

The London School of Economics and Political Science

Within and against the law

The politics of labour law in China's adaptive authoritarianism

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A thesis submitted to the Department of International Development
of the London School of Economics and Political Science
for the degree of Doctor of Philosophy

London, May 2016

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Abstract

This thesis seeks to answer how and why legal institutions, in particular laws, sustain authoritarianism in China. This thesis questions the paradox of law as domination and resistance: laws sustaining the CPC's adaptive authoritarianism, or opening up avenues for political contestation and bringing about political change. It does so through the study of the political role of labour laws in China, combining an institutionalist perspective with a law and society approach.

First, it argues that labour laws have been developed to support the capitalist economy, enforcing property rights and institutionalizing the rule of the Party-state. Second, through ethnographic-oriented research of three case studies of legal aid/labour non-governmental organizations (LAL NGOs) in Beijing, it demonstrates that labour laws, lawyers and LAL NGOs fulfil regime-supportive functions that both display and enable the adaptiveness of the CPC's authoritarianism. Lawyers and LAL NGOs work *within the law* to protect workers' rights and to improve the legal framework, helping to contain labour disputes and maintain social stability. Third, it finds that the legal definitions of rights contrast with workers' conceptions of rights, the former being based on a capitalist rationale, while the latter is based on concepts of morality, fairness, equality, and on workers' socio-economic conditions. Studying workers' perceptions, understandings and uses of the law shows that some workers disagree with the premises of the labour laws, do not find the laws useful for a variety of reasons, and distrust the legal system, putting into question the legitimacy of such institutions of governance. I find that, according to popular conceptions of rights, workers act outside and *against the law*. The pitfall of the CPC's 'adaptive governance' lies in its simplification of social order into rational legal order, omitting popular conceptions of rights and coherent forms of action that the same laws try to dismiss. Therefore, the space for transformative political action, either to challenge capital or the Party-state, rests outside and *against the law*.

Acknowledgements

What a trip! Years, kilometres, and so many people involved. It is time to start another adventure. But before, a few words from the heart...

This research would not have been possible without the generosity and kindness of uncountable anonymous workers in China. I can only hope that I have made justice to their voices in these pages. I am grateful to all the wonderful people I met during fieldwork. Thanks to the NGOs and their staff for opening their doors to me and accommodating me in their offices. Thanks to all those who agreed to talk to me and make this research what it is. Any misinterpretation is my own.

I would like to express my wholehearted appreciation to my supervisor at the LSE Professor Jude Howell. It has been an absolute privilege to be mentored by Jude. She has been an outstanding supervisor - intellectually stimulating, detailed yet urging me to keep my eyes open to the big stories, incredibly encouraging and respectful of my autonomy. Her support has gone beyond this immediate PhD in more ways than she might be aware of. I cannot thank her enough.

Sincere gratitude goes to my two examiners, Professor Jane Duckett and Professor Lin Chun, for their generous engagement with my thesis, and for their valuable suggestions for developing this work in the future.

At the LSE, I would like to thank Susan Hoult and Louisa Green for helping me to look for solutions to the hiccups of the way. At the Department of International Development, I would like to extend thanks to Dr Mayling Birney for her comments at various stages of this project. And to Dr Stuart Gordon and Professor Jean-Paul Faguet for giving me an exciting opportunity to develop professionally at the LSE.

Thanks go to Sue Redgrave for her thorough proof-edits, and for having the patience to deal with my long and convoluted sentences and explain language usage and style.

I have been financially supported by a number of institutions. Before the financial crisis gave the excuse to smash social spending in Spain, I enjoyed fellowships from Fundación ‘La Caixa’ and Fundación Caja Madrid. Thereafter, my gratitude goes to the LSE financial support of the PhD Research Studentship and the LSE-PKU Mobility Programme.

In Beijing I would like to thank Professor Ye Jingyi for hosting my research visit at the Law School in Peking University (PKU). Thanks as well to Dr Zhang Jian at the School of Government at PKU. Dr Zhang Hui at Renmin University lent me an ear when I was dispirited, and introduced me to Zhang Li, who was wonderful in assisting with the transcription of my interviews. In Hong Kong I would like to thank Dr Chris C.K. Chan. And Sally and Omana for their friendship and unreserved generosity. Thanks to Geof Crothall for hosting my visit at CLB. I am grateful to Dr Eva Pils for a short but absolutely sparking conversation in Hong Kong Chinese University, which stimulated my thinking around the usefulness of the term ‘rights consciousness’.

Despite the years and distance, I want to thank those with whom I first started to study China: Professor Taciana Fisac, Professor Isabel Cervera, Dr Mario Esteban Rodríguez, Dr Andreas Janoush and Dr Gladys Nieto, at the Autonomous University of Madrid. My sincere appreciation for their constant interest in and support of my academic development and for believing in me all along.

During the last two years of this PhD, I experienced first-handed two labour struggles, which made me test on my own skin much of what I had heard from Chinese workers, and the ideas that I was in parallel developing while writing earlier drafts of this thesis. I would therefore like to thank my comrades of the *Fractionals for Fair Play Campaign* at SOAS for the collective drive, and at LSE, Veronique Mizgailo, UCU Health and Safety Representative, for her respectful support. They reaffirmed that workers lead, and unions follow and support. On this note, I would like to thank Dr Naidoo for helping me keep well. And my wholehearted

appreciation to Andrew Shorrock - I have no words to express how much he has helped me grow.

During the process of “doing a PhD” I have encountered old and new friends, wonderful people that in one way or another have kept me happy, focused, less lonely, and brave. In Beijing, all my love to my adopted godparents Sally and Steve Allnutt. Thanks to Daniel Méndez Morán for his calm company, and to Christopher Clausen for his friendship. To Rubén González Vicente for the talks, the nerdy talks, and the music! In Madrid I would like to thank my oldest friends for always being there and for bearing the distance for so many years now. Deepest thanks to my dearest friend Alba. In London Sara Tochetti and Gisela Calderón Góngora have been wonderful readers and friends, who I thank for their incisiveness. Thanks in one way *and* another to Zhang Shuwan, Chris Sampson, Daniel Fuchs and Laura de Bonfils. One of the best things from this PhD has been meeting my wonderful friends at the LSE – we saw each other through the process: thanks to Taneesha Mohan, for her strength and temperance; Anokhi Parikh, for her constant sharpness and inspiration; Gauthier Marchais for his conviviality (*courage* my friend!); Jarayaj Sundaresan and Alaa Tartir. Thank you all in all possible ways, but most, for your comradeship and solidarity.

Last, but always first, thanks to those that make me who I am, and that are most responsible for my getting this far in life. To my partner, Frido, for inspiring me to be boundless; for everything, and for still giving me reasons to laugh every day even when we were both finishing our PhDs at the same time! We did this, together: *jLuz y fuerza, compañero!* To my brother, Diego, the real Doctor: thank you for being pure good, I deeply admire you. To my mother, Patricia, for a life of *exceeding* love: You are the most incredible woman I know. You have taught me that effort, strength and determination can take you anywhere. And you have always made me think that I can do anything that gets into my mind. You are my stronghold. I am because of you.

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List of Acronyms

ACFTU	All China Federation of Trade Unions
ACLA	All China Lawyers Association
CLB	China Labour Bulletin
CPC	Communist Party of China
CSR	Corporate Social Responsibility
GONGO	Governmentally-Organized Non-Governmental Organization
ICFTU	International Confederation of Free Trade Unions
ILO	International Labour Organization
LAL NGOs	Legal Action/Legal Aid Labour Non-Governmental Organization
LCL	Labour Contract Law
LDMAL	Labour Disputes Mediation and Arbitration Law
LL	Lawyers Law
MOCA	Ministry of Civil Affairs
MHRSS	Ministry of Human Resources and Social Security
MOJ	Ministry of Justice
NGO	Non-Governmental Organization
NPC	National People's Congress
ODPL	Occupational Disease Prevention Law
OSH	Occupational Safety and Health
PIL	Public Interest Litigation
PRC	People's Republic of China
PRD	Pearl River Delta
RMB	Renminbi
SOE	State Owned Enterprise
USA	United States of America
WTO	World Trade Organization
YRD	Yangtze River Delta

Glossary

<i>baogongtou</i>	包工头	Labour contractor or foreman, mainly present in the construction industry
<i>chiku</i>	吃苦	To endure hardships
<i>dagongzhe</i>	打工者	Temporary worker, casual labourer
<i>danwei</i>	单位	Work unit
<i>falü yuanzhu</i>	法律援助	Legal aid
<i>gongyi</i>	公益	Common good, public interest
<i>gongyou</i>	工友	Workmate, fellow worker
<i>hukou</i>	户口	Household registration
<i>meibanfa</i>	没办法	There is nothing to be done, there is no way, there is no alternative
<i>mian(zi)</i>	面 (子)	Face (as “losing face”), honour, reputation
<i>nongmingong</i>	农民工	Peasant worker, migrant worker
<i>pufa</i>	普法	Disseminate, popularize or promote knowledge of the law, raise rights awareness
<i>ruoshi qunti</i>	弱势群体	“The weak”, disadvantaged social groups

Chapter One

98%

On a mild spring evening in Beijing a group of workers were washing away the tiredness of a day of work at a construction site with a bottle of *erguotou baijiu*.¹ They were having a noodle dinner out of metal bowls in the yard of the dormitories, squatting on the dirt floor. Between shot of *baijiu* and slurp of noodle, Worker Di hollered: “*We are very tired; this is a very hard job: we eat and drink, and tomorrow at 5am, again. Look at where we are eating; we are on the floor. These are not labour conditions. This is not the law. This is how it is: there is no standard*”. He paused and slurped some more of his noodles, as if by quietening his hunger he could calm his anger. But then he cried: “*We are the lowest class in society. You are here sitting down with the lowest workers in China*” (W6, 4 May 2012). A few days later, at the same construction site, Worker Xi made the same claim: “*You are sitting here with peasant workers. We are the lowest class in society – we are the worst paid and we work the hardest... We don't know our rights, and we don't understand the law*” (W11, 25 May 2012).

In contrast to Worker Xi and Worker Di's claims, many enthusiastic reports have declared increasing 'rights consciousness' among Chinese people (Cabestan, 2005; Gallagher, 2006; Goldman, 2005; Froissart, 2005; Lee, 2007a; Li, 2010; Lorentzen and Scoggins, 2015; Lubman, 2010; O'Brien, 2013; Pei, 2000; Wong, 2011; Yang, 2005; Zhang, 2012), which has been interpreted as an indication of their increased predisposition to fight for their rights. These are rights that the Communist Party of China (CPC) has enshrined in labour laws, most significantly in the 1995 Labour Law, and the 2008 Labour Contract Law (amended in 2013) and Labour Disputes Mediation and Arbitration Law. Within one year of the two latter laws being enacted, labour disputes rose 98% (China Labour Statistics Yearbook, 2009). This increase in labour dispute cases has been taken as an indicator of workers' increased activism to protect their rights (Friedman and Lee, 2010; Lee and Friedman, 2009; O'Brien and Li, 2006; Pun, et al., 2010; Wang, et.al. 2009). Labour

¹ *Erguotou baijiu* (二锅头白酒) is a brand of Chinese white liquor (*baijiu*, 白酒) made from sorghum, common in Beijing. *Erguotou* literally means “second pot head” referencing the second distillation that indicates the level of purity of the white liquor. It is usually very strong, the most common *erguotou baijiu* being 56% alcohol. It is also very inexpensive, the most affordable bottles ranging RMB 2-5.

laws, therefore, have been seen to grant Chinese workers the rhetorical basis and the resources to make claims and to fight for their legitimate rights, putting pressure on capital and challenge the Party-state (Chan and Pun, 2009; Gallagher, 2005a; Lee, 2007a, 2010; Lee and Hsing, 2010: 3 Lee, 2007a; Pun, et al., 2010). This line of narrative expects that eventually, through rightful and legitimate means, the citizenry, organized in and supported by civil society organizations such as labour non-governmental organizations (NGOs), will mount sufficient political challenge so as to initiate policy and/or political changes (Epp, 1998; Halliday et al., 2007; McCann, 1994), or even to kick-off regime transition, as has been the case in comparative contexts in ex-Soviet republics and Eastern Europe (Goldman, 2005; Liebman, 2011; Halliday and Liu, 2007).

The relevance of law has been considerably overplayed in the literature, both in terms of its capacity to trigger workers' mobilizations, and its political significance in stimulating regime transition. Contrasting research on law and legal institutions in authoritarian settings points out the role of law in entrenching authoritarianism (Moustafa, 2007, 2008, 2014). In China, in line with Nathan's arguments, legal institutions, such as the above labour laws, enable 'authoritarian resilience' (Nathan, 2003) because they institutionalize the rule of the CPC. From a governance perspective, legal reforms have proven the capacity of the CPC to adapt to new social and economic challenges without having to undergo political transformations, which is described as a form of 'adaptive governance' (Heilmann and Perry, 2011). In this sense, laws are central components of 'adaptive governance': as instruments of the Party-state, they facilitate and regulate economic development which, in turn, bolsters the legitimacy of the CPC (Liebman, 2011: 168). At the same time, the increasing number of labour dispute cases taken into the legal channels could be interpreted as the legal institutions absorbing potential social challenges; legal institutions providing outlets for popular grievances (Diamant et al. 2005). From these institutionalist and governance perspectives, labour laws and adjoining institutions regulate socio-economic relations, create a hegemonic legal order and contain labour grievances in a way

that institutionalizes the governance and rule of the CPC and sustains authoritarianism in China.

Grand conclusions about the power of law to sustain authoritarianism or, on the contrary, to facilitate regime change have arisen from institutional and policy observations backed up by scarce but detailed empirical evidence of law in practice. The extent to which legal institutions sustain authoritarianism depends as much on the institutionalization of the interests and power of the political elites, as on how these legal institutions render the social behaviour considered appropriate to the legal order. Hence, in-depth, grounded empirical research from a law and society perspective (Ewick and Silbey, 1998; Galanter, 1983; McCann, 1994; Merry, 1990; Nielsen, 2007; Rosenberg, 1991; Sarat, 2004) can provide a nuanced picture of how law functions in practice, to better understand *if, how and why laws sustain authoritarianism* by effectively achieving the political aim of the authoritarian rulers: a legally ordered society.

In this thesis I find that the law, lawyers and certain civil society organizations fulfil regime-supportive functions, such as institutionalizing the rule of the Party-state, diffusing the legal order, socializing workers in legal and legitimate behaviour, and managing and containing labour conflict. However, I also show that the designed use of law, in the way that it shapes and regulates potentially destabilizing forms of social behaviour, is not yet so extensive as to completely ensure regime resilience. In fact, there is a significant amount of unlawful social behaviour and contestation from workers, which indicates the flaw of the 'adaptive governance' of the CPC in integrating potentially destabilizing concepts and behaviour into its institutions. This is what Scott (1998) has argued is the failure of the state's scheme to fully standardize social order in its legal institutions due to the exclusion of key elements of informal practices, in this case, people's concepts of rights, or what Perry (2008, 2009) names 'rules consciousness'.

By taking a law and society approach and contrasting legal institutions with social concepts and practices, it becomes clear that the law is not yet as extensively used

by workers as the literature above suggests, either because of a lack of knowledge as Worker Xi claims (which would be interpreted as lack of rights consciousness), or for a variety of other reasons, such as power relations embedded in the laws or economic constraints. For example, for Worker Da, a talkative taxi driver in Beijing, “*laws are not fair for us workers. Contracts are not fair. The content is not fair. It doesn’t have any effect on our situation because the company establishes the content of the contract, and we can’t discuss (shangliang, 商量) anything about it. We can’t discuss with the boss. The contract is not fair*” (W7, 5 May 2012). For Worker Zhang, legal action “*is too inconvenient (mafan, 麻烦). And I don’t have any money to do it, and if I litigate, it means that I can’t work, so I don’t get money, and I can’t go and look for another job because of the time lost in the process. No, no, no litigation*” (W3, 27 April 2012). Similarly, for Worker Shao, “*litigation is not worth it, we have to spend money that we don’t have. The law is troublesome (falü feishile, 法律费事了)*” (W5, 1 May 2012). From the legal perspective, the problem is not in the laws, but in the fact that workers’ demands are unreasonable and do not have a legal basis: “*Workers demands are not reasonable (buheli, 不合理), or they don’t accept the words of the law (...) They have to listen to the lawyers, otherwise there is no way to represent them; sometimes it is because their demands are not covered by the law (buheshi falü, 不合适法律)*” (Z9, 20 December 2012).

This introductory chapter briefly situates the study of Chinese labour laws within the literature that speaks to the political role of law in sustaining or resisting authoritarianism. Section 1.1 outlines the guiding theme of this thesis and introduces the research questions addressed. Each question is related to the theoretical discussions that provide the analytical framework of this thesis, and presents the main findings and arguments made. Section 1.2 describes the methods used to develop this research and its ethical considerations. Section 1.3 provides an outline of the thesis.

1.1 The role of law in sustaining authoritarianism

The study of the political role of law relates to the oxymoronic nature of law as domination and resistance. Laws present a number of curiosities in authoritarian contexts and, needless to say, China provides an experimental terrain to test a number of assumptions underlying the existing literature, namely, that legal institutions sustain authoritarianism, on the one hand, and provide avenues for political contestation and political change, on the other. This thesis, therefore, addresses the main question: *How and why do legal institutions, in particular laws, sustain authoritarianism?* This question is addressed through a number of sub-questions that relate to the theoretical discussions, as briefly outlined below and in Chapter Two in further detail.

The rule of law² has been understood as indivisible from liberal democratic political settings, Linz and Stepan (1996) arguing that laws and legal institutions, such as the judiciary, play a role in democratic transition and consolidation. Until the 1990s, legal institutions under authoritarian settings had scarcely been researched, mainly because they were assumed to be instruments of authoritarian rulers (Gerring et al., 2004; Hirschl, 2000; Lijphart, 1977; Marvall and Przeworski, 2003; Moustafa, 2014; North and Weingast, 1989; O'Donnell, 2001; Wibbels, 2005). The institutionalist approaches to the study of the rule of law under authoritarianism, or thin theory (Fuller, 1976; Summers, 1993), focus on legal institutions. There has been an increase in scholarly attention paid to legal institutions, as they present multi-faceted roles and much more complex political dynamics than simple instruments of the authoritarian states. The main area of research has focused on examining, on the one hand, how and why legal institutions, such as laws and the judiciary, advance the interests of authoritarian rulers; and, on the other hand, how and why they become sites for contentious state-society relations and resistance.

² The 'rule of law' (*fazhi*, 法治) is a contested concept, which will be explored further in Chapter Two. In China, the usual formulation is 'rule according to law' (*yifazhiguo*, 依法治国), which is usually translated as 'rule by law'. However, throughout this thesis I will use the term 'rule of law' following Peerenboom (2002), who acknowledges the possibility of different conceptualizations of the rule of law besides the liberal democratic notion.

Moustafa (2007) argues that legal institutions, courts in particular, enables rulers to gain social control; bolster the legitimacy of the regime, adding a rhetorical instrument to the state's use of force; and enforce private property rights to institutionally support the market economy, among other functions. Therefore, legal institutions contribute to the institutionalization of authoritarian rule (Moustafa and Ginsburg, 2008; Moustafa, 2007), and enable regime stability. In line with these arguments, in China, allegedly, the rule of law project responds to the aim of the CPC to remain in power, as it provides instruments of governance, social control, and ideological legitimacy (Ginsberg, 2008; Landry, 2008; Liebman, 2011; Lubman, 1999; Peerenboom, 2002). In this line, Nathan (2003) and Shambaugh (2008) explain the resilience of the authoritarian regime based on a series of institutional changes, innovations and adaptations within the institutions of the Party (Shaumbaugh, 2008) or the Party-state (Nathan, 2003) that have enabled the CPC to absorb political and economic shocks and remain in power. According to this institutionalist approach, it could be argued that legal reforms enable the differentiation and functional specialization of institutions of government, while also opening channels for public participation. These are two of the factors that explain, in Nathan's view, the 'authoritarian resilience' of the Chinese Party-state. His analysis, however, lacks empirical evidence to prove why and how legal institutions do, in fact, sustain authoritarianism, and to explain the practical processes at play through which such legal institutions enable regime resilience.

Heilmann and Perry (2011), with a focus on governance and policy processes, argue that the CPC has been able to undergo economic transformation without political liberalization, and overcome significant challenges to its stability, because of its capacity to adapt its mechanisms of governance (political techniques and procedures) from the revolutionary and Maoist periods (Heilmann and Perry, 2011: 6), as will be further explained in Chapter Two. The explanatory factor of the political stability of the Chinese regime here is the capacity of the CPC to adapt its governance mechanisms and institutions to the challenges of the day. Adaptability, in their argument, accounts for resilience, namely the lack of systemic transformation of the Party-state regime. In sum, institutions, together with policy

processes, account for the ‘resilience’ or ‘adaptive governance’ of the Party-state regime. Among a variety of institutional changes and policy mechanisms that are taken into account in the ‘adaptive governance’ thesis, Liebman (2011) argues that law has been a central component of China’s adaptive authoritarianism: “Law is central to contemporary governance, both for the state, which now includes legality as part of its ideology, and for ordinary people, who increasingly articulate their interests in terms of legal rights” (Liebman, 2011: 166).

The aforementioned discussions lead this thesis to address the main question: *how and why do legal institutions, in particular laws, sustain authoritarianism?* By sustaining authoritarianism, I refer to how laws render the adaptiveness of the governance of the CPC (Heilmann and Perry, 2011), allowing, therefore, the Party-state to maintain its stability through small institutional changes or adaptations but without systemic change. By legal institutions I refer to an institution-oriented approach to law (Deakin et al., 2015; La Torre, 1993; MacCormick, 2007), and use the term mainly in reference to formal institutions pertaining to the legal system, primarily constituted by the state, such as legal codes (laws), institutionalized judiciary (courts) and legislature (people’s congress), formal conflict resolution mechanisms (mediation, arbitration and litigation), institutions of law enforcement (inspectories), and legal practices and interactions that are shaped by these institutions. In particular, this research focuses on labour laws such as the 1995 Labour Law, and the 2008 Labour Contract Law and the Labour Disputes Mediation and Arbitration Law. Legal institutions here refer to formal systems of rules and not to customary, popular, or informal systems of rules. I make this clear distinction with the intention of differentiating the role of formal legal institutions and informal institutions such as social rules of behaviour (i.e. morality), which will be explored following a law *in* society (Ewick and Silbey, 1998) perspective, as explained below.

1.1.1 Research questions

In order to address the main question in this thesis, namely, *how and why do legal institutions, in particular laws, sustain authoritarianism?* I examine the following sets of sub-questions that are informed by and respond to the existing theoretical and empirical literature reviewed in Chapter Two.

First, to assess the role of law in the adaptive authoritarianism of the CPC, in Chapter Three I ask: *what functions do labour laws fulfil for the authoritarian state?* In particular, labour laws can represent institutional changes or adaptations of the governance of the CPC to the conditions of the market economy, which ensure property rights and conflict management. Through these functions laws establish social and economic control and provide a credible commitment to a market economy, enforcing property rights, as North (1996) suggested. These have been assumed to be central functions of legal institutions in supporting authoritarian rule (Moustafa, 2007, 2008; Moustafa and Ginsburg, 2008). Hence, the first assumption examined in this thesis is that legal institutions, laws in particular, sustain authoritarianism.

As previous studies on the political role of law in sustaining authoritarianism in comparative contexts suggest, research on ‘authoritarian resilience’ and ‘adaptive governance’ in China has broadly followed either an institutional perspective, or explored the role of law in policy processes within the Party-state apparatus. In other words, existing research has mainly analysed how the formal legal institutions constituted by the state reinforce its rule, examining legal institutions and their historical-political origins (Henischke, 2011; Ho, 2009; Lubman, 1999; Peerenboom, 2002), policy-, law-making and judicial reform processes (Cooney et al., 2007; Ip, 2012; Karindi, 2008), the agency of bureaucrats and elites in the policy process (Mertha, 2009), the politics of courts (Yu, 2009), and the role of lawyers, legislators and judges *vis-à-vis* the Party-state (Halliday and Liu, 2007). This approach has been overly macro, institutionalist, and state-centred, and has provided little empirical evidence to prove the regime-supportive dynamics of law in practice from below.

In a second instance, this thesis examines the assumption that legal institutions, laws in particular, provide resources in political activism to bring about political change. Therefore, I ask: *to what extent do legal institutions open up avenues for political contestation?* In order to assess the extent to which laws sustain authoritarianism, it is important to examine the regime-supportive aspects of laws, and legal institutions more generally, in as much detail as their counter-regime uses. Some argue that legal institutions entrench authoritarianism and sustain political stability (Gerring et al., 2004; Hirschl, 2000; Lijhpart, 1977; Moustafa, 2014; North and Weingast, 1989; O'Donnell, 2001; Wibbels, 2005). However, others contend that in authoritarian contexts legal institutions, such as courts, have often been transformed into sites of political resistance, opening avenues for political contestation and therefore can represent a challenge to the resilience of the regime (Halliday et al. 2007; Halliday and Liu, 2007; Karpik and Halliday, 2011; Moustafa, 2008; Pei, 2000). For this to happen, in a variety of political settings such as authoritarian, illiberal democracies or dictatorships, lawyers and legal professionals have formed a vanguard to fight for political freedom and to contest state power (Halliday et al. 2007; Karpik and Halliday, 2011). Similarly, in liberal democratic contexts the role of law in promoting political and social change has been examined, legal institutions providing opportunities and symbolic and rhetorical resources for political activism (McCann, 1994; Merry, 1990; Minow, 1987; Scheingold, 1974; Silverstein, 1996).

The political use of law, defined as 'legal mobilization' (Zemans, 1983), and the collective mobilization of rights and legal channels to make political demands has catalysed social movements (McCann, 1994, 2004). However, legal tactics by themselves do not assure political mobilization (Scheingold, 1974); an effective leadership is necessary, as mentioned above, activist lawyers being indispensable to activating a campaign or political movement in coordination with legal mobilization. Activist lawyers, reform-minded judges, the media and civil society organizations provide the 'support structure' for effective political mobilization of the law (Epp, 1998). In authoritarian contexts, however, legal institutions have been seen to enable political activism "to challenge state policy without having to initiate a broad

social movement" (Mousafa, 2014: 287; El-Ghobashy, 2008; Moustafa, 2002). Legal mobilization therefore allows the bypassing of the collective action problem in politically restrictive conditions (Moustafa, 2007). In rural China, O'Brien and Li (2006) have identified a similar phenomenon, peasants creatively using laws and policies as a legitimate basis to denounce local officials and make claims on the state, a form of contentious politics termed 'rightful resistance'. Moreover, a number of rights protection (*weiquan*) lawyers have used the law to challenge the authoritarian state (Fu and Cullen, 2011).

In light of these empirical accounts and theoretical propositions, to assess the extent to which legal institutions support authoritarianism I examine how and why legal institutions open up avenues for political contestation by asking, in Chapter Four: *how does an authoritarian regime prevent lawyers and civil society organizations from politically mobilizing the law?* Conversely, *how and why do lawyers and civil society organizations use legal institutions (law and legal channels) to challenge the Party-state (if at all)?* Subsequently, in chapter Five I ask: *to what extent does the mobilization of the law (i.e. litigation) by legal actors such as lawyers and civil society organizations initiate broad political and social mobilization to challenge the authoritarian state?* By asking these questions I complement the study of the role of legal institutions in sustaining authoritarianism in China from a historical institutionalist and policy process perspective³ with a law and society approach⁴ (Diamant et al., 2005; Galanter, 1983; McCann, 1994; Merry, 1990;

³ In political science, the study of institutions has a substantive tradition. Within the 'new' institutionalist literature, historical institutionalists emphasise that the political structure has a decisive imprint on the way institutions originate, change, are employed, and affect group and individual behaviour (Steinmo, et al., 1992; Thelen and Steinmo, 1992). Historical institutionalism conceives of institutions as a result of processes of political struggle, lending particular attention to the historical context and temporal sequences (Hall and Taylor, 1996; Leftwich, 2007). The policy process perspective approaches the study of the state and governance by examining public policies, reform and implementation, lending particular attention to the policy-making process and the dynamics of the actors in the system involved in the policy process (Hill, 1997, 2013; Jenkins, 1997).

⁴ 'Law and society' is a field of inquiry within the sub-discipline of sociology of law. It originated in the USA in the mid-20th century and organized itself around the Law and Society Association and two main journals, *Law and Society Review* and *Law and Social Inquiry*. It understands law as a social construction, and its main concern revolves around the role and capacity of law to bring about social change, mainly focusing on legal institutions (primarily laws and courts), legal practice, legal actors, and legal action. Common themes of research have ranged from understandings of rights and rights-based actions; law, social movements and political processes; and rights claims and dispute analysis,

Nielsen, 2007; Rosenberg, 1991; Sarat, 2004), which informs an analysis of law from below (Santos and Rodriguez-Garavito, 2005; Merry, et. al., 2010), or of law in action (Woo and Gallagher, 2011).

Finally, these questions are explored in this thesis in reference to labour laws in China. Hence, in Chapters Six and Seven, I ask *how and why are labour laws understood and used by workers? To what extent are workers using these laws in politically challenging ways to defy the power of the authoritarian state?* Similar to the studies on the political role of law mentioned above, research has shown that labour laws influence “the consciousness and aspirations of subordinate social groups” (Forbath, 1991: xii), framing the formation and development of the labour movement in the USA in the 19th and 20th centuries. In China, Lee (2007a: 61) has claimed, “inadvertently and sometimes serendipitously, legal reform has made the state a catalyst of labour activism”. In a dispute-oriented piece of research, Gallagher (2005, 2006) shows that engagement with the law increases workers’ legal consciousness. Increased rights or legal consciousness, as has been mentioned above, has been taken as an indication of workers’ increasing political contestation (Pei, 2000) or ‘rightful resistance’ (O’Brien, 1996; O’Brien and Li, 2006). In contrast to the law and social movements’ arguments, rights or legal consciousness, therefore, is taken as an indication of increased contestation against the political *status quo*. Indeed, rising rights consciousness has been seen as a potential driver for workers to claim citizenship (political) rights and “produce in China changes as profound as those that occurred earlier in Eastern Europe” (Goldman, 2005: 24). Howell (2016) argues that alongside market liberalization, legal reforms have provided workers with alternative forms of organization, most notably, through

among others. It does not characterize itself as a specific theoretical or methodological approach to the sociological study of law; on the contrary, research in this field embraces perspectives from across the social sciences to study law. It is usually also referred to as “socio-legal” research. I will refer to this tradition as “law and society” in this thesis. Ewick and Silbey’s (1998) approach, “law in society”, pertains to the law and society tradition, but broadens the scope of research to study law *in everyday life*, beyond the formal institutional settings, under the claim that law – what they call legality – is both constituent of and emerges from social interactions, hence, to better understand the role of law in society one needs to examine law in social life, in people’s daily lives, schools, workplaces, in interactions with neighbours, etc. (ibid: 20). In Chapters Six and Seven I follow Ewick and Silbey’s law *in society* approach, which pertains to the law and society tradition, and make the distinction where necessary throughout the text.

labour non-governmental organizations. This, she argues in line with North et al. (2009), can create “the doorstep conditions of democratic political transition” (Howell, 2016: 22).

The aforementioned assumptions about the political potential of laws and rights to lead to systemic or regime transformation are based on liberal understandings of rights of citizenship (individual rights to property, freedom, etc.) or political rights that can directly challenge the political nature of an authoritarian state, and are not necessarily attuned to the realities of political life in China. Perry (2008) suggests that these interpretations are misleading, mainly because they base the analysis of the power of rights on Western conceptions of rights to property, liberty and legal justice, among others, while in China concepts of rights are based on livelihoods, subsistence and development (ibid: 38), basically, socio-economic concepts of rights. She argues that the rhetoric of rights – i.e. workers framing their claims as rights-based – is nothing really new and does not represent a significant challenge to the stability of the regime; instead, “it is better understood as an expression of ‘politics as usual’” (ibid: 18) that does not seek to challenge or propose an alternative political authority to that of the CPC, but as a reflection of “rules consciousness”, seeks to use the state-authorized language and discourse “in order to negotiate a better bargain with the authoritarian state” (ibid: 20). In order to better understand the role of laws in sustaining authoritarianism, it is therefore equally important to study legal institutions at the governance level, and at the grassroots level following a law *in* society approach, to understand the uses and practices of law in society.

As mentioned above, most studies of the political role of law in authoritarianism have mainly taken an institutionalist or policy level approach and, agency, if considered, has been that of legal elites (lawyers, judges, legislators, legal professionals), arriving at conclusions about the regime-supportive role of law with little empirical evidence about how legal institutions work in practice. To evaluate the political role of law and its capacity to sustain authoritarianism, it is essential to understand the images and practices of law in everyday life. Hence, I ask *how and*

why are laws understood and used by ordinary people, workers in particular? Examining this question in contrast to the content of law and the social behaviour laws intend to design, will allow for a grounded understanding of *if, how and why laws are being used in politically challenging ways to defy the power of the authoritarian state.*

I address these questions following Ewick and Silbey's (1998: 34) law *in* society approach, which suggests that to study the law "we should expand rather than narrow the range of material and social practice and actors that constitute it". Basically this leads to broadening the scope of previous studies that focus on exclusively formal legal institutions, to include the study of the understandings and uses of law in everyday life, what Ewick and Silbey (1998) call "legal consciousness". Inspired by Ewick and Silbey's law *in* society approach (1998, 2003; Silbey and Ewick, 2000), I argue that to fully understand the role and consequences of law in social and political life, we need to complement the institutional approach of previous studies of the rule of law in authoritarianism, with the study of law from below and ask how law is understood, experienced and used by ordinary people. A grounded understanding of how law functions, is understood and used by people will allow us to better assess the political capacity of law, and the extent to which it renders compliance or resistance, thereafter allowing us to evaluate the extent to which law sustains the political *status quo* in China, namely, the single Party-state regime, or authoritarianism.

In sum, to examine *how and why do legal institutions, in particular laws, sustain authoritarianism*, this thesis examines the following sub-questions. Chapter Three examines *what functions do labour laws fulfil for the authoritarian state?* Chapter Four asks *to what extent do legal institutions open up avenues for political contestation? How does an authoritarian regime prevent lawyers and civil society organizations from politically mobilizing the law? How and why do lawyers and civil society organizations use legal institutions (law and legal channels) to challenge the Party-state (if at all)?* Chapter Five examines *to what extent does the mobilization of the law (i.e. litigation) by legal actors such as lawyers and civil society*

organizations initiate broad political and social mobilization to challenge the authoritarian state? Chapters Six and Seven ask how and why are labour laws understood and used by workers? To what extent are workers using these laws in politically challenging ways to defy the power of the authoritarian state?

1.2 Research methods and ethical considerations

This research seeks to examine the role of law in sustaining authoritarianism in China, in particular, labour laws. It aims to situate the case of China within two larger debates to offer a comparative perspective, the first related to how the rule of law supports authoritarian regimes, and the second about the role of law in political activism, social movements, and resistance. This thesis is therefore a theoretical endeavour as much as an empirical concern about the adaptiveness of authoritarianism and the role of legal instruments in contentious (labour) politics. I arrived at these theoretical interrogations from being first attracted by the empirical problems: China was considered to be the “epicentre of the world’s labour unrest” (Silver and Zhang, 2009: 174), and in 2008 alone labour disputes skyrocketed 98% (China Labour Statistics Yearbook, 2009). Why did this happen? And did this amount of legal action mean anything in political terms?

This research was therefore designed as a case study to examine the effects of labour laws on workers’ mobilizations. Thereafter, inductively, it grew into an interrogation of the role of law in authoritarian China through the lens of labour. Case study research allowed for process tracing and for a study of an “exploratory nature” (Gerring, 2007: 39), which is appropriate for theory testing, but also allows the circularity between conjecture and refutation. Once in the field, I inductively developed an extended case method (Buroway, 1998, 2009). The extended case method uses participant observation as a technique of investigation for reflexive science (Burawoy, 1998), and emphasises the dialogical nature of the scientific enterprise between the researcher and the object of study; it therefore stresses the inter-subjectivity of this process and the necessary “explicit consciousness” of the

researcher to bring about “reflective understanding” of the issues researched (Burawoy, 1998: 6). It also aims to extend theory.

Qualitative research methods such as qualitative interviews, and ethnographic-oriented⁵ research techniques such as fieldwork and participant observation, were also suitable, both for their exploratory nature, and because they have been successfully used to study resistance (Ong, 1987; Scott, 1985, 1990), and in law and society studies (Ewick and Silbey, 1998; Fleury-Steiner and Nielsen, 2006; Merry 1990, 1994; Sarat 1990). Ethnographic approaches have also been extensively applied to studies of working class-consciousness, workers’ subjectivities, identity formation, and action and, although mainly at the capitalist point of production, industrial sociology and labour process theory (Braverman, 1974; Burawoy, 1978, 1979; Chan, 2010a; Knights and Willmott, 1990; Lee, 1998, 2007a, 2007b; Pun, 2005). Informed by poststructuralist and postmodern approaches, the analysis of consciousness also needs to consider how social relations outside the point of production, and cultural, symbolic, and discursive factors are constitutive of class-consciousness (Fantasia, 1988; Sturdy et al., 2010; Thompson, 1980).

In contrast to the labour studies mentioned above, this research is located outside the point of production, conducting research in workers’ spaces such as workplace dormitories, and in community and support spaces such as labour non-governmental organizations, to examine how workers understand and construct their reality. This strategy allows understanding the relevance of law *vis-à-vis* the universe of factors that partake in the making of workers’ consciousness, and is

⁵ Ethnography, as an approach and method to the study of social life and social processes in social sciences, originates from the discipline of anthropology, and is considered by many as central, and even exclusive and distinctive to social and cultural anthropology (Amit, 2000). However, ethnographic research has been used across disciplines in social sciences (Atkinson et al., 2001; Hammersley and Atkinson, 1994). I sympathise with Willis’ (2000: viii) emphasis of “the ethnographic as conditioning, grounding, and setting the range of imaginative meanings within social thought”. By ethnographic research I mean the in-depth, exploratory and inductive study of a social phenomenon in its natural setting(s) (Hammersley and Atkinson, 1994), with a “focus on complex interactions of economic, social, political, and cultural processes, without a priori privileging causally any of them” (Marcus, 1998: 44). I use the ethnographic research methods of long-term fieldwork and participant observation, recording data in textual format in fieldnotes (Emerson et al., 1995, 2001).

consistent with the law *in* society approach to study law in everyday life (i.e. in places of daily social interactions). I therefore consistently conducted research outside the courtrooms and formal legal spaces, in NGO offices, and dormitories of construction sites where workers conduct their daily lives and do not directly interact with formal legal institutions.

Empirical data was gathered during twelve months of fieldwork in China (PRC), between 2012 and 2013. The research developed as a multi-case and multi-sited study (Burawoy, 2009; Marcus, 1995). During an exploratory phase, I was first located in Hong Kong where I visited two labour NGOs to familiarize myself with the spectrum of organizations working both in Hong Kong and on the mainland. The second phase of research was located in Beijing, where I was a visiting scholar at the Law School of Peking University (PKU) and conducted fieldwork in three labour non-governmental organizations, mapped out and visited other labour NGOs, and visited workers in construction sites. In a third phase, I conducted eight research visits to Hong Kong, Shenzhen, Guangzhou, and Wuhan, where I visited other labour NGOs and interviewed workers for comparative and triangulation purposes.

The choice to study legal institutions through non-governmental organizations responds to the call to move from the institutional focus of previous studies of law and society (Diamant et al. 2005; Gallagher, 2006; Woo and Gallagher, 2011) and decentre the analysis from courts, to “disaggregate the Chinese state and society” and to study “law in action” (Woo and Gallagher, 2011: 1). Moreover, previous research mainly focused on institutional forms of law as formal institutions and dispute resolution processes once the dispute had been initiated (petition, mediation, arbitration). Such an approach overlooked studying law outside the formal institutions and processes, which enables us to better understand how and why people view, understand and use the law (or not). Ethnographic-inspired research techniques such as participant observation, and open-ended conversations in workers’ spaces, allowed a grounded study of people’s consciousness, subjective experiences, ideas and perceptions of justice *vis-à-vis* the law.

1.2.1 Fieldwork location and case selection

Previous research on the development of labour relations in China has mainly focused on the coastal industrial areas, especially Guangdong Province. Hence, during the first phase of the fieldwork I conducted a two-month exploratory field visit based in Hong Kong. During this time I visited labour NGOs for research purposes: I interned with Asia Monitor Resource Centre (AMRC), gathered relevant data from China Labour Bulletin's (CLB) labour litigation database, made contact with all the labour organizations based in Hong Kong and working across the border on the mainland, and conducted exploratory visits to Shenzhen where I gathered data from other labour NGOs. Thereafter, I relocated my fieldwork base to Beijing, through a research visit to the Law School of Peking University (PKU).

Beijing, despite not having the industrial base that the eastern coastal region has, and having stricter regulations for receiving migrant labour force, in fact receives significant flows of migrant workers not only to the industrial sectors (although the manufacturing sector is smaller in Beijing, there is a considerable concentration of factories on the outskirts of the city, e.g. in Daxing district), but most significantly, also to the construction and services sectors (security guards, hotel and restaurant industry, hairdressing, etc.). In 2009 it was reported that 7.26 million migrant workers (with rural household registration, *hukou*, 戶口) had lived in Beijing for over six months, corresponding to 37% of the total population of Beijing (Meng, 2010). In 2010 Beijing's floating population was 8.94 million (Liang et al., 2014). Moreover, Beijing registered the second highest rate of labour conflict in China, after Guangdong Province. According to official statistics, in 2010 Beijing registered 61,050 disputes, 10% of the total, in comparison to Guangdong's 15% (Labour Statistical Yearbook, 2011: 369). It is home to a relatively large number of NGOs, some of which are labour NGOs; the base of a number of legal aid NGOs which emerged after 1994 at the time when the Ministry of Justice (MOJ) was seeking the establishment of a legal aid system; and also a base for two of the first and biggest labour public interest law firms. Furthermore, Beijing is the law-making centre, and it enabled my access to labour law experts, starting at Peking University (PKU).

Hence, Beijing was a suitable location to explore the interaction between labour laws, labour conflict, and labour NGOs.

Labour NGOs have been emerging in China since the mid-1990s (Chan, 2012; Howell, 2004). Upon commencement of fieldwork in Beijing I mapped out the existing labour NGOs in Beijing. Throughout this thesis I will use the term NGO to include the self-nominated forms of organizations: non-governmental organization (*minjian jigou*, 民间机构), non-profit organization (*minban feiyingli jigou*, 民办非营利机构) and public interest organization (*gongyi zuzhi*, 公益组织). There is a variety of organizations in China, some registered under the Ministry of Civil Affairs (MOCA) as non-governmental non-profit organizations (*minban feiyingli qiye*, 民办非营利企业), while many are registered as commercial entities, or not registered at all. Chapters Three and Four will provide more detail on NGO registration and its relevance to the questions about the role of law in sustaining authoritarianism.

Labour NGOs cover a myriad of services and activities: from providing community services to migrant workers in cities and industrial nodes, to engaging in advocacy and Corporate Social Responsibility (CSR) work at the enterprise level (eventually also with local governments). This particular form of organization (labour NGOs), is not a formation peculiar to China, though much of China's political and economic context enable them to carry more significant weight given the absence of independent and autonomous trade unionism. The problem with using the term "labour NGO" throughout the thesis as a conceptual category is that empirically it involves a considerable range of organizations with different purposes, institutional structures and political links with the Party-state. Moreover, this research focuses on labour NGOs in China that focus on providing legal aid or legal support to migrant workers with labour disputes. Hence it would be appropriate to conceptually consider these specific formations as "legal action labour NGOs" or "legal aid labour NGOs" (in both cases abbreviated as LAL NGOs, a term used throughout this thesis). Of the ten labour NGOs identified in Beijing, five met the criteria of providing legal support and/or formal legal aid. I discarded one because

its main target group was not necessarily workers, and it focused mainly on human rights. Of the remaining four, I considered that NGOs X, Y and Z provided a comprehensive sample, covering different locations in Beijing, size (small, medium and large), a spectrum of links to workers (NGO X being more community-based, NGO Z being entirely professionalized, and NGO Y a mixture of the two), funding, and connections to the Party-state. All three organizations are formally registered. I conducted in-depth research and participant observation in these three LAL NGOs; I also visited and interviewed staff of five other labour NGOs, but was unable to gain access to the remaining two.

NGO X is a small labour NGO located in the centre of Beijing [REDACTED] District. It was established in 1999 as a hotline to provide information for newly arrived workers in Beijing. In 2004, sponsored by the Beijing [REDACTED] District Bureau of Justice, it successfully obtained the status of People's Mediation Committee, a formal qualification that allows it to mediate in labour disputes. It provides free legal advice and mediation to migrant workers in Beijing, on site (meaning that the legal personnel visit work sites such as construction sites or factories) and at their offices; and legal education. It runs like a community-based organization that provides legal advice and mediation services. It has four subsidiaries: Shenzhen (established 2006), Shenyang (2006), Shanghai (2011), and Chongqing (2013). In Beijing, NGO X's full-time staff are not professional lawyers, although its two permanent personnel are qualified labour conflict mediators and provide legal consultation. It also has an average of two to three volunteer lawyers who attend its offices daily and a much broader network of volunteer lawyers who work at private law firms, to whom they resort for representation if a case fails to be resolved through mediation and proceeds to arbitration and/or litigation.

NGO Y is a medium size legal aid and research centre focusing on occupational health and safety cases, located in the district [REDACTED]. It started operations in 2004, and was formally registered in 2006 as a non-profit organization by a labour public interest lawyer at Beijing Municipal Civil Affairs Bureau, with the sponsorship of the Beijing Lawyers Association (the Beijing branch of the All China Lawyers

Association, ACLA) and the approval of the Beijing Bureau of Justice. It provides free legal assistance to workers through telephone and face-to-face consultation, legal training, and mediation, arbitration and legal representation in litigation. It was the first professional organization focusing on occupational safety and health (OSH) in China and has seven full-time pro-bono lawyers. This organization also has a research department with three full-time legal personnel who conduct research on various issues related to labour and labour legislation, and issues a quarterly publication. It uses the practice of its legal department as the basis for its research work, which targets specific issues to formulate legislative and policy recommendations, actively engaging in policy advocacy.

NGO Z is the first and biggest legal aid organization in China, whose main focus is providing legal services to migrant workers, the majority of cases being labour disputes. *NGO Z* was established in 2005 by a law firm led by a renowned and veteran public interest lawyer (PIL), and approved by Beijing Bureau of Justice. In 2009 it succeeded in registering as a non-profit organization with the Beijing Municipal Bureau of Civil Affairs. It provides free legal consultation on labour issues and legal resolution of labour conflict via both hotlines and face-to-face. Moreover, it provides occasional legal training and free legal representation for migrant workers who meet the threshold for legal aid set by ACLA's Legal Aid Foundation Fund (explained in Chapter Four). It also has a research department that uses the cases taken by the legal department to conduct research on workers' problems so that it identifies gaps in labour legislation and consequently, can provide recommendations to the relevant governmental department and therefore participate in the law-making process. Moreover, *NGO Z* covers a number of other legal issues related to migrant workers and peasants, children, and rural governance. It has approximately 53 full-time staff members, with 20 legal professionals at its Beijing office, 9 of them with approved practice lawyer certificates who provide consultation and representation, and 15 legal professionals conducting legal research. It has also established a nationwide network of more than thirty organizations and legal aid stations across China.

For comparative purposes, I interviewed the remaining five labour NGOs in Beijing, NGOs A, B, I, J and R. Such an in-depth comparative perspective of legal aid/action NGOs has not been carried out in previous research: Gallagher's study (2006, 2007) focused on one legal aid centre at the East China University of Political Science and Law in Shanghai; Lee and Shen (2011) mapped out the key characteristics of approximately thirty labour NGOs in China (some of which corresponded to the category of LAL NGOs); and Xu (2013) studied the mobilization strategies and approaches of thirty labour NGOs across China, some of which focused on legal aid.

To expand the comparative perspective of this study, I conducted eight research visits to Hong Kong, Shenzhen, Guangzhou, and Wuhan, where I interviewed local branches of NGOs X and Z in Shenzhen, a law firm specializing in labour cases in Shenzhen (Law Firm D), a university-based legal aid centre at Guangzhou (Legal Aid Centre G), a university-based legal aid centre in Wuhan (Legal Aid Centre L), and a labour NGO (NGO C) in Wuhan. A full list of interviews, dates and sites is attached in Appendix 1.

1.2.2 Data collection and analysis

Data collection methods included review of secondary literature, documentary material, statistical data, participant observation, semi-structured interviews and open-ended conversations (unstructured interviews), which I conducted myself in Mandarin Chinese. This research includes four levels of analysis and mobilizes different types of data to address each one. I will hereby explain the data collection methods that suited each research question, the corresponding level of analysis examined, and point out the analytical pathways followed from the types of data gathered to the general arguments posed in this thesis. A table summarizing these analytical pathways can be found in Appendix 2.

To assess the role of law in sustaining authoritarianism, I first use a historical institutionalist approach to examine the historical process through which the labour laws came about, the economic and social changes introduced, and the functions

these laws serve for the Party-state under the market economy. Therefore, to understand the historical process of labour and legal reforms, I use secondary (historical) research; to understand the nature of labour laws and the changes introduced, I contrast the historical evidence of the labour regime pre-1978 with the contemporary labour framework, using documentary material (labour laws), to highlight the changes introduced by the legal framework; and I use statistical data to understand the role of legal channels and the evolution and nature of labour disputes. Using this combination of historical, statistical, and documentary data, I assess the functions of the labour laws as the new Party-state's governance institutions of labour relations.

Second, to assess the extent to which legal institutions maintain social stability and enable the adaptiveness of the authoritarian regime I study how lawyers and LAL NGOs work in practice with the law. I conducted participant observations at three LAL NGOs, attending daily operations and activities, researching internal NGO material, examining the institutional settings of the LAL NGOs and lawyers, and observed the interactions between lawyers and workers. Once I had gained the trust of the NGOs, I conducted semi-structured interviews (Jovchelovitch and Bauer, 2000) with lawyers and legal staff. Lawyers, legal staff and NGO leaders at LAL NGOs formed "natural groups" (Gaskell, 2000: 42) or an "epistemic community" that facilitated the selection of respondents. These natural groups also provided a range of views, opinions and experiences within one set of research questions. I interviewed as many lawyers and legal staff as was possible in all three LAL NGOs, and reached the point of saturation (*ibid*: 43) when common themes and confirmation of data appeared across the interviews. Most interviews were recorded, and later transcribed by my research assistant; they vary in duration from 30-90 minutes. In total, I conducted 34 interviews at the three main LAL NGOs studied in this thesis. All interviewees remain anonymous throughout the entire thesis. A list of (anonymized) interviews can be found in Appendix 1. During the interviews I also wrote notes that I typed up immediately after the interviews or after the day of fieldwork. These notes supplemented the transcripts of the interviews. The interview and participant observation material gathered allow the

assessment of if and how lawyers and LAL NGOs mobilize the law and organize politically, and show the existing constraints of and limitations to their political mobilization of the law. This also provides evidence to assess if, how and why the law opens up avenues for lawyers' and civil society organizations to contest the Party-state, and the capacity of legal actors to challenge the authoritarian regime with law.

The questions posed to lawyers in semi-structured interviews included themes such as: lawyers' motivations to work for the LAL NGO and, by implication, for the protection of workers' rights; their experience working for the LAL NGO, and their views of the functioning and aims of the organization; their experience with and views of legal reforms, legal implementation, and the legal process; their experience with and views of the legal practice, in particular in relation to labour dispute cases; their relation to workers and what (and why) they recommend workers to do in regard to labour disputes, among others. From these interviews, I extracted evidence to show the institutional arrangements that govern the legal profession and the LAL NGOs, and lawyers' proclivity to politically mobilize the law. In relation to the first of these two themes, for example, I used evidence from the interviews when lawyers narrated the requirements of their practice certificate, its annual renewal, internships, ACLA membership, or employment conditions at a remote law firm to indicate the institutional arrangements to monitor lawyers, and LAL NGOs. This theme I coded as 'institutional arrangement'.

For the second theme, for example, I asked about lawyers' motivations to work in the field of legal aid and their views on legal reform and the rule of law. Indicators of lawyers' and LAL NGOs' political role (and likelihood to challenge the Party-state) were taken from interviews when lawyers and NGO legal staff identified their role in 'developing' or 'advocating the rule of law' (*tuijin/changdao fazhi*, 推进 / 倡导法治), and 'maintaining social stability' (维稳, *weiwen*, or *weihu shehui wending*, 维护社会稳定), in cooperation' or 'collaboration' with the government to 'improve the legal system' and 'protect workers' rights'. Moreover, the advice that lawyers give

to workers to resolve labour disputes, such as 'according to the law' or in 'legitimate' (*hefa*, 合法) ways, are indicators of the commitment of lawyers to the law and the rule of law project more broadly, and of their disposition to use the law as a political tool to challenge the Party-state. This theme was coded as 'LL political role?' (LL standing for Lawyers and LAL NGOs). These interviews were analysed through thematic analysis (Boyatzis, 1998; Flick, 2009), through a manual coding of the interview and fieldnote textual material on the basis of codes such as the aforementioned.

Third, to assess if, how and why LAL NGOs support workers' mobilization, and/or organize grassroots mobilizations in coordination with legal mobilization, in opposition to the Party-state, I used semi-structured interviews with lawyers and LAL NGO staff, unstructured interviews with workers, and participant observations (Hammersley and Atkinson, 1994) in LAL NGOs examining their activities and the dynamics, interactions and relations between workers, and lawyers and NGO staff. Evidence gathered through these methods also allows a response to the question of how and why laws open up avenues for political contestation, in this case, for workers. For example, in interviews with lawyers I asked how they manage labour dispute cases (especially collective cases, if any), if they initiate any form of action in parallel to the legal process, and the advice and support they give workers searching for advice to take forms of action 'alternative' to formal legal action (e.g. organize with other workers, select a representative to independently and collectively negotiate with the employer). Answers to these questions would indicate if and how lawyers and LAL NGOs organize parallel actions to legal mobilization, and/or support workers' autonomous paralegal or 'illegal' mobilizations. This in turn would indicate the extent to which lawyers and LAL NGOs use the law to take political action, and incite workers to take political action themselves beyond the law, which contests the Party-state.

I conducted overt participant observations (Emerson et al., 2001) in the three LAL NGOs. Initially, I conducted passive participant observations: as an observer, I sat aside, and mainly listened and took notes. However, my presence was unavoidable

and needed to be thematized as part and parcel of the research, questioning my role and my influence on the research sites and interactions. In the three LAL NGOs, legal consultations were carried out in rather open spaces in their offices: in NGOs X and Y, at a large rectangular table where lawyers and workers sat together, sometimes several at the same time, sometimes queuing in the same room listening to another worker discussing his/her case; in NGO Z, a long front desk where lawyers sat opposite the workers. Obviously, in all three cases, the presence of a foreign woman sitting somewhere nearby the lawyer or the worker seeking consultation did not go unnoticed. Upon arrival of the worker, my presence was always noticed, and explained by the lawyer, primarily for ethical reasons, to gather workers' agreement to my presence during the consultation, and informed consent. In the cases in which the lawyer did not introduce me, I did so myself. At certain points during these participant observations, I turned from a passive observer to an active participant, initiating an open-ended conversation with the worker when the legal consultations concluded, a conversation that was elicited in a similar way to the narrative interview (Jovchelovitch and Bauer, 2000), but was unstructured (Oakley, 2005). These conversations were intended to study workers' perceptions and attitudes of the legal institutions, and their subjective experience with the law and the labour dispute. This research method suited the law *in* society approach (Ewick and Silbey, 1998), through which I aimed to study law from below in order to better assess the level of penetration of law in society, which in turn can shed light on the effectiveness of law in obtaining the desired social behaviour and legal order, and in sustaining authoritarianism.

During participant observations I sought to observe the relational dynamics between lawyers and workers in legal consultations, and the forms of advice lawyers provided workers with. These legal consultations are one of the ways in which workers' rights and legal consciousness rises. In participant observations I sought evidence as to what form of rights consciousness is diffused in LAL NGOs, for example, if workers seek legal consultation for disputes that are not covered by the laws, I sought to see what lawyers advise workers to do – legal action, alternative action, or if the worker was left with the issue unresolved. This last scenario would

point to a difference between what the worker may have thought was his/her right and what the law (and by extension the lawyer) holds. This would in turn provide evidence of a form of rights consciousness being raised at LAL NGOs that is based on the legal rights. Moreover, the literature suggests that the avenues law open for political contestation are easily navigated by lawyers, who can become a vanguard in political movements (Halliday et al., 2007; Scheingold, 1974). Therefore, in participant observations I sought evidence that would shed some light on this proposition, seeking indications of how lawyers interacted with workers, if they coordinated legal action with other forms of workers' actions, if they would organize workers to take alternative forms of action; all in all, if lawyers stepped outside the law or encouraged workers to do so. Observing how lawyers provide advice to workers and paying attention to the form of advice provided sheds light on the capacity of lawyers and LAL NGOs to mobilize workers to take actions that contest the Party-state. The absence of these would suggest the avenues for political contestation opened by law are not as such, in turn, the law, and by extension lawyers and LAL NGOs, supporting the political *status quo*.

I manually coded the interview transcripts and participant observation fieldnotes on the basis of "concept-driven" and "data-driven" codes (Gibbs, 2007: 44-46) or themes. Concept-driven codes were developed from the literature, searching for categories derived from the literature – 'institutional arrangement' or 'LL political role?' as indicated above. Data-driven codes, which derive from grounded theory approaches (Glaser and Strauss, 1967; Strauss and Corbin, 1997), developed during fieldwork once common categories started to arise from the interviews with lawyers and workers (as explained below), and during engagement with the interview transcripts and fieldnote material. During fieldwork I conducted a first round of analysis, keeping a separate set of fieldwork memos (Auerbach and Silverstein, 2003; Strauss and Corbin, 1998) or reflections from the field, where I recorded the main themes that gradually appeared in the interviews and in participant observations. Once I concluded fieldwork, I read through all my interviews, field notebooks, fieldnotes and memos, to identify the data-driven coding. During a second round of analysis I combined data-driven coding with

concept-driven coding. I used themes that evolved from the interviews themselves, among others: ‘legal education’, ‘advocacy’, ‘litigation’, ‘representation’, ‘legal action’, ‘rights protection’, ‘legal knowledge’, ‘rights consciousness’, or ‘the weak’; and from observations, such as ‘dependency’, ‘empowerment’, or ‘according to the law’.

Finally, examining how and why laws are understood and used by ordinary people will enable assessment of whether legal institutions are effective for the CPC’s adaptive governance. In response to the law *in society* approach (Ewick and Silbey, 1998), I studied workers’ perceptions, attitudes, support for and use of the law. In the offices of LAL NGOs I conducted interviews with workers that had experience with the law, as just mentioned. For comparative reasons, I sought to study the same factors with workers who had not engaged with the law. I did so by visiting workers at two construction sites in Beijing. These interviews with workers were unstructured interviews or “interviews as conversations” (Burgess, 1993: 101) as used in a variety of disciplines in the social sciences (Oakley, 2005), most specifically, as used in ethnography as the “ethnographic interview” (Skinner, 2012; Spradley, 1979). Unstructured interviews try to eliminate the power relation between informant and researcher (Corbin and Morse, 2003), it being the informant or “conversational partner” (Rubin and Rubin, 2005) who leads the narrative and tells his/her story.

During the course of fieldwork I engaged in countless conversations with workers at the offices of the three LAL NGOs, and at the two construction sites. In the dormitories of the construction sites, workers were grouped on the basis of origin (e.g. from Sichuan, Shandong, Hebei, etc.). The dormitories of the construction sites were “natural settings” that enabled my conducting a purposeful sampling, and over two months and a total of fifteen field visits, I visited different dormitory units to gather the maximum variation (Gobo, 2004; Patton 1990) of workers’ perspectives across province of origin. The construction industry is male-dominated, and so at one of the two construction sites, I purposely visited the one women-only floor in the entire dormitory compound. I also visited the common

spaces of the dormitories, such as a small library room, the kitchen and the yard that was used for dinner in the warm months, where I talked to any worker present in the space. In the offices of the three LAL NGOs, I proceeded with the unstructured interviews without sampling, as the fact that workers visited the LAL NGOs already provided a natural purposive sampling of workers with labour disputes that were seeking legal advice and/or representation. During the course of nine months of fieldwork in these three LAL NGOs, I visited their offices on average four times per week, and conversed with, at least, five workers per week; this approximately came to one hundred and fifty workers that I engaged with in open-ended conversations during the course of fieldwork. From these, I chose 27 conversations with individuals and groups of workers or conversational events. Workers' profiles differed in age, place of origin and industrial sector, although they were predominately construction workers (15 conversations). Of these conversations, 16 took place at the offices of LAL NGOs, 1 was part of a participant observation at the office of Law Firm D, and 10 were conversations at the construction sites. Women workers accounted for 9 of these conversational events, 18 were with men. Additional details of these unstructured interviews can be found in the complete list of (anonymized) interviews in Appendix 1.

Evidence used in this thesis is directly drawn from these 27 conversations, not because of their statistical representation of the distribution of workers' opinions on the law to the totality of Chinese workers (Merkens, 2005), but because they captured typical representations or patterns of a variety of perceptions, opinions and subjectivities, and allowed me to elucidate the subtleties, intensities, and differentiation of workers' perceptions, opinions and conceptions of the law. I aim to show the depth, multiplicities and complexities of workers' accounts and views of rights and the law, against the general theoretical concept of 'rights consciousness'. The generalizability value of these conversations lies in their variance, which allows disaggregating the term 'rights consciousness' as is used in a generalized way in the theoretical literature. Hence, the aim was not to choose the most representative of the sample to the whole population of Chinese workers, but rather those most representative of the 150 workers I interacted with, which allows

for the generalizability of the findings (Gobo, 2004: 406) in relation to the theoretical propositions. By doing so, this data provides nuanced empirical evidence for the overwhelmingly consensual narrative in the literature about the political significance of workers' rights consciousness, and allows us to gain depth of understanding how and why workers comprehend and use the law, and what this means politically. In addition, the extended case method does not aim at representativeness of the samples or cases chosen, but invites the researcher to extend from the micro- to the macro-, from the case to the theory (Burawoy, 2009).

None of these conversations were recorded because I believed that a recording device would interfere with the natural development of the conversational event and with the informality that I was seeking with the openness of the conversational events. Instead, I took notes during the conversations, as accurately as possible. These interview notes were supplemented with fieldnotes of the visit and conversational event. I typed up my notes immediately after the field visits, in journals and post-conversation/post-observation reflections. My fieldnotes and field diaries gathered a significant amount of thick description (Geertz, 1973), and combined different voices from the personal to the professional researcher, as well as other voices from the field –aggrieved workers, lawyers, legal advisors, NGO staff. These fieldnotes are also highly personalized accounts (van Maanen, 2011) that unavoidably present the fieldworker's standpoint. To abstract myself from the accounts of the worker, I annotated verbatim quotes where possible and have included these in this thesis to give voice to the workers. All quotes are my own translations from the verbatim, an accurate reproduction of how and what the worker said during these conversations, unless stated otherwise.

I used this qualitative method during interactions with workers in dormitories of construction sites and at the offices of LAL NGOs. I initiated conversation with workers, introducing myself and my research, and a space always followed in which my conversational partner/s would ask me all sorts of questions about myself, allowing for the interview to be an 'interchange' (Kvale, 1996). Next, I would pose some specific questions about the worker's work and labour conditions, and also

open-ended questions followed by a considerable amount of silence on my side, in order to elicit their own narratives and life-stories. This aimed to uncover their subjective experiences of work, family, relations, labour disputes, and most importantly their perceptions and opinions of the legal institutions. This last theme was elicited with questions such as “do you have a labour contract at your workplace?”, “do you know about the Labour Contract Law, what do you think of it?”, “have you had a dispute at work?”; if yes, “can you tell me about it?”, “how have you addressed it? What experience have you had with the legal process?” if no, “if you had a dispute, how would you address it? Would you litigate? Why? Why not?” This open-ended interview method enabled unexpected topics to arise from the conversations, which became fundamental to the analysis and the arguments in this thesis, namely, workers’ social norms and conceptions of justice *vis-à-vis* the law.

These interviews with workers provided evidence of the forms of action workers take in relation to labour disputes and the reasons for taking one or another form of action, which are explored in Chapter Seven. The most salient evidence gathered through these interviews relates to workers’ perceptions of the laws, and their ‘rights’ and ‘rules consciousness’. Economic factors, time, inequality, severity of the dispute (e.g. work injury), level of knowledge of the law, level of experience with the law and access to legal aid, and lawyers’ advice would be indicators for workers’ views and opinions of the law and the legal process. For example, a worker using legal terminology and responding that “the law protects our rights”, “the labour contract protects us”, or that he/she sought legal assistance to “protect his/her rights”, or identified his/her labour dispute as the result of an “illegal” (*buhefa*, 不合法, *feifa*, 非法, *weifa*, 违法, *weigui*, 违规, or *buguize*, 不规则) behaviour on behalf of the employer, indicates (legal) rights consciousness. Workers responding that the legal process takes too long and he/she cannot afford it, indicate both time and financial factors that inform workers’ views of the law and legal process. From these unstructured interviews another factor identified was workers’ observance of social norms that differed from the law, which explains why they might not take

legal action and/or disagree with the law. For example, a worker responding that he/she would not take legal action because it would lead to loss of *face* (*mian*, 面), or be harmful to social relations, indicates that there are social norms informing workers' views of the laws and their decisions to take legal action. Moreover, workers responding that the "law is useless" (*falü meiyong*, 法律没用) or "unfair" (*bugongping*, 不公平), or a specific behaviour is "not right" or "wrong" (*budui*, 不对) but not using the legal terms mentioned above indicate the prevalence of social norms, morality and 'rules consciousness', in contrast to the law-informed 'rights consciousness'. I manually coded the notes of these unstructured interviews and fieldnotes, combining "concept-driven" and inductive "data-driven" coding (Gibbs, 2007). Concept-driven codes were developed from the literature review, searching for indicators of 'rights talk' ('rights consciousness') as mentioned above, and 'workers conceptions and subjective experiences'. Codes developed from the interview data such as 'morality', 'socio-cultural', 'social relations' or 'fairness', referred to the broader theme 'rules consciousness'. These codes facilitated the analysis and identification of the data to address each of the research questions posed in this thesis, and arrive at the argumentative narrative in each of the following chapters, all in all, to answer the main research question of *how and why legal institutions, laws in particular, sustain authoritarianism in China*.

1.2.3 Ethical considerations: trust and treason

This research was carried out in accordance with the LSE Research Ethics Policy and fulfilled the Ethics Review Questionnaire for Researchers (prior to fieldwork in 2011). In addition, it adhered to the Statement of Ethical Practice of the British Sociological Association (2002). All people interviewed and who participated in the research provided informed consent: in the case of NGOs, a written statement of my research project was provided to them prior to my initiating regular participation in NGO activities and observations. Consent was provided at the beginning of my fieldwork by all three NGOs via consultation with the director of each organization. All those interviewed (whether formally through semi-structured interviews or through informal conversations) were informed of the aim of the

research and participated voluntarily in the conversations/interviews, providing oral consent. I reassured each and every participant of confidentiality and anonymity. The only third party involved in the process that had access to interview data was my research assistant, who only partook in transcribing the interviews with lawyers and NGO staff, all whom consented to the recording and agreed to participate in the project. All interviewees and organizations have been anonymized.

In order to reflect on the ethical considerations I faced during fieldwork due to my position as a researcher in legal consultations, I provide two sketches of my fieldnotes:

Today was the first day of fieldwork at NGO Y. I arrived at the offices and Lawyer Guo who received me, immediately opened the door of the consultation room and invited me to enter and have a seat. A consultation was ongoing between a lawyer and two women, one of them an injured worker. She walked with crutches and had an obviously serious injury to her leg. The lawyer introduced me and explained my presence and my research project and asked the worker if she agreed to my presence. Informed consent was provided and the consultation continued. After the consultation ended, I initiated conversation with her. She talked without me needing to ask her many questions. She was just so happy to talk, so much in need to share her grief, to have somebody interested in her situation more than in the technicalities of her case – her employer, her accident, when it happened, etc. She kept talking and talking, venting her feelings of frustration and anger at her boss who dismissed her after the accident and was not willing to adapt the office for her to be able to continue working there. "I am a good worker", she kept saying. She started crying, kept talking, telling her story in tears. I could not help it and I, too, had tears in my eyes within seconds. (Fieldnote, 12 June 2012)

I came into the consultation room in NGO Y and there was an old woman and a man, sitting patiently, waiting for a lawyer to come and provide them with legal advice. The woman started talking to me; she was there for her son's case, a case that NGO Y has dealt with for over two years now. She comes all the way to Beijing from the countryside in Hebei Province just to meet the lawyer, a long journey. Her son, who lost his leg in an accident at work, could not bear his injuries and his disabled condition, and committed suicide. I sat with her in the

consultation room for over an hour; she cried and cried while telling me her story, letting her grief out. I could barely understand her, but just sat with her in her grief. The other worker in the room also listened to her while he waited for his lawyer and filled in some forms, and while other staff came in and out of the room doing their work but without paying attention to her - I thought they had to be immune to situations like this. I held her hand. She kept crying and crying. I couldn't understand her any longer. I just listened and sat with her.

(Fieldnote, 28 August 2012)

During fieldwork I participated in numerous legal consultations and listened to many different testimonies of workers who, as with these two women, were anxious and in need of somebody who would just listen to them with affect. In these situations, I could not but pause the aims of the research. Neutrality was impossible; emotions and empathy dominated. Further, how could I 'use' these people's grief to satisfy the purposes of my research? I could not. Even now I continue to struggle with the feeling that during fieldwork I engaged so closely with many people who shared with me their deepest feelings, and I 'used' these for the sake of sociological science. I cannot help but feel that I objectify people and their stories, and by using them in this thesis, I betray their sincerity and trust, even though I always had their informed consent to participate in this research. Then, and now, I struggle with dissociating the personal from the researcher. During fieldwork, research and research ethics were as important as my personal involvement with the people I had contact with. For this reason, I kept a highly personal tone in my fieldnotes, which resembled 'confessional tales' (van Maanen, 2011). For the purpose of clarity and objectivity, I have abstracted these from the narrative of this thesis, in order to give the space and voice to the real protagonists of these struggles.

Lastly, with a sense of betrayal, in this thesis I critique the work of LAL NGOs and lawyers. All critique that I voice of the NGOs, lawyers and their work has to be understood as in line with the analysis of the role of law in authoritarian contexts, and in resistance and political activism, and not as a personal critique of individuals who work and dedicate laudable efforts to assist, support and improve the lives of many aggrieved workers. Most NGO staff are dedicated and work in good faith to

improve workers' rights and general working conditions. I have deep respect and admiration for the lawyers and NGOs I followed, listened to and learned from during my fieldwork, and I am grateful for their welcoming me into their daily activities at their offices. The analysis of the aforementioned data is organized in this thesis as follows.

1.3 Structure of the thesis

Chapter Two sets out the theoretical terrain for this thesis, which lies at the intersection of the literatures on rule of law in authoritarianism, and law and social movements. It locates China within the contemporary discussion about the role of law in sustaining authoritarianism, and its opposite, in resistance and political transformation. Equally, legal institutions provide a lens to better understand changing governance mechanisms and state-society interactions in contemporary China, which serve comparative purposes with other authoritarian settings. The chapter outlines and critiques the dominant institutional narratives employed to explain how and why legal institutions enable the institutionalization and consolidation of authoritarian rule (Moustafa, 2007, 2014) and bolster regime legitimacy (Landry, 2008; Ginsburg, 2008; Moustafa, 2007, 2014). It also points out the virtues of grounded analyses of the law and society approach to gather a more comprehensive understanding of the processes at play in the formation of legal consciousness, and more broadly the role of law in political movements and resistance, and therefore, in challenging authoritarianism.

Chapter Three describes the historical process of labour and legal reforms that preceded the historical moments analysed in this thesis: the enactment of the 1995 and the 2008 labour laws, and the conflict that followed. It also interrogates the nature of the labour laws, to show the fundamental transformations that were settled with these new laws. It first argues that the development of legal institutions to regulate labour relations in China reflects an institutionalization process of property rights to support the market economy. These legal institutionalizations are regime supportive. Second, it argues that the development

of labour laws was also a response to the enormous amount of social pressure coming from workers' large-scale strikes and protests in the late 1980s, early 1990s, and the early 2000s. These clearly illustrate Polanyi's concept of the "double movement" (Polanyi, 2001: 130) by which the extension of unregulated markets is followed by a countermovement to regulate the market and protect labour from the excesses of capital, either with legislation, trade unions, factory regulations or welfare systems (Silver, 2003: 17). In China, the enactment of labour laws illustrates this countermovement to protect workers, while at the same time, depicting a strategy of enshrining workers' interests as rights in labour legislation to pacify labour unrest. Third, it shows that the Party-state, even when facing endogenous (within the Party-state) and exogenous (from foreign enterprises) opposition to enact the laws, did so in order to keep its capacity to control the labour market and to regulate capital, hence, it was an adaptation of its governance to the challenges of the time (in reference to Heilmann and Perry, 2011). Fourth, it analyses the content of the 1995 and 2008 labour laws to highlight the socio-economic changes introduced in labour relations. It argues that the two most significant transformations affected the very nature of labour relations, namely, that it officially recognized the commodification of labour and the antagonism of labour-capital. It thus established official mechanisms to manage labour disputes, which have resulted in a 'judicialization' of labour politics. It then introduces the new labour actors, that is, labour NGOs, which have arisen in an extremely complex labour scenario, and provides an outline of labour NGO development to finish situating the case of the research historically.

Against evidence from comparative authoritarian and post-Socialist contexts, Chapter Four sets out to examine why in China legal reforms have not triggered the amount of political transformation as would be expected when following the theoretical propositions that view a causal relation between legal reforms and political liberalism (Goldman, 2005; Halliday and Liu, 2007; Halliday et al. 2007; Karpik and Halliday, 2011), even with democratization (Dahl, 1957; Linz and Stepan, 1996). It addresses the question of how and why, if at all, labour laws open up avenues for political contestation. Looking at how the Party-state ensures that

lawyers and legal aid NGOs fulfil the function of securing social stability, it argues that this is done through an institutional arrangement designed by the Party-state that guarantees lawyers' self-censorship and core compliance; dependent and patronage relationships between the legal profession and the state (in the form of the Ministry of Justice); and feedback mechanisms that enable legal institutional cultivation and perfection. I argue that, due to the institutional constraints in place, lawyers and LAL NGOs are extremely limited in their capacity to mobilize the law against the Party-state, and thus contribute to the adaptability of the regime of the CPC.

Chapter Five examines the premise that legal institutions provide avenues for political contestation (Moustafa, 2007, 2008, 2014; Moustafa and Ginsburg, 2008) and political liberalism (Halliday et al., 2007). In an attempt to examine the legal process as a relational one, and to decentre the analysis from legal institutions, namely courts, and disputes, this chapter examines how lawyers and LAL NGOs provide legal assistance to workers, to assess how and why lawyers and civil society organizations mobilize the law, and if, how and why they catalyse workers' broad actions and movement to challenge the Party-state. LAL NGOs protect workers' rights 'according to the law', and provide legal education and representation services, raising workers' 'rights consciousness' and assisting workers in legal mobilization. This chapter shows that lawyers and LAL NGOs, however, are more efficient in maintaining social stability (to the benefit of the regime) than in supporting political activism because of three key issues: first, in legal representation lawyers act '*on behalf of workers*', which comes about through the transfer of workers' agency to lawyers and develops into a dependent relationship between workers and lawyers; second, by focusing only on individual legal resolutions of labour disputes, LAL NGOs depoliticize labour conflict by virtue of 'juridicalizing' it and limiting any possible action to the assertion of rights, that is, only rights-based claims and actions; and third, on a fundamental level, LAL NGOs perform a crucial function for the regime - the socialization and therefore, legitimization, of the new legal norms, which extend the ideological project of the state – the rule of law.

That said, workers can and do fall outside the formal scheme of order: they think and act before and beyond the law. Through an analysis of workers' subjective experiences of work, their perceptions and opinions of the laws, and their concepts of justice, Chapter Six contests two assumptions: the first, that with the increase in workers' rights consciousness, we can expect to see increased contestation and resistance to the Party-state, in a way that holds it accountable to its own legal institutions; and the second, that workers have accommodated and accepted the rule of law ideology of the Party-state. On the contrary, this chapter shows that there is considerable contestation of the precepts of the laws, workers dissenting from their principles and uses. Against the laws, workers' conceptions of labour relations, rights and justice are based on a universe of socio-cultural norms (such as morality), material needs (livelihoods and subsistence) and subjective experiences. In short, the introduction of legal institutions has created a situation of tension between 'rights consciousness' and 'rules consciousness' (Perry, 2008), in which each provides conflicting and mutually contradictory rationales and logics of action. In line with these socio-cultural concepts, workers take a range of paralegal, illegal and autonomous action, without the support of LAL NGOs or the All China Federation of Trade Unions (ACFTU); legal mobilization being the last resort. These alternative forms of action are described in Chapter Seven.

Chapters Six and Seven point out that if anything, for its ideological value, the tension between the legal norms and popular and social norms, what could be interpreted as a tension between 'rights consciousness' and 'rules consciousness', illustrates the shortcoming of the CPC's 'adaptive governance' (Heilmann and Perry, 2011). How the Party-state will reconcile social norms and popular practices with the legal order will test the limits of its adaptive governance: this poses a question to the CPC whether to better adapt its legal institutions to popular knowledge and practices (which is not necessarily achievable by granting more rights, such as collective bargaining or right to strike), or to better obtain society's cognitive and behavioural alignment with the legal order (either by consent or coercion). It becomes clear that a study of law in everyday life is necessary in order to see the world "outside the brackets" (Scott, 1998: 20). The CPC might be extremely

efficient in designing institutions, policies and formal structures of order, but how resilient or adaptive these make the regime depends on the extent to which they can absorb or accommodate the wide array of informal processes and local practices.

Chapter Eight provides the concluding remarks of the thesis, pointing out the main findings of this research and its contributions, reflecting on the role of law in Chinese politics, and more broadly, in authoritarianism. In addition, it outlines the limitations of this research and identifies future avenues of research.

Chapter Two

Rule of law under authoritarianism:

Domination and Resistance

“Law, as an ideology, contains both the elements of domination and the seeds of resistance”
(Merry, 1990: 8)

The multifaceted political roles of legal institutions have led to an increased focus in research from the social and political sciences. Legal institutions, namely laws and especially courts, have been proved key functions in state formation, political stability, market and regime transitions, and democratization. The rule of law has mostly been assumed to function in established democracies, where private property rights are consolidated and there is separation of powers that ensures the independence of the judiciary from the executive. Dahl (1957) considered the rule of law to be indivisible from democracy, while Linz and Stepan (1996) asserted that legal institutions play a role in democratic transition and/or consolidation. Therefore, until the 1990s, the rule of law had not been studied in authoritarian regimes, mainly because legal institutions were considered ‘pawns’ of the authoritarian rulers (Moustafa, 2014), instruments of the sovereign (Marvall and Przeworski, 2003), institutional sources for the regime to preserve its hegemony (Hirschl, 2000: 95), centrepieces for political stability (Gerring et al., 2004; Halliday et al., 2007: 6; Lijphart, 1977; North and Weingast, 1989; O’Donnell, 2001), and central to the exercise of state control (Shapiro, 1981). However, there has been a “rule of law revival” in transitional and developing states (Carothers, 1998), and an increasing number of scholars have ventured into examining the role of legal institutions in the governance of authoritarian regimes, as these play much more multifaceted political roles than mere instruments of dominance of authoritarian rulers. For example, Moustafa (2007) argues that authoritarian regimes increasingly use courts to institutionalize their rule, resulting in the “judicialization”⁶ of authoritarian politics. As a result, legal institutions (in particular courts) gain presence in political life, and increasingly protect individual rights,

⁶ ‘Judicialization’ of politics refers to “(1) the process by which courts and judges come to make or increasingly dominate the making of public policies that had previously been made (...) by other governmental agencies, especially legislatures and executives and (2) the process by which non-judicial negotiating and decision making forums come to be dominated by quasi-judicial (legalistic) rules and procedures” (Tate, 1995, in Moustafa, 2007: 10, fn6).

constitutionalism, and even fight for political liberalism (Halliday et al. 2007; Karpik and Halliday, 2011). Legal institutions have also been regarded as sites of ‘contentious politics’, providing opportunities and resources for resistance to authoritarian rulers (Halliday et al., 2007; Karpik and Halliday, 2011).

Law embodies an intrinsic paradox: domination and resistance. The anticipation that its capacity for resistance will outgrow that of domination creates the expectation that, in authoritarian settings, legal institutions will induce political liberalization, installing the rule of law, and leading to democratic transition. Past examples from, among others, post-Soviet and Eastern European countries (Schwartz, 2000; Straughn, 2005; Solomon, 1996, 2008 2010), or East Asian countries (Ginsburg, 2003, 2008; Rajah, 2012) have been used to analyse the CPC’s capacity to undergo market liberalization and legal institutionalization without political transformation. China is, in this respect, the deviant case that attracts comparative attention.

There is research, however, which points out that there is no necessary inter-relation between legal institutions and regime liberalization (Root and May, 2008). Research on China’s prolific legal reforms indicates that the “rule of law as implemented in China is a political reform project that offers some of the promise of political liberalization without the loss of political power by the ruling party” (Gallagher, 2006: 787). It is also said that the rule of law has been used as a strategy to fill the ideological vacuum that overshadows the post-1978 period, and to bolster the legitimacy of the CPC (Ginsberg, 2008; Landry, 2008; Liebman, 2011; Lubman, 1999; Peerenboom, 2002). By so doing, legal institutions contribute to the resilience of the authoritarian regime. At the same time, there is a wealth of research that has indicated the multiple avenues that legal institutions open up for political contestation in China, both rhetorical and practical (Diamant et al., 2005; Halliday and Liu, 2007; O’Brien and Li, 2006; Peerenboom, 2002; Pils, 2011). Among many authors, Pei (2000: 23) has asserted that “despite the limited nature of the improvement in the expansion and protection of rights, the enumeration of legal rights and promulgation of public policies have provided Chinese citizens important

instruments of resistance against the government and its agents". There appears to be a consensus in the literature on China that legal reforms have triggered an increasing rights conscious society that has more knowledge and resources to resist the state through its own legitimate means (Goldman, 2005; O'Brien and Li, 2006).

The study of the legal oxymoron (domination and resistance) in the Chinese context contributes, through a comparative perspective, to the theorization of the rule of law under authoritarianism, and to better understanding of the dynamics of gradual political change and stability more broadly. Hence, this thesis asks: *how and why do legal institutions, in particular laws, sustain authoritarianism?*

In the following I review the key literature that frames this research. First, in section 2.1, I examine the dominant explanations of why and how legal reform and legal institutions enable regime stability and/or adaptation in authoritarian contexts, pointing out their underlying institutionalist assumptions. In section 2.2 I consider the variety of explanations of why and how legal institutions are transformed into sites of contention in both liberal democracies and authoritarian contexts, paying particular attention to the Chinese case. In section 2.3 I offer concluding remarks to summarize the framework that informs this study, which extends from the two bodies of research on law as domination and resistance. I argue that there is a need to go beyond the institutionalist approaches to the study of legal institutions (mainly through courts), which see legal institutions as a neutral and objective unit of analysis and examine its uses, effects, and processes without examining the nature of law and its relational aspects (and power relations). There is a need to integrate institutionalist and policy process approaches with micro-level studies of law outside the courtrooms, in everyday life (Ewick and Silbey, 1998), to understand the extent to which legal institutions are accommodated and accepted or trusted as legitimate forms of governance of a given authoritarian regime. This approach to law in society will inform how resilient the regime is due to its legal institutions, or on the contrary, why and how legal institutions are used and resisted.

2.1 Rule of law in authoritarian regimes: Domination

Since the 1990s there has been a surge in research on the role of law and legal institutions in authoritarian regimes (Moustafa, 2014). There has been a variety of case studies that have examined either/or both the questions of the role of legal institutions as forms of governance and as sites of contestation in authoritarian regimes or transitional regimes, in contexts such as post-communist Europe (Schwartz, 2000; Straughn, 2005) and Southern Europe's dictatorships such as Portugal and Spain (Toharia, 1975; Hilbink, 2007), post-Soviet Russia (Solomon, 1996, 2008, 2010), Latin American military dictatorships in Brazil, Chile and Argentina (Barros, 2008; Hilbink, 1999, 2008; Osiel, 1995; Pereira, 2008), Egypt and the Gulf (Brown, 1997; Moustafa, 2007, 2008), the Philippines (Tate and Haynie, 1993), Taiwan and Korea (Ginsburg, 2003, 2008), Singapore (Rajah, 2012), and China (Halliday and Liu, 2007; Lubman, 1999; Peerenboom, 2002).

Despite the great variety of case studies and findings, there are common points in this literature that can be reduced to two main areas. On the one hand, existing research shares an institutional perspective, which derives from 'thin' conceptions of the rule of law. This perspective focuses on the formal, institutional and procedural aspects of the rule of law (Fuller, 1976); while a 'thick' conception adds to the instrumental aspects substantive conceptions of the rule of law, which include political morality, economic and political arrangements and conceptions of rights (Peerenboom, 2002, Chapter 3; Summers, 1993). Rule of law is usually considered part and parcel of a democratic polity (see Linz and Stepan, 1995; Maravall and Przeworski, 2003; or Huntington, 1991), hence some observers use the term "rule by law" to suggest the incompatibility between "rule of law" and authoritarian contexts (Moustafa and Ginsburg, 2008). In relation to China, the "rule of law" or "rule according to law" (*yifa zhiguo*, 依法治国) is understood as the state's instrumental use of law (Baum, 1986; Potter, 1999; Peerenboom, 2002). Lubman (1999) deliberately uses neither 'rule of law' nor 'rule by law' but rather 'legality', but he emphasises the instrumental nature of law in China, especially during the Socialist period when law had an intrinsic class-instrumentalist function (Lieberman, 2011). Peerenboom (2002) indicates that the concept of the rule of law is

a contested one, and that: “we need to theorize rule of law in ways that do not assume a liberal democratic framework, and explore alternative conceptions of rule of law that are consistent with China’s own circumstances” (2002: 5). The majority of studies of the rule of law in authoritarianism, and particularly, in China, adopt an institutionalist perspective, or thin conception of the rule of law.

On the other hand, previous research has identified commonalities in the functions of law and courts serving authoritarian governance. In particular, Moustafa (2007) indicates the common functions of the judiciary as instruments of governance in authoritarian regimes: to exercise state power; to advance administrative discipline within state institutions (Shapiro, 1989); to maintain cohesion among ruling factions; to facilitate market transitions by providing credible commitments to property rights; to contain majoritarian institutions, namely, democratic or liberal rights and political parties (courts becoming authoritarian enclaves); to delegate the implementation of unpopular reforms and policies; and to strengthen regime legitimacy (Moustafa, 2007; 2014: 283). Due to these functions, legal institutions enable the institutionalization of authoritarian rule (Moustafa, 2014) and the advancement of the interests and power of the rulers consolidating the authoritarian state (Moustafa, 2007).

However, this is not uncontested, as the ‘judicialization of politics’ (Moustafa, 2007, 2008) in authoritarian contexts leads to opening spaces for political activism, explored below in section 2.2. Authoritarian rulers are aware of the risks involved in legal reform and devolving power to the judiciary; still, explained from a rationalist-choice perspective, they develop legal systems and institutions mainly due to the principal-agent problem: to secure their power either by setting up institutions that enable their predatory behaviour (Olson, 1993), or to address the decline in ideology as a source of state legitimacy in those regimes with long-term horizons (Moustafa and Ginsburg, 2008; Ginsburg, 2008). This last point has been used in the Chinese case to explain Deng Xiaoping’s, Jiang Zemin’s, and, today, Xi Jinping’s emphasis on building the rule of law to respond to the post-Mao ideological vacuum (Landry, 2008; Ginsburg, 2008; Moustafa, 2007: 39), as the rule of law

provides an ideological support to the legitimacy of the CPC, grounded on its ability to sustain economic growth (Peerenboom, 2002). Informed by these propositions, this thesis asks: *what functions do legal institutions fulfil for the authoritarian state?*

2.1.1 Rule of law in authoritarian China

There are important insights to be gained from the studies of the role of law and legal institutions under the Chinese Communist Party-state. There has been a wide interest in understanding how and why the CPC has been able to undergo such tremendous economic transformation since 1978 without systemic change or political liberalization. This interest and perplexity with the case of China is based on assumptions derived from modernization theory, democratization and regime transition studies (especially regarding post-Socialist transition of the Soviet and East European cases): market liberalization and political liberalization (more specifically, democracy) are supposed to go hand in hand, and by extension, necessarily bring about the rule of law to first secure economic property rights and then grant civil and political liberties. Hence, China represents the deviant case (Gerring, 2007: 105) that defies the expectations of these theories, and provides an exceptional setting to further the “debate about models of development” (Heilmann and Perry, 2011: 4). A wealth of research has addressed these issues, looking at the changes and adaptations at the institutional and policy levels that have enabled the CPC to remain in power, and/or the extent to which these changes can facilitate political liberalization and/or regime transition (Gilley, 2004, 2008; Heilmann and Perry, 2011; Pei, 2006; Shambaugh, 2008; Shirk, 2007; Yan, 2011).

As an anchor point in the discussion, Nathan (2003) argued that through a series of institutional changes and innovations, the CPC has been able to absorb shocks and remain in power. These institutional changes include the norm-based succession of political leaders; the introduction of a meritocratic system in the bureaucracies; the differentiation and functional specialization of institutions (most importantly here would be the increasing autonomy of the National People’s Congress to legislate

and the increasing independence of courts granted by the 1994 Judges Law); and the creation of input institutions, or channels for public participation such as village elections, the petitioning system, and the 1989 Administrative Litigation Act which enables citizens to sue government departments or officials for violations of government policy (Nathan, 2003: 15). These four main institutional changes are the central explanatory factors of Nathan's 'authoritarian resilience' thesis. His rationale is that the increasing institutional differentiation within the structures of power (government and Party), and judicial independence as a sort of separation of powers, are sources of regime resilience because they allow for increased efficiency, systematization, and professionalization of the institutions of governance. Similarly, Lee (2010) argued that, among other factors, the increasing strength of the legal system, in terms of sheer number of laws or the increasing power of the State Council and Local People's Congresses to issue laws and regulations, indicates the political institutionalization of the CPC, which enables political stability. These arguments correspond to Moustafa and Ginsburg's (2008) about the role of legal institutions in entrenching authoritarianism through institutionalization of authoritarian rule.

Nathan (2003) emphasises the role of input institutions, such as local courts and the petitioning system. These institutions represent bottom-up feedback channels that allow the citizenry to believe there are mechanisms of participation and influencing policy. In his view, these also sustain the legitimacy of the Party-state by maintaining the focus of people's concerns at the local level. Although Nathan's arguments resonate with the idea that legal institutions (mainly courts) institutionalize authoritarian rule (Moustafa, 2007, 2008, 2014; Moustafa and Ginsburg, 2008), his thesis lacks empirical evidence to prove that these institutionalizations do, in fact, enable regime resilience, and the processes through which this occurs.

From an institutionalist perspective, these sorts of gradual changes take place as a result of other incremental and gradual changes (Streeck and Thelen, 2005; Mahoney and Thelen, 2010), by processes of drift, through which institutions are

adjusted to the “changes in the political and economic environment in which they are embedded” (Streeck and Thelen, 2005: 24); or layering, or differential growth of two coexisting institutions, where one stagnates while the other is actively revised and improved to govern individual behaviour (ibid: 23). These modes of institutional change enable institutional, and therefore, political stability. The aforementioned studies examine the changes in the CPC’s governance institutions that lead to political stability, but if agency is considered at all, it is that of political elites. They do not, however, provide any argumentation or evidence of the role of ordinary people in fostering gradual institutional change.

Moving beyond a purely institutionalist perspective, Heilmann and Perry (2011) argue that the regime has been able to withstand mounting challenges derived from the enormous socio-economic transformation because of its capacity to adapt its methods of governance (political techniques, procedures and institutions) from the revolutionary and Maoist period. This is what they call ‘adaptive governance’. The regime is “increasingly adept at managing tricky challenges” (including legal institutionalization) (Heilmann and Perry, 2011: 1-2), because of the maintenance of Soviet-inspired institutions on the one hand (namely, the Leninist party-state), and on the other, changes and adaptations of its policy mechanisms, governance techniques and procedures, and institutions, mainly, its guerrilla-style policy-making, decentralization, and fragmented political system that enables bottom-up input (ibid: 6), the continued use of the campaign tradition (Perry, 2011) and experimentation in policy-making (Heilmann, 2011). Continuity and adaptability account for resilience or the lack of systemic transformation. Heilmann and Perry’s thesis resonates with Shambaugh’s (2008) argument, from an institutionalist perspective, about the “learning capacity” of the CPC. However, by focusing on methods of governance, Heilmann and Perry attempt to go beyond the institutionalist drive in political science studies of China (Gilley, 2004; Nathan, 2003; Naughton and Yang, 2004; Pei, 2006; Shambaugh, 2008; Shirk, 2007).

Heilmann and Perry assert that the ‘adaptive governance’ of the CPC is what has enabled its sustainability, by adjusting and absorbing endogenous and exogenous

challenges (ibid: 8). Among the adaptive capacities of the CPC is its ‘adaptive legality’ (Lieberman, 2011). Lieberman argues that law has been central to the adaptive governance of the CPC because it has provided a new legitimating ideology and a framework for “ordinary people, who increasingly articulate their interests in terms of legal rights” (ibid: 166). By arguing that the legal system has enabled the ‘adaptive authoritarianism’ of the CPC, Lieberman is proposing the same line of reasoning as that of the studies mentioned above about the role of legal institutions in advancing the interests and power of the authoritarian rulers (Hirsch, 2000; Marvall and Przeworski, 2003; Moustafa, 2007); at the same time it is also similar to Nathan’s institutionalist approach, as legal institutions can be understood as input institutions. Lieberman expands his analytical framework and includes in his explanation of the CPC’s adaptive legality policy dynamics (such as experimentation in policy implementation) and cognitive and behavioural aspects of legality (public opinion, social norms and conceptions), which would be closer to a thick conception of rule of law. Most insightfully, Lieberman suggests that the CPC has achieved its adaptive legality not by installing institutional constraints on its legal institutions – in particular, courts –, as Moustafa (2007, 2008, 2014) would suggest; but by ensuring that legal institutions embrace “aspects of revolutionary history, most notably populist legality, in new ways as they seek to increase their legitimacy within the party-state and within the public” (Lieberman, 2011: 166).

What is most interesting in both the adaptive governance (Heilmann and Perry, 2011) and adaptive legality (Lieberman, 2011) arguments is that their proponents allude to the combination of an agency-oriented analysis with a governance and institutional analysis. Their definitions of adaptability are “agency-oriented” (Heilmann and Perry, 2011: 8) because they consider that “actors in a system” will “intentionally or unintentionally” react, interact and use institutions, and because the degree of adaptability of the government of the CPC “depends upon people’s readiness to venture forth into unfamiliar environments to act, experiment, and learn from changing circumstances” (ibid: 8). Despite this mention of an agency-oriented definition of adaptability, there is no reference to or evidence of the roles and processes of institutional adaptation in the hands of specific actors apart from

mentions of ‘bureaucrats’, ‘technocrats’, or notable political figures. Heilmann and Perry’s edited volume is instilled with a macro- and policy-level focus that leaves a historical institutionalist aftertaste, as they still focus on historical, socio-economic and political structural conditions that explain the CPC’s adaptive governance, and any agency considered is that of rationalist choices of political elites. Moreover, when reading Heilmann and Perry’s volume (with the exception of Fewsmith, 2011), one can identify similarities with institutionalist explanations, which argue that these ‘adaptations’ of methods of governance are the results of gradual institutional changes (Streeck and Thelen, 2005; Mahoney and Thelen, 2010). Such changes could occur, for example, due to fluctuations in the political and/or economic environment in which they are embedded at the hands of, if any, political elites or ‘human actors’ (Streeck and Thelen, 2005: 24). These institutional explanations still lack an account of agency, and of how endogenous pressures from below can explain institutional change.

To highlight another institutional aftertaste of the adaptive governance thesis, Liebman’s adaptive legality suggests that legal institutions adopt the popular legalism of the revolutionary period (such as the use of mediation to resolve disputes) in order to align themselves to the dominant social norms (Liebman, 2011: 166). This resembles the cultivation of institutions to avoid cognitive frictions that could result in destabilizing endogenous shocks (Thelen and Streeck, 2005). Whether with an institutionalist perspective or a governance mechanism one, the outcome to be explained is change that enables continuity. Even when Heilmann and Perry (2011) suggest the importance of considering agency, as mentioned above, the empirical evidence in their volume of how political elites (cadres, judges, etc.) who use and cultivate the changes and adaptations of these governance mechanisms actually use the processes, policies and institutions at hand is scarce. Instead, these studies remain at a policy process and historical institutionalist levels, which methodologically do not include agency as a unit of analysis (or if it does, only considers rational choices of elites). Furthermore, conclusions are reached about how the adaptations of the CPC’s governance have enabled it to continue in power and bolstered its legitimacy with little mention as to how these

adaptations have been accepted (or not) by ordinary people. Liebman (2011: 166) mentions that “populism also refers to efforts by legal institutions to seek public support by aligning outcomes with perceived dominant social norms or conceptions of popular morality or by making legal institutions more accessible”. The CPC’s populism of the revolutionary period, applied to the legal system, is seen as a crucial source of the adaptability of the regime, but what is still missing is a grounded analysis of if and how legal institutions are actually aligning social norms and conceptions of morality to obtain popular support, and hence, institutional, governance, and regime adaptability and continuity. This thesis will address this gap, conducting empirical research following a law *in* society (Ewick and Silbey; 1998, 2003; Silbey and Ewick, 2000) approach. This will complement the institutional approach with the study of law from below and examine how law is understood, experienced and used by ordinary people, as will be explained below.

With regards to studies of the legal reform and legal institutions in China, it appears that this grounded approach has also been, to a great degree, missing. Lubman (1999: 4-5) studied the relations between legal institutions and economic reform. He argues that there are a number of administrative and institutional issues that obstruct the effectiveness and autonomy of the legal system (especially, the judiciary) in post-reform China, and the rule of law more generally. In particular, this relates to the increased authority of local governments to control local courts, influence their decisions and curb them in their interest, in a sort of “local protectionism” (ibid: 266-269). The “legal fragmentation” (ibid: 302) and the relative power of local Party officials over the judiciary, when compared to the Supreme People’s Court, weakens the legal system by making it arbitrary and lacking unified and cohesive proceedings. This also implies the lack of power of the judiciary to interpret legislation and adjudicate accordingly; courts, on the contrary, are controlled (or ‘guided’) by the local Party-state. This finding challenges the argument put forward by Shapiro (1989) and reasserted by Moustafa (2007) about the capacity of legal institutions to discipline state bureaucrats and maintain cohesion. Moreover, it disregards the opportunities that the “legal fragmentation” opens for local courts to adjudicate with a certain degree of autonomy from

intervention from upper level courts (as suggested by Yu's 2009 study). However, Lubman's (1999) findings confirm that legal institutions secure the interests of local governments by virtue of their control over the judiciary, in other words, entrenching the local Party-state. Furthermore, Lubman asserts the increasing role legal institutions have in reaffirming the legitimacy of the CPC against the post-Maoist crises in values and ideology: "the rule of law could fill the growing vacuum of belief, despite the absence of a strong rights-based tradition in Chinese history" (Lubman, 1999: 306). Similarly, as Gallagher (2005: 57) posits, "rule of law is intended to substitute for more radical political change, and to bring with it increased channels for citizens to seek redress for their grievances and to protect their legal rights. It is also designed to legitimate the rule of the CCP as an institution that can not only bring rapid economic growth but also ensure social stability through the use of laws and courts".

Potter (2001), through an analysis of legal documents, discourses, and historical research of the legal reforms, argues that the development of legislation post-1980s has been driven by globalizing forces that have encouraged the Chinese legal system to conform with the international system. Legal reform in China has brought about new legal (liberal) norms that confront with local norms, values, behaviour and attitudes, or Chinese local legal culture; this is, a process of "selective adaptation" of international legal institutions to local conditions, whereby new legal institutions discard traditional norms ("delegitimization") by introducing new norms into the prevailing belief system ("transvaluation") (*ibid*: 6-7) can also occur. In some instances, such as the Contract Law (1999), Potter argues, the norms of the liberal market coexist with the priority of general principles of justice and fairness prevailing in China (based on the collectivist approach to social welfare characteristic of the socialist period's public law). In other instances, such as in intellectual property law or human rights law, there are more complex dynamics between the imported global liberal legal norms and Chinese local legal culture (i.e. individual versus collectivist ownership, or the pre-eminence of the right to development over civil and political rights). With this "selective adaptation" the likelihood is that China challenges the experiences of the liberal legal models.

Peerenboom (2002), following an institutional approach, argues that legal reforms have been a source of political liberalization, though the type of rule of law that is being established in China is not that of liberal democracies, hence, it is not likely to bring regime transition to converge politically with the Western liberal democracies with rule of law. Peerenboom also argues that the rule of law is a central component of the CPC's legitimization strategy. In line with Shapiro (1989), he claims that legal institutions enable the disciplining of state bureaucrats, and ensure that local governments carry out government policies (Peerenboom, 2002: 60). Moreover, the rule of law rhetoric also induces a redistribution of power within the Chinese political system and stimulates a more liberal-oriented (especially middle-class) and rights-based citizenry. These components of a thin theory of rule of law are likely to lead in his view, in the long run, to a democratic change but in the form of non-liberal soft authoritarianism (ibid: 513), because citizens have increased opportunities – rhetorical and institutional, in courts – to challenge the government with regard to its irregularities and illiberal behaviour.

Legitimacy is a difficult concept to define, measure and prove. It appears however to be crucial in the literature as it is the common explanatory factor as to why legal institutions bolster authoritarian resilience (Ginsburg, 2008; Landry, 2008; Liebman, 2011; Lubman, 1999; Moustafa, 2007, 2014; Moustafa and Ginsburg, 2008; Peerenboom, 2002; Tate and Haynie, 1993), mainly because wilful compliance is less costly than coercion (Moustafa, 2007). Or, to use Marxist terminology, hegemony⁷ is more efficient than coercion. It appears that conclusions on how legal institutions represent a source of state legitimacy are arrived at rather boldly in the literature, and in particular with regard to China, without considering the degree of penetration of the rule of law ideology in Chinese society, the levels of trust in

⁷ In Gramscian terms the role of the law is to establish systems of punishment and sanctions, and ideas of obligations and behaviours (linked to morality) that exert a "collective pressure and obtains objective results in the form of an evolution of customs, ways of thinking and acting, morality, etc." (Gramsci, 1977: 242). Hence, law is integral to the hegemonic ideology that obtains the desired consenting behaviour of the masses to the ruling class. For Althusser, law is a centrepiece of his theory of ideology; as part of the ideological state apparatus, legal ideology is to secure consent of the masses by "*constituting' concrete individuals as subjects*" (Althusser, 1971: 160, emphasis in original). Note that a Marxist analysis of law is beyond the scope of this chapter.

these institutions (with the exception of Landry, 2008, 2011), or popular opinions towards legal institutions and the Party-state. Studying these factors will allow a more nuanced understanding of how legal institutions legitimize the rule of the CPC in the eyes of the people it governs.

Some of the aforementioned studies have followed an institutional (court-centred) and rational-behavioural approach to argue that the increased use of legal institutions signals the idea that people deem the legal system legitimate, and that, in turn, these institutions legitimize the CPC. For example, workers using legal mechanisms to resolve disputes or aggrieved citizens using Letters and Visits Offices 'prove' that these are legitimate means to address grievances. However, a grounded, law and society approach (Ewick and Silbey, 1998; Galanter, 1983; McCann, 1994; Merry, 1990; Nielsen, 2007; Rosenberg, 1991; Sarat, 2004) is largely missing from existing research (with the exceptions of Diamant et al., 2005, Gallagher, 2006, and Woo and Gallagher, 2011). Such an approach can be of great value to the understanding of the rule of law in authoritarianism as it can generate evidence of if, how and why ordinary people (not political elites or legal professionals such as judges), despite or because of coming in touch with legal institutions, deem them as legitimate forms of governance, and therefore, legitimate the power of the CPC. Such an approach also allows the study of ordinary people's agency, consenting to or dissenting from the new legal institutions and legal ideology. These accounts are largely missing from the existing literature on the rule of law in authoritarian contexts although, in the case of China, there is the exception of Landry (2008) who, through survey data, argues that what makes legal institutions (courts) take root in Chinese society (institutional diffusion) is that they instil trust in Chinese citizens. Trust, the media, and social networks explain, according to Landry, why people adopt these legal institutional innovations (*ibid*: 212), and by extension, enable the development of the rule of law and sustain authoritarianism.

Moreover, the studies above have largely overlooked the potential inconsistencies that can arise from the clash between new legal institutions on the one hand, and

social norms, conceptions of justice and morality, and popular practices, on the other. Studying if and why these frictions occur can highlight alternative causes of institutional change, and the presence of endogenous sources of regime instability. If such were the case, then the new legal institutions would not necessarily enable regime adaptation or bolster regime legitimacy. Hence, in this thesis I propose an ethnographic-oriented study of social norms and popular conceptions of justice *vis-à-vis* legal institutions; this will provide new, nuanced and grounded evidence to the extent to which legal institutions, in particular law, enable regime resilience by bolstering legitimacy in the eyes of ordinary people. This resembles a grassroots approach to the study of law *in* society (Ewick and Silbey, 1998), to examine everyday conceptions and practices coherent with and/or against the images and practices (Gupta, 1995) of the new legal institutions, and that is de-centred from courts. This approach is aligned with Ewick and Silbey's (1998) study of law in everyday life, Migdal's (2001) state-in-society approach, and Scott's (1998) ethnographic study of the state from its contrast to popular knowledge and practices. This approach can enable theoretical refinement of the regime's 'authoritarian resilience' or 'adaptive governance' theses, by providing a deeper understanding of how legal institutions are actually taking root in Chinese society and being accepted by ordinary people into their repertoire of behaviour or resisted.

Legal institutions need to appear to have some degree of judicial independence (Moustafa, 2007) in order to consolidate legality. This can be an additional source of internal institutional inconsistency in authoritarian contexts. In order for legal institutions to secure the power of the authoritarian rulers, in China the Party-state would need to alter "the allocation of power between the courts and the rest of the Party-state. That cannot be done without the Party abandoning its dominance" (Lubman, 1999: 299). Whether or not the CPC will do so and increase the independence of the judiciary remains to be seen, but there are signs of increasing independence. Yu (2009) provides an empirical account of local experimentations by local courts that has resulted in marginal but significant discretionary autonomy of local courts to adjudicate and innovate in constitutionally significant cases. Yu

(ibid: 5) argues that the ‘judicial context’ (institutional constraints, or relaxation thereof) explains the increasing constitutional surge of local courts despite the increasing conservatism of the Supreme People’s Court. She has put forward a number of reasons for the expansion of judicial power at the local level, among which are: the malleability of locally-designed supervisory institutional mechanisms between higher level courts and local courts (e.g., individual case supervision) and the local courts’ maintenance of good institutional relationships with upper level courts and other competitive branches of the government at the local level (people’s congresses). Furthermore, Yu argues, “the rise of the local courts in the constitutional arena also constitutes an interesting mode of ‘institutional diffusion’, which helps strengthen the resilience of the authoritarian rule” (ibid: 25). This is not because of courts partaking in political diffusion (of the political opposition), which is suggested to be a crucial factor for the judiciary to prompt political transitions (Ginsburg, 2003) because “political diffusion creates more disputes for courts to resolve and hinders authorities from overruling or counterattacking courts” (Yu, 2009: 312). On the contrary, Yu argues that the increasing number of local courts represents a form of *de facto* institutional diffusion (or differentiation) between courts and other institutions, such as legislature and local people’s congresses (government officials). Institutional diffusion is not equivalent or leading to political diffusion, which allows the judiciary to secure regime resilience. However, she also observes institutional differentiation and power pluralisation with local courts and people’s congresses gaining confidence and competence as political players at the local level, which might be an interesting source of endogenous change.

In addition, Ip (2012) has seen signs of increasing judicial independence, and potential drivers of political liberalization. According to Ip’s (ibid.) study, the Supreme People’s Court appears to be increasingly influential and independent in policy areas and in law-making: it has not only been issuing guidance (Administrative Judicial Interpretations) to national laws that has local applicability, but also manipulating the decisions and behaviour of local bureaucratic agencies and the provincial judiciary to follow its guidance – even when such guidance goes against Party policy (issued by the State Council). For example, in 2002 it authorized

both judicial review and administrative reconsideration for “persons whose rights have been violated by labour or social security agencies” (ibid: 358). This might be interpreted as a positive indicator of increasing independence of the judiciary, and a sign of a certain degree of separation of powers which might eventually restrain the arbitrariness and power of the Party-state over the judiciary and more broadly.

Additionally, Chen and Xu (2012), in a case study of how courts handle labour disputes in Dongguan (Guangdong), found that courts were containing collective labour conflict by individualizing collective disputes; hence, functioning to maintain social stability. Su and He (2010) also found that courts were engaged in extra-judicial mechanisms to contain collective action (strikes) on the streets. Hence, courts appear to be fulfilling functions for regime stability, containing potentially challenging political activism, the centrepiece for the theorization of law as an instrument of power in authoritarian contexts (Moustafa, 2007).

Authoritarian regimes therefore might be challenged by/with the legal institutions in two ways. One is by the judiciary and legal actors themselves navigating the legal system to press for political liberalization and increased independence from Party-state control; the other by the citizenry and political activists who either increasingly bring disputes into legal institutions and press the government to delegate authority to these to adjudicate in a lawful manner (according to law rather than the interests of the Party-state), and/or directly use legal institutions to challenge the authority of the Party-state and demand increased rights, for example, by suing rulers directly. If legal institutions provide such opportunities for resistance, as will be explained below, how do authoritarian rulers build control mechanisms into the legal system to prevent this from happening? Moustafa (2007) argues that authoritarian regimes prevent legal reforms from backfiring by securing control over the judiciary in four ways: 1) regimes provide institutional incentives that promote self-restraint and ‘core compliance’ with the key legal framework and core regime interests; 2) they ensure a fragmented judicial system that limits the capacity of judicial and legal actors, and plaintiffs (or activists) to act in a unified way against the interests of the regime; 3) they design institutional arrangements

that constrain the access to justice for litigants and potential activists; and 4) they incapacitate the ‘judicial support network’. The judicial support network⁸ is formed by reform-minded judges and political activists, who, as a collective agent, mobilize resources and use judicial institutions to challenge the regime (Moustafa, 2007: 44).

In sum, there appears to be two endogenous sources of risk to the resilience of the CPC deriving from legal institutions: the judiciary claiming or manoeuvring internal politics to obtain increasing independence to adjudicate without local Party-state interference, and the degree to which legal institutions open avenues for the citizenry to oppose or challenge the Party-state. This thesis does not explore the avenue of political contestation, and focuses on the opportunities that legal institutions open for the citizenry outside the courtroom. Hence, according to these theoretical propositions, this thesis asks: *through what processes or mechanisms does an authoritarian regime ensure that the legal institutions contain political activism and control the pressures for political liberalization?* In Chapter Four it examines how the Chinese Party-state prevents legal institutions from opening avenues for political contestation and ensures that legal actors comply with its interests.

Finally, in contrast to the aforementioned expectations, Root and May (2008) have asserted that the relationship between legal institutions (the judiciary in particular) and regime liberalization is ambiguous, mainly because it is difficult to discern and isolate which legal institutions are causal factors of liberalization within a context of broader processes of social change. In fact, they argue that in authoritarian contexts, it is more likely to see legal institutions fulfilling a stabilizing role because courts provide “a mechanism for resolving administrative disputes, so as to release tensions and instabilities before they erupt” (Root and May, 2008: 316-318). Hence, legal institutions ‘contain contention’ (McAdam et al., 2001) and secure stability. In the Chinese case, most significantly, it has been argued that legal institutions

⁸ Term coined after Epp (1998), who argued that the most critical factor in legal mobilization for political purposes is the existence of a ‘support structure’ of rights advocates that enables organizational capacity in sustained and coordinated legal mobilization and political campaigns. This will be explored below in the next section.

provide legitimate spaces for grievances to be aired against local officials, for example, which legitimizes the regime by protecting the central government. Significant attention has been paid to how legal institutions incite or contain disputes in China, and stabilize or destabilize the political regime (Lubman, 1999; Diamant, Lubman and O'Brien, 2005; Woo and Gallagher, 2011; Stern, 2010, 2013). There is a variety of case studies in China that arrive at the same dichotomous conclusion: either legal institutions provide a site for political contestation and open avenues for political liberalization or they are an “outlet for expressing grievances” (Diamant et al., 2005: 6), which stabilizes the regime.

“Like their democratic counterparts, authoritarian rulers need effective courts to perform the basic functions of courts - to resolve disputes, to impose social control, and to regulate at least aspects of public life” (Shapiro, 1981, in Solomon, 2008: 261). But how do authoritarian rulers ensure that legal institutions fulfil this function? The extent to which legal institutions provide avenues for resistance, or prevent grievances from outgrowing the system and spilling over into other forms of action can inform the degree to which legal institutions secure the power and legitimacy of the rulers. The relevant research is examined below.

2.2 Law and resistance

Legal institutions provide sites and rationales for state-society relations. On the one hand, legal institutions are an instrument of domination; on the other, and paradoxically, a resource and site for political contestation. Below I review the relevant studies of law and resistance in liberal democracies, post-Socialist and hybrid regimes, and in authoritarian regimes, with particular attention to the Chinese case, to extract a framework to explore the questions *why and how do legal institutions provide avenues for political contestation and with what political effects on authoritarian regimes?*

Halliday and Karpik (2001) and Halliday et al. (2007) recognise the integral significance of law to political stability and change, and develop the thesis that legal

professions have been agents of political liberalism.⁹ The “legal complex” is the concept they develop to encapsulate the “structure and dynamics of lawyers, judges and the diversity of legal occupations” that constitute “a putative collective actor on behalf of political liberalism” (Halliday et al., 2007: 6). Under this conceptualization a number of case studies have served the comparative purpose of developing a theory of the linkage between lawyers and political liberalism. They show in what contexts and forms the legal complex mobilizes towards legal freedoms to advance political liberalism in four different ways: the whole legal complex mobilizing for political liberalism (Korea, Taiwan, Francoist Spain, Egypt, Hong Kong, Venezuela, Uruguay); only lawyers mobilizing (China in 2002-2006, Japan after the Meiji Restoration 1868-1920 and again in 1980s-2005, and the USA in the early 2000s); a selective mobilization of the legal complex due to contextual conditions or inhibitions such as threats to personal security (Israel, Brazil, Argentina); and when the legal complex fails to mobilize or is hostile to political liberalism and on the contrary, contributes to the contraction of legal freedoms (Chile under Pinochet, Italy in the 1920s-1930s under Mussolini, Japan during the Great Depression between 1920s-1930s). These case studies provide a comprehensive picture of the conditions that enable the legal complex (especially lawyers) to play a role as an agent of political change, accompanying its “claims with campaigns on behalf of basic political and religious rights” (ibid: 34), or is constrained from doing so.

In the first scenario, when the whole legal complex mobilizes for political liberalism, it achieves success in gaining moments of political liberalism or in bringing about political transitions because of courts granting independence and room to manoeuvre to lawyers (ibid: 17). Courts, therefore, provide political opportunities (such as restructuring of the judiciary or legal reform) for political liberalism. In these cases, there are two other important factors: lawyers taking positions of

⁹ By political liberalism they refer to a liberal political society, which “offers and protects basic *legal freedoms*” (core legal freedoms or rights of citizenship); “encompasses a *moderate state* (...) (that) depends upon some autonomy of the judiciary, at the very least to the degree that it can exert restraint over other elements of the state or advance claims to rights or justice”; and “*civil society* (...) (as) an autonomous sphere that stands outside and prior to the state and may act collectively to hold it accountable” (Halliday et al., 2007: 10-11, emphasis in original).

leadership within civil society to stimulate mobilization and political change by leading the formation of coalitions within civil society (lawyers, NGOs, media, and other civil society groups, such as international NGOs) that support liberal courts in furthering legal freedoms; and the role of market conditions influencing the legal complex in their pursuit of political liberalism (foreign investment, trade, economic expansion pressing for the state to recognize property rights) (ibid: 19). In the second scenario, the case studies explain why only lawyers mobilize in contexts where the judiciary is controlled by a one-party state, and where the legal profession faces the control of an “iron triangle” of police, prosecutors and judges” (ibid: 20). In the case of China (2002-2006), for example, lawyers engaged in criminal defence manage to drive some marginal or sometime significant instances of political liberalization, not by coalescing with judges, but by forming a collective identity as a professional (or epistemic) community through a public forum, paradoxically provided by the Ministry of Justice-controlled online forum, and by seeking support from legal academics who draft new laws (Halliday and Liu, 2007). The authors’ expectation is that through this collective identity, criminal lawyers (categorized as political lawyers) might be able to create alliances with commercial and mainstream lawyers when the Party-state tightens its control and regulation over commercial lawyers as well. Halliday and Liu (ibid.) presume that lawyers will react to the tension of economic liberalization without political liberalization, and eventually organize collective action for political liberalism. In other instances, the legal complex contributed to illiberalism (Chile under Pinochet, Mussolini’s Italy and Japan in the 1920s-1930s) due to a significant differentiation within the legal complex, courts and prosecutors aligning with the regime, and lawyers suffering threats to their personal safety. These conditions constrained the legal complex and disabled its liberalizing power.

It is worth emphasising that the main explanatory factor for lawyers exerting pressure for political change is the occurrence of political opportunities, which vary from supportive or reform-minded judiciary, to institutional or structural independence from the executive. For Halliday et al. (2007), the most important factor is the independence of the legal complex, a viewpoint similar to that of

Moustafa (2007), who stressed the independence of the judiciary as crucial to legal institutions opening up channels for political activism. Moreover, it is worth emphasising that the possibilities of forming alliances within the legal complex and with civil society influence the capacity of the legal complex to ‘lead’ the fight for political liberalism.

Halliday et al. perform a noteworthy exercise in describing the amount of variation and diversity across the cases analysed in their volume to put forward a theory of the relationship between lawyers and political liberalism. However, they acknowledge that the outlier (legal complex conserving political illiberalism) cases prove that “mobilization by the legal complex is to be analysed by particular issues at particular times” (ibid: 28). The generalizability of their theory is therefore reduced to identifying the “mobilization opportunities across time” and space that allow the legal complex to mobilize, lawyers and civil society reduced to being *reactive* agents of change (Halliday and Karpik, 2001). This implies the lessening of the agency of lawyers and civil society actors in the process. Besides, I find that they provide little explanation of the negative cases to explain the institutional factors that impede or constrain lawyers from becoming agents of political change. Finally, in their explanation of lawyers leading the fight for political liberalism on behalf of people’s basic legal freedoms, they emphasise the relational aspects *within* the legal complex, while granting some importance to the creation of alliances *with* civil society groups. However, if lawyers “marched at the vanguard of these movements towards political liberalism” (Halliday et al. 2007: 1), I miss in their theorization an explanation of the relational aspects between the lawyers and legal complex, and the constituency it speaks for and whose rights it seeks to protect. What are the conditions that grant the legal complex the power to speak on behalf of a given constituency and where does their drive for political liberalism come from? And if the legal complex is to be considered a ‘vanguard’ of political liberalism, how much of its success relies on its capacity to represent and mobilize a constituency within civil society and outside the courtrooms? In sum, I take up the virtues of the studies compiled by Halliday et al. (2007) and suggest that a move from court-centred and procedural analysis to grounded and relational analysis can also provide some

insight into the conditions that determine why lawyers press for political change, or contract the spaces or limit the possibilities of other groups advancing political change, especially under authoritarian regimes.

In a similar fashion there is a wealth of literature that has shown the value of law for political activism in liberal democratic contexts. It has been argued that laws in these contexts have a progressive role in socio-political transformation by creating a ‘myth of rights’ (Scheingold, 2004), a belief or an expectation of rights and the legal system, and by triggering social action when people face cognitive dissonances between the expectations of those rights and what is actually realized in their daily situations. In this line, it has been shown that law is a useful resource in political movements. For example, in his case study of the civil rights movement in the United States (1954-1968), Scheingold (2004: xix) argued that the ‘myth of rights’ is not directly politically transformative because of the difficulty of translating rights into public policies and implementing them. The simple idea or belief in rights, however, is a resource in itself that creates expectations and shapes the identity and behaviour of people, which when mobilized, can have an indirect effect on political processes. Scheingold therefore studied the interplay between the ideology of rights (‘myth of rights’ in his words) and political action. In the American context, the everyday presence of rights and legal values is termed as “rights” or “legal consciousness”, or “the ways people understand and use law (...) Consciousness (...) is the way people conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world” (Merry, 1990: 5), which is also embedded in and constitutive of everyday life (Comaroff, 1985).

The linkage between rights or legal consciousness and legal and political action is based on the principle that law is realistic, convenient and moral because it seeks the maximization of individual freedom, and it rests “on reason and not on power” (Scheingold, 2004: 37). Law is a moral, rational, and realistic instrument that provides the basis for a system of belief or ideology that has more legitimacy than the political process, which is based on power. This decoupling of law and politics

based on rationality and power is troubling because it perceives law as an objective unit, just as the studies on rule of law under authoritarianism do.

This political use of law has been defined as “legal mobilization” (Zemans, 1983), “invoking legal norms” as “a form of political activity by which the citizenry uses public authority on its own behalf” (Zemans, 1983: 693). The assumption that law provides both the political opportunity and the institutional and discursive resources to be mobilized in political activism has been framed as the “legal mobilization theory”: a “synthetic approach to analysing law and social movements” that integrates the dispute-oriented analysis of legal studies with social movements theories about collective action based on the political process (McCann, 2004: 506). The perspective of law and social movements literature follows that of social movements and contentious politics, looking at opportunities, claims, resources, tactics, actors and outcomes.

Legal mobilization theory is rooted in the assumption that law “is a primary medium of social control and domination” (McCann, 1994: 9); however, law provides strategies of action, with discourse and symbols that are “malleable resources” (McCann, 1994: 6-9) for people to define interests and make claims, and to act within and outside the rights discourse and the legal system, to stimulate progressive action “on rights that have not been formally recognized or enforced” (Minow, 1987: 1867). Therefore, law is “a political instrument” (Scheingold, 2004: 95), that when mobilized, prompts citizens’ political participation and access to governmental authority by, for example, using the judicial branch of the government (Zemans, 1983). The most significant effect of legal mobilization is an indirect one: people’s empowerment, and raising their expectations (of authority, accountability and legitimacy) of the legal and political institutions. The disjunction between people’s beliefs, perceptions and ideas of rights and reality creates the cognitive dissonance that is necessary for political activation, to make use of governmental institutions and taking grievances to court. Legal mobilization by individuals or specific actors within social groups as activist lawyers can not only

have consequences in formal political processes, but also lead to the activation of social movements.

These propositions were expanded in McCann's (1994) research on the pay equity movement in the late 1970s and 1980s in the United States. He argued that the existing literature on social movements provided little positive outlook on the role of legal instruments and legal tactics in achieving political change. He showed how legal tactics provided substantial power to the pay equity movement in terms of resources, strategies and rights-based claims. Rights consciousness and legal mobilization enabled the movement to further itself in the phases of political negotiation and most importantly, movement formation or building. But it was organizing political activities and campaigns parallel to litigation that enabled the development of collective identities, collective sustained action and social movement development. Legal mobilization was therefore assumed to be "a legal catalysis" of social movement development, especially during the early stages of movement formation (McCann, 2004: 512; 1994: 48). However, it has also been argued that in specific contexts such as Egypt, judicial institutions "enabled activists to challenge state policy without having to initiate a broad social movement" (Mousafa, 2014: 287; El-Ghobashy, 2008; Moustafa, 2002), which is the case under authoritarianism.

As in Halliday et al.'s (2007) legal complex, in liberal democracies activist lawyers have been seen to be pivotal actors in legal mobilization, turning legal tactics into political mobilization (Scheingold, 2004: 210). This is due to lawyers' professional skills, as they are capable of teaching the language of rights, mediate in courts, "transform individual discontents into political demands" (Scheingold, 2004: 135), and of accessing legal channels effectively. McCann (1994: 50) also argued that lawyers become "leaders" and pivotal mobilizers in specific phases of an advocacy campaign, litigation, and movement development. He showed that an issue such as individual wage discrimination gained power and legitimacy in a collective spirit when lawyers framed it in terms of law and legal discourses (ibid: 51). Lawyers therefore enabled women to learn the rights discourse and engage in "naming" and

“claiming” directly in their workplace or everyday environment (ibid: 65). This showed that law provides both significant opportunities and the normative discourse that legitimizes the claims of movements at the very early stages of the process of formation.

McCann (1994: 41) also concluded that litigation can spill over into other forms of action and trigger grassroots participation in non-legal activity in support of a political cause. In this way, legal mobilization incites extra-legal political activity; however, it is not the law *per se*, but lawyers who incite and organize these other forms of political activity such as rallies, protests and marches. These forms of action in the American context are not unlawful, yet fall outside the formal legal institutions. Here the importance lies in organizing paralegal and sustained collective action *in combination* with legal action, in order for legal mobilization to have a political impact. This is a crucial insight to look for when studying legal mobilization with a comparative perspective, especially in authoritarian contexts where political freedoms and the possibilities for collective organization are constrained or absent.

Lawyers, however, are only one of the key players in the effective political mobilization of law. According to Epp (1998), the effective mobilization of law into political movements requires some pre-conditions: the existence of an organized leadership of activist lawyers and civil society organizations, and supportive political and legal structures. He developed a comparative study of the cases of the USA, India, Britain and Canada (all common law countries), where he examined four dimensions: constitutional structures, judges, rights consciousness, and strength of the support structure for legal mobilization. Due to the characteristics of the legal process (costly, slow and producing only incremental changes), legal tactics can actually be an obstacle to the development of a campaign or a movement because of the need for sustained engagement and resources. Hence, his study concluded that the development of rights (or the ‘rights revolution’) is mainly a result of pressure from below, from “deliberate, strategic organizing by rights advocates”, which was possible due to the existence of a “support structure for legal

mobilization" (ibid: 2-3). The precondition for the political mobilization of law is the existence of a support structure of civil society organizations and rights-advocacy lawyers and sources of funding (ibid: 18). The concept of support structure has been used to study legal mobilization in other political contexts; most significantly, Moustafa (2007: 44) refined Epp's concept to include reform-minded judges together with activists, forming a "judicial support network". Moreover, Diamant, Lubman and O'Brien (2005: 10) have argued that this concept "merits attention in studies of Chinese legal contention" to understand if these support structures exist or will develop in China, and if so, whether they will lead rights-based mobilization into building coalitions and creating solidarity for collective action. Hence, the aforementioned discussions provide an important reference point against which to test the Chinese case. In this thesis, therefore, I extend a comparative perspective to test the aforementioned theoretical and empirical propositions in an authoritarian context, and ask: *how and why do lawyers and civil society organizations use legal institutions to challenge the authoritarian regime (if at all)? Do these legal actors support legal mobilization with other grassroots paralegal or extra-legal actions and campaigns? To what extent does legal mobilization by legal actors such as lawyers and civil society organizations have the capacity to initiate broad political and social mobilization to challenge the authoritarian state?*

To test the validity of the aforementioned conclusions about law and resistance more generally it is necessary to carry out comparative studies in non-liberal democratic contexts. The findings outlined above from liberal democracies and common-law systems indicate that not only the political system is important, but also the legal tradition (and ideology), and cultural norms are significant factors. For example, Scheingold argued that in the American context, the strong belief in the basis that constitutional rights and the legal system in general provide ordered rules and patterns of behaviour for social interaction and political order that can account for Americans' proclivity to legal mobilization. "*The myth of rights rests on a faith in the political efficacy and ethical sufficiency of law as a principle of government*" (Scheingold, 2004: 17, emphasis in original). Whether it is due to the specific American liberal tradition or to the American culture, the fact that the legal

ideology is so present in the USA establishes significant grounds to explore the validity of these arguments in different socio-political contexts, questioning how much of the ‘myth’ and the ‘politics of rights’ is generalizable as a theory of how law operates in society and in politics.

2.2.1 Law and resistance in China

Similarly to the aforementioned studies, research has been conducted in China to examine the role of law as an instrument of resistance to the Party-state. Most notably, research has been conducted on the avenues opened by legal reforms to challenge the Party-state, for example, in terms of the administrative litigation to sue Party-officials for misconduct (O’Brien and Li, 2005); use of the Letters and Visits Offices (a medium for lodging complaints) (Cai, 2004; Chen, 2003; Minzner, 2006; Thireau and Hua, 2005; Li, Liu and O’Brien, 2012); use of legal channels to resolve various types of disputes, for example of HIV/AIDS and environmental pollution victims (Wilson, 2015) and labour disputes (Froissart, 2014; Gallagher, 2005a, 2006; Chen and Tang, 2013; Chen and Xu, 2012); development of a public interest bar or *weiquan* movement (Fu and Cullen, 2011; Pils, 2011); and appearance of a type of popular contention in rural China that has been classified as ‘rightful resistance’ (O’Brien, 1996; O’Brien and Li, 2006). Each of these forms of contention has been studied in relation to their significance in instigating political reforms. The underlying notion is that legal mobilization is a political action in its own right, especially in an authoritarian context, and that it has the potential to effectively bring about political change, democracy and the rule of law (Pils, 2011; Teng, 2009): “the invocation of legal norms and use of the legal system (legal mobilization) are even more intrinsically political in an authoritarian regime than in an established democracy” (Gallagher and Wang, 2011: 210).

As Epp (1998) indicated, the single most important factor for effective legal mobilization in political movements is the existence and leadership of a support structure. This support structure integrates political activists, lawyers, civil society organizations, and according to Moustafa (2012), reform-minded judges. Similarly,

for Halliday et al. (2007) and Halliday and Liu (2007), the capacity of the legal complex (legal professions) to fight for political liberalism is determined by the degree of independence and autonomy it enjoys. In China, Halliday and Liu (2007) have analysed the role of the legal complex (formed by criminal defendant lawyers) in furthering moments of legal liberalism, which they see as providing opportunities for future political liberalism (ibid: 103-105). However, more pessimistic views have proved that courts play a central role in securing the stability of the regime (Yu, 2009; Chen and Xu, 2012). Moreover, Michelson (2006: 27) indicates that “students of contemporary China have uncritically assumed that lawyers open courtroom doors and that improving procedural and distributive justice in the court-room improves justice writ large”. To temper the aforementioned optimistic view of lawyers as activists and reform-advocates, one should remember that the socialist legality ensures that the legal system serves the state’s interests (Lieberman, 2011; Michelson, 2003, 2006, 2007; Potter, 1999). Peerenboom (2002) in fact indicated that the legal profession is closely overseen by the Party-state in a sort of corporatist or clientelist relationship (Peerenboom, 2002: 15). He argues that the legal system itself restricts the possibilities of lawyers becoming activists: “given China’s more civil law system, lawyers are less likely to emerge as major catalysts for social change” (ibid: 15-16). To this factor, Michelson (2006) showed that lawyers in Beijing follow similar client screening practices as other lawyers in the world, deciding what cases to take on the basis of institutional and cultural factors: their own working conditions and economic pressure, and their evaluation of the moral character of the potential client. These screening practices have established lawyers as ‘gatekeepers to justice’ who may decline representation of cases (mainly labour disputes) of “the poor and powerless” (ibid: 27). Economic incentives and cultural factors therefore also contribute, together with political ones, in determining the political activism of lawyers. How then, can lawyers be the ‘vanguard’ of political liberalization in China?

In the more optimistic view, Fu (2011) has examined cause lawyering (in contrast to Halliday et al., 2007, who centred their thesis on political lawyering). Fu (2011) argues that public interest lawyers in China have actively used the law (and courts)

and use specific cases that do not challenge the legitimacy of the CPC to advocate for development of rights and policy changes, such as consumer, women's, and migrant workers' rights. However, he argued that the development of the “rule of law without politics” has “created strong incentives and limited opportunities for activist lawyers” (ibid: 341). The rise of public interest litigation (PIL), or cause lawyering, that is, “the use of litigation as a strategy to protect a general interest that is larger than that of the individual case interest” (Fu, 2011: 348; Fu and Cullen, 2010: 1), was initiated after 1995. This type of lawyering has been termed rights protection (*weiquan*, 维权) lawyering and is seen as a political action, as “lawyers use legal institutions and other platforms to challenge China's authoritarian system” (Fu and Cullen, 2011: 41). Fu and Cullen (ibid.) argue that some forms of moderate *weiquan* lawyering are related to public interest lawyers in the sense that both are faithful to the legal system and tend to work within the legal frameworks, but some *weiquan* lawyers move from such moderate stands to critical and radical approaches to oppose the system and create a socio-political transformation. Factors that account for the radicalizing process include political-legal contextual changes that create opportunities for certain issues (such as the constitutional amendment of 2004 that provided constitutional protection for human rights), professional experience with PIL, frustrations with the restrictions of the legal framework, identification with the client or client radicalism, or the fame and public attention the lawyer has attracted (as a protective mechanism). These are lawyer-centred, but also institutional.

Given the institutional legacies of the socialist period (Lieberman, 2011; Michelson, 2006, 2007) and the institutional constraints on lawyers' activism (Michelson, 2006, 2007), this thesis asks: *how and why do legal professionals and civil society organizations constitute a support structure for solidarity action in authoritarian China?* With the aim of theory testing, this thesis uses the aforementioned theorizations about the role of law in political activism as a framework to study the phenomenon in the Chinese case.

Beyond examining the political role of lawyers, there is important research on the role of law in popular contention in rural China, and in labour struggles. O'Brien and Li (2006) explain that in rural China a form of contention or 'rightful resistance' has appeared. Operating with social movements theory, they build their argument on the basis of opportunity structures (Eisinger, 1973; McAdam, 1996; Tarrow, 1998), claim framing (Goffman, 1975), and repertoires of action (McAdam et al., 2001). They define rightful resistance as "a form of popular contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power (...). In particular, rightful resistance entails innovative use of laws, policies, and other officially promoted values to defy disloyal political and economic elites" (O'Brien and Li, 2006: 2). In their view, it is actually the poor implementation of central policies at the local level that presents opportunities for people to express their grievances and organize rightful resistance, to hold the state accountable to its own policies. Rightful resistance implies "employing authorized symbols to pose inconvenient rhetorical questions, these villagers wrap their resistance in sweet reason and tender impeccably respectable demands; at the same time, their rebukes reflect growing rights consciousness and a claim to equal status before the law" (ibid: 7).

O'Brien and Li grant most attention to the structural openings or opportunities that are provided by, for example, legal reform or policy reform, in shaping popular contention. They assume that rightful resisters enjoy growing rights consciousness but include little account of how people's identities, consciousness, perceptions and rationales of action are formed, and how these factors account for their rightful resistance. Shared identities have been central in theorizations about collective action, consciousness being shaped either by structural factors, material conditions, language, culture, and/or social relations (Barker et al., 2013; della Porta and Diani, 2006; Fantasia, 1988; Giddens, 1980; Thompson, 1980). There is virtue therefore in exploring the factors, processes and mechanisms (including socio-cognitive) that link individual consciousness with collective action, rather than assuming that certain forms of action are derived from specific types of consciousness, and thereafter elaborating on their political impact.

Rightful resistance, O'Brien and Li argue, could become a considerable challenge for the regime when rightful resisters start acting outside the prevailing rules and try to advance their interests and assert new rights (ibid: 127-128), most significantly, by "fostering changes in political identities", in particular, by extending the "rights talk" into claims to political rights (citizenship rights) (ibid: 116-123). This prognosis corresponds to a Western-centric liberal understanding of rights of freedoms of speech, movement, property and association (Halliday et al., 2007: 3). "Such entitlements become citizenship rights when the object of claims is a state or its agent and the successful claimant qualifies by simple membership in a broad category of persons subject to the state's jurisdiction" (Tilly, 1998: 57). There is also a presumed linearity in the conception of rights as derived of popular struggles and collective action that historically have challenged the state to turn peoples' interests into rights (Chen and Tang, 2013; Tilly, 1999). More so, there is an understanding that popular struggles will turn political because of claiming citizenship rights, which include civil, political and social ones (Giddens, 1982; Tilly, 1998: 59, in reference to T.H. Marshall, 1965). Hence, it follows that engaging in rights-based actions in authoritarian contexts is a political action with potential challenges for the regime: Goldman writes that "[o]ne of the major changes in the last two decades of the twentieth century was a growing sense of rights consciousness, particularly of political rights" which, she argues has the potential "to produce in China changes as profound as those that occurred earlier in Eastern Europe" (Goldman, 2005: 2, 24). However, Zhou (2005: 1) argues that this conception of rights is particular to the Western political tradition of liberalism, and that in China "the liberal notion of rights as we know it would be unlikely to provide a viable language for articulating visions of political change *vis-à-vis* democratization".

In post-Socialist countries transitioning to a market economy, Burawoy and Lukacs (1992) argued that market liberalization opens up channels for labour activism to be absorbed and therefore, pacified. One such alternative channel for labour activism in authoritarian China is the legal channel. It has been argued in a number of studies that legal institutions provide workers with a mechanism to individually address their grievances (Gallagher 2005a, 2006), or state-sanctioned channels to

resolve labour conflict (Chan and Pun, 2009; Gallagher, 2005; Lee, 2010; Lee and Hsing, 2010). Legal mobilization is characterized by workers' use of the available and authorized legal and judicial mechanisms to address their grievances and make claims on management and/or on the Party-state, for example, using the law to file a lawsuit against the employer for non-payment of wages. Legal mobilization to resolve labour disputes therefore can be seen as a form of 'contained contention' (McAdam et al., 2001; Chen, 2003), as it creates mechanisms for workers to air their grievances at the same time that it enables the CPC to remain in control of these disputes and maintain social order.

However, it has also been argued that "inadvertently and sometimes serendipitously, legal reform has made the state a catalyst of labour activism" (Lee, 2007a: 61), precisely because it has opened up spaces for resistance, as the literature above suggests. The extent to which legal reforms have been assumed to catalyse labour activism has been studied through two lenses: 1) workers' legal mobilization; and 2) workers' collective action and solidarity. As Lee (2007a) suggests, legal reform has propelled labour struggle in China. A number of studies have claimed an increasing 'rights consciousness' among Chinese workers (Gallagher, 2006; Goldman, 2005; Froissart, 2005; Lee, 2007a; Li, 2010; Lorentzen and Scoggins, 2015; Pei, 2000; Wong, 2011; Yang, 2005; Zhang, 2012), which has been taken as a central indicator of the role of law in labour conflict, both in terms of the increasing use of rights and legal rhetoric to make claims, and the use of legal channels to resolve disputes. It appears that in the literature there is an unspoken consensus that policy and legal reforms have provided the basis for the increase of workers' rights consciousness, with the legal aid movement (Chan, 2011; Gallagher, 2006, 2007) and labour NGOs (Chan, 2013; Lee and Shen, 2011) instrumentally educating workers on their legal rights. The Party-state and its policies are presumed to be the origin of such rights consciousness, workers reacting and complying with the entitlements recognized by law; hence, laws shape workers' rights-based actions (as discussed below). This understanding does not take into account workers' rights conceptions prior to the existence of the labour laws, or their agency over this rights consciousness formation.

Lorentzen and Scoggins (2015) have attempted to address the conceptual lack of clarity of the term ‘rights consciousness’ by using rational choice and game theory methods. They define rights consciousness as “a greater willingness by an aggrieved individual or group to make a claim for redress on the basis of a ‘right’” (ibid: 639-640). By analysing “the choice to make a rights claim” in “high-profile cases of rights claims in China” (ibid: 640) compiled from newspaper reports, they design a model that explains rights consciousness as a result of three changes: in values, in state policies, and in societal equilibrium (shared expectations). They argue that rights consciousness that results from changes in state policies is likely to have stabilizing effects, while that which emanates from changes in values and in shared expectations could have destabilizing effects (ibid: 654). Hence, certain types of rights consciousness may directly pose a challenge to the Party-state, while others do not. Their study certainly brings some value to the discussion on rights consciousness in terms of disaggregating the concept. However, the lack of empirical evidence to support why people made the choices of action that they did in the three cases that they research means that their model is based on suppositions and hypothesis, and the methodological flaws of game theory are embedded in it. Ethnographic research provides a much deeper understanding of why people make the choices that they do, and the rationales and explanations they provide for those actions. This methodology also allows the revealing of people’s consciousness in their own words, instead of presuming it from their forms and types of actions.

In this sense, Gallagher (2006) follows Merry’s (1990) ethnographic dispute analysis approach to the study of legal consciousness formation while workers engage with the legal system. In Gallagher’s (2006) study in legal aid centres, she is more precise in referring to legal consciousness as a result of legal aid plaintiffs’ engagement with the legal system, and argues that this process occurs in two separate dimensions: in terms of feelings of efficacy and competency, and perceptions and evaluations of the legal system. With this study she tries to address the gap in the existing literature that reaches conclusions based on observed attitudes and behaviours (Hendley, 2004). In an extended study, Gallagher and Wang (2011)

compare the formation of legal consciousness among users and non-users to show the importance of legal experience in creating a positive attitude towards the legal system, which ultimately, they argue, “is part of the strategy to avoid democracy” (2011: 204). They argue that people’s evaluation of the legal system depends on political identity (citizenship, political socialization, role of the state in the dispute), and find that workers’ attitudes towards the legal system are shaped by their experience of it: experience with the legal system decreases the view that the system is efficient and responsive, but disenchanted plaintiffs might still have positive attitudes due to their increased sense of internal efficacy and better understanding of the procedures. But where do the perceptions and beliefs about the legal system of workers’ without experience with the legal system originate? How do these perceptions inform their choice to take legal action? And more importantly, how do these beliefs work for the benefit or challenge the legitimacy of the rule of law ideology, which the CPC is building on to remain in power? This thesis therefore asks: *how and why are laws understood and used by ordinary people, workers in particular?*

The studies above, including Gallagher and Wang’s (2010), examine the effects of legal institutions on people’s beliefs and attitudes towards the law, and more broadly, extract conclusions about their actions *vis-à-vis* the Party-state as being political by nature. These studies assume an institutional unidirectional relationship between legal institutions and people’s attitudes, beliefs and actions, without considering people’s (workers’ in particular) social constructions, knowledge and popular practices *prior* to the law, and how these inform their beliefs, actions and choices of engaging with the legal system. I consider there is a considerable gap in the literature in terms of analysing people’s local knowledge and practices *vis-à-vis* the law. This is important methodologically, empirically and theoretically, to better understand the likelihood of legal institutions taking root in Chinese society and being viewed as legitimate tools of resistance or governance. In general, it has been assumed that the increased use of legal mechanisms to resolve disputes is due to people’s increased rights consciousness, which in turn can potentially have a destabilizing effect for a given regime, especially an authoritarian one. However,

the extent to which legal institutions become instruments of resistance not only depends on institutional constraints on the autonomy of the legal system, support and opportunity structures of legal mobilization and people's attitudes once engaged with the law, but also on how much people accept these institutions as valid and legitimate forms of action and see the virtue of engaging with the law to protect and/or extend their interests. There has not been sufficient exploration of what informs people's beliefs about the legal system prior to having contact with it, whether the system is legitimate in their eyes, and why they decide to use it. Furthermore, conclusions have been reached about how legal institutions ultimately embolden the legitimacy of the CPC because they provide people with a new ideology (Landry, 2008; Lubman, 1999; Peerenboom, 2002), a sense of political participation through input institutions (Nathan, 2003) and an outlet for people's grievances (Diamant et al., 2005: 4). However, very little evidence has been provided on how legitimate the legal system actually is in the eyes of Chinese people, and why it is so (or not). This thesis addresses this gap, providing nuance to the relationship between law and political change and/or stability.

In terms of how rights consciousness frames or triggers workers' mobilization, it has previously been argued that legal institutions partake in the making of a new working class of migrant workers (*nongmingong*, 农民工, or *dagong*, 打工) (Pun, 1999, 2005, 2009; Chan and Pun, 2009) which differs from the traditional working class of the Maoist period (see Chapter Three). The new legal institutions provide workers with the basis for their increasing rights consciousness, which then is the explanatory factor for their activism. Lee (2007) examined the factors that determine workers' mobilizations in two different socio-economic settings, the Northern Rustbelt in China where state-owned enterprise workers prevail, and the Southern Sunbelt where the majority of workers are migrant workers in private and foreign-invested sector. She argues that political, economic and legal institutions all determine workers' identity, which in turn affects their forms of action. Similar to the discussion above about rightful resistance, central in her analytical framework were the categories of citizenship, proletariat and subaltern, all of which forge workers' subjectivity. Of these three, she argues, "the most empowering identity

workers have found is grounded in one variation of citizenship – citizens' rights to legal justice (...) As workers and the general public learn to articulate their grievances and demands by adopting the language of the state, in this case legalistic language, a process of subject formation takes on a life of its own" (Lee, 2007a: 27). Lee's findings on workers' subjectivity formation support the idea that rights consciousness derives from the legal institutions of the Party-state, and that this rights consciousness is linked to ideas of citizenship, which will lead workers to political action in pursuit of civil and political rights.

In the literature there is also the underlying circular assumption that rights evolve from interests, and that rights-based action gives way to further interest-based action (Clarke et al., 2007). On some occasions, authors make a clear distinction between interests and rights, and elaborate on how interests precede rights (Chan, 2011; Chan and Siu, 2012; Feng and Tang, 2013). Rights refer to entitlements that are enshrined in law, and that the Party-state, responsible for the welfare of the people, is supposed to protect; while interests are 'not yet' defined as rights. In general, rights have historically originated "from the confluence of work on state transformation and work on collective action" (Tilly, 1998: 57). In particular, on labour rights: "economic rights had to be won by the working class in the face of opposition both from employers and from the state" (Giddens, 1982: 172). Hence, following a conceptualization of rights based on T.H. Marshall's (1965) theory of citizenship¹⁰, workers' rights were derived from class- or interest-based action; class conflict therefore being "*the medium of the extension of citizenship rights*" (ibid: 174, emphasis in original).

Chan and Pun (2009) showed that there were indeed signs of class-based action in China, workers being more class-conscious and therefore engaging in interest-based action, which does not preclude them from using rights discourse. Interest-based action mainly takes the shape of protests, strikes and other forms of

¹⁰ Based on Western industrialized nations, England in particular, civil and political rights precede social rights. Consequently, collective labour rights as the civil rights of workers as a class (industrial citizenship) precede the institutionalization of individual rights of workers (social rights) (Chen, 2007).

workplace collective action. Chan (2012: 325) actually states that “legality is merely one of the strategies or resources workers employ to advance their interests”, noticing that rights-based action is used to assert interests as well as rights.

The conceptual distinction between rights and interests, and their different forms of action, is clear in Chan’s (2011) comparative study. Rights-based protests take place in China in relation to violations of workers’ legal rights, while interest-based protests were found in Vietnam where workers’ demands went beyond the minimum legal standards (ibid: 46). Chan also argues that, in China, rights protection (*weiquan*) has been framed around a rights discourse based on the word ‘rights’ (*quanyi*, 权益), which, when “used in China today about labour issues it refers almost exclusively to legal rights, not to interests” (ibid: 49). Hence, rights protection has mainly led to a reactive rights-based set of actions in response to rights violations, and not to “pro-active behaviour” such as collective bargaining to pursue interests (ibid.).

Similarly, Chen and Tang (2013) classify labour conflicts in China according to the bases, claims and framing workers use: rights, interests, or pre-reform entitlements. In an attempt to provide conceptual clarity to the discussion about labour conflict in China, they argue that the source of rights-based claims rests on the state’s legal institutions: “once a legal institution governing labour relations is in place, the demarcation between rights-based and interest-based labour conflicts can be largely made” (2013: 563). Hence, they define rights as “legally sanctioned interests” while interests go beyond and “ask for more” than the law stipulates: “interest-based disputes involve workers’ demands for economic benefits beyond those stipulated in law (...) Interest-based claims have commonly been expressed in positional terms that embody a raw sense of economic justice” (ibid: 564-565). In addition, labour conflicts pertaining to the pre-reform era are those in which workers’ claims refer to their dependency on the state enterprise for the provision of welfare. Finally, they indicate that these three types of labour resistance have evolved historically from pre-reform entitlement claims, to rights-based conflicts, to now an increasingly interest-based conflict. Interest-based conflicts take the form

of collective protests and spill outside of the legal system because interest-based claims are not legally recognized. Hence, these forms of consciousness and action have the potential to profoundly challenge the Party-state “to build institutions to channel these energies” (ibid: 583), one of them being collective bargaining through the trade union (Chan, 2011).

In this respect, Chan (2011) argues that interest-based claims require a proactive and collective behaviour, collective bargaining being the most suitable channel to pursue workers’ interests; this means that basically interests are to be pursued through the trade union, the All China Federation of Trade Unions (ACFTU). However, workers continue to pursue their interests without the support of the ACFTU (Chan, 2010a, 2010b; Chan and Hui, 2013; Chan and Pun, 2009), as most forms of workers’ collective actions are autonomous protests, direct action, and ‘wildcat’ strikes (without the support or endorsement of the ACFTU). There have been a number of labour actions that reflect interest-based claims and the fact that Chinese workers use the language of rights and legal action to resolve their grievances does not necessarily mean that workers are not pursuing their interests. Clear-cut conclusions have been arrived at in the literature about rights versus interests awareness based on the types of actions workers take in China, with the underlying assumption that rights consciousness precludes workers’ class consciousness. However, there is not sufficient evidence of what workers understand as their rights as opposed to their interests, why they use the discourse of rights rather than class (interests), and what their rationales are for taking legal action against other forms of action.

Another example of how rights-based conflict can represent a challenge to the *status quo* of the regime is because it incites workers to demand more than they are entitled to, and to put pressure on the institutions of the Party-state, including the trade union. This corresponds to O’Brien and Li’s (2006) prognosis that rightful resistance or the ‘rights talk’ can generate a change in political identities and trigger demands for citizenship rights. This is also in line with Scheingold’s (2004) ‘myth of rights’, and Minow’s assertion that the idea of rights or rights consciousness can

stimulate the imagination and action “on rights that have not been formally recognized or enforced” (Minow, 1987: 1867). Hence, rights consciousness can trigger political action when people believe in rights that are not yet recognized and use litigation or other forms of action, such as protests and strikes, as political means to establish these interests as rights. The challenge then lies in the capacity of the Party-state to absorb these pressures without undergoing significant systemic change, something it has proved to be incredibly skilful at, as pointed out above (Heilmann and Perry, 2011; Liebman, 2011; Nathan, 2003).

In sum, the assertion (and expectation) in the literature is that legal reform leads to rights consciousness, which leads to legal mobilization or rights-based action, which then, in turn, has the capacity to trigger other forms of interest-based activism or political actions to make claims on the Party-state on the basis of political or citizenship rights. This form of activism can challenge the stability (both economic and political) of the regime. Legal institutions have been seen to provide the opportunity and resources for workers to develop their activist behaviour (Chan, 2010a), and engage in more interest-based and collective forms of action outside the frames of the law. The increase of rights consciousness brings about “not only increases [in] the frequency of resistance, but changes the forms of such resistance” (Pei, 2000: 20). Thus, legal institutions could, in fact, trigger a ‘radicalization of labour’ (Lee, 2007a: 160), as a sort of “post-socialist labour insurgency” (Lee, 2002). Howell (2008) suggests that the transition to the market economy and the legal reforms have provided workers with alternative forms of organization. The gradual structural and institutional changes following the broadening of market relations have extended the rights and opportunities of subordinate groups such as workers, and have provided spaces for new forms of organizing – labour NGOs – and inclusive institutions for workers to foster institutional changes that benefit them (Howell, 2016: 7, 21). This, she argues in line with North et al. (2009), can create “the doorstep conditions of democratic political transition” (Howell, 2016: 22).

On a contrasting note to the studies above on rights consciousness, rights-based action and its political significance, Perry (2008) calls for a tempering of the enthusiastic readings of ‘increasing rights consciousness’. She argues that the literature on rights consciousness has based the analysis of rights on Western conceptions of individual rights to property, liberty and legal justice, among others, as pointed out above. In turn, this analysis of rights has led to misinterpreting the political undertones of Chinese claims to citizenship. She argues that Chinese conceptions of rights have a long tradition, but based on concepts of livelihoods, subsistence and development, “from Mencius to Mao –and beyond” (Perry, 2008: 38). Therefore, the rhetoric of rights, or the rights consciousness found in previous studies should be better termed as “rules consciousness”, and the rights-based action should be better understood as “an expression of ‘politics as usual’” (Perry, 2009: 18), or “system-supportive” (Perry, 2008: 45) actions. These actions aim not to challenge the state, but show that Chinese people, among them, workers, seek to use the state-authorized channels to better their livelihoods or “to negotiate a better bargain with the authoritarian state” (Perry, 2009: 20), but not to bring it down. I find Perry’s arguments extremely insightful, calling for an interrogation of the nature of rights as contingent to historical, political and cultural contexts, which has not always been done in previous studies. As mentioned above, previous studies have taken law as an objective and discrete unit, without analysing its nature and historical process. I draw inspiration from Perry’s arguments in this thesis and aim to provide empirical evidence of Chinese conceptions of rights *vis-à-vis* the new legal rights, to better understand the political value of legal institutions, rights-based action or legal mobilization in the authoritarian regime.

2.3 Concluding remarks

In this chapter I have established the theoretical framework that guides this study, reviewing the literature on the rule of law in authoritarianism on the one hand, and law and political activism/social movements on the other. In the next chapters I test and refine the theory, extending comparative evidence from China by examining a number of propositions set out in the aforementioned literature.

I have also outlined the main themes that will be examined in this study. In relation to how legal institutions entrench authoritarianism, there are four main factors that need to be examined: (judicial) independence, institutional fragmentation, core compliance, and constraints on the support structures. Moreover, studies on the rule of law in authoritarian contexts have also stressed the role of legal institutions in supporting regime legitimacy. In the following chapters I will provide evidence from the Chinese case to examine the validity of these arguments. I have also asserted that previous studies of the rule of law in authoritarian contexts have provided little analysis of the nature of legal institutions; been largely institutionalist and institution-centred, without looking at the processes of law in action beyond the courtrooms; and when studying the political role of law, there has been a large oversight of non-elites' agency (beyond political elites and legal professionals). I have therefore argued that a grounded analysis of legal institutions outside the courtrooms can shed some light on the value of law in everyday political life, and most interestingly, examine if and how legal institutions bolster regime legitimacy by looking into popular opinions, perceptions and uses of the legal institutions.

In relation to law and social movements and contentious politics (resistance), the five main themes identified are: rights and legal consciousness triggers rights-based action; lawyers constitute the 'vanguard' of political activism; legal mobilization is politically effective if it comes with a support structure of lawyers and civil society organizations (and their resources – skills and funding); legal mobilization (as rights-based action) is a catalyst of social movement formation; and legal mobilization is politically significant if combined with parallel collective action and political campaigns. In the Chinese context, there has been fruitful research on rightful resistance (O'Brien and Li, 2006), *weiquan* lawyers' activism (Fu and Cullen, 2008, 2010, 2011; Pils, 2011; Teng, 2009), and legal mobilization in labour disputes (Froissart, 2014; Gallagher, 2005a, 2006; Gallagher and Wang, 2011). These studies conclude either that rights-based action can potentially trigger political transformations (even democratic systemic change) or that it is regime stabilizing. In any case, as in the literature on law and authoritarianism, these pieces of

research take legal institutions, and, more significantly, rights, as discrete units but do not examine their nature and historical processes. The present study aims to examine the nature of legal institutions in contrast to prevalent conceptions of rights, that is, legal and political culture. A grounded, historical and culturally sensitive analysis of rights is necessary to better understand the political relevance of rights- and interest-based actions in China. Furthermore, such an approach will also contrast with the research reviewed in this chapter, by providing an analysis of law in action as a relational process in which different actors have agency, not just 'reactive' capacity.

In sum, in contrast to an overly institutionalist (and court-centred) approach to the study of legal institutions, which responds to a thin (instrumental and procedural) conception of rule of law, I have suggested in this chapter that it is useful for both theoretical and methodological reasons to follow a thick conception of rule of law and examine the nature of legal institutions *vis-à-vis* popular conceptions of rights and justice. This ethnographic-oriented, or law *in* society (Ewich and Silbey, 1998) approach, will allow for a grounded understanding of the degree of penetration of the rule of law in Chinese society that will inform how legitimate legal institutions are seen in the eyes of ordinary people, which more broadly will indicate if and how legal institutions bolster regime legitimacy, and if so, why. This approach has rarely been adopted in the existing studies of China's legal-political life, and will not only contribute to a more nuanced understanding of the role of law in Chinese political life, but also to the theoretical discussion about the role of law in comparative politics and contentious politics.

Chapter Three

Governing labour through law

“This Law is enacted in order to improve the labour contract system, define the rights and obligations of both parties to a labour contract, protect the legitimate rights and interests of workers, and establish and develop a harmonious and stable labour relationship.” (Labour Contract Law, 2007, Article 1)

China initiated its transition to a market economy in 1978. Under the socialist or planned economy, social, political and productive life in urban China was organized under the work unit, or *danwei* (单位). With the advent of the ‘socialist market economy’ (*shehuizhuyi shichangjingji*, 社会主义市场经济) life as known under Chinese socialism was radically transformed, social relations and relations of production being reshaped and restructured to fit the capitalist logic. Consequently, the Party-state retreated from planning and managing the economy, relinquishing some of its monopoly over the distribution of resources (Naughton, 2008). However, far from being unregulated, capitalism in China has been fostered by the Party-state, as a form of ‘bureaucratic capitalism’ (Meisner, 1996) or “state capitalism” (Lin, 2015: 24). At the local level, the decentralized political structure gave way to a variety of modes of convergence between a rising entrepreneurial class and the local political elite, characterised as ‘state entrepreneurialism’ (Blecher, 1991; Blecher and Shue, 1996; Duckett, 1998), ‘bureau-preneurialism’ (Lu, 2000: 275), ‘local state corporatism’ (Oi, 1992, 1995), or ‘socialist corporatism’ (Pearson, 1994). Others have argued that the Party-state has restored capitalism in a Gramscian ‘passive revolution’ (Gray, 2010), restoring class relations with a combination of institutional economic reforms, on the one hand, and rhetorical devices on the other that build the ‘ideological state apparatus’ (Lin, 2015), to secure the CPC’s hegemony (Hui, 2014).

The role of the Party-state in market transition is seen from a variety of perspectives; however, the undisputable common point is that the Party-state at national and local levels has been the driving force of capitalist development in China. The central government has been engaged in an institutionalization process, which has both secured private property and facilitated market processes in the Chinese economy, at the same time that it has enabled the CPC to remain in

political power as grantor of the wonders of China's economic development. Particularly pertaining to relations of production, "the state's withdrawal from direct management of industrial relations required the development of labour laws and regulations" (Pringle, 2011: 41). Between 1979 and 1994 approximately 160 labour regulations and rules were issued (Ngok, 2008: 49). In 1994 the Labour Law was enacted, followed by the Labour Contract Law (LCL), the Labour Disputes Mediation and Arbitration Law (LDMAL) and the Employment Promotion Law, enacted in 2007. Such a prolific legal development is indicative of an institutionalization process through which the CPC aimed to support the market economy and thus, strengthen (and regain) its legitimacy. As Gilley (2008: 260) suggests, legitimacy is both explanatory and constitutive of institutional change, and "maintaining legitimacy means shifting institutions to generate valued performance". Some argue that after 1992, and especially since China's accession to the WTO in 2001, this performance rests to a great extent on sustained economic growth (Peerenboom, 2002).

Authoritarian regimes create regulatory and legal institutions to govern economic relations to facilitate market transitions by providing credible commitments to property rights: "establishing autonomous institutions is a common strategy to ensure credible and enduring policies in the economic sphere" (Moustafa, 2007: 7). Legal institutions and legal mechanisms to channel disputes have therefore enabled the CPC to undergo titanic economic transformations without systemic change (Nathan, 2003; Peerenboom, 2002). Labour laws, in particular, have fulfilled this function for the Party-state, by redefining and legislating labour relations on the basis of property rights (labour as a property that can be sold in the marketplace) and by providing an attractive environment for foreign direct investment. Although the CPC has not officially endorsed capitalist relations of production, China's 'socialist market economy' and its labour laws implicitly acknowledge antagonistic class relations between labour and capital based on the principle of property, that the state is to regulate by protecting labour from the excesses of the market, and managing and containing labour conflict. In this sense, labour laws were also a historical response to the mounting labour struggle in the 1990s of state-owned

enterprise (SOE) workers that had lost their pre-reform entitlements from the ‘moral economy’ (Scott, 1976; Chen, 2000; Chen and Tang, 2011; Lee, 2007; Solinger, 2001). The CPC therefore adapted its governance mechanisms to the internal and external pressures of the time and enacted a number of labour laws to govern labour relations. Hence, labour laws have a two-fold purpose for the resilience of the Chinese authoritarian regime: secure private property rights and support the market economy on the one hand; and safeguard social order, particularly industrial peace on the other.

In this chapter, I first provide the economic historical overview of the main transformations that have occurred since 1978 from the *danwei* system to the labour legal framework in section 3.1. Sections 3.2 and 3.3 present the ‘double movement’ (Polanyi, 2001) or double functions of labour laws as pacifiers of labour unrest and protectors of labour by regulating capital. In section 3.3 I examine the nature of the labour laws, dissecting the main changes introduced in terms of labour contracts, labour dispute resolution, and worker representation. In section 3.4 I argue that given the inefficiencies and constraints of the trade union in representing workers’ interests, new actors have appeared to mediate in labour relations (also some to perform governance functions) and protect workers’ rights: labour NGOs. All in all, legal institutions, and traditional (ACFTU) and new actors (labour NGOs, LAL NGOs and lawyers) representing workers partake in the new governing system of labour in China. Examining the institutional framework through which the Party-state regulates and governs labour relations, and the nature of its development, will provide the first insights into how labour laws correspond to the adaptive governance (Heilmann and Perry, 2011) of the CPC, to sustain the authoritarian regime. Section 3.5 provides concluding remarks.

3.1 From the *danwei* to the labour contract

In Maoist China, the organization of production was characterised by the state’s allocation of labour and determination of wages (Knight and Song, 2005; Gallagher, 2005b; White, 1988). The socialist state allocated labour into an all-encompassing

structure of work units (*danwei*), which guaranteed workers lifetime employment (so-called ‘iron rice bowl’, *tiefanwan*, 铁饭碗) and material entitlements as housing, social welfare, and education. In the planned economy of the Maoist period, the labour regime of the *danwei* was a system of ‘organized dependency’ of workers on the state (Walder, 1986), in which material benefits were distributed according to production targets and outcomes. Everyday life was highly politicised and there was an overall penetration of the state into society. Lü and Perry (1997: 5-6) note that the *danwei* had five attributes: management of labour force (hire, fire and transfer); provision of welfare as housing, or communal facilities; independent accounting; organization in urban industrial sector; and public sector. Pringle (2011: 12) adds three characteristics: labour stability; a “top-down administrative remuneration system”; and “the ideological integration of the interests of managers and managed”. In the *danwei*, management was performed through three committees (*lao san hui*, 老三会): the Factory Management Committee, Workers’ Representative Conference, and, run by the trade union, the Staff and Workers Congress (Pringle, 2011; Sheehan, 1998). Walder (1986) argues that this structure within the *danwei* system established a bargaining system between workers and management to determine wages, working conditions, welfare, and the like, meaning that there was a direct participation of workers – or dependency thereof – on the representative within the trade union for bargaining and participation in the workplace. This system enabled the sharing of interests and the ideological integration between managers and workers, which ultimately achieved workers’ compliance to communist authority, what Walder (1986) labelled as ‘communist neo-traditionalism’¹¹.

¹¹ The central feature of this ‘communist neo-traditionalist’ system was “networks of patron-client relations that links the party organization and shop management” (Walder, 1986: 24), under which rank-and-file workers would pursue their interests via informal social ties with supervisors, managers or officials with power within the enterprise, informally negotiating their interests and grievances as individuals within the framework described, negotiating individually with the supervisor whom they had a personal association with, or collectively “through an informal pattern of ‘bargaining’” (ibid: 20).

Despite the average increase of government investment during the socialist period, and an increase in industrial output at an average annual rate of 11.5% (Naughton, 2007: 56), it is claimed that the *danwei* system resulted in an inefficient state-owned sector. It has been argued that the *danwei* system was overstaffed with unskilled and unnecessary labour (Korzec, 1992; White, 1987, 1988), where workers lacked incentives to perform and increase productivity (Howell, 1993), as they enjoyed life-tenure (and other mechanisms of secure employment, as the *dingti* -顶替- allocation mechanism through which parents' employment was inherited), lacked mobility options, and enjoyed relatively high standards of living and social welfare and material benefits. Therefore, at the end of the Maoist period unemployment levels appeared to be rising, while the economy was stagnating with inefficient capital – and technology-intensive industries and a virtually non-existent services sector (White, 1989; Pringle, 2011: 24; Naughton, 2007: 81).

With China's Open Policy a ground-breaking transition to a market economy was initiated. In practice, it meant allowing foreign direct investment and foreign trade to expand onto Chinese soil¹² and build industries capable of absorbing the growing numbers of unemployed¹³ workers and increasing surplus of rural labour force (approximately 35% of the total; White, 1989: 154; Howell, 1993; Lee, 2007a). With the creation of Special Economic Zones (SEZ) and the diversification of enterprises by ownership types (Joint Ventures, and later Wholly Foreign Owned Enterprises), "dramatic changes in labour policy, institutions and relations" (Howell, 1993: 209) were to follow.

To start with, the composition of the Chinese workforce was transformed in both the rural and urban sectors, as were labour relations and managerial practices in the mid-1980s. In the rural economy, household-based smallholding agriculture replaced the collective communes; and market-oriented public enterprises were

¹² There is a wealth of literature on China's market transition. See Brandt and Rawski (2008); Crane (1990); Gallagher (2005b); Gu (1997); Howell (1993); Naughton (1995, 2008); Nolan (2004); Oi (1992, 1995); Oi and Walder (1999); Solinger (1993); White (1987).

¹³ Note that, in order to avoid the use of the term 'unemployment', various euphemisms were used to describe people without employment, such as 'waiting for a job' or 'searching for a job'.

promoted, the Township and Village Enterprises (TVEs). Foreign Direct Investment in SEZs, growing discretionary power of enterprise directors over hiring and firing and a more general subjection of SOEs to profitability-criteria began to transform the urban economy. “The most significant change since 1978 has been the expansion of the private sector which, by 1985, was providing 13.6% of new urban jobs and largely lies outside the framework of administrative labour allocation” (White, 1988: 183). Employment in the private and non-state sector grew while state-owned employment seriously declined (Cai et al., 2008). With the privatisation of SOEs under the so-called ‘seizing the large and letting go of the small’ (*zhuada fangxiao*, 抓大放小) policy after 1997, state-owned enterprise workers were dismissed on a large scale.¹⁴ Privatization allowed the merging of foreign and domestic private capital with small and medium public enterprises (Gallagher, 2005b; Gu, 1997), adding diversification to enterprise ownership, and therefore, managerial practices.

Addressing the complaints of foreign investors about labour rigidity and the lack of autonomy in personnel management early on (Gallagher, 2005b), the Chinese government enacted the Equity Joint Venture Law of 1979, which was extended in 1980, to grant more power to enterprises in SEZs to manage labour, hire and fire workers, and establish wages more flexibly. With the Provisions of the State Council of the PRC for the Encouragement of Foreign Investment of 1986, managers in foreign-invested enterprises could hire and fire workers in relation to production requirements, with the mediation of the Labour Service Corporations, a new set of non-state institutions designed to facilitate labour allocation, and approval of the Labour Bureau (Howell, 1993).

Gradually market forces determined employment and remuneration. For basic ideological and political reasons, the conservative factions of the CPC were

¹⁴ Urban employment in the state-owned sector decreased throughout the 1990s and 2000s, from 75.5% of total urban employment in 1994 to 51.9% in 2009, in parallel with a significant increase of the workforce entering other ownership enterprises (including private, foreign-owned, and joint-venture firms), which increased from 5% in 1994 to 44% in 2009 (China Labour Statistical Yearbook, 2010).

reluctant to allow labour markets, as it would recognize labour as a commodity, which is incompatible with the “theoretical axiom” of Chinese Marxism-Leninism up to that point (White, 1988: 189). A market-oriented labour regime would not only eliminate the basic egalitarian principle of the socialist labour regime and recognize capitalist relations of production, but also dissolve the social contract between the state and society, which would in turn represent a challenge to the ideological legitimacy of the Party (White, 1988). However, after Deng Xiaoping’s ‘trip to the South’ in 1992, to break the post-Tiananmen economic and political stagnation, the CPC pushed towards more decisive reforms (Naughton, 2008), establishing market-oriented labour employment and remuneration mechanisms. For White (1987: 365), “the general aim of China’s reformers [was] to create a new system of labour allocation and employment which [would] improve productivity and increase the flexibility and dynamism of state industry”. At the same time the foreign-invested sector was creating numerous employment opportunities,¹⁵ and attracting a varied workforce. With the increased demand for labour, and to allow labour mobility, in 1988 the State Council allowed joint ventures to hire workers from outside the province without approval of the Labour Bureau (Howell, 1993: 215).

The market-based allocation of workers was formalised with the introduction of a labour contract system (White, 1988). This mechanism eliminated the social contract of socialist labour relations. Labour contracts were first piloted in 1980 in Shanghai with skilled workers (Pringle, 2011: 27). Instituted first in the SEZs of Shenzhen and Zhuhai (Gallagher, 2005b: 106; Giles et al., 2006; Howell, 1993: 219; White, 1987), labour contracts were generalized in 1983, but only started to affect the state-owned sector in 1986 (Giles et al., 2006; Howell, 1993: 212) when the State Council issued the Temporary Regulations on the Use of Labour Contracts in State-Run Enterprises (Cai et al., 2008). Contracts were initially limited to the non-state and foreign-invested sector, and it was through the deepening of economic reforms and the further diversification of ownership types that this new capitalist

¹⁵ “The most significant change since 1978 has been the expansion of the private sector which, by 1985, was providing 13.6% of new urban jobs and largely lies outside the framework of administrative labour allocation” (White, 1988: 183).

labour relation spread as a form of ‘contagious capitalism’ (Gallagher, 2005b). In 1986, labour contracts were rolled out to the national level via “provisional regulations on hire and fire and unemployment insurance” (Pringle, 2011: 27). In 1994, with the enactment of the Labour Law, contracts were finally the legal form of labour relations at the national level, regardless of industry and enterprise ownership type. In 2008, a specific law was created to regulate labour contracts: the Labour Contract Law (examined more in detail in the next section).

According to Pringle (2011) and Ngok (2008), the introduction of labour contracts is the most symbolic change in Chinese labour relations, representing the transformation of the socialist-style ethos of worker collectivism and social contract of state-worker relations to capitalist labour relations based on legal contracts and the recognition of labour-capital relations. This change came about because a labour contract system establishes the worker as a separate legal entity who, as Collins (2010: 3) emphasises quoting Marx, driven by the “dull compulsion of economic necessity” sells his/her labour in return for a wage. The contract is the legal expression of an economic/market transaction, and encapsulates labour as a factor of production. Hence, as Pringle (2011: 44) argues “contracts and the concomitant commoditization of labour are now the legal basis of the relationship between labour and capital in China”. Labour laws therefore reinforced the contract as the legal entity on which to base labour relations in China.

In the 1980s and 1990s therefore, the Party-state retreated from the direct economic functions that it held during state socialism in exchange for the emergence of a market economy, notwithstanding it retained a crucial role in the economy. The Party-state broadly saw its managerial functions transformed into regulatory (with the exception of some sectors of the economy and SOEs), hence its developing regulatory mechanisms and institutional arrangements to oversee the economy, and labour relations specifically. Therefore, in consonance with the market economy, to secure property rights and regulate the market, the CPC developed labour legislation. However, there were parallel forces from below which pressured the Party-state to create institutional frameworks to both regulate

labour relations and practices, and to respond to the upsurge of labour protest that derived from the transformation of workers' economic and social lives (as will be explained below). Labour legislation was therefore also created as a means to contain the growing labour unrest.

3.2 Pacification of labour unrest

Political, economic, and top-down forces that stimulated the development of the labour legislation are related to the Chinese Party-state's need to maintain an attractive environment for foreign investment and to regulate the diversity of managerial practices. However, equally important to the understanding of this institutional transformation is to consider the "popular practices and politics" (Lee, 2007a: 14). Pringle (2011: 46) asserts that the development of recent legislation appears to be due to workers militancy, stating that "the original law [Labour Law of 1995] was aimed at heading off unrest whereas the Labour Contract Law is an attempt to placate it" (Pringle, 2011: 46). This, I would argue, is supported by the fact that the 2008 LCL was not enacted in isolation, but in parallel with a second piece of legislation specifically designed to manage labour conflict: the Labour Disputes Mediation and Arbitration Law (LDMAL). As evidenced by Gallagher (2005b), the long period between the enactment of the 1995 Labour Law and that of the supplementary laws in 2008 indicates that these laws were "caught in the same bureaucratic wrangle that delayed the passage of the National Labour Law itself throughout the 1980s until the rise of labour strikes and exploitation in foreign-invested companies gave impetus to its passage" (Gallagher, 2005b: 113). While the research of Gallagher (2005b), Chan (2010a) and Leung (1998) demonstrated the impact of protest waves between 1992 and 1994 on the making of the 1995 Labour Law, it is not a coincidence that in 2008 the most significant labour legislation created thereafter was a package that addressed both the formalization of capitalist labour relations (contractual-based) and conflict management. Thus, this section will examine the pushing forces from below that stimulated the creation of the post-1994 labour legal institutional framework, more

specifically, workers' unrest, disputes, strikes and protests¹⁶ from state-owned enterprise workers first, and from peasant workers, second.

3.2.1 State-owned enterprise workers

As a result of the restructuring of the state-owned sector, throughout the 1990s workers at state-owned enterprises engaged in labour protests and strikes. The elimination of the urban work-unit or *danwei*, job tenure and social benefits enjoyed by state-sector workers (the 'iron rice bowl') created widespread hardship and discontent. Especially after the 1997 SOE reform workers in the state-owned sector, privileged under socialism (Lee, 2007a) were seriously affected: large numbers were laid-off (*xiagang*, 下岗), or became unemployed. For example, between 1993 and 1998, official counts of laid-off workers rose from 3 million to 17.24 million (China Labour Statistics, 1999, in Cai, 2002: 327), while academic research asserts that between 1996 and 1997 alone, the number was as high as 20 to 25 million (Chan, 2001).¹⁷

In the 1990s, laid-off workers faced an extremely complex situation: they were not officially defined as unemployed¹⁸ (hence very difficult to reintegrate into the developing labour market), nor were they receiving sufficient welfare support

¹⁶ Chinese workers do not have the right to strike, nor to stage demonstrations (Chen, 2000: 61). Therefore, there is no accurate data available from the Chinese government on the number of strikes and protests that have taken place in China, the number of participants, their claims, grievances, or outcomes. Moreover, due to the government's control of the media, the information available from these sources is very limited and in many cases, unreliable. However, there are growing attempts by Chinese local media to cover these incidents, as well as from labour scholars and labour organizations, which are developing research on the topic (CLB, 2010: 12-13).

¹⁷ This disparity in the accounts of laid-off workers signals the sensitiveness of the topic, and emphasises that official accounts of laid-off workers vary and are inaccurate.

¹⁸ Unemployment rates were rising throughout the 1990s; although the official statistics reported unemployment rates of 3% to 4% in the 1990s, academics reported rates 3 to 4 times higher (Lee, 2007a). For example, in 2001 there was an approximate 12.9% unemployment rate (Giles et al., 2006). However, unemployment statistics are not accurate in evidencing the scale of the effect of SOE restructuring (Solinger, 2001), as officially, "laid-off" (*xiagang*, 下岗) is defined as a worker who meets the following conditions: a) began working in the SOE before the contract system was introduced in 1986 and had a permanent job in the SOE; b) was laid-off due to financial or operational problems of the firm but has not been formally detached from his relations with the firm; and c) has not found another job (Lee, 2007a: 50; Solinger, 2002: 304). The unemployed definition included those workers whose firm had been officially declared bankrupt and therefore, whose job post had disappeared (Lee, 2007a: 50).

either from the government or the SOE to which they were still affiliated and which should have provided the basic living allowance. In many cases these allowances, if received, were below the minimum required for basic livelihood, and the state's welfare schemes (the "three lines of guarantees": unemployment insurance, the Re-employment Project and the policy on basic living allowance) were both inefficient and insufficient.¹⁹ Therefore, not only did workers from the state-sector suffer from the breaking of the socialist social contract, the "implicit state guarantee of employment security and welfare in exchange for workers' political acquiescence" (Lee, 2007a: 12); but their grievances were also aggravated by non-payment of pensions, living allowances, and a deep livelihood struggle (Lee, 2007a) or subsistence crisis (Chen, 2000).

The desperate situation of many laid-off workers led to heightened disaffection and protest, which unfolded against the historical background of SOE workers having been highly militant and politically mobilized during the Maoist period (Cai, 2002; Perry, 1993, 1994; Perry and Li, 1997; Unger and Chan, 2004; Walder, 1991). For example, during the Hundred Flowers Campaign workers organized 1,300 strikes in Shanghai in just a few months in 1957 (Perry, 1993, 1994). This traditional industrial working class, or *gongren jieji* (工人阶级) held a collective identity and experience in organization and mobilization inherited from the Maoist class politics (Hurst, 2009; Lee, 2000, 2002, 2007a). Thus, in the 1990s these workers had the knowledge and capacity to launch the most large-scale protests (Chen, 2000). Militant protests of SOE workers occurred in the early 1990s, and their confrontations with local officials and managers between 1999 and 2002, especially in the northeast or Rustbelt (Hurst, 2009; Lee, 2007a), raised the concerns of local governments who were being compelled to address their grievances. These struggles were crucial factors in pushing the government to further labour reforms to address in particular the non-payment of wages, pensions, and living allowance.

¹⁹ The Re-employment Project was full of pitfalls; workers did not easily find employment in the non-state sector (which offered great opportunities to unskilled migrant labour or skilled workers); and the social insurance schemes were deficient (decentralized and dependent on the economic resources of the local government) (Solinger, 2002).

Although the role of SOE workers in collective actions has been significant, Lee (2007a) indicates that their protests were highly ‘cellular’, localized and bound to the work-unit, hence putting pressure on local governments. Since the 1990s, however, it has been migrant or peasant workers who have registered increased strike and protest activity (Lee, 2007a: 6). According to official statistics released by the Ministry of Public Security, the number of mass incidents (*quntixing shijian*, 群体性事件) recorded between 1993 and 2005 rose from 11,000 to 87,000 (Lee, 2007a: 5; Schucher, 2006: 49),²⁰ although there are higher estimates that indicate that mass incidents rose to 127,467 by 2008 (CLB, 2010: 12-13), and to 180,000 in 2010 (CLB, 2011). Today, peasant workers have taken political prominence, as they are the bearers of capitalist exploitation, and the main protagonists of these strikes and protests.

3.2.2 Peasant workers

The introduction of foreign-direct investment created huge employment opportunities in the SEZs of the southeast coast of China, which, together with the relaxations of the household registration system (*hukou*, 户口) and the reforms in the rural sector, stimulated an unprecedented internal migration phenomena: by the mid-1990s, rural surveys estimated that there were between 50 to 70 million migrant labourers (Roberts et.al, 2004: 49), increasing to 120 million in 2000 (China National Census, 2000), and to an estimated 130 million in 2006 (China’s State Council, 2006, in Pun et.al., 2009: 135). In the 2010 census, 261.39 million people lived in places other than that of their registration (China National Census, 2010). This evidences the great increase in rural labour-force mobility that has occurred in post-reform China.

However, this pool of rural migrant workers holds a rural *hukou* that does not entitle them to social protection or welfare in urban areas. Moreover, these workers are the ‘cheap labour’ that has endured the most serious hardships in post-reform China, and have been and still are “the main victims of the most serious

²⁰ Thanks to Daniel Fuchs for pointing out this figure.

labour-rights violations" (Chan, 2001: 7). Although they have not directly experienced the Maoist state industrialism and socialist production regime of the urban *danwei*, rural migrant workers have been redefining their working class identity as that of *nongmingong* (农民工)²¹ or *dagong* (打工),²² in reaction to the commodification of their labour (Pun, 1999; 2005, 2009; Chan and Pun, 2009; Pun et al., 2010; Tomba, 2011). This commodification and proletarianization process, some argue, is unfinished due to their remaining rural land rights (Lin, 2015: 25).

In her study of two industrial areas in China, Lee (2007a) argues that, precisely due to the different labour regimes that rural migrant workers have grown into, they have tended to use mobilization strategies different from SOE workers, namely strategies within the margins of the legal framework (also: Gallagher, 2005a; Lee, 2010; Lee and Hsing, 2010: 3). This type of mobilization is characterized by workers' use of the available and authorized legal and judicial mechanisms to address their grievances and make claims on management or the state, for example, the use of the law to file a lawsuit against the enterprise for non-payment of wages, termination of contract, or industrial injury.

Although initially Lee (2007a) suggests that rural migrant workers of the southeast coast do not strike or stage street protests as often as state-owned enterprise workers in the northeast do, research has pointed out that migrant workers not only engage in a type of subtle or 'everyday forms of resistance' (Scott, 1985) in the workplace (Pun, 2005), but also that their collective and direct action has become increasingly common in the export-oriented industrial zones of China's southeast coast (Chan, 2001; Chan, 2010a, 2010b; Lee, 2000, 2002; Pun et al., 2010). Continuous waves of protests and increasing labour disputes of migrant workers also constitute driving forces that press for the development of the labour institutional framework. Inversely, the increase in rural migrant workers' mobilizations has been, in part, due to the changes in the institutional framework (Chan, 2010a; Gallagher, 2005a, 2006; Pun et al., 2010; Wang et al. 2009).

²¹ Translated as 'peasant worker'.

²² Meaning 'temporary job', 'working for the boss', or 'selling labour'.

Such distinction between SOE workers and peasant or migrant workers has been continuously made in the literature, suggesting contrasting experiences and conditions for their collective action. On the one hand, SOE workers, the original working class (*gongren jieji*, 工人阶级), engaged in collective action in relation to their pre-reform entitlements (Chen and Tang, 2013) or due to their subsistence crisis (Chen, 2000), while migrant or peasant workers (*nongmingong*, 农民工, or *dagongzhe*, 打工者), do so in reference to violations of their legal rights (Chan, 2011: 46). This analytical distinction implies that the sources of workers' consciousness are different: peasant workers derive their consciousness from law, while SOE workers do so from their social relations of production. In this sense, SOE workers would qualify as having class-consciousness, while peasant workers are the carriers of rights consciousness. As mentioned in Chapter Two, this differentiation of workers and their forms of consciousness leads to the assumption that class and rights consciousness are mutually exclusive, peasant workers only having rights consciousness while not class-consciousness, which some have proved is not the case (Chan, 2010a, 2012; Chan and Pun, 2009).

The Party-state, by virtue of granting legal entitlements to workers, has sought to pacify labour unrest (Pringle, 2011) in pursuit of social stability or harmony. Some, however, argue that the creation of labour laws was in response to the CPC's 'passive revolution' (Gray, 2010), or to the hegemonic project of the Party-state to gain workers' consent to its rule and to capitalism (Hui, 2014). Furthermore, according to the literature on rule of law in authoritarianism, the enactment of labour laws to pacify labour unrest responds to the functional role of legal institutions to exercise state control over the social (Moustafa, 2007; Shapiro, 1981; Solomon, 2010). Nevertheless, in a Polanyian counter-movement, labour laws also come about to protect labour from capital (Lee, 2007a; Polanyi, 2001; Silver, 2003).

3.3 Regulating capital, protecting labour

"Labour laws are to protect the interests of the weak (ruoshi qunti, 弱势群体)"
(X4, 17 September 2012)

“The purpose of the laws is to protect [our] rights. If nobody says anything, we wouldn’t get our pay. The law is to protect us, and there is no other way. Peasant workers bear too much hardship, and we don’t have legal awareness”
(W25, 17 September 2012)

As Polanyi (1944: 176-177) once indicated, the deepening of a market economy entails a counter-movement to “protect society”, what he called a “double movement”, through which the state would attempt to regulate the labour market through a variety of mechanisms including social legislation, factory laws, unemployment insurance and trade unions. According to Collins (2010: 5) labour law “addresses the paradox encapsulated in the slogan ‘labour is not a commodity’.²³ It regulates labour relations for two principal purposes: to ensure that they function successfully as market transactions, and, at the same time, to protect workers against the economic logic of the commodification of labour”. In China, the same can be said about its labour laws: they regulate the labour market and protect workers from “the excesses of the logic of the market system” (ibid.).

As mentioned above by Ngok (2008) and Pringle (2011), the most significant factor is the establishment of labour contracts. Labour contracts, in the language of the law, regulate an exchange between two equal parties – the worker exchanging the factor of production ‘labour’ against a wage paid by the employer. But underlying this exchange is an implicit recognition of conflicting interests between capital and labour, who have to come to a formal agreement to reduce the conflictual nature of this relationship. The aim of preventing or minimizing conflict is a constant function of the laws as institutions of social control of the Party-state, as mentioned above.

The only law inherited from the socialist period was the Trade Union Law (1992), which is a compilation of the previous Trade Union Law (1950) and the Labour

²³ “Labour is not a commodity” was the guiding principle of labour movements in the early 20th century, and was enshrined as the motto of the International Labour Organization in the Declaration of Philadelphia in 1944. ILO Constitution: http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration (Last accessed on: 5 December 2015).

Insurance Regulation (1951).²⁴ Otherwise, the first labour legislation under the ‘socialist market economy’ is the 1995 Labour Law, which derives from a series of regulations that were first introduced in the SEZs, beginning with the aforementioned Equity Joint Venture Law of 1979. The 1986 Temporary Regulations on the Labour Contract System allowed foreign-invested enterprises to hire workers in relation to production requirements under fixed-term contracts (Gallagher and Jiang, 2002; Josephs, 1995). This system was later generalized to other types of enterprises in 1983, and only in 1986 did it touch the state-sector when it had initiated its reorganization (Howell, 1993: 212). These regulations introduced a ground-breaking change in Chinese labour relations, especially for urban industrial workers, as it authorized the labour relation to be set through a contract system instead of through bureaucratic allocation, signalling “the beginning of the end of the work-unit system of employment in place since the 1950s” (Gallagher and Jiang, 2002: 7).

In 1994 the National Labour Law, which had already started to be drafted in the 1980s,²⁵ was adopted by the National People’s Congress, and came into effect in 1995. “It took nearly fifteen years to build the necessary consensus within the leadership, the ministries, and the ACFTU for its passage” (Gallagher, 2006a: 57), as the law had to balance the perspectives of the different factions in the highest echelons of the CPC (leftists and rightists or pro-reformers), and the elements of the state’s command economy with the market economy. Such a long drafting period not only indicates “how sensitive and contentious the subject of labour relations is in China” (Josephs, 1995: 560), but also highlights the complexities of the law-making process in China’s still developing legal system.

²⁴ In the first years after the instalment of the People’s Republic of China in 1949 labour legislation included the 1950 Trade Union Law, the Regulations on Procedures to Resolve Labour Disputes and the 1951 Labour Insurance Regulations, which underwent significant changes during the period between 1956 and 1976 (Gallagher and Jiang, 2002).

²⁵ Josephs (1995: 560) argues that the beginning of the drafting process actually dates back to the 1950s, while Gallagher and Jiang (2002: 4) argue that it began with the liberalizing experiments of the economic reforms in the 1980s.

The Labour Law, among other issues, recognized workers' basic legal rights and established the foundations of the new labour-for-wage relation. It mainly recognized workers' individual rights and also the rights of employers, who were granted managerial autonomy in their labour relations, regardless of their ownership type (Gallagher, 2005b; Gallagher and Jiang, 2002). Moreover, and coherent with the Law for the Protection of Women's Rights and Interests adopted in 1992, the Labour Law addressed the subject of gender discrimination to protect women's labour rights (Josephs, 1995: 568).

The 1995 Labour Law was the first comprehensive labour law in China that applied not only to the strictly defined 'working class' of state-owned enterprise workers, as the socialist labour system did; nor only to workers of foreign-invested enterprises, as the previous regulations in the SEZs did. This Law recognized the basic rights of workers without distinction of the type, ownership, or nationality of the enterprise (Gallagher, 2005b). Moreover, as this Law entrusted the implementation of labour policy to local labour departments, it recognized the jurisdiction of the Ministry of Labour and Social Security (now the Ministry of Human Resources and Social Security, MHRSS) over all labour, including urban industrial workers, state-owned enterprise workers, migrant workers, and white-collar or managerial and technical workers who had previously been termed 'cadres' and managed under the Ministry of Personnel (Josephs, 1995: 567). This Law legally unified different status groups of workers and recognised the employee's weak position in the labour relationship, which is the basic problem stemming from an unequal wage-for-labour system under capitalism.

In 2007, the National People's Congress expanded the Labour Law by enacting a set of supplementary laws: the LCL, the LDMAL, and the Employment Promotion Law, which came into effect in 2008. Although the labour contract and the dispute resolution systems had been in place since 1986 and 1993 respectively, the new set of labour laws enacted reinforced and specified their operations. The LCL specifically referred to the establishment, performance, variation, and termination

of labour contracts, and is particularly directed to regulate the increasingly temporary nature of employment in China.

The period between the 1995 Labour Law to the enactment of the new set of labour laws in 2007 saw a number of events and incidents that merit attention. Firstly, although the ACFTU was not regarded as a member of the International Confederation of Free Trade Unions (ICFTU),²⁶ in 2007, after significant signs of change,²⁷ there were heated discussions within the ICFTU about whether to grant it membership (Chan, 2011). Secondly, waves of protest and strikes in the years immediately before the adoption of the new laws (Chan, 2001; Chan, 2009, 2010a; CLB, 2007, 2009a), and the uncovering of a number of labour-related incidents (i.e. CLB, 2009a) resulted in domestic and international attention being paid to China's labour conditions. Pressures from both domestic and international forces can be considered influential factors driving the development of the legislative framework.

The ACFTU had previously contributed to labour legislative and institutional reforms, established legal advice departments, and had been actively involved in mediation and arbitration of labour disputes (Howell, 2006, 2008). However, it had basically followed a top-down strategy to set up trade union branches in enterprises. Thus, due to its close links to the CPC, the ACFTU had been categorized as a 'classic dualist' trade union that functions in a 'state corporatist' fashion (Chan, 1993; Chen, 2003; Howell, 2008). Starting in 2004, the ACFTU initiated a campaign to expand its presence in foreign enterprises. Between 2004 and 2005, the AFCTU particularly pressed Wal-Mart – the global retailer well known for its anti-trade union stance (BBC, 2004) – to establish trade union branches, while Wal-Mart

²⁶ This was due to its non-independent nature and therefore, its non-representativeness of Chinese workers. In 2002, the ICFTU issued its policy towards the ACFTU where it stated that "the ICFTU, noting that the ACFTU is not an independent trade union organization and, therefore, cannot be regarded as an authentic voice of Chinese workers, reaffirms its request to all affiliates and Global Union Federations (GUF) having contacts with the Chinese authorities, including the ACFTU, to engage in critical dialogue". (IHLO: <http://www.ihlo.org/LRC/ACFTU/000706.html>; Last accessed on: 5 December 2015).

²⁷ Since the mid-1990s there had been attempts to introduce direct elections for grassroots trade union cadres in Zhejiang, Shanghai, Shandong, and Guangdong provinces (Howell, 2008), and in 2004 the ACFTU initiated a campaign to expand its membership in foreign enterprises, specially directed at Wal-Mart (Chan, 2006).

insisted on the voluntary character of establishing trade union branches as stated in the Trade Union Law. Met with refusal to establish trade unions through the enterprise management, as was the usual procedure, the ACFTU engaged in a grassroots mobilization strategy to organize workers to set up trade unions in Wal-Mart shops. In July 2006, the ACFTU unionised the first Wal-Mart store in the city of Quanzhou, Fujian (Chan, 2006; China Daily, 2006; Howell, 2006). This movement was an unprecedented bottom-up unionizing experience in the ACFTU's practices (Chan, 2006), which indicates the Union's increased effort to represent Chinese workers. Moreover, it signalled the use of the Trade Union Law made by both workers and the trade union (Chan, 2006), and the significance of these legal instruments in supporting the development of labour relations. Hence, this episode, which occurred concurrently with the first drafting of the LCL (the first draft was published for comments on 20 March 2006), can be considered a relevant force pushing for the development of labour legislation.

Between 2004 and 2005 a number of influential factors can be counted: since 2003, the ACFTU had permitted migrant workers to join the trade union movement, and it had more actively taken rural migrant workers into its sphere of responsibility (Howell, 2006: 9), which attracted some policy attention to the needs and rights of these workers. There were also waves of protests and strikes in the Pearl River Delta, demanding minimum wages and a trade union to represent workers' interests (Chan, 2010a: 169; CLB, 2009a) which were supported by a number of reports that appeared in the domestic media in 2007, publicising the case of slave labour in Shanxi province brickyards²⁸ and accidents and deaths in coal mines (CLB, 2009a). It could be interpreted that these factors account for some of the pressure that the government was facing domestically to improve labour conditions and to develop the legal framework.

²⁸ In 2007 local television exposed the case of hundreds of missing children that were found in illegal brickyards in Shanxi province. As a reaction, the central government held an investigation and uncovered 3,186 unlicensed brick factories with more than 81,000 employees (including children), and some having been held against their will (CLB, 2009a: 16).

3.3.1 The making of the Labour Contract Law

Although the policy-making process within the Chinese system involves “hundreds of officials from various Communist Party and government departments” (Shirk, 1993: 7) and is characterized by the negotiation or bargaining between different bureaucratic units that are normally equal in rank (Lampton, 1987: 18; Lieberthal, 2004), when it comes to the law-making process, it has not often included the public. The drafting of the LCL, however, was open to public consultation, with legal experts, and members from civil society partaking of an experimental participatory law-making process.

Since the 1980s there have been a number of limited experiments with consultative and participatory mechanism²⁹ that respond to the Leninist principle of ‘democratic centralism’ of the CPC (Lieberthal, 2004); nonetheless, the case of the LCL is remarkable because the CPC opened for public consultation the formulation process of a national law. The ACFTU had previously “contributed to significant reforms in the legislative and regulatory framework governing labour relations” (Howell, 2008: 848); however, it is almost unheard of for the formulation of a primary national law (*jiben fa*, 基本法), which holds the highest rank of the Chinese legislative hierarchy and has precedence over all other local, provincial or administrative regulations (Ho, 2009: 72), to be opened to public consultation. As innovative as this was, the public reaction was equally significant: the MHRSS published the draft of the LCL on its ministerial website,³⁰ and within one month it

²⁹ The two most important mechanisms are village elections (introduced in the Constitution in 1982, and officially established by the Organic Law in 1988), whose significance relies on their stimulus to create an ideological basis for alternative forms of political participation (O’Brien and Li, 2000); and institutional mechanisms to promote participation through ‘citizen involvement’, such as letters and petitions, public hearings, consultations, questionnaires, surveys and hotlines, advisory committees and surveys (Chou, 2009). Letters, petitions and lawsuits are well-known among the Chinese public, as they have been acknowledged by law in the 1989 Administrative Litigation Act which allows citizens to sue the government. Consultations are a governmentally-initiated mechanism for public participation that include the people involved or affected by a policy, and have been carried out in China in relation to price reforms, and environmental impact assessment projects (Johnson, 2010; Zhao, 2010).

³⁰ MHRSS: http://www.molss.gov.cn/gb/news/2006-03/21/content_110616.htm (Last accessed on: 30 January 2013).

had received nearly 200,000 comments online or through letters and newspapers, most of them from ordinary workers.³¹

The drafting process of the Law was not without controversies as it included a wide variety of actors and opinions. Intellectuals, technicians and labour experts were actively engaged in its formulation, with two groups leading the discussion. The first was supported by Professor Dong Baohua, chief consultant to the expert group for the labour contract legislation of the State Council, which supported equal protection of the rights of workers and employers; while the second, aligned with Professor Chang Kai, director of the Institute of Labour Relations at Renmin University and head of the research group for drafting the LCL under the Legislative Office of the State Council, demanded better protection for those underprivileged in the labour relation, namely, workers (Karindi, 2008: 7).

Private business and international corporations actively participated in the debate, lobbying the MHRSS with suggestions that reflected the nature of their investment interests in China. For example, the Shanghai Association of Human Resources Management in Multinational Companies pointed out the negative effects that could result from the passing of the Law. The European Chamber of Commerce in China acknowledged that the flexibility and low cost of labour in China were the main reasons for European companies to move their production lines to China, suggesting that “the strict regulations of the draft new law [would] limit employers’ flexibility and [would] finally result in an increase of the production costs in China. An increase of production costs [would] force foreign companies to reconsider new investment or continuing their activities in China”.³² The American Chamber of Commerce openly stated that the introduction of labour contracts as stipulated in the first draft would reduce labour employment opportunity for Chinese workers (CLB, 2006; Karindi, 2008). Moreover, symbolizing the pluralisation of policy

³¹ The exact number was 191,849, of which “two-thirds came from ordinary workers, while the rest came from employers, social organizations and academia” (Wang et al., 2009).

³² The European Union Chamber of Commerce in China (EUCCC). “Re: Comments of the European Union Chamber of Commerce in China on the Draft Labour Contract law”. 18 April 2006. Available for members at: <http://www.europeanchamber.com.cn/online/login.php?preurl=/groups/presentations.php?id=79>. See Karindi (2008).

entrepreneurs in China (Mertha, 2009), civil society organizations and labour NGOs such as Global Labour Strategies, Hong Kong Liaison Office (IHLO), Worker Empowerment (WE), Dagongzhe Migrant Worker Centre, China Labour Bulletin, International Labour Rights Forum, Citizens' Rights and Livelihood Watch, among others, also provided comments in the drafting process (Karindi, 2008; personal communications with WE and CLB, Hong Kong, July 2011).

It took three consecutive consultation rounds for the final draft to be promulgated at the National People's Congress. Thus, when it finally came into effect in 2008, the Law represented "an attempt to reconcile the demands of these competing voices" (Cooney et al., 2007: 800). However, it is still the most symbolic representation of the capitalist relation of production, by which labour and capital are antagonistic forces, and workers are 'the weak', drawn into the market to sell their labour.

In sum, the empirical material reviewed in this section highlights the fact that the labour law-making process has been a dynamic and complex one, in which significant bottom-up forces interacted with the economic and political factors that were leading the labour reforms. Labour laws therefore can be understood as part of the Polanyian double movement (Polanyi, 2001; Lee, 2007a; Silver, 2003), by which the Party-state retained its capacity to exert social control (of labour unrest) and economic control (of the unregulated labour market). The pacifying function of labour laws was emphasised above; below the three main protective characteristics of the labour laws will be reviewed, namely, labour contracts, dispute resolution mechanisms, and representation.

3.3.2 Labour contracts

As established above, the introduction of labour contracts has been the most representative of all the institutional transformations of the labour relation, highlighting its change towards a capitalist form. In the language of the Labour Law and the LCL, the labour relation is established between two parties (*shuangfang*

dangshiren, 双方当事人): labourer (*laodongzhe*, 劳动者) and employer (*yongren danwei*, 用人单位). This can be interpreted as a rationalization of economic relations in which both parties *voluntarily* confirm this relation via an agreement that standardizes and clarifies each party's roles and responsibilities; or it can be interpreted as the recognition of the existence of two conflictual parties which need legal intervention in order to protect and preserve each party's interests and rights.

The 1995 Labour Law had as its first objective “to protect the legitimate rights and interests of labourers...” (Labour Law, Article 1). The first instance of this ‘protection’ is the legally binding character of labour contracts. In its third chapter, under articles 16 to 35, the Labour Law defined and regulated the conclusion, content, termination, and revocation of labour contracts. Individual and collective labour contracts were stipulated in this Law, although only three articles are dedicated to the latter. It also included stipulations on minimum standards (wages and salaries, working hours and overtime, rest and vacations, social insurance), introduced a dispute resolution system, and reinforced the role of the trade union in labour relations as defined in the 1992 Trade Union Law as an equal partner to the employment unit in settling collective contracts and disputes. Lastly, it allowed the employment unit the power to administer and manage labour (hire and fire). Although this Law is the cornerstone of the Chinese labour legal framework, its implementation and consequences were not without problems. For example, because it did not specify the practicalities nor recognize the guarantees of labour contracts (starting, termination, amendment, invalidity, consequences of not signing a contract, etc.), it enabled the continuation of short-term employment or the rolling of fixed-term contracts over long periods. Employment units therefore avoided having to provide the social benefits ascribed to long-term contracts.

The 2008 LCL expanded the stipulations of the Labour Law. It was solely directed at regulating and reinforcing labour contracts as the basis of labour relations in the Chinese ‘socialist market economy’, and related behaviour. It includes provisions on

conclusion of labour contracts; performance and modification of labour contracts; revocation and termination; special provisions including collective contracts, labour dispatch, and part-time employment; supervision and inspection; legal responsibility; and supplementary provisions. The LCL, “compared with the Labour Law (...) is more specific and operation-oriented in terms of its provisions” (Ngok, 2008: 59). The LCL has its origins in the 1986 Temporary Regulations on the Labour Contract System, and was in fact already in the drafting or planning stage in 1998 (Gallagher, 2005b; Gallagher and Jiang, 2002). As with the Labour Law, the LCL was caught in a bureaucratic impasse until it was redrafted in 2006, mainly due to the controversies over nationally instituting a labour system based on contracts, which signified a clear departure from the socialist labour system and the full embracement of labour markets. This caused enough political tensions within the political leadership to slow and delay its enactment.

Cooney et al. (2007) indicate that the three most important features of the Law are that it introduces provisions regarding underpayment of wages, establishes the mandatory existence of a written contract between employer and employee, and guarantees that workers who have a signed contract will not be disadvantaged should the enterprise undergo, for example, a merger or buy-out. Wang et al. (2009) argue that this law was particularly concerned with limiting the use of short-term contracts, and establishing a legal framework for job security; however, this is contradictory to the flexibility aimed for under the market economy, and as indicated by various studies, no job security has been achieved.³³

Directly related to short-term employment and to the allocation of labour, Section 2 of the LCL introduces an important addition to the Labour Law: regulation of labour dispatch agencies and other sub-contracting employment units. Although the existence of state-run Labour Service Corporations dates back to the early

³³ Ho (2009) found that some enterprises have created two separate legal entities to simultaneously hire workers in two part-time shifts, while Worker Empowerment (2009b) found that enterprises have created subsidiaries to sub-contract workers that have worked for two years for the mother company, thereby avoiding engaging in long-term fixed or open-ended contracts. This was one of the loopholes of the LCL with regards to labour dispatch, addressed in the amendment to the LCL in 2013.

1980s (Howell, 1993; Josephs, 2008), they were unregulated in the Labour Law. The LCL enabled the plurality of forms of labour service agencies (state-run and private labour units), and established their legitimate function of administering short-term employment contracts. Under the LCL labour dispatch and sub-contracting agencies can provide fixed-term contracts to dispatched workers to work for a third party for a minimum duration of two years for temporary, auxiliary or substitute work (LCL, Article 58, 66). The Law makes the third party or receiving unit responsible for applying the labour standards, for paying overtime and for performance bonuses, as well as for providing welfare benefits (LCL, Article 62.2). Overall, Ngok (2008) conveys that the strong point of the LCL is that it establishes a sound contract system, regulating temporary employment, and severance payments. However, Xu (2008: 461) argued that dispatch agencies enabled an increasingly “agency-mediated market relation, rather than state- or network-mediated” and that most dispatch contracts are actually provided for exactly two years, and not longer.

This ground-breaking transformation has more substantive significance if considering its far-reaching effects, transforming not only economic and social institutions, but much more embedded cultural and historical tenets, as Lawyer Eng emphasises: *“before the market reforms, labour relations in China were based on trust, on mianzi (面子), on social relations. After the introduction of laws in 1995 and especially since 2008, the mandatory contract-based labour relation distorted some basic socio-cultural components of China’s social arrangements – basically, before people treated work as an extension of their social lives, and people agreed orally, that was enough; the contract now represents distrust”* (D1, 25 September 2012). The now capitalist labour relation is an antagonistic one, and requires the labour contract to prove its formalization. This removes the basic social component of the socialist system of production, in which production was considered a social process. Today, some workers regard labour relations not as economic transactions, but as social relations, hence, their view of the labour contract as an element of distrust in the social relation. Workers’ conceptions of work relations,

rights, and their perceptions of labour laws and the contract system will be analysed in more detail in Chapter Six.

3.3.3 Labour disputes

“Chinese institutions for dispute resolution are being reshaped by the same forces that have launched the extraordinary transformations of China’s planned economy and society.” (Lubman, 1999: 217)

Given that the labour relation is one between two antagonistic parties, the labour legislation necessarily established a system to manage and contain disputes between them. In the Labour Law labour disputes can be addressed through mediation, arbitration committees, and courts if necessary, or through consultation (Labour Law, Article 77). However, there is no clarity about what constitutes a labour dispute, apart from that related to an invalid contract (Labour Law, Article 18). The LCL maintains the same provisions as the Labour Law in terms of disputes. However, the 2008 LDMAL provided more detailed definitions as to what constitutes a legitimate labour dispute and the specific processes to manage it.

The LDMAL expanded the stipulations of labour dispute organs and institutions of workers’ representation that were covered in previous laws and regulations. The 1986 Regulations on Worker Representative Councils established workers’ councils as representatives of workers’ interests in the workplace, and specified their functioning under the ACFTU, which was regulated through the 1992 Trade Union Law. The growth of the non-state sector and the rapid changes in labour relations across these sectors (Gallagher, 2005b), called for a readjustment of the role of the trade union, thus, the Law was revised in 2001. In particular, the Trade Union Law settled the role, responsibilities, procedures, powers and functioning of the trade union in the workplace. The role of the union in the tripartite labour relation was to represent workers; however, its power in collective negotiations and collective contracts remained subordinate to the CPC (Gallagher and Jiang, 2002). On paper, as established in the 1992 Temporary Regulations on Labour Disputes in SOEs, (superseded by the 1993 Regulations on Labour Disputes in Enterprises), the trade

union was also the sole legal representative of workers (Pringle, 2011), which applies also to labour disputes. However, the new 2008 LDMAL established a precise labour dispute resolution system, with specific organs separate from the trade union, namely, mediation committees, arbitration and people's courts, which could be said to have weakened the ACFTU's position, as workers' could in certain instances also be represented by a lawyer, for example.

The LDMAL aims to resolve labour disputes to "promote *harmonious* and stable labour relations" (LDMAL, Article 1, emphasis added). It defines a labour dispute as that happening between the employing unit and labourers, related to: confirmation of labour relations; conclusion, performance, alteration, cancellation or termination of labour contracts; expulsion, charge, resignation or severance; working hours, rest and vacation, social insurance, welfare benefits, training and occupational protection; labour remuneration, medical expenses for job-related injury, economic compensation or damages; and other labour disputes (LDMAL, Article 2).

The LDMAL reinforced the four-stage labour dispute resolution process that had been established under the Labour Law: consultation, mediation, arbitration and litigation. Consultation constitutes the first step, and can be done through the trade union for collective contract-related disputes, or through other workers' representatives for individual cases in which there is no established union in the workplace. Mediation and especially arbitration are significantly stressed in this Law, while litigation is seen as the last resort. The Law expanded the roles of the existing mediation and arbitration committees and enabled other non-labour related mediation committees to deal with labour disputes (such as neighbourhood or township mediation committees; CLB, 2009b). The LDMAL has a special focus on arbitration: it stipulates the procedures and qualifications of the arbitration committees, and awards them legal status as their decisions are legally binding. It makes arbitration a compulsory stage of the resolution process, and reduces the time frames to expedite and resolve a labour dispute through arbitration. The period allowed to apply for an arbitration committee to address the labour dispute is shortened from sixty days to five days after the dispute has occurred (LL, Article

82; LDMAL, Article 30), and that to make an adjudication from sixty to forty-five days from receiving the application (LL, Article 82; LDMAL, Article 43). When arbitration does not resolve the dispute, then either the worker or the employment unit can apply for a lawsuit to be filed within fifteen days of the arbitration decision (LL, Article 83; LDMAL, Articles 48 and 50). Litigation is not emphasised in the Law, as it neither appears in the title of the Law, nor is it extensively regulated: its connections with the arbitration process are only mentioned in a few provisions (Zhao, 2009: 421).

In short, the LDMAL reflects the aim to maintain social stability, given the premise that the labour relation is a conflictual one by virtue of its capitalist nature. The creation of specialized legal instruments and institutions, such as mediation and arbitration committees, that intervene in labour disputes highlights the fact that the Party-state recognizes the conflictual character of labour relations and intends to regulate and control them. Against a background where workers lack freedom of association, representation, and the right to strike, the LDMAL provides the only available legal alternatives to deal with labour disputes: through mediation via the trade union or mediation committees; arbitration through the arbitration courts; or litigation via People's Courts, as the last resort.

The enactment of the LCL and the LDMAL brought about a significant increase in labour disputes. Since the mid-1990s labour disputes had been rising steadily, but the year 2008 saw a sudden increase from 350,182 cases accepted in 2007 to 693,645 in 2008 (see Figure 3.1), a 98% increase in only one year. The majority of these (32.45% in 2008) involved labour remuneration issues. By 2010 there had been a slight drop to 641,202 cases. Despite this drop, the surge in labour disputes of 2008 has been taken as an indicator that workers are more aware of their rights and more willing to protect them by any means (Wang et al., 2009). However, when considering the total number of workers involved in these cases as a proportion of the total employed workforce, one can estimate the real value legal channels have for managing labour conflict. In 2012, 882,487 workers were involved in labour disputes cases, a mere 0.08% of the 767 million workers employed in China that

year (China Labour Statistical Yearbook, 2013). Against this scale of China's workforce, disputes and potential conflict, legal institutions do not appear to be the most effective channel to resolve labour disputes, and cannot be said to be a truly viable route for workers engaging in labour and/or political activism and challenging the authoritarian regime.

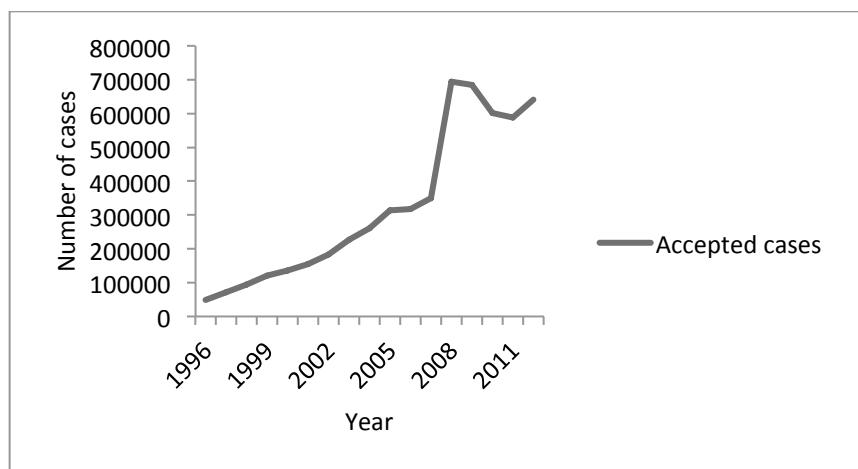


Figure 3.1. Evolution of labour disputes (China Labour Statistical Yearbook, 2013)

Figure 3.2 below shows that, in general, until 2009 arbitration exceeded mediation as the prime means of resolving labour disputes. This emphasis on mediation has been seen as a return to the non-legalistic methods of the socialist period in an attempt to resolve conflicts (Zhuang and Chen, 2015). Liebman (2011) interpreted this as the CPC's revival of 'populist legality'; an 'adaptive legality' strategy that aims to align popular social norms and informal dispute resolution mechanisms with the Party-state legal instruments. By doing so, the aim is to make 'popular legalism' a source of legitimacy. Alternatively, the recent surge in mediation *vis-à-vis* arbitration may be seen as workers' unwillingness to go through the whole legal process due to the numerous challenges it poses (time, resources, capacities; see Chapters Five and Six). Furthermore, it may indicate that mediation committees are managing a greater number of disputes in order to prevent increasing pressure on courts, hence foreclosing the legal pyramid to potentially challenging cases.

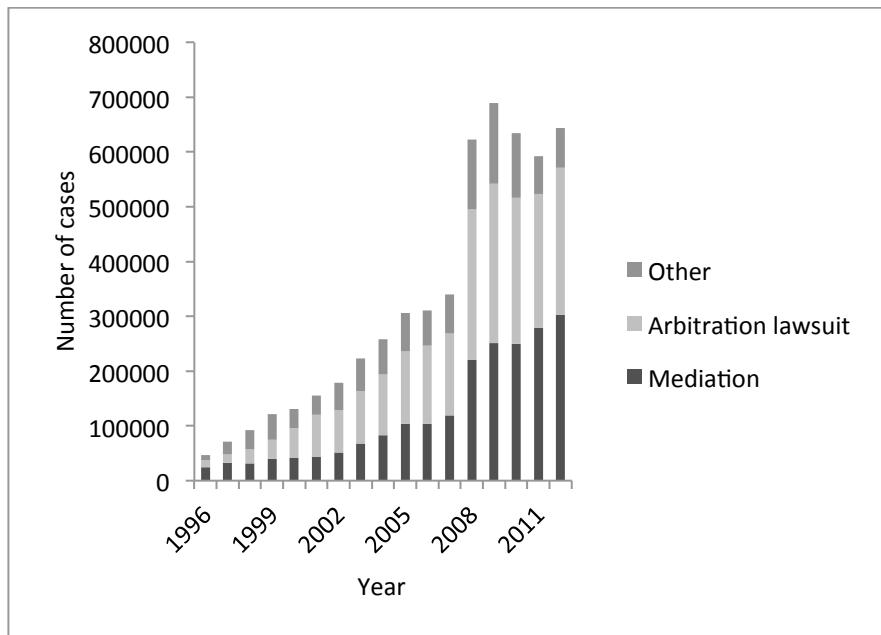


Figure 3.2 Labour disputes by manners of settlement
(China Labour Statistical Yearbook, 2013)

Finally, comparing collective and individual labour disputes handled by mediation and arbitration committees allows us to see the real value that legal institutions have for labour mobilization. As portrayed in Figure 3.3, since 1996 on average 4.57% of cases have been collective disputes. For example, in 2011 and 2012 they were only 0.97% and 1.13% of the total cases. Even in 2008 when labour disputes peaked, only 3.16% cases filed were collective, which involved 502,713 people (an average of 23 workers per collective case). This data does not mean that collective labour conflict does not happen in China, indeed, it takes other forms.

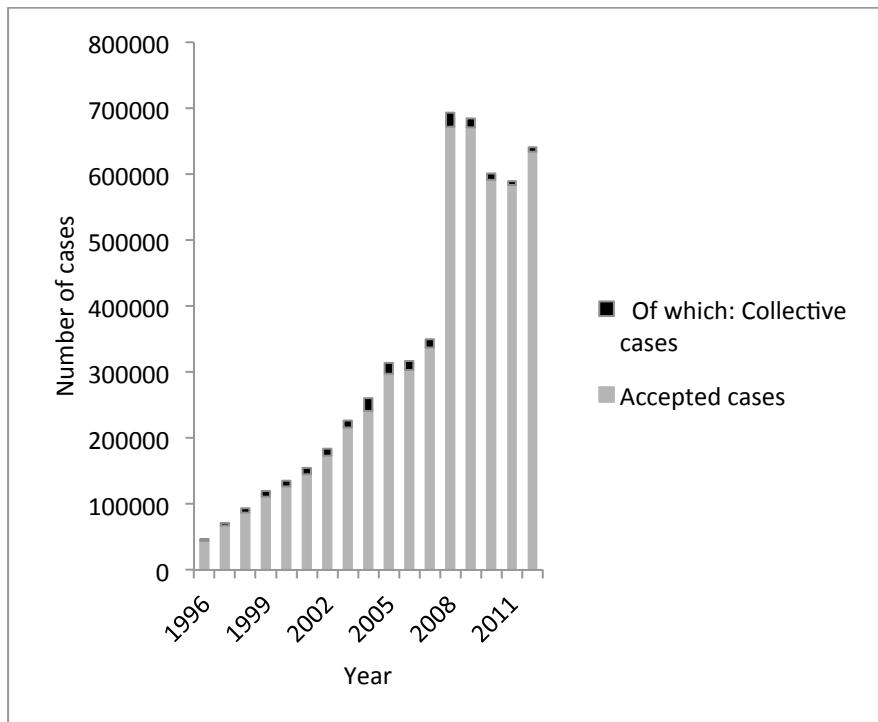


Figure 3.3 Evolution of Individual and Collective Labour Disputes
(China Labour Statistical Yearbook, 2013)

Available and accurate statistics on workers' strikes and collective action is scarce, but the Ministry of Public Security reported the number of mass incidents in 2008 reached 127,467, an estimated 30% of which were labour-related (CLB, 2010: 12-13). The China Labour Bulletin is the most updated and reliable source of data on labour strikes and protest in China; however incomplete, it shows indications and patterns of labour activity. In 2009, the China Labour Bulletin (CLB, 2011: 11) indicated that there were approximately 30,000 labour-related mass incidents in that year only, which ranged from involving 200 workers to thousands. As shown in Figure 3.4, the number of strikes and protests has been growing in recent years. When taking place, strikes and collective actions are large-scale and potentially very disruptive, politically and economically. For this reason, the government usually responds quickly and in an *ad-hoc* manner with negotiation, conciliation and/or coercion (CLB, 2011), government officials and even courts engaging protesters in the street to dissolve strikes and protests as quickly as possible (Su and He, 2010). This data indicates that collective conflict does indeed happen in China, however, it finds little space in the formal legal dispute channels, mainly because legal

institutions are simply not designed to encapsulate collective conflict, as the legal framework is based on individual rights.

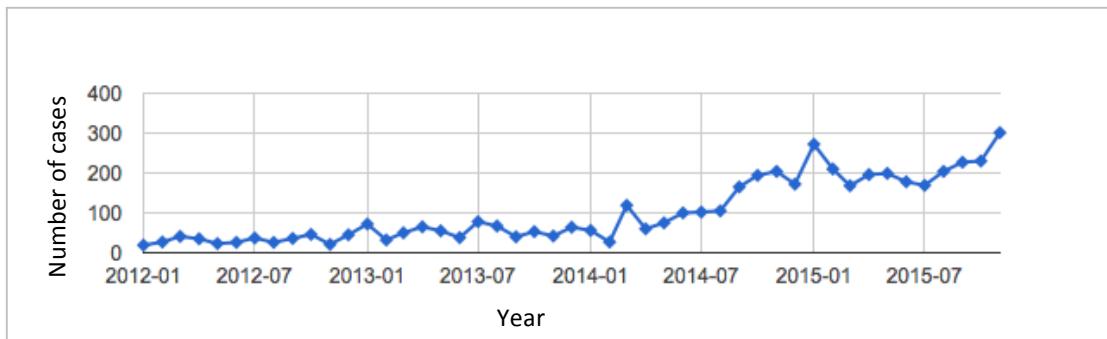


Figure 3.4 Evolution of strikes in China (January 2012-November 2015)
(China Labour Bulletin, Strikes Map)³⁴

Moreover, Chen and Xu (2012) found that courts in Dongguan actively used both judicial and extrajudicial mechanisms to contain collective labour cases, for example, by breaking them into individual cases. “The individualization of collective disputes (...) makes the formation of collective identity and consciousness more difficult” (ibid: 107). They conclude “the courts as state institutions have performed a role in foreclosing labour movements in China” (ibid: 106). Hence, the potential capacity that legal institutions have to provide open avenues for activism in China is limited to individual cases that could represent public interests (Public Interest Litigation). This means that the potential destabilizing effect on the authoritarian regime is held to a minimum because the opportunity to use the law to strive for political change is restricted to the legal professionals or elites – lawyers and judges, or the legal complex (Halliday, Karpik and Feeley, 2007; Karpik and Halliday, 2011). In China, it has been shown that only a marginal number of lawyers are ‘radical’ *weiquan* lawyers (Fu and Cullen, 2008, 2011) that openly challenge the state through the legal system. The Party-state, in turn, has devised informal practices and institutional mechanisms to ensure that lawyers abide by its interests (Solomon, 2010), many lawyers actively functioning as gatekeepers of justice

³⁴ CLB, Strike Map. Available at: <http://strikemap.clb.org.hk/strikes/en> (Last accessed on: 6 December 2015). Quantitative data available on strikes in China is scarce, and China Labour Bulletin only started to collect it in its Strike Map since 2011.

(Michelson, 2006). This discussion will be extended in Chapters Four and Five with regards to labour lawyers in LAL NGOs.

In sum, the upsurge in the use of legal channels to resolve labour disputes has been seen to be an “immediate result” of the laws, as “workers who believe their rights have been violated are much more likely to seek arbitration under the new law” (Wang et al., 2009: 492). It has been argued that the above statistical data indicates that Chinese workers have increasingly been addressing their labour grievances through the legal channels, and therefore have become more litigious. However, it is also possible that the sudden increase in labour disputes was due to the removal of the legal fees to file labour disputes in arbitration courts; and/or to courts being mandated the priority of managing labour disputes to pacify labour conflict and prevent the development of collective identities and a labour movement (Chen and Xu, 2012). Hence, legal dispute channels represent the institutions exerting social control, attempting to contain labour unrest, and securing regime stability.

3.3.4 Worker representation

Labour relations in the workplace still follow a tripartite system: trade unions, enterprises and the state. The ACFTU is the sole trade union in China, and is in charge of protecting and representing workers in the workplace. The ACFTU, in the Leninist ‘classical dualist’ terms, “provides a two-way conduit between the party centre and the workers. (...) Thus, it has two functions: by top-down transmission, mobilization of workers for labour production on behalf of the nation's collective good; and by bottom-up transmission, protection of workers' rights and interests” (Chan, 1993: 36). Furthermore, due to the ACFTU's close connections with the state, it has often been examined through the lens of the state corporatist model (Chan, 1993; Chen, 2003; Howell, 2008).

Due to the economic reforms, the degree of enterprise directors' autonomy to manage labour has widely increased, and currently there are a variety of modes of connections between enterprises and local governments. Ding et al. (2002: 436)

indicated that, although in the foreign-invested sector the role of the trade union is much less relevant, the relations outlined in Figure 3.5 are found in different sectors and ownership types of enterprises, especially in state-owned enterprises, where the CPC and the state bodies have much more penetration and where “trade unions still maintain their substantial ‘density’, while in many non-state enterprises ... their role is much more limited; indeed, in some there are neither unions nor worker congresses”.

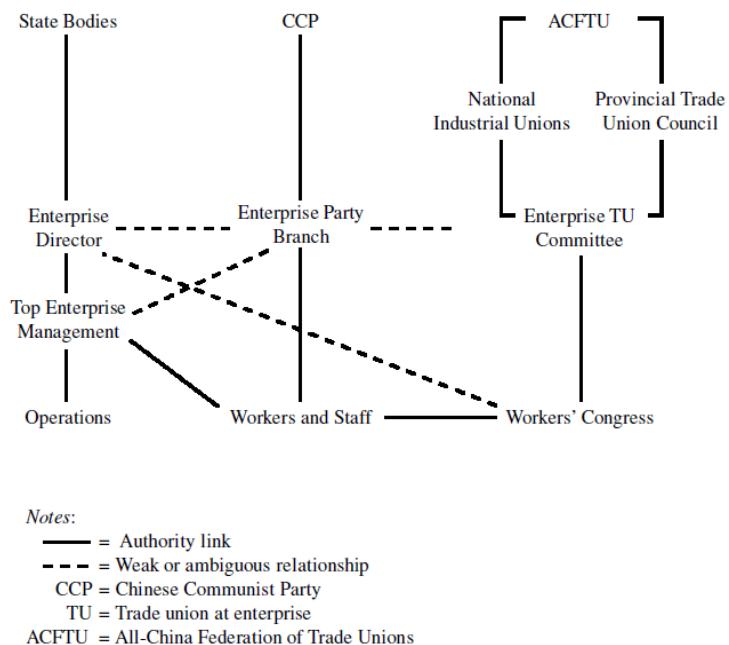


Figure 3.5 Relationship between trade union, party and management in Chinese enterprises (Ding et al., 2002: 435; adapted from Child, 1994).

From the legal perspective, in addition to the 1992 Trade Union Law, the LCL strengthens the role of workers’ organizations, such as unions and workers’ congresses in labour relations (Ngok, 2008: 59). The role of the trade union had been stipulated in the 1995 Labour Law and in the 1992 Trade Union Law, which had empowered the trade union to sign collective contracts and perform “collective consultations” and/or “negotiation”.³⁵ Actually, the LCL “articulates certain powers

³⁵ Note that the wording of “collective negotiation” or “collective consultation” is an intentional refusal of policymakers to recognize mechanisms for “collective bargaining”, which relates to a more conflictual understanding of labour-capital relations as having antagonistic interests, and through which the ACFTU would have to adopt a more confrontational attitude with the Party and capital. This, however, is the most recent change in the Guangdong provincial government and the

of the enterprise branch of the ACFTU *vis-à-vis* management, but they are mostly a reiteration of provisions of the Labour Law and the Trade Union Law" (Josephs, 2008: 391). However, by analysing the content of the Law it can be observed that it provides the union with ample space to act in collective consultations (Wang et al., 2009), and in the labour dispute resolution process, acknowledging more power for workers' representative units (trade unions or workers' congresses) to take part, "on an equal footing" (LCL, Article 4) in the decision-making process regarding, for example, changes in contracts (*ibid.*) or the content of collective contracts (LCL, Article 51). This does however not necessarily mean that the union uses this space to represent workers' interests. The ACFTU's identification with the state and the enterprise management distances it from the workforce; and although the labour laws have strengthened the power of the trade union to sign collective contracts, perform 'collective consultations', and mediate in labour disputes in the name of workers, it usually sides with the enterprise management in the workplace.

However, it has been pointed out that the trade union does represent workers' interests (individual or collective) when they are strictly related to economic terms, and "as long as their claims are made through state-sanctioned channels" (Chen, 2003: 1008). Still, it does not advance "the fundamental rights of freedom of association and collective bargaining" (Josephs, 2008: 391) nor does it effectively use "its powers at the grassroots level" (*ibid.*: 392), namely, to mobilize workers to fight for their interests and rights. There is considerable debate about the power of the ACFTU to assert workers' interests, one reason being that it has been slow in catching up with the economic reforms affecting industrial relations, having to develop strategies and techniques to handle legal disputes, collective contracts and negotiations (Howell, 2008). Pringle (2011: 36) has pointed out that, despite the difficulties of trade union reform, the ACFTU has actually attempted on several occasions to remain devoted to the collective identity of the working class and lobbied for collective rights to be included in the legislation. However, as pointed

Guangdong FTU has been experimenting with a regulation on collective negotiations, the "Guangdong Provincial Regulations on Collective Negotiations and Collective Contracts in Enterprises", since January 2015 (GPRCC, 2013; Chan and Hui, 2013; Lau, 2014).

out by Howell (2008), to more assertively defend workers' interests against those of capital, the ACFTU would have to engage in a more confrontational way with the CPC. This has not been the case, due to its double identity (Chen, 2003) or, as highlighted by Pringle's study, even if "there are examples of the union reacting to the changes in the industrial relations map, and in particular to the labour unrest that these changes have brought (...) in all of these examples the ACFTU always subordinated its protection of workers' rights and interests to its role as upholder of Party-state policies" (Pringle, 2011: 52).

Therefore, the role of the ACFTU is deeply ambivalent. As the sole legal representative of workers' interests, it is bound to safeguard workers' rights and interests, integrating peasant workers into its membership (in 2003); but as a mass organization under the direct command of the CPC, the ACFTU primarily upholds the Party-state policies (*ibid*: 52). Moreover, its limited capacity to organize at the grassroots is related to the trade union's under-representation in certain sectors (such as foreign-invested enterprises and private enterprises). However, there have been growing empirical evidence that the trade union has increasingly been attempting to support workers' demands, and to represent their interests in the labour dispute process, having increased its participation by providing training and appointing staff to these committees (Howell, 2006: 263).

Since the 1990s, there have also been a growing number of grassroots organizations and individual actors which claim to represent workers and either provide alternative platforms for workers' organizations or protect workers' rights. These include labour non-governmental organizations (NGOs), legal aid centres, and labour lawyers.³⁶ The importance of these actors in managing and governing

³⁶ These actors are likely to be outside the state's legal framework for social organizations, therefore, having a constrained and hazardous action margin. In fact, Chinese lawyers, labour groups and their staff are at risk of being harassed and arrested: Shenzhen Dagongzhe Migrant Worker Centre and its legal person have suffered violent attacks, the most serious in 2007, when Huang Qingnan, the legal person of the labour group, was attacked and seriously injured (Worker Empowerment, 2008; Diamant et al., 2005: 12; Josephs, 1995: 572). Also, human rights lawyers are constantly monitored, and threatened with suspension, or even arrested and charged with criminal sanctions. The year 2011 saw an intensification of the crackdown against human rights activists in China, especially against lawyers. In 2015, there was a serious intensification of repression against human rights

labour relations and/or representing workers' interests is multifaceted and complicated. Most significantly, these organizations contribute to educating workers on their rights, and some claim to represent workers at the policy level, directly participating in policy- and law-making processes, for example in the drafting of the LCL, and as will be shown in the next chapter.

3.4 Labour NGOs

Under this new labour scenario, labour NGOs are increasingly becoming an actor in Chinese labour politics, especially given the questionable ability of the ACFTU to represent workers' interests. Labour NGOs are one of the various types of organizations expanding in China, spreading from the southeast coast to the north of China since the late 1990s (Chan, 2013). They stem from the efforts of the labour movement working across the border from Hong Kong, where a range of regionally operating labour unions and independent organizations exist.

Research on labour NGOs in China focuses on two main issues: labour NGOs' relationship with the state; and the role they play in relation to workers. This second aspect is examined in Chapter Six, and for matters of clarity, I do not address it here, but focus on the relationship between labour NGOs and the Party-state. The main findings arrived at in the literature point to the state's surveillance, co-optation and repression of NGOs (Friedman and Lee, 2010), pressing NGOs to work underground (Xu, 2013), or to adapt to informal politics, which range from tolerance and support, to coercion and repression (Cheng et al., 2010). Cheng et al. (ibid.: 1089-1090) argue that for local governments such as Shenzhen's, "it appears rational and advantageous to provide these labour NGOs with a certain degree of political support to promote social harmony and justice". However, labour NGOs have to navigate between inconsistent informal and formal politics (in the very sense of formal and informal institutions or rules of the game) with the respective

lawyers (Duggan, 2015; Jacobs and Buckley, 2015) and labour activists; most recently in December 2015 four labour NGOs in Guangdong were raided and their directors detained by the authorities. (BBC, 4 December 2015. Available at: http://www.bbc.com/zhongwen/simp/china/2015/12/151204_china_guangdong_rights_ngo. Last accessed on 6 December 2015).

local government or government actor (including the ACFTU), which may result in a ‘confidence dilemma’. This may be because the labour NGOs encounter limitations to developing informal ties with local governments, or because they do not know if there are reliable formal or informal ‘rules of the game’ to continue operating (ibid, 2010). This confidence dilemma might take the NGO to stagnation or demise because of its inability to create strategies to act in response to local governments’ diverse rules of the game. Xu (2013) argues that beyond coercion, NGOs are co-opted by the Party-state in a variety of forms, some organizations becoming domesticated. In this fashion, Howell (2015) shows that since 2012 the government has begun to procure services (*fuwu goumai*, 服务购买) from labour NGOs to deliver to migrant workers in a sort of ‘welfarist incorporation’. Chan (2013) and Friedman and Lee (2010) assert some commonalities with the above, by stressing the service-delivery orientation of labour NGOs. Co-optation and procurement of services for migrant workers from labour NGOs is a mild and subtle strategy of the Party-state to integrate within its institutional structures any potential source of conflict and potential activism from labour NGOs, thus maintaining social stability.

Some labour NGOs focus their efforts on protecting workers’ rights, this however does not prevent their service delivery orientation (Chan, 2013; Friedman and Lee, 2010; Howell, 2015; Xu, 2013) in the form of the provision of legal services and training. Froissart (2011b: 18) argues that while defending workers’ rights, labour NGOs “contribute to the political system’s flexibility and the regime’s dynamic stability, and thus to the Communist Party’s ability to remain in power”. This is a common argument in the literature, responding to Nathan’s (2003) authoritarian resilience thesis, as highlighted in Chapter Two. Inasmuch as it appears to be a well-established narrative, and one that the evidence here supports, it is necessary to elaborate on the mechanisms and analyse in detail the institutional factors that enable or determine certain labour NGOs to undertake functions that are supportive to the CPC’s remaining in power. The next chapter will study the institutional arrangement that determines that some of these labour NGOs, specifically, those which provide legal services according to the legal framework described above, hereby called legal action labour (LAL) NGOs, efficiently comply

with the legal system and fulfil functions beneficial to the authoritarian state. LAL NGOs are integrated into the legal system, or as Howell (2015) suggests, incorporated into the state's provision of welfare services.

The provision of legal services by NGOs dates back to the mid-1990s. In 1994 the MOJ, with the assistance of the governments of Canada and Australia, propelled the development of a legal aid system;³⁷ in 1996 the Lawyers Law was enacted (amended in 2007), enabling the dissociation of the legal profession from the state (previously law firms were state-owned and lawyers were state bureaucrats), as well as the commercialization of the legal profession and the establishment of private law firms. Since then, the legal profession has begun to emulate the commercial model of the Western counterparts that supported these reforms (mainly Canada, Australia and the USA), starting to be, to a certain degree, independent from the state. Given these legal reforms, a small but significant number of non-profit and non-state organizations focused on the provision of legal aid and assistance to the 'disadvantaged' (*ruoshi qunti*, 弱势群体) segments of the population, forming grassroots organizations as legal aid stations or centres, and legal clinics.³⁸ Of these disadvantaged social groups, peasant or migrant workers constituted the main group, followed by children. Therefore, a small number of organizations started to work on labour issues from the legal perspective, providing social and legal services to migrant workers arriving in industrial and urban areas, among them, since the late 1990s and early 2000s, the case studies of this research, NGOs X, Y and Z.

³⁷ In 1994 MOJ announced the need to develop a legal aid system. The first legal aid centres were established under the auspices of several law professors based at universities such as Wuhan University and Xi'an Northwestern University of Politics and Law (Gallagher, 2007). Legal aid centres were also established at the district and municipal levels of government, and at trade union branches. Following the leadership of individual public interest lawyers, grassroots organizations also established legal aid centres, a significant number of them successfully registering as such under the MOJ or the MOCA in 2006. For regulation of legal aid, see State Council (2003).

³⁸ The Ford Foundation had an important role in supporting and funding the establishment of legal clinics, which lawyers above followed in China.

These new types of LAL NGOs are committed to the protection and promotion of labour rights. Some lawyers, such as Guo Jianmei, Li Lihong and Tong Lihua,³⁹ began to advocate and take labour dispute cases to make public interest (*gongyi*, 公益) standpoints, in a sort of Public Interest Litigation (PIL), or “the use of litigation as a strategy to protect a general interest that is larger than that of the individual case interest” (Fu, 2011: 348; Fu and Cullen, 2010: 1). Although in China there is not much recognition of PIL, some lawyers are taking on impact cases to use the legal channels to strive for social and legal change. Inasmuch as these NGOs/lawyers are protecting workers’ rights, they can be typified as *weiquan* lawyers, according to Fu and Cullen’s (2008, 2011) definition: lawyers committed to “defending the legal rights of vulnerable groups against official abuses”, for example, “(migrant) workers against employers in labour disputes” (Fu and Cullen, 2008: 114). It is these lawyers, the most radical ones, who are seen to be using the legal institutions “to challenge China’s authoritarian system” (Fu and Cullen, 2011: 41), following the arguments reviewed in the literature that view lawyers as the vanguard of political movements (Halliday et al., 2007; Halliday and Karpik, 2001; Halliday and Liu, 2007; Karpik and Halliday, 2011; McCann, 1994; Scheingold, 2004). Few of these radical *weiquan* lawyers openly use the law to challenge the regime; those that do are mainly human rights lawyers (Pils, 2011; Teng, 2009) while others remain moderate. Labour NGOs such as these that provide legal assistance are relevant cases to examine whether and how legal institutions are opening avenues for contestation, as the literature reviewed in the previous chapter suggests. Moreover, with the increasing number of public interest lawyers and labour NGOs in China and the availability of legal resources, *how does the Party-state ensure that LAL NGOs and their lawyers do not use the law to challenge the Party-state?* This question will be addressed in the next chapter.

³⁹ These three lawyers are well known for being among the first advocating for legal aid and public interest litigation in China in the early-mid 1990s. Guo Jianmei is one of the first lawyers in China advocating for legal aid and public interest litigation for women’s rights; she is based at Peking University (PKU), and participated in the 1995 UN World Women’s Conference in Beijing. She set up a legal aid station at the Law School in Peking University (PKU). Li Lihong established a legal aid clinic at Wuhan University and Tong Lihua is a PIL lawyer based in Beijing, working for labour and children’s rights, associated to the China University of Political Science and Law.

3.5 Concluding remarks

Labour laws have developed in China as a result of different forces, economic, political and social, but mainly workers' struggle. The resulting legal institutional framework creates an entirely different labour regime from the one existing in the Maoist period under the socialist planned economy. The new laws allow the Party-state to govern labour relations and the labour market, in a form of "law-based labour regime" (Lee, 2007a: 40). This chapter has shown, through a historical overview, that the Party-state has introduced labour laws to support the capitalist economy and to provide credible commitments to private property, which, as indicated by Moustafa (2007), is one of the main functions legal institutions fulfil in authoritarian regimes. Through such a legal institutionalization, the Party-state secures its social control, and therefore, political stability. This is most representative if we consider the social pressure presented by labour conflict in the 1990s, and understand the pacifying role of laws at that point in time. This proves that the recognition of labour rights was also a historical process in which workers' struggles forced the state to recognize workers' interests as rights, and as Polanyi (1944) indicated, to protect workers from capital.

In practice, labour laws introduced two main changes that radically restructured social relations and relations of production. Under the 'socialist market economy' labour relations have been redefined as economic relations between labour and capital which are formalized through labour contracts, and have been recognized as antagonistic; hence the institutionalization of conflict resolution mechanisms. This represents a completely different ethos of labour relations in China from the socialist period, a change that embodies much more profound structural (not just institutional) transformation in Chinese society: from the socialist period where the official discourse claimed that the working class was the master of production, and work was based on a social contract between workers and the state to a market economy where workers are now 'the weak; an individual party in the contractual relation of employment, in need of protection by the state from the exploitative logic of the market. This has much more far-reaching socio-cultural significance, affecting deeply embedded socio-cultural traits as will be shown in Chapter Six.

The second change is the recognition of the conflictual character of the labour-capital relation and the state's establishment of legitimate and authorized mechanisms to resolve disputes. These legal mechanisms (mediation, arbitration and litigation) mitigate social conflict by channelling labour disputes into the legal system with the aim of maintaining industrial and social harmony. At the same time, however, this reform has enabled new actors to partake in the management and resolution of labour disputes, such as mediation committees, lawyers and civil society representatives. Labour NGOs are one such actor that has appeared to represent workers and provide services at different levels. This calls into question the role of the ACFTU as supposed sole legal representative of Chinese workers. Moreover, some of these organizations have become integral to the legal system, diffusing the law, raising rights and legal awareness, monitoring legal enforcement and compliance, and, crucially, participating in legal reform and development. Labour NGOs, particularly those that focus on legal action and legal aid, have become part and parcel of the law-based labour regime, as will be explained in the following chapters.

Against this institutional setting, legal institutions provide an outlet for people's grievances; they are instrumental in "channelling social discontent into moderated forums" (Diamant et al., 2005: 7), in securing social stability (Gallagher, 2005), and thus, bolstering regime legitimacy. The focus on legal mechanisms to resolve labour disputes is a response to an attempt to institutionalize, and therefore, 'judicialize' labour politics, a means for the Party-state to secure an increased oversight through a system in which legal institutions (courts) do not necessarily enjoy the independent capacity to adjudicate cases or to recognize further rights (i.e. collective rights). A dispute-centred analysis that examines the use of legal dispute channels does not allow us to understand why workers opt out of the legal path, what is not contemplated in the law, and what alternative forms of action workers take. Examining how legal resolution mechanisms are not only used, but also perceived by workers, and how workers choose to address labour conflict through paralegal or illegal actions will allow for a more nuanced view of the extent to which legal institutions secure social stability or, on the contrary, incite socio-

political (labour) activism. These identified shortcomings in previous research will be addressed in the following chapters.

Chapter Four

“The purpose of the law is to maintain social stability”

How the Party-state contains LAL NGOs and lawyers

“By 2008 (...) the problems of migrant workers had not been resolved, and triggered other problems, as suicides and murders, many problems. The government, to stabilize, to maintain social stability - stabilize is to avoid major incidences-, to stabilize it still needs to resolve the problem of migrant workers. It [the law] is not to protect migrant workers’ rights, but it is for the purpose of maintaining stability”
(Z1, 23 May 2012)

The rule of law is a statecraft and modernization project that was initiated in the late Qing dynasty and Republican period when a system of political order based on laws (*fazhi*, 法治) was given predominance over previous concepts and forms of political rule⁴⁰ (*lizhi*, 礼治, and *renzhi*, 人治) (Peerenboom, 2002; Zhou, 2005). Serious legal reforms were initiated after 1978 when Deng Xiaoping commanded a comprehensive modernization programme, enacting the Four Modernizations set earlier by Premier Zhou Enlai. These were to create the institutional framework to support the transition to the market economy. Since then, the National People’s Congress (NPC) has been involved in an intense law-making process. Important milestones include the 1989 Administrative Procedure Law that established the process of the legal system; the 1992 reform of the legal profession; and the 2004 legal reforms to ensure judicial independence. Between 1978 and 2013, 243 laws were enacted by the NPC, and more than 680 regulations drafted by the State Council (Xinhua, 2014a). Under President Xi Jinping, the Communist Party of China (CPC) is putting additional and remarkable emphasis on developing the rule of law. The Fourth Plenum of the 18th Central Committee of the CPC held in October 2014 established the year 2020 as the deadline to have built a “Socialist rule of law with Chinese characteristics” (The Economist, 2014a, 2014b; Xinhua, 2014b). By so doing, the CPC aims to preserve its governing capacity whilst giving a sense of rationalization and systematization to its ruling, using legal institutions to mitigate the different sources of social pressure.

⁴⁰ For classical legal theories and the evolution of the rule of law in China, see Huang (1996, 2001) and Peerenboom (1993, 2002: Chapter 2). See Chapter Two for the discussion on the Chinese legal system as rule of law and rule by law.

Chapter Three has provided a historical account of how the legal institutions governing labour-capital relations came about in response to the marketization of the Chinese economy and increasing labour unrest. Controlling the labour force, and ensuring stable labour-capital relations is crucial to sustaining growth and productivity in a market economy, hence, labour laws aimed at sustaining China's growth patterns (Peerenboom, 2002). Together with the radical endorsement of commoditised labour-capital relations, these laws established formal legal institutional mechanisms to resolve labour conflict outside the workplace. The increased emphasis of the laws on legal resolution of labour disputes decreased the relative prominence of trade union while creating legal actors that intervene in labour disputes such as mediation and arbitration committees,⁴¹ signalling a 'judicialization' of labour politics. These legal reforms and the increasing space available for civil society organizations in China enabled the appearance of a new player, outside the traditional tripartite labour system, but which has strategically come to intervene in (and mitigate) labour conflict: legal aid/action labour (LAL) NGOs and *weiquan* lawyers. The resulting institutional setting, which includes legal institutions such as labour laws and dispute resolution mechanisms, the tripartite labour system, and NGOs, reflects different degrees of institutional change that the CPC has put in place to absorb socio-economic and political pressures resulting from abandoning state socialism and transitioning to the market economy. In other words, institutional changes that were meant to recalibrate the socio-economic environment and maintain political stability, as Nathan (2003) would suggest.

China's success when compared to examples from the ex-Soviet republics and Eastern European countries draws much attention, especially in regard to the question of how the CPC has been able to promote overwhelming socio-economic transformation whilst avoiding systemic change (Gilley, 2004, 2008; Heilmann and Perry, 2011; Pei, 2006; Shambaugh, 2008; Shirk, 2007; Yan, 2011). In addition to

⁴¹ During state socialism, prior to 1978, the factory or the workplace was a social order in its own right. As explained in Chapter Two, Walder (1986) showed how the factory relied on a system of 'organized dependency', where daily life was politicized with a reward system, workers being politically and personally dependent on their managers for rewards and bonuses – their social and economic life dependent on the enterprise. A system described as the Chinese form of "communist neo-traditionalism".

economic liberalization, legal development adds beguilement to the puzzle of China's political continuity, given past experiences in comparative contexts in Asia or the colour revolutions of the ex-Soviet republics, in authoritarian contexts such as in Egypt (in this case, with reference to constitutional courts; Moustafa, 2007), in liberal democracies as US, Canada or UK (Epp, 1998; Halliday and Liu, 2007; McCann, 1994; Minow, 1987), or in the Chinese context (Fu and Cullen, 2008, 2010). The assumption in aforementioned literature would be that legal development, specifically with the proliferation of laws, the increasing professionalization of lawyers and the appearance of public interest litigation, would catalyse important political challenges to the regime. It is therefore of great interest in the context of China, to explore the question: *how, if at all, does the Party-state ensure that legal institutions fulfil the function of securing social stability (and not that of opening avenues for political contestation)?* Underlying this question is the paradoxical nature of law, as means to support an authoritarian regime, or trigger social movements and political contestation.

In this chapter I examine how the Party-state ensures that law and legal institutions fulfil the function of sustaining the regime, by examining how it contains social actors from politically mobilizing the law. Hence I ask: *how does the Party-state prevent lawyers and LAL NGOs from politically mobilizing the law?*

Section 4.1 examines the institutional arrangement through which the Party-state contains lawyers and LAL NGOs, ensuring therefore that legal institutions are not politically mobilized. This institutional arrangement determines that LAL NGOs are essential to the legal system, and fulfil a crucial function for the Party-state – exerting social control to secure social stability. Section 4.2 examines two case studies that additionally highlight the central role LAL NGOs play in the development of legal frameworks. By showing how LAL NGOs engage in legal advocacy work, I argue that they are creating feedback channels (input institutions in Nathan's (2003) view) that enable legal institutional adaptation or drift (Streeck and Thelen, 2008), and therefore, both institutional change and overall stability. Section 4.3 concludes, pointing out some further avenues of research.

4.1 How the Party-state contains lawyers and LAL NGOs

Since the mid-1990s the non-profit/non-governmental sector has been proliferating in China.⁴² Diverse types of organizations have appeared to cover a variety of areas of work such as environmental, gender or labour issues, or the provision of services such as leisure activities, education, social welfare, or legal aid. A variety of factors have been considered in the study of the rise of NGOs in China, including the post-1978 economic liberalization and the administrative and regulatory reforms that followed, such as the 1998 Regulations on the Registration and Management of Social Organizations (Lu, 2009; Ma, 2002, 2006). These factors enabled the existence of civil society organizations within the formal institutional structures. Access to national and international funding has also been a key determinant for NGO development in China (Spires, 2011). Some of these civil society organizations are led by and staffed with lawyers, their mission the protection of workers' rights and delivering legal aid. These are LAL NGOs, such as NGOs X, Y, and Z. As Lawyer Yan at NGO Z indicated: *"Legal aid is increasingly important (...). You see, this type of organization [LAL NGO] has an increasing value. The work of our leader (...), our public interest programmes certainly have a value for the harmonious development of this society. They meet the needs of ordinary people (laobaixing, 老百姓). It is so that the interests of the disadvantaged groups (ruoshi qunti, 弱势群体) are protected, and social contradictions and conflict (shehui maodun, 社会矛盾) are reduced. It [LAL NGO] advances social equilibrium"* (Z7, 19 December 2012). How does the Party-state ensure that these civil society organizations and actors remain faithful to the ethos of maintaining social stability, and do not mobilize the law politically against the Party-state? This section explores the various components of the institutional arrangement that governs LAL NGOs and lawyers, and restricts them from politically mobilizing the law.

⁴² There is an extensive literature on civil society in China that traces the origins of civil society to the transition to the market economy, economic liberalization, legal reform, and the burgeoning of a public sphere. Among many, see Brook and Frolic (1997); Howell (2004); Huang (1993); Lu (2009); Ma (2002, 2006); Ma (1994); Rankin (1993); Rowe (1990, 1993); Wang (2008); White (1993); White, Howell and Shang (1997); Yu (2002).

4.1.1 NGO registration

According to the 1998 Regulations on the Registration and Management of Social Organizations and the 2004 Regulations on the Management of Foundations,⁴³ NGOs in China (non-profit social organizations, non-governmental non-commercial enterprises, and foundations) have to register with the Ministry of Civil Affairs (MOCA) or local bureaus of civil affairs. To register with MOCA, organizations need a governmental sponsor (*zhuguan danwei*, 主管单位) or 'mother-in-law' unit to endorse the organization (Ma, 2006: 64-65); this is usually is the professional agency at their administrative level.⁴⁴

According to these Regulations, LAL NGOs, like any other social organization, have to register with MOCA or the local equivalent, and as providers of legal assistance and legal aid, seek sponsorship from a 'mother-in-law', registering under and being approved by an appropriate body within the Ministry of Justice (MOJ) or equivalent.

For example, since 2004 NGO X has been registered with the Beijing [REDACTED] District Justice Bureau as a People's Mediation Committee which qualifies it to provide mediation services; NGO Y was approved by Beijing's Bureau of Justice in 2007 and registered under Beijing's Municipal Civil Affairs Bureau as a non-profit civic organization; and NGO Z is registered as a non-profit organization, also at Beijing's Municipal Civil Affairs Bureau and approved by the Beijing Bureau of Justice. NGO Z also serves as the branch office of the Legal Aid and Public Interest Committee of the All China Lawyers Association (ACLA). Additionally, as providers of legal aid, both NGO Y and NGO Z are ascribed to the official professional organization, the ACLA, specifically to its Legal Aid and Public Interest Committee.

⁴³ Note that in 2015 the NPC initiated the drafting of a new law to control foreign NGOs, the "Law on the Administration of Overseas Non-Governmental Organizations" (*jingwai feizhengfu zuzhi guanli fa*, 境外非政府组织管理法). Available at: http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2015-05/05/content_193566.htm (Last accessed on: 8 December 2015). This Law will allow the Ministry of Public Security to control and prohibit foreign NGOs from working in China, and will require foreign NGOs to have a governmental sponsor, yearly inspections and authorization from the Ministry of Public Security (Duchatel and Kratz, 2015).

⁴⁴ Howell (2015: 707-708) points out that since 2008 there have been experiments in Shenzhen, Guangzhou and Beijing in relaxing the registration requirements, selected types of organizations being allowed to register without a government sponsor. In 2012, MOCA extended this scheme and allowed certain organizations, such as charities, industrial associations and public interest groups to register directly with MOCA at the corresponding administrative level.

Usually, NGOs have a dual registration status with MOCA and a governmental professional partner; however, LAL NGOs have an additional layer of supervision as providers of legal services, due to their membership of the ACLA (as explained below).

The challenges and benefits of the registration process have been previously discussed (Ma, 2002, 2006; Lu, 2009). For example, Yu (2006: 117) indicates "every NGO needs to accept the simultaneous guidance of the concerned governmental authorities and the professional competent department, in its daily professional activities, it receives the leadership of the responsible unit". Besides providing legitimacy and official endorsement, this dual (or triple) registration process can be seen as a form of control exerted by the Party-state (Ma, 2006). In fact, civil society organizations in China are classified in a state domination-autonomy continuum depending on their registration status, those organizations not yet registered enjoying the highest degree of autonomy from state control (Howell and Pearce, 2001), although also being more exposed to its harassment. LAL NGOs such as NGOs Y and Z would be in the higher end of the domination spectrum, even under the patronage of the Party-state, having been registered within two governmental units and an official professional organization. Indeed, NGO Z, which originates from a state-owned law firm and currently serves as the branch office of the Legal Aid and Public Interest Committee of ACLA could be classified as a Governmentally-Organized Non-Governmental Organization (GONGO).

What is most relevant is to examine if and how these institutional requirements pose any actual practical (and/or political) opportunities for and constraints on the operations of LAL NGOs. As shall be explained below, it is precisely by being approved by the Bureau of Justice and having ACLA membership that NGOs Y and Z qualify to access funding from ACLA's Legal Aid Foundation Fund; and because of LAL NGOs' professional and recognized status these organizations enjoy a political space to advocate for policy changes (see section 4.2). At the same time, however, registration with ACLA also means annual monitoring of lawyers' practice, which can be a source of lawyers' self-censorship and discipline.

LAL NGOs' dual registration under MOCA and the MOJ (or local equivalents), and with ACLA, represents one of the first institutional arrangements through which the Party-state secures a certain degree of oversight of these organizations. Registration requirements create a double-institutional mechanism to supervise and control LAL NGOs. One could argue that, in fact, it is through this institutional arrangement that the Party-state incorporates LAL NGOs into the legal system, thus securing providers for an otherwise scarcely resourced legal aid system.

4.1.2 Legal profession and institutional duplication

During the state socialist period, in line with the instrumentalist view of law (as a tool of class struggle), lawyers were employees of the state in state-owned law firms, and were “to serve the state and ‘the people’ (*renmin*, 人民)” (Peerenboom, 2002: 347). However, during the Maoist period and especially during the anti-rightist movement in 1957, lawyers demanded changes in the legal system for which they were labelled as capitalists and persecuted, and law firms were closed down, especially during the Cultural Revolution. In the early stages of the reform period, echoing some of these claims during the Maoist period to professionalize the legal industry and separate law from politics, Deng Xiaoping started to encourage the re-development of the legal profession to support the new regulatory and legal process accompanying the market economy. To stipulate the responsibilities, rights and obligations of lawyers, and to protect the rights and interests of clients, the Lawyers Law (NPC, 2007c, hereafter LL) was passed in 1996 (amended in 2007). It superseded the single regulation on the legal profession of the reform period, the Provisional Regulations on Lawyers, passed by the NPC in 1980 (in effect in 1982). The LL effectively inserted market logic into the legal profession, allowing lawyers more independence from the state than they had previously enjoyed.

Law firms were then separated from the state in private law firms, and the legal profession was ‘liberalized’. However, the Party-state retained a certain degree of

power over private practice through legal institutions such as regulations covering the legal profession, by defining the practice qualification requirements and discipline criteria of lawyers in the LL (lawyers shall abide by the Constitution and the law in their practice; LL, Article 3) and in the 1993 Lawyers Professional Responsibility and Practice Discipline Standards. The Party-state also created the official governing body, the ACLA (the public organization for lawyers' self-discipline; LL, Article 37). Lawyers are therefore under a "dual management system" (Peerenboom, 2002: 353-354) whereby they are managed both by the MOJ and the ACLA (i.e. at both national and local levels).

Under the LL (LL, Article 6) "the State institutes a system of uniform national examination for the qualification of a lawyer" granted by "the judicial administration department under the State Council". The MOJ is responsible "for administering the bar examination, assessing lawyers' qualifications, issuing practice certificates to lawyers and business certificates to law firms and conducting the annual renewal review, supervising compliance with professional responsibilities and disciplinary rules, and ultimately disciplining lawyers" (Peerenboom, 2002: 355). To become a lawyer, a person shall acquire a qualification and a practice licence (LL, Article 5). To acquire such a qualification, a person must uphold the Constitution, have a minimum of three years of legal education and pass the national bar examination (LL, Article 6). To acquire the practice licence, a person shall have the lawyers' qualification and one year of practice training at a law firm (LL, Articles 8). With both the qualification and the licence, a person can *practice* law. LAL NGOs provide the platform for junior lawyers to fulfil their internship requirement and obtain their practice licence.

Lawyers can only undertake legal business if they have a practice licence and are registered at a law firm (LL, Article 15). According to Article 15 of the LL, none of the lawyers working at NGOs Y and Z can be directly employed by the NGO, because NGOs cannot register as law firms. This means that their legal staff are employed by a third party, for example, a pre-existing law firm, as is NGO Z's case. This specific requirement obliges LAL NGOs to duplicate their organizational structure, linking to

an existing law firm or establishing a law firm from scratch. This second option is financially challenging for most NGOs because it requires a significant upfront capital of assets of RMB 100,000⁴⁵ or more (LL, Article 15), which substantially adds to the capital necessary to register as an NGO. In the case of NGO X this did not present a problem, as all its lawyers are volunteers with their practice licence and employment registered with private law firms.

However, NGO Y and NGO Z both have lawyers as staff. NGO Y's legal aid department has seven full-time lawyers, while NGO Z's legal aid department runs with twenty legal staff, nine of them lawyers with practice licences. None are employed directly by the NGO, but rather by a private law firm. For example, NGO Z had originally been run using the duplicate structure, the legal entity having emerged out of the restructuring of a state-owned law firm which was privatized in the late 1990s as a commercial law firm; it then became a public interest law firm in 2005 serving as the hiring unit for and hosting the practice licences of all the lawyers at NGO Z (Z1, 23 May 2012). In effect, for lawyers, the administrative issue of the location of their licence or their employment unit does not affect their practice as they are aware that they are hired to deliver legal aid at the attached NGO.

This arrangement ensures the close monitoring (double supervision from governmental bodies) and fragmentation of civil society organizations (NGOs and law firms), obstructing a coordinated or unified political action on their behalf. This is also an important institutional obstacle to the development of public interest lawyering and LAL NGOs in China, as it imposes a double financial and administrative burden to set up two organizational structures (NGO and law firm) in order to deliver legal aid. This duplicate requirement adds complexity and institutional layers to the LAL NGOs. Moreover, it also affects the organizational culture of the NGO, as having to be ascribed to a law firm, it then takes on the professional culture of law firms and in most cases, follows the business model of

⁴⁵ Approximately £10,000.

commercial law firms, especially prominent in the case of NGO Z. These NGOs Y and Z operate with a specific and structured legal professional culture, which affects the way they provide their legal services and shapes their relationship with their clients (workers). As will be explained in Chapter Five, this creates a gap between the NGO and lawyers and workers.

It could be argued that these registration and organizational duplication requirements are proof that the authoritarian Party-state is institutionally designing a fragmented landscape for LAL NGOs and lawyers who face a complex and constraining institutional environment if they were to mobilize the law politically. Moustafa (2007) argued that judicial fragmentation was one of four key strategies through which authoritarian regimes ensure that legal institutions expand the power of the rulers. Similarly in this case, this fragmentation of legal actors could therefore secure the functionality of both the legal institutions and LAL NGOs for the purposes of regime sustainability.

Of course, these mechanisms also aim to ensure the quality and professionalism of lawyers, building standards and accountability mechanisms into the legal system. However, these institutional arrangements strongly influence, formulate even, the organizational structure, human resource management, and culture of LAL NGOs, yet again, ensuring that they comply with the legal system as designed by the Party-state. It should not be forgotten, either, that the Party-state also creates and runs the legal disciplinary institutions. Additionally, the design of the legal profession determines that LAL NGOs are useful to the legal system: they provide the platform for junior lawyers to fulfil their internship requirements and obtain their lawyers' certificate, enabling in this way the operation and reproduction of an otherwise under-populated legal aid; all in all, maximizing the possibilities of the development of the legal system.

4.1.3 Lawyers' internships in LAL NGOs

According to the legal institutions governing the legal profession, lawyers are required to fulfil a one-year internship practice in order to obtain their practice certificate from the MOJ. LAL NGOs such as NGOs Y and Z, which are registered and attached to a law firm, provide one such platform for junior lawyers to fulfil this requirement. For example, in 2012 two of the seven lawyers working in the legal aid department at NGO Y were interns; and at least three of eleven lawyers were doing internships at NGO Z.

Before graduating, still at university, I didn't even have a concept of public interest (gongyi, 公益). I do the work simply because I did my internship here, so after graduating I simply stayed here working (...) I think, for us young people, this public interest is really just doing the job, it's the same as any other ordinary job. It's the same as teachers, or working in a company, it's a job. In any case, at the same time you do your job you can also help many people. It's like any other job. At that time, I was doing an internship, I had not considered doing this work; but after a year of internship, I felt this work is ok, so I graduated [acquired the lawyers practice certificate] and stayed here working (...) There was no specific reason for me to do this job, just because I had done my internship here, and then had a better understanding of the work, so I stayed here working. (Z5, 20 September 2012)

Lawyer Zeng's reflection on the opportunity NGO Z had given him to conduct his internship and obtain his practice certificate exhibits a very practical point of view rather than a specific desire to work at an NGO. LAL NGOs such as NGOs Y and Z employ interning lawyers not only to manage their budgetary constraints, but most importantly, because these organizations are firmly committed to the development of the legal system, and especially of legal aid. It is expected that having been offered training opportunities, more junior lawyers will become interested in the public interest sector. For example, intern Lawyer Wei explained that he had become interested in public interest litigation after attending an activity on the topic at Tsinghua University and this led him to seek an internship at NGO Y (Y8, 21 November 2012). Providing training opportunities also contributes to the needed increase in numbers (and quality) of lawyers in order to build a solid legal system and the rule of law in China (Z13, 30 January 2013).

However, for the NGOs, having intern lawyers can mean instability in their human resources, as well as uncommitted staff that see their work at the NGO “just like any other job” as Lawyer Zeng mentioned above, and only having an instrumental value in their own career development. Lawyer Yan at NGO Z stated: *“We have very low salaries and the public interest sector is not yet developed in China. Besides, there is no security or protection for lawyers that are doing this type of work. Some of the lawyers here are early [older generation] lawyers, but the young generations of lawyers do not want to enter this sector because the system is not well developed”* (Z7, 19 December 2012). The lack of recognition of lawyers’ practice in the public interest sector (public interest lawyering is not an institutionally recognized sector *per se*), and the low economic rewards leads to a rather high turnover of licenced lawyers. For example, in NGO Z, in 2011 four licenced lawyers left for private practice, while in 2012 two more had left looking for better remunerated work (Lawyer Song, NGO Z, Beijing, 6 September, 2012). This can constrain the long-term sustainability of the NGOs’ legal practice, which is aggravated by the inability to rely fully on intern lawyers. Over-reliance on interns can also be a burden for the NGO because the majority of interns want to enter the private sector after obtaining their lawyers practice licence anyway, or are unable to remain in the city due to constraints on the number of lawyers allowed to practice in the capital.⁴⁶

As private law firms do, LAL NGOs such as NGOs Y and Z provide an indispensable function for the reproduction and development of the legal profession (and legal institutionalization more broadly), granting opportunities to junior lawyers to fulfil the internship requirements on the one hand; and on the other, for the development of the legal aid system, which is understaffed and lacks financial resources (Peerenboom, 2002: 362-364). Through these institutional arrangements,

⁴⁶ Beijing is a notoriously constrained institutional environment for lawyers: since 2010, due to a surplus of lawyers in the capital, the Beijing Municipal Bureau of Justice has restricted the provision of lawyers’ licences to only those with a Beijing *hukou* (Y8, 21 November 2012). This is another institutional arrangement to control the supply of (quality) lawyers in the cities, which, by virtue of distributing lawyers across the nation, also creates a system of segregation and tiered lawyers. At the same time, it is an institutional constraint on lawyers deciding where to develop their practice.

LAL NGOs are integrated into the legal system, and become integral to the institutional development of the rule of law project.

4.1.4 All China Lawyers Association (ACLA) membership

Established in 1986, the ACLA is the official public and professional organization of lawyers. It “is established at the national level, while local lawyers’ associations are established by provinces, autonomous regions, and municipalities directly under the Central Government” (LL, Article 37). The ACLA is the bar association that ensures lawyers’ self-discipline (LL, Article 37) in complying with the law through a yearly inspection and evaluation, which in turn determines the renewal of the practice licence granted by the MOJ. It is a membership-based organization, but Articles 39 and 40 of the LL stipulate that all lawyers must be members of their local lawyers association at the respective administrative level, thus they are necessarily members of the appropriate level of ACLA.

Together with the lawyers’ qualification requirements and practice licence, ACLA’s supervision is intended to ensure the quality and professionalism of lawyers in China. In fact, the Ford Foundation and the American Bar Association have been providing support and training to the ACLA to improve its organization and management (Peerenboom, 2002: 350). To manage and ensure the professionalism of lawyers, ACLA governs lawyers’ behaviour by stimulating self-discipline and monitoring their compliance with the responsibilities and obligations stipulated in the LL. The ACLA is also responsible for disciplining lawyers and ensuring their compliance with the LL, which also stipulates the punishment and liability of lawyers and firms that do not comply with their legal responsibilities (Peerenboom, 1998).

Lawyers’ practice licences are reviewed annually, which implies that ACLA membership also depends on this renewal being approved by the MOJ. As part of their annual review, lawyers have to submit a number of documents to the MOJ (or local equivalent): “a summary of their work during the last year, a certificate of

completion of training, a report regarding compliance with professional responsibilities and disciplinary rules, and a certificate evidencing fulfilment of obligations set forth in the articles of association of the bar association" (ibid: 355, quoting the Lawyers' Practice Certificate Administration Measures, 1996). The blurred division of managerial, supervisory and disciplinary responsibilities over lawyers between the MOJ and ACLA may be seen as a sign of lack of independence of the bar association. The institutional linkages between the ACLA and the MOJ and the local bureaus of justice, and some law firms' dependence on these governmental agencies for new cases and business opportunities (ibid: 355) points to clientelist or patronage (what Peerenboom, 2002, terms as corporatist) relations between the legal profession and the MOJ, as lawyers seek a close relationship with the MOJ to gain access to business or to curtail predatory officials (ibid: 15, 372). Moreover, the ACLA still needs to be "linked to government entities to survive and be effective" (ibid: 372), administratively, but also because it is dependent on government funding. Zhu (2004: 63) also points out that key personnel in the Secretariat of the ACLA, its executive body, are appointed by the MOJ, which calls into question the independence and 'self-regulatory' capacity of the bar.

ACLA's supervision of lawyers and the yearly inspection before renewal of the practice licence are therefore the disciplinary mechanisms that ensure lawyers' core compliance, basically pre-empting them (in theory, at least) from conducting any unlawful or undesired action. These particular arrangements have driven a small number of lawyers to abandon (or not enter altogether) formal legal practice, taking on cases as *citizen representatives*, and entering what has been called the 'black market' of lawyers. Lawyer Bo is one such lawyer in Shenzhen who, after working at various law firms, including two years at an important labour law firm (Law Firm D will be discussed further in Chapter Seven), now practices as a citizen representative. He takes on mainly labour-related cases, charging a small fee to his clients, but works without a lawyers' licence and so, without affiliation to ACLA. This, he argues, gives him "*a bit more freedom*" (T1, 6 January 2013) to take on sensitive cases as his practice does not depend on his licence being approved for

renewal. Sensitive cases that he mentioned included workers from SOEs where there was no legal compliance:

The cases of workers at foreign companies are not sensitive, the government is not afraid of these because it is foreign money. The government controls lawyers through the judicial department; but the government can't control citizen representatives because they are not registered nor do they have to fulfil the requirements of ACLA. (T1, 6 January 2013)

The problem is that “*it is very troublesome to be a citizen representative*” and the government has other ways of applying pressure (such as physical attacks or forcing his landlord to evict him from his office) on citizen representatives:

Shenzhen government is constantly suppressing (daya, 打压) citizen representatives and they are considering ways of requiring them to register under the city government. At the national level, the 2013 Civil Lawsuit Law initially contemplated citizen representatives, but then it was taken out of the law. (T1, 6 January 2013)

In contrast to Lawyer Bo, other lawyers who still work within the NGOs, and so are subject to the pressure of the annual practice examination, avoid taking on politically sensitive cases – sometimes including sensitive collective labour cases – because of the potential risk of losing their licence.

In sum, ACLA’s supervision and the yearly inspection by the MOJ are the institutional guarantees of lawyers’ core compliance and lawful behaviour, including lawyers at LAL NGOs. These institutional disciplinary mechanisms ensure the quality of all lawyers, notwithstanding LAL NGOs, but also, that they fulfil an efficient and useful role for the Party-state, the role of interpreting and applying the legal rules, developing the legal system and ensuring the smooth functioning of legal institutions and the extension of legal order.

4.1.5 Legal aid funding

Legal aid is briefly addressed in the LL, in three articles under Chapter VI (LL, Articles 41, 42 and 43). Nevertheless, this Law stipulates that lawyers have to provide legal aid, while the 2003 Regulations on Legal Aid (State Council, 2003) establish the requirements more in detail. According to Lawyer Song all private law firms are

required to provide a stipulated annual quota of free legal representation as legal aid (Z1, 23 May 2012). This quota is stipulated by the MOJ or local administrative equivalent (local bureaus under the ministry such as the Beijing Bureau of Justice). Executive Director Dang stated that the legal aid quota for commercial law firms is 10% of the total of the law firm's annual cases (X7, 23 November 2012). Volunteer Lawyer Zhuang reported that in her law firm this quota amounts to two cases per lawyer per year, which she fulfils by volunteering with NGO X (X8, 7 December 2012).

Taking advantage of this regulation, NGO X has created a network of over 300 volunteer lawyers (X7, 23 November 2012), who are called in when labour dispute cases require further representation in arbitration or litigation. Most of these volunteer lawyers are employed at private law firms and provide occasional, one-off legal aid on a volunteer basis to fulfil the pro-bono quota and to develop their own skills (X4, 17 September 2012). Other lawyers fulfil the pro-bono requirement by covering spare shifts at governmental or trade union legal aid centres. For example, the Beijing Federation of Trade Unions has at least 20 partners at private law firms, but not from NGOs, "*because the trade union doesn't like NGOs*" (E4, 26 November 2012). This pro-bono requirement evidently suggests the Party-state's outsourcing of legal aid, which reduces its administrative and economic burden in the provision of such aid.

According to the Regulations on Legal Aid (Article 3), above county level legal aid is the responsibility of the government which should provide the financial resources for its provision. Thus, by providing legal aid under the official system (as NGOs Y and Z do), LAL NGOs are financially dependent on the state or on private or philanthropic contributions.

Legal aid is a financially taxing exercise, more so because the average time-frame for labour cases undergoing litigation is two to four years (depending on the nature of the dispute, injury-related cases tend to take longer). The Labour Disputes Mediation and Arbitration Law (LDMAL) stipulates a three-stage process to resolve

labour disputes – mediation, arbitration, and litigation – the last two stages being conducted in legal institutions such as Arbitration Committees or People's Courts respectively. For these last two stages legal aid may be provided if the worker qualifies financially. Whether an NGO focuses on one phase, as NGO X does, or on the whole process, as NGOs Y and Z do, determines their financial burden and the possibilities of accessing financial support. Financial resources are one of the main determinants of NGOs' registration (Lu, 2009; Yu, 2006); and therefore, of their activity and independence (Wang, 2008).

NGO X, as a Mediation Committee, does not conduct legal representation and does not strictly provide legal aid as stipulated by the Regulations on Legal Aid; hence, it does not qualify to access legal aid funds. Instead, NGO X relies on funding from international organizations such as the Ford Foundation, the American, Japanese and Canadian Embassies, and even international labour movement organizations such as the German Rosa Luxemburg Foundation. In contrast, both NGOs Y and Z receive their major source of funding from the Ministry of Finance via the ACLA's Legal Aid Foundation Fund. A RMB 100 million legal aid fund was set up in 2010 by the government to provide funding to legal aid centres and contract out some of these legal aid services to private law firms (Z11, 22 January 2013).⁴⁷ In addition to funding from the Legal Aid Foundation Fund, NGOs Y and Z also receive some financial support from the Ford Foundation for some of their legal development projects. Both, NGO Z especially, are heavily dependent on funding provided by the Legal Aid Foundation Fund to conduct their casework.

The Legal Aid Foundation Fund has its own standards that NGOs Y and Z have to comply with. It provides funds to cover the costs of legal aid (mainly representation costs) post-facto, meaning that NGOs have to apply for the funding on a yearly basis based on their provision of legal aid the previous year. Moreover, the Legal Aid Foundation Fund has established standards as to who qualifies for legal aid: in the case of migrant workers, they have to prove a rural *hukou* and fall into the

⁴⁷ Lawyer Fu, the director of NGO Z, partook of the inception of this Fund and advocated for NGOs to be able to access it (Z12, 22 January 2013).

hardship or poverty levels⁴⁸ (*pinkun*, 贫困) (Z1, 23 May 2012). This restricts the scope of NGOs' reach as they have to abide by these qualifiers when accepting legal aid cases. For example, NGO Y provides free legal representation to workers with a rural *hukou* if they can provide proof that their income is below RMB 500 per month per family (Y1, 2 May 2012). Abiding by the categories established by the Legal Aid Foundation Fund is necessary for NGOs because otherwise they would incur unfunded costs. However, this stipulation is another channel through which the provision and scope of the legal aid that NGOs provide is determined and regulated by the government, and the categories of who qualifies to legal aid and legal representation are based on the rural origin and poverty level of the worker, and not on the nature of the dispute, which would be more politically significant in public interest litigation.

Funding constraints increase the service delivery orientation of LAL NGOs, which Howell (2015: 703) has described as a “welfarist incorporation” (*fuwu goumai*, 服务购买). NGOs Y and Z’s entrenched reliance on funding from the ACLA’s Legal Aid Foundation Fund reveals that the Party-state continuously procures legal aid services for migrant workers from LAL NGOs.⁴⁹ This financial dependency induces LAL NGOs to self-discipline and core compliance in order to secure their funding. Additionally, this source of funding is dependent on the LAL NGO’s having satisfied previous requirements of formal registration and recognition by the MOJ and the ACLA’s Legal Aid Foundation. All in all, funding sources are another institutional mechanism to secure control of and discipline lawyers and LAL NGOs.

⁴⁸ Note that the 2003 Regulations on Legal Aid do not indicate a concrete threshold; however, Article 10 indicates that citizens in economic hardship can apply to legal aid if meeting any of six conditions, one of them being in receipt of social benefits or being in the lowest income range. The lowest income range is dependent on the administrative level of government. Moreover, the corresponding governmental jurisdiction can add to the requirements established in the regulations to provide legal aid. However, the State Council has suggested that no requirement is necessary for migrant workers applying for legal aid in cases of labour remuneration and occupational injury compensation. See State Council Suggestions to Resolve the ‘Peasant Workers Problem’, Article 29 (*guowuyuan guanyu jiejue nongmingong wenti de ruogan yijian*, 国务院关于解决农民工问题的若干意见) State Council, 27 March 2006. Available at: http://www.gov.cn/jrzq/2006-03/27/content_237644.htm (Last accessed 9 December 2015).

⁴⁹ This is especially significant against a context of tightening monitoring of international funding to civil society organizations, which has been severely cracked down since 2014, and even more so since the 2015 drafting of the foreign NGO law (see footnote 41 in this chapter).

4.1.6 Legal implementation and judicial independence

At the centre of the discussion about the rule of law in authoritarian contexts is the question of the degree of judicial independence. Moustafa (2007: 40), quoting E.P. Thompson (1977),⁵⁰ argues that a certain degree of judicial independence, even if it is simply giving the impression that this is so, is necessary for legal institutions to effectively build legitimacy and sustain authoritarianism at the same time that their perceived independence attracts legal activism. As pointed out in Chapter Two, the independence of courts in China is a tricky question, even if the judiciary has manoeuvred autonomous spaces at various levels in recent years (Ip, 2012; Yu, 2009). The lack of judicial independence has effects on the roles and capacities that other legal institutions have, for example, to implement laws, and on legal professionals.

In reference to the implementation and monitoring of labour laws, research has pointed out the lack of legal enforcement by Labour Bureaus (Henischke, 2011; Ho, 2009; Worker Empowerment, 2009b, 2010; Wang et al., 2009). For example, according to Lawyer Ou: “*the Labour Bureau doesn’t care (buguan, 不管).*⁵¹ *If the worker has proof of the labour relation, then they’ll do something; if there is no proof, then they won’t care*” (Y9, 26 December 2012). When a worker attends the Labour Bureau to seek assistance for their labour issue, the lack of proof of the labour relation is indicative that no labour contract has been signed and the employer is breaking the Labour Law and the LCL. Labour Bureaus rarely monitor contract-signing rates, and generally do not respond to disputes that lack proof of labour relation which are indicative of legal violations by the employer. Lawyer Eng emphasised the problem of lack of state capacity to implement and monitor in relation to Shenzhen’s local authorities: “*for example, in Shenzhen there are over 200,000 companies, while the labour inspection department has only approximately 1,000 people; and they don’t care. They cannot control, the government cannot*

⁵⁰ “The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation”, otherwise legal institutions “will mask nothing, legitimize nothing” (Thompson, 1975, quoted in Moustafa, 2007: 40, fn66).

⁵¹ This could also be referred to *buguan* 不管, which would indicate that it does not control, manage or monitor.

cope, it has no capacity to control (...) but of course it is also because it has vested interests” (D1, 25 September 2012). This highlights the fact that Labour Bureaus do not have the capacity (or granted power) to enforce or monitor compliance with national legislation, but also, might have vested interests (e.g. corporatist interests with the enterprises in the locality) in not fully implementing laws and local regulations.

Equally, the local courts have no capacity to meet the demands of a growing number of labour conflict cases. For example, in Shenzhen every court has three people [the judge and two assistants]. In Shenzhen there are simply not enough people to take all the cases and that is why they keep pushing and delaying cases. It is a waste of resources, because labour conflict exceeds the capacity of the courts. (D1, 25 September 2012)

Beijing also suffers from the problem of judicial overcrowding: “*There are over seven million peasant workers in Beijing, so just imagine the problem of their access to justice and the law!*” (Z11, 22 January 2013). With an increasing promotion of legal standards and a growing emphasis on the law from the central government (Choi, 2015; Huang and Huang, 2015; Minzner et al., 2015), there is more pressure on all levels of local government and on the judicial system – to implement national laws, to develop their own local regulations according to the law and to local conditions, and to deal with an increasing use of the legal system by the people. As Lawyers Eng and Song indicated, both the governmental (Labour Bureaus) and judicial institutions (courts) lack the capacity, resources and independence necessary to cope with this increasing pressure.

In addition, the problem of the judiciary is two-fold: its lack of capacity to deal with the sheer number of cases, and its lack of capacity to rule independently from political (and economic) interference.

Judges have to rule the case's decision within the law, but in most cases it is already decided from above [i.e. the Party]. There are big cases, such as Wang Lijun's case,⁵² which show this very obviously.

⁵² Wang Lijun is the former police chief of Chongqing, who had a close relationship with the Chongqing Party Secretary, Bo Xilai. In February 2012 Wang Lijun entered the US Consulate in Chengdu (Sichuan) and revealed the details of the alleged murder of British citizen Neil Heywood at the hands of Bo's family, which he had ignored due to his connections to Bo Xilai. At the time, Bo Xilai was a credible opponent of Xi Jinping for the leadership positions within the Politburo Standing

There is a problem of judicial independence. It is a distribution problem. This distribution problem is also related to the power granted to the judges. I see it in the cases I deal with. (D1, 25 September 2012)

Similarly, Lawyer Zhu stated:

Lawyers are much more professional than before. The whole legal system is much more professional. The problem is that the judges don't usually understand the starting point of the laws,⁵³ which is to protect workers. The judges also receive indications from above as to how to proceed with the cases. (...) Yes, from the government. (...) Moreover, the other problem is that there is little active inspection and monitoring. The whole approach is after the problem has raised, it is not preventive. (Z6, 26 September 2012)

The lack of judicial independence and capacity to deal with increasing numbers of cases may be explained by the fact that the Party-state retains authority over legal institutions in order to guarantee that they will not act against its interests. LAL NGOs act as a buffer to the potential problems caused by lack of judicial capacity by managing cases before and after they enter the courts. Judicial independence is combined with legal institutional fragmentation – and administrative duplication of LAL NGOs into law firm and NGO. LAL NGOs fill in the gaps, thus becoming a crucial actor in the legal system.

One way that this problem is being addressed is by relying on professional and approved NGOs, such as the NGOs in this study, to alleviate some of the pressure on the system. In a way, this responds to the 'incorporation' of NGOs as providers of services, as Howell (2015) pointed out. These LAL NGOs provide legal aid and absorb many cases that would otherwise revert to the Labour Bureaus, the Letters and Visits Offices, or look for their own ways of resolving the matter (as will be shown in Chapter Seven). *"So NGOs come and resolve many problems that the*

Committee, General Secretary of the CPC, and President of the PRC, in the 18th Party Congress of November 2012. This incident precipitated Bo Xilai's downfall and imprisonment. Wang Lijun's trial was covered widely by the media, and he was sentenced to imprisonment for abuse of power, among other charges (Xinhua, 2012). Bo Xilai was sentenced to life imprisonment for corruption in 2013 (BBC, 2013; Xinhua, 2013).

⁵³ Until the amendment of the Judges Law in 2001, judges were not required to have a degree in law or legal experience. The amendment now requires judges to have a university degree in law or a degree in another subject combined with some knowledge of law, and two years of experience of legal work to become a judge in a lower court, and three years of experience to become a judge in a higher level court or the Supreme People's Court (Peerenboom, 2002: 291).

government cannot resolve, for example, providing legal training (pufa, 普法), providing services, and preventing many more inconveniences (mafān, 麻烦) from happening” (D1, 25 September 2012). In fact, the [REDACTED] district in Beijing registered a decrease of petitions to the local government within one year of NGO Z operating (2005-2006). The district government acknowledged the key role played by NGO Z, which, by providing advice and taking dispute cases through mediation and other legal means (Z12, 22 January 2012), was absorbing social conflict. This suggests an important correlation between LAL NGOs and other forms of action, LAL NGOs acting as a buffer to potential social disruption. Hence, LAL NGOs perform a parallel role to that of legal institutions in preventing the pressure of labour conflict from spilling over to other institutions of the state such as Labour Bureaus and the petitioning system. By doing so, they also become palliative instruments of labour conflict. At the same time, LAL NGOs become buffers of labour conflict in their own right, as they drive disputes into the authorized and legal resolution channels, increasing the institutionalization and ‘judicialization’ of labour conflict, as argued in the previous chapter. However, some LAL NGOs play another important role for the Party-state, precluding labour conflict from reaching (and putting pressure on) the judiciary by focusing on mediation as the ‘best’ and ‘most suitable’ way for migrant workers to resolve labour conflict (as will be shown in Chapter Five).

In sum, I have presented here the main institutional arrangements that ensure that LAL NGOs and their lawyers remain useful to the CPC’s strategy of governing by law, contributing to the dissemination, maintenance and development of the legal system, and ultimately, securing social order and the stability of the regime. These institutional arrangements include the NGO formal registration and dual management system; the regulatory institutions of lawyers – including the LL, lawyers’ practice licence and ACLA membership – and patronage relations between the bar and the Party-state (i.e. MOJ); the institutional duplication (and fragmentation) of LAL NGOs; the dependency on funding, especially from the Legal Aid Foundation Fund; and lack of judicial independence and capacity. The financial

factor also indicates how the government of the CPC outsources the provision of legal aid to both private law firms and LAL NGOs. These institutional arrangements regulate LAL NGOs and lawyers, securing their core compliance (Moustafa, 2007) to the law as designed by the Party-state, and prevent them from politically mobilizing the law to challenge the Party-state or from taking on politically sensitive cases and engaging in ‘radical’ *weiquan* lawyering (i.e. collective labour cases in SOEs or human rights cases), according to Fu and Cullen’s taxonomy (2008, 2010). LAL NGOs are extraordinarily useful to the legal system and the Party-state more generally, for yet another reason: they are increasingly becoming ‘intermediary’ organizations between the state and society, creating input institutions through which accurate data on the effectiveness and implementation of the laws is being transferred back to the Party-state. Through this, LAL NGOs are advocating and nurturing the improvement and gradual transformation of the legal institutions to better suit (and govern) the socio-economic conditions of contemporary Chinese society.

4.2 Advocacy and legal development

“We represent them [peasant workers] at the individual level in cases, and we represent them as a social group at the policy level (...). We voice their needs.” (Z12, 22 January 2013)

“There are some laws that do not match social reality (...) They don’t understand society, the needs of workers; I mean law is opposite to reality. Lawmakers are in their offices without foundation, drawing some laws, and they have not done deep research. In the end, the laws they formulate have no social application in this society.” (Z5, 20 September 2012)

LAL NGOs such as NGOs Y and Z are recognized as legitimate legal actors that provide legal aid to migrant workers and contribute to the lawful resolution of labour disputes; they are able or allowed to engage in legal advocacy. These organizations and their staff lawyers are committed to the law and believe it is the best instrument to protect workers’ rights and advance China’s socio-economic

development. Hence, they use the findings of their research as the basis to lobby the government for legal development; this is crucial for the smooth functioning of the legal system and for the Party-state, because LAL NGOs provide feedback to the government on the actual gaps, lack of implementation, and problems of the law in practice, which enables gradual institutional change by adjusting and improving the legal institutions.

As with the LCL in 2007/08 while it was being drafted,⁵⁴ LAL NGOs and legal experts provide recommendations to the relevant governmental and legal bodies in an attempt to shape the law-making process and outcomes. In particular, in 2011 NGO Y actively partook in the drafting process of the amendments to the Occupational Disease Prevention Law (*zhiyebing fangzhi fa*, 职业病防治法). NGO Z continuously participates in the making of labour regulations and national level laws through different political channels, with the background aim of developing public interest litigation and the 'rule of law' in China. In the following I explain how and why each of these two LAL NGOs engage in legal advocacy through two case studies, and indicate the factors that determine that such organizations partake in the law-making processes. I conclude this section highlighting the relevance LAL NGOs' advocacy work has for the development of the legal system, for the maintenance of social stability, and for the preservation of the regime more broadly.

4.2.1 NGO Y and the Occupational Disease Prevention Law

NGO Y focuses on workplace safety and injury-related labour disputes. Since 2009 it has been conducting research, mainly on occupational health and safety (OHS) in China, given that the majority of cases it manages are those of injured migrant workers. This has given NGO Y the evidence to produce extensive research reports and policy recommendations in relation to the Regulations on Worker Injury Insurance (2008), the Occupational Disease Prevention Law (NPC, 2011, hereafter ODPL), the Social Security Law (2011), and it continues to do research on uninsured injured workers. NGO Y has a public policy research department staffed with

⁵⁴ See Chapter Three.

four/five legal researchers, all of whom hold law degrees. The research department continuously conducts surveys on labour issues based on the NGO's own casework and legal practice, and publishes a quarterly report with its findings on the different issues researched. With this material, NGO Y advocates directly for legal reform by sending their quarterly reports to legal academics at the main Chinese universities, and to specific law and policy-makers, for example, at the NPC.

Between 2010 and 2012 the NPC reviewed the Occupational Disease Prevention Law (ODPL),⁵⁵ the State Council Legislative Affairs Office opened the draft of the amendments to the Law to public consultation in three rounds: June 2011, October 2011 and December 2011. In December 2011 the amendments to the Law were approved (NPC, 2011). Against this timely context, NGO Y produced a research survey on occupational disease victims based on the cases arriving at their legal aid department. Between 2010 and 2011 with a sample of 1,026 workers, and 172 in-depth cases, the research showed that pneumoconiosis is the most prevalent occupational disease (70.2%), followed by poisoning (19.1%); the majority of affected workers were from the mining industry (36.4%). Only 23.3% of the sampled workers had some form of protective facilities in the workplace. The report also showed that the overwhelming majority of workers affected by an occupational injury or disease (84.3%) are migrant workers, only half of which (50.6%) had a written contract of employment. This latter fact is of great importance given that proof of labour relation and medical certificates are pre-conditions to apply for certification of a work-related injury or disease as stipulated in the Regulations on Occupational Injury Insurance issued in 2003, and amended in 2010 (State Council, 2010). All this documentation and the certification of occupational injury is also a prerequisite for a dispute to proceed through arbitration when trying to obtain compensation for the disease or injury.

According to the Social Insurance Law (2011) workers are entitled to compensation for occupational diseases or injuries if they obtain certification that the

⁵⁵ For a commentary on the amendments to the Occupational Disease Prevention Law, also known as Law on the Prevention and Treatment of Occupational Diseases, see CLB (2012).

disease/injury is work-related. However, the report showed that only 40% of affected workers get any compensation at all. Furthermore, based on this study and its experience in occupational health casework, NGO Y indicated that the chief obstacle for workers is obtaining medical recognition of their disease or injury because of the official documentation requirement (such as proof of the labour relation). Without a medical certification, workers are unable to proceed to a labour dispute and therefore, do not receive compensation for their injury/disease, as mandated by the Social Insurance Law. At the time, when advocating for specific changes to drafts of the Law, NGO Y indicated that due to their lack of documentation, 48% of affected workers were “rejected by the official occupational disease diagnosis institutes” (NGO Y, Survey Report on Occupational Disease Victims, February 2011).

Given its *“long cooperation with the Beijing Department of Labour and Department of Health”* (Y2, 30 October 2012), NGO Y was recommended by the Department of Health to the Standing Committee of the NPC Commission reviewing the Law. In March 2011, NGO Y was the only NGO invited to an internal meeting organized by the Education and Science Committee (*jiaoke weiyuanhui*, 教科委员会) to discuss the draft amendments of the Law. In June, the draft was disclosed to the public, calling for recommendations. At this time, NGO Y, working with the Workers’ Daily newspaper, invited twenty expert scholars in the field to attend a forum (Y2, 30 October 2012).

NGO Y produced a set of recommendations to give to the State Council Legislative Affairs Office while it was seeking public consultation on the first draft of the ODPL. NGO Y’s strategy was to send their report and recommendations to the 170 Standing Committee commissioners of the NPC, with suggestions for amendments to the draft. According to Legal Researcher Ying, these suggestions were very positively received, the Vice-chief Commissioner even reproducing the language of this report in his comments to the media (Y2, 30 October 2012). It also provided recommendations to the second and third round of consultation on the draft amendments. For the October 2011 round, NGO Y organized a second forum, while

for the third, it produced recommendations that were sent to the thirty most important Commissioners (Y2, 30 October 2012).

As a result of the consultation process, the final approved amendments to the Law included some of the recommendations that NGO Y suggested to the Legislative Affairs Office and the Commissioners of the NPC Standing Committee. Among others, NGO Y's recommendations, which were linked to its research report, were reflected in amendments to Articles 44 and 62 of the ODPL. Organizations that perform the diagnosis of the occupational disease may not refuse workers that seek diagnosis (ODPL, Article 44) and can perform workplace inspections to gather information about occupational health conditions and hazards (Article 48). However, workers who cannot prove their labour relationship may apply to a local civil affairs bureau for medical assistance (ODPL, Article 62). In relation to compensation, the amended Law increases the maximum penalty imposed on employers who harm workers' health by not complying with the ODPL, which ranges from RMB 300,000 to RMB 500,000 (ODPL, Article 78). *"We monitored the effect of our suggestions by the responses we received from the Commissioners via email, telephone or text message. Of course, they will not say that the amendments of this clause are because of us. Their opinion is affected by us but you cannot say it is 100%"* (Y2, 30 October 2012).

One of the key factors explaining the impact of NGO Y's effect on the law-making process is the lack of legal (and empirical) knowledge that legislators have. In the case at hand, only 20 of the 170 Commissioners have any background or experience in law; the NPC Standing Committee has a serious lack of legal expertise. This expertise is crucial when particular areas of the law are being developed. Therefore, Legal Researcher Ying argued that the Commissioners welcome suggestions and recommendations from professionals and experts in the legal field during the law-making process (Y1, 2 May 2012). As Lawyer Pan, the leader of NGO Y indicated, it is because of their expertise and professional standing that the government accepts and even seeks their advice in OHS-related matters. As a result of his dedication and expertise, Lawyer Pan has been awarded various prizes from the MOJ, the

ACLA and the ACFTU, such as the National Outstanding Lawyer in Protecting Labour Rights (ACFTU), and the National 1st May Labour Medal (ACFTU) in 2007. As Legal Researcher Ying said, *"that he won the Medal is [proof] that he is recognized by the governmental system (...). It means that he is safe"* (Y2, 30 October 2012). These prizes represent Lawyer Pan's political status, and signal state-endorsement and recognition of his position within the legal apparatus. NGO Y and its lawyers are embedded into the system (*tizhinei*, 体制内). *"Anyone can give recommendations, but when officials want to invite an expert to give advice, they will first check his background"* (Y2, 30 October 2012). Therefore, it is NGO Y's acquired professional and expert status on OHS matters which enables it to provide advice to the government on labour and OHS-related legal development, Lawyer Pan being regularly visited by government officials seeking his advice on particular legal issues at his office in Beijing (Y12, 25 January 2013).

NGO Y's ability to engage in legal development is determined by its professional and expert status on the one hand, and its political status (state endorsement) on the other. For Legal Researcher Ying, there are actually three factors that determine entry into the law-making process: expertise, moderate approach and recognition: *"if you have a moderate approach it is easier to enter the rule-making process; you will have a bigger effect"* (Y2, 30 October 2012).

However, to enter the policy-making processes, it is necessary to have connections to certain gatekeepers at the governmental level, and to have knowledge of the political dynamics of law- and policy-making in China. NGO Y concentrates its efforts where it knows it will see an outcome:

Here it is easier to change the law, not the regulations of the different governmental departments. Legislators are independent and they don't have conflicts of interests. [Government] departments have interests and if regulations are too strict, it is them that are affected (...). It is more difficult to change the regulations from departments. (Y2, 30 October 2012)

For example, Legal Researcher Ying compared the outcome of NGO Y's advocacy work during the drafting of the ODPL and the current work they are conducting on

the regulation of uninsured workers. NGO Y has an established relationship with various governmental units, such as the Department of Labour under the Ministry of Labour and Social Security, and the Department of Health, under the Ministry of Health. Regarding its advocacy work on uninsured workers, Legal Researcher Ying points out: *"you can see the interests in the departments, their willingness to protect their interests"*, for example, each department being concerned by the budgetary implications that would derive from providing insurance to workers. This would require the creation of a fund for uninsured workers, and would imply different departments having to decide which one had the main responsibility (i.e. the Department of Labour, the Department of Work Injury Insurance, or the Department of Medical Insurance under the Ministry of Labour and Social Security, or other departments under the Ministry of Health). Moreover, she said:

There is no judicial review of the regulations of the departments; the departments make regulations without supervision by a legislative body, while the national legislator [NPC] is kind of independent, kind of independent. Because departments are disconnected, and no department alone can decide on a law by themselves, but they can decide on regulations (...) in the case of regulations that are affecting several departments, we will coordinate for the interests of both departments, the Department of Health and the Department of Labour. (Y2, 30 October 2012)

Although regulations have to abide by law, local governments and departments can and must issue regulations that make laws applicable to the local conditions. Where there are no relevant laws, governmental regulations apply, as in the case above.

Different government departments can have different interests and on some occasions, their regulations can be contradictory. NGO Y orchestrates a coordinated advocacy approach that aims to propose institutional changes that balance the interests of different governmental departments (the different stakeholders), are more effective and have a higher likelihood of impacting regulations. However, because of the complexities of coordinating the interests of different departments, when it comes to policy advocacy, and specifically in the case of advocating for the creation of an uninsured workers fund, NGO Y has to use additional methods to attract political attention, such as using the media to raise more public and social

awareness. Among their advocacy methods, NGO Y also performs impact litigation: they choose to take more cases of uninsured injured workers, with the aim of increasing the number of these cases that reach court, so as to raise awareness and have an impact on governmental policies through litigation (Y2, 30 October 2012).

NGO Y therefore is a recognized and endorsed actor that operates within and for the benefit of the legal system. Its expertise is considered and actively sought by legislative actors within the governmental bodies while developing new legislation. Its political capital results from its expertise and professionalism, given that it is also the only organization versed in occupational health casework and has considerable empirical evidence that even the legislative bodies of the NPC Standing Committee lack. It provides substantive empirical research that is of great value for legislators – extremely valuable feedback to improve the legal institutions. NGO Y therefore enjoys ample space to advocate for legal reform and development in relation to OHS and labour rights.

4.2.2 NGO Z and Public Interest Law

Since 2002, NGO Z has engaged in legal and policy advocacy, most importantly, promoting public interest (*gongyi, 公益*) law in China. Its leader, Lawyer Fu, is a well-established legal practitioner, scholar, and policy advocate, and one of the leading figures in China advocating for public interest law. For Lawyer Fu “the enforcement of public interest law is the most realistic and practical way of achieving justice (...) Public interest law is the soul of the rule of law, and the rule of law is the foundation of the realization of justice” [2009: 1-2].

NGO Z has played a major role in the law-making process in various fields, mainly legislation for the protection of children, and labour laws. Among others, Lawyer Fu has actively participated in the drafting of the LCL, of the Social Insurance Law, and of the amendments to the Regulations on Occupational Injury Insurance (*gongshan baojian tiaoli, 工伤保险条例*). NGO Z’s policy advocacy strategy is “*to make a big issue into concrete, specific issues, and advocate for little things, this way we can*

speak up for migrant workers' needs" (Z12, 22 January 2013). NGO Z's advocacy model is based on its well-established expertise and its empirical evidence is based on more than ten years of professional work and its legal research department houses half its 50 member staff (Z1, 23 May 2012). Based on its continuous casework, legal researchers produce the evidence identifying the legal problems and main labour issues peasant workers face which informs their recommendations for policy or legal reform. In a broader sense, NGO Z also acts as a labour inspectorate because when handling a case, it "*looks for the people responsible, we go to the end of the line, and demand accountability and responsibility, putting pressure on companies to abide by the law (zhenggui, 正规), putting pressure on the government, too*" (Z7, 19 December 2012).

As with NGO Y, NGO Z relies on its legal research, and as a result of its professional stand and expertise it has developed a model of strategic communication with the government. Through this strategic communication, NGO Z makes use of empirical evidence to make policy issues concrete, to "*break things down and make them tangible, specific, manageable; not political but practical*" (Z12, 22 January 2013). Making things practical means that NGO Z strategically uses the empirical evidence produced by the research department to maximise its political resources. With this assertion, Lawyer Wang also emphasises the apolitical character of their work and legal action more generally – it does not intend to challenge the regime but to favour institutional and regime development.

For example, Lawyer Fu was contacted directly by the director of the Department of Occupational Injury Insurance under the Ministry of Labour and Social Security requesting his views on the occupational injury insurance system. NGO Z produced a report based on 152 cases of injured migrant workers they had dealt with between 2005 and 2007, and pointed out more than 1,140 occupational injury problems. The report was provided to the Department of Occupational Injury Insurance, recommending reform of the existing Regulations on Occupational Injury Insurance. Thereafter, between 2007 and 2009, Lawyer Fu and other lawyers at NGO Z were invited to participate in roundtables at the Department of

Occupational Injury Insurance where amendments to the Regulations were drafted *prior* to public consultation. They were also invited to other high level meetings, such as the February 2009 final roundtable to discuss the problems of implementation of the Social Insurance Law with the Administrative Law Office of the Legislative Commission of the NPC, the Political-Legislative Department of the Legislative Office of the State Council, and the Legislative Department of the Ministry of Labour and Social Security [REDACTED] 2009: 222). In July 2009 the State Council Legislative Office announced the amendments to the Regulations [REDACTED] 2009: 227-228). Years later, in 2011, the Social Insurance Law was enacted.

NGO Z has also been instrumental in the development of public interest law and legal aid in China. Given its role in the provision of legal aid even before the system formally existed in China, NGO Z advocated for the development of a formal system of legal aid. One of the most significant results of NGO Z's advocacy is related to the establishment of the Legal Aid and Public Interest Law Committee within the ACLA, which Lawyer Fu, the director of NGO Z, directs. This is the governing organization of the legal aid system in China. Also, Lawyer Fu promoted the establishment of the legal aid fund (discussed above), which materially supports the legal aid system. One of NGO Z's most notable achievements in this area was in 2010, when Lawyer Fu was invited to governmental meetings to decide how to distribute the legal aid fund's budget of RMB 100 million. The legal aid fund was open to private law firms and governmental legal aid centres, but Lawyer Fu advocated for civil society organizations to be given access to it as well (Z12, 22 January 2013). As a result, since 2010 NGOs such as NGO Z and NGO Y have been able to apply for funds from the Legal Aid Foundation Fund to cover the casework costs of those plaintiffs who qualify for legal aid (as explained above).

NGO Z's participation in such high-level political meetings can only be explained by Lawyer Fu's own political capital. NGO Z, having begun life as a state-owned law firm, restructured into a private law firm under which it built a public interest law firm or NGO. It already had state endorsement as a legacy from its original incarnation and thus avoided the difficulties faced by other NGOs in China

(regulations for registration, funding, etc.). This enabled NGO Z to develop and engage in large amounts of casework in various fields, not only labour. Moreover, Lawyer Fu is a political figure with substantial political status: he is a member of the CPC; was one of the nineteen members of the Legislative Committee of the NPC (*falü weiyuanhui*, 法律委员会); is the legislative representative at the Beijing People's Congress; and the Director of the Legal Aid Committee of the ACLA; in 2012 he was standing director of the ACLA, and the legislative representative of the Standing Committee of the People's Congress of Beijing City for [REDACTED] District; he was one of only three lawyers to attend the 18th Party Congress, where he advocated for the deepening of the rule of law in China. Lawyer Song, NGO Z's Executive Director is also a member of the CPC, and Secretary General of the Committee on Public Interest Law at the ACLA, and has been awarded the National 1 May Medal by the ACFTU. These facts indicate NGO Z's political capital, which, "*of course, gives him [Lawyer Fu] enormous opportunities to speak out and advocate for policy and legal reforms*" (Z13, 30 January 2013). Lawyer Fu's background allows NGO Z a privileged position *within* the political and legal systems, enabling its participation in government-led discussions and working forums where the drafts of legislation are designed and shaped. Lawyer Fu pursues the development of the rule of law in China, whilst fostering the professionalism of lawyers and firms providing legal aid. Hence, NGO Z not only advocates for small improvements in the legal institutions, but it provides the infrastructure for the development of legal aid in China.

The cases examined above illustrate how LAL NGOs perform empirical research that feeds into their advocacy reports, identifying gaps in the current legal system. With these, such NGOs attempt to and succeed in influencing the government to change legal institutions, advocating for new labour rights to be included in the legislation. NGOs Y and Z therefore play a crucial role in the development of China's labour legislation and the legal aid system, pointing to broad implications at the political level, claiming to "represent workers at the policy level" and "to speak workers' needs" (NGO Z). At the same time, these LAL NGOs are instrumental in the legal governance of labour relations in China, as they not only identify legal loopholes

and gaps in implementation, but also perform functions properly those of labour inspectors from the Labour Bureaus as they identify workplaces where there is a lack of legal compliance (for example, lack of labour contract signing, or insurance provision). By doing so, LAL NGOs compensate for the inadequacies of legal implementation, lack of monitoring, and the inefficiencies of governmental bodies (Labour Bureaus, judiciary, and even the ACFTU).

Of the two cases discussed, NGO Z more clearly illustrates the role LAL NGOs are playing in the macro-structure of China's legal system, instrumentally formulating and developing legislation and providing the platform for the development of the legal aid system and of lawyers. Moreover, the case of NGO Z provides evidence of the simultaneous role LAL NGOs play at the macro-level, promoting legal development at the same time that they are instrumental in governing both labour and lawyers in China. NGO Z's main lawyers, Lawyer Fu and Lawyer Song are directors of different units within ACLA and their participation in the law-making process also highlights the fact that, despite the ACFTU's legal status as the 'sole legal representative of workers', there are other actors taking on the role of workers' representative at the policy level. They are able to take this role because of the professional expertise and political capital of the leaders of the LAL NGOs, which reflects their state-endorsement. Moreover, these LAL NGOs function within the state-sanctioned frameworks and perform crucial functions for the government, such as the delivery of social services (in the form of legal aid), and resolution of labour disputes, thus preventing conflict from overcrowding other governmental channels (such as petitioning), both of which ultimately contribute to the primary aim of the legal system – the preservation of *harmonious* social and labour relations, and social order. Finally, NGO Z aims to play an ever more transformative role within the legal system, as its legal advocacy work is intended to pave the way to the rule of law in China (Z13, 30 January 2015).

Through this advocacy work NGOs Y and Z constitute themselves as input institutions for bottom-up channelling of information, in the sense that they enable civil society to feedback into the system which then allows the state to present

itself as open to feedback from professional lawyers and experts. At the same time, these inputs are extremely valuable as a source of feedback for the Party-state in its efforts to improve the legal system and in absorbing sources of potential pressure (enabling the law to fulfil its function to maintain social stability (*weiwen*, 维稳)). This sort of dynamic is analogous to the kind of institutional change through active ‘political cultivation’ of the institutions by different political elites to adjust the institutions to the political and economic environment (drift) which ultimately enables both institutional and political continuity: “regimes capable of survival in a complex environment are likely to have built-in feedbacks that inform rule makers how their rules are working out in practice” (Streeck and Thelen, 2008: 15). LAL NGOs’ advocacy work is useful to and efficient for the government precisely because it is a feedback mechanism that allows the upward flow of information in order for the legal institutions to be corrected and perfected, and the absorption of abnormalities and potential sources of social pressure. In other words, it allows for gradual institutional improvement (and change) that leads into both institutional and regime stability.

4.3 Concluding remarks

In this chapter I have examined the question of how the Party-state ensures that the law fulfils the function of preserving social stability and maintaining the regime. I have shown that it does so through a sort of incorporation (Howell, 2015) of civil society actors (LAL NGOs and lawyers) who become crucial players in maintaining social stability. I have examined the formal institutional arrangement that is in place to ensure that civil society actors (legal actors such as LAL NGOs and lawyers) comply with the legal system and remain efficient for the purpose of maintaining socio-political stability.

This institutional arrangement derived from the structural reforms following market liberalization, such as legal reforms and the opening of institutional spaces for civil society organizations. It includes the regulations on NGO registration and the institutional duplication (and fragmentation) of LAL NGOs into private law firm and

NGO, their supervision by MOCA, MOJ and ACLA; the legal and professional requirements demanded of lawyers – internships, licences and ACLA membership, – ensures lawyers' and LAL NGO legal staff's core compliance to the law (Moustafa, 2007); the public sources of funding for legal aid make LAL NGOs dependent on public funding and interested in cooperating with the state; and the lack of judicial independence (Moustafa, 2007) and capacity pressures LAL NGOs to fill in the gaps and fulfil similar functions to the judiciary and Labour Bureaus. It is possible, therefore, that due to ACLA's close relationship with the MOJ and LAL NGOs' dependence on ACLA's funding, that LAL NGOs are also involved in patronage or clientelist relations with the MOJ, hence, extending their core compliance. I have argued that these institutional arrangements incorporate 'intermediary' organizations such as LAL NGOs beyond the procurement of services (as pointed out by Howell, 2015). In these cases, LAL NGOs appear to be integral to the legal system, which enables the CPC to ensure that they restrain themselves from challenging the regime or inciting workers to mobilize. Hence, these actors enable the efficient functioning of the legal system, and the CPC increases its chances of governing by law and controlling two sources of social pressure, those originating from labour conflict and potential challenges by lawyers and LAL NGOs.

The institutional factors presented in this chapter also determine the characteristics and organizational culture of LAL NGOs, which will be explained in the next chapter. It is through these institutional arrangements that the Party-state ensures that LAL NGOs become integral to and constitutive of the legal system, and efficiently meet the law's function of maintaining social stability. These organizations do so by contributing to the diffusion, implementation, fine functioning and development of the laws, managing labour disputes and feeding evidence about laws in practice back into the system. LAL NGOs' research and advocacy is hence of extreme importance to the Party-state. Identifying gaps in implementation and advancing labour legislation is not only extremely significant to furthering workers' rights, but also crucial to the Party-state and the trade union which have limited first-hand knowledge, legal expertise and capacity to develop the legal frameworks. LAL NGOs such as NGOs Y and Z provide the expertise and empirical data necessary for the

improvement and perpetuation of the legal framework governing labour relations in China. LAL NGOs therefore compensate for the inadequacies and limitations of the Party-state's capacity, and enable the cultivation and gradual improvement of legal institutions to absorb the irregularities and gaps in their functioning. With their advocacy work LAL NGOs create feedback mechanisms which, as Streeck and Thelen (2008) point out, are necessary for institutional change or 'input institutions' of the sort that Nathan (2003) emphasises to make his argument for the resilience of the regime.

Drawing from the examples of NGOs Y and Z, I have provided evidence to challenge the assumption that *weiquan* lawyers in China, and by extension, LAL NGOs, can somehow radically challenge the authoritarian state or politically activate or mobilize their constituency (their worker clients), as will be explained in the next chapter. On the contrary, the institutional factors examined above impose constraints on LAL NGOs that ensure that they remain faithful and efficient to the purpose of the legal system. This is not to argue that NGOs in China do not have the potential to incite social mobilization through mobilizing the law. There is sufficient evidence in the literature to show that law can be a resource to challenge political regimes and to push for policy and political transformation, such as in liberal democracies as in the USA, Britain or Canada (McCann, 1994; Epp, 1998; Moustafa and Ginsburg, 2008), or even under authoritarianism (Halliday and Liu, 2007). In China, however, these LAL NGOs do not represent a challenge to the *status quo* of the regime; on the contrary, they are constructive to its resilience and adaptability to contemporary socio-economic conditions and challenges having been institutionally incorporated into the legal system and committed to its ideological project, the rule of law.

Chapter Five

“On behalf of workers”

Legal mobilization by lawyers and Legal Action Labour NGOs

“Legal aid NGOs have a major role, which is in the advantage of the government (...) NGOs preserve social order, maintain social harmony. They alleviate social conflict”
(Y10, 26 December 2012)

“I don’t understand the law, and I have no capacity to resolve this issue, so I come to NGO X so that they help me solve the problem”
(W23, 11 September 2012)

Even in cases of highly restricted political environments, legal institutions, courts in particular, “represent crucial avenues for these actors [ordinary people and political activists] to challenge state policy because most other formal avenues, are, by definition, closed down in authoritarian states. Litigation also affords strategic advantages to political activists because it provides opportunities to challenge the state without having to initiate a broad social movement” (Moustafa, 2007: 42). Halliday et al. (2007) argue that the necessary condition for legal institutions to open to transformative political results is the existence of a ‘legal complex’ or a vanguard of lawyers that fight for liberalism (Halliday et al., 2007). Moustafa (2007) asserted that it is the existence of a ‘judicial support network’ that is independent enough from the authoritarian rulers that opens up spaces for legal activism. In turn, in liberal democracies, Epp (1998) indicated that the necessary pre-condition for a ‘rights revolution’ (the transformation of individual rights into constitutional rights) is the existence of a ‘support structure’ (Epp, 1998), an organized leadership and supportive political and legal structures that allow for an effective political mobilization of the law. This organized leadership includes lawyers and civil society organizations that enable the mobilization of legal institutions and the coordination of legal action with other forms of action in a campaign. Such legal tactics, McCann (1994) argued, were foundational for the pay equity movement in the USA in terms of providing resources, strategies, and frames for rights-based claims. Legal mobilization in this case enabled or catalysed the social movement formation, because it was combined with grassroots collective action. Hence, the assumption drawn from this literature is that legal mobilization, in most cases by lawyers or with the support structure of lawyers and civil society organizations, has the

capacity, under certain conditions, to drive or support political activation and mobilization.

In the Chinese context, this has also been asserted by, for example, O'Brien and Li (2006: 2) who argue that in rural areas "rightful resistance entails the innovative use of laws, policies and other officially promoted values to defy disloyal political and economic elites". Liebman (2011: 181) argues that "legal aid has been encouraged despite knowledge that the creation of a public interest bar has been an important catalyst for regime challenges elsewhere in Asia and in the colour revolutions of the former Soviet bloc countries". Gallagher (2006: 55) also points out that, "despite widespread pessimism about the enforcement of Chinese laws, laws matter greatly for how disputes arise and how disputes are resolved. We must thus pay attention to how China's burgeoning labour legislation has shaped the individual and collective action of workers while serving to mobilize or restrict their mobilization".

In this chapter I address the assumption in the literature that legal institutions open avenues for political contestation in which lawyers are the vanguard of political movements (Halliday et al. 2007), and form, together with civil society organizations, the support structure of legal mobilization (Epp, 1998) that catalyses social movement (McCann, 1994; Scheingold, 2004). Therefore, to assess if and how laws sustain authoritarianism, in this chapter I examine if and how laws are used in political contestation, asking: *to what extent does the mobilization of the law by lawyers and LAL NGOs trigger political and social mobilization to challenge the regime?* By legal mobilization I refer to lawyers' and LAL NGOs' use of the legal institutions in labour disputes, such as mediation, arbitration and litigation; however, I also examine how LAL NGOs mobilize the law for training and education purposes. I argue that it is crucial to examine the process of legal mobilization and the relational dynamics developed between lawyers and workers in order to understand how and why lawyers' and LAL NGOs' legal mobilization foster (or not) workers' activism. Hence, in this chapter I provide detail of the interactive processes at play between lawyers and workers in the three LAL NGOs, gathering

evidence from participant observations in LAL NGOs' legal consultations and interviews with lawyers and workers.

Section 5.1 lays out the main discussion in the literature on the political role of labour NGOs and lawyers in China. Section 5.2 examines the organizational culture of LAL NGOs and how it shapes its interactions with workers. Section 5.3 examines how LAL NGOs socialize workers in the laws, in legal consultation and legal education activities. Section 5.4 scrutinizes LAL NGOs' legal representation of workers in labour disputes, to highlight the effects it has on workers' capacities in Section 5.5. Section 5.6 provides concluding remarks.

5.1 Labour NGOs and lawyers: A political force of workers' movement?

As asserted in the literature, the role of lawyers and civil society organizations is necessary for the political mobilization of the law to exert policy and political changes (Epp, 1998; Halliday et al., 2007; McCann, 1994; Scheingold, 2004). In China, previous research has investigated the political role of labour NGOs (Chan, 2013; Cheng et al., 2011; Franceschini, 2014; Froissart, 2011; Howell, 2015; Lee and Shen, 2011; Pun, 2009; Xu, 2013) and lawyers (Froissart, 2014; Fu, 2009; Fu and Cullen, 2008; Pils, 2007, 2011; Teng, 2009), through the lens of their legal and political activism, or as reproducing the domination of the Party-state and therefore, sustaining the regime.

Labour NGOs' capacity to stimulate workers' activism has been seen to be related to NGOs' engagement with workers. In this regard, there are two distinct views in the literature. On the one hand, there is the optimistic view that labour NGOs represent an alternative form of workers' organization (Howell, 2015), that both empowers and includes workers in urban spaces (Gransow and Zhu, 2014). Cheng et al. (2010: 1082) argue that the current Chinese "pre-civil society", of which labour NGOs are a part, "are becoming increasingly powerful instruments through which Chinese people take part in public affairs, develop and articulate personal interests, and collectively form a more active and participatory citizenry".

Chan (2013) argues that labour NGOs in the Pearl River Delta are based in the community of migrant workers and constitute an alternative form of organization for migrant workers in the area. Chan (ibid: 7) argues that labour NGOs that are “rooted in migrant workers’ communities, have the potential to empower the vulnerable workers and create a space for an independent civil society, although they cannot be regarded as democratic working class organizations”. This is mainly due to labour NGOs not having resources from within the migrant workers’ communities and not being reliant on this social basis to operate. Nevertheless, these organizations, even with the challenges presented by the Party-state’s repression, limited access to international funding and scarcity of sustainable human resources, do create a space “to empower the vulnerable migrant workers with legal knowledge and organizing skills” (ibid: 19). That is, labour NGOs have been seen to empower workers by raising their rights consciousness and protecting their rights. Gallagher’s (2007) research on university-based legal aid clinics (not registered as NGOs, but generally formal units under law schools at universities), shows that these organizations empower workers by teaching them their rights, how to use the law to protect themselves, and providing assistance in legal cases. Lee and Shen (2011) agree with these authors, arguing that labour NGOs train workers in legal skills, raise their rights awareness, and are useful to claim workers’ wages. However, they conclude on a much more critical note, arguing that labour NGOs are a sort of ‘anti-solidarity machine’ because they do not stimulate the formation of a working class identity and solidarity action.

Similarly, Hui (2014: 121), from a Gramscian perspective, argues that there are labour NGOs and labour rights lawyers in the Pearl River Delta in Guangdong Province that reinforce the legal hegemony rather than nurturing the formation of workers’ class consciousness and stimulating their counter-hegemonic movement. Hui sees three reasons for this: first, these agents follow the capitalist logic that presumes that labour and capital have “self-autonomy” to enter the “free market”; second, their legalistic approach channels “labour activism into the legal arena”; and third, it atomizes workers into legal subjects, detracting them from the class component of their struggle (ibid: 221-222). There are, however, Hui (ibid: 212)

admits, some radical labour NGOs in the Pearl River Delta, that although having “put great emphasis on legal education and mobilization, their goals are not necessarily legally bounded”. Instead, their engagement in collective actions is “low in profile and under legal pretexts in order to avoid political suspicion” (ibid: 214). These labour NGOs, she argues, are the organic intellectuals of the working class.

Franceschini (2014: 3) argues that labour NGOs are not necessarily a “progressive force for political change” and doubts that they can constitute “sprouts of independent unionism in China”. He examines labour NGOs’ relationships with the government, other NGOs, international donors, and workers. The most significant reason for labour NGOs not being a pro-labour force, he says, is the socio-cultural distance and, in line with Froissart (2005), the lack of trust between migrant workers and NGO staff. This last point, Franceschini (2014) argues, is due to the fact that NGO staff are mainly composed of university graduates with little connection to and understanding of the experiences of rural migrant workers, and to the low direct participation of migrant workers in NGOs. This coincides with Chan (2013) who writes that even community-based organizations lack embeddedness in migrant workers communities. This last point, I would argue, is most important when considering the potential labour NGOs, LAL NGOs in particular, have to politically activate workers. In the case of LAL NGOs, the professional composition of NGO staff heightens the divide between them and the migrant workers, which highlights the service delivery orientation of the NGOs, instead of its integration and embeddedness with workers, which would allow the NGO more capacity to activate or mobilize workers. Therefore, the study of LAL NGOs and *weiquan* lawyers requires an interrogation of the assumptions in the literature that legal institutions, laws in particular, open avenues for political contestation (Halliday and Karpik, 2001; Halliday, et al., 2007; Moustafa, 2007; Solomon, 2008, 2010), and that legal mobilization by lawyers and civil society organizations support and catalyse political movements (Epp, 1998; McCann, 1994; Scheingold, 2004). In the following I will examine LAL NGOs’ organizational culture, and their legal education and legal mobilization activities, to uncover their potential political role in relation to workers.

5.2 LAL NGO's organizational culture and relations with workers

NGO X's office is located in the basement of a hotel and commercial building in the business area of [REDACTED] in the heart of Beijing. Peasant workers in Beijing rarely have a reason and time to travel to the most central point of the city. NGO X's centrality can be a physical sign of its distance to workers; other labour NGOs choosing to locate closer to industrial areas to facilitate access and increase embeddedness in workers' communities. However, NGO X praises its office as a meeting point for many migrant workers. On arriving at NGO X's office, workers – always addressed as 'workmate' (*gongyou*, 工友) or 'worker' (*dagongzhe*, 打工者) are warmly welcomed, invited to sit, have a rest, drink some tea or hot water. Before discussing the specific labour-related concern that has brought the worker to NGO X, there is always a broader conversation involving the origin of the worker, his/her migration experience, daily life, how he/she is coping with work and the city, etc. In the open space of NGO X's office, workers meet other workers, and overhear each other's experiences. In fact, one of NGO X's daily tasks is to compile diaries and stories of migrant workers who seek their services. To this purpose, in 2012 NGO X had two members of staff dedicated to interviewing workers, transcribing their stories, and uploading them to the "Workers' Archives" section of its website. This creates an enormous reference material of life-stories, histories and experiences of labour migration and daily struggles for other migrant workers, and is a resource for further research on workers' life-stories. It is the basis for workers' identification with other workers.

NGO Y is located in central Beijing, in an office building in the [REDACTED] district. NGO Z is located in the [REDACTED] district, on the outskirts of Beijing, next to the fourth ring road. Its offices are in a two-storey building. In contrast to NGO X which uses the terms 'workmate' or 'worker' to refer to workers under the condition of "temporary or casual worker" and "workmate", NGOs Y and Z refer to workers as 'peasant workers' (*nongmingong*, 农民工) or 'clients' (*dangshiren*, 当事人). The connotations of each term are different, and although *nongmingong* has been widely used since the reform period to refer to this specific type of rural to urban

internal labour migration, it has negative connotations in the urban areas, peasant workers being looked down as having a rural and 'backward' background, low education levels and being of low quality (*suzhi*, 素质). The use of 'dagongzhe' or 'gongyou' reflects the attitude of NGO X to workers, referring to them not by their otherness and rural origin, but the nature of their employment condition (temporary or casual), or in a more unifying manner, as 'workmates' (the word *gongyou* is composed of the Chinese characters work 工 and friend 友); this also implies a sense of unity in NGO X, where any worker is a 'workmate' and overcomes the rural/urban distinction of the term 'peasant worker'. The term 'client' as used mainly by NGO Z reflects its professional leaning whereby, even though a not-for-profit organization, its relations with workers is still based on a commercial model of legal services.

Moreover, in NGOs Y and Z there is a predominant narrative that depicts workers as 'the weak'. It is assumed that workers are, in fact, weak due to their material conditions, low education and cultural levels and lack of understanding of the law, but not because of the structural inequality of the labour-capital relation, as reinforced by the labour laws. As Lawyer Yan at NGO Z said, peasant workers are "*very, very, very poor people who have no culture, low education level, no understanding of the law, and no proof of labour relation, which is the most basic factor. These workers are in a weak position*" (Z7, 19 December 2012).

LAL NGOs', especially NGOs Y and Z, narrative and conception of workers as 'clients' and 'the weak' is indicative of their distance from workers. Their location and spaces also illustrate this point. Gransow and Zhu (2014) have argued, based on research in the Pearl River Delta, that labour NGOs produce urban spaces that both transform the landscape of the cities, but also serve as mechanisms of inclusion of migrant workers in the city and advance their labour rights. They argue that labour NGOs' 'synthesising and spacing' of their own offices, and hospital, court and factory spaces are ways in which they could potentially negotiate and contest institutionalised urban spaces. They conclude that these labour NGOs are creating

urban spaces for migrant workers in the cities and hence, empowering migrant workers and “developing informal, innovative and flexible forms of agency by means of organizational spacing to empower the workers” (Gransow and Zhu, 2014: 12). Similarly, Jakimow (2013) argues that migrant labour NGOs provide ‘spaces of belonging’ through which migrant workers transform and construct a new identity in the city that goes beyond the rural-urban divide. These, she argues, are ‘acts of citizenship’ (Isin and Nielsen, 2008) that enable workers to claim citizenship rights (Jakimow, 2015). NGOs X, Y and Z do, in fact, provide spaces for workers to integrate in the city, however, these spaces are also a representation of power that clearly depict the NGOs’ organizational culture and their interactions with workers.

NGO X’s office is a space that lends itself to social and collective interaction and to workers identifying with other workers. As portrayed in Image 5.1, the office consists of a main room which is a small space dominated by a big table where all consultations take place and where workers, lawyers, and NGO staff sit around without regard to any specific procedure or order. This consultation room is decorated with photographs of organizational highlights – the director of the NGO meeting construction workers, workers in the NGO’s office, and workers receiving their claimed salary. At busy times in NGO X, various legal consultations happen simultaneously in the consultation room, and workers, volunteer lawyers and NGO staff have lively conversations on labour dispute issues (Image 5.1).

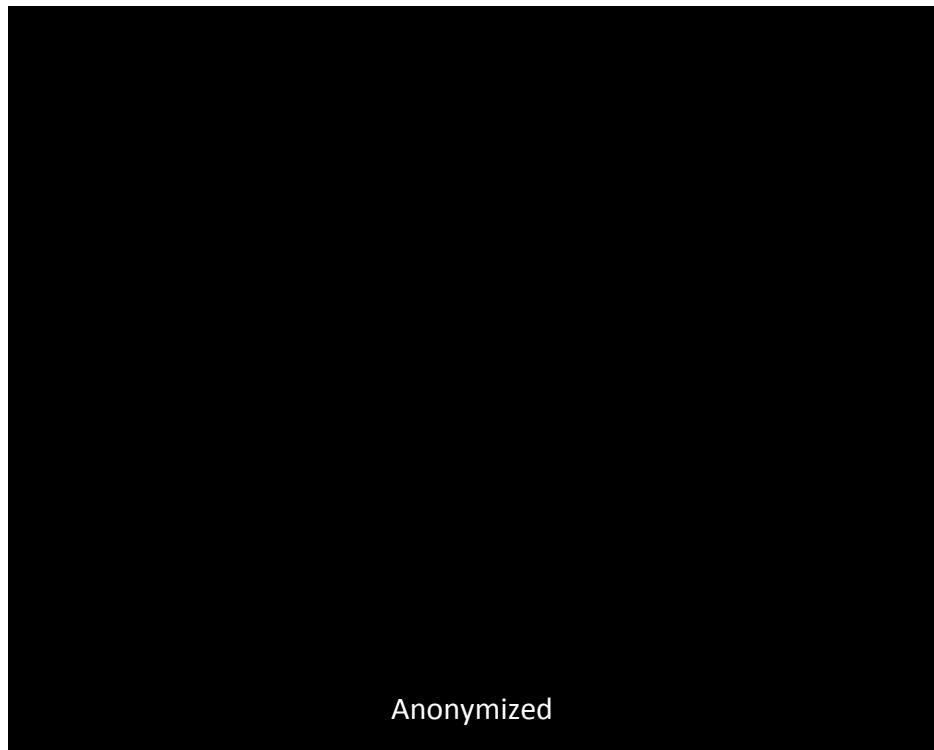


Image 5.1 NGO X's Office. Workers, lawyers, and NGO X's staff
(Author's own with NGO X's camera – edited)

The use and structure of office spaces very symbolically determine social interactions which, at the same time, reflect particular organizational cultures and professional backgrounds. NGO X provides legal assistance in a less formalistic way than NGOs Y and Z. The layout and use of its office space reflects its understanding of workers as workmates or comrades, rather than clients. However, its location in the high-end commercial district of Beijing city centre points to its tangible distance from the workers' everyday spaces, who either live and work in the outskirts of Beijing in the manufacturing sector, or around the city in the construction and services industries.

Unlike NGO X, NGOs Y and Z are modelled as law firms, and their work is oriented towards a professional delivery of legal services. NGO Z in particular follows an approach based on the model of commercial legal practice. Its setting is very different to that of NGO X's, and shapes social interactions in a different way. As portrayed in Image 5.2, in the main hall at NGO Z's office (the legal consultation hall) there is a main desk where lawyers sit on one side and receive workers –

'clients', who sit on the opposite side. Computer screens add to the physical barrier between lawyers and workers. Consultation here is provided on a one-to-one basis between lawyer and worker. The consultation hall is decorated with blue frames containing different articles of the labour laws. Although this hall is an open space and many workers queue or sit in the chairs beside other workers being advised and thus can overhear or intervene in the one-to-one consultation process, the setting of this space is much less inviting as a common or collective process; on the contrary, it shapes interactions as professional, formal, and individualized relations between lawyer and worker.

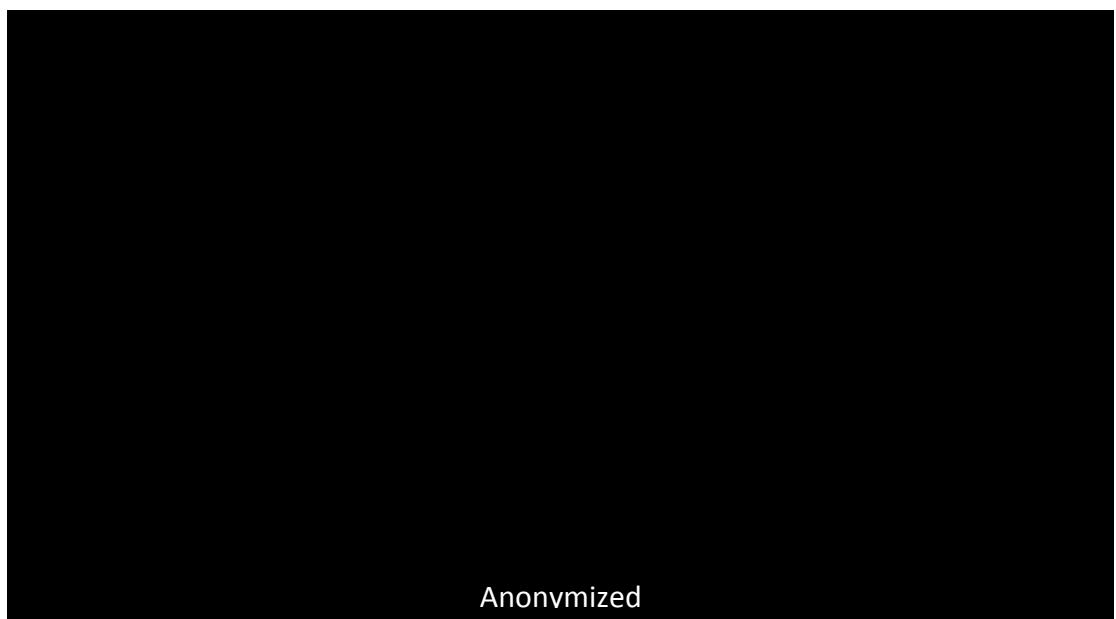


Image 5.2 NGO Z's Legal Consultation Hall
Worker on the left and Lawyer on the right
(Author's own – edited)

The physical space that each of the LAL NGOs occupies shapes social interactions between lawyers and workers, and between workers that meet at the offices. LAL NGOs' office spaces denote the professional background and organizational culture of the NGO. As a less formalistic LAL NGO, NGO X creates common spaces for workers to identify with and in which to create social links to other workers, and for workers to belong to the city. In line with Gransow and Zhu (2014), NGO X can be seen as creating spaces for workers' collective and urban identification beyond their 'peasantness' or migrant character. NGOs Y and Z, on the contrary, due to their professional culture, shape interactions and workers' possibilities in a

different and legalistic way. Chan (2013) has previously suggested that labour NGOs' lack of embeddedness in workers' communities shows that these organizations are not a political force to represent and organize workers. In the case of LAL NGOs, their professional culture and social composition of their staff (lawyers) reveal their conception of workers as 'clients' and therefore, define the forms of professional interaction between workers and lawyers, and among workers, which, in turn, affects the likelihood LAL NGOs have of stimulating individual or collective forms of action among workers. By examining how LAL NGOs deliver legal education and how they mobilize the law to resolve workers' labour disputes also offers a window into the social distance between LAL NGOs and workers, and therefore, the capacity these actors have to politically mobilize the law '*on behalf of workers*', on the one hand, and to stimulate workers' political mobilization, on the other.

5.3 Socialization of legal norms

The countless visits of peasant workers to NGOs X, Y and Z repeatedly echoed variations on the theme of "*I don't understand the law*". Claims reverberated such as "*We are the weak*"; "*I don't have the capacity to resolve the issue*" and "*We have to depend on them [NGOs/lawyers]*". Lawyers at LAL NGOs also assert that "*peasant workers have no legal consciousness*"; "*peasant workers' knowledge of the law is very low*"; "*their capacities are very constrained*"; "*we help the weak*" and "*we promote legal consciousness*".

LAL NGOs educate workers on the law on a daily basis, in both the legal consultations, and the occasional legal education training sessions they hold. They educate workers on their legal rights, making the law accessible to them, raising their understanding of the law and aiming to increase their rights consciousness.

Potentially, legal education activities might raise workers' rights consciousness and incite the 'myth of rights' (Scheingold, 2004) which, according to the experiences in liberal democracies (McCann, 1994; Merry, 1990; Scheingold, 2004) would in turn

encourage workers to make claims on the state to uphold their rights and monitor legal compliance by capital, in a sort of 'rightful resistance' (O'Brien and Li, 2006). LAL NGOs' legal education would therefore support workers' mobilization by providing them with the legitimate discourse upon which to frame their claims on the Party-state. However, legal education initiatives can also function as the socialization of the legal rules, delivering the Party-state's new legal ideology, as was the case with legal education (*pufa*, 普法) campaigns during the Maoist period, "campaigns to educate about and induce compliance with the new legal norms (...) the primary goal of the *pufa* campaigns may be to deliver state ideology, not to increase understanding of law. Nevertheless, one message of the *pufa* campaigns is that law should be accessible to ordinary people" (Lieberman, 2011: 183). With this ambivalence of legal education campaigns, it is relevant to examine how these are conducted by LAL NGOs and with what effect on workers' mobilization capacities. To extract the potential political significance of LAL NGOs' and lawyers' legal mobilization, I will show in detail the resources and processes used to mobilize the law and assist workers in their labour disputes.

5.3.1 Legal consultation

NGOs X, Y and Z provide legal advice through telephone and face-to-face consultations.⁵⁶ All three NGOs have established hotlines, which are the fastest and easiest way to provide legal consultation. In 2012, NGO X, for example, received 4,593 phone calls, of which 83% (3,803) were workers seeking legal consultation, 2% (76) seeking employment, and 15% (714) related to other matters such as volunteer and social concerns (NGO X Hotline Service Records, 2012). Call information is recorded in NGO X's Rights Files, including date, name, gender, and province of origin of the worker; current work situation; reason for the call; phone number; origin of the call/location of work (Beijing or outside); name of the advisor; and advice provided. Through these files, NGO X keeps track of all the telephone calls they have received and how they have addressed the questions raised, showing the patterns of conflict and advice given on paths of action according to

⁵⁶ See Chapter 1 for brief background on NGOs X, Y and Z.

each problem encountered by workers. NGOs Y and Z also have established hotlines that function similarly and which serve a double purpose: legal consultation and education for workers, and as a source of data to inform their advocacy work (see Chapter Four). They then produce research reports that are sent to legislators, "*the first step is to let the legislators know how serious the reality is, and under what problems these people have to carry out their lives*" (Y2, 30 October 2012). From the perspective of the NGOs, the hotlines are a fast and efficient mechanism to raise workers' awareness of the laws and how to address a labour issue.

Apart from telephone consultations, all three NGOs provide, free of charge, face-to-face legal consultations at their offices, and occasionally visit the workplace in question. Legal consultations are carried out in the main office space at NGO X, and in a designated consultation room or hall in NGO Y and NGO Z, respectively. In 2012 NGO X received a total of 2,192 visits to its office, a 25% increase over 2011. Of these, 58% (1,281) were workers seeking legal assistance, 23% (508) were volunteers, 2% (42) workers seeking employment, and 17% (365) other social groups (NGO X, 2012 Yearly Work Report). NGO X's legal staff occasionally make field trips and visit the dormitories of construction sites and the vicinities of factories to provide legal advice, distribute their brochures and make the organization visible to workers. The frequency of consultations at NGOs' offices varies monthly and depends greatly on the season. NGO X received an average of six visits per day in 2012, but in certain periods the frequency increases, for example, around Spring Festival.

The consultation process is standardized in all three NGOs. When a worker arrives at the offices of any of these NGOs, he/she is asked to fill in the personal details, work details and the cause (if any) of dispute, on a Consultation Form. In many cases, lawyers at NGOs Y and Z fill in the information for workers while the consultation is taking place. Following this, workers will have additional paperwork to fill in at NGOs Y and Z if they wish to proceed to seek legal assistance (and aid). In NGO X, the process is much simpler and more user-friendly, as the assistance is limited to legal consultation and mediation. At NGO X workers fill in a Rights

Protection Registration Form portrayed in Image 5.3 (left) and at NGO Y a Labour Rights Protection Consultation Registration Form (Image 5.3 right). The second form is also very straightforward, the worker only having to tick checkboxes related to the type of company employed at, the type of dispute, and the like. In both NGOs X and Y there is a larger space for the worker to explain in his/her own words the nature of the problem. This space allows the worker to voice his/her issue and to describe the conflict, which also can provide a space for the subjective experience of the worker to be revealed. Every form also has a space for the legal advisor, consultant or lawyer to describe the advice provided and remaining actions to be taken, if mediation or legal action is to take place. However, NGO Z's highly professional approach means that the consultation process is much more bureaucratized, and in addition to the registration form, workers pursuing legal assistance must fill in up to eleven forms on their first visit, including a Legal Aid Application Form, Legal Aid Agreement, and a Risks Acknowledgement Form. These different approaches illustrate the extent to which bureaucracy informs these LAL NGOs' legalistic approach to workers' disputes, and by extension, of the legal process.



Image 5.3 Rights Protection Registration Form, NGO X (left)

Labour Rights Protection Consultation Registration Form, NGO Y (right)
(Author's own – edited)

The consultation procedures are standardized, not only because of the documents and forms used, but because the consultation follows a systematic process, with standardized questions and pro-forma advice for two sorts of labour disputes:⁵⁷ labour disputes (related to wages or contract issues), or occupational health and injury disputes (confirmation of injury, evaluation of labour capability, injury compensation). Consultations are tailored to the individual worker seeking assistance and they are case-specific to the degree that they respond to the individual worker's dispute. However, lawyers provide advice on the basis of the

⁵⁷ As indicated in Chapter Three, labour disputes are defined as "arising between employing units and workers" concerning "confirmation of labour relations; conclusion, performance, alteration, cancellation or termination of labour contracts; expulsion, charge, resignation or severance; working hours, the period of rest and vacation, social insurance, welfare benefits, training and occupational protection; labour remuneration, medical expenses for job-related injury, economic compensation or damages, etc; and others" (LDMAL, Article 2, 2008).

law, which means that most cases are treated similarly and are advised to be resolved in a similar way, 'according to the law' (i.e. the LDMAL).

For example, a recurrent problem that NGO X deals with is the non-payment of workers' wages, especially in the case of construction workers in the period prior to the Spring Festival (Chinese New Year). These cases are usually handled in a similar way: case by case, the legal advisors telephone the employers or labour contractors to mediate '*on behalf of workers*', to obtain their wages. Between three and five phone calls are usually sufficient to achieve payment, at least part of, the wages owed to workers, a process which is evidently considerably quicker than resorting to the legal process. Workers do not have to do anything in this process apart from providing NGO X with the telephone number of the employer. In cases where this is not possible, lawyers advise workers on the necessary steps in order to resolve the issue according to the law. The most relevant and recurrent example is workers' lack of a labour contract, the basic proof of a labour relation, without which workers cannot take legal action. In these cases, lawyers provide the same sorts of generic advice, explaining why the proof of the labour relation is important for legal purposes, what constitutes proof, and how to gather it. The worker is then instructed to seek proof of the labour relation in order to receive LAL NGOs' assistance (for arbitration and litigation). For example, in NGO Y, Lawyer Guo suggested to one of the workers involved in a collective dispute in a yoghurt factory on the outskirts of Beijing that he should take pictures of himself holding the newspaper of the day inside the factory. The worker afterwards brought three photographs of himself doing so in three different locations inside the factory, to be used in the first hearing at the arbitration court the next day as proof of the existence of a labour relation (Fieldnote, Participant Observation, NGO Y, Beijing, 10 September 2012). In these instances, lawyers provide basic legal information to workers, and raise their awareness of the significance of labour contracts and of the legal process to resolve labour disputes and train workers in basic skills to protect their legal rights.

Lawyer Zuo is telling the worker attending consultation that, 'according to the law', he needs proof of the labour relation

(*zhengju*, 证据). When the worker says he doesn't have such proof, he tells the worker that he should go back and record a conversation with the boss. At the same time that Lawyer Zuo is saying this, he is holding the worker's phone in his hand and making a gesture as if he would be holding the phone under his arm or armpit. He is showing the worker how he can record a conversation with the boss without the boss realising that he is doing so. Lawyer Zuo is training the worker on the importance of the proof and how he can gather proof of his labour relation, and what sort of evidence would be considered as legally valid proof. Lawyer Zuo says that if he does this he will have a proof and that once he has gathered this he can then come back and they can proceed with mediation to try and resolve the issue. (Fieldnote, Participant observation at NGO X, Beijing, 17 September, 2012)

In all three NGOs legal consultation is provided according to the law: the types of labour disputes that LAL NGOs manage must fit the legal definition of a labour dispute, and the advice on how to resolve the dispute must also fit the stipulations of the LDMAL. Even more significant is the fact that legal mobilization, in particular, arbitration and litigation, depends on the existence of (ideally) a labour contract or other proof of the labour relation. Therefore, LAL NGOs' and lawyers' consultation and advice, and thereafter their approach to resolving labour disputes indicates an acceptance (and reproduction) of the basis of the capitalist labour relation, and reinforces it by providing assistance on the basis of the existence of a proof of the labour relation. Legal action therefore is precluded to those workers without a labour contract or proof of the labour relation, or whose disputes do not meet the definition of a labour dispute as per the LDMAL.

Legal consultations are therefore important to raise workers' awareness of labour laws, their legal rights and how to protect them, what constitutes a legitimate dispute and how to resolve it appropriately. This can be an empowering experience for workers who come to understand the protective features of a labour contract, for example, or learn how to seek proof of their labour relation or how to legally deal with a labour dispute. However, there is also a disempowering aspect resulting from consultations, which derived from LAL NGOs' conception of workers based on a deficit model: workers are not perceived as autonomous agents capable of

dealing with their labour issues, but as ‘the weak’, lacking knowledge of the laws and resources to protect themselves, and in need of advice and protection from LAL NGOs and lawyers.

The bureaucratized, institutionalized and systematized legal consultation process, especially at NGO Z, is not necessarily worker-friendly, does not necessarily cater to workers’ own interests and needs that emerge, nor does it help workers to strive for what they think is fair or just (see Chapter Six). Lawyers and LAL NGOs follow the legal standards, and consult and advise workers on the basis of the law, raising workers’ legal awareness or legal rights consciousness. By also educating them on what claims have legal basis, they delegitimize certain claims and disputes. LAL NGOs and lawyers therefore, through legal consultation, socialize workers in the laws and legitimate behaviour under the new legal order.

5.3.2 Legal education

LAL NGOs engage in legal education activities (*pufa*, 普法) not only in legal consultations, but explicitly, by holding legal education sessions, where they directly educate workers on the words of the law, workers’ rights and how to protect them. LAL NGOs have developed material that makes laws accessible to workers, such as handbooks. These are self-published by the LAL NGOs and explain the laws, recurrent legal problems encountered by workers, and how to address them. They are the material used to ‘disseminate legal knowledge’ or ‘raise rights awareness’. For instance, in 2012 NGO X published in two editions a total of 25,000 copies of their “Handbook for Migrant Workers’ Integration into the City” (Image 5.4 upper right) and 10,000 copies of “Workmate Communication” (*gongyou tongxun*, 工友通讯), a project funded by the Rosa Luxemburg Foundation. When workers visit NGO X’s office seeking legal consultation, NGO X gives away these handbooks for the worker to read, but on many occasions they are given a bag full of handbooks with the instruction to distribute them to other workers and friends in their workplace. Furthermore, in 2012 NGO X’s staff regularly distributed handbooks in the streets at the exits of subway stations, in the surroundings of the

main train stations in Beijing, to any worker-looking man or woman, and during field visits to construction sites and factories in the Daxing district of Beijing.

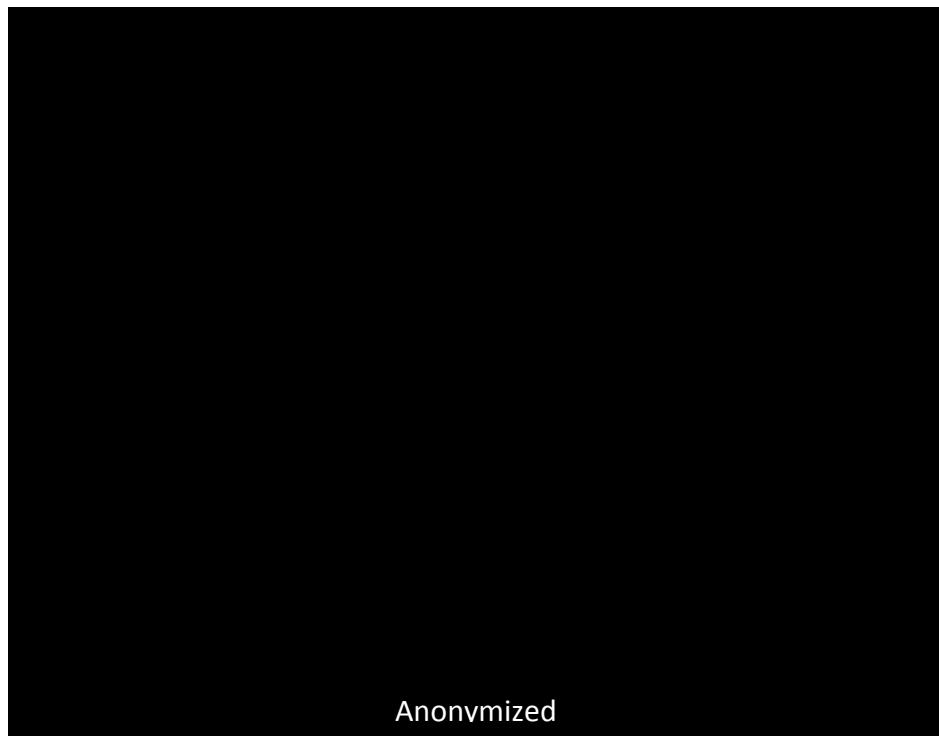


Image 5.4 Legal education handbooks
(NGO Y's on the left, NGO X's upper right, NGO Z's lower right)
(Author's own)

In general, these handbooks are focused on the law, with the exception of NGO X's "Handbook for Migrant Workers Integration into the City", which includes tips for the workers' first days in the city, legal advice, contract-related issues, labour law revisions, prevention of occupational injuries, and other important everyday knowledge such as an explanation of public signs and billboards, media, how to behave in the city, and how to communicate with their relatives back in the countryside. NGO Z's "Peasant Worker Rights Awareness Handbook" (Image 5.4 lower right) takes a different approach, confining itself to explaining labour laws. This handbook explains each chapter of the labour laws addressing common questions in an attempt to make the laws accessible to workers.

These handbooks are an important resource through which LAL NGOs educate workers on the law. LAL NGOs also hold legal education sessions, where a lawyer or

legal advisor teaches the articles of the labour laws most relevant to workers, or specific issues that recurrently affect workers. Legal training sessions use the handbooks published by the NGO. For example, NGO X holds legal training classes in the office on a monthly basis if enough workers have signed up to attend, and other *ad hoc* sessions as necessary. NGO X also reaches out to workers at their workplace and occasionally conducts legal training sessions at construction sites or in factory dormitories in the outskirts of Beijing. NGO Y occasionally conducts legal education sessions at their offices, mainly over the weekend when workers are more likely to attend. NGO Z also holds legal education classes and in 2006 opened a 'Rights Awareness School' at its offices in [REDACTED] to offer weekend legal education classes. However, over the course of this fieldwork I was not aware of any legal training classes held; the reason, I was told, was because winter, a very difficult time to organize any activity, was about to start (Fieldnote, Participant Observation, Lawyer Song, NGO Z, Beijing, 23 September 2012).

Attendance at legal training classes is generally low, and even if held at weekends, it is difficult to attract workers to attend on their single free day per week (if any⁵⁸). NGO Z tried to offering cash transfers to attract attendance, but without much success (Fieldnote, Participant Observation, NGO Z, Beijing, 23 September 2012). Apart from the difficulty of appealing to workers to attend, the teaching techniques used can also be worker-unfriendly, as in general they consist of reading out loud the legal handbooks or the articles of the labour laws.

Lawyer Liu decides to commence the legal training session even though there are only three workers. We all sit around the long table and have our little handbooks ready for the instruction. Lawyer Liu asks us to open at page 83 and reads out loud the passage of the handbook related to the labour contract and the Labour Contract Law, saying that a worker should be provided with a contract within one month of starting work at the unit. He says that the contract is a very good way to protect the worker, and explains what happens if the contract is not signed within this time, reading from the handbook passage: 'the worker can go to the arbitration committee or initiate a litigation process'. As well as reading and explaining, Lawyer Liu asks questions of the

⁵⁸ For example, construction workers interviewed for this study have one day off per week.

workers: 'what do you think about this?' Worker Zhang (who has a pronounced scar on his face and a serious hand injury from a mob beating arranged by his employer after he said he would take legal action over a workplace issue), is very engaged. He has reasons to learn. Two new workers appear and sit down: now there are five. Once they are settled, Lawyer Liu repeats that the Labour Contract Law is very good as it protects workers very well.

Worker Zhang starts asking questions and replying to Lawyer Liu's ones. Next to him is Worker Jin who is obviously bored, not paying attention at all and even holding the handbook upside down! (...) While Worker Zhang is asking questions about the law in relation to his own dispute, Worker Jin is slowly falling asleep, his arms now free of the handbook, crossed and resting on his belly, but they are slowly becoming loose as he dozes off and are starting to slightly fall off (...) (Fieldnote, Participant observation, NGO X, 16 June 2012)

Worker Zhang was predisposed to make use of the legal education session, as he had a serious conflict with his employer and the session could provide useful information. However, at the same time, the topic or the teaching strategies did not engage Worker Jin. Repetition as a teaching strategy does not necessarily raise workers' awareness: workers assert that it is boring, uninspiring, and does not apply to their reality (see Chapter Six). Moreover, these sessions are theoretical and do not necessarily teach them the specific skills needed to protect themselves which the one-to-one consultations are more likely to provide. When Lawyer Liu asked questions and invited workers' opinions, the change in technique triggered a more critical understanding of the law and how it affects workers' situations more specifically. Moreover, it was when Worker Zhang related the legal clauses to his own subjective experience and his dispute that the law became more tangible, applicable, and useful to him. Reading out loud and repeating the articles of the law is not the most efficient strategy to diffuse legal knowledge and raise rights awareness, however, during fieldwork at NGOs X and Z, it was the most widely used technique in the legal training witnessed (also evidenced by Lee and Shen's research based on different labour NGOs; 2011).

However, the situation described above might indicate that workers' subjective experiences influence their engagement with the law, and therefore, the formation of their rights consciousness. Yet, the situation described above shows that LAL NGOs and lawyers engage with the formative process of workers' rights consciousness 'according to the law'. In these training sessions, LAL NGOs do not necessarily question or analyse the nature of laws, how these rights are defined or if they meet workers' needs at the workplace which, as will be explained in Chapter Six, is one of the main issues raised by workers interviewed in this study – laws not reflecting workers' reality and needs. Laws are presented to workers in a normative way as the existing protective device of workers' rights. With a legalistic service-delivery orientation, legal education by LAL NGOs and lawyers is instrumental in the uncritical reproduction of the legal order, socializing the new legal (and capitalist) norms and shaping workers' *legal rights consciousness*.

Finally, lawyers and LAL NGOs do important work through these legal education initiatives: on the one hand, workers can feel empowered by learning about the laws; on the other, the socialization of legal norms is beneficial to the Party-state's rule of law project. However, LAL NGOs' legal education activities and techniques also illustrate a palpable social distance between lawyers and workers, which can have the 'unintended' consequence of disempowering workers, as discussed in Section 5.5 below.

5.4 Legal mobilization

LAL NGOs follow the dispute resolution process stipulated by labour laws, specifically, the Labour Disputes Mediation and Arbitration Law (LDMAL) (2008), which defines disputes and the processes to resolve them, mainly through mediation, arbitration and litigation. NGO X, as a People's Mediation Committee, provides mediation services to workers. NGOs Y and Z, as registered legal aid centres and ascribed to law firms, are also legitimate providers of legal representation services in arbitration and litigation.

However, LAL NGOs' legal mobilization implies lawyers' representation. Because of the highly technical and bureaucratic nature of the legal process, lawyers represent or act '*on behalf of workers*'. This, it will be argued, can disempower workers in a number of ways. This is not unique to the Chinese legal system; it is the case under most legal systems, as legal institutions are designed by certain power constellations of the particular society and political system and, as mechanisms of control, serve the function of sustaining order. One crucial way of sustaining legal order is by defining the roles, capabilities and logics of action of each actor under the legal system. The legal system is thus yet another way of organizing society, with the creation of a profession or epistemic community of knowledge (lawyers), and one of clients with consumer legal needs.

This section examines LAL NGOs' legal representation of workers in labour dispute cases, uncovering LAL NGOs' rationales, the narratives held by LAL NGOs and lawyers, and the relations developed between lawyers and workers in the process of legal mobilization. A detailed examination of these processes, particularly, mediation and litigation, will illustrate the power relations that develop between workers and lawyers, which again, are indicative of the social disconnection of LAL NGOs from workers. In turn, this highlights the main obstacle to LAL NGOs' political role as the 'vanguard' in leading workers' political activism.

5.4.1 “*Mediation best suits peasant workers*”

Mediation is the prime mechanism to resolve labour conflict. Liebman (2011: 174) has indicated that since the 2000s there has been an increasing emphasis on the 'legal populism' of the revolutionary period and Ma Xiwu's⁵⁹ adjudication method, which mainly consisted of the resolution of disputes via mediation. This emphasis on revolutionary methods of dispute resolution, Liebman would argue, signals the legacies of today's legal institutions, and therefore, the 'adaptive legality' of the

⁵⁹ Ma Xiwu was a prominent figure at the beginning of the Yan'an period. In the 1940s he became president of the Shaanxi-Gansu-Ningxia border area regional high court and vice-president of the Supreme People's Court. He opposed "the formality and expertise implicit in both Republican legal reforms and Western models" and introduced the Ma Xiwu adjudication method of the Yan'an period, which emphasised the resolution of disputes via mediation (Liebman, 2011: 174).

CPC and increased legitimization of the legal system because it embeds on pre-existing norms or institutions. Zhuang and Chen (2015) argue that mediation was already the main method to resolve labour disputes during the Maoist period under the planned economy, and since the mid-2000s, there has been a ‘revival’ of mediation because it serves the economic, political, and bureaucratic interests and priorities of local governments. Using the example of the Guangdong government, they show that mediation allows local governments to bypass legislation in order to handle labour disputes in a manner favouring their interest and priorities, which include, among others, economic interests, such as keeping a stable investment and productive environment for foreign companies, and restricting workers’ “excessive claims for compensation” (Zhuang and Chen, 2015: 389). Mediation also allows for local governments’ political priorities to be considered, such as maintaining social stability and preventing ‘mass incidents’ from escalating; and bureaucratic interests, providing incentives to judges (promotion and annual bonuses) to reach certain targets, namely, a high level of conciliation and low adjudication rates (*ibid*: 394). However, from an anthropological perspective, the use of mediation is explained because it best suits Chinese morality, as Chinese traditional and rural society was one “without litigation” (Fei, 1992: 101). The evidence from LAL NGOs presented here confirms that the dominant narrative is that “*mediation best suits peasant workers*”, for reasons discussed below.

The return to mediation signalled the fact that the Party-state had realized that formal judicial methods of dispute resolution were not necessarily penetrating into Chinese daily life (see Chapter Six). The LLDMAL, however, highlights that there is an institutionalized and formalized ‘revival of mediation’. Article 3 of the Law stipulates “labour disputes shall be resolved on the basis of facts and pursuant to the principles of lawfulness, impartiality and timeliness, *with stress on mediation*, in order to protect the lawful rights and interests of the parties according to law” (LDMAL, Article 3, emphasis added). Article 10 states that mediation can be performed by an “enterprise labour dispute mediation commission, basic level people’s mediation institutes established in accordance with the law, and institutes with labour dispute mediation function established in towns and villages”. In the

mediation process, both employee and employer should have representatives; in the case of the employee representative, Article 10 also stipulates that it “shall be labour union members or recommended by all employees”. As such, mediation involves the intervention of a third party in the labour dispute, although it is the least bureaucratic of the resolution processes as any unit with mediation status can intervene. Organizations ranging from neighbourhood committees to formal People’s Mediation Committees are acceptable thus it does not necessarily involve the trade union. NGO X is a registered People’s Mediation Committee, and according to the law it can mediate *‘on behalf of workers’* if they request it to do so. However, with the institutionalization of mediation in the LDMAL and the institutionalization and regulation of mediation committees, there are indications that the process may be losing the informality that attracted workers to it.

Statistical records show that in 2010 mediation was used in 39.5% of labour dispute cases, up to 47% in 2012 (China Labour Statistical Yearbook, 2011, 2013). In NGO X, the great majority of dispute cases are handled through mediation. Since its origins as a People’s Mediation Committee, NGO X has been handling an average of 48% of its cases through mediation (by telephone or on-site visit). Figure 5.1 shows the evolution of and way the dispute cases were handled by NGO X: provision of legal advice or guidance, telephone mediation, on-site mediation, and referral to legal aid. Many cases are handled well through telephone mediation, with a very high success rate. In 2011, 98% of the cases dealt with by NGO X were successfully resolved, the great majority being related to obtaining some payment of construction workers’ wages.⁶⁰ By 2012, after eight years of mediation experience,

⁶⁰ The construction industry functions through the subcontracting system (Pun and Lu, 2010, 2011): construction workers join a construction troop and follow a foreman from their village directly to construction sites in the cities. They have no formal labour relation either with the foreman (with whom they normally have a verbal agreement based on trust and social networks from their village), or with the subcontractor company. Construction workers’ labour is provided with a stipulated salary to be paid at the end of the project (which could run for as long as twelve months), rather than on a monthly basis as stipulated by the LCL (Article 50). Usually the end of the working cycle will be a certain harvest season or Chinese New Year. Until then workers receive weekly pocket money and coupons to purchase food at the canteens in the site dormitories. Very often, after having worked for the length of the project and just before Chinese New Year, conflict arises throughout the construction industry because the subcontractor does not pay the full amount of wages owed.

NGO X had assisted in a total of 2,886 cases involving 28,041 workers and successfully negotiated the payment of RMB 93,419,830.15 of workers' withheld wages (NGO X Introduction Report, Beijing, 2012: 8).

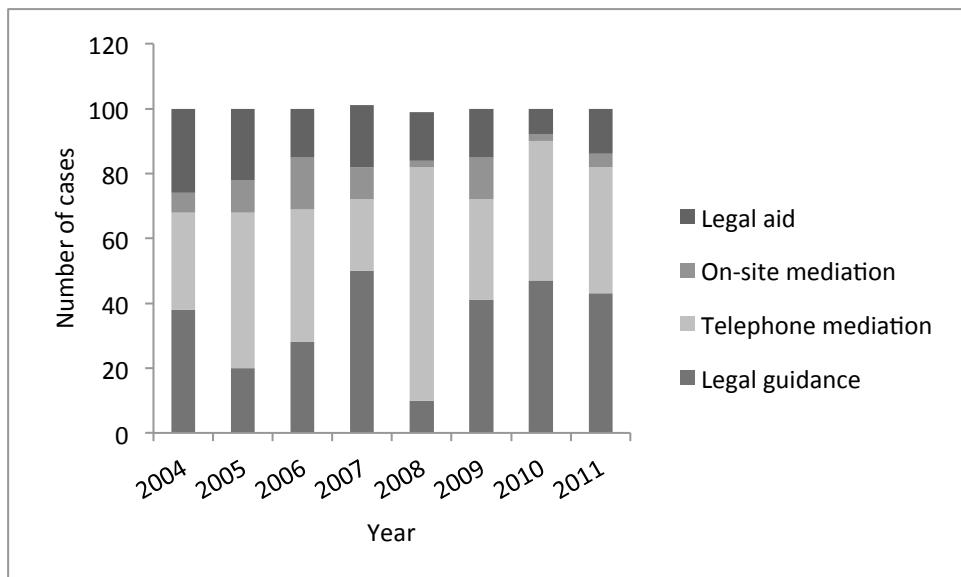


Figure 5.1 Labour dispute cases by method of resolution
NGO X (NGO X Rights Protection Yearbooks, Beijing, 2004-2011)

There is a widespread preference for using mediation to resolve disputes. Not only does the LDMAL favour mediation, but there is a common view across LAL NGOs and lawyers that mediation is best for peasant workers because it better suits their 'needs and conditions'. Volunteer Lawyer Zuo at NGO X stated that "*for workers, rights protection means to get their money [wages] back*" (X4, 17 September 2012). For some lawyers at LAL NGOs, the needs and interests of workers are material – to get their wages, for which mediation is most effective as it can obtain a fast outcome within two phone calls, for example.

The main issue is arrears of wages. Our [NGO X] central work is to help workers demand their payment. Mainly we resolve this through mediation (...) For workers, the most imperative thing is to resolve the issue and get their money in the shortest time. Of course, they hope first to get their money, that it can be resolved via telephone for example, and the second day they can get the money and go back to work! If mediation does not resolve the issue and the worker decides to litigate, litigation takes a long time. First is arbitration, when arbitration finishes then it is possible to litigate: first in the People's Court (...) The whole process requires more than two years; it can even go up to three

years (...) If only, but litigation is also risky, it is not possible to guarantee a case will win (...) We explain this to the worker very clearly, that litigation is risky, because litigation requires proofs, not facts. After all, facts are what you say, but litigation requires proofs. But in many situations workers don't have proofs: they have no proof of anything, no labour contract, no proof of anything.

In wage arrears, we [NGO X] believe that mediation is the most effective, because the most important is efficiency: the worker can come here to the office in the morning seeking assistance; in the morning we can already perform telephone mediation; if the boss responds, then maybe, immediately the problem is resolved, and the boss says 'yes, one month of wages, yes, I will give it'. It is possible that the boss pays this to the worker, and that's it. Mediation does not consider if it is a mistake of the employer or the worker – when a conflict arises it can't be the responsibility of one party, most likely it is the responsibility of both parties, and this or that problem, perhaps needs to be negotiated by a mediator, perhaps both parties allow the mediation to proceed, perhaps the issue is resolved and the money is paid. (X1, 24 May 2012)

This view is shared across NGOs. However, it is a reductionist view of workers' needs and interests, and one that also does not address the structural origins of workers' disputes. Mediation, although it offers fast and positive results for the individual worker, does not address the root causes of the disputes. This makes it a palliative solution and non-transformational. Lawyer Guo in NGO Y felt that:

Most workers don't want to litigate (...) most workers hope to resolve the issue fast, therefore mediation. Basically the tendency is much more towards mediation; we [NGO Y] are also more inclined to mediate, because this way we can save time and energy for all parties (...) Mediation can resolve individual problems, but it cannot resolve broader problems. (Y3, 18 September 2012)

Mediation requires fewer resources in terms of time, documentation, knowledge, skills, and support of a third party or lawyer. Moreover, it is a culturally sensitive resolution process that, according to some lawyers, does not disturb social relations, preserving *face* (*mianzi*, 面子) and keeping to traditional Chinese values (Y10, 26 December 2012). Mediation, for other lawyers, best fits Chinese characteristics:

Workers consider both options, mediation and arbitration; each person thinks differently. In general, here [at NGO X] workers go through a third party mediation, which suits one of China's characteristics, it is a harmonious resolution (...) When workers have a third party mediating – including in arbitration (...) as much as possible both parties are balanced, it takes into consideration the interests of both parties; and under fair and legal conditions, it fairly strives for the interests of both parties, not harming the existing feelings and relationships between the two parties. It is fair. (X4, 17 September 2012)

It appears that time, efficiency, and the alleged cultural component of preserving social relations are two of the main reasons for mediation being the most suitable channel to resolve disputes; this supports Fei's (1992) argument about Chinese traditional and 'ritual-based' forms of resolving disputes, and Liebman's (2011) indication of the preference for informal resolution mechanisms.

Allegedly, mediation is the most suitable dispute resolution channel for workers. However, mediation reduces labour issues to the material component, especially when it comes to wage disputes, the solution being the payment of these wages and not addressing the root cause of the problem. In most cases, because mediation tries to conclude the dispute quickly, workers seeking their wages will accept employers' counteroffers, receiving some, but not all, of their rightful wage. In this compromise workers are better-off than before the mediation having obtained, at least, a proportion of their wages. At the same time, employers cut their production costs by not paying the full amount of wages owed, yet avoid administrative sanction for non-compliance with labour laws because a mediated dispute is not processed by the Labour Bureau or scrutinised by any labour inspectorate. The degree to which mediation protects workers' rights is therefore questionable, firstly because individual construction workers, for example, fall short of obtaining their full and rightful wage; secondly, because this final product of the negotiation resembles a 'class compromise' (Wright, 2000); and thirdly, because mediation resolves individual problems but not collective issues or the structural origins of the labour-capital conflict, as Lawyer Guo from NGO Y indicated above (Y3, 18 September 2012). LAL NGOs mediating '*on behalf of workers*', therefore, is

seen as the ‘best’ and ‘most suitable’ way to assist workers, but one that easily and swiftly obtains social stability. LAL NGOs and lawyers, through mediation, obtain quick results for workers, thus preventing their disputes from escalating. Hence, LAL NGOs’ and lawyers’ mediation is instrumental to maintaining social stability.

5.4.2 “*Litigation is the last resort*”

According to Wang et al. (2009: 492) an increasing number of workers are willing to proceed to arbitration to resolve their disputes. In 2010, 42% of all labour dispute cases were managed through arbitration and 41% in 2012 (China Labour Statistics Yearbook, 2011, 2013).

Arbitration is, since the LDMAL was put in place, “free of charge” (Article 53, LDMAL), which facilitates workers’ access to the process. It is not, however, without challenges and difficulties, the first being that according to Article 28 of the LDMAL, workers have to submit an application to the Arbitration Commission, which has to accept the case on the basis of the evidence provided, including proof of the labour relation. The lack of proof of the labour relation would mean that the case has slight legal standing, the worker having limited legal options. Alternatively, the worker could report the issue to the Labour Bureau, which is responsible for inspecting companies’ compliance with the labour contract. However, “*the problem with going to the Labour Bureau is that it doesn’t care; if the worker has no proof, then the Labour Bureau won’t do anything*” (Y10, 26 December 2012). This uplifts the role of LAL NGOs in mobilizing the law to protect workers: “*workers do not fully understand what a proof is, nor do they understand how to gather it. They need us to first explain this and then they can go and gather the proof (...) If proof gathering is complete, then there will be no major problems to litigate*” (Y3, 18 September 2012).

LAL NGOs prefer mediation, as pointed out above, and some consider that arbitration does not facilitate the resolution of labour disputes; instead, they say, it makes the process lengthier and more bureaucratic (Z12, 22 January 2013),

introducing an additional unnecessary but compulsory administrative layer before taking the case to court. Alongside proof of the labour relation and dispute, arbitration and litigation also require a considerable time investment. According to the LDMAL, an arbitration case can take up to 30 days from application to the hearing date (Articles 29, 30, 35, LDMAL), the award being made within 45 days of the hearing (Article 43, LDMAL).

Arbitration does not require so much time; in general arbitration takes 60 days. Arbitration is the faster of the two [arbitration and litigation]. After arbitration, if any of the parties is not satisfied with arbitration or if the worker is not satisfied then comes litigation. The first instance of litigation takes an average of six months. Litigation takes longer. (Y3, 18 September 2012)

In most cases, workers do not want to litigate. Lawyer Ou from NGO Y stated:

Litigation is not necessarily the most effective way to resolve labour disputes. There are cases when both parties prefer mediation, and there are others when neither wants to mediate. If it was me, I advise that the legal channel is the last channel. I mean, honestly, there are other channels and ways, but if there are no other channels then I suppose I would recommend taking the legal channel. (Y9, 4 December 2012)

In many cases LAL NGO lawyers discourage workers from taking legal action based on one or a combination of the legal merit of the case, the available proof of the labour relation and/or labour dispute, and whether the worker qualifies for legal aid (as funded by the Legal Aid Foundation Fund). From field observations at NGOs Y and Z, if lawyers consider that the case is not likely to succeed at arbitration or People's Courts, they would discourage taking legal action. This is understandable when considering the length of time and resources needed to take legal action; however, it also illustrates LAL NGO lawyers' role as a first filter (Z5, 20 September 2012) or 'gatekeepers to justice', as argued by Michelson (2006). This means that even if workers are willing to take legal action, the ultimate decision is not in their hands: workers lack autonomy and ownership of legal mobilization in their own disputes.

Moreover, even if the experience of resolving a labour dispute through the legal process can be empowering for the worker, there is a dependency relation evolving throughout the process between lawyers and workers - workers transferring their agency to the lawyers. This effect is not necessarily intentionally created by the LAL NGOs or lawyers, as "*lawyers have restrictions in their work, they have to abide to the legal procedures*" (D1, 25 September 2012); but derives from the nature of the legal process, which is bureaucratic, technical, requires certain resources, and favours individual cases. As will be explained below, this dependent relation with the lawyer can diminish workers' sense of control and decision capacity over their own labour dispute, which in turn can reinforce the opinion that workers are 'the weak', and do not know the law or how to protect their rights.

5.5 “On behalf of workers”: LAL NGOs and lawyers as “disabling professionals”

Legal Personnel Ma stressed, "*There is an enormous gap between lawyers and workers, psychological and cultural*" (X5, 25 September 2012). In the cases of NGOs X, Y and Z, the social distance between lawyers and workers is due to the professional and legalistic orientation of LAL NGOs, which in turn indicates the different class or social background and different interests and aims of workers and lawyers. Clearly depicted by the processes through which LAL NGOs provide legal education and consultation, LAL NGOs resemble professional and commercial law firms with a solicitor-style culture and a case-based legalistic approach. This is particularly notable in the case of NGO Z, legal consultation provided in a highly professional way but removed from the worker's immediate realities and subjective experiences and in many cases, from their interests.

Moreover, the legal process requires knowledge, technical skills, and the investment of time and resources. These factors have been said to be the reason why a 'support structure' (Epp, 1998) of lawyers and civil society organizations is necessary for the political mobilization of the law. LAL NGOs such as NGOs X, Y and Z provide such support for the mobilization of the law in workers' labour disputes.

Workers don't have the time or the energy to do this; this is one of the meanings of our existence, because for workers, come out to work is for their livelihoods, they don't have that much energy or money to get involved in litigation or take care of these things. So we help them spare some time and clear up this time for their work, at the same time that we protect their rights. (Y3, 18 September 2012)

The technical nature of the legal process makes legal knowledge essential to mobilizing the law. "*Without a lawyer, it is simply not possible to litigate*" (Z1, 23 May 2012). Because lawyers have the necessary knowledge, skills and expertise, they take over and guide workers throughout the legal process, representing them or acting '*on behalf of workers*', which does not necessarily mean that they pursue workers expressed or subjective needs, desires and interests, but that they extract from workers' disputes what has legal basis and translate workers' claims into legal claims in order to proceed through the legal institutions. This points out the knowledge-based hierarchical power relation between lawyers and workers. It has been observed that in all three NGOs, even if lawyers explain the legal process to workers, the power lies with the lawyer to decide if the case is 'legitimate', has legal basis, and how to proceed to resolve it legally. In some instances, lawyers even fill in the forms for workers. After filling in the forms, and providing the necessary proof, workers do not do anything else, and they are encouraged to leave the case to lawyers. Hence, workers pass responsibility for their cases to lawyers and rely on them to represent them and fight their disputes. Workers therefore depend on lawyers in the legal process, transferring their agency to them. LAL NGOs' legal services (non-profit, free legal aid) undoubtedly increase workers' access to legal justice and the chances of resolving their labour dispute via legal channels. Nevertheless, this same feature contributes to the dependency relation between workers, and lawyers and LAL NGOs. After visiting LAL NGOs workers increase their understanding of the laws and learn how to protect their rights; however, they "*always want somebody to help them*". Because these LAL NGOs provide free legal services, workers rely on the lawyer to conduct the whole legal process, and are also more likely to return to seek their help (L2, 22 October 2012): "*because we don't understand the law, we would come back to you [NGO X] to help*

us deal with our difficulties and protect our rights” (W25, 17 September 2012). All workers interviewed confirmed this same statement: if an issue were to arise with them or friends or family in the future, their first choice would be to seek assistance from the NGO.

LAL NGOs’ and lawyers’ mobilize the law to protect workers’ legal rights. However, the extent to which this mobilization is political in nature is curtailed by LAL NGOs’ and lawyers’ core compliance to the legal institutions, which leaves narrow spaces for politico-legal action due to the power relations that are embedded in the laws and reproduced through the legal process between lawyers and workers. Moreover, as discussed in the previous chapter, the absence of an independent judiciary, the institutional arrangement containing lawyers and LAL NGOs, and more fundamentally, the individualizing nature of the labour laws ensure the apolitical nature of legal mobilization in labour disputes. In other words, the same institutions lawyers and LAL NGOs use to protect workers’ rights pre-empt them from becoming activists and the ‘vanguard’ of workers’ movements. Contrary to lawyers as the ‘vanguard’ of political fights (Halliday and Karpik, 2001; Halliday et al., 2007) or as the ‘support structure’ (Epp, 1998) for political mobilization of the law, in coordination with political campaigns (McCann, 1994), the LAL NGOs and lawyers hereby studied do not fulfil the characteristics of a political force of workers movement. This would imply mobilizing the law politically to push for structural political changes that are in the interest of workers beyond the immediate individual dispute, such as addressing the fundamentally capitalist root cause of labour conflict, therefore challenging the capitalist and authoritarian Party-state.

This, as Illich (1977: 12-13) would have argued, corresponds to an “Age of Professions” where “politics withered” and needs were designed by professionals with the power to advise and prescribe solutions because they ‘know’ what is in the best interest of their clients. This has a ‘disabling’ effect, Illich argued, on the citizen who is disempowered to act for him/herself and believes the illusion that he/she needs to consume legal services in order to resolve his/her problems. This focus on

the professional and specialized knowledge of the lawyer over the legal process also depoliticizes labour conflict and limits workers' capacities for action and power in the process.

From a Foucauldian perspective, lawyers can be interpreted as the authority or power mechanism that reinforces the organization of society through a disciplinary system, the legal institutions or apparatus being the disciplinary tool to normalize behaviour. Lawyers, in abiding by the law, are self-governing, and by 'training' and 'disciplining' ordinary workers on 'correct' behaviour, they reproduce the state apparatus – the legal institutions in this case – to "function to assure that discipline reigns over society as a whole" (Foucault, 1979, in Rabinow, 1984: 206). The very nature of the legal institutions as disciplinary mechanisms or systems of control, and lawyers as disciplinary agents, curtails the capacity of legal mobilization, and therefore, of LAL NGOs, to mobilize the law politically and incite workers' activism *vis-à-vis* capital and the authoritarian state.

Moreover, the institutionalized and bureaucratized legal process is aseptic, technical, and as will be seen in the next chapter, removed from the immediate experience and reality of many workers. It also tends to remove the worker from the lived and subjective experience of the conflict, reducing the dispute to documents and forms with tick boxes that translate workers' disputes into legal categories and pre-defined logics of legal action. The legal process therefore subtracts the labour conflict from its natural setting, displacing it from the workplace to an external, bureaucratic and formalistic environment in which the worker is individualized, has little control over the process and has no connection to other workers who might face similar problems. This legalistic treatment of labour conflict as individualized, and 'judicialized' represents a strategic depoliticization of the labour-capital conflict, and a disciplinary mechanism that impels workers to follow the legal order. A process of transfer of agency takes place from the worker to the professional lawyer, who 'leads' workers through the legal process, yet, does not 'lead' workers into political activism, taking alternative forms of action that might be more effective in achieving workers' interests, such as collective action

(see Chapter Seven). This legalistic approach to labour conflict contributes to the maintenance of social stability, hence, working to the benefit of the Party-state.

However, workers are creative in their dealings with labour conflict and do not always follow the legal order, as will be seen in Chapters Six and Seven. They use a range of mechanisms to make their claims and deal with their workplace conflicts and are not necessarily supported by lawyers and LAL NGOs, or the trade union. There are alternative ways of supporting workers which might have more empowering effects than those seen above, and that might stimulate coordinated actions alongside legal action, which is more likely to inspire workers' activism.

5.6 Concluding remarks

LAL NGOs and lawyers mobilize the law in labour disputes under the banner of protecting workers' rights (*weiquan*). LAL NGOs provide legal aid legal services, such as legal consultations, education and legal representation, broadening workers' access to legal justice. In this sense, the laws have provided an opportunity for lawyers, civil society organizations and workers to protect workers' legal rights. I have shown in this chapter, however, that LAL NGOs' legal mobilization affects, sometimes limiting, workers' political activism and mobilizing capacity in a number of ways, which in turn reflects on the extent to which legal actors and legal institutions sustain authoritarianism.

LAL NGOs provide very significant support to workers in terms of increasing their knowledge of the laws, raising their legal rights consciousness, and assisting them in resolving their labour disputes. This chapter has provided additional evidence to support Gallagher's (2006) arguments that legal aid centres, in this case, LAL NGOs, empower workers because they increase their individual competence and understanding of the law, helping them develop a critical outlook that informs and perfects future legal action, if taken. This is important because it contributes to the protection of individual workers' legal rights, and empowers workers to take action within the law.

However, I have also shown that there are two main factors that preempt LAL NGOs and lawyers from empowering workers' political activism: the first is that LAL NGOs and lawyers socialize workers in the legal order, disciplining them into legitimate social behaviour. The second one is due to the power relations embedded in the legal system that are reproduced between LAL NGO staff and lawyers, and workers through legal education and representation. LAL NGOs' depiction of workers as 'the weak' or as 'clients', their location within the city in office spaces, and the use of their office space have been used to show the disconnection between workers and the LAL NGOs and their lawyers, which is aggravated by the power relations that unfold during the consultation and representation processes.

I have argued that in the process of providing legal consultation and legal representation, LAL NGOs and lawyers take on the role of representing workers and leading them through the legal process. The legal system and the legal channels to resolve disputes are highly bureaucratic, individualized, lengthy, and technical, which make the professional skills of lawyers a necessary resource to take legal action, creating a dependency of workers' on lawyers which results in workers' *transferred agency* to lawyers. LAL NGOs and lawyers act '*on behalf of workers*'; they represent workers in legal mobilization and at policy levels (as evidenced in the previous chapter), not because of workers' choices of representation, but because the system is designed in a way that workers *need* lawyers to navigate it. This concentration of legal knowledge and technical skills in the profession of lawyers is not particular to the Chinese legal system, but is common to any society. This is what grants lawyers their professional and social status, and determines that the legal profession is a 'dominant' and 'disabling' profession (Illich, 1977). The power relation embedded in the legal system and reproduced by LAL NGOs' lawyers perpetuates the 'weakness' of workers, reproducing power relations in society and class differences between so-called peasant workers and lawyers and NGO staff (the urban middle-class). Even when workers gain rights consciousness and legal knowledge, it has been demonstrated here that LAL NGOs do not enable

workers to take autonomous legal or extra-legal action – workers are advised against this and strongly encouraged to take legal action instead.

This social gap and dissociation between LAL NGOs and workers, and the power relation developed between lawyers and workers, in addition to the institutional arrangements that contain LAL NGOs and lawyers examined in the previous chapter, preclude LAL NGOs from catalysing workers' autonomous and grassroots political movements to protect their rights as a collective or to challenge the Party-state and capital to address the structural origins of labour conflict. Legal action can resolve individual problems, but it falls short of resolving the general issues workers encounter, which arise from structural inequalities between workers and employers in a market economy. Even if individual cases are resolved through legal channels, the sources of these problems remain untouched by the law, and are, in fact, maintained and reproduced in the legal system by treating labour rights as individual rights, and labour disputes as individual by nature. As Lawyer Lin from NGO Y said, *"legal aid cannot solve the problems that peasant workers face, it is too difficult and problems are too broad"* (Y10, 26 December 2012). These problems are unlikely to be addressed via legal action; hence, the limited political challenge legal action represents to the Party-state and capital. It would be interesting to know how much of a challenge to the Party-state the increased use of legal channels to manage conflict represents economically. It seems that politically, the Party-state has it under control.

With regard to LAL NGOs' activating workers' political action by using the law, I have found no evidence of NGOs X, Y and Z coordinating or organizing legal mobilization in parallel with collective campaigns. In fact, these LAL NGOs advise workers to take 'legitimate' legal action to resolve their legally defined labour disputes, and represent them when doing so. As Lawyer Wang clearly stated in the previous chapter, LAL NGOs, by virtue of representing workers at policy levels and in individual cases, in fact depoliticize labour struggle by turning it legalistic (Z12, 22 January 2013). This depoliticization is multifaceted, but most significantly happens because of the individual treatment of labour cases, which precludes workers from

forming a collective identity and identifying common interests, the subtraction of labour conflict from the workplace into the courts, and the transfer of agency from a political agent –the collective worker- to a legal agent –the lawyer.

Therefore, LAL NGOs' and lawyers' legal mobilization in fact fulfils a crucial function for the Party-state: they socialize legal rules and the appropriate (institutionalized) forms or logics of action, which 'accord to the law'. That is, they are building blocks in the normative and disciplinary process of the new legal order, legitimizing the content and uses of laws as new and valid forms of action from below, but also as valid institutions of governance of the CPC. LAL NGOs hence take up the role that is most vital, as Fei (1992: 106-107) argued to "establish a social order based on a rule of law, the first thing needed is to reform the social structure and the ideological perspective". In this regard, LAL NGOs complement the institutional change of the state by enabling the cognitive change and socialization of the new norms into everyday life – they are instrumental in the state's project of building the rule of law. LAL NGOs cultivate the new institutions of governance by socializing them and fostering their change or adaptation to the challenges of the social context. In other words, they socialize and legitimize the rule of law project of the state (Landry, 2008; Liebman, 2011; Ginsburg, 2008), and reinforce the 'adaptive governance' (Heilmann and Perry, 2011) of the CPC.

Chapter Six

“Contracts are useless. The law is useless”

Workers' conceptions of law and justice

“Traditionally, and then quite differently under Mao, particular norms prevailed regarding what is fair, just or correct, and these are now coexisting with and being challenged by the new economic order that has arisen over the past two decades.

Analyzing the sense of injustice expressed today by ordinary Chinese citizens emerging from such a complex heritage can help us understand the normative repertoire used by Chinese people today to interpret the reality they face and how they respond to it.” (Thireau and Hua, 2003: 83)

There has been a wide consensus in the literature that asserts that ‘rights consciousness’ has been rising in Chinese society since the 1990s (Gallagher, 2006; Goldman, 2005; Friedman and Lee, 2010; Froissart, 2005; Li, 2010; Lorentzen and Scoggins, 2015; O’Brien and Li, 2006; Pei, 2000; Perry, 2008, 2009; Yang, 2005).⁶¹ Neither in the previous chapter nor in this one do I intend to negate the above assertion; instead, I have argued in the previous chapter that the underlying notion of rights consciousness referred to in the literature is a type of *legal* rights consciousness (or legal consciousness). Even if rights consciousness is a less analytically narrow category than legal consciousness because it implies that people can have rights consciousness without knowledge of the law and its proceedings (Dittmer and Hurst, 2006: 43), I find that the common assumption that rights consciousness as is increasing in Chinese society is one that is in reference to legal rights.

Although this is not explicit, in the literature (Chen, 2007: 64; Chen and Tang, 2013; Leung, 2015) rights consciousness and legal consciousness are used rather loosely and interchangeably (except for Gallagher, 2006), because there is an underlying assumption that links the proliferation of laws since the 1990s and people’s rising

⁶¹ There has also been widespread governmental and media diffusion following the proliferation of labour laws, especially after the enactment of the LCL in 2008. Commercial and governmental media and cultural apparatuses such as Xinhua, the People’s Daily, *Gongren* magazine, *Xinjingbao*, and other newspapers and radio programmes have been actively publicizing the laws and their content, in a widespread legal education initiative. The laws have also been taught at schools and disseminated by mass organizations such as the China Communist Youth League (Exner, 1995). Legal education campaigns have also been set up by LAL NGOs, which have instrumentally partaken of the formative process of legal rights consciousness through their legal consultation and legal education activities. As discussed in the previous chapter, this has contributed to the increased awareness of rights and laws among Chinese workers, as asserted in the literature (Chan, 2013; Froissart, 2011; Gallagher, 2006, 2007; Lee and Shen, 2010).

consciousness of their rights. Cabestan (2005: 49) assumes that the increase in litigation since the 1990s indicates that "the Chinese society is more aware of its rights". Similarly, Wilson (2015: 6) takes the increased number of cases handled by courts as an indicator of the increased legal consciousness and social conflict in Chinese society. These assumptions presume a uni-linear understanding of rights consciousness as caused by the enactment of laws and the statistical outcomes of use of legal instruments – measured by the number of people taking legal action (use of courts) (Gallagher, 2006: 784). This understanding also presumes a backward causal link between the increase in labour legal disputes and rights consciousness, the increasing number of legal labour disputes signalling the increase of rights consciousness among Chinese workers, and their increased willingness to protect these rights, or to confront the state in a "bottom-up claim to citizenship" (Goldman, 2007: 71). As Lee and Friedman (2009: 23) suggest, "the rise of rights consciousness is outgrowing institutional capacity to meet or contain workers' demands. Workers have more rights on paper – and are more aware of them – than ever before". Such an enthusiastic reading of increasing rights consciousness is historically encapsulated in the post-reform period and is socio-culturally and historically misinformed, as Perry has suggested: in China "it is remarkable how many instances of collective protests during the imperial and Republican periods were connected with the filing of lawsuits (...) Legal channels were a recognized means for villagers to advance collective interests" (Perry, 2009: 19).

In this chapter I intend to challenge this concept of rights consciousness by contrasting it with findings of a number of Chinese workers' understandings of law, rights, justice, and their substantive experiences of work. By doing so, I intend to show the discrepancy between legal rights consciousness and the notions of justice that some Chinese workers hold, which are based on socio-cultural and material factors, and not necessarily on legal precepts. This shows a discrepancy between formal institutions of the Party-state and informal institutions, such as social norms, local knowledge and everyday practices. Practice and social behaviour, therefore, are consciously and unconsciously informed by many different factors and

structures, including psychological, historical, social, material, cultural and philosophical, the law being only one among these. Perry (2009) argues that, aside from the fact that Chinese people did use the courts in the past as one among many forms of action, rather than witnessing a new rights consciousness with the different forms of protest behaviour that have been staged since Tiananmen – strikes and labour protests, rural protests, online activism or middle-class NIMBY protests, these forms of action and “the rhetoric of rights that infuses contemporary protest perpetuates a longstanding penchant of Chinese protesters to use the authorized language of the state in presenting their grievances – precisely in order to signal that their protest does not challenge state legitimacy” (ibid: 18). This is “the latest expression of a much older *rules consciousness* that has been the bedrock of routine in popular protest in China for centuries” (ibid: 19, emphasis in original). Moreover, popular contention that uses the rhetoric and language of the state and utilizes state-sanctioned channels to express grievances signals the resilience of the ability of the CPC to overcome social pressures without undergoing systemic change.

In an attempt to respond to Perry’s invitation to conduct a historical and socio-culturally sensitive analysis, I intend to deconstruct the ‘rising rights consciousness’ argument, and posit that this assertion presumes Chinese workers’ consciousness to be a *tabula rasa*, waiting for the concepts of legal rights to be impressed. This interpretation views the ideas of rights as having been developed only after the liberalizations of the market economy and equates the concept of rights only with liberal concepts of rights (rule of law) that are brought about by the forces of the market economy. It also sees workers as having no agency over the concepts of rights that are being derived from newly enacted laws. I argue that this concept of rights consciousness is not the most useful analytical category or framework to understand Chinese workers’ consciousness and actions, as there are popular understandings of rights and justice prevalent among Chinese workers that are related to social constructs not encapsulated in the laws, and the rights consciousness category put forward in the literature does not explain the drivers of workers’ actions beyond legal mobilization. These social constructs also better

explain the diverse forms of action workers take beyond legal action, as will be explained in Chapter Seven. Workers' conceptions and subjective experiences show that even when lacking legal consciousness as an awareness of the words of the law, Chinese workers have a deep understanding of the fundamental rules of social and economic relations; they have standards of how these should operate, on the basis of what is right or wrong, fair and unfair. Moreover, I will show that workers are not only driven by economic concerns: the language they use and the actions they take (as shown in Chapter Seven) indicate that there are underlying material and non-material factors, such as family and social ties, sense and desire of equality, and broader desires and ideas of what life should be and how to achieve it. In contrast to this, in the literature there is a paucity of analysis of Chinese workers' (local or popular) conceptions of rights and justice prior or in contrast to those concepts derived from the newly enacted laws.

I examine Chinese workers' understanding and opinions of rights and law. There appears to be contrasting signs of workers using the language of rights and rights protection (*weiquan*, 维权) but claiming not to "know the law"⁶² – a key indicator that workers' conceptions of rights are not necessarily those rights established by law (rights consciousness is therefore not legal consciousness, and it does not necessarily derive from the law). In fact, if asked about a particular law, most people would deny knowing its content, and some would even deny knowing of its existence. Wong (2011: 882) has shown through survey data that the Labour Law (1994) was the most known law with 70.1% of respondents being aware of it, more than the Constitution of the PRC (55.1%). But does knowing of the existence of the Labour Law, or of the Labour Contract Law (LCL), mean that workers have rights consciousness? Is 'understanding the law' the same as having 'rights consciousness'? If so, why and how would knowing the content of the law inform workers' actions?

⁶² See section 1.1.2 for how I distinguish methodologically legal rights consciousness and rules consciousness, and Chapter 2 for a discussion of these terms in the literature.

In this and the following chapter, in a sort of micro-sociology of law, I show how workers understand their problems as opposed to the law's understanding of them, how they address conflicts, why do they do so, why they do not use the law, and what other strategies they deem useful or not. I show that there are Chinese workers who have great awareness of their interests and rights,⁶³ and very critical readings of their material conditions and the causes of their grievances. This shows that deep socio-cultural constructs or cognitive scripts⁶⁴ (Geertz, 1973) that precede and prevail over the values held in the law are also formative factors of workers' consciousness. These social constructs can be understood as informal institutions or 'traditional' values. These include concepts of morality, social norms of behaviour, understandings of social relations, and notions of fairness and justice, which denote that people cling to much more 'ancestral' rules of social behaviour and rituals, as Perry's (2009) rules consciousness argument suggests. Furthermore, these concepts inform workers' actions differently to '*legal* rights consciousness' – workers resort to a variety of forms of action alternative and/or in addition to legal action when addressing labour disputes, as will be shown in Chapter Seven.

These two chapters provide workers' own voices, opinions, and conceptions, extracted from 27 unstructured interviews with workers. They are used in this chapter to illustrate workers' explanations of their working conditions, their understanding of law and labour relations, and their conceptions of law and justice. These are occasionally supported by comments from LAL NGO staff, lawyers and labour experts. Workers' accounts were gathered using participant observation as the primary data collection method, with unstructured interactions and open-ended conversations in legal consultations at LAL NGOs, in the offices of LAL NGOs, and in visits to construction site dormitories. Fieldnotes were taken to capture the data during participant observations, which following Schensul et al. (1999: 65), described activities in order of occurrence, interactions and the positions of each

⁶³ See Chapter Two for discussion about interests and rights.

⁶⁴ Geertz's (1973: 62) definition of cognitive patterns or cognitive scripts is "a template or blueprint for the organization of social and psychological processes", which include values, ideology, and culture. Social construct, as a social construction of reality, is made by traditions and norms, which in institutionalist theory would be described as "informal institutions".

participant, recorded demographic characteristics of each participant wherever possible (i.e. origin, age, sex), and used verbatim quotes when possible. These fieldnotes attempted 'thick' description (Geertz, 1973), while I proceeded to categorization, codification and analysis when re-working the fieldnotes in a second notebook, as deMunck and Sobo (1998) advocate. Evidence compiled in this chapter is drawn from 27 events of participant observation, out of a total estimate of 150 open-ended conversations with workers during the length of my fieldwork. The 27 interviews captured here provided the most representative and richest data of the 150 accounts of workers I observed and engaged with during fieldwork, and are therefore valuable in relation to theoretical propositions.

In terms of workers' actions, as mentioned above, the 'rising rights consciousness' argument assumes that increasing use of courts and legal channels is indicative of workers' increased rights consciousness, assuming a backward causal link from specific forms of action to cognition. Forms of popular protest as 'rightful resistance' (O'Brien and Li, 2006; O'Brien, 1996, 2010), and lawful or 'rights-based activities' (*weiquan huodong*, 维权活动; Li, 2010) provide evidence to ground this conclusion. I, however, suggest in this chapter that the use of the rights consciousness framework to explain workers' actions is analytically thin, as it provides a linear reading of a causal process that can be misleading and reductionist. To assume that one form of action is due to one cognitive process (legal mobilization = rights consciousness) is an over-simplification: the relation between cognition and action is a much more complicated one – and widely debated in both the disciplines of psychology and sociology. Therefore, I argue that more micro-sociological and ethnographic research on workers' subjectivities is necessary to first understand people's socio-cultural concepts and cognitive processes, which can later be linked to certain types of action. This would allow people to explicitly explain how they understand and justify their own rationales of action, instead of presuming that if they use the courts more than before it is because they have (or they have 'more') rights consciousness.

Finally, in this chapter I also show that the view of the increase in rights consciousness among Chinese workers is enthusiastically taken as an indicator of the degree of penetration of the rule of law ideology into Chinese society. This is even more relevant as it is presumed to signify the potential for China to gradually move *forward* towards a more transparent, accountable, lawful, and ultimately democratic form of governance, given the increased willingness of Chinese people to protect their rights and to pressure the authoritarian state to hold to its own laws. However, this presumption or prognosis should be asserted more carefully given that the economic and political institutions derived from the transition to a market economy, of which the current legal system is a part, might not necessarily be penetrating into Chinese society in the way that is expected in the literature: to push for liberalizing and democratizing changes in the political sphere (Goldman, 2005; Halliday, et al., 2007; Halliday and Liu, 2007; Pei, 2006). In fact, what is necessary is to further research an ever-changing China where law is gaining more weight in political and social life (even if only in discursive form), and ask: *How and why do people understand and use these new legal institutions at hand?* In other words, it is not the law itself that matters most, but rather what people think of law, if and how they act within it (i.e. if the law is legitimate and useful in their eyes) or, if outside of it, how they justify the alternative actions they take.

Therefore, in this chapter, I explore workers' subjective experiences of work in section 6.1. Section 6.2 provides evidence of workers' perceptions of law and labour relations. In section 6.3 I gather workers' conceptions of justice *vis-à-vis* legal justice. Section 6.4 concludes, suggesting further lines of research.

6.1 Workers' subjective experiences of work

*"We are peasant workers.
Peasant workers' lives are hard"*
(W25, 17 September 2012)

Workers have various, but very concrete, motivations for entering labour migration and taking up hard working conditions. Family responsibilities and economic pull-

push factors draw peasant workers into the cities and industrial nodes in search of employment. Pun (2005) showed that young women migrant workers were keen to enter factory work to escape the traditional roles that would be assigned to them if they remained at home in the countryside –marriage, housework, etc. It is argued that the second generation of migrant workers are qualitatively different from that of the first because of higher educational levels, awareness of the laws, skills and resources (in terms of their use of technology and social media; Zhang, 2010) and anger derived from their labour conditions (Pun and Lu, 2010). Moreover, it is argued that their aspirations of making a ‘better’, i.e. ‘urban’ life, and their comparatively lower aims to return to the countryside inform their demands and forms of protest increasingly going beyond the legal standards (Chan, 2010a; Chan and Pun, 2009; Leung and Pun, 2009; Wang, 2011). Despite this categorization of different generation of workers, the evidence suggests that the two main factors drawing workers to labour migration are family responsibilities and economic factors.

These responsibilities and aspirations for a ‘better life’ drive some workers to endure, at times, arduous and difficult working conditions while others turn to more radical forms of action (Chan, 2010a; Chan and Pun, 2009; Leung and Pun, 2009). Workers have an understanding of their material conditions and labour relations that are somewhat different to that of the legal frameworks. Their perceptions and opinions of the law, and their subjective experiences and common attitudes towards work illustrate socio-cultural and historical factors that differ from the content of the laws.

6.1.1 “Meibanfa”: Endurance and resignation

Peasant workers see their life as intrinsically hard, and their working conditions as arduous, as the quote above from a group of three workers in a clothing factory in Daxing illustrates. The workers stated, *“Our situation is hard, we will take whatever work comes (...) because of our children and elders back home, we endure the hardship”* (W25, 17 September 2012). Similarly, a group of women workers in the

dormitory of a construction site in Beijing discussed their labour conditions and motivations to work with me. Worker Nu said:

We work more than fifteen hours a day to cook all three meals for all the workers in this site. We wake up at 4am and finish the last meal at 8pm. Then we can eat. It is very exhausting! (...) But there is nothing to be done. No work, no wage! (...) Peasants' lives are very hard, there is no other choice but hard work (...) It is for your children that you endure the hardship; there is no other way (...) Peasant workers are the lowest class, have the lowest wages, and have the hardest jobs. But again, if you don't work you don't earn money. There is no alternative. (W10, 25 May 2012)

She was echoed by another worker in the dormitory: *"If you don't work you don't live, there is no other way! You must work to live (...) For your children, you must go out and work"* (W10, 25 May 2012). These workers provide examples of a narrative that appears across the board in China: work is necessary, but extremely hard; workers endure the hardship because of their family responsibilities.

Endurance and resignation is taken as far as to even tolerate unsafe working conditions. The factory workers from Daxing said: *"The work is too exhausting; the conditions in the factory are unsafe. There is a lot of dust that comes out of the clothes which is toxic, but we are not provided with appropriate masks (...) But if one is not healthy, there is no work"* (W25, 17 September 2012). Workers are, of course, aware of the unsafe conditions, impact on their health, and potential long-lasting effects, which could eventually bar them from the labour force. Yet, they endure these unsafe conditions because of a common belief that "there is no alternative": *"Conditions are too hard, but there is no alternative; there is no other way but to do casual labour"* (W25, 17 September 2012).

These excerpts show the construction of a social category – the peasant worker – and an identity ascribed to him/her: endurance of appalling working conditions, inherent to peasant workers' work, and having "no alternative" but to work for low wages and with low job security; these material conditions make them "the lowest class" in society (as Worker Di, W6 and Worker Nu, W10 emphasise). This social

image of the peasant worker is paired with the “*meibanfa*” discourse, which leads to resignation. However, we shall see that resignation is not the only way peasant workers have to cope with these conditions.

Throughout conversations with workers during fieldwork, endurance appears as a common attitude towards work and life. It can be related to cultural and historical factors, as NGO X’s Legal Personnel Ma explained: “*In China, it is traditional to endure a little hardship; as the saying goes, it’s ok to bear a little hardship, ‘To endure hardship is happiness’ (chiku shi fu, 吃苦是福)*” (X5, 25 September 2012). Endurance is therefore seen as a cultural trait, and in fact, considered necessary for China’s economic development:

Workers’ social awareness is very strong; they will normally seek the government’s intervention to resolve issues, but as China develops, they have to endure hardship and Chinese people are willing to do this. It is precisely when they encounter hardship that their consciousness develops. This way, their rights protection awareness slowly rises. (X5, 25 September 2012)

It is implied that migrant workers are willing to tolerate these hard conditions because of their own familial responsibilities and beyond, for the sake of China’s development, and that enduring hard working conditions will lead them to develop their consciousness. This explanation differs from that previously encountered in the literature: that their rights consciousness develops in consonance with legal developments.⁶⁵

This interesting insight provided by Legal Personnel Ma indicates that workers’ awareness of their rights and rights protection is not necessarily derived from legal frameworks, but more importantly, from pre-existing cultural factors, social responsibilities (family) and from their enduring the (hard) material conditions at the workplace. Workers’ behaviour in the workplace and the strategies they use to

⁶⁵ Note that, among others, Skocpol (1979) studies the conditions for revolution and indicates that oppression and exploitation are necessary but not sufficient in themselves conditions to lead to social revolutions, specifically in relation to peasants. Peasant revolts, however, have been seen as necessary conditions for social revolutions in France, China and Russia, peasants enduring conditions of political and socio-economic oppression and marginality.

endure or address the material conditions and conflict, should it arise, are related to these cultural factors, social constructions of what work is and should be (expectations), and to their ability to conceive of alternatives. Workers' actions, or the ways in which workers protect themselves (and their rights if so), will be shown to be related to the material conditions in the workplace, the subjective experiences of these, and the historical and socio-cultural factors that have defined Chinese people's attitudes towards hardship, conflict, and resistance. This particular endurance factor, linked to a "there is nothing to be done" attitude, explains certain forms of action (or lack thereof), namely, acquiescence, silence, or exit (further elaborated in Chapter Seven). Workers' consciousness, and thereafter, the ways in which workers protect themselves is therefore not only – nor mainly – related to the legal system, but most importantly, to China's culture and workers' socio-economic conditions.

Workers show critical analysis of their situations. One common way of enduring is by making the personal collective. Workers share their adversity and collectively complain about their situations. This venting strategy is a coping mechanism, through which they share their views on the hard working conditions with others who are also in similar situations. Worker Xi said, when discussing different ranks of construction workers: "*They have it hard; we have it hard; it is not fair. But there is nothing to be done*" (W10, 25 May 2012). Social comparison makes workers aware that other workers are suffering similar conditions, and this can bring redress. Social comparison, sharing subjective experiences and complaining are ways in which workers become aware that unfair working conditions abound, and also create collective links to other workers that share the same situations. Despite this *meibanfa* narrative, collective interests and potential forms of action can grow out of these sharing experiences and venting coping mechanisms – as will be explained in Chapter Seven.

6.1.2 Wrong, fairness, respect and integrity

"What rural people recognize as improper behaviour may,
in fact, be perfectly legal"
(Fei, 1992: 106)

Endurance of hardship does not mean that workers accept these working conditions or that they cannot identify that there are legal irregularities at their workplace. "*Workers cannot think that far [i.e. identify there is a legal problem], they just have a general feeling that something is not right*" (Y2, 30 October 2012). This view of workers not being able "to think that far" is rather patronizing. In fact, workers "feeling that something is not right" might indicate that their standards and perceptions of their working conditions do not necessarily match the legal precepts; as the above quote by Fei (1992) indicates, what workers perceive or feel as 'improper' or 'wrong' behaviour might not be considered as such in law.

The three factory workers from Daxing explained to me that they had been working in the clothing factory for seven months; they worked continuously for over 15 hours per day with no lunch break, had only one day off each month and did not have a contract of employment.

The wages are extremely low, extremely low. We make no money (...) We have RMB 600 (RMB 20 per day),⁶⁶ deducted from our salary for the living fees. We would be willing to pay this if the living conditions were better, but the conditions provided at the factory are not fair, and the food is very bad (...) In our hearts we know this is not fair; it is not fair. In our hearts we know that this is wrong (buduide, 不对的). (W25, 17 September 2012)

These workers confirm Legal Researcher Ying's words above, "a feeling that something is not right", but more than this, these workers show that they are not only aware of legal irregularities but of a deeper sense of unfairness and wrongdoing. Working conditions, an unsafe environment, low wages, and living conditions are all factors that workers identify as wrong and unfair.

⁶⁶ This accounted for approximately 19% of their salary, calculated on the basis of the average wage of a migrant worker in the textile sector in Beijing (approximately RMB 3,200 per month in 2012 - £330).

Similarly, Worker Wan claims: "*It was much better with Mao, our society was equal, and we didn't have all these problems. Now ordinary people (laobaixing, 老百姓) don't have any development*" (W13, 11 June 2012). Worker Nu shows the same view, when emphasising that:

China's problem is that the country is rich. It has developed fast and the money has come fast, but it is spent quickly as well. China's problem is that the people that have money have a lot of money; and those that are poor are very poor, too (...) We have made an effort to come out to [migrate for] work, but there are people back in our hometown that are so poor that they can't come out to work. (W10, 25 May 2012)

Worker Nu's statement provides strong evidence to refute the general narrative that migrant workers lack consciousness, whether of their rights or the general political economy of China's development. Peasant workers have a very acute awareness of their working conditions and the macro-economic forces of China's development. In fact, Worker Nu shows that workers analyse China's development, which, from their standpoint, has been unequal and unfair because they have to endure harsh working conditions yet have seen no benefits of the miracle. As she said, even work is a privilege for some, as others have not been able to migrate for work. Worker Wan's and Worker Nu's opinions are just two representative examples of a common narrative among peasant workers that denotes a desire for equality and fair treatment.

Lawyer Lin agrees when stating "*workers are considering much more than the living standard; they also give importance to recognition, management practices (guanli, 管理⁶⁷), and respect*" (Y10, 25 January 2013). Workers' perceptions of unfair treatment are not only due to material and economic factors (including their work and living conditions), and their class position (the lowest in society), they are also related to social norms of behaviour and the expectation of being equally recognized and treated with respect in Chinese society.

⁶⁷ Can also refer to rituals (*guanli*, 惯例).

Informal social norms inform the way workers perceive their labour relation, and consequently, how they expect to interact and be treated at work. It will be shown below that many workers conceive of labour relations as social relations rather than economic relations, and hence, ruled by social norms of behaviour. Worker Nu indicated that her work relation with her direct employer at the construction site, the *baogongtou* (包工头),⁶⁸ is very much like any other construction worker's relation: "*He is ok. We are all from the same place, so we are all family, relatives*" (W10, 25 May 2012). Worker Nu is suggesting that his type of employment relation in the construction sector is, in fact, an extension of kin, family, hometown and regional networks. Workers like Worker Nu therefore follow norms of social relations in what is now, by law, an economic relation. This dissonance between workers' informal norms of social behaviour and the legal and formal rules that now govern the same relation may be the reason why workers perceive labour disputes differently from what the law stipulates: workers' conceptions of what is right or wrong in a social relation is somewhat different to what constitutes a labour dispute according to the law.

Worker Ying,⁶⁹ after a legal consultation, cried to me in despair and frustration. As well as suffering from an occupational injury and being involved in a long legal process, she declared that she was frustrated and very upset at her employer because she had continuously tried to negotiate to work from home: she could no longer go to work to the office because it was on the second floor, there was no lift and she could no longer walk up the stairs. "*I can do the work from home, with all*

⁶⁸ The construction industry runs through a subcontracting structure (Pun and Li, 2010; Pun, Li and Zhang, 2011) where the frontline work is subcontracted to small private companies which gather migrant workers that arrive at sites in teams following a *baogongtou*, normally a person from the same township or region. Workers normally follow the same *baogongtou* on multiple occasions, and rely on him to find the work. In most cases, the *baogongtou* is in charge of arranging the work, wages, and dormitory and living conditions with the subcontractor. The contract-signing rate in the construction industry is extremely low, for example "in 2013, no less than 82 per cent of forty million construction workers, for instance, had not signed any labour contracts" (Lin, 2015: 41).

⁶⁹ Worker Ying had been working for the *danwei* in an office for more than five years. In 2010 she had a motorbike accident while running errands for the company. The company did not provide any insurance or security and she had to pay her own medical expenses. She sought the help of NGO Y and lawyers and the Labour Bureau but the company refuted her claim that she had suffered an occupational injury. In January 2011 she went to court, but only in August 2011 was her occupational injury confirmed. At the time of our conversation she was undergoing mediation.

this technology, internet, QQ⁷⁰, Weibo, I could work from home (...) I have a two year old son who is in kindergarten", she said. "*I have been working for so long for the danwei [company], I don't understand why the boss doesn't agree to me working from home*" (W15, 12 June 2012). Worker Ying views herself as part of the *danwei*, and considering that she has seniority (in terms of length of employment) in the company, she expected to be treated with the familiarity of social relations, her employer "caring" for her and looking after her wellbeing – she has a son to provide for. Her emotional reaction and social sharing denote that she perceived this treatment as inappropriate to her relation with her employer, and disrespectful to her long dedication to the company. Yet again, the behaviour of her employer in this regard – not accepting her request to work from home – is not illegal, even though she considered it wrong and disappointing.

Social constructs of equality, fairness and, furthermore, morality, underlie the above excerpts. The examples indicate that there are norms of social behaviour that escape the formal legal precepts. Workers share a sense of how they should be treated, irrespective of what the law dictates. When they are not treated accordingly, workers feel that it is 'wrong', which is an appeal to the morality of social relations. Morality, Fei (1992) argues, is "the belief that people in a society should abide by certain norms of social behaviour. Morality always includes regulations, beliefs, and sanctions, all of which are shaped by the constraints imposed by a social structure" (Fei, 1992: 71). What may be legal treatment in today's China can be perceived by workers as immoral and unfair. This indicates that there is a disjuncture between the formal institutions of the state (in this case, labour laws), and workers' social norms of behaviour and popular or local constructs of morality which are applied to labour relations. This sense of morality applied to labour relations also informs workers' conceptions of fairness and justice, which are broader than those defined by legal (and procedural) justice. A sense of substantive justice would be derived from workers' subjective experiences

⁷⁰ QQ is an instant messaging software and Weibo is a microblog website. They are both widely used in China.

and their conceptions of morality, fairness, and equality, as explained below in section 6.3.

6.2 Workers' perceptions of law and labour relations

*“Litigation is not worth it, we have to spend money that we don’t have.
The law is troublesome (falü feishile, 法律费事了)”*
(W5, 1 May 2012)

6.2.1 “Labour contracts are useless”

The LCL establishes the contract of employment as the basic element to confirm a labour relation between employers and workers. Since its coming into effect in January 2008, the contract-signing rate has been found to have increased by 93% (Hua, 2008). However, survey data conducted by independent labour organizations of 537 workers in 6 industrial zones of the Pearl River Delta (PRD) and the Yangtze River Delta (YRD) indicated that in 2009, while 75% of workers had signed labour contracts, such contracts were only of 3 years duration at best (SDMWC, 2010). However, when comparing these two regions, the research reported that the signed-contract rate in the PRD was 67% in 2009, much lower than the 83% in the YRD (SDMWC, 2010; WE, 2009a).⁷¹ Despite this overall increase in contract signing

⁷¹ It could be argued that due to the different political economies, industrial bases and composition of capital of the PRD and the YRD regions, signing-contract rates and working conditions would be expected to vary. Different studies accounted for different results. Ho (2009) argued that the main factor accounting for the differences in signing-contract rates lay in legal implementation. However, she pointed out that the reason for these local authorities to rigorously enforce the Law and to actively create supplementary instruments was that in the PRD local governments were actually trying to foster a more capital-intensive technological industry, and reduce labour mobility and the number of migrant and low-skilled workers in the area. Thus, a rigorous implementation of the Law is found to be a strategy to encourage industrial upgrading in the PRD (Ho, 2009: 88). In contrast, Hendrischke (2011) suggested that in Jiangsu and Zhejiang, even though signing-contract rates were high (95%, according to Zhou, 2008), the majority of companies were reluctant to comply with this legal requirement due to the inherent increase in labour costs. Moreover, he argued that implementation was problematic because of local governments' lack of enforcement incentives: if the Law was rigorously enforced, local governments feared it might increase labour costs, and lead to a reduction in investments, retrenchment and unemployment, which would be deleterious to local governments' revenues (Hendrischke, 2011: 58). It can also be argued that the ACFTU had been more proactively protecting the rights of migrant workers since 2003 (Howell, 2006: 9), and particularly in the PRD to pacify the waves of protests and strikes demanding minimum wages and a trade union to represent workers' interests (Chan, 2010b: 169; CLB, 2009a). Hence, legal implementation could be viewed as a mechanism to pacify labour unrest.

rate, which can be read optimistically as increasing mechanisms protective of workers' rights and conditions at work, it is important to explore what workers have to say about it, and to contrast sectors where there has been improvement of contract-formalization of labour relations, and those that remain largely "informal" (lacking contractual labour relations), such as small private manufacturing companies and the construction sector. According to the law, the contract of employment is a guarantee and a protection for workers. However, workers' opinions on the law and on labour contracts signal very different views, which help to understand the differing values attached to the law and the differences in rights consciousness.

The factory workers from Daxing mentioned above stated:

We have no contract of employment; out there it is all oral agreements. With a contract it is likely that the salaries are a bit higher, but out there normally between 70-80% are oral agreements (...) but because our situation is hard, we will take whatever work comes. Because of our children and elders back home, we endure the hardship. We are peasant workers. Peasant workers' lives are hard. (W25, 17 September 2012)

Regardless of knowing the legal standards, and being aware of the requirement of establishing the labour relation through a contract, workers such as these three in a clothing factory take on work without a contract of employment out of pure necessity. They indicate that contracts are usually an oral agreement between worker and employer, rather than in written form as the LCL stipulates. The acceptance of these forms of employment relations do not necessarily signal workers' resignation or endurance *per se*, but can also indicate that work relations are seen much more flexibly, as social relations, where oral agreements are accepted because of social trust and the application of social norms of behaviour to the labour relation. This may be the case in the construction sector, where there is a widespread flaunting of legal standards, which can be explained by the industry's structural conditions which have a propensity to informality/illegality (Pun and Lu, 2010; Pun, Lu and Zhang, 2011), but also by the conception of the labour relation as an extension of social, hometown and kin networks. The prevalence of informal

labour relations – i.e. with no signed labour contract – can be seen as a risk for workers who are unregulated and unprotected, but it has also been explained as an expression of workers' own choices:

The government is now more caring about peasant workers (...) each industry has its own regulations, and the construction industry is very particular. The problem of migrant workers in the construction industry is that they are not provided with insurance, with injury insurance in the construction site. Also, workers don't want to sign contracts or pay for the insurance because it is not required; because they are mobile they don't stay in the city for long and it is useless for them to pay for insurance in the city; and because with labour contracts they don't have the flexibility to be mobile. (Z9, 20 September 2012)

In contrast, a worker from a yoghurt factory in Daxing stated, “*the labour contract is necessary (bixude, 必须的). The labour contract confirms the labour relation; it is a type of proof. It protects us*” (W22, 10 September 2012). It was established in the previous chapter that contracts are the bare minimum necessary in order to take legal action. In court, physical proofs are required to establish the existence of a labour relation in order to proceed with the case. Workers' voices, as Lawyer Lin told Worker Shou, are not sufficient, they do not carry the weight of a written proof: “*The contract is a safeguard, it is a guarantee. The key point is to avoid the problem happening in the first place, and for this the labour relation has to be confirmed; the labour contract prevents problems*” (W26, 16 October 2012). In a similar way, Worker He, who has been provided with contracts in every employment she has had since 2007, raised her voice when discussing the value of the contract with another worker at NGO X: “*I signed a contract with this person, so I go and look for him, demanding my salary*” (W23, 11 September 2012). Worker He hereby recognized the importance of the labour contract to identify the employer, to target the claims in a labour conflict.

However, it is not only that workers might not demand a contract, employers also do not offer one: “*Many companies do not provide a contract because either they are not following the standards, and/or because employers do not have legal consciousness*” (Z9, 20 December 2012). As well as employers' lack of awareness of

the legal standards, there is a lack of implementation and monitoring of legal standards by Labour Bureaus, lack of political will, and contrary vested interests, especially in the construction sector.

In 2011, for example, there was a 23% contract signing rate. Problems persist, especially in the construction industry. Why don't workers have a contract, if since 2003 Wen Jiabao has increased attention to this problem. The baogongtou system persists. The construction industry has very fuzzy relations. The legal training is intended for workers to understand why it is important to have a contract (...) Workers do have a view and opinion of the laws. The labour contract law is a big question. Workers' focus is not on the law but on basic life. (I1, 28 December 2012)

As the staff at NGO I indicates, the core issue is how labour relations are perceived and organized, which in reality and most prevalent in the construction industry, is very different to what the laws stipulate. The labour contract is seen by many workers not as a protective instrument, but as a constraint on their mobility, and as a distortion of their social relations. For example, Lawyer Liu told a group of workers attending a training session at NGO X, "*the Labour Contract Law is the law that gives workers most gains. You then have to see if you can protect your rights*". To which Worker Gan responded: "*There is law, there are rights, but it doesn't protect us. We have to protect ourselves*" (W16, 16 June, 2012). Worker Gan indicates the lack of trust in the law to protect workers.

6.2.2 Social relations and *face*

The concept of binding agreements is not new in China, as shown by the traditional expression of "*in black and white terms*" (*baizhi heizi*, 白纸黑字) expressing two parties' binding agreement (X5, 25 September 2012). However, despite this cultural precondition, labour contracts have introduced the idea of commercial transactions – processes of commodification deriving from the introduction of market forces – to what is understood as personal or social relations. Labour laws not only change the basic conception of (work) relations but also introduce new forms of regulating these, which may be in opposition to the rules that regulate social relations in China. The case of construction workers most clearly shows this.

Worker Nu explained that she had started migrating for work over ten years ago, following a *baogongtou* who she recognized as being “family, relatives” as mentioned above (W10, 25 May 2012). Similarly, Worker Zhang had been working on a construction site in the Haidian district of Beijing for two years. When he arrived he signed a contract, but said “*I have no idea what the contract says or what the salary is or anything. I do not have a copy of the contract. The copy is with the boss*” (W1, 20 April 2012). Worker Zhang followed a *baogongtou* from his hometown, because “*there was trust and a former relation*” with him. However, workers that followed the same *baogongtou* but came from different towns did ask, discussed the terms and conditions and received a contract of employment, according to Worker Zhang. He did not (W1, 20 April 2012). Even when workers like Worker Zhang know that their labour relation should be established through a labour contract, they do not demand one from the *baogongtou*; rather, they rely on their trust and social ties to this person. In contrast, workers from other locations and without a social relation to the *baogongtou* do demand a contract to formalize their labour relation. This indicates that there are social relations and socio-cultural explanations of the organization of work relations, which can differ from legal standards.

Labour relations, therefore, are not necessarily perceived as economic relations, as established by the LCL and as defined following the logic of the market economy. On the contrary, many workers perceive their labour relation as governed by the same rules of other social relations: based on trust, respect, *face* and social harmony. The introduction of the contract into the labour relation can be understood as an alteration and even a disruption to the trust and established social rules, and some workers would consider asking to be provided with a contract as an offense to the basic trust that underlies any social relation. Lawyer Jian emphasised, “*it is because of the trust of the other person; people are not willing to ask for a contract because this would harm face; it will show that they don't trust the other person*” (Z2, 13 September 2012). Therefore, contracts (and by extension, legal precepts) can be perceived as a sign of mistrust and inconsistent

with cultural notions of social relations and historical experiences of work during the socialist period.⁷²

This same social dynamic can apply when dealing with conflict. For example, Worker Di indicates that: “*We are brothers (gemenr, 哥们儿) with our boss (the baogongtou), there is no way. We won’t address the problem, we won’t say anything. This is the Chinese characteristic: face. If we have a problem or we are not satisfied with something, it is just like that, there is nothing to do*” (W6, 4 May, 2012). In the same way that many workers will not demand a contract in order not to show mistrust or damage the employers’ and their own *face*, many workers will avoid conflict altogether, either enduring or leaving the work. In other words, workers’ conceptions of labour relations as social relations and their perceptions of law explain their forms of action, or lack thereof, as will be discussed in Chapter Seven.

6.2.3 “Contracts are unfair”

To confirm the disparity in the use of labour contracts *vis-à-vis* relying on social relations, Worker Li, who intervened in my discussion with Worker Zhang after having entered the dormitory room and listened to our conversation, stated emphatically: “*it is possible to have a contract here, but contracts are useless (meiyong, 没用). The law is useless*” (construction site, Beijing, 20 April, 2012). Why does Worker Li believe that contracts and the law are useless?

There are multiple explanations: contracts can be signed but may be blank or fail to reflect the actual working conditions; they may not be fair; or, simply, the employer may not adhere to the contract secure in the knowledge that there is such a lack of implementation and monitoring that it is unlikely that anything will come of it. However, Worker Li refers here to the fact that labour contracts are not a guarantee of basic standards of life and material conditions, which are what many

⁷² Many of the construction workers interviewed for this study were over 40 years old, and would have had some working experience themselves or would have learnt a different model of work from their parents.

workers are concerned with. Worker Shao reflects this as well, claiming: “*the contract, yes, yes, the contract. Ok, but I do not know how to get a contract. What we worry about most is that we do not get paid*” (W5, 1 May 2012). Another example is that of Worker Liu who rejected the contract offered to him because of its conditions. He had been working for eight months as a security guard for a company owned by a retired SOE manager. Shortly after starting work, his boss began deducting money from his salary (more than RMB 1,000⁷³ in the month of June). When he queried this, his boss refused to return the money deducted or gave any explanation for it; instead he gave him a document stating that the amount deducted was only RMB 900, but still without an explanation. When asked if he had a labour contract to prove the labour relation, Worker Liu said that the employer had given him one but he did not sign it “*because the salary offered was very low and the conditions were so bad that I didn't want to bind myself to such a company*” (W24, 11 September 2012). The labour contract represented, for Worker Liu, an obstacle to his mobility as mentioned above, and his symbolic – and real – acceptance of unfair and poor working conditions and salary, which he rejected. However, he worked without a contract while searching for a better option.

Lawyer Ai also acknowledged that “*the contract, the labour relation is not fair. Workers are aware of that*” (Y4, 14 September 2012). Workers are aware that contracts can bind them to certain working conditions that, as with Worker Liu, they do not necessarily accept. In this context, I would like to recall Worker Da, the taxi driver mentioned in the introduction of this thesis, who told me that he thought the laws, and the contracts were *unfair* because workers could not negotiate them, in this last instance, with the employer (W7, 5 May 2012). This argument is central to the definition of labour relations in a market economy, which the labour contract reinforces: in a capitalist economy, the labour-capital relation is an structurally unbalanced economic relation and individual labour contracts reinforce the individuation of labourers in the labour process (which during the socialist period was conceived as a social process), the worker having no say in

⁷³ This represented 30% of his monthly wage, which was RMB 3,400 (£351) in 2012.

negotiating the content of this contract (see collective bargaining developments below in Chapter Seven). Worker Da here claims that the central unfairness of labour contracts, and of the legal and economic system for that matter, is due to the unilateral power of capital to design contracts, and the lack of worker power in the labour relation. This lack is due to the fact that workers have no real process through which to negotiate the terms and conditions of employment or the labour contract, given the absence of an effective trade union (note that Worker Da did not even mention the ACFTU or the trade union branch when discussing this point).

The perception that labour contracts are unfair can also be found when discussing legal resolution of labour conflict. The following example is a description of a participant observation during a legal consultation by Lawyer Lin for Worker Xu at NGO Z (W18, 27 June 2012). Worker Xu was hired by a labour dispatch agency, which had irregularly terminated her contract without notice. Her direct boss also had not provided a termination letter. Worker Xu explained at length that, although technically she worked for a labour dispatch agency, this agency was a cover. She had already been working for the company when it sent her to the dispatch agency to be re-employed in the same company. The dispatch agency is part of the company⁷⁴. Lawyer Lin's reply was, "*You think it's unfair. We also think it's unfair, but there is no way [to take legal action]*".⁷⁵ Worker Xu had no evidence – her contract had been terminated irregularly, but her only proof was a negative one of not having advance notice of the termination of the labour contract. "*I understand everything that you are saying and I believe you, but it is not me that has to believe you; it has to be the judge; the judge has to believe you. So the problem is that you have to provide proof so that he believes you*", Lawyer Lin said. "*It is not that all lawyers can deal with everything, as it is not that the law can resolve any type of issue*", he stressed. Worker Xu said there was no way she could get any evidence regarding the issue, that that was the problem, and why the system was unfair,

⁷⁴ This formula of having a dispatch agency as an employment subsidiary to the mother company has been found in previous research (Ho, 2009; WE, 2009b). The amendment of the LCL in 2013 was mainly to address the problem of labour dispatch.

⁷⁵ At the time of this consultation the amendment to the LCL to regulate labour dispatch had not been enacted, which left this situation in a legal limbo –not yet being illegal, the LAL NGO was not able to assist Worker Xu in her claim.

because her words would not be taken into account in court, and that only the labour contract or the termination of it would be valid in court. Lawyer Lin then told Worker Xu that she had to find a solution herself, because NGO Z could not help her without any proof. Lawyer Lin said she could go to court and use her voice as proof, but NGO Z would not be able to assist her: "*Your voice is also a proof; the problem is its effectiveness*" (W18, 27 June 2012). This situation arose after the enactment of the LCL, companies increasingly using labour dispatch agencies to circumvent the legal requirement of the labour contract (Ho, 2009; Wang, et al. 2009; Xu, 2008). Worker Xu's case reflects the discrepancy between what workers perceive as unfair treatment, yet (at that point) is legal. Furthermore, it shows that there are limits to the law's ability to enable workers to protect what they perceive to be their interests and to be right, and to obtain substantive justice through legal mobilization as will be explained below and in Chapter Seven.

6.2.4 “Laws do not correspond to reality”

“Law is one thing, but reality is another thing. What happens in reality is different and the law does not necessarily reflect the reality of workers and their needs, and it is not necessarily effective”
(E3, 9 May 2012)

Similarly to the quote above, Lawyer Zeng states, "*laws do not correspond to reality. And laws say nothing about how to use them*" (Z5, 20 September 2012). Lawyer Zeng and Labour Expert Gong bring out the core of the argument made in this chapter: that the law does not reflect either workers' material reality and their subjective experiences or local/popular/socio-cultural constructs of justice, morality, and fairness. In this sense, when workers claim that "the law is useless", as in the quote above, it is mainly because the law is dissociated from workers' realities and subjective experiences of work.

The legal process is highly rational, technical and aims to standardize behaviour. This creates an enormous distance from the worker who, during conflict, is most focused on the subjective and emotional experience, and frustration due to what is

perceived as unfair treatment. Contrary to workers' feelings, the legal process is aseptic, surgical; it removes the worker from his/her most basic reality and emotional reaction towards the conflict. When workers that have suffered serious occupational injuries, such as Worker Shou (W26, 16 October 2012), or Worker Ying (W15, 12 June 2012), or serious loss of life, as Worker Ma whose son committed suicide after an occupational injury (W21, 28 August 2012), express their emotions to the lawyers at the LAL NGOs, they must be told that these are not covered in the laws and so do not have any legal status and cannot be addressed through the legal channels. For example, Lawyer Song, exasperated, repeatedly told a worker who was narrating his experience of a labour conflict and sharing his feelings with the lawyer in a legal consultation: *"Don't give me all the details. In the arbitration application form, you don't need to write so much detail, just the concrete point, only the specific point, just tell me the specific point!"* (Participant observation, NGO Z, 8 June 2012).

The degree to which the law can provide workers with redress on the one hand, and secure social stability (and regime stability), on the other, greatly depends on how much these institutions are able to encapsulate local knowledge and practices, and informal processes, as argued by Scott (1998). How far laws sit from social reality will influence the extent to which the legal institutions are integrated into people's cognitive processes and adopted in everyday life. From the evidence presented in this chapter it seems as though the current labour laws are still distant from people's everyday experiences and realities, which makes it difficult for many workers to identify with and use the laws. Workers' conceptions of justice, morality and fairness are in dissonance with some of the basic precepts of the labour laws (i.e. economization and commodification of social relations), while not necessarily against its protective factors (holidays, overtime payment, health and safety). This is due to legal rationality being based on precepts different to those of the prevalent morality and local practices in Chinese society – a rationality that includes social norms and rules of behaviour, concepts of justice, and people's subjective experiences and emotions. In China, inasmuch as in any other society, laws are a

modern state project that, in this case, is based on the capitalist rationality coherent with the logics of the liberal market economy.

Moreover, as Michelson (2006: 27) pointed out, lawyers can act as gatekeepers to justice: “by removing emotions and everyday reason and narrowing the scope of discussion to the relevant ‘legal’ norms (as they variously and inconsistently define them)”, Chinese lawyers act as lawyers do elsewhere in time and place. Their use of rigidly legalistic discourse to negate the legal validity of claims advanced by workers is to some degree a function of institutional norms and legal doctrine privileging enterprise mediation committees and government labour arbitration committees and People's Courts. Lawyers' core compliance, accompanied by the high rationality and technicality of law, are key in explaining why lawyers and LAL NGOs (and more basically, the legal institutions), do not stimulate workers' activism. The law separates the dispute from workers' reality and subjective experiences. This adds limitations to workers' obtaining substantive justice, as legal justice might not allow their emotional grief to be released in the legal process. Strategically, this is the most crucial limit the law imposes on workers' actions: it restrains the emotional and subjective component of their experience, thereby limiting its potential to engage workers collectively through their identification with the law and with other workers' grief and anger. This aseptic legal process prevents the formation of workers' solidarity by removing their emotions from the legal process. In comparative settings, solidarity has been created through the combination of legal mobilization with collective action and political and public campaigns (McCann, 1994), lawyers actively engaging the law with parallel political initiatives (McCann, 1994; Epp, 1998; Scheingold, 1974). During the course of my fieldwork I observed no coordinated legal mobilization and collective political campaigns other than NGOs' legal advocacy work, which was not directly engaging or mobilizing workers, but accessing the policy circles and elites. In the absence of coordinated action, legal mobilization in China of the type depicted in this study imposes more limits on workers' collective action and labour movement development than offers opportunities. Workers' realities and subjective experiences of these lead them to take a whole array of different forms of alternative action which are more attuned

to their realities and subjective experiences, as will be explained in Chapter Seven. Hence, legal rights consciousness and legal mobilization might fail at a fundamental and structural level to bring workers' redress and to obtain substantive justice for migrant workers as a collective.

6.2.5 Trust

Landry (2008) explains how institutional diffusion (of legal/judicial institutions) takes place in China, and argues, in line with the institutional innovation literature (Hetherington, 1998; Levi, 1999; Levi and Stoker, 2000) that institutional diffusion is a necessary step to establishing the rule of law, and is dependent on the trustworthiness that legal institutions inspire. Using survey data, Landry confirms previous studies on high degrees of interpersonal trust and system-based trust, mainly of central government institutions (Inglehart, 1997; Shi, 2001; Tang and Parish, 2000). Landry (2008: 211; 2011: 151) finds that the high levels of trust in government institutions transfers to citizens' high levels of trust in legal institutions (courts), even when people have no experience with them, which explains the likelihood of penetration of the rule of law project into Chinese society: "High levels of trust in legal institutions bode well for the capacity of Chinese citizens to adopt institutional innovations" (Landry, 2008: 212). Trust in legal institutions is, in turn, explained by a number of factors that include individual characteristics and ascription to the authoritarian Party-state (CPC and Communist Youth League membership, exposure to state-owned media, etc.). This trust displays a regime-supportive behaviour.

In contrast to Landry's (2008) findings, I find significant levels of lack of trust in the legal system. Lack of trust in the judiciary relates to the perceived lack of judicial independence, and a common perception that the courts will seek to protect the corporate side – based on the corporatist behaviour of local governments and courts, corruption, etc. This is related to the institutional entrenchment between the Party-state and its judiciary, and capital, which is sustained by the structural inequalities of labour-capital relations embedded in the law.

Workers know how to protect their rights (weiquan). There are workers that don't want to go through the legal channels. But the government authority [Labour Bureau] is not enough; it doesn't have the capacity to manage. Workers petition, they throw themselves from the buildings, they stop the traffic, they cluster or create disturbances. Some use the media to publicize their issues. The problem is that workers don't trust the courts. There is a lack of trust in the system. The law is top-down and people don't believe in the law. (Z5, 20 September 2012)

Workers' lack of trust in the legal system extends to lawyers, and even to lawyers who provide legal aid, such as those volunteering in NGO X, or working in NGOs Y and Z. For example, Lawyer Hao asserted:

Many people do not believe in lawyers; they don't trust lawyers, because many lawyers charge such high fees. Workers don't have the money to pay a lawyer, and also have a social status [lowest class in society] for which they are discriminated against. Lawyers here [in NGO Z] have a much better attitude towards workers. And workers just want to protect their rights. And they want to do it fast. So mediation is better. Also, because so many people don't believe in lawyers, don't trust lawyers; this is also why mediation is better. (Z10, 26 December 2012)

Lawyer Ou agreed: "Some workers are afraid. The main precondition for their trust is that you don't charge them fees. Between you [lawyer] and them [workers] there is not that type of money-interest relationship; this is the biggest limitation to workers' trust. And this is the main advantage of public interest lawyers" (Y9, 4 December 2012).

In the social relation between workers and lawyers, trust improves if the commercial transaction aspect (as applies if using a private law firm) is removed. With legal aid/NGO lawyers:

At the beginning workers are very surprised that the service we provide is free. They are very distrustful, but then they become friendlier. Workers worry that the lawyer will take advantage of them or that the lawyer has interests aligned with the judge or with the boss. Trust between the worker and the lawyer improves when there is no economic relation. (Y8, 4 December 2012)

Lawyer Eng agrees that lawyers from NGOs can be closer to workers:

Lawyers have restrictions in their work, they have to abide by the legal procedures (...) There is an enormous gap between lawyers and workers, psychological and cultural (...) this distance can create problems of trust. This is why NGOs that work with lawyers from the grassroots make this relationship better, and also because NGOs don't have the restrictions that lawyers have. NGOs have more space to act; lawyers have to abide by legal procedures.
(D1, 25 September 2012)

Lawyers' core compliance, as explained in Chapter Four, affects the social relation with workers, and the trust they can gather from workers. Lawyers act according to the law, and extend the legal constraints to workers when advising them how to act. Lawyer Eng considers, however, that "NGOs have more space to act" because they do not have to confine themselves and their advice to workers to legal actions. However, as we have seen, especially with NGOs Y and Z, in fact they do direct workers exclusively to legal action.

In sum, the two fundamental reasons for workers not to believe in the law and not to resort to it to resolve labour disputes are economic and psycho-social. It is perceived as economically unsound once time and money have been factored in, as described in the previous chapter. "*Most workers don't want to go to court anyway. Economically it makes sense for workers [not to go to court]; it is economically effective because they can save money because in many cases it is very expensive for the worker because they have to pay for the lawyer*" (D1, 25 September 2012). As Worker Zhang said, "*it is too inconvenient (mafan, 麻烦). And I don't have any money to do it, and if I litigate, it means that I can't work, so I don't get money, and I can't go and look for another job because of the time lost in the process. No, no, no litigation*" (W3, 27 April 2012). On the other hand, workers do not trust the law for a variety of other reasons, both procedural and more fundamentally, as previously noted, because of the discrepancy between the contents of the law and workers' conceptions of justice.

6.3 Workers' conceptions of justice: Substantive justice versus legal justice

"The value of the law is different in each country. China is changing, so this value is changing together with society's changes. The social value on which law is based is changing" (W18, 27 June 2012)

The aforementioned feelings of fairness and equality indicate workers have a conception of justice, a type of substantive justice that differs from legal precepts. Workers' conceptions of justice are based on socio-cultural norms of social behaviour (morality), and on their subjective experiences and the material conditions of their work. This idea of substantive justice is therefore based on social constructs, emotions and subjective experiences. Legal justice, however, is based on legal precepts, which are based on legal rationality, macro-economic principles (market economy/capitalist rationality), and ideas of the modern state (rule of/by law, protective or paternalistic state).

Legal rationality, therefore, differs from workers' conceptions of justice. Workers' rationality is informed by the aforementioned constructs of morality and fairness, and by their subjective experiences at work and emotions. The law does not fully match workers' concepts, and for some workers, it does not capture their experiences either in its precepts or in its processes. For some workers, legal justice reduces substantive justice to economic compensation when the procedures of the law have resolved their individual issue, in most cases (the majority of them occupational health cases), awarding them economic compensation. However, other workers are left with what Gallagher (2006: 785) calls "informed disenchantment" because of their negative evaluation of the effectiveness and fairness of the legal system. This, Gallagher argues, leads workers to more critically informed action in the future. This view is mainly focused on procedural justice, while the evidence above shows that 'disenchantment' or other negative views of the law are not only due to the outcome of procedural (legal) justice, but are most significantly related to a fundamental incongruity between legal justice and people's ideas of substantive justice. Therefore, workers' critical actions may be due to their dissatisfaction with the legal system, but workers' socio-cultural

constructs and subjective experiences better explain the variety of forms of action that they resort to, dissatisfaction with the legal system or cognitive dissonance with the legal precepts being only one of many explanatory factors. Hence, disenchantment could be due to a dissonance between legal justice and workers' conceptions of substantive justice, as well as procedural factors.

This dissonance between legal and substantive justice is also highlighted by the fact that many workers' claims are left outside the law, either because they are not considered valid or because the basis of the law differs from workers' sense of fairness and justice. On numerous occasions during fieldwork, I witnessed workers seeking assistance for their labour issues – including discrimination at work – being turned down by the lawyers at the three LAL NGOs on the basis that their demands were unreasonable (*buheli*, 不合理), illegitimate or illegal (*buhefa*, 不合法). They were unreasonable or illegal because they were not covered by the law, not because they were unreasonable demands according to the material situation of the worker, and many were, indeed, reasonable for the worker and his/her subjective experiences. As Lawyer Gu said: "*Between workers and lawyers there are communication problems: workers' demands are not reasonable, or they don't accept the words of the law, or they unite. They have to listen to the lawyers, otherwise there is no way to represent them. Sometimes it is because their demands do not suit the law (buheshi falü, 不合适法律)*" (Z9, 20 December 2012). Lawyer Gu highlighted this basic communication problem between lawyers and workers, which is based on the dissonance of their concepts of justice.

This dissonance is not only about concepts; it can also be due to dissatisfaction with legal procedures, as Gallagher (2006) pointed out. The case of Worker Xu explained above whose contract was irregularly terminated by a labour dispatch agency, demonstrates this clearly. At the time, the labour laws did not regulate labour dispatch agencies, and although Lawyer Lin sympathised with her, she could not find redress through the legal system. The dissonance between Worker Xu and Lawyer Lin was not so pronounced, given that Lawyer Lin agreed with Worker Xu

that the situation was not 'fair'. The dissonance in their case related to procedural justice, and the structural power of the legal system embodied in the judge, who was to be provided evidence to support the claim. This case is also extremely relevant in showing that legal justice, as well as not delivering substantive justice, narrows workers' conceptions of justice prescribing them what is 'reasonable', what they are entitled to, and what they can ask for or not. This, by extension, means that legal justice also requires appropriate behaviour – the actions and behaviours workers can take to obtain their 'reasonable' and 'legitimate' demands are purely legal actions, all other actions being deemed illegal, and by these definitions, not recognized as valid ways of pursuing workers' legal rights (nor their interests). Hence, by definition, these actions would not reflect the type of rights consciousness that is discussed in the literature (use of courts equals rights consciousness). To reiterate this, a group of workers from a yoghurt factory in Daxing (who were claiming eight months of unpaid salary from their employer) stated: "*We can only depend on the law to lawfully protect our rights (hefa baohu quanyi, 合法保护权益)*" (W22, 10 September 2012). Legal education is central to diffusing this form of legal rights consciousness and making workers aware of what is, and is not, a 'reasonable' demand and the available channels and sanctioned actions to resolve conflict, as noted in the previous chapter: "*We [NGO Y] provide workers' legal training so that workers gain consciousness about how to resolve a specific problem, and to increase their rights protection consciousness*" (Y4, 14 September 2012). This dissonance indeed leads to workers' feelings of disenchantment and dissatisfaction with the law and to a lack of trust in the law (and in lawyers).

Finally, the discrepancy between legal justice and substantive justice is also due to the structural character of legal system, which reflect power relations in society. Lawyer Zhu clearly stated: "*The laws are very unfair because they protect capital. In some respects they are better than before because some workers' conditions are better protected. However, overall, these laws recognize an unfair relation and protect more the corporate side. It is a problem of redistribution, and it is in the judicial system where the law is most unfair*" (Y6, 3 September 2012). The problem

of redistribution in legal justice has to do with structural inequalities between workers and capital. The law, therefore, reflects the existent unequal relations in society and this also contributes to the differing rationalities between workers' ideas of justice and legal justice. Lawyer Zhu again: "*The law is not fair, it is a problem of redistribution*" (Y7, 21 November 2012).

6.4 Concluding remarks

It is agreed in the literature that rights consciousness has been rising in China. Yet, I have argued in this thesis that it is a specific type of rights consciousness that has been taking shape, one that is in reference to legally entitled rights. Despite this increase in legal rights awareness, I find that there are Chinese workers who hold strong and negative opinions of the law, and of the material and social conditions of their work. In this chapter I have shown that these perceptions are informed by socio-cultural factors such as constructs of morality (prevailing rules of social behaviour), fairness and justice, workers' conceptions and their subjective experiences of work. Workers' voices are an expression of awareness of their conditions and expectations of how work relations should unfold, which reveal social constructs, desires and life expectations. These voices show that legal institutions rest far from local knowledge and informal practices, some workers not entirely identifying with the laws nor fully integrating them into their behaviour (as will be shown in the next chapter). In this sense, the evidence gathered here suggests that the analytical category of 'rights consciousness' is rather hollow, institutionally driven and socio-culturally misinformed. Workers' consciousness is more aligned with Perry's (2009) 'rules consciousness' argument.

In this chapter I have shown that the social category of 'peasant workers' has incorporated the hardship of labour which informs workers' identity, in the phrase 'peasant workers' lives are hard'. Moreover, it appears that there is an underlying expectation that peasant workers (should) endure this hardship and exploitation because 'there is no alternative' (*meibanca*, 没办法). In contrast to this resignation, I have found that some workers understand their labour relations to be ruled by

norms of social behaviour rather than by law, because they are considered as social relations, not economic relations. This finding was asserted mostly by construction workers, but was also present in manufacturing workers. It would be worth exploring, in future research, if the different forms of organizations of production and social life in different industries, and the different levels of legal compliance across industries is related to or modifies the prevalence of the perception of labour relations as social relations of production.

I have found that workers are willing to endure the hardship of labour because they have familial responsibilities or find the returns satisfactory; however, they express disagreement when basic social values are disrupted, disruption which may not necessarily be illegal. Workers interviewed pointed out their disputes over wrongdoing by employers or unfair treatment; these might not be illegal according to the legal frameworks, yet still might trigger workers to act, as will be shown in the next chapter. Therefore, the ways workers address work or labour conflict is coherent with these cognitive structures, taking a range of actions to confront – or escape – labour conflict. As highlighted by NGO X Legal Personnel Ma, “*rights protection is related not only to the legal system, but most importantly, to culture*” (X5, 25 September 2012).

I have argued in this chapter that there are prevalent conceptions of rights and justice among workers that are based on social values and social norms of behaviour, morality and fairness. These are conceptions of substantive justice that coexist, but also clash, with legal (procedural) justice, inasmuch as legal justice does not encapsulate these values, but rather focuses on economic efficiency and effectively achieving social harmony. Institutional approaches to the study of law (thin theories) would not necessarily arrive at these findings, hence the need to broaden the scope to thick conceptions of the rule of law, and study ordinary people’s conceptions and legality. The gap between the state’s legal institutions on the one hand, and local knowledge and popular practices on the other, is a crucial element to keep in mind when arguing for the strength of the CPC’s ‘adaptive legality’ (Lieberman, 2011) to secure the stability of the regime. The extent to which

legal institutions (laws in particular), and the rule of law ideology more generally, are working to the benefit of the CPC's legitimacy and securing its control of society depends on the degree to which this ideology is penetrating into existing concepts, norms and guiding Chinese people's everyday interpretations and practices. Workers such as those interviewed in this study not only distrust the laws, but also find that they are not representative of their real conditions, needs and interests. This shows that there is still significant dissent and resistance to the laws and to the basic economic principles on which they rest. This in turn signals a flaw in the 'adaptive legality' of the CPC to use the law for social control, and a potential source of contention to the laws as governance institutions of the Party-state.

Chapter Seven

“The law is the last resort”

Workers' agency and alternative action

“Laws are not crucial, and have no use. In China there are many other ways in which problems are being solved, and this is what’s worth doing: social organization, social strategies, through society, trade union, organizations and other actions.

They are not the same actions to demand rights because there is not the same understanding of what your right is”

(E3, 9 May 2012)

“Workers are not ‘the weak’ (ruoshi, 弱勢). They have five, ten years of experience.

They have capacities (nengli, 能力). They can find their own ways to resolve the issues through their own communication and support networks. The problem is that they are being exploited, not that they can’t. We [NGO I] encourage them. And stimulate them to find their own ways if it is not possible to walk the legal path”

(I1, 28 December 2012)

Analysing workers' perceptions of the law and the sense of justice and injustice they express has highlighted the divergence between legal norms and the normative repertoire of social norms and morality that guide workers' interpretation of their workplace relations, disputes and therefore, their actions. Workers' sense of injustice and morality provides logics of action that depart from legal action, and informs a rich range of alternative forms of action. Contrary to the deficit-based approach held by LAL NGOs in which workers are 'the weak', the evidence presented here demonstrates that workers are indeed not 'the weak'. They do not lack rights consciousness either. The problem in previous research has been that workers' rights consciousness has been analysed as derived from legal institutions, disregarding wider normative discourses, workers' perceptions, social constructions of rights, justice and morality, socio-cultural and historical factors, demographic factors (age, migration and work experience, generation, education levels, family burden), subjective factors (fluidity, temporality, life desires, and work expectations), and even structural factors (organization of the production process in a specific industry and its regulations, which influences workers' associational and structural power; Wright, 2000). There are a universe of factors that contribute to workers' identity and consciousness, legal rights being only one, and not necessarily the most relevant one in the eyes of workers. Rights consciousness is only one explanatory factor of or rationale behind workers' actions and it has

mainly been used to explain workers' rights-based actions; however, it does not explain other forms of action, such as interest-based action.⁷⁶ Chen and Tang's (2013: 560) three-fold typology (rights-based, interest-based, and pre-reform entitlements) explicitly pairs rights-based actions with legal institutions: "rights and interests are perhaps more clearly differentiated in the labour sector than in any other areas, thanks to the development of legal institutions regulating labour relations (...) all rights can be viewed as legally sanctioned interests" (ibid: 562). Hence, rights consciousness would not be an explanatory variable of other forms of action that pursue workers' interests or their sense of justice. Furthermore, rights consciousness does not fully explain why workers take legal action itself; this may be due to other factors, such as following the advice of lawyers, or having exhausted all other means to resolve the conflict.

It has been argued that legal institutions are instrumental in "channelling social discontent into moderated forums" (Diamant et al., 2005: 7); it has also been argued that legal institutions provide the legitimate rhetoric and resources to challenge the Party-state to abide by its own declared legal norms (Thireau and Hua, 2003; O'Brien and Li, 2006). Considerable scholarly attention has been paid to the study of the role of legal institutions in political activism and by extension, to their role in triggering regime transition in authoritarian regimes. In comparative contexts, and under certain conditions, it has been shown that legal mobilization by legal professionals can be a powerful force in political liberalization (Halliday, et al., 2007; Halliday and Liu, 2007; Karpik and Halliday, 2001), and when coordinated with political campaigns and other forms of collective action, has achieved significant political gains, for example, in winning civil and labour rights (Forbath, 1991; McCann, 1994; Merry, 1990). In the Chinese context, however, legal mobilization by LAL NGOs is not necessarily spilling over into other public spaces and other forms of collective action. Lawyers and LAL NGOs do not encourage

⁷⁶ See Chapter Two for a discussion on rights-based and interests-based action. Right-based actions would involve making claims on what is stipulated in the law, such as demanding a labour contract or payment of wages owed, while interest-based actions would involve demands for socio-economic benefits beyond what is stipulated in the law (Chan, 2011; Chen and Tang, 2013; Clarke et al., 2007), such as higher wages, better overtime payment, social insurance coverage, or demanding associational rights.

workers to take other forms of action, only 'legitimate' action. However, Chinese workers resort to a wide variety of forms of action to address labour conflict: "*There are many ways workers are negotiating with employers and solving (or not) their problems. The majority of workers are not using the law. They use other strategies, independently, autonomously (zizhu, 自主). These can be individual or collective, legal or illegal. But workers are taking very different types of action*" (E3, 9 May 2012). Lawyer Zhu stressed the same idea: "*All workers have capacities. There are many conflicts, and workers have their own ways to address them, because of the personal relations between workers and the baogongtou. Construction is chaos, there are no regulations being applied, or specified. But workers still have their ways to address their problems*" (Y7, 21 November 2012). Workers' alternative forms of action are indicative of their agency and different sources of power, which are not only associational and structural. As Wright (2000) suggests, social relations provide an important source of power that goes beyond the discursive (symbolic) power provided by the law.

In this chapter I examine the different forms of action workers take, outside the law, autonomously or with the support of labour NGOs, and explain why workers resort to these forms of action in reference to the social norms and constructs explained in the previous chapter. Workers protect themselves, their rights and interests (respect, fairness, basic living, family, desires, emotionality) with a variety of forms of action that are presented in sections 7.1 to 7.7. They include informal and autonomous actions, such as endurance, exit, voice and everyday forms of resistance, violence, discussing or negotiating directly with the boss, or collective forms of action such as stopping work, striking or protesting; or formal actions through institutional channels, such as petitioning, denouncing to the Labour Bureau, mediation and legal action. It will be shown that the different actions workers take, in most cases, are more attuned to their subjective experiences of work and their understanding of labour relations and social norms of behaviour, rather than to the legal framework. Legal action (litigation), in fact, is 'the last resort' for most workers, and in many cases, it is only taken when all other options have failed. Hence, I argue that the rights-based approach taken in the literature is

analytically narrow, as it equates rights to legal rights, and understands interests as pre-rights claims. Interests and rights are much more complex social realities than the legal conceptions of rights, and workers take a wide variety of actions to uphold them, and win what they understand as fair and just. This dissonance – or institutional clash between legal norms and popular/social norms – and the variety of ‘illegitimate’ forms of action workers take can indeed represent a significant challenge to the Party-state, especially in comparison to legal action. Legal institutions aim to stabilize social discontent and bolster regime legitimacy (Diamant et al., 2005; Gallagher, 2006; Lubman, 1999; Peerenboom, 2002), but I find that ordinary workers dissent from the values of the law, both conceptually and practically in their choices of action. The potential to challenge the regime by using legal institutions is less than that of the more fundamental level of political contestation workers display when dissenting from the new ideological basis of the Party-state, the rule of law. Section 7.8 provides concluding remarks that bring together the findings of Chapters Six and Seven in relation to the political significance of legal mobilization *vis-à-vis* workers’ alternative forms of action.

7.1 Silence and exit

Some workers that encounter problems at the workplace remain silent. To avoid social conflict, they deny or negate the existence of problems, usually providing an explanation based on trust and social relations, as exemplified by Worker Di when referred to his *baogongtou* as his brother, saying, “*It is just like that, there is nothing to do*” (W6, 4 May, 2012). This is especially the case in the construction industry where the labour relations of ordinary workers are enmeshed with social relations. Endurance (as explained in Chapter Six) also relates to this form of action or inaction, workers accepting their situation either because this is the norm, or in order not to distort social relations. The belief that the conditions and treatment a given worker receives at the workplace is the standard and the belief that he/she cannot do anything about it (*meibanfa*, 没办法) would explain silence and inaction. Either workers are conscious and disagree with the working conditions or a given labour issue, or they simply see it as normal – which could indicate false

consciousness.⁷⁷ But even when acknowledging the existence of problems, some workers would rather remain silent and non-confrontational in order to preserve their (and their employer's) *face*, to preserve social harmony and the social relation.

For the same reasons workers see leaving their jobs as an option that avoids confrontation and ends further endurance of the problem. *"If there is a problem with the boss, the preferred option would be to look for another job"* (W3, 27 April 2012). Lawyer Lin (Y10, 25 January 2013) also agreed that more workers leave their jobs than in the past. In his narrative, it is depicted as connected to the law and to companies not complying with legal standards:

The law is the most basic. Workers are more conscious now. The new generation has more awareness and there is more action. Before, workers petitioned more. Now, the generation of the eighties and nineties use social networks and the internet; they have more capacities. (...) The problem is that the companies need to respect the laws more. If there is a problem, workers leave. This is a characteristic of Chinese people: it has to do with social relations. (Y10, 25 January 2013)

Workers' exit not only indicates the prevalence of norms of social behaviour, or rules consciousness as Perry (2009) would suggest, but also that they have increasing structural power in the labour market (The Economist, 2010): due to labour shortages in recent years, workers have had greater power to accept or reject jobs with low wages or certain working conditions. Hence, exit as a form of workers' agency is related to the state of the economy and workers' structural power. Exit indeed is an individual form of action and does not reflect an organized pressure from workers to capital; however, it does indicate increased structural

⁷⁷ False consciousness means that the person has adopted the dominant ideology as his/her natural beliefs and attitudes, as well as corresponding legitimate social practices. False consciousness would mean that the law has established a natural order of things, a hegemonic ideology (in Gramscian terms) that acquires the consent of the subordinate (subject) classes. It therefore deflects people's awareness from the structural sources of oppression and exploitation, and obtains their consent to the hegemonic social order without their realization. Through believing in the 'myth of rights', people are unable to perceive the structures of inequality and the exploitation suffered. See Blecher (2002); Eyerman (1981); Jessop (1982).

power (Wright, 2000) to which capital would need to respond, for example, conceding an increased wage to attract labour.

There are no accurate statistics to prove the degree to which exit is used as a form of resistance to or dealing with labour conflict; however, it is a fact that workers leave their jobs as an expression of their disagreement with the working conditions or so as not to initiate labour disputes and distort norms of social behaviour. It has been argued that it is possible to translate Hirschman's (1970) formulations on consumer reactions to organizational decrease in quality/benefits to the context of employment relations. If this were the case, both Chinese workers' silence and exit strategies would prove disagreement with their employment conditions, as well as conformity with the prevalent norms of social relations (rules consciousness). Silence, in the case of Chinese workers, is not a result of workers not wanting to appear disloyal to the employer (Upchurch et al., 2006), but is due to conformity with the aforementioned social norms, to prevent losing *face* and disrupting social harmony. Furthermore, exit is similarly a non-confrontational resistance strategy that is consistent with the same norms of social relations in China.

Silence, and other forms of action that might go unnoticed – such as complaining with co-workers during rest time – can match Scott's (1985, 1990) 'hidden transcripts' or 'weapons of the weak'. These forms of action or inaction, which he categorized as 'everyday forms of resistance', are the ways in which peasants and subaltern groups resist exploitation or domination in ways that might not be apparent because these groups might not question the authority and domination publicly, but in settings that are trusted and offstage. At the workplace, slowdowns, stoppages, and exit, for example, could be qualified as 'hidden transcripts', as identified by Pun (2005). Pun (2005) identified *dagongmei*'s 'everyday forms of resistance' in Southern China's factories: women workers resorting to various forms of action, transgression and resistance in their everyday life at the workplace. These ranged from non-verbal to discursive processes to construct their identities and transgress the disciplinary power of the factory and the hegemonic gendered and sexualized discourses on migrant women workers under China's capitalism;

screams (voice), and bodily actions (fainting and menstrual pain as forms of female resistance to industrial capitalism) were among the methods used. Workers' silence and exit does not indicate unconsciousness or compliance with the conditions that they face; nor do they indicate a form of legal rights consciousness. On the contrary, these actions conceal a deep sense of dissent that is only aired in ways that the lens of rights consciousness and legal mobilization do not encapsulate. Exit, especially, is therefore an expression of resistance, of structural power and risk-taking on behalf of migrant workers who quit their jobs and reject certain labour conditions.

7.2 Voice: Venting and negotiating

Chinese workers are all but silent when it comes to certain social spaces. During breaks and after work, workers complain at length about their hard work, tough working conditions, and family responsibilities. These forums provide workers with the 'offstage' and trusted settings to reveal their critique and discontent, and voice their grievances in the form of social sharing, as Scott (1990)'s 'hidden transcripts' suggests. Some of these voices have been heard above, as with Worker Nu (W10), Worker Di and his co-workers (W6), or the Daxing workers (W22). Although these workers also said "*there is nothing to do*", sharing their subjective experiences was a form of expressing their discontentment with their lives and working conditions. Forms of resistance, therefore, are not limited to the workplace, but enter into every space of life – and especially into construction site or factory dormitories (Pun and Smith, 2007).

Exit might result after exhausting the redress found in social sharing, or after having attempted to negotiate with the employer. Lawyer Zhu is of the view that "*workers have their own ways to protect their rights. For example, they try to negotiate directly with the boss, but without much result. So much of the time they give up (fangqi, 放弃)*" (Y6, 31 October 2012). Worker Tan also exemplifies how workers attempt to negotiate with their employers, and how exit is a commonly considered coping strategy: "*Last week I went to talk to the boss because I had two days*

without work, but not because of law or regulation, but because there was nothing to do” (W8, 14 May 2012). Worker Tan’s main concern was that he would not get paid for those days that he had no work. When asked what he would do if his employer did not pay him his wage, he replied: “*I don’t know. I don’t know. I don’t know the law, but I will talk to the boss. If he doesn’t give me my RMB 150/day, I would say, then give me RMB 120. Something, he’ll have to give me something! I’ll just have to talk to the boss (...)* [Would you take legal action if you don’t get your wages?] *Of course, we have to get our wages. [And if not?] Another solution is to look for another job*” (W8, 14 May 2012). Worker Tan is one example of many that illustrates how workers’ most common forms of action to deal with a problem at the workplace is to discuss and negotiate directly with the employer. This not only shows workers’ agency, but power and determination to autonomously resolve their issues. Worker He stressed: “*If I was having any problem, I would solve it by myself. If I can’t solve it, then I will use the law. I will come to you [NGO X] and go through the legal channels*” (W23, 11 September 2012). Worker He shows that workers have a great degree of awareness and autonomy, unlike their depiction as ‘the weak’ and having little rights consciousness or knowledge of the law. Workers do not have to know the law to know that there is an issue and to try to resolve it. The law is a potential resource for their use, but workers may not always consider it the most suitable path to solving their problem.

Negotiation can also be indirect, as when workers resort to mediation. This strategy has been increasingly used following the LDMAL (2008), and its effects (and limitations) on workers’ agency have been discussed in the previous chapter. However, Worker Liu’s experience further evidences the widespread preference for direct negotiation or mediation. He asserted that:

Some people would seek legal assistance, but most would not. Most workers would behave violently, for example, blocking the doors of the company. But this is not creating trouble (naoshi, 闹事); they are demanding their rights. Some will behave violently and in a confrontational way: violence, confrontation, in an independent resistance way [collective action]. I would nevertheless recommend other workers to do their best to negotiate with their employers, as I did. If the issue were not

resolved, then I would recommend coming to NGO X to seek assistance to resolve their disputes, to go through the law. There is no other way, although it is a very inconvenient and long process, negotiation is the best way. (W24, 11 September 2012)

Far from being subservient, non-confrontational, weak, and not knowing how to act when presented with a problem at the workplace, Chinese migrant workers have a great deal of experience and are creative in finding ways to deal with their workplace problems, as stressed by the quote at the beginning of this chapter by one of NGO I's staff (I1, 28 December 2012). Voice, directly negotiating with the employer, or venting with co-workers and friends, are therefore form of actions and resistance. These are also expressions of workers' autonomous agency. When a worker resorts to the assistance of a LAL NGO, as in Worker Liu's example above, then it is clear that their actions become aligned with the legal prescriptions. Workers' attempts to directly negotiate with the employer also take into account accepted social rules of behaviour, trying to resolve the issue by discussion between the two parties involved, and maintaining the social relation. Again, venting, social sharing, and direct negotiation are a sign of the prevalence of social rules of behaviour, and not necessarily a lack of rights consciousness.

7.3 Petition and Labour Bureaus

Voicing grievances through governmental channels is a traditional and highly resorted to mobilization strategy in China. Although the administrative system of Letters and Visits Offices has been in place since the 1950s (Luehrmann, 2003), petitioning the government to express complaints and grievances has been a common practice since imperial times. Under the system of State Bureau for Letters (*guojia xinfang ju*, 国家信访局) and local bureaus of letters, people present their complaints and grievances to the relevant administration authority to seek justice (Cai, 2004; Chen, 2003; Minzner, 2005; Thireau and Hua, 2003, 2005; Li, Liu and O'Brien, 2012). Thireau and Hua (2003), in a very insightful study, show how different types of spaces offer different legitimate avenues for different workers to address different grievances, and legitimate different claims. In particular, they

reveal that when the two systems overlap, arbitration committees were used by workers with financial means⁷⁸ in relation to violations of their labour legal rights, while Letters and Visits Offices were mainly used by impoverished workers to make claims related to their beliefs of social and political norms that should be applied at the workplace. They argue that the use of Letters and Visits Offices signals continuity with the imperial appeals procedure, and by recognizing the state's legitimacy, fulfils a stabilizing purpose; this fits with Liebman's (2011) 'adaptive legality' argument, with institutional continuity providing a source of regime legitimacy. Nathan (2003: 13-15) views these petitioning offices as input institutions that enable state-society interaction and allow citizens to believe that their complaints are being heard and that they have some degree of political voice, which in turn enables the regeneration of the regime's legitimacy. Letters and Visits Offices are certainly mobilized on the demand-side; however, studying the degree to which citizens find redress and satisfaction in the petitioning system would indicate how much these institutions bolster regime legitimacy. Moreover, Thireau and Hua (2003) argue that petitioners use the Letters and Visits Offices as a general "normative habitat" (Cottreau, 1999, cited in Thireau and Hua, 2003: 102), making claims on the assumption or belief "that rulers and ruled share the same understanding of right and wrong, of just and unjust" (Thireau and Hua, 2003: 87). This – assumed – shared understanding does not necessarily imply that workers mobilize the legal norms, as has been argued in the previous chapter. My contention here is that, examining workers' opinions of these governmental institutions, such as legal institutions, reveals that this assumed "shared understanding" between rulers and ruled is not necessarily the case in practice, rulers increasingly moving towards legal and procedural justice, while workers' understanding is based on concepts of substantive justice.

As indicated by Thireau and Hua (2003), half of the grievances taken to municipal Letters and Visits Offices in Shenzhen (in 2001) were related to labour issues (*ibid*: 87). This system has been widely used by workers to file complaints about their

⁷⁸ Note that at the time of this research, arbitration committees still charged a fee for filing a labour dispute. After the LDMAL was enacted in 2008, this fee was removed (see Chapter Three).

labour conditions, but as Labour Bureaus are the state institution responsible for monitoring labour conditions, standards, and compliance with the labour legislation, workers have also directed their grievances to them to seek governmental intervention. Equally, some workers seek the assistance of the local police force. Worker Shan had worked on a construction site in Daxing in Beijing for over three years. He was involved in an accident at the site, which affected at least 20 workers. A site manager took them to hospital, signed them in, and then took all the medical records, X-rays and test results, together with their pay slips (all evidence of the existence of a labour relation and occupational injury). Then this person went missing, leaving Worker Shan (and the others) without any medical records or proof of labour relation. Worker Shan attended the local police station together with five other workers involved in the accident, but, he said, “*they don’t take care of the issue because they request a proof of the labour relation, which, of course, we don’t have. They didn’t do anything. I don’t agree with this*” (W19, 28 June 2012). Worker Shan here refers to an issue that is larger than the relevance of law, i.e. political will: “*they don’t care. (...) They didn’t do anything*”.

Workers’ use of these sanctioned channels indicates that they continue to use longstanding and legitimate institutions to address their grievances, as the quote from Perry at the beginning of this thesis indicated (Perry, 2009: 18), a form of “politics as usual” that is a sign of rules consciousness. However, when workers use the petitioning system and seek the assistance of state authorities such as Labour Bureaus and the police only to meet with careless and immutable responses, their satisfaction with and trust in the system greatly decreases. “*They don’t care*” is a common refrain of workers seeking help from the LAL NGOs. Worker Shan’s “*I don’t agree with this*” illustrates a bottom-line disagreement with governmental authorities, which are generally seen as having (a traditionally paternalistic) responsibility for workers’ welfare.

In fact, this governmental inaction leads to increasing use of other forms of action, and to increasing pressure on the non-governmental sector. As Lawyer Jian said: “*We, social organizations, cannot resolve all these problems. It is the government’s*

responsibility” (Z2, 13 September 2012). The government, however, continues to face an increasingly complex social scenario, one where increasing labour unrest is justified as resulting from the government’s lack of implementation and monitoring of labour laws, at the same time that it continues to be one of the main targets of the claims of labour disputes. NGOs, as discussed in Chapters Five and Six, play an important role as buffers for governmental institutions.

7.4 Labour NGOs

Labour NGOs do not exist in great numbers in China, potentially because of the sensitivity of labour issues, which are supposed to be dealt by the trade union, the ACFTU. However, there are some labour NGOs and community or street-level based organizations (*shequ*, 社区) that provide support to migrant workers. NGOs’ roles in managing labour disputes has been discussed in Chapter Five, however, it is worth returning to the subject to further understand the different support non-LAL NGOs provide compared to LAL NGOs.

The LAL NGOs studied in this thesis focus mainly on legal action, and therefore, understand workers’ choices of action within the legal framework: “*Workers need to know how to protect their rights (weiquan). They take violent actions but this does not resolve the problem. Through legal action, they get protection. NGOs help them do it*” (X4, 17 September 2015). Lawyer Ou told me that “*before coming to seek legal aid, workers have normally tried direct negotiation, petitioning (xinfang, 新房), or some form of mediation. But this has no use*” (Y9, 26 December 2012). Lawyers like Zuo and Ou believe that these forms of action “have no use” because the only useful resource is the law – the law has power, workers do not (workers are ‘the weak’). As stated by Lawyer Zhu, “*rights protection needs to be through the law, and it needs to be professional. Our [NGO Y] aim is to change the perceptions of the person we are helping*” (Y6, 31 October 2012).

There are, however, other labour NGOs who hold differing views to those displayed by Lawyer Ou and Lawyer Zhu who work for LAL NGOs. There are a number of

labour NGOs and community-based organizations (*jiayuan*, 家园) which support workers in somewhat different ways than LAL NGOs, and with very different effects on workers' agency. For example, staff at NGO I indicates:

Lawyers and law firms represent (daili, 代理) workers. We [NGO I] don't represent workers; we want to train them so that they do it [resolve labour conflict] themselves. Maybe this is slower and takes longer to get an outcome, but we want workers to do it themselves and to change their capacity. This is a 'social work' technique. And it does have an effect. The key is to stimulate workers to try to find the cause of the problem – which can be due to the weakness in the law or other reasons. (...) Each way has its own effects. But the profession defines the strategy [of the organization]. Mediation, for example, is conservative – the worker relies on somebody else to do the mediation. It does not resolve the problem, it will happen again. (I1, 28 December 2012)

The strategy of NGO I differs from that of LAL NGOs, especially NGOs Y and Z in this study. Workers are viewed not as 'the weak', but as having capacities and autonomy to take their own action and NGO I supports them to do so. Interestingly, as well, staff at NGO I emphasise the direct effect that the professional leaning of the NGO has on its strategy and on the types of actions it recommends workers to take. In contrast to the professional legal practice orientation that other NGOs carry out, NGO I follows a 'social work' model,⁷⁹ operating without legal staff: if a worker requires legal assistance, they provide advice on which particular NGOs may be able to help, such as NGOs Y and Z.

Another example comes from community-based organizations such as NGO B. "We [NGO B] encourage workers to do it themselves (自己去做), because our philosophy is 'to help people to help themselves' (助人自助)" (B1, 14 November 2012). In the case of a worker taking legal action, NGO B can offer assistance in preparing the necessary material, documents, write the application for the court; and provide

⁷⁹ 'Social work' implies a focus on social and community based development through cultural and educational activities, seeking the improvement of workers' lives and welfare, and their empowerment by reciprocal activities that maximize workers' potential and develop their capacities to 'do it themselves', to help themselves, as opposed to the more paternalist orientation of aid and service delivery work, that seeks to assist, aid and represent workers in a deficit-based approach (understanding that workers have weaknesses or needs that require fulfilment or treatment).

advice as to what the worker might need to do and say at court, how to address the arbitrator or the judge, and where the worker needs to pay careful attention. NGO B provides guidance to the legal process, but they do not take the cases to court.

We [NGO B] do not represent workers in litigation. Our strategy is to encourage or make the worker capable of doing it him/herself. This way, when the worker does it independently, he/she can assist other workers when they encounter a problem. Our aim is that by assisting one worker and building the capabilities of one worker there are more workers reached, because the first worker will assist other friends and workers. (B1, 14 November 2012)

NGO A is another useful example to demonstrate that labour NGOs support workers in other forms of action they are taking, whether legal or paralegal. NGO A also supports legal action and assists workers in litigation by putting them in touch with volunteer lawyers, much as NGO X does. However, its main aim is that workers should take collective forms of action:

In the last few years [the numbers of] legal dispute cases have been decreasing very much. This is a change in the way Chinese workers protect their rights (weiquan): before there were many legal cases, now cases are decreasing because most of it is now turning into collective action. This is the change into a pattern or model of workers protecting their rights (weiquan). They know that their collective power is very strong, so they use collective power to protect their rights (...) We [NGO A] give workers advice according to their situation, we ask them to think about a few things they have to pay attention to. If the worker has already exhausted all regular and legal channels, we will help him/her think through some illegal (feifa, 非法), well, it can't be called illegal; it is unconventional or irregular ways of rights protection (...). It does not count as illegal, it is just unconventional – in general, they are not thought about –, or other effective ways, other effective ways of resolving problems. (A1, 6 November 2012)

As we can see, the principles and strategies of these labour NGOs and community-based organizations are very different from those of NGOs Y and Z. Although all organizations aim to support migrant workers, the principles of each NGO and its professional nature determine its strategies, which have very different impacts on workers' agency. On the one hand, as argued in Chapter Six, one of the effects of LAL NGOs is the 'transfer of agency' from workers to lawyers, and the creation of a

dependent relation on the lawyer because lawyers act '*on behalf of workers*'. On the other hand, in the cases of NGOs B, I and A, they instead stimulate workers to be autonomous and decide upon their agency and own forms of action to address labour conflict, even if this means supporting workers' 'unconventional' actions.

7.5 Violence

Contrary to the perception of Chinese workers always being silent and subservient to social norms of behaviour, there are, indeed, workers who use many confrontational ways to address workplace disputes, the use of violence (or the threat of it) being one of them. Worker Wan's experience proves the extent of exploitation and pressure workers face when voicing their issues whether in a confrontational or non-confrontational way. Prior to 2008, Worker Wan arrived at Beijing to work in the construction industry for the Olympic Games. Shortly before and during the games, it was reported that the government had cleared the city of workers who had migrated there to work on the Olympic building sites, sending them back to their hometowns once the work had been completed (Cody, 2008; Shin and Li, 2013). Worker Wan was involved in a protest to demand better working conditions at his construction site and to oppose the 'cleansing' campaign. He held a banner, he told me. But "*somebody from the criminal syndicate (heishehui, 黑社会), who was arranged by the government, came and beat me*" (W14, 11 June 2012). To testify to the beating, he had four pronounced scars on his face and his left hand, his thumb disabled. "*It is all because the Communist Party is rotten (fubai, 腐败). It is not solvable anyway, because, even if I know who beat me, I cannot do anything. They [the government] don't care (tamen dou bu guanxin, 他们都不关心).* *NGO X cannot help me either*" (ibid). With the help of his daughter, Worker Wan took his case to court – suing his employer as responsible for his injuries – spending RMB 100,000 on the legal process; however, he lost the case and he received no compensation or redress.

Frustrated by the treatment he received and the failure of his case at court, he stated: "*I would like to get a gun and solve it by myself, but I can't pull the trigger*"

(as he showed me his disabled hand). “*The government controls this very tightly, it's not like in the US where everybody can get a gun*” (W14, 11 June 2012). Worker Wan discussed the alternative actions that he had taken, including litigation, assessing their efficiency:

It's all useless. Nobody cares. The government is corrupt. The government does not dare to fight with the US, Philippines or Japan for the Diaoyu Islands,⁸⁰ but treats its people (laobaixing, 老百姓) in this way. This [the government's lack of response] is what will bring the fall of the CPC, it will be from inside: the people won't continue to put up with this. It is like an 'ants' hole'⁸¹. (W14, 11 June 2012)

The use of violence against an employer is not unheard of. However, it is interesting to point out that the target of violent acts in labour disputes is usually not the employer, but the government. In fact, there is a continuous rhetoric behind workers' expressions of grief that the ultimate entity responsible is the government – whether because of lack of legal implementation, lack of protection, lack of care, or straight corruption and vested interests with capital. This can be read as potentially signalling a ‘governance crisis’ (Wang, 2003) or a ‘legitimacy crisis’ (Shue, 2004) that the laws are not able to solve.

7.6 Collective action

There are many statements to prove that workers have different conceptions and expectations of their workplaces and labour relations, and react with many different strategies to workplace conflict. But what accounts for workers engaging in collective action? Does ‘rights consciousness’ have anything to do with it? The literature argues that there is a difference between rights-based actions and interest-based actions (Chan, 2011; Chen and Tang, 2013; Clarke et al., 2007). Each kind of action is related to a different type of cognitive/conceptual process: rights-

⁸⁰ He refers here to the historical territorial dispute between China and Japan over the Diaoyu/Senkaku Islands in the East China Sea. The dispute blew up again in 2012 after the Japanese government purchased the islands, and a wave of anti-Japanese demonstrations surged across China during August and September 2012. See BBC (2014).

⁸¹ In reference to the Chinese proverb “An ant's hole causes the collapse of a great dike” (*qianlizhidi kuiyuyixue*, 千里之堤溃于蚁穴).

based actions being related to rights consciousness, interest-based actions related to the interest of workers as a collective, the equivalent of class-consciousness. Workers have shown a narrative about ‘peasant workers’, denoting the identification with a social figure or category, and the features ascribed to it. Work migration, rural origin, transient urban adscription, being “*the lowest class in society*” (W6, 4 May 2012), and hard lives (W25, 17 September 2012) are some of the characteristics pointed out by workers who “belong” to this social group.

Identification with these features, and workers’ overwhelming use of the term ‘peasant worker’ to describe themselves, denotes the existence of a collective identity. However, there are many other division lines within this collective – place of origin, industry, position at work, gender, age, generation, etc. As pointed out in Chapter Three, despite the lack of reliable and official data, there is evidence from media sources and academic research, however, that suggests that peasant workers are increasingly resorting to collective action including strikes⁸² and various other forms of protest (Chan, 2011; Chan, 2010a, 2010b; Chan and Pun, 2009; Lee, 2007a; Pun and Lu, 2010), for which collective identification and solidarity is necessary. For example, an examination of the diversity of causes and outcomes of 100 protests in the immediate aftermath of the passing of the Labour Contract Law (LCL) (CLB, 2009a) confirmed the results of other empirical research: not only litigation, but strikes, street protests, and violent actions were becoming a recurrent mobilization strategy for migrant workers in China’s export-oriented coast (Chan, 2001; Chan, 2010a; Lee, 2000).

As mentioned in Chapter Three, migrant workers’ collective action usually has been contrasted to the experiences of earlier generations of state-owned enterprise workers who participated in major strikes and protests during the 1980s and early 1990s⁸³ related to their subsistence crisis (Chen, 2000).⁸⁴ Scholarly research has

⁸² See Chapter Three for reference on the absence of the legal right to strike.

⁸³ For research on SOE workers see Chapter Three, and Cai (2002); Chen (2000); Hurst (2009); Lee (2000, 2002, 2007); Perry (1993, 1994); Perry and Li (1997); Unger and Chan (2004); Walder (1991).

⁸⁴ “A subsistence crisis means here a situation in which workers have incomes far below local minimum wages or no incomes at all for a period of time. Not all laid-off workers necessarily

insisted on separating these two groups of workers to make the claim that their different life and work experiences and natures of employment (state-owned versus foreign/private enterprises) determined their different claims and forms of action. SOE workers were the traditional industrial working-class (*gongren*, 工人), having inherited their class identity from the Maoist class politics (Hurst, 2009; Lee, 2000, 2002, 2007a), who held a collective identity and experience in collective organization and mobilization. Thus, in the 1990s these workers had the knowledge and capacity to launch large-scale protests (Chen, 2000). Yet, although large in number, these protests were highly cellular, i.e. localized and restricted to the work-unit (Lee, 2007a). On the other hand, migrant workers have been depicted as lacking class-consciousness and conceptualizing their shared identity in reference to legal rights (Lee, 2007a), which implies that they do not recognize or organize around shared interests. This division of the Chinese labour force also resulted in an analytical division between SOE workers and migrant workers in terms of the causes for their action – supposedly class-consciousness leads to interest-based actions while rights consciousness logically explains rights-based action (mostly legal action). This differentiation is misleading because it is based solely on an understanding of workers' identities and subjectivities as derived from institutional sources (the labour regime for SOE workers and law for migrant workers); there is, however, much virtue in considering social relations, material conditions and historical contexts in the formation of workers' identities as E.P. Thompson (1963), following a Marxist understanding of class-consciousness, suggested.

The LCL has brought about more divisions in the labour force (both informal and formal labour) and ranks in employment. These analytical divisions of the working classes (SOE workers/peasant workers, first and second generation, formal/informal) have contributed to the interpretation of migrant workers' collective actions as something new and born of an increasing rights consciousness, and so different from previous workers' forms of actions. However, in reference to Perry (2009) and maintaining a historical and socio-culturally sensitive perspective,

confront such a crisis. Those who do are ones who have been denied a minimum living allowance and lack alternative employment" (Chen, 2000: 42).

it should be noted that major revolts in China have historically been staged by peasants.⁸⁵ Peasant workers, therefore, follow historical and social rules of behaviour that have been extant for centuries, regardless of whether they are included in the legislation or not. It could be argued that collective action has an established and much longer tradition as a mobilization strategy than legal mobilization does. Even during the Maoist period, mass campaigns and collective action were a conventional mobilization strategy used by the Party-state for political purposes. With the transition to a market economy and the new law-based governance mechanisms, collective action has been deemed to be 'illegitimate' or 'illegal'.

Despite the limitations the government imposes on collective action (e.g., repression and state reactions to protests and strikes), peasant workers continue to use collective forms of action to confront industrial conflict, exhibiting both rules consciousness (Perry, 2009) and class-consciousness (Chan, 2011; Chan and Siu, 2012; Chan, 2010b, 2012; Chan and Pun, 2009; Leung, 2015). As Lawyer Tian commented, "*workers strike and stage protests, engage in collective or large-scale confrontational action. Workers know how to protect their rights (weiquan). Strikes and protests have an immediate economic effect; legal action doesn't. But for a strike to have an effect it needs experience to organize it*" (Z6, 26 September, 2012). Lawyer Tian's last point is of relevance here. Workers need to organize collective actions. It could be argued, in line with rational choice perspectives, that workers, in effect, 'run the equations' for each possible course of action, considering their abilities to successfully carry out the action, possible negative impact on themselves, time scales involved and likelihood of achieving their aim – and only then choose which to take. Cai (2006) has argued that (SOE) workers participated in collective action on the basis of the evaluation of its success. When comparing legal and collective action, it appears 'rational', on the basis of likelihood of success, that collective action is effective, as legal action can be extremely lengthy (months, and

⁸⁵ Note that historically, revolts and revolutions in China were staged by peasants because of the absence of a working class in China until the early 20th century. For the early history of the Chinese working class, see Hershatter (1986); Honig (1986); Perry (1993); Selden (1983); Strand (1989).

sometimes years), whilst strikes and protests can obtain results within hours or days. Collective action, therefore, might be more suitable to workers' needs and demands, and also to their ideas of substantive justice. As NGO J Director Zhang (previously a construction worker himself) said: *"lawyers give training on the law, but workers act in other ways, because their needs are different from the law and then their actions are also different from the law. This doesn't mean that they are illegal. Workers lose hope because the process is too long, and they have no trust. Workers' first option is collective action. If this does not work, then they will use the law"* (J1, 10 May 2012). Similarly, some labour NGO experts argue that collective action is much more aligned with workers' realities and should be a preferred form of action prior to taking legal action: *"collective action is the most effective way for workers to get their money, which is the basic problem. The law is the last resort"* (E3, 19 May 2012).

Picking up on Lawyer Tian's statement, that workers have to organize, it could be argued that what appears as endurance or silence, or lack of organization, might not necessarily only be due to workers' adherence to social rules of behaviour, but could also be from fear of retaliation (given governmental repression). Worker Yao indicated that at the construction site, in general, *"when there are issues, we don't organize to raise our claims. It is not easy to do, nobody dares to do it; nobody dares. (...) Everybody just looks after themselves"* (W2, 20 April 2012). Worker Yao is emphasising an individualized behaviour which would suggest a lack of collective identification. However, there is sufficient proof of social sharing and collective identification that the lack of organized action, therefore, does not prove lack of class identity, but the existence of other constraining factors, such as coercion. For example, the three workers from a clothing factory in Daxing who had participated in a strike revealed that it is possible for collective action to take place spontaneously because workers share the bare minimum of collective identity and awareness of their shared material conditions, and therefore, common subjective experiences and the sense of exploitation. As reported by one of the Daxing workers: *"Everybody thinks the wages are too low, so everybody just went on strike. (...) Nobody came to look for us to strike; everybody just thinks the salary is too low,*

so we all went on strike for eight days in June, then again eight days in July, and a couple of days in August” (W25 17 September 2012). The strike succeeded in gaining a wage increase of RMB 10 per day, and between RMB 2-3 per manufactured item. This proves that autonomous collective action (in this case, a series of wildcat strikes) is taking place in China with relative successes for workers without reference to the law, or prior organization. A common sense of injustice is sufficient to trigger workers’ spontaneous collective action. ‘Rights consciousness’ in this case would simply be an instrument for framing claims during the collective action, but would not necessarily prove to be the reason behind the action

The type of rights consciousness that is arrived at after legal training such as that discussed in Chapter Six differs greatly from the awareness that workers show when discussing organization and collective action. In an activity organized by NGO J with construction workers, Director Zhang clearly described the power of workers’ collective action:

In 2010 1,000 workers in factory B went on strike for one day. How much money do you think the factory lost in one single day? One hundred million (yi yi, 一亿)? No, it was some hundred thousand million, the equivalent to 10 years of the salary of those 1000 workers! That is the difference between powerful workers and weak workers, because the boss is really afraid of this, of workers having power and going on strike. Workers’ real power comes from their unity (tuanjie, 团结). If one worker knows how much the minimum wage is or does not agree with something, he/she goes to talk to the boss, and then what? If this worker talks to another worker, and that one follows him, and then a third one follows, then the power is formed. But first you have to think what the goal is, what you want to achieve. And then think of the ways to get it, and when to do it. You are now about to go back to your hometowns to harvest, so this would have no effect right now. (J1, 10 May 2012)

This piece of evidence shows the differences in techniques to stimulate workers’ actions. The support provided from NGOs X, Y and Z, legal rights consciousness and legal mobilization, are not necessarily the key stimulus to workers’ collective action, and have limited capacity to obtain gains beyond compensation to individual workers – which implies no structural changes either. As Lee and Shen (2011: 173)

wrote, "rather than cultivating workers' collective power, many labour NGOs have an anti-solidarity tendency". This tendency, however, is not necessarily intentional on the part of the NGOs, but arises from the legal strategy they choose to follow and the fundamental limitations it imposes on their actions and of those social groups they try to assist.

Some legal experts are of the opinion that collective action is the most suitable for workers' conceptions of justice. *"What can you say about these laws? That they disregard the most basic right of workers: their collective rights (interests)"* (E3, 9 May 2012). Workers will be able to obtain their substantive and collective interests, not through legal action, but through collective action, most of it 'illegal'. One legal exception is collective labour legal disputes – strikes being one of the most efficient methods because of their direct economic impact and socio-political disruption. Another mechanism that is increasingly resorted to and discussed is collective bargaining. As Lee and Friedman (2009: 24) point out: "there are now indications that some enterprise-level trade union chairs are engaging in active, if still highly legalistic, defences of their members' interests. (...) Top officials of both the CCP and the ACFTU have expressed the wish that unions pursue collective bargaining – the idea being that this will help to reduce pressure for more radical forms of activism".

7.7 Collective bargaining

Collective bargaining (referred to as collective negotiation – *jiti xieshang*, 集体协商 – in the labour laws) is an increasingly resorted to mechanism to address labour conflict, although it is yet to be fully addressed by the legal frameworks. The Trade Union Law (1995) and the LCL recognize a tripartite framework for labour relations (employers, the state and trade unions), and acknowledges that workers' representative units (trade unions or workers' congresses) should be able to take part, "on an equal footing" (LCL, Article 4) in the decision-making process regarding, for example, changes in contracts (LCL, Article 4) or the content of collective contracts (LCL, Article 51). The trade union, the ACFTU, has the legal power to

negotiate collective contracts, negotiate the resolution of major problems in labour relations, and perform collective consultations (Trade Union Law, Article 6, Article 20, Article 33; LCL, Article 6; Chapter V, Section 1, Articles 51-56 on collective contracts). Yet, the mechanism for collective bargaining remains to be fully contemplated in the laws, and due to the ambiguous character of the trade union (its 'dual identity' as state organization and enterprise management; Chan, 1993; Chen, 2003), the ability of the negotiation process to protect workers' interests has been repeatedly questioned.⁸⁶ For this reason, there are social forces striving to formalize (in law) this mechanism to obtain industrial peace:

There is a collective of lawyers and intellectuals who are discussing this, including NGOs, all addressing the question of how to resolve labour-capital problems. NGOs' perspective is basic here, because they have direct access to workers. Lawyers have restrictions; NGOs have more margin, more space to act; lawyers have to abide by the legal procedures. Besides, there is the enormous psychological and cultural gap between lawyers and workers. (D1, 25 September 2012)

Collective labour conflict is not rare in China, but it is mainly expressed in strike or protest formats. Official statistics on labour disputes can be misleading, downplaying the prevalence of collective labour conflict, as discussed in Chapter Three. Between 1996 and 2012, on average, collective labour dispute cases accounted for 4.57% of labour dispute cases processed through legal channels – arbitration and litigation - (China Human Resources and Social Security Yearbook 2013). If only considering the official statistics one could interpret that collective labour conflict is insignificant in China. The reality, however, is that the legal channels are not designed to deal with collective labour conflict, as Lawyer Ai

⁸⁶ Note that a discussion on the independence of the ACFTU and trade union reform, and the development of collective bargaining is beyond the scope of this research. For a comprehensive study of the ACFTU see Pringle (2011: 201), and Howell (2008); on collective bargaining, see Chan and Hui (2013). Without attempting to draw conclusions about the ACFTU and the system of collective bargaining, it is worth emphasising that the evidence presented here shows that workers are autonomously engaging in collective bargaining, with some organizations stimulating and supporting this, such as Law Firm D or NGO A. It would therefore be valuable to further research the interactions between workers, labour NGOs and other organizations on the one hand, and the ACFTU on the other, to better understand the role of each in pushing for the development of collective bargaining frameworks, and if this might incite internal reform of the ACFTU or other forms of worker representation. Furthermore, studying these dynamics would also be illustrative of the extent to which the ACFTU remains an important actor in the maintenance of regime stability.

suggested: “*there are not many collective dispute cases. They are much more complex and only lawyers with more experience will take these cases because they are much more demanding for the lawyer*” (Y4, 14 September 2012). The limited capacity of the legal institutions to cope with increasing labour unrest is an explanation echoed by Lawyer Eng earlier in Chapter Four (D1, 25 September 2012).

Limited judicial capacity and independence can therefore explain the fact that collective cases are divided into individual cases. However, Chen and Xu (2012) pointed out that judges in Donguan actively dismantled collective cases, both at court and using extra-judicial mechanisms, for the very reason that legal institutions aim to contain potentially disruptive labour conflict. Hence, both the institutional design of the legal system to favour individual grievances, and the procedural limits imposed by legal institutions and actors (both judges and lawyers complying with the legal system), act to effectively stall political activism through the judiciary.

Collective labour conflict best reflects the structural and fundamental issue in labour-capital relations, and it is where the legal system appears most limited to absorb this. Collective bargaining, however, is understood as a way that collective disputes (and all labour conflict for that matter) can be resolved because it obtains a ‘class compromise’ (Wright, 2000) between the collective of workers and capital: “*Legal cases cannot resolve the basic labour-capital problem. The law is not useful to resolve the basic labour-capital problem. Collective bargaining can. The law has a basic distribution problem. It is the same in the market economy; it is a distribution problem. The legal system reflects these inequalities*” (D1, 25 September 2012).

“*Workers are stronger if they do collective negotiation. It is not included in the laws, but it is very useful. But I don't think it needs to be included in the laws because it is already being done by workers in the workplace*” (Y3, 18 September 2012). Collective bargaining is being done unconventionally by workers outside of the framework of the trade union precisely because the framework of tripartite relations with the ACFTU representing workers is problematic. “*Collective bargaining in China is not as in other places. In China collective negotiation is done*

through the trade union, but the problem is that the trade union does not represent workers' interest" (A1, 6 November 2012). In fact, there is evidence to suggest that the corporate sector is also increasingly inclined to engage in collective bargaining. As argued by Lawyer Eng, "*the problem is that even companies want to do collective bargaining, but they can't find anyone to negotiate with because workers don't have representatives or don't know about this possibility*" (D1, 25 September 2012).⁸⁷

Even lawyers in LAL NGOs are of the opinion that collective bargaining is more suitable to resolve collective conflict:

In these cases, collective bargaining is more effective and faster. The problem is the trade union. The trade union is not very good at protecting workers' rights, also because the enterprise trade union representatives are part of the enterprise management. The government level trade union does provide assistance; better than the enterprise level (...) the problem is because of vested interests. (Y4, 14 September 2012)

Lawyers at the NGOs X, Y and Z do not perform or suggest collective bargaining. There are other labour NGOs, however, that prioritise workers' collective interests, and encourage workers to organize collective bargaining at their workplaces. NGO A is one such example.

NGO A's activities for workers and training sessions are not fully focused on the law, but on what collective bargaining is, how to perform it, and most importantly, how to translate workers' interests into claims and how to obtain worker representation to perform collective bargaining. Image 8.1 shows the deck of cards

⁸⁷ Note that Friedman (2014) explains the under-development of collective bargaining as related to the lack of cohesive employer associations with which the ACFTU can negotiate. Friedman argues that, as is the case in Western liberal democracies, employer associations are crucial to the development of sectoral-level collective bargaining. Based on the case studies of Zhejiang and Guangdong Provinces, he argued that given the weakness of the ACFTU despite its privileged access to state bureaucracy, and the lack of legitimacy of the two national level employer associations, the China Enterprise Confederation-China Enterprise Directors Association (CEC-CEDA) and the All China Federation of Industry and Commerce (ACFIC) among employers, it is up to local employer associations to mobilize employers around shared interests and engage in sectoral-level collective bargaining.

it produces to easily diffuse these ideas among workers and contrasts it to that of NGO Z.

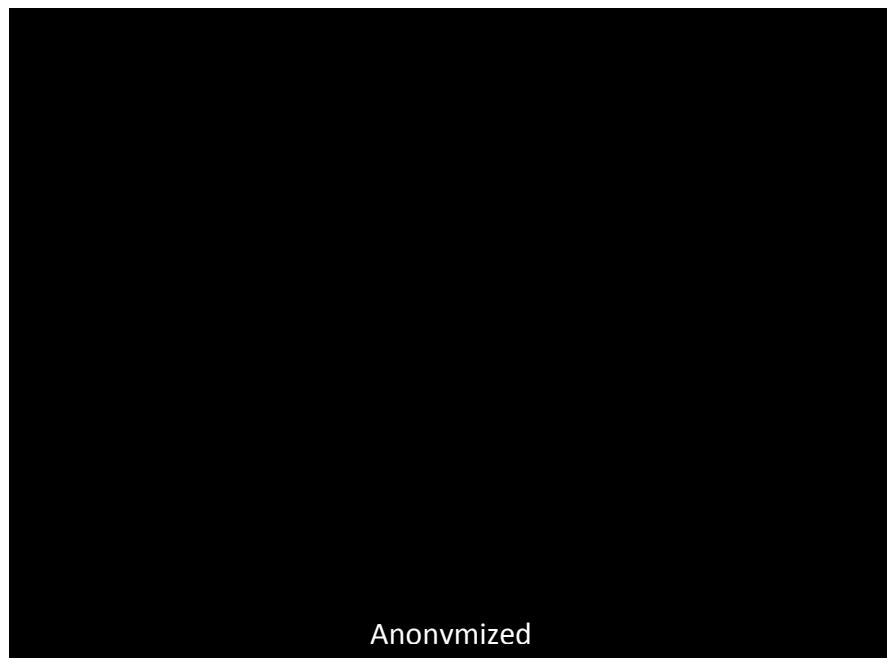


Image 7.1 Legal rights awareness playing cards
(NGO Z's cards on the left, NGO A's cards on the right)

In comparison to NGO Z's material (the eight cards on the left), NGO A's material (the eight cards on the right) clearly illustrates that not focusing completely on the legal framework implies looking into alternative and 'unconventional' forms of action such as collective organization and collective bargaining. NGO A, however, frames this strategy in reference to the law – mainly the Trade Union Law, as we can see in the playing cards. This indicates that even when moving beyond the law, NGO A uses the rhetoric of the law and authorized resources (Trade Union Law) to encourage workers to take this form of action. However, the contradiction is that NGO A would incite workers to collective bargaining outside the framework of the trade union, given the problem of its 'dual identity' and problematic representation discussed above.

Similarly to NGO A, Law Firm D also encourages workers to attempt collective bargaining. Law Firm D is an outlier, as it is a private law firm that runs labour

dispute cases much like a trade union. Law Firm D focuses on collective bargaining and is trying to persuade other NGOs, and training workers, to push for collective bargaining in the workplace: “*We stimulate workers’ consciousness. We have the appearance of lawyers from the outside, but we are activists. Even if we are lawyers, our strategies are not strictly according to the legal framework*”, Lawyer Ren declared (D2, 6 January 2013). Of the system of collective negotiation in China, he said:

In reality it is not true, because if you can’t have a representative how are you going to negotiate the terms of a collective contract? Collective bargaining through the trade union is not real. And litigation cannot help resolve this issue. All conflict that is addressed through legal channels meets the legal definitions and can be resolved one way or another. But there are many types of conflict that cannot be resolved through the legal channels, because the nature of the conflict is collective. For this, collective bargaining is necessary. Collective bargaining will resolve any problem that China has; every problem can be resolved through collective bargaining, whether political, economic or social. (D2, 6 January 2013)

This shows that workers do not need the law to address their rights or establish the legitimate forms of action or channels to address their grievances or pursue their interests. Workers take collective action, and sometimes engage in collective bargaining, without legal recognition or support from the trade union. As Lawyer Ren said: “*Workers need to organize by themselves, this is the only way for them to achieve their goals and needs, not through the intervention of an external party such as lawyers and NGOs*” (D2, 6 January 2013).

In line with this idea, that workers “*need to organize by themselves*” to obtain their needs, Law Firm D addresses legal consultations in a very different manner to NGOs Y and Z. During a participant observation of a legal consultation, Worker Ou and a group of four other striking workers narrated their struggle to Lawyer Chao (participant observation, D3, 6 January 2013). Worker Ou said that he and another female worker had organized the strike, which took place after 70% of the workers of the factory (more than 400 workers) had signed a letter addressed to the employer stating their demands. The factory they worked at was going to be

restructured (transferred from Fujianese to Japanese management) and all the long-service workers (*laoyuangong*, 老员工) were demanding compensation for the effects of the restructuring on their working conditions, and a written proof of its effects for the different types of workers. The employer did not respond and so workers went on strike.

Lawyer Chao discussed with the workers how they could approach their struggle: *“From a legal point of view, the boss has not done anything illegal. Your demands are legitimate (heli, 合理) and reasonable (youdaoli, 有道理), but we have to find a way to frame them (...) But, of course you can demand them”*. One of the workers interrupted Lawyer Chao, crying *“but we can’t talk with the boss!”* Lawyer Chao responded:

Of course you can, it is normal that you think you can’t, but you just have to select some workers to go and talk to the boss, and study the situation to see what the best way to negotiate with the boss is. You can ask the boss to come out and call the media or you can call the government to talk, to force him to talk. Both ways are possible. You can also take collective action (jiti xingdong, 集体行动) and unite to force the boss to discuss. Certainly it will have some effect.

Leaving the details of the conflict aside to focus on the consultation process and its effects on workers' actions, Lawyer Chao explained:

We need one representative (daibiao, 代表) for each 30-40 workers, so that we have at least ten people representing the workforce. We cannot rely on the lawyers. Each small group will have a squad leader (banzhang, 班长). It is necessary to have 400 workers collectively united and the lawyer can help you bargain (tanpan, 谈判) by giving assistance to the workers' representatives. (...) We can give you some legal advice, but it is not that the lawyer does everything; it cannot be done like this. It is the workers who have to do it! We can first give some recommendations but we are passive (beidong, 被动).

Note that Lawyer Chao used the plural 'we' rather than the singular form ('I', the lawyer or 'you', the worker), which shows that he included himself as part of the collective, and as part of the process.

“The demands are entirely legitimate”, Lawyer Chao repeated. Echoing this, one of the workers then claimed: “The trade union (zonggonghui, 总工会) said it on its Weibo page; the Guangdong trade union said it”; (the trade union had been discussing the use of collective bargaining (negotiation) to resolve conflicts such as this one). When asked where the offices of the trade union were, Lawyer Chao recommended that the workers first write a letter to the trade union instead of doing it “the formal way”, and that they also use Weibo to write about the problem. The worker next to me said “workers are very willing to unite”. Worker Ou then asked Lawyer Chao if they (the lawyers) could help them write the letter to the trade union because “We are worried that we don’t have the level (shuiping, 水平) to write it”. Lawyer Chao replied: “It is not about this; it is about your own experience and demands. Write down clear demands”. Later, Lawyer Chao warned:

Now, there is no legal protection; it is a little dangerous (you yidian weixian, 有一点危险). But we do it so that later on there is no more danger. So the squad leaders need to know that there is some danger. But we [the lawyers in Law Firm D] have done a lot of bargaining and there have been very good outcomes.

One of the workers worried that “the leaders will fear that they will be fired” at which Lawyer Chao reassured him: “We will give training to the leaders to protect them”. He also explained how to set up a strike fund.

In comparison with the effect that the legal consultations and education sessions at NGOs X, Y and Z had on workers (as examined in Chapter Five), that of Law Firm D is much more noteworthy. The five workers were attentive to each word the lawyer uttered, were engaged and critically considered what was said. Their attitude was not passive; on the contrary, these five workers were completely active, and strongly and emphatically demonstrated this by questioning or replying to everything that Lawyer Chao said, at times leading the discussion and thus Lawyer Chao’s advice by asking questions themselves in the first place. As the consultation came to an end, Worker Ou claimed: “The law is empty” (*falü shang shi kongbai*, 法律是空白). Lawyer Chao explained in reply that “this [collective bargaining] did not happen before and this is why it is not in law, but because it is happening, then

the law has to change and improve to address this. Don't worry because this will happen". This reflects the fact that legal development is also a result of pressure from below to adjust the law to social realities, and corresponds to the view that legal rights evolved from the enshrinement of interests into legal institutions. In Western industrialized countries, pressures from labour movements have led to the recognition of labour rights (Giddens, 1982), and in China (see Chapter Three) this has also been understood as attempts to absorb social pressure and maintain social stability (a sign of 'adaptive governance', one could say). The fact that the Guangdong provincial government has issued the Guangdong Provincial Regulation of Collective Contracts for Enterprises (GPRCC, 2013), coming into effect on 1 January 2015, proved Lawyer Chao's prediction to be correct.

To conclude, Worker Ou summarized the main points of the consultation, emphasising that more than 400 workers (70% of the workforce) would support the action to protect their rights, because "*workers are furious (qifeng, 气氛). They want a practical solution*". He then reminded his co-workers:

Tomorrow when you go to work, you collect the opinions of other workers summed up in one paper. No need to sign this, these are the ideas for the demands, to know what demands there are and how to pursue them. Then there will be unified demands and each worker can approve them so that every worker can feel that 'this has something to do with me' and that they want to participate. Tomorrow when we go to work, we will listen to the other workers and what they want so that it can be included in the bargaining.
(Participant observation, D3, 6 January 2013)

These events evidence a process of a very different nature and with diametrically different effects than the consultations taking place in the NGOs of this study, mainly NGOs Y and Z. Lawyer Chao was not acting 'on behalf' of these workers; instead, he discussed the situation with them, critically analysing the way forward with the group. This is not because of the nature of the conflict (a collective labour dispute in the manufacturing sector involving the restructuring of the company); but because of the approach Law Firm D takes, which lends itself to a more emancipatory impact by supporting workers' agency and autonomy. The conclusions of Chapter Five, especially with regard to NGOs Y and Z, suggested that

the legalistic approach of lawyers acting “on behalf of workers” result in workers’ *transferred agency* to lawyers and workers’ dependency on lawyers to resolve their labour disputes. NGO A and Law Firm D much more closely resemble a labour movement organization, or even a trade union, even though Law Firm D is a private law firm, because it supports workers’ collective, autonomous, and independent (even from the trade union) action. Despite collective bargaining being another form of industrial peace (Wright, 2000), the strategy of Law Firm D’s legal consultation much more emphatically impels workers to develop a class-based identity (by talking to other workers and collating unified demands for all of them) and to use their power as a collective, striving for their collective interests, which will put them in a much fairer and structurally more equal position when addressing their conflict with capital. At the same time, this form of action resolves the unfairness that individual workers feel, as indicated above, as they identify with other workers that have been treated similarly.

This section has illustrated that workers are not ‘the weak’, but instead have powerful agency to take all sorts of legal, illegal and paralegal autonomous actions, including silence, violence, petitioning or seeking Labour Bureau or NGO support, strikes, collective bargaining, and other forms of collective action. Some of these forms of action correspond to workers’ rights consciousness, but are usually more reflective of workers’ subjective and collective experiences of work, in particular, silence and exit, or petitioning and seeking governmental intervention reflecting workers’ alignment to social rules and institutional resources that suggest what Perry has described as ‘rules consciousness’ (Perry, 2009). Rights protection, or workers’ conception of substantive justice for that matter, is not only related to the legal system, but most importantly, it is related to socio-cultural constructs, and to workers’ subjective and collective experiences of work and material conditions.

7.8 Concluding remarks

Workers resort to a wide variety of actions to address labour conflict; some actions correspond to workers’ pursuit of rights as defined in the legal institutions, and

some workers pursue their interests guided not only by their material needs, but by popular conceptions of justice and morality. Alternatively, or in some cases in combination with legal action, workers resort to weapons that may correspond to Scott's (1990) 'hidden transcripts' such as silence, exit and social sharing; and to direct negotiation, petitioning or denouncing to Labour Bureaus, seeking NGO support, violence, collective action and, increasingly, collective bargaining. These forms of action show that there are Chinese workers that are conscious and have the agency – capacity, skills, resources and power – to act *vis-à-vis* capital and the Party-state. Rights-based analyses of workers' consciousness and actions reduce the universe of workers' material, subjective, socio-cultural and historical lives to legal institutions, and deprive them of their agency to shape their own identities and consciousness and to choose among different forms of action, including paralegal, 'illegitimate' or illegal action. I have shown in this chapter that the institutional clash between the laws and the socio-cultural norms proves the existence of dissent much more fundamental than that seen in the courtroom. Workers, by disagreeing with the precepts of the law, and by using 'illegitimate' forms of action, (whether intentionally or not) contest the new rationale on which the Party-state is building its legitimacy – the rule of law.

It has been argued that legal institutions provide avenues for political contestation in authoritarian regimes (Moustafa, 2007, Halliday et al., 2007, Halliday and Liu, 2007) as much as in liberal democracies (Epp, 1998; McCann, 1994; Merry, 1990; Scheingold, 2004). The optimistic view that legal institutions in China are opening avenues for political contestation (Halliday and Liu, 2007) should be moderated when considering Chinese workers. Legal institutions reduce workers' actions to rights-based claims and disputes, assume deficiencies or problems without addressing the root causes (palliative), and individualize conflict. In comparative contexts, legal mobilization has triggered collective action (McCann, 1994, 2004) when an active support structure (of lawyers and judiciary) has mobilized the law in parallel with political campaigns and collective actions. In these contexts, judges, lawyers and legal professionals were considered the 'vanguard' of movements for political freedom (Halliday et al., 2007). This is not necessarily the case for the

support structure of LAL NGOs such as NGOs X, Y and Z, nor of lawyers, who, as Michelson (2006) argued, act as 'gatekeepers to justice'. For these reasons, with regard to workers, legal mobilization by LAL NGOs and lawyers neither challenges the authority of the regime, nor does it trigger workers' collective action. On the contrary, it aims to contain it (Chen and Xu, 2012). Hence, legal institutions are designed to absorb social discontent, in order to maintain the power and legitimacy of the Party-state.

Nevertheless, the extent to which legal institutions are fulfilling the goal of sustaining authoritarian rule in China is questionable, but not because of the citizenry using legal institutions to politically challenge the Party-state. The evidence presented here shows a fundamental point of tension between legal institutions and Chinese social values. Workers' forms of action arise in response to different conceptions of morality and justice than those contained in the legal institutions. These principles of morality, socio-cultural norms responding to socio-cultural constructs that are deeply embedded in Chinese society, better reflect what Perry describes as "rules consciousness" (Perry, 2009). The advent of the market economy and the introduction of the modern system of governance through rule of law are encountering cognitive contradictions with the foundations of Chinese society. As Fei (1992: 106-107) commented:

"The current judicial system has very distinctive side effects in rural areas. It is destroying the original order based on a rule of rituals, but it has not been able to establish an effective order based on law. We cannot establish a social order based on a rule of law simply by making a few legal texts available and by setting up a few courts. More important is how people use these facilities. What is more, the first thing needed is to reform the social structure and the ideological perspective."

In fact, this process is not only occurring in rural areas, but also in urban ones. If applying Fei's (*ibid*) arguments to the contemporary Chinese context, in order for the rule of law to take root in Chinese society more broadly, it requires an overwhelming change of the nature of society, from one that is "governed through rituals" to one that "is now governed through laws" (*ibid*: 101). Institutionally, this

phenomenon can be read as a coexistence or even clash of institutions, legal and socio-cultural. If the rule of law is to succeed as a form of governance, it needs to either 'adapt' to, as Heilmann and Perry (2011) and Liebman (2011) argue, or absorb the popular values and social norms into the legal institution to obtain social acquiescence and secure institutional continuity. Alternatively, it could try to produce a ground-breaking socio-psychological change in the minds and practices of Chinese society, so as to make Chinese society adapt to the new values and principles on which the law is based, and direct all forms of popular action by law.

This chapter has intended to open further avenues of research in order to better understand the grassroots conceptions of justice and the ways in which the macro changes in governance institutions are interpreted, adopted, and resisted in everyday life in China. In other words, I assert that a grounded law in society research, which leans towards a socio-psychological sensitivity, is necessary to better understand what 'rights consciousness' means for ordinary people (and how it informs their actions) *vis-à-vis* the Party-state's definitions of rights, and the penetration of the rule of law ideology. The literature on the political role of legal institutions under authoritarian contexts (Ginsberg, 2008; Halliday et al., 2007; Halliday and Liu, 2007; Moustafa, 2007, 2008; Moustafa and Ginsberg, 2008; Solomon, 2010) has, so far, lacked such a micro- psycho-sociological approach; on the contrary, research has largely focused on institutional and procedural conceptions of rule of law and has examined legal institutions and elites (judges and lawyers) as political 'fighters' (Halliday et al., 2007) in authoritarian contexts. I argue that to better understand the potential spaces for political contestation that legal institutions open, it is necessary to contrast the macro- and institutional perspectives of policy and governance studies on the transformation of the state and its governance, economic institutions and legal system since 1978 (i.e. Heilmann and Perry, 2011; Liebman, 2011; Lubman, 1999; Nathan, 2003; Peerenboom, 2002; Shambaugh, 2008) with a grounded examination of how the state institutions are not only used, but also perceived by ordinary people, and if and how these institutions are changing the social constructs, cognitive and behavioural patterns of Chinese society. In conclusion, I propose a research agenda

that studies both the institutional and psycho-sociological clashes between the new rule of law ideology of the Party-state (and its liberal values and market economy rationale) and Chinese socio-cultural norms of justice and morality. This approach will allow an evaluation of the effectiveness of the ‘adaptive governance’ (Heilmann and Perry, 2011) of the Party-state and the legitimacy of the regime in the eyes of Chinese people.

Chapter Eight

Within and against the law

Conclusions

“What is harmony? Harmony is that I owe you RMB 100 but I give you only RMB 50. This is harmony. The law is not fair”
(Z5, 20 September 2012)

“Mediation protects the immediate rights of workers. It is cheaper for both, the worker and the employer. This is not the way to protect workers’ substantive rights”
(E4, 26 November 2012)

In February 2015, while I was writing this thesis in London, the Communist Party of China renewed its commitment to improving its governance by “comprehensively advancing the rule of law”.⁸⁸ In a rhetorical campaign, Xi Jinping declared the rule of law a guiding principle of the CPC’s governance, and legal reform its main focus since the Fourth Plenum of the 18th CPC Central Committee was held in October 2014.⁸⁹ Just a few months later, in July 2015, paradoxically, the state’s police forces executed the most significant crackdown on lawyers and human rights activists in decades, detaining at least 200 lawyers (Al Jazeera, 2015; Amnesty International, 2015; Duggan, 2015; Jacobs and Buckley, 2015), some of whom were placed under criminal investigation for subversion and illicit gain (Xinhua, 2015). Again, in December 2015 the police carried out another unprecedented crackdown on a number of labour NGOs and activists in Guangzhou, seven labour activists being harassed and placed under criminal detention, accused of “gathering a crowd to disturb social order”, and “threatening national security” (BBC, 2015b; Chen, 2015; CLB, 2015). These incidents reveal the continuous tension that furthering legal reform creates for the CPC. To balance this tension, the CPC uses a combination of institutional and governance adaptation, and repression. This thesis has focused on the former, as the CPC has increasingly moved in that direction, aware that gaining compliance and consent is more efficient in the long-term than coercion. Whilst the

⁸⁸ Since February 2015 Xi Jinping has emphasized the CPC’s commitment to upholding the rule of law. In a Politburo seminar Xi released his strategic political goals, the “Four Comprehensives” (*sige quanmian*, 四个全面) (BBC, 2015a; Choi, 2015). The Four Comprehensives are “comprehensively building a moderately prosperous society (*xiaokang shehui*, 小康社会), comprehensively deepen reform, comprehensively govern the nation according to law (*yifa zhiguo*, 依法治国), and comprehensively strictly govern the Party” (China Daily, 2015a, 2015b).

⁸⁹ For a discussion on the Fourth Plenum, see Minzner et al. (2015). Roundtable: “The future of ‘rule according to law’ in China”.

CPC has committed to improving the legal infrastructure by professionalizing the judiciary and differentiating the court system (Clarke, 2015) in a way that it could gain some independence, it is nonetheless aware and wary of the consequences of opening up too much legal space in terms of political activism and contestation. In yet another test of its adaptive capacity, the CPC demonstrated throughout 2015 that furthering legal reform was strictly subject to the stability of the Party-state regime.

Through a combination of institutionalist and law *in* society approaches to the study of labour laws in China, this thesis has addressed the broad question of *how and why legal institutions, in particular laws, sustain authoritarianism in China*. In so doing, it has provided evidence of the role of labour laws as institutions of 'adaptive governance' (Heilmann and Perry, 2011) of the Chinese Party-state, and the degree to which such legal institutions sustain authoritarianism. Accordingly, I have examined the historical processes and institutional arrangements that have made labour laws governance instruments of the Party-state, and I have argued that these laws have institutionalized the rule of the CPC, and ensured that lawyers and civil society organizations remain subservient to the system. I have also explored the limitations that such an institutional arrangement imposes on lawyers and civil society organizations in mobilizing the law on the one hand, and on the other, in catalysing broad-base social movements or workers' activism. Up to this point, I have argued that labour laws sustain the adaptive authoritarianism of the CPC, and that lawyers and civil society organizations act *within the law*, enabling the expansion and improvement of the legal order.

However, I have also shown that it is not through law that workers defy the authoritarian state; it is by having different conceptions of rights to those enshrined in the laws, and by bypassing the law and using other forms of 'illegal' action, such as violence, collective action, and autonomously organized (outside the trade union framework) collective bargaining, in other words, acting *against the law*, and in spite of the law. In this thesis, workers' voices and actions show that the legal institutions of the Party-state are not always deemed legitimate or trustworthy,

which, by extension, defies the ideological project of the state, the rule of law. Workers' conceiving of their rights based on social norms (morality), fairness, and socio-economic factors, and acting 'outside the law' is termed 'rules consciousness' (Perry, 2008, 2009), in contrast to the legally defined 'rights consciousness'. This thesis has provided evidence of the existence of both these forms of consciousness, and of the underlying contradiction between the principles of the legal norms (which reinforce capitalism and the power of the Party-state) on the one hand, and social norms (e.g., morality) on the other. It is, of course, not a given that 'rights consciousness' and 'rules consciousness' are mutually exclusive; however, the evidence presented here suggests rather that they stand in contrast to each other because of the fundamental difference between the capitalist (liberal) logic of 'rights consciousness' and the social, economic and cultural rationale of 'rules consciousness'. This tension highlights the fact that the Party-state's rule of law project has created a situation of coexistence of two conflicting sets of institutions (Crouch and Keune, 2005; Orren and Skowronek, 1994, 2004): formal legal institutions and informal social knowledge and practices, each extending contradictory rules and licensing mutually contradictory (legal and illegal) behaviour.

The aforementioned tension leads us to reconsider, both theoretically and empirically, Heilmann and Perry's (2011) thesis on the 'adaptive governance' of the CPC. The prevalence of workers' 'rules consciousness' and the extensive use of illegitimate, paralegal and illegal forms of action indicate that the adaptation of the Party-state's legal institutions to the social and environmental conditions of the time has yet to embrace or integrate these illegal forms of behaviour, or put in motion adjunct mechanisms to obtain full allegiance of the populace to the legal order. Conversely, workers, lawyers, and activists stage a more significant political contestation to the Party-state by dissenting from the principles of its legal institutions and using alternative forms of collective political action, such as strikes and protests.

This thesis therefore contributes to the study of the rule of law in authoritarianism, primarily by offering a perspective of law *in* society (Ewick and Silbey, 1998). The central object of inquiry has been labour laws, to the extent that these represent formal legal institutions constituted by the Party-state. Institutionalist and policy studies of law can only tell us so much about how the rule of law sustains authoritarianism at the formal political level. I, however, contend that the scope of such an institutionalist study of law is narrow, arguing that it can only show the role of law within the formal political structure. We need to study the law, and by extension, the state, from different perspectives (Migdal, 1994, 2001) and think about the political life of law differently. Hence, in this thesis I combined such an institutionalist and policy-oriented approach as followed in previous studies of law in authoritarian contexts (including Heilmann and Perry's (2011), with the study of law from below (Merry et al., 2010). This latter approach allows us to gather empirical evidence on workers' perceptions and uses of the law, and alternative forms of behaviour. This then allows us to assess the extent to which laws sustain authoritarianism by eliciting forms of behaviour aligned to the legal order they aim to create, and thus, are to the benefit of the authoritarian state. The study of law *in* society facilitates a thick (substantive) conception of the rule of law, examining legality, legal culture and popular conceptions of rights *vis-à-vis* the institutions of the state, in order to better understand the political role of law, the state and political life more generally under authoritarianism.

This concluding chapter reflects on the central theme addressed in this thesis, the study of the political role of law in authoritarian China. Section 8.1 reflects on the key findings of this research and the contributions made to the two main themes laid out in Chapter Two, the role of law in sustaining authoritarianism, and in opening avenues for political contestation. Section 8.2 summarizes the theoretical and empirical contributions made in this thesis. Finally, Section 8.3 discusses the limitations of this research and suggests avenues for future research.

8.1 Key findings: The contours of ‘adaptive governance’

This thesis has questioned the assumptions in the literature about the role of law in domination and resistance. The first assumption is that laws are regime-supportive institutions that facilitate the ‘resilience’ and ‘adaptive governance’ of the CPC. The second assumption is that laws are a resource for political activism bringing about political transformation.

This thesis has presented the merits and flaws of legal institutions in enabling the ‘adaptive governance’ of the CPC and sustaining authoritarianism. First, labour laws fulfil regime-supportive functions that are conducive to the stability and ‘adaptive governance’ of the CPC by providing credible commitments to property rights and supporting the capitalist economy. This in turn grants the Party-state a governance institution of labour and a new ideological legitimacy under the contradiction of the ‘socialist market economy’. Second, labour laws, and an institutional arrangement that monitors lawyers and civil society organizations such as labour legal action NGOs, restrain these actors from politically mobilizing the law and contesting the Party-state, and from triggering workers’ political organization and mobilization. Third, lawyers and labour NGOs feed back into the Party-state and contribute to further developing and perfecting these legal institutions (labour laws in particular). Thus, labour laws, and lawyers and labour NGOs for that matter, fulfil regime supportive functions, enabling the ‘adaptive governance’ of the CPC and sustaining authoritarianism.

However, the law is not necessarily an all-encompassing and efficient institution for the adaptive authoritarianism of the CPC. Laws, responding to the logics of both the capitalist economy and to the interests of the Party-state, imply a rational design of social order that radically simplifies social reality. Naturally, this legal order excludes prevalent socio-cultural norms and forms of behaviour, which then become potentially defiant of the authoritarian state by virtue of their ‘illegality’. Some workers express disagreement with the premises of the laws and do not use the legal channels, either because they deem them inadequate, they do not respond to their needs, and/or because of certain power or economic constraints

that impede their access and use. Hence, I have argued that legal institutions do not instantiate popular ideas of rights and justice, or ‘rules consciousness’ (Perry, 2008, 2009), nor do they include popular bodies of knowledge and social practices which can therefore represent a challenge to which the CPC would need to adapt or else integrate within its institutions of governance. The Party-state, proving its ‘adaptive governance’, is indeed gradually integrating social behaviour into the legal institutions by further recognizing workers’ interests as rights (i.e. regulations on minimum wage, ongoing integration of collective bargaining into labour laws, etc.), hence extending its policy and legal reform. However, an interesting and significant space is left outside of the legal brackets: people disagree with the law (i.e. stating that it does not address their needs or the reality at the workplace) and refuse to use it, choosing other forms of illegitimate or illegal action. This indicates that, implicitly or explicitly, people do not fully agree and comply with the ideological project of the state – the rule of law – and its governance mechanisms. In other words, the laws are not yet inclusive or legitimate enough to effectively ensure regime resilience, given that deviant and potentially politically destabilizing behaviour is not contained by legal institutions. Evidence presented here is in line with Scott’s (1998) arguments about the failure of states’ schemes to standardize social order (legibility as the central component of statecraft) due to the exclusion of elements of informal processes and practical knowledge. I have therefore argued that the flaw in the ‘adaptive governance’ of the CPC, in particular in its labour laws, lies in its failure to integrate, or even suppress, social conceptions of rights and justice, and subsequent norms and forms of behaviour that the same laws attempt to dismiss by creating a rational legal order.

8.1.1 Why laws sustain authoritarianism

Studies of the rule of law in authoritarian settings that have focused on courts have shown that legal institutions tend to fulfil instrumental functions for the regime, institutionalizing the authoritarian rule (Moustafa, 2007, 2008, 2014; Moustafa and Ginsburg, 2008). Similarly, Nathan (2003) has argued that legal reforms have promoted ‘authoritarian resilience’ precisely because of the functional

specialization of the CPC's institutions of governance. Liebman (2011), following Heilmann and Perry's (2011) analysis, argues that laws are central components of the 'adaptive authoritarianism' of the CPC, which ultimately extend its legitimacy and enable its governance without systemic transformation. This thesis has contributed comparative empirical detail to the nascent theorization about the political role of law in authoritarianism, and in particular, it has interrogated the role of law in the CPC's 'adaptive authoritarianism'. This thesis has identified the instrumentality of labour laws in sustaining authoritarianism in the following three ways.

First, in Chapter Three, I have argued that labour laws further the resilience, and therefore, the adaptability of the CPC because, through labour laws, the Party-state governs labour relations. Labour laws are part of the institutional infrastructure created to support the capitalist economy and its transformed social relations. In line with institutionalist approaches (Moustafa, 2007; North, 1990; North and Weingast, 1989), laws have endorsed and institutionalized property rights, which, in the realm of labour, has meant the actualization of the commodification of labour relations and the recognition of labour-capital antagonism through the establishment of judicial mechanisms to resolve labour conflict. Hence, labour laws have reorganized social life to align to the necessities of the market, restoring class relations. These legal institutions have developed as 'adaptations' to the necessities of the market economy post-1978, both to regulate the excesses of the market protecting labour, and to protect labour in a Polanyian 'double movement' (Polanyi, 2001). Incidentally, the protection of labour was also conceived as a method of pacifying the increasing labour unrest of the 1990s. Moreover, through labour laws, the CPC has retained the governance capacity to promote (Peerenboom, 2002) and regulate economic development (Liebman, 2011), and to control the potential conflict arising from labour-capital disputes through a number of institutions to manage labour disputes, including mediation, arbitration and litigation. In this way, labour laws are used as the CPC's new governing institution of labour in the capitalist economy. Hence, this confirms that the creation of labour laws has been part of the institutionalization process that restores class divisions in society and

maintains the power of the Party-state over labour-capital relations. As Liebman argues, “law has been used to transform society, and as a tool for the party-state to govern” (Liebman, 2011: 167). Moreover, it has been argued that legal institutions bolster regime legitimacy, therefore sustaining authoritarianism, precisely because they provide the ideological support needed to fill the ideological vacuum left after the turn to capitalism (Ginsberg, 2008; Landry, 2008; Liebman, 2011; Lubman, 1999; Moustafa, 2007; Peerenboom, 2002). Indeed, the rule of law project is gaining momentum, both as a political rhetoric of the CPC and as *de facto* legal reforms deepen. I, however, have a cautious reading of laws as legitimacy-boosting, as although some research has been undertaken (Gallagher, 2006; Li, 2004; Landry, 2008, 2011), there is limited evidence from an institutionalist and policy perspective that the public actually finds these laws legitimate and trustworthy. This thesis has, in fact, provided a counterpoint to this argument, with evidence that shows that there are ordinary workers who disagree with the premises of the labour laws and distrust the legal system. Moreover, in contrast to Landry’s (2008, 2011) survey findings of high levels of trust in legal institutions due to individual characteristics such as education levels, knowledge of the law and political institutions, media consumption, and social networks, this thesis finds that there are socio-economic and structural (power relations) factors that, as seen in the interviews quoted in this thesis, influence workers’ trust in the legal system.

Second, the CPC is establishing a hegemonic legal order. In Chapter Four I have shown that labour laws define the realm of the possibility, attempt to delimit workers’ behaviour and constrain lawyers and civil society organizations from politically mobilizing the law. Apart from using coercion and repression, as in 2015 with human rights lawyers, the Party-state has devised an institutional arrangement to complement its legal institutions, which regulates the behaviour of legal actors. By the way that labour laws define what labour disputes are and how to manage them, they delimit lawyers’ possible actions to manage labour conflict. Moreover, an institutional arrangement has been created to ensure lawyers’ and other civil society legal actors, such as LAL NGOs’, core compliance (Moustafa,

2007, 2008), thus also ensuring that lawyers and LAL NGOs fulfil instrumental functions for the adaptive legality of the Party-state.

I have shown that this formal institutional arrangement consists of the following five main features. First, a set of institutional requirements and monitoring system of the legal profession: lawyers' internship, practice licence and ACLA membership. Second, requirements that LAL NGOs register both with MOCA and the MOJ, duplicating the organizational structure into NGO and law firm, and the regulations on NGO registration prevents the coexistence of and co-operation between NGOs addressing same issues at the same administrative level. This fragments LAL NGOs and prevents lawyers from developing a collective identity (as an epistemic community) which, as highlighted by Halliday and Liu (2007), is a key factor in political mobilization, and so contains their ability to organize coordinated political action.

Third, a triple monitoring system of lawyers and LAL NGOs, monitored by the MOJ as legal professionals in the annual review of lawyers' practice licence, by ACLA as membership is mandatory and it reviews the lawful behaviour of lawyers, and by MOCA, as LAL NGOs need to be registered. This factor, in addition to the fact that there is a certain degree of incorporation of LAL NGOs into the political echelons, with the leadership of some of these organizations being highly recognized by the Party (i.e. being awarded the ACFTU Labour Day Medal –both NGOs Y and Z) or even penetrating into the leadership of the organization (as is the case with NGO Z, whose leaders are Party members and representatives in the People's Congress), indicates that lawyers and LAL NGOs lack sufficient independence from the Party-state to be able to contest it (at least in a fight for political liberalism, as suggested by Halliday et al., 2007; and Halliday and Liu, 2007).

The fourth arrangement is a patronage relationship between the MOJ and both lawyers and LAL NGOs for registration, lawyers' practice licence renewal, and public funding via ACLA's Legal Aid Foundation Fund. The final one is the lack of judicial independence and capacity to deal with the increasing amount of labour disputes,

which means that LAL NGOs avoid the pressure of labour conflict proceeding to court.

In relation to this last point, LAL NGOs' preference for mediation on the premise that it best suits peasant workers shows their compliance with the LDMAL, and is consistent with the evidence of a revival of the use of mediation to resolve conflict (Zhuang and Chen, 2015), which Liebman (2011) interprets as a component of the 'adaptive legality' of the CPC. Mediation as a feature of the adaptive legality of the CPC indicates an intentional return to the popular legalism of the revolutionary period to align with popular social norms and preferred dispute resolution mechanisms. Moreover, this strategy, even if sustaining the adaptive authoritarianism of the CPC, indicates that LAL NGOs, by virtue of following the legal requirement to mediate first, become instrumental to the Party-state because they contain labour conflict from putting pressure on the still underdeveloped legal institutions (namely, arbitration courts and the judiciary). The fact that the judiciary lacks independence increases the instrumentality of LAL NGOs for the adaptive legality of the Party-state, as though, in line with Moustafa's argument (2007), some degree of perceived independence is necessary for legal institutions to build legitimacy and sustain authoritarianism. In this case, LAL NGOs have an added value to the Party-state in preventing disputes from proceeding to litigation and therefore concealing the judiciary's lack of capacity and independence. In other words, LAL NGOs build the ideological image of the rule of law. However, there is a flaw in the 'adaptive legality' of mediation. I argue that mediation is increasingly institutionalized and legalistic, and some lawyers refuse to arrange mediation for cases that they think do not have legal merit (i.e. disputes that are not legally recognized). This increasing institutionalization of mediation can fail the aim of the CPC's 'adaptive legality' because it omits popular causes of disputes.

Third, in the process of showing how and why laws sustain authoritarianism, I have also shown in Chapter Four that legal actors fulfil an indispensable function for the CPC. I have shown that LAL NGOs are integral to the adaptive legality of the CPC in their advocacy and legal development work aimed at furthering the rule of law, and

perfecting these legal institutions. LAL NGOs conduct research on the gaps and lack of legal implementation, which feeds into policy- and law-making processes, and enable the further adaptation of the governance instruments to the challenges from below, by incorporating new rights and procedures into the legal institutions. From an institutionalist point of view, LAL NGOs engage in ‘political cultivation’ of legal institutions in a process of explicit reconfiguration and perfection of the laws, that results in institutional ‘drift’ and institutional stability (Streeck and Thelen, 2008: 24-25). Hence, LAL NGOs fulfil a crucial function in enabling and sustaining the adaptive authoritarianism of the CPC.

These findings confirm some of the arguments posited by previous research on how authoritarian regimes control courts (Moustafa, 2007, 2008) and lawyers (Solomon, 2010). Furthermore, I have provided evidence that suggests that legal institutions, and legal actors, fulfil indispensable functions in sustaining authoritarianism, most significantly ensuring that political activism and potentially contentious and challenging behaviour is either prevented or contained within the frames of the law. Laws, as governance institutions, create the rules to order and control society, in particular, lawyers, LAL NGOs and workers. Ultimately, the final reason why laws, and adjacent institutional arrangements, secure authoritarianism is because they do not design realistic avenues for political contestation, hobbling lawyers’ and LAL NGOs’ attempts to form a ‘support structure’ (Epp, 1998) for the political mobilization of law to challenge the regime. Lawyers and LAL NGOs do mobilize the law and support workers in their labour disputes, but do not fully fulfil the conditions of a ‘support structure’ in the sense of activating a political movement against the Party-state: this is not necessarily because they are not activists themselves, but because they are constrained by the formal institutional arrangement aforementioned. By default then, lawyers and LAL NGOs act ‘according to law’ and to the benefit of the CPC’s adaptive legality.

8.1.2 *Within the law: Legal mobilization in authoritarian China*

In a variety of comparative authoritarian contexts lawyers and legal professionals, together with judges, have formed a collective force and organized to strive for political liberalism, contesting the state using law and through courts (Ginsburg, 2007; Halliday et al., 2007; Halliday and Liu, 2007; Karpik and Halliday, 2011). In liberal democracies, lawyers have led the political mobilization of law, or 'legal mobilization' (Zemans, 1983), and have coordinated organized collective action and campaigns so that legal mobilization resulted in effective political changes (McCann, 1994, 2000; Scheingold, 1974). Such leadership by lawyers required and was part of a 'support structure' of reform-minded judges, the media and civil society organizations that enabled sustained and effective mobilization of the law (Epp, 1998). Through the study of labour law in practice at the hands of labour lawyers and LAL NGOs, I have provided comparative evidence to examine the validity of the aforementioned theories about law and resistance in authoritarian China. In doing so, I have argued that the extent to which lawyers and LAL NGOs mobilize the law politically indicates how and why legal institutions sustain authoritarianism in China; in other words, the extent to which law opens up avenues of political contestation and how these avenues are used by legal professionals to contest the Party-state highlights the CPC's resilience and 'adaptive governance'.

Through the cases of NGOs X, Y and Z I have provided evidence of LAL NGOs' activities and lawyers' engagement with workers, showing that they fulfil three crucial functions for the 'adaptive governance' of the CPC. First, through legal education (*pufa*, 普法) activities and by providing legal consultation to workers with labour grievances, lawyers and LAL NGOs socialize workers in the labour laws, which means that they raise workers' rights or legal consciousness, and define the potential workers' actions in terms of what is 'reasonable' (*helide*, 合理的) and 'legitimate' (*hefade*, 合法的), which contributes to aligning workers' ideas and behaviour with the new legal order. Furthermore, the revival of these legal education activities, which were used during the Maoist period "to educate about

and induce compliance with the new legal norms" (Lieberman, 2011: 183), is consistent with and facilitates the 'adaptive governance' of the CPC.

Second, the provision of legal aid is crucial for broadening people's access to law and legal justice. LAL NGOs play a very important role in this matter, not only enabling workers to seek redress through law, but also buffering the state, given the limited capacity of the judiciary. By dealing with labour conflict, especially through mediation, LAL NGOs reduce the pressure of labour disputes on the judiciary, and other governmentally run legal aid centres, such as the municipal government or trade union legal aid centres. This basically works to the benefit of the Party-state because it inhibits the public exposure of the inefficiencies and limitations of the legal system, preserving the ideological smokescreen of a functioning rule of law. At the same time, the question of LAL NGOs' opening access to justice shows an important contradiction. On the one hand, legal aid addresses the problem of migrant workers' access to justice, and provides them with the opportunity to access legal channels. On the other hand, lawyers, by virtue of strictly abiding by the law, determine the likelihood of some workers' gaining redress through the law. In a number of cases, lawyers deny representation to workers if their claims do not 'fit' the law, thus becoming 'gatekeepers to justice' (Michelson, 2006). I have argued that this is related to the fact that the law narrows the definition of justice, and does not necessarily provide workers with substantive justice. Legal action is denied to a considerable number of workers, and when it is available, it is palliative rather than transformative. Legal action *per se* can help individual workers in their disputes but does not address or transform the causes of these problems. This space is where political activism can focus its energies to be transformative and contest both the Party-state and capital.

Third, lawyers and LAL NGOs, through legal means such as mediation, arbitration and litigation, protect workers' rights and find redress and compensation for many, but mostly in individual cases. The importance of these activities should not be underestimated, especially from the point of view of aggrieved workers who find redress with the assistance of these actors. In this sense, I have provided further

empirical detail with a comparative perspective to support Gallagher's (2006) arguments about how legal aid centres empower workers and assist them in their labour dispute cases. A counterpoint I have made, however, is that by providing legal representation, because of the nature of the legal profession and the legal process, and because the deficit model that the LAL NGOs employ depicts workers as 'the weak', 'lacking knowledge' and 'powerless', lawyers and workers develop a power relation that is not necessarily emancipatory for workers. This power relation can reflect the different class background of *weiquan* lawyers (middle-class) and workers (working class), which in turn explains why lawyers, even when working for the cause of workers' rights protection, do not become a 'vanguard' of the labour movement, or as Hui (2014) argues in Gramscian terms, the organic intellectuals of the working class. On the contrary, these LAL NGOs and *weiquan* lawyers contribute to the propagation of the legal rationale and order, or hegemony (Hui, 2014; Lin, 2015), reinforcing the rule of the Party-state. Moreover, from a relational perspective, lawyers act 'on behalf of workers', and in the legal process there is a *transfer of agency* from workers to lawyers, on whom workers depend because of their professional knowledge and technical skills. The inequality in knowledge between lawyers and workers leads to a situation in which the majority of lawyers are central actors exerting social control, and as 'disabling professionals' (Illich, 1977), guide workers to take specific forms of actions which accord with the law, as mentioned above. This calls into question the aforementioned broadening of access to justice and indicates there is an intrinsic problem in the legal process – the redistributive role of law. Legal mobilization would have an effective political outcome if it were to address the structures of power that prevail in society, specifically in labour-capital relations, which are the primary source of the conflict. However, law reproduces the class structures of power between labour and capital, and the state, and creates new power relations at the micro-level, between lawyers and workers. As Scheingold (1974: 6) argued, "if litigation can play a redistributive role, it can be used as an agent of change". I have proved that this is not the case with the lawyers and LAL NGOs studied in this thesis, because of the structure of the legal system and profession, and ultimately, the nature of law.

The lawyers and LAL NGOs studied in this thesis (with the exception of two cases, NGO A and Law Firm D) depoliticise labour conflict by reducing it to strictly legal definitions of rights, extract it from the workplace and contain it within the frames of the law. Although the actors studied here do engage in advocacy at the policy level, creating avenues or mechanisms to contribute to the development and improvement of legal institutions, these actors do not lead or initiate political campaigns in addition to providing legal services because this is not legally possible. In addition, they dissuade workers from taking ‘illegal’ forms of action and from mobilizing collectively; therefore, not catalysing social movements as has been the case in other settings (Epp, 1998; McCann, 1994; Merry, 1990; Scheingold, 1974; Silverstein, 1996). Given the limits that the law imposes on lawyers’ and LAL NGOs’ actions, in addition to the institutional arrangement that monitors them, the possibilities of their political contestation through law is very limited, precisely because the law defines what they can and cannot do. Those lawyers that are pushing the law beyond the legal definitions, such as human rights lawyers, or those in Law Firm D trying to establish a system of collective bargaining, are indeed engaged in political activism *within and beyond the law*. Working *within the law*, however, pre-empts the lawyers and LAL NGOs studied here from forming a vanguard for political activism, which by default makes them functional for the maintenance and reproduction of the legal order, and therefore, for sustaining authoritarianism.

I have therefore provided evidence to contribute to the discussion of the role of law in political contestation in authoritarian contexts, showing that under the current constellation of power in China, given the very nature of the labour laws, and the institutional constraints imposed on lawyers, legal mobilization offers very few possibilities for political contestation and/or collective legal or paralegal mobilization. In turn, by acting *within the law*, lawyers and LAL NGOs fulfil regime-supportive functions and facilitate the adaptiveness of the CPC’s authoritarianism. I offer no other option to activists than what a number of workers are doing, acting *against the law*.

8.1.3 *Against the law: The flaw of ‘adaptive governance’*

In contrast to the numbers of scholarly and journalistic reports on the ‘rising rights consciousness’ of Chinese workers and their increased activism in fighting for their rights (Gallagher, 2006; Goldman, 2005; Yang, 2005; Perry, 2008, 2009; Pei, 2000), I have provided evidence in this thesis that shows that there are workers whose conceptions of rights do not comply with the legal definitions, and therefore, do not engage with the law, but rather take ‘illegal’ and ‘illegitimate’ actions. I have argued that ‘rights consciousness’ has been an analytically hollow and unclear concept as used in the literature, and has been referred to without sufficient empirical evidence and methodological rigour of what exactly it means for workers to have ‘rights consciousness’. Even if, conceptually, ‘rights consciousness’ is less narrow than ‘legal consciousness’ (as knowledge of the law and its processes) (Dittmer and Hurst, 2006), I have argued that ‘rights consciousness’ has generally been used in the literature to refer to workers’ ideas of rights as derived from the laws, which overlooks the fact that workers have consciousness of rights (as per rules) prior to the laws. Through a law *in* society approach (Ewick and Silbey, 1998) I have contrasted the concept of ‘rights consciousness’ meaning legal rights consciousness, with workers’ understandings of rights, ideas of justice, and perceptions and opinions of the law. I have argued that workers’ conceptions of rights and justice derive from the combination of their subjective experiences of work, socio-economic needs (of livelihood, fairness and subsistence), and socio-cultural norms of behaviour (morality), which proves the existence and content of ‘rules consciousness’ (Perry, 2008, 2009). These concepts of rights are dissonant with the legal precepts that inform ‘rights consciousness’, providing both contrasting and contradictory logics of action. In particular, *legal* rights consciousness informs a specific form of behaviour which, I have argued, is strictly rights-based legal action. However, I have shown that some workers do not trust the laws because they do not reflect their sources of grievances and do not represent their needs, or because they are not fair or legitimate in their eyes. Consistently, workers are unable to find redress in the legal system. This leads to most labour struggle happening outside the confines of the law, with strikes and protests being the most politically and economically disruptive in their collective

nature and because by striking and protesting, workers are directly opposing both the Party-state and capital. This way, workers oppose the law, not only with their claims (which usually go against or beyond what is legally established), but also with the very nature of their ‘illegal’ action.

On this note, I have contributed to the existing discussion on ‘rights consciousness’ by providing empirical evidence to clarify an ambiguous term. Institutional studies of law (which follow a thin conception of rule of law) in authoritarian contexts reach partial conclusions on how laws sustain authoritarianism. Thick approaches to the rule of law, or studies of law *from below*, or *in* society provide more comprehensive detail as to if, how and why laws sustain authoritarianism, bolster regime legitimacy, and obtain social order. I have therefore contributed to the literature on the rule of law in authoritarianism by providing a view from below. In addition, I have provided empirical evidence for what Perry has argued, with an analysis of political discourses, is ‘rules consciousness’ (2008, 2009), and not ‘rights consciousness’. I believe that there is sufficient evidence to argue that ‘rights’ and ‘rules’ consciousness are not mutually exclusive, but at present, coexist and contend. ‘Rights consciousness’ refers strictly to rights defined by law, which are indeed based on liberal notions given that the labour laws reinforce a capitalist economy whereby labour relations are virtually relations of property – labour is a commodity to be sold in the market. ‘Rules consciousness’ refers to a socio-economic and cultural understanding of rights as morality, equality, fairness, livelihoods, and subsistence. The grassroots conceptions of rights that I have heard in workers’ accounts during the course of this research are attuned to what Perry (2008, 2009) describes as ‘rules consciousness’ but with one difference: she argues that “rules consciousness” is “politics as usual” (2009: 18) through which Chinese people use state-sanctioned language and channels to negotiate with the state. I have found that ‘rules consciousness’ necessarily means the use of mostly ‘illegal’ (not state-sanctioned) actions and channels, because the Party-state has adopted a legal ideology and institutions that leave no space for workers’ conceptions of rights, or ‘rules consciousness’, other than that *outside and against the law*.

Such contrasting forms of workers' consciousness and action therefore denote a conflictual element of the CPC's 'adaptive governance' (Heilmann and Perry, 2011), the flaw in the CPC's 'adaptive governance'. The rule of law, as a hegemonic project to restore a class society and to maintain social order in the capitalist economy, sustaining the power of the CPC, is finding attempts at resistance on the ground. In other words, the introduction of capitalism and this modern system of governance through law finds contention in some still prevalent socio-cultural norms of behaviour, coherent with 'rules consciousness'. Workers' adherence to the latter indicates that they disagree with the content of the laws and the capitalist project, and find redress in alternative, paralegal or illegal forms of action; hence, they act *against the law*. The shortcoming of the CPC's 'adaptive governance', therefore, is its failure to reconcile the laws with popular conceptions of rights or 'rules consciousness'.

The challenge that lies ahead for the 'adaptive governance' of the CPC is to adapt its legal institutions to popular conceptions of rights. It could do this by creating or allowing intermediary institutions (LAL NGOs, labour NGOs) to take up these popular conceptions of rights and manage both legal disputes and these paralegal and illegal forms of behaviour (both of which the trade union is inefficient at), and/or adjusting the legal institutions and making them more inclusive by further recognizing legal rights (e.g., uninsured workers social security, minimum wage, collective bargaining). The Party-state is indeed adopting both of these strategies in order to keep its grip. The latter form of institutional adaptation responds to what Liebman (2011) has argued as 'adaptive legality': the alignment of legal institutions with "perceived dominant social norms or conceptions of popular morality" (2011: 166). However, I have provided evidence to contrast with Liebman's argument, as these institutional adaptations of the labour laws do not necessarily reflect the points of contention echoed by the workers' voices in this thesis. I have interpreted workers' views of the laws as forms of dissent with the capitalist principles. The workers' voices analysed here reveal that the rule of law project is neither fully aligning with popular conceptions of rights and justice, nor is it deeply embedding itself in Chinese society. This suggests that it is not gaining ordinary people's

compliance as it is aims to, nor necessarily bolstering regime legitimacy in their eyes, putting into question its capacity to sustain authoritarianism. The space for political contestation and activism therefore rests outside and *against the law* (and its state power and capitalist principles).

8.2 Contributions

This thesis makes three main contributions: first, it provides empirical comparative evidence to the literature on the rule of law in authoritarianism; second, it makes an empirical and theoretical contribution to the literature on ‘regime resilience’ (Nathan, 2003) and ‘adaptive governance’ (Heilmann and Perry, 2011); and third, it makes an empirical contribution proving the existence and content of “rules consciousness” (Perry, 2008, 2009).

First, the existing research on the rule of law in authoritarian contexts is overwhelmingly centred on legal institutions, and more specifically, the judiciary, and on legal elites. Most significantly, this research has confirmed that legal institutions sustain authoritarian regimes because they institutionalize or entrench the power of the authoritarian rulers and legitimize the regime (Ginsberg, 2008; Landry, 2008; Liebman, 2011; Lubman, 1999; Moustafa, 2007, 2014; Moustafa and Ginsberg, 2008; Peerenboom, 2002). I have provided comparative empirical evidence of the case of China, specifically, on the role and functions of labour law in sustaining the rule of the CPC. In doing so I have confirmed the propositions in the literature on how legal institutions enable the institutionalization of the authoritarian rulers; obtain core compliance of legal actors; endorse property rights and facilitate and support the market economy (Moustafa, 2007; Moustafa and Ginsberg, 2008).

However, I have contested the argument of laws’ functions in strengthening regime legitimacy (Ginsberg, 2008; Landry, 2008; Liebman, 2011; Lubman, 1999; Moustafa, 2007, 2014; Moustafa and Ginsberg, 2008; Peerenboom, 2002), mainly because the overly institutionalist literature has not provided evidence of how and why legal

institutions bolster regime legitimacy, particularly, in the eyes of the people. I have contended that we cannot arrive at compelling conclusions about how legitimate legal institutions make the regime without examining if, how and why legal institutions are deemed legitimate by ordinary people, and therefore, whether they think that the instruments of governance of the Party-state are legitimate.

Hence, the main contribution to this body of research has been to combine such institutionalist approaches with a law *in* society (Ewick and Silbey, 1998). I have argued that to better understand the value of law in sustaining authoritarianism, particularly, workers' understandings and opinions (public opinion) of the law, and by extension, of the regime, there is much advantage to be had in surpassing the conceptualization of legal institutions as discrete and objective units, and studying the life of law *in* society (Ewick and Silbey, 1998). This approach provides evidence of workers' attitudes, perceptions, uses and experiences of the law (and how and why they act differently, if so), which better inform conclusions about how legitimate law is, and how legitimate law makes the Party-state regime. The power of laws to legitimize the Party-state is only in part derived from the coercive power of the state; the images and principles of the laws need to be integrated into everyday life and accepted into the ideals of ordinary people in order to become an enduring social and governance form. Evidence presented in this thesis on workers' perceptions and uses of the law indicates that the legitimacy-bolstering function of the law is not, as yet, accomplished. On the contrary, workers disagree with and distrust the law for a number of reasons, including conceptual, economic, socio-cultural, and potentially, ideological.

Second, the aforementioned empirical evidence of workers' conceptions of rights and opinions of the law provides a counterpoint to Heilmann and Perry's (2011) 'adaptive governance' thesis. As with previous institutionalist and policy process research on regime resilience and adaptability, Heilmann and Perry's (2011) and Liebman's (2011) 'adaptive governance' argument lacked empirical detail as to how and why the CPC's governance adaptations were functioning in practice, and how effective they were in making the regime resilient. In this thesis I have provided

empirical evidence, gathered through a law *in* society approach (Ewick and Silbey, 1998), to tackle the theoretical and empirical shortcoming of the ‘adaptive governance’ thesis. On the one hand, the theory does not consider how the agency of a variety of political actors, which in this research include lawyers, labour NGOs and workers, affects the ‘adaptive governance’ of the CPC. When considering non-elite groups and doing empirical research on the workings of this ‘adaptive governance’, it appears that the adaptiveness of the CPC’s structures or institutions of governance has left key informal practices, knowledge and forms of social behaviour outside the legal confines. This is the flaw in the CPC’s ‘adaptive governance’.

Third, I have provided empirical evidence from workers in Beijing, and in the construction industry, which adds comparative substance to the existing research on workers’ subjectivities and actions that has mainly focused on manufacturing sector workers in the Pearl River Delta (Chan, 2001, 2011; Chan, 2010a, 2010b; Chan and Pun, 2009; Leung, 2015; Leung and Pun, 2009; Pun, 2009; Pun et al., 2010; Su and He, 2010). Moreover, I have provided evidence for the discussion on workers’ ‘rights consciousness’, showing workers’ contrasting conceptions of rights and justice. By contrasting workers’ understandings of justice and fairness, and their attitudes towards the law presented in their narratives (their opinions of the law, what they think they are or ‘should’ be entitled to, their views of what is fair, etc.) with the content of the legal codes (i.e. concrete articles in the labour laws or lawyers’ advice ‘according to the law’), it has been possible to see that workers have divergent conceptions of rights and justice to those embodied in the laws. This signals a tension between what has been referred to as ‘rights consciousness’ (which refers directly to rights entitled by law), and ‘rules consciousness’ (Perry, 2009). Perry (2008, 2009) suggested, with political discursive data, that rights consciousness is an incorrect category to name what in reality is ‘rules consciousness’; however, she provided no empirical account of the existence of this rules consciousness among Chinese people, as opposed to rights or legal consciousness. This research has filled this gap in Perry’s analysis, providing the empirical detail to support her argument: I have provided evidence of the existence

and content of workers' 'rules consciousness', which is composed of concepts of equality, fairness, morality and, as Perry (2008) suggested, socio-economic concepts of rights to livelihoods and subsistence. In doing so, I have also provided an empirical contribution to the discussion about 'rights consciousness' in China, and brought it back to the broader discussion on its capacity to stimulate political activism and bring about regime change. Studying rights, legal or rules consciousness for that matter, provides rich empirical detail of the level of penetration of the law into Chinese society, and therefore, sheds some light on its efficiency in gaining popular support, aligning people's values with the Party-state, and legitimating and supporting the 'adaptive' rule of the CPC.

8.3 Limitations and future research

The aim of this research was to examine how and why legal institutions, in particular laws, sustain authoritarianism in China. In a sense, this question meant that the point of inquiry was state-society relations through the lens of law. However, when narrowing this down to the study of labour laws, the political constellation was complicated by the simple fact of the pure number of institutions, institutional dynamics and political actors that come into play and the blurred conceptual and empirical delimitations among them: the Party-state, capital, civil society (LAL NGOs, lawyers), and labour (trade union, again labour NGOs, workers). The conceptual differentiation of the different actors is not so clear-cut in reality, and has made it difficult to differentiate, for example, non-governmental organizations from the Party-state, especially when the leadership of the NGO was both a Party member and Party and People's Congress representative, as in the case of NGO Z.

In this thesis I distinguished between levels of the state whenever possible, but I did not distinguish between the Party and the state, treating it in general, as a unit that is the defining factor of China's authoritarianism. However, neither is the Party-state monolithic, nor its institutions have remained unchanged. It would therefore be relevant and interesting to examine the role of law in 'adaptive authoritarianism'

by disaggregating the state, both in terms of central and local governments, Party-state, and formal and informal practices. I focused this research on formal legal institutions to engage directly with the China-related literature on regime resilience and the broader literature on authoritarianism, as these overwhelmingly looked at formal institutions of the state, and legal institutions such as the judiciary. However, there are a wealth of informal practices through which the Party-state extends its power, including the accommodation of collective action – judges and government officials stepping outside of the courtroom to manage conflict (Xu and He, 2010). A study of how these informal practices operate within the legal system and the degree to which they extend authoritarianism as new forms of ‘adaptive governance’ was beyond the scope of this thesis, but in-depth research in courts at different levels to deepen the findings from a law *in* society approach would be valuable.

Moreover, some readers may feel that not enough focus was placed on the implementation of labour laws, as this could add variation to the degree that laws sustain authoritarianism, to the amount of labour unrest within companies and industries, and lead to different levels of understanding and support of the law by workers. The study of legal implementation could also aid the assessment of how effective laws are as mechanisms of governance. The legal implementation question was once part of this research at its early stages, but due to the nature and time constraints of the fieldwork, it was left unresearched and I make no claims about it. This research direction would also have led to a whole different set of questions to those asked in this research, such as how and why do companies comply with the law? Is there any difference across industries and types of company? How and why do labour inspectorates and government officials monitor and render compliance with the law? Indeed, addressing these questions will provide further evidence as to how and why legal institutions, laws in particular, sustain authoritarianism, if indeed they do.

In relation to LAL NGOs, some readers may argue that the sample I based this research on limits the generalizability of the claims hereby made on labour NGOs

more generally. The fact that the bulk of this research is based on three in-depth case studies of LAL NGOs in Beijing can disguise organizational differences and regional variations among LAL NGOs. Arguably, Beijing being the capital and political centre of China has a tighter political environment, whereas Guangdong Province has usually enjoyed a more experimental (and arguably open) political atmosphere, where civil society organizations have been able to flourish and even behave in more overtly politically challenging ways. The political opportunities available under the various political economies in China therefore can favour LAL NGOs taking a variety of mobilization strategies and engaging in different forms of activism. Indeed, it can be argued that labour NGOs in the Pearl River Delta have utilized a broader range of actions if compared to those in Beijing, specifically if compared to the LAL NGOs hereby examined which mainly focus on legal mobilization. Therefore, the political opportunities LAL NGOs and NGOs more generally have across different regions in China should be further examined to better understand the factors that account for variation in NGOs' activist behaviour.

Despite regional differences in LAL NGOs' behaviour, with three in-depth case studies of NGOs X, Y and Z, and comparative evidence of five other NGOs in Beijing and of labour NGOs in three other locations in China (Wuhan, Guangzhou and Shenzhen), I triangulated, and can claim that, to the best of my knowledge, the institutional arrangement for LAL NGOs is not restricted to these three cases in Beijing. Also, even though the specific institutional arrangements might vary with other types of NGOs (which need not seek approval of the MOJ but that of another governmental department relevant to the professional area of the NGO, for example, the Ministry of Health, Ministry of Environmental Protection or corresponding departments at the administrative level), the principles remain. Some NGOs might nevertheless see some changes coming under the new Law on the Administration of Overseas Non-Governmental Organizations (NPC. 2016).

Moreover, the generalizability of the findings hereby presented can be limited not only by regional variation, but also by organizational differentiation: mobilization

strategies can vary depending on organizational characteristics such as registration status, sources of funding (publicly or privately funded NGOs), or if comparing LAL NGOs with privately run law firms, trade union and governmental legal aid centres. In this thesis, NGOs Y and Z illustrated similar organizational behaviour modelled to private law firms, and all three NGOs X, Y and Z displayed similar mobilization activities among themselves and if compared to Legal Aid Centres L and G, which are university-based (publicly funded) centres. There are noticeable differences in the mobilization activities of NGOs X, Y and Z on the one hand, and NGOs A, C and I, and Law Firm D on the other, which indicate both regional and organizational variation. Therefore, the generalizability of the evidence hereby presented is limited by the representativeness of the empirical samples, calling for a more detailed examination of the factors that determine the differences in labour NGOs' mobilization strategies and by extension, their political role *vis-à-vis* the Party-state.

A particularity of the Chinese case not seen elsewhere (with the possible exception of Vietnam), is that the malfunctioning and inefficiency of the trade union (ACFTU) in terms of representing workers' interests, and of the Labour Bureaus and the judiciary to implement and protect workers' legal rights, have caused labour NGOs to come into existence and to then attempt to fill in the gaps, assuming a significance over and above what comparative NGOs hold in other contexts where there is a plurality of trade unions, such as in Indonesia (Ford, 2006; Howell, 2015). This might be peculiar to the Chinese case and the increasingly interesting role these actors take and the pressure they might put on the ACFTU in terms of compelling it to reform is yet to be seen.

Finally, evidence to prove workers' voices and actions is drawn from a selection of 27 unstructured interviews with a variety of workers. This sample might feel small for generalizable purposes. However, these 27 cases were selected from an uncountable of open-ended conversations I engaged in during fieldwork due to their empirical value in showing the existence of conceptions of rights and justice that differ from those in the legal codes. To the best of my knowledge, there had been no empirical evidence before in Anglo-Saxon academia to prove what Perry's

(2008, 2009) ‘rules consciousness’ actually means in contemporary China. I have addressed this with a small but rich selection of workers, and indeed advocate for further research along this line. Furthermore, as Cai (2008: 91) pointed out some time ago, “the relationship between citizens’ use of permitted modes and illegal modes of action has not been adequately addressed. (...) There is no systematic research on the likelihood of citizens’ legal action escalating into illegal modes. Analysis of this likelihood illuminates the degree of pressure faced by the Party-state in maintaining social order”. I have partly addressed this in this thesis but there is a need for further systematic research, using mixed methods, on the coexistence or coordinated use of legal and illegal forms of action by workers, and/or labour NGOs. In the course of this study I did not find evidence of LAL NGOs organizing political campaigns or supporting workers’ activism (with the exception of Law Firm D which supported workers engaging in autonomous collective bargaining), in parallel with legal mobilization. This does not mean that it does not happen. The study of the how and why and who causes it to happen will shed much light on the politics of resistance in authoritarian China.

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Appendix 1. List of interviews

No	Code	Given name	Description	Location	Date of Interview
NGO X (9)					
1	X1	Executive director Dang	Executive director and legal advisor	Beijing	24 May 2012
2	X2	Lawyer Luo	Volunteer lawyer	Beijing	6 June 2012
3	X3	Lawyer Ning	Volunteer lawyer	Beijing	11 Sept. 2012
4	X4	Lawyer Zuo	Volunteer lawyer	Beijing	17 Sept. 2012
5	X5	Legal personnel Ma	Legal personnel and project assistant	Shenzhen	25 Sept. 2012
6	X6	Lawyer Xia	Volunteer lawyer	Shenzhen	28 Sept. 2012
7	X7	Executive director Dang	Executive director	Beijing	23 Nov. 2012
8	X8	Lawyer Zhuang	Volunteer lawyer	Beijing	7 Dec. 2012
9	X9	Lawyer Ting	Volunteer lawyer	Beijing	17 Jan. 2013
NGO Y (12)					
10	Y1	Legal researcher Ying	Legal researcher	Beijing	2 May 2012
11	Y2	Legal researcher Ying	Legal researcher	Beijing	30 Oct. 2012
12	Y3	Lawyer Guo	Pro-bono lawyer	Beijing	18 Sept. 2012
13	Y4	Lawyer Ai	Intern lawyer	Beijing	14 Sept. 2012
14	Y5	Lawyer Zhu	Pro-bono lawyer	Beijing	31 Oct. 2012
15	Y6	Lawyer Zhu	Pro-bono lawyer	Beijing	3 Sept. 2012
16	Y7	Lawyer Zhu	Pro-bono lawyer	Beijing	21 Nov. 2012
17	Y8	Lawyer Wei	Intern lawyer	Beijing	21 Nov. 2012
18	Y9	Lawyer Ou	Pro-bono lawyer	Beijing	4 Dec. 2012
19	Y10	Lawyer Lin	Pro-bono lawyer	Beijing	26 Dec. 2012
20	Y11	Lawyer Hou	Pro-bono lawyer	Beijing	25 Jan. 2013
21	Y12	Lawyer Pan	Director	Beijing	25 Jan. 2013
NGO Z (13)					
22	Z1	Lawyer Song	Deputy Director/Lawyer	Beijing	23 May 2012

23	Z2	Lawyer Jian	Pro-bono lawyer	Beijing	13 Sep. 2012
24	Z3	Lawyer Xue	Pro-bono lawyer	Beijing	14 Sep. 2012
25	Z4	Lawyer Peng	Pro-bono lawyer	Beijing	20 Sep. 2012
26	Z5	Lawyer Zeng	Intern lawyer	Beijing	20 Sep. 2012
27	Z6	Lawyer Tian	Pro-bono lawyer	Shenzhen	26 Sep. 2012
28	Z7	Lawyer Yan	Pro-bono lawyer	Beijing	19 Dec. 2012
29	Z8	Lawyer Cao	Pro-bono lawyer	Beijing	20 Dec. 2012
30	Z9	Lawyer Gu	Pro-bono lawyer	Beijing	20 Dec. 2012
31	Z10	Lawyer Hao	Pro-bono lawyer	Beijing	26 Dec. 2012
32	Z11	Lawyer Song	Deputy director and Lawyer	Beijing	22 Jan. 2013
33	Z12	Lawyer Wang	Pro-bono lawyer	Beijing	22 Jan. 2013
34	Z13	Lawyer Fu	Director	Beijing	30 Jan. 2013

NGO J (1)

35	J1	Zhang	Executive director	Beijing	10 May 2012
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NGO A (1)

36	A1	Lin	Director	Beijing	6 Nov. 2012
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NGO B (1)

37	B1	Shu	Legal advisor	Beijing	14 Nov. 2012
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NGO R (1)

38	R1	Lei	Project assistant	Beijing	31 Dec. 2012
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NGO I (5)

39	I1	Staff	All 5 members: Director, programme manager and staff	Beijing	28 Dec. 2012
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NGO C (1)

40	C1	Yong	Ex-worker and NGO director	Wuhan	19 Oct. 2012
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Legal Aid Centre L (2)

41	L1	Feng	Legal consultant	Wuhan	21 Oct. 2012
42	L2	Lawyer Yu	Legal consultant	Wuhan	22 Oct. 2012

Legal Aid Centre G (1)

43	G1	Lawyer Ao	Legal consultant	Guangzhou	3 Jan. 2013
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Law Firm D (3)					
44	D1	Lawyer Eng	Lawyer	Shenzhen	25 Sept. 2012
45	D2	Lawyer Ren	Director	Shenzhen	6 Jan. 2012
46	D3	Lawyer Chao	Lawyer	Shenzhen	6 Jan. 2012
Citizen representative (1)					
47	Ti	Lawyer Bo	Citizen representative / 'Black market' lawyer	Shenzhen	6 Jan. 2012
Labour experts (7)					
48	E1	Labour Expert Kang	Academic	Hong Kong	March 2012
49	E2	Labour Expert Da	Academic	Hong Kong	March 2012
50	E3	Labour Expert Gong	Trade union scholar, Academic	Beijing	9 May 2012
51	E4	Labour Expert Mo	Academic	Beijing	26 Nov. 2012
52	E5	Labour Expert Lai	Academic	Beijing	2 May 2012
53	E6	Labour Expert Qiao	Academic	Beijing	17 May 2012
54	E7	Labour Expert Mao	Trade union scholar, Academic	Beijing	18 May 2012

No	Code	Given name	Description	Location	Date of Interview	Gender, age and origin
Workers (sample of 27)						
55	W1	Worker Zhang	Construction worker	Construction site, Haidian district, Beijing	20 April 2012	Man, 50, Shandong
56	W2	Worker Yao	Construction worker	Construction site, Haidian district, Beijing	20 April 2012	Man, 60, Shandong
57	W3	Worker Zhang	Construction worker	Construction site, Haidian district, Beijing	20 April 2012	Man, 57, Shandong
58	W4	Worker Li	Construction worker, <i>baogongtou</i>	Construction site, Haidian district, Beijing	20 April 2012	Man, 45, /
59	W5	Worker Shao	Construction worker	Construction site, Haidian district, Beijing	1 May 2012	Man, 52, Anhui
60	W6	Worker Di and others	Construction workers	Construction site, Haidian district, Beijing	4 May 2012	Men, 50s-60s, Henan
61	W7	Worker Da	Taxi driver	Haidian district, Beijing	5 May 2012	Man, late 30s, Beijing
62	W8	Worker Tan	Construction worker	Construction site, Haidian district, Beijing	14 May 2012	Man, mid 50s, /
63	W9	Worker Chang	Construction worker	Construction site, Haidian district, Beijing	18 May 2012	Man, 56, Shandong
64	W10	Worker Nu and others	Construction workers	Construction site, Haidian district, Beijing	25 May 2012	Women, 44 and late 40s, 2 from Anhui, 3 from Henan
65	W11	Worker Xi	Construction worker	Construction site, Haidian	25 May 2012	Woman, 39, Henan

				district, Beijing		
66	W12	Worker Ju	Worker at furniture shop	NGO Z, Beijing	8 June 2012	Woman, 59, Anhui
67	W13	Worker Bao	Construction worker, <i>baogongtou</i>	NGO Z, Beijing	8 June 2012	Man, 50s, Sichuan
68	W14	Worker Wan	Construction worker	NGO X, Beijing	11 June 2012	Man, 46, /
69	W15	Worker Ying	Office worker	NGO Y, Beijing	12 June 2012	Woman, mid 20s, /
70	W16	Worker Gan	Unidentified worker	NGO X, Beijing	16 June 2012	Woman, 22, Hebei
71	W17	Worker Ai	Injured worker	NGO Y, Beijing	21 June 2012	Woman, late 30s, /
72	W18	Worker Xu	Labour dispatch worker	NGO Z, Beijing	27 June 2012	Woman, 33, Shanxi
73	W19	Worker Shan	Construction worker	NGO Y, Beijing	28 June 2012	Man, 63, Henan
74	W20	Worker Man	Construction worker	NGO Y, Beijing	28 June 2012	Man, early 50s, /
75	W21	Worker Ma	Mother of suicide worker	NGO Y, Beijing	28 August 2012	Woman, late 60s, Henan
76	W22	Daxing Workers	8 Workers in yogurt factory	NGO Y, Beijing	28 August 2012	6 men, 2 women, 20s, /
77	W23	Worker He	Unemployed worker	NGO X, Beijing	11 Sept. 2012	Woman, 40s, Henan
78	W24	Worker Liu	Security guard	NGO X, Beijing	11 Sept. 2012	Man, 40s, Shanxi
79	W25	Daxing Workers	3 workers in clothing factory	NGO X, Beijing	17 Sept. 2012	Men, early 20s, 2 from Sichuan, 1 from Jiangxi
80	W26	Worker Shou	Construction worker	NGO Y, Beijing	16 Oct. 2012	Man, late 20s, Hebei
81	W27	Workers	5 striking workers in toy factory	Law Firm D, Shenzhen	6 January 2013	Men, 20s and 30s, /

Appendix 2. Analytical pathways

Research questions	Analytical approach	Object of analysis	Research method and data	Codes / indicators	Organized in Chapter
<i>what functions do labour laws fulfil for the authoritarian state?</i>	Historical institutionalism	Formal institutions (labour laws), labour regime, labour disputes	Law (documents), historical secondary research, statistics on labour disputes	Labour regime, economic reforms, legal institutions, number and nature of labour disputes	3
<i>how and why does the Party-state prevent lawyers and civil society organizations from politically mobilizing the labour laws?</i>	Institutionalism	Formal institutions	Documents (laws and regulations), semi-structured interviews with lawyers and LAL NGO staff	Governance institutions of lawyers and NGOs: legal profession, legal practice, internship, ACLA membership, NGO registration, funding	4
<i>to what extent does the mobilization of the law by legal actors such as lawyers and civil society organizations initiate broad political and social mobilization to challenge the authoritarian state?</i>	Law and society (law and social movements)	Law in action: legal processes, social relations, legal mobilization	Participant observations at LAL NGOs, semi-structured interviews with LAL NGO staff and lawyers	LAL NGO's legal mobilization, lawyer-worker relation, worker activism?	5

<p><i>to what extent are labour laws understood and used by workers? How and why do workers perceive, support and use labour laws? To what extent does this represent a challenge for the authoritarian state?</i></p>	<p>Law in society</p>	<p>Ordinary workers' perceptions, understandings, uses of the law; social norms</p>	<p>Unstructured interviews with workers, participant observations, semi-structured interviews with lawyers</p>	<p>rights consciousness (rights protection), rules consciousness (morality, fairness, social relations), legal action (mediation, arbitration, litigation, petitioning), illegal action (violence, strike, protest, collective action)</p>	<p>6 and 7</p>
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