an alleged violation causing damage has taken place. Access to justice in this context is narrowly constructed as the provision of legal services to satisfy the legal need, depending on the willingness and ability of workers to bring their grievances to the attention of legal institutions. Violation of labor rights may abound, but this new regime largely shifts the regulatory burden from the government to the individual workers. While government labor inspection has existed, it is common ground that the government has performed poorly in providing proactive and effective protection of labor rights.

This is not to imply that, by creating a private legal regime for labor rights, the state is neutral in regulating labor relations. On the contrary, the Chinese state is decisively biased in favor of employers, in two fundamental aspects. First, the labor law largely neglects preventative measures against labor rights violation and leaves it to the market to sort out labor relations without effective government intervention. While the law tries to strike a balance between ending the socialist paternalism and protecting labor rights, the lack of earlier intervention and preemptive action on the part of the government has created a vacuum in the system (Halegua, 2008), leading to systematic exploitative and repressive labor practices, especially so in the earlier years of market reform. China was desperate to attract foreign investment in the 1990s, and labor rights were a marginal concern, if at all, in growing the GDP (Lee, 2002)

Second, labor could have relied more forcefully on private legal action in China if labor were organized and can act collectively to rebalance the asymmetric power relations in the employment relationship (Chen, 2007). However, when the government shifts to private litigation, it prohibits collective bargaining and other collective action, and criminalizes independent labor organizations and organized labor activism (Chen, 2007; Chan, 2009; Howell, 2008). The rule of law in labor relations creates legal dependence, imposed through law and government action, in which individual workers are forced to pursue a narrow legal path to address their individualized legal claims. Individual employment contracts lock workers individually into that particular labor relationship.

This is not to deny the effectivity of law in labor protection and the gradual expansion of legal rights for Chinese workers over the decades. Indeed, some of the formal rights for workers in China's labor law are impressive given China's level of economic development. The distinctive form that legal protection takes and the technique through which legal rights can be materialized create a degree of neutrality for law and a sense of justice, which in turn render the legal regime legitimate in the eyes of its users (Fryer, McBarnet and Moorhouse, 1981). Legal rights for workers in the Chinese labor law may pale in comparison with the socialist welfare previously in place, but they are more than

deceitful manipulation to mask inequality and exploitation. With the ability to create specific consequence, the legal system proves to be useful for individual workers seeking legal remedies and has been used widely by such workers.

However, the limited substantive rights are openly violated by employers and, in general, legal remedies are not readily accessible due to the larger pro-capital political environment and to labor law's faulty institutional design. For workers who resort to legal action, the existing legal mechanism, even in full operation, is fundamentally biased against them. It has been well documented that China may be the factory of the world, but this 'factory' functions largely through sweat-shops characterized by low wages, long working hours, and repressive working conditions. In a structural sense and when judged by the totality of its enforcement, Chinese labor law serves a repressive purpose against the interests of workers and in spite of the limited protection of workers' legal rights that this law offers (CLB, 2004, 2009).

Institutionally, it is well known that ordinary migrant workers can hardly afford the cost of legal process for labor dispute resolution initially designed into the 1995 Labor Law. The compulsory arbitration and subsequent litigation that the law requires can easily take many months to effect before a decision can be made. An additional procedure that further prolongs the process is needed in cases of industrial injuries and occupational diseases. A defendant factory, as a repeat player with more resourceful and experienced legal representation in handling labor cases, could easily stall the procedure through appeal and other means to force the laborer to compromise. The prolonged legal process imposes severe burden on migrant workers wishing to pursue legal remedies. Subsequent legal reform is working to expedite some of the urgent legal problems facing migrant workers, such as allowing workers to sue directly in courts for payment in arrears, but the reform does not meaningfully alter the burdensome structure of labor dispute resolution (Halegua, 2008; Josephs, 2009).

To facilitate the private labor legal system, the government offers limited legal aid, broadly defined, to workers so as to help rebalance the asymmetric power relations between workers and their employers. What do we know about legal aid in China? There is a national legal aid system under the auspices of the Ministry of Justice that reaches to every township. According to the National Legal Aid Centre, in 2011, there were more than 13,000 full-time staff members, including legal aid lawyers, in the legal aid system; and total legal aid spending in China was just over 1 billion RMB, and the total number of legal aid cases reached 800,000 (Legal Daily, 2012).

These figures mislead more than they inform. Legal aid in China relies extensively on private lawyers' paid or unpaid services and most of the legal aid centers, those in rural counties in particular, merely manage legal aid cases to be handled by private practitioners. The in-house capacity to offer legal assistance by government legal centers is in general limited. To a larger degree, China is able to harbor the ambition to offer legal aid in one million cases per year largely because the government is able to extract legal aid services from practicing lawyers. Under Chinese law, lawyers have a legal obligation to offer legal aid services broadly, including legal advising and case handling,

depending on the jurisdictions, on a *pro bono* basis (for legal advice) or at discounted rate (for litigation matters). Providing at least a certain amount of this free legal aid service has been made a condition for lawyers to maintain their practicing certificate on an annual basis. In addition to that provided by lawyers in firms, legal aid is also officially provided in labor unions, women's federations, labor departments, and universities (through legal aid centers offered by law schools as part of their clinical legal education). Donor programs in China also target legal aid and have been instrumental in providing financial support for law firms and NGOs to supply legal aid in China.

One of the principal functions of the Chinese labor union is to give legal assistance to workers with legal need. Indeed, unions are duty-bound to support workers in legal aid cases as long as workers resort to institutional channels to address their grievances (Chen, 2003, 2004, Halegua, 2008). Unions' legal support includes direct legal representation in courts, bargaining with defendant companies on behalf of workers, and mobilizing public opinion to support workers (Chen, 2004). But it is commonly acknowledged that while legal aid through labor unions may provide assistance to workers in cities with abundant resources (Chen, 2004), beyond such cities, the unions' legal aid is generally limited since they lack financial resources, professional lawyers to handle cases, and, above all, the basic institutional capacity to provide legal assistance (Qi, 2010). The non-state sector, often supported by foreign donations and projects, also offers limited legal aid services to workers.

The mainstream labor legal practice in such cases is moderate, with a focus on individualized grievances. For moderate lawyers, legal action and the subsequent legal remedies may present what they understand to be the best opportunity to address particular legal difficulties. Several reasons explain the resilience of moderate legal action. First, Chinese law is relatively clear on labor rights and there has been continuous improvement in labor rights protection. Realizing the deficiency of legal protection for workers in operation and the potential that law may offer, the government has tried to expand workers' legal rights and simplify legal procedure to make law more worker-friendly. For example, the 2007 Labor Contract Law and subsequent laws substantively improved protection of legal rights in securing stable employment in favor of labor, beefing up unions' power in collective negotiation with employers, and a speedier, cost-effective and responsive dispute resolution system in some labor disputes (Josephs, 2009; Wang, et al, 2009). As many have argued, the formal law is one of the best in the developing economies in protecting labor rights (Gallagher and Dong, 2011). Armed with labor-friendly laws, lawyers can provide much needed legal assistance for workers in individual cases, and there are abundant "low hanging fruits" for public interest-minded lawyers and their donors.

Second, at a micro-level, the government tolerates and even encourages limited legal contentions concerning the social and economic rights of individual workers. Claims of labor rights, narrowly defined, do not pose a challenge to the political system. On the contrary, legal aid for workers can bring the workers from street protest to courtroom litigation (Chen, 2004). The legal mechanism serves as an alternative to potentially political contention on the streets, just like labor law reform serves the political agenda of



containing the labor movement without significant structural change (Wang et al., 2009). In particular, when workers come to courts they appear as isolated individuals for their private grievances rather than for advancing workers' collective interests. In the legal process, workers' collective grievances, whenever they may be put forward, will be broken down into individual cases, and legal action permits and encourages individual rights consciousness at the expense of the collective consciousness (Chen and Xu, 2012). Indeed, improved legal protection would slow down the formation of a collective identity and class consciousness, and reduce the political risk that aggrieved workers may pose. Individual claimants generally seek specific legal remedies without political mobilization and, in turn, the court-centric approach applies legal rule to a concrete case. As large as the number of labor cases may be in China, those legal cases, because of the legal process, do not aggregate to pose political challenges.

Throughout the 1990s, litigation of individual cases was a commonly used strategy for migrant workers to solve their disputes with their employers and other parties. This was especially true in South China where migrant workers clustered. Migrant workers almost by definition lacked the necessary social capital and capacity and were forced to rely on the court for legal remedies, whereas resourceful SOE workers in the North were more effective in making direct demand through street action (Lee, 2007). It was no surprise that Zhou Litai arrived in Shenzhen in the mid-1990s and made a reputation for himself as a formidable labor lawyer. There were abundant cases, in particular concerning industrial injuries, for which the only remedy for the injured laborers was to resort to litigation (Fu and Cullen, 2011).

Despite the commonly acknowledged frustration with the legal process in solving labor disputes and the lure of legal and social mobilization, most labor lawyers continue to offer traditional legal services for individual cases. Knowing the limit of their work in solving structural difficulties, these lawyers continue case work to render help to destitute workers. Against all the odds, workers win their legal battles more than occasionally. In public interest law firms specializing in labor law, for example, lawyers solve legal difficulties facing migrant workers by relying on dedication, legal skill, and some political support (Gallagher, 2006, Halegua, 2008). These lawyers build trust in their legal services among workers and are able to attract more workers to rely on law to solve their legal difficulties. As Josephs (2009: 393) points out, in labor litigation, "if a critical mass does achieve some measure of redress, others will be encouraged to use the formal dispute resolution process."

The legal process thus has a degree of credibility, and moderate legal action is able to absorb grievances and solve disputes. The individualized style of lawyering has been able to attract substantial support from foreign donors and the Chinese government because the litigation-based strategy solves some individual cases, alleviates the difficulties facing destitute workers, and offers a slim hope that law does justice at least occasionally. As the sharp increase in labor cases in the aftermath of the 2008 Labor Contract Law demonstrates, workers will continue to mobilize law to demand their legal rights whenever these rights are available (Wang et al., 2009). As discussed below, radicalism in labor such as collective industrial action evolves slowly and tends to co-exist with

moderate legal action.

It is important to note that access to justice focuses on, but is not limited to, legal aid and legal proceedings. The government realizes the limit of legal strategies in stabilizing labor relations and has adopted a wide range of methods of extra-legal resolution to contain and resolve labor disputes, collective ones in particular. The government has, for example, designed multiple mediation programs to divert labor cases away from formal arbitration and courts (Halegua, 2008). Those informal mechanisms prove to be more expedient and effective in preempting conflict (Yue and Zhuang, 2014). Indeed, the government has never had full trust in law to solve collective labor disputes, and has always resorted to political mechanisms for containing and diluting sensitive contention in labor and other areas (Biddulph, 2014; Fu, 2012; Minzner, 2011). The critical question is whether these informal mechanisms based on political expedience can effectively address China's labor conflict, which is deeply rooted in the nation's political economy.

### **Bringing Politics Back In**

As mentioned above, Chinese labor law, in spite of reform, remains characterized by long proceedings, difficult procedural requirements, and disaggregation of cases, with isolation and individualization of disputes as a core control strategy (Fu, 2014a). While the legal system offers some legal remedies in individual cases, the difficulties in the legal process have increasingly led to non-institutional claim-making that is *ad hoc*, largely disorganized, often illegal, and from time to time violent (Cai, 2008a, 2008b). There is also strong evidence that increasingly, aggrieved individuals are abandoning the legal channel in favor of more non-institutionalized means of conflict resolution (CLB, 2011a and 2011b). Workers are ever more inclined to resort to extra-legal mechanisms including strikes and other street actions to protect their collective rights and interests (Cai, 2008a, 2008b; Lee, 2007; Yang and He, 2010).

For workers, participation in dispute and in dispute resolution has been an educational process. It is through the process their shared experience of frustration and protest that workers become aware of their common interests, their collective identity, and their place in the political economy. That self-awareness of their class interest in turn serves as a catalyst for an emerging organized and disciplined collective action (Pun and Chan, 2008; Leung and Pun, 2009; Pun and Lu, 2010; 2014). What Gallagher refers to as “informed disenchantment” well captures the social psychological dimension in which aggrieved litigants were first traumatized by their experiences in the workplace and then frustrated by their encounters with legal institutions. Changes in social and economic conditions are important in shaping individual decisions, but what matters more is the changing expectation and newly found determination among workers. Put simply, workers started to demand much more than the legal system can offer. Their demand now outpaces economic growth and cannot be satisfied or contained (Gallagher, 2006), Pun and Lu (2010) also discuss the psychological transformation, from silence characterized by “pains” and “trauma” to action characterized by “anger” and “resentment”, among workers in a “semi-proletarianization process” (see also Chan and Pun, 2009). In Lee's

terms (2002, 205-206), the factory despotism leads to development of a “collective critical consciousness” among workers which in turns creates space for their mobilization.

Underlining the “informed disenchantment” or “semi-proletarianization process” is the concurrent change of demography; a new generation of workers is occupying factories to replace their retiring parents. As many researchers have noted, compared to their parents this second generation is better educated, more cosmopolitan, used to consumer goods and personal freedom, less loyal to the workplace, and above all, less fearful of authorities and more willing to participate in industrial action (Pun and Lu, 2010; Gallagher, 2014; CLB, 2014). Through their suffering on factory floors and their frustration with the legal process, contemporary workers experience the gap between their expectations and the brutal realities; they witness the out front performance of legal rights and backstage manipulation of powerful interest. The pain and anxiety that had long besieged and largely been tolerated by the first generation, suddenly becomes suffocating and unbearable to the second generation. No longer simply accepting their fate, and having given up on institutions, young workers are in a process of becoming activist citizens (CLB, 2014).

Workers’ new sense of justice is political in three aspects. First, workers recognize access to justice is a collective matter. They are gaining a degree of political maturity and becoming aware of their common identity and common interests. Workers generally face common problems, legal or otherwise, and now see there may be a collective solution that is more cost-effective than individual legal action. On the basis of that realization, workers develop the will to unite, to organize, and to act out together (CLB, 2014). An inner awakening stirs among the young generation of workers, and once that happens, “China’s workers are shaking off the mantle of individual victims and emerging as a strong, unified and increasingly active collective force”, as CLB (2014) has forcefully pointed out. As leading labor relations specialist Chang Kai (2014) points out, individualized labor dispute resolution has largely failed to address China’s increasingly collective conflict.

Second, worker dissatisfaction cannot be effectively addressed by the traditional “rightful resistance” in its narrow sense that workers fight their battle within legal perimeters. On the contrary, workers have moved beyond struggling for their legal rights, and are using legal and extra-legal means to fight for their interests that are not grounded in legal provisions. As Gallagher (2014) noted, workers started to recognize and pursue more structural issues and a broader interest-based articulation. Minimum wage is an example. Generally workers are no longer satisfied with a minimum wage and are demanding a pay higher than the government-regulated minimum wage can offer. Beyond remedies for individual violations, workers are on the offence in developing a long term perspective of their interest; they want to negotiate a longer term settlement with the management or employers (Lee, 2002). Second generation workers are therefore more forward looking and are essentially exercising a regulatory function in preventing grievances and potential violation of a labor standard, a function that the government has failed dismally to perform. Once a matter of concern moves from legal right-based action to interest-based advocacy, the relevance and importance of the legal process decline significantly.

Finally, workers are able to organize themselves in various ways beyond the official unions and government control (CLB, 2014). An emergent generation of worker leaders, with the support of active labor NGOs and sympathetic lawyers and academics, has the potential to bring China's labor movement to a new level. Labor activists born in the information age and equipped with information technologies have demonstrated their will and their ability to act collectively and form a formidable force in bargaining, directly with management and indirectly with the government. On a variety of collective labor disputes (e.g., payment in arrear, overtime, and social security), laborers' actions have shifted from "mostly spontaneous, mostly atomized action" to a truly collective movement (Gallagher, 2014), with strikes becoming the new norm in China's industrial relations (CLB, 2009, 2011a, 2011b, and 2014).

In general, realizing their collective rights are the precondition of their individual rights (Chen, 2007), workers are bypassing the institutions, developing their ability to form their own organizations, designing their own strategies, and, in the process, reinforcing their own collective identity. In 2010 the labor movement shocked the world, the Chinese government included, when workers successfully organized a large-scale strike in the Guangdong-based Honda car-making factories. This success triggered a wave of wild-cat strikes that which are still on-going in China. As a result, a generation of committed young workers has taken on a leadership role in the grassroots and bottom-up industrial actions that have been mushrooming in Southern China, with realization that collective action is the most effective way to advance workers' legal rights and interests (CLB, 2014; Chang, 2014).

In the process of politicization and re-formation of China's working class, the role of the official unions is largely marginal or even irrelevant. For the new generation of workers, the difficulty in enforcing their legal rights lies principally in the monopoly of official unions in representing workers, and the unions' lack of independence and competence. In the market economy, the traditional dualism is no longer possible because of the diversity of interests and the resulting conflict of interest among different groups (Chen, 2003). But unions cannot act like unions do elsewhere in the world because of the political control over them by the Party state and unions' consequent subservient position in the political system.

The state recognizes the deficit in unions' representational function and has initiated a new round of union reform. Unions are demanded to be more engaging with workers, especially when there is actual or potential conflict, in an attempt to incorporate and capture the vibrant forces. At the same time, workers are allowed, in pilot cases, to exercise certain rights in choosing their union leaders in exchange for the right to organize their own independent unions (Chan, 2009; CLB, 2014).

There are structural barriers facing union reforms in China. As Chen (2003: 1009) argues, Chinese unions do not have their own class constituency. Indeed, a key function of unions in China is to forestall any collective action on the part of workers (Art. 46, Union Law) and unions are duty-bound to implement state policies even if those policies are

against workers' interests. In that sense, while labor unions are able to offer legal assistance to individual workers and preemptive intervention through aggressive mediation in employment disputes (Yue and Zhuang, 2014), these unions are "worse than weak" when it comes to protecting workers' collective interests (Chan, 2011: 43). As Gallagher and Dong (2011) argued, legal change without complementary political reform cannot safeguard labor rights. Without effective politico-legal representation for the unions and other collective organizations that represent them, workers in the Labor Contract Law era saw their formal legal rights disappear as quickly as they arrived, with employers – SOEs or otherwise – openly sabotaging the new labor law system with immunity (CLB, 2014; Wang et al., 2009).

The government is aware of this difficulty for workers and allows them a limited degree of collective action in bargaining with employers. While the law individualizes labor disputes and offers limited possibilities for legal remedy, it also recognizes the vulnerable position of a laborer entering into an employment relationship and allows workers to organize to try to overcome that inequality in the bargaining position. Chinese law, half-heartedly, authorizes collective negotiation in employment contracts through the official unions to alleviate workers' disadvantaged position in the bargaining process (Chen, 2007). As expected, however, collective negotiation that is based on, and through, the official unions, by and large has not been able to improve the employment conditions of workers or to enhance their bargaining position in the employment relationship. The simple reason is that unions are effectively captured by the state and possibly also by the employers and thus have been able to exercise little, if any, autonomy in representing workers' interests. There was isolated success in which unions, with the support of local governments, were able to represent the genuine interests of the workers in dealing with employers, but the collective negotiation system has had little real impact in improving workers' collective interests in general (Chen, 2007). Unable to organize themselves to exercise an effective collective action, workers are largely left out of the union-controlled negotiation process that determines their fate. In that sense, unions are positioned under law to contain rather than to truly represent workers. As Chen (2007: 77) concludes, since workers are without the power to organize, their rights are individualized and thus are bound to be "vulnerable, hollow, unenforceable, or often disregarded."

The deficit of union support for workers is compensated for, in part at least, by a growing civil society in China. Support such as from lawyers and other advocates in China's emerging NGO sector are indispensable for the development of a working class identity (CLB, 2014). Lawyers have taken notice of the changes and are taking part in the emerging movement. These lawyers have designed legal services in response to the changing profiles of the new working class, their new strategies and their legal need. One of the best examples is the new legal practice of Duan Yi and his Lao Wei Law Firm in advising and supporting workers' collective bargaining and action. Duan and his law firm regularly offer training on collective bargaining; build platforms for academic and policy discussion on collective action; host seminars among academics and policymakers on collective bargaining; represent workers in collective bargaining; advise workers in industrial actions; and defend worker leaders who are penalized for organizing industrial actions. Strongly believing in the power of collective action among workers in protecting

workers' rights and interests, Duan and his firm's lawyers identify with the cause of the workers and are a significant part of a newly emerging labor movement in China. For Duan and his fellow lawyers, the rights of workers are respected and protected only when labor is well organized and positioned such that it can bargain effectively. Instead of litigating individual cases, Duan's priority is decisively on advising and training labor for labor organizations and collective bargaining (Fu, 2014b).

Chinese workers are developing a different sense of justice that goes beyond the legal perimeters. With the support of lawyers and other advocates, along with tactically mobilizing social media, workers are articulating their interest-based claims beyond the legal boundaries. Workers' access to justice now has a different meaning. In this new political model, workers realize that the difficulties they face individually are common among workers. They recognize that a worker is not merely a rights-bearing and duty-bound legal subject as the law attempts to define, but is also a member of his or her class who shares a common interest with fellow workers against their adversaries. Realization of their common interest enables workers to develop a common identity and the formation of that common identity creates a condition necessary for collective action. In this new political culture, workers' access to justice is defined politically as their right to form independent labor groups outside the official unions, to bargain with the employers effectively and on an equal footing, and to organize industrial action including strikes with immunity. These are the battleground for the near future.

That workers have become more political does not necessarily mean they are radical. While bypassing cumbersome procedure and engaging in collective action, workers have shown their discipline in making claims and demands. In any event, workers have not totally abandoned law and legal process, and indeed, they are largely challenging the narrow definition of rights and are aggressively expanding these boundaries. Ultimately, workers are demanding new legal rights to collective bargaining; to form their own labor groups, and to restore the right to strike. All are possible, theoretically, under the current political-legal framework. Law remains important for workers, but the battleground is shifting decisively from defending narrow legal rights of an individual to advancing the collective interest.

The government is responding cautiously to workers' mobilization, making concessions to workers in certain non-structural issues but ready to suppress organized activism through criminal law, as the 2015 crackdown on labor activists and NGOs have painfully illustrated.. While police are more tolerant of industrial actions including strikes by workers, especially those within factory compounds, they don't hesitate to punish activists and advisers working in labor NGOs.

## **Conclusion**

Access to justice is commonly defined as providing legal assistance so that the poor can seek legal remedies in legal institutions. Facing drastic social and economic transitions,

the Chinese state has tried to improve legal aid services through improving their availability, accessibility, affordability and accountability. The goal for legal aid services is efficient operation and legitimacy in the eyes of the general public. In a larger context of good governance reform, legal aid has potential for defusing social conflict, offering effective remedies, maintaining social stability, and, in the end, taking politics out of labor relations. A lot has been done to improve legal services and a lot more should be expected.

Nevertheless, access to justice in that narrow legal sense should be placed in the larger context of China's shifting political economy. When socialist paternalism collapsed during market reform, Chinese workers experienced a dual assault from market forces: the first was the subsistence crisis experienced by former SOE workers, and the second was the brutal exploitation of migrant workers newly arrived in cities. The dual attack caused immense human sufferings and also triggered waves of protest. In response, the government created a new legal regime, with complex legal processes, to capture, contain and dilute rising labor conflict. That legal regime relies on individual legal action to obtain corresponding legal remedies, and it shifts regulatory responsibility from the government to individual workers. While the legal process does offer workers a degree of assistance as discussed above, it also individualizes labor disputes and disaggregates labor contention, blocking the formation of any meaningful labor organization.

The government may design legal or other institutions to shape and control workers' demands. However, as soon as workers' sense of justice is fundamentally offended and legal institutions fail to deliver, workers will bypass these legal institutions and resort to non-institutional means to make their claims. In that sense, access to justice is a dynamic political process at the intersection of government designs and bottom-up demand. Law can depoliticize conflict in the employment relationship, but it can do so only when legal rights are meaningfully implemented and benefit workers tangibly. In a system where legal action fails to deliver in so many cases and for so long, and where official unions are regarded as part of the problem rather than the solution, workers start to mobilize on their own, developing their own organizations and strategies to correct the asymmetric power relations. Once class awareness is raised and a collective identity established among workers, justice has a different meaning and the workers' movement develops a life of its own. The Chinese state is now forced to face that challenge. The proposed reform including limited freedom of workers in collective bargaining and their more meaningful participation in the official unions can be regime-supportive (Hurst, 2014). Whether those offers are too late and too little to meet workers' new demand for justice is hard to foresee.

## References

Biddulph, Sarah, (2014) "Management of stability in labour relations" in S. Trevaskes, E. Nesossi, F. Sapio, S. Biddulph (eds), *The Politics of Law and Stability in China* (Edward

Elgar)

Botero, Juan Carlos, (2014) "The Delivery of Justice in Middle-Income countries", in Randall Peerenboom and Tom Ginsburg (eds.) *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (New York: Cambridge University Press).

Cai, Yongshun, (2008a) "Social Conflicts and Modes of Action in China," 59 *The China Journal* 89-109.

Cai, Yongshun, (2008b) "Power Structure and Regime Resilience: Contentious Politics in China," 38 *British Journal of Political Science* 411-432.

Carothers, Thomas (ed.) (2006) *Promoting the Rule of Law Abroad: In Search of Knowledge*, (Washington, D.C.: Carnegie).

Chan, Anita, (2001) *Chinese Workers under Assault* (Armonk: M.E. Sharpe).

Chan, Anita, (2009) "Challenges and Possibilities for Democratic Grassroots Union Elections in China: A Case Study of Two Factory-Level Elections and Their Aftermath," 34 *Labor Studies Journal* 293-317.

Chan, Anita, (2011) "Strikes in China's Export Industries in Comparative Perspective," 65 *The China Journal* 27-51.

Chan, Chris King-Chi and Pun Ngai, (2009) "The Making of a New Working Class? A Study of Collective Actions of Migrant Workers in South China," 198 *The China Quarterly* 287-303.

Chang Kai, (2014) "劳动关系的集体化转型与政府劳工政策的完善"(Collective Transformation of Labor Relations and the Improvement of Government Labor Policy) China Society of Economic Reform, [www.cser.org.cn/news/3750.aspx](http://www.cser.org.cn/news/3750.aspx), last accessed 10 May 2015.

Chen, Albert, (2011) *Introduction to the Legal System of the People's Republic of China*, (Hong Kong: LexisNexis).

Chen, Feng, (2003) "Between the State and Labor: The Conflict of Chinese Trade Unions' Double Identity in Market Reform," 176 *The China Quarterly* 1006-1028.

Chen, Feng, (2004) "Legal Mobilization by Trade Unions: The Case of Shanghai," 52 *The China Journal* 27-45.

Chen, Feng, (2007) "Individual Rights and Collective Rights: Labor's Predicament in China," 40 *Communist and Post-Communist Studies* 59-79.

Chen, Feng and Xu Xin. (2012) "Active Judiciary": Judicial Dismantling of Workers'



Collective Action in China.” 67 *The China Journal* 87-107.

CLB (China Labor Bulletin), (2004) 利益的冲突与法律的失败：中国劳工权益分析报告 (Conflicts of Interest and the Ineffectiveness of China’s Labour Laws) (on file with the author).

CLB (China Labor Bulletin), (2009) Going It Alone: The Workers’ Movement in China (2007–2008) , [www.clb.org.hk/en/files/share/File/research\\_reports/workers\\_movement\\_07-08\\_print\\_final.pdf](http://www.clb.org.hk/en/files/share/File/research_reports/workers_movement_07-08_print_final.pdf), last accessed 10 May 2015.

CLB (China Labor Bulletin), (2011a) Unity is Strength: The Workers’ Movement in China (2009–2011) , [www.clb.org.hk/en/files/share/File/research\\_reports/unity\\_is\\_strength\\_web.pdf](http://www.clb.org.hk/en/files/share/File/research_reports/unity_is_strength_web.pdf), last accessed 10 May 2015.

CLB (China Labor Bulletin), (2011b) 工人集体行动十一年：基于 553 个个案的分析 (Eleven Years of Workers' Collective Action: An Analysis of 553 Cases), [www.clb.org.hk/schi/files/2000-2010\\_Chinese\\_workers\\_movement\\_research\\_report.pdf](http://www.clb.org.hk/schi/files/2000-2010_Chinese_workers_movement_research_report.pdf), last accessed 10 May 2015.

CLB (China Labor Bulletin), (2014) Searching for the Union: The workers’ movement in China 2011–13, [www.clb.org.hk/en/sites/default/files/File/research\\_reports/searching%20for%20the%20union%201.pdf](http://www.clb.org.hk/en/sites/default/files/File/research_reports/searching%20for%20the%20union%201.pdf), last accessed 10 May 2015.

Fryer, Bob, Alan Hunt, Doreen McBarnet and Bert Moorhouse, (eds.) (1981) *Law, State and Society* (London: Croom Helm).

Fu, Hualing, (2009) “Access to Justice and Constitutionalism in China,” in Stephanie Balme and Michael W. Dowdle, (eds.) *Building Constitutionalism in China* (New York: Palgrave Macmillan).

Fu, Hualing, (2010) “Access to Justice in China: Potentials, Limits, and Alternatives”, in John Gillespie and Albert Chen (eds.), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (London and New York: Routledge).

Fu, Hualing, (2011) “Challenging Authoritarianism through Law: Potentials and Limit,” 6 *National Taiwan University Law Review* 339-365.

Fu, Hualing, (2014a) “Politicized Challenges, De-politicized Responses: Political Monitoring in China’s Transitions” in Fergal Davis, Nicola McGarrity and George Williams (eds.) *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (London and New York: Routledge).

Fu, Hualing, (2014b) “Human Rights Lawyering in Chinese Courtrooms,” 2 *The Chinese Journal of Comparative Law* 270-288.

Fu Hualing and Richard Cullen (2011), “The Development of Public Interest Litigation in

China” in Po Jen and Holning Lau (eds.) *Public Interest Litigation in Asia* (London and New York, Routledge) 9-34.

Gallagher, Mary E (2005) *Contagious Capitalism: Globalization and the Politics of Labor in China*, (Princeton NJ: Princeton University Press).

Gallagher, Mary E (2006) “Mobilizing the Law in China: ‘Informed Disenchantment’ and the Development of Legal Consciousness,” 40 *Law and Society Review* 783-816.

Gallagher, Mary E and Dong Baoha, (2011) “Legislating Harmony: Labor Law Reform in Contemporary China,” in Mary E Gallagher, Sarosh Kuruvilla and Ching Kwan Lee (eds) *From Iron-Rice Bowl to Informalization: Markets, State and Workers in a Changing China*. (New York: Cornell University Press).

Gallagher, Mary E., (2014) “China’s Workers Movement and the End of the Rapid Growth Era” 143 (2) *Daedalus* 81-95.

Halegua, Aaron, “Getting Paid: Processing the Labor Disputes of China’s Migrant Workers,” 26 (1) *Berkeley Journal of International Law* 254-322.

Howell, Jude A. (2008) “All China Federation of Trade Unions beyond Reform? The Slow March of Direct Elections,” 196 *The China Quarterly* 845-863.

Hurst, William, (2009) *The Chinese Worker After Socialism*. (Cambridge University Press).

Hurst, William, (2014) “Nascent Protections in Emerging Giants: Struggles to Judicialize Labor Rights in China and Indonesia,” in *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (New York: Cambridge University Press).

Josephs, Hilary K. (1995) “Labor Law in a “Socialist Market Economy”: The Case of China,” 33 *Columbia Journal of Transnational Law* 559.

Josephs, Hilary K, (2009) “Measuring Progress under China’s Labor Law: Goals, Processes, Outcomes,” 30 *Comparative Labor Law and Policy Journal* 373-393.

Lee, Ching Kwan (1999) “From Organized Dependence to Disorganized Despotism,” 157 *The China Quarterly* 44-71.

Lee, Ching Kwan, (2002) “From the Specter of Mao to the Spirit of Law: Labour Insurgency in China,” 31 *Theory and Society* 189-228.

Lee, Ching Kwan (2007), *Against the Law: Labor Protest in China’s Rustbelt and Sunbelt*, (Berkeley, CA: University of California Press).

Legal Daily, (2012) 数字回顾法援十年 (Legal Aid Statistics in the Past Ten Years),

[http://www.chinalegalaid.gov.cn/China\\_legalaid/content/2012-09/12/content\\_3998332.htm?node=40884](http://www.chinalegalaid.gov.cn/China_legalaid/content/2012-09/12/content_3998332.htm?node=40884), last accessed 10 May 2015.

Leung, Pak Nang and Pun Ngai, (2009) "The Radicalisation of the New Chinese Working Class: A Case Study of Collective Action in the Gemstone Industry," (30) *Third World Quarterly* 551-565.

Lubman, Stanley (1967) "Mao and Mediation: Politics and Dispute Resolution in Communist China" 55 *California Law Review*, 1284-1359.

McCubbins, Mathew D., Daniel B. Rodriguez and Barry R. Weingast, (2010) "The Rule of Law Unplugged" 59 *Emory Law Journal* 1455-94.

Meene, Ineke van de, and Benjamin van Rooij, (2008) *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation* (Leiden: Leiden University Press).

Minzner, Carl F. (2011) "China's Turn against Law," 59 *American Journal of Comparative Law* 935.

Peerenboom, Randall (2002) *China's Long March toward Rule of Law* (New York: Cambridge University Press).

Pun, Ngai and Lu Huilin (2010), "Unfinished Proletarianization: Self, Anger, and Class Action among the Second Generation of Peasant-Workers in Present-Day China," 36(5) *Modern China* 493-519.

Pun, Ngai and Chris King-Chi Chan, (2008) "The Subsumption of Class Discourse in China," 35 *Boundary* 75-91.

Qi, Xuerui, (2010) 略论工会法律援助制度 (Preliminary Discussion on the Trade Union Legal Aid System), [www.chinalegalaid.gov.cn/China\\_legalaid/content/2010-08/18/content\\_3998452.htm?node=40883](http://www.chinalegalaid.gov.cn/China_legalaid/content/2010-08/18/content_3998452.htm?node=40883), last accessed 10 May 2015.

Rhode, Deborah L. (2004) *Access to Justice* (New York: Oxford University Press)

Stephen, Frank H (1996) *Access to Justice*, (Edinburgh: Edinburgh University Press).

UNDP (United Nations Development Program) (2008), *Making the Law Work for Everyone* (volume 1) (UNDP).

Wang, Haiyan, Richard P Appelbaum, Francesca Degiuli and Nelson Lichtenstein, (2009) China's New Labour Contract Law: is China moving towards increased power for workers? 30 *Third World Quarterly*, 485-501.

Yang, Su, and He Xin, (2010)“Street as Courtroom: State Accommodation of Labor Protests in South China,” 44 *Law & Society Review* 157-185.

Weingast, Barry, R, (2008) “Why Developing Countries Prove So Resistant to the Rule of Law” in James J Heckman, Robert L. Nelson and Lee Cabatingan (eds) *Global Perspectives on the Rule of Law* (Routledge-Cavendish).

Yue, Jinglun and Zhuang Wenjia, (2014) 国家调解能力建设：中国劳动争议“大调解”体系的有效性与创新性 (State Capacity Building in Mediation: Effectiveness and Innovation of the ‘Grant Mediation’ System in China’s Labor Disputes) , 8 *管理世界 (Management World)* 68-77.