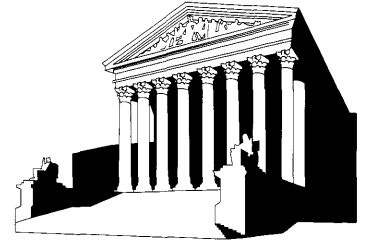


A Right To Strike?



The Hong Kong SAR government is preparing to amend the law to give employees protection from anti-union activity. This month, *Professor Arthur McInnis* makes a case for extending the amendments to include a clear right to strike.

The Basic Law

The Basic Law protects the right to form trade unions and to strike. Article 27 provides:

Hong Kong residents shall have freedom of speech, of the press and of publications; freedom of association, of assembly, of procession and demonstration; and the right and freedom to form trade unions, and to strike.

This wording is sufficiently clear that these rights should be regarded as have been given absolutely. However, it has not been translated into either local legislation or action.

International Conventions

Important aspects of these rights in the Basic Law are also affirmed under various international conventions. These are, in particular, the International Labour Organisation ('ILO') Conventions (1948) Concerning the Freedom of Association and the Right to Organise, and Concerning the Right to Organize and Bargain Collectively (1949), which affirm the rights generally, though not expressly give a right to strike. However, the absence of the right to strike from the wording of the Conventions has been overcome in practice by the ILO supervisory bodies through the general freedom of association principles. With regard to these Conventions, it can be argued that they apply to Hong Kong. Historically, both Conventions applied to Hong Kong, along with some 50 other treaties, but most were never directly implemented after the 1997 handover.

Several arguments may be put forward for the application of both Conventions today. The first argument is pursuant to article 18(3) of the Bill of Rights, which can be said to cover them indirectly. The second argument is pursuant to article 39 of the Basic Law. Article 39 provides, in part:

The provisions of the ... international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

Unfortunately, despite what would appear to be clear wording, there has been disagreement on the part of Britain and China over the meaning of the word "applied" and what steps either need to have or would need to be taken to see the Conventions were clearly in force today. The third argument upon which the two Conventions can be said to apply is pursuant to the Joint Declaration. The oft-quoted article 3(3) from the Joint Declaration provides, in part:

The laws currently in force in Hong Kong will remain basically unchanged.

Therefore, if Britain had applied these Conventions to Hong Kong, then it could be said that they remain in force today. The final basis upon which the Conventions might apply is simply pursuant to the general principles of international law or customary international law. That is, they have become so well and broadly accepted that they apply without the need for specific implementation. The answer is complicated by the fact that China is not a signatory to either of the Conventions. Leaving aside the delicate issue of applicability today, why is it that the Conventions are so important?

The 1948 and 1949 Conventions seek to provide a general framework for trade union rights. Under the 1948 Convention, article 2 gives all workers and employers the right to establish and join organisations of their own choosing without previous authorisation. Such organisations are neither supposed to be dissolved or suspended by administrative authority under article 4. Likewise, the employers' and workers' organisations are given the right to join federations and affiliate with international organisations under article 5.

While the Conventions give the rights in broad terms, signatories could limit them by expressing reservations. This was done by Britain, in the case of its original application to Hong Kong. The result is that these rights are qualified in many cases in the Trade Unions Ordinance. Thus, for example, persons cannot become trade union members if they are not engaged in the trade in question.

Similarly, trade unions cannot federate unless each trade union is from the same trade. Other limits preclude the police from joining unions and unions from spending funds for certain purposes. The obvious effect of these and other limitations is to significantly limit trade union activity in Hong Kong.

The Right to Strike

The right of labourers to withdraw their labour or strike has been justified on a number of grounds and some would argue is even a fundamental human right. Others would say that it is an inherent part of democracy. Both of these arguments can be said to be political. Other justifications, though, are not. Thus, from an economic perspective, it has been justified as a counterweight to the capacity of employers to hire, fire and close enterprises. While the right to strike is put forward here as a principle, in actual fact it is treated differently in many countries. In a very small way, this perhaps offers some explanation why the right has not been better articulated or protected in Hong Kong.

Trade Union Rights

Hong Kong currently has a number of guarantees for workers in both the Employment Ordinance and the Trade Unions Ordinance. Thus, trade unions are immune from civil actions for certain acts done in furthering a trade dispute, and workers who take part in industrial actions are also protected from anti-union discrimination and interference.

However, in practice, the latter provisions have not been effective because it is hard to prove that discrimination or dismissal were due to union activities. The burden of this proof is upon the worker. This is contrary to the situation in many other countries. There is even less protection for collective bargaining in Hong Kong, and thus while it is permissible, the agreements themselves are not binding. Once again, this is almost unheard of in other developed countries. For years, successive governments have opposed lobbying on the part of trade unions to make collective bargaining agreements enforceable. It may be noted that shortly before the handover, a law was even passed to enforce collective bargaining agreements — only to be suspended and then repealed by the Provisional Legislature.

In part, the Government's justification for not enforcing such rights is that the level of unionisation is too low to make it worthwhile. Only about 20 per cent of employees belong to a union, and the number of those subject to collective bargaining agreements may be only five per cent. A variety of factors have also been suggested to account for these levels,

including the nature of Hong Kong industry, its small size and scale, and the makeup of the labour force; however, none appear to be particularly convincing.

Proposed Rights

The Government would now like to improve the situation for trade unions and their current and prospective members. Previously, it has said to the United Nations that it would amend local legislation to provide compensation from employers for dismissing those for union activities and to shift the burden to employers to prove that dismissals are not discriminatory.

Though not released yet, it appears that those amendments may be coming to the Employment Ordinance under a new heading "Protection against Anti-Union Discrimination." However, it appears that the protections may not extend to employees who take part in strikes organised by their unions. The rationale for the Government's position is that union activities are those carried out either after work or with the employer's consent during work. Therefore, on this rationale as strikes are neither, they fall outside the protection in the proposed amendments. If true, this would run contrary to trends in most other countries and would largely defeat the effect of the amendments.

Conclusion

The right to strike is fundamental and it deserves the fullest possible protection. The protections to this point in time have been weak. Now that amendments are being considered to the legislation, the Government should look at clarifying both the scope and applicability of the protections afforded under the ILO Conventions and enshrining the right to strike in local legislation. The debate should not be about whether the right is protected but its true scope locally. Thus, should the right lie with individuals or trade unions? Can the right be restricted by agreement? What is the nature of the activities that fall within the right? Lastly, what procedural limitations, if any, should it entail? It is suggested that these are the real issues that should be debated in the 21st century, not those left over from the 19th. ■AAC

Arthur McInnis is an Associate Professor of Law at the University of Hong Kong and a consultant at the Hong Kong office of the law firm Denton Wilde Sapte. He can be contacted by e-mail: jam@dentonwildesapte.com.hk