Original Article

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Four Patterns in the Evolution of Dismissal and Resignation: An Epitome of the Labor Law Regime during Forty Years of Reform and Opening Up

https://doi.org/10.1515/me-2020-0005
Received May 15, 2020; accepted May 15, 2020

Abstract: Dismissal and resignation as well as dissolution and termination are two pairs of associated and important concepts for us to understand the ending regime of China's labor relationship. Facing the paradox in the development of labor market, these four concepts are combined with the propositions of autonomy and governance. During the era of reform, they have been combined into four types of systematical patterns: the equivalent of dismissal and resignation, the correspondence between dismissal and resignation, the opposition between dismissal and resignation, and the comparison of dismissal and resignation. From the wandering of labor law-making between "separation" and "unification," we can see the difficulties of balancing the governance and autonomy in social law. As we are again at the crossroads of reflecting back and looking forward, investigating the logic of the evolution and historical performance of these four patterns will not only help us to better understand the current features of China's labor market system, but also lay the theoretic foundation for its development in the next decade.

Keywords: autonomy, dismissal, dissolution, governance, resignation, termination

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المنارة للاستشارات

1 Introduction: A Paradox in the Labor Market Development

Dismissal and resignation are actions to end legal labor relationships according to the manifestation of intention by the employer or the employee. As a pair of concepts, they only appear in a labor-market oriented environment. In the 1980s, China began to use the wordings of "dismissal" and "resignation."[1] The Labor Law promulgated in 1994 integrated both concepts into the dissolution and termination of labor contract. Through historical evolution they are endowed with dual implications. As a theoretical category, dismissal and resignation become a pair of implicit tools of analysis; as a system category, dismissal and resignation would explicitly emerge as some marginal legislative concepts during the reform era, which were applied to foreign-invested enterprises in early years of reform and to today's new employment relations. As dissolution and termination have been at the core of labor relations legislation all the time, tensions between these two pairs of concepts have arisen in a dual-track legal environment. In the past 40 years, every decade witnessed a major adjustment in Chinese labor legislation. In each adjustment, relationships were redefined between the four concepts. History has left us with systematic patterns with distinct features of their times as well as many theoretical debates.

In Chinese social law, there is a world-wide puzzle behind the four concepts of dismissal, resignation, dissolution, and termination, which we may call the labor market paradox. On the one hand, seen from the market economy perspective, the uncertainty of continuous contracts implies constant changes of total consideration as time goes by. As the employment contract lasts, contracting parties have to trust each other; there is no reason for the labor relationship to continue if mutual trust is absent. At the same time, both parties also require a certain degree of freedom. Accordingly, the right of formation is incorporated into every country's labor law system. On the other hand, seen from the perspective of social problem, the right of formation is "the right to annul a legal relationship and cause changes in the right," which has the characteristic of "implementation by unilateral action of forming a declaration."[2] The counterparty to the right of formation can only tolerate or admit such effect, that is, the counterparty must accept the other party's decision. Such right, as a "power in the private law," associated with the real

1 July 26, 1980, the State Council promulgated the Regulations of the People's Republic of China on Labor Management in Chinese-foreign Equity Joint Ventures.

2 Carl Larenz and Manfred Wolf: The Right of Formation in Germany Civil Law, translated by Sun Xianzhong, Global Law Review, 2006 edition, No. 4.

المنارة للاستشارات

situation of strong capital and weak labor, will often result in the abuse of rights. From the dual economic and social perspectives, the former tends to emphasize "flexibility," while the latter "stability." Around this conflict, various theoretic debates are launched. With the Labor Law promoted in the 1990s and the Labor Contract Law in the 2000s, Chinese scholars, based on their own value judgments, are keen to import academic thoughts and legislative experiences from other countries to standardize Chinese system design, which also constitutes the basic way of academic study in China. In the author's opinion, this issue could be interpreted from two aspects, logic of reasoning and logic of history.

From the logic of reasoning perspective, the most important difference between dissolution and termination of a contract is whether it has the retroactive effect.[3] A labor contract is a continuing contract. If one party breaches the contract, the contract relationship can only be terminated as it cannot be reinstated.[4] Therefore, instead of dissolution, termination shall be more frequently used in the context of labor contract. Dismissal and resignation are actions that directly end the labor legal relations according to the manifestation of intention by the employer or the employee, which normally are the hypogyny conception of termination in most countries as a right of formation. Dismissal and resignation, as the marginal legislative concept in China, are also used in the sense of termination. The problem is, why does the Chinese labor law retain the wording of dissolution other than termination, and why dissolution has always been more important in systematic design than termination? This is a crucial issue for understanding the design of Chinese labor law system. Due to historical reasons, the concept of dissolution in China is associated with the social law idea of protecting labor. In addition, it also embodies governance in the form of public law regulating the behavior of employers. As a result, dissolution always stands at the core of the labor law system. In line with the mainstream opinion, Chinese labor law scholars basically task labor law with protecting labor, playing a social role of Regulation. Their view tends to exaggerate the influence of the logic of reasoning.

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3 Professor Wang Jiafu has emphasized in his early writings that the main features of the dissolution of contract include the "parties to the contract should bear the obligation of restitution." As he explains, "the dissolution of contract means that after the establishment of the contract relationship, to eliminate the relationship with retroactive effect by dissolution action, and the dissolution of contract shall have the effect of restitution. In contrast, the termination of contract is only to eliminate the relationship but the parties do not have the obligation to make restitution." Wang Jiafu et al., Contract Law, China Social Sciences Press, 1986 edition, page 190–195.

4 "Termination is a manifestation of intention of one party to eliminate the continuing contractual relationship in the future. It is a legal system parallel to dissolution." Edited by Wang Jiafu: Chinese Civil Law, Civil Law Credit Rights, Law Press, 1991 edition, page 362.

المنارة للاستشارات

From the logic of history perspective, the complexity of the reform of labor institutions does not lie in the establishing a new institution, but in the reconstructing of existing ones. The collision between the new and old institutions, and the adjustment of the new and old structure of interests, will give rise to irregularities in the legal system. While scholars make value judgments on the Labor Law and the Labor Contract Law, history shows its own unique logic. In author's opinion, any kind of academic logic will have its lasting value only when it conforms to the logic of historical development.

2 History: Four Patterns of Ending Labor Relations

As theoretical categories, the employer's termination or dissolution of the labor contract means dismissal, while the employee's termination or dissolution of the labor contract means resignation. The four concepts of dismissal, resignation, dissolution, and termination, when each combining with the proposition of autonomy or regulation, will result in a variety of paradigms. Four systematical patterns have emerged during the past 40 years of reform and opening up. Once dismissal and resignation are treated as institutional elements, their relationships can be summarized as follows: the equivalence of dismissal and resignation, the correspondence between dismissal and resignation, the opposition between dismissal and resignation, and the comparison of dismissal and resignation.

2.1 The Relationship of Equivalence in the 1980s

Dismissal and resignation are equivalent to each other. Regarding their relationship, more emphasis shall be given to equality rather than correspondence. It is fair to characterize the relationship as the model of "correspondence" plus "equality." Dismissal and resignation, as legislative concepts, were originally used to regulate labor relations in foreign-invested enterprises; both fall into the category of termination. At the same time, state-owned enterprises used the concepts of expulsion, removal, and discharge, all of which fall into the category of dissolution. The institutional arrangement of equivalent is determined by the characteristics of China's labor relations. Unlike wordings in the Labor Law and the Labor Contract Law, dismissal, resignation, expulsion, removal, and discharge were explicit legislation concept in the 1980s, while dissolution and termination of the labor contract were implicit theoretical concepts used for analysis.

For state-operated enterprises, the non-fixed term labor relation is understood as public law relationship with indefinite period and cannot be terminated at will.

المنارة للاستشارات

The dissolution of a civil contract is a penalty on the defaulting party which may be applied if one party refuses to perform the contract or fails to perform the contract as agreed. The "dissolution of contract" is introduced under the section of "default and remedy,"[5] which is similar to the Chinese Contract Law.[6] Dissolution in labor relations integrates the element of public law into the remedy, which is stipulated by national laws or policies and is mandatory. There were a large number of state-owned and state-operated enterprises in China at that time, and the state exercised strict and comprehensive control over labor relations. Enterprises did not have the right of dismissal, and laborers did not have the right to resign. In this equivalent relationship, it is understood that there is an unbreakable reliance of interests between the enterprise and laborers. The fully centralized regulatory system lacked room for autonomy, where the laborer's reliance rested on the state, which was an obligation under public law. With the start of economic reform, the concepts of expulsion, removal, and discharge emerged.[7] These three concepts were all defined from the perspective of dissolving labor relations: when laborer seriously violated labor discipline prescribed by the state, and the employer could exercise the right of dissolution on behalf of the state. In equivalence, the laborer did not have the right to resign, and the laborer's transfer from one enterprise to another was mainly achieved through government negotiation.

As for foreign-invested enterprises, a set of termination system with written contract as the core has been formed during the era of reform and opening up,[8] where the terms of dismissal and resignation were adopted.[9] From the principle of

5 Li Yongjun: Contract Law, Law Press, 2005 edition, page 703.

6 Article 97 of China's Contract Law stipulates that "After a contract has been dissolved, the performance of any obligations which have not been performed shall be terminated; where obligations have already been performed, depending on the situation of the performance and the nature of the contract, a party may demand a reinstatement, or taking other remedial measures, and may also demand compensation for any losses."

7 The Regulations on Rewards and Penalties for Employees of Enterprises, came into effect in 1982, contained provisions for expulsion and removal due to serious violations of discipline. The Provisional Regulations on the Discharge of Employees Disciplined by State-operated Enterprises, implemented in 1986, has provisions on the discharge of employees who violate disciplines.

8 July 26, 1980, the State Council promulgated the Regulations of the People's Republic of China on Labor Management in Chinese-foreign Equity Joint Ventures.

9 Article 2 of the Regulations of the People's Republic of China on Labor Management in Chinese-foreign Equity Joint Ventures stipulates: "For employees of joint ventures, the employment, dismissal and resignation, production and work tasks, wages and rewards, working hours and holidays, labor insurance and living benefits, labor protection, labor discipline and other matters are stipulated through the conclusion of labor contracts."

المنارة للاستشارات

civil contract, the termination of a contract refers to the full elimination of contractual rights and obligations; it mainly applies to non-default situations,[10] such as the termination of contract due to performance, negotiation, offset or combination. Dismissal and resignation, as right of formation, which have the effect of eliminating legal relationship when the manifestation of intention by one party reaches the counterparty, is a contract termination. In order to balance the interests between the parties, dismissal or resignation must be based on the labor contract.[11] The labor contract referred herein includes the labor contract entered into by the enterprise and the labor union, as well as by the enterprise and the individual laborer, where the former one has the nature of collective contract. Dismissal and resignation, under a relationship of equivalence, realized the autonomy of employers and employees through the agreements reached in advance.

From the 1980s to the early 1990s, termination in the case of foreign-invested enterprise and dissolution for state-operated enterprise were completely separated in law for over a decade. This "dual track mechanism" formed two closed systems of labor relations. As a result, the adjustment of labor relations in the two systems was in complete opposition to each other. The two contrasting institutional elements of "regulation" versus "autonomy" applied to state-owned enterprises and foreign-invested enterprises, respectively.

2.2 The Relationship of Correspondence in 1990s

There is a correspondence between dismissal and resignation. As two institutional elements, dismissal and resignation are not required to be equal. In the 1990s, the principle of giving preference to labor was raised in law making.[12] The adoption of dissolution and termination into the Labor Law can be regarded as the legislation model of "correspondence" plus "preference to labor."

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10 See Wang Liming: Theory of Breach of Contract, China University of Political Science and Law Press, 1996 edition, page 518–519.

11 July 26, 1980, the State Council promulgated the Regulations of the People's Republic of China on Labor Management in Chinese-foreign Equity Joint Ventures, Article 2: "Labor Contract, was collectively signed by the joint venture and the trade union of the enterprise; smaller joint ventures can also sign with individual employees."

12 At the end of 1980s, the author emphasized "protecting labor" as one of the basic principles of labor law, which then differed from the mainstream view in traditional jurisprudence. He later characterized the principle as "tilting to one side in law-making." Dong Baohua, Cheng Huiying: China Labor Jurisprudence, China University of Political Science and Law Press, 1992 edition, page 80.

المنارة للاستشارات

Termination of labor contracts achieved autonomy. Fixed term contracts may be "terminated at the expiration"; non-fixed term contracts may be "terminated when agreed conditions occur." In the meantime, under the concept of termination, dismissal and resignation were included as institutional arrangements of private law. According to Provisional Regulations on Institution of Labor Contract System in State-Operated Enterprises, "performance of the labor contract shall be terminated at its expiration"; and "the contract can be renewed with full agreement of both parties."[13] The Labor Law keeps a similar provision.[14] At first glance, it seems to be expressed in terms of temporary contracts (nowadays many labor law academics still misunderstand Chinese-style fixed-term contracts), but that is not true. From the perspective of continuing contract theory, only the loss of reliance relationship may result in the termination of a continuing contractual relationship. Actually, the institutional arrangement of the Labor Law is that, when the contract expires or agreed termination conditions occurs, the Chinese-style written form of contract is terminated and the constraint of written labor contract is relieved, thus either party has an opportunity to dismiss or resign at their own will. However, at that moment, the labor relation as a continuing relationship persists infinitely. In fact the labor relationship is not terminated as long as the reliance basis still exists between the parties. The parties may continue to maintain the existing contractual relationship by the agreement of renewal; the length of service, as a main factor in compensation, will be calculated continuously. In this way, the requirements of continuing contract are met by the combination of "termination due to expiration" and "agreement of renewal."

The dissolution of labor contract has incorporated regulation. To protect laborer, dismissal (dissolution by the employer) and resignation (dissolution by the laborer) are subject to different restrictions. A strong preference to one party in law-making is thus incorporated into the right of formation. Dissolution by employers is subject to strict public law restrictions. China escalated legitimate reasons of dismissal generally used in other countries into statutory reasons, and further added the statutory notice period, statutory economic compensation, and others. The dissolution of labor contract by the employer must comply with statutory reasons, procedures (notice period), and treatment (economic

13 Article 9 of the 1986 Interim Provisions on the Implementation of the Labor Contract System in State-operated Enterprises stipulates: "The term of a labor contract shall be determined through consultation between the enterprise and the workers. Performance of the labor contract shall be terminated at its expiration. Due to production and work needs, the contract can be renewed with full agreement of both parties. The labor contract for rotation workers must be terminated at the expiration of the contract."

14 Labor Law, Article 23: "A labor contract shall be terminated on the expiration or when the agreed termination conditions occur."

المنارة للاستشارات

compensation), annulling the parties' prior agreement. Many parts of the agreement fell into the scope of labor supervision,[15] and subject to administrative control. In contrast, laborer is relatively free to dissolute labor contract: they can resign without any reason as long as a 30 days advanced notice is given. Such institutional arrangement is chosen to accommodate the practical needs of senior employees with a non-fixed term labor contract – when the state-operated enterprises implemented the labor contract system, generally there is no pre-agreed termination conditions. As there is no "termination due to expiration," the labor relations remain heavily regulated.

In the 1990s, after the issuance of the Labor Law, enterprises of different types of ownership were relieved from their closed system of labor relations, giving birth to a unified system. The institutional elements of autonomy and regulation are allotted to termination and dissolution, respectively. Through the combination of termination and dissolution, the private law and the public law integrated. A uniform legal system arose for foreign-invested enterprises, state-owned enterprises, and private-owned enterprises.

2.3 The Relationship of Opposition in the 2000s

Dismissal and resignation are in opposition to each other. The termination and dissolution by employers (dismissal) are highly regulated, while the termination and dissolution by laborer (resignation) are highly free. Neither equivalent to nor in correspondence with each other, dismissal and resignation are designed as opposite elements. In the 2000s, starting from readjustment in thinking, the idea of unilateral protection of laborer arose in the process of making labor contract law and was finally adopted by the legislation.[16] The Labor Contract Law rectifies the Labor Law and develops its own unique institutional logic. Such rectification can be readily observed from two aspects. First, contract termination by the employer

15 As a supporting provision of the Labor Law, the Measures for Administrative Punishment for Violation of the Labor Law of the People's Republic of China promulgated by the former Ministry of Labor even include "failure to pay economic compensation in accordance with laws and regulations for dissolution of labor contracts" in the scope of labor inspection.

16 "The legislative purpose of the Labor Contract Law is to protect the legitimate rights and interests of laborers, or to protect the legitimate rights and interests of both laborers and employers? That is, to adopt 'single protection' or 'dual protection,' it is one of the 'key issue' in labor contract legislations." "During public review, one view is that the labor contract law should reflect 'dual protection,' which protects both the legitimate rights and interests of laborers and the legitimate rights and interests of employers." "But majority's opinion is that it should unequivocally protect the legitimate rights and interests of laborers," Xin Chunying, Editor: Labor Contract Law Interpretation of People's Republic of China, Law Press, 2007 edition, page 3–4.

المنارة للاستشارات

becomes dissolution; second, contract dissolution by employees becomes termination. Through such a two-way transformation, dismissal and resignation become two opposite concepts in theory.

Contract termination by the employer becomes dissolution. In the narrow sense, the corrective thinking behind the Labor Contract Law is one of legal remedy. By compressing termination upon agreement and expanding statutory termination, the right of termination normally exercised by the employer is converted into the right of dissolution that can only be exercised as a legal remedy. For the agreed period and agreed termination conditions, the Labor Contract Law adopted two type of measures, i.e. "narrowing the scope of termination" and "legalization of termination conditions." The first one expands the scope of the application of non-fixed term contracts, narrows the scope of the application of termination due to expiration, implements unilateral compulsory contracting,[17] and transforms the fixed term regime by compressing the scope of application. The second removes the clause of termination upon agreement from the essential terms of labor contract, establishes a statutory termination system, and applies the economic compensation clause of contract dissolution to contract termination, so as to apply the clause of dissolution to transform the agreed conditions system. Removing the clause of termination upon agreement is commonly viewed as to restrict the use of certain flexible human resource management, such as "weeding out the worst performing employees" or "competing for employment."[18] After the two measures of narrowing and legalization, termination by the employer becomes similar to dissolution.

Contract dissolution by employees becomes termination. The corrective thinking of the Labor Contract Law is broad. Since expanding employees' right of dissolution makes it easy for them to leave unharmonious labor relations, dissolution which would amount to breach of contract is now treated as normal termination. In the two ways of ending a labor relationship by the employee, the statutory termination is the normal method of ending the term of the labor contract which should not cause any liability; only when the employer has offered separate

17 Under the circumstances of "continuous twice contracts" or "working for ten years," laborer's unilateral offer will have the effect of concluding a non-fixed term contract, which will make the termination system not applicable fundamentally.

18 Notice by the Labor and Social Security Ministry on the Issuance of Propaganda Outline of Labor Contract Law of People's Republic of China: "Labor Contract Law canceled the Labor Law's content that employer and the employee may agree on the termination of labor contract, and made it clear that termination of labor contract is a statutory acts so that the labor contract may not be terminated unless it complies with the statutory circumstances."

المنارة للاستشارات

pay consideration, an early ending of service period or confidentiality period may involve liability for breach of contract. To give more flexibility in resignation, the legal liability of the employee for breach of labor contract has to be reduced. The Labor Contract Law thus adopts strict restrictions on liquidated damages[19] and indemnification liability[20] to enhance the freedom of employees. The scope of liquidated damages is so narrow and the standard so low that they can hardly restrict breach of contract by employees and some scholars comment that "the penalty nature of liquidated damages is lost, and there is even no way to safeguard the employer's basic investment."[21]

The tendencies for the employer's contract termination to become dissolution and for the employee's contract dissolution to become termination are based on "harmony and stability," the legislative purpose of the Labor Contract Law.[22] How to achieve "harmony" through "stability"? When it comes to specific institutional arrangements, the responsibility of stabilization is mainly assumed by the employer, whose right of dismissal is subject to regulation. From the standpoint of protecting laborer, employees are given much more freedom on resignation so that they can be released from the unharmonious labor relationship at their will. Such an institutional arrangement separates the institutional elements that have previously been integrated. The principle of regulation is now imposed on the right of dismissal by employers; the principle of freedom is attached to the right of resignation by employees.

19 Strictly limit the scope of the service period, the non-compete period, and the notice period of leaving for employees with knowledge of business secrets, and reduce the scope of funding of recruitment, training, or other special treatment in local regulations to the funding of training, and other situations such as funding of real property purchase are not allowed to set liquidated damage; the notice period of leaving for employees with knowledge of business secret is also abolished.

20 In the circumstance of funding training by the employer, if the employee violates the agreed period of service, the amount of liquidated damage shall be the lower of "the agreed liquidated damages" and "pro rata training costs in accordance with the uncompleted service period." The liquidated damages confirmed in this way may not even be able to cover the actual losses.

21 Li Jianfei, Li Minhua: Philosophical Thinking on Liability of Service Period of Labor Contract, Academic Journal of Henan Administrative Institute of Politics and Law for Officials, 2009 edition, No. 2.

22 Article 1 of the Labor Contract Law states: "This Law is formulated for the purposes of refining the labor contract system, specifying the rights and obligations of the parties to a labor contract, protecting the legitimate rights and interests of laborers and building and developing harmonious and stable labor relationships."

المنارة للاستشارات

2.4 The Relationship of Comparison in the 2010s

Dismissal and resignation bring in comparison. On the condition that traditional employment relationships are not fundamentally impacted, different laws and regulations apply to the new-type employment relationship. A mechanism of comparison and selection is thus introduced through the "dual-track system." Dissolution and termination remain as the core concepts in managing labor relations, dismissal and resignation are introduced as marginal legislative concepts. In April 2015, the CPC Central Committee and the State Council issued the Opinions on Building Harmonious Labor Relationship (hereinafter referred to as "Opinions") as a charter document guiding the development of labor relations in the new era. The Opinions reflects a deep understanding of current problems and challenges facing China's labor relations, and put forward a new stage of building harmonious labor relations. The Opinions require "to coordinate the handling of the relationship between promoting enterprise development and protecting employees' rights and interests," and accordingly the Supreme People's Court points out "to uphold the principle of paying equal attention to both the protection of the legitimate rights and interests of laborers and the maintenance of the operation and development of employers in accordance with the laws and regulations."[23] The Opinions also propose "to promote enterprises and employees to consulate and cooperate together, to co-construct mechanisms together, to create benefits together, and to share the benefit together." The sharing economy is in line with this idea, but it cannot be regulated by existing labor laws. China's new-type employment relationship allows laborers and employers to choose among applicable laws, and different regulatory methods are adopted in traditional and new-type employment relationships, and thus establish a new dual-track model.

To distinguish the traditional and new-type employment, Mr. YIN Weimin, Head of the Ministry of Human Resources and Social Security, proposed in 2016 to use the "Labor Contract Law" as a criterion: "along with social and economic development, new industries and new employment forms arise, which did not exist when the Labor Contract Law was issued."[24] When new industries that operate on network platforms constantly emerge, the sharing economy allows people to share social resources, contribute and benefit in different ways, and share economic benefits. It is also the most typical form of new-type employment

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23 November 30, 2016, the Supreme People's Court, The Eighth National Civil and Commercial Court Trial Conference (Civil Part) Minutes.

24 Ministry of Human Resources and Social Security: Opinions on Labor Contract Law on New Employment Forms, China News Network, http://www.chinanews.com/cj/2016/02-29/7777190.shtml, access date: April 11, 2018.

المنارة للاستشارات

relationships. Employees in these new business models have jobs and professional features that are different from those in the standard labor relationship models. Firms in the sharing economy develop new methods to manage employees as traditional employment methods are difficult to meet their need of flexibility and autonomy. A new dual track system emerges in the labor market of sharing economy: labor relationships and non-labor relationships. The labor service relationship becomes a typical case of non-labor relationships. Both labor service relationships and labor relationships are generated by the hiring of labor in the economy. But they are regulated by separate legal regimes and considered two distinct legal relations.

Dissolution and termination apply to traditional employment relationships. In labor relationships, stability is prized and heavy regulation often restricts the scope of adjustment. The labor law adopts a restrictive regulation that both the employers and employees have to be qualified before their relation can be included in the scope of regulation.[25] As far as employers are concerned, China's labor law does not stipulate the intention of labor relation, but only restricts it by listing its extension. The labor law does not apply as long as the employer is not enumerated under the law. As a result, the scope of qualified situations is relatively narrow. For the laborer, subject to certain standards, such as age, education, health, and capacity, the scope of qualified situations is also narrow. According to courts statistics in different localities, the cases of claiming labor relations, including under employment models in the sharing economy, have gone up in recent years; many have become high-profile labor dispute cases.[26] The People's Supreme Court emphatically issued two documents in 2015 and 2016 to "prevent the generalization of labor relationships,"[27] particularly to curb the expansion of traditional labor relationships to the sharing economy.

Dismissal and resignation apply to new-type employment or labor service relationships. In these relationships, flexibility is prized. With little state intervention, freedom of employment is enjoyed, dismissal and resignation are equivalent. Contrary to the closed adjustment method adopted in the labor law,

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25 Ministry of Labor and Social Security, Notice on Issues Relating to Confirmation of Labor Relationship (Ministry of Labor and Social Security [2005] No. 12).

26 For example, according to statistics from the Beijing First Intermediate People's Court, of the labor disputes concluded between 2010 and 2017, there were 11,053 cases involving labor relations confirmation, accounting for 51.18%. Beijing First Intermediate People's Court held a press conference of "White Paper of labor disputes trial," Chinese Courts Network, https://www.chinacourt.org/chat/chat/2018/03/id/49337.shtml, access date: May 29, 2018.

27 December 24, 2015, the Supreme People's Court's Certain Specific Issues in the Current Civil Court Trial. November 30, 2016, the Supreme People's Court, The Eighth National Civil and Commercial Court Trial Conference (Civil Part) Minutes.

المنارة للاستشارات

China's labor service relationships are wide in scope. Employees are paid remuneration for labor service. Any entity that cannot be included in the scope of the labor law can be regulated by civil law as a labor service relationship. The operation mode of sharing economy embodies a triangular relationship of "supplier – sharing platform – consumers," different from the traditional linear relationship of "workers – enterprises – consumers."[28] The sharing economy platforms connect the supply and demand sides, whereby goods and services change hands. As the existing labor relationships are too rigid to adapt to this flexible and autonomous development model, labor service relationships, along with various accompanying civil contracts, have become prevalent. The State Council makes it clear: "Support workers to achieve diversified employment opportunities through the use of new employment models."[29]

Dissolution and termination stand in comparison with dismissal and resignation. The principle of regulation applies to traditional employment relationships, while the principle of autonomy to new-type employment relationships. Outsides the adjustment scope of standard labor relations, the traditional employment relationships are allowed again to play an important role, which stand in comparison with the standard labor relationships.

3 Similarity: Dismissal and Resignation in the 1980s and 2010s

Under certain "dual track" institutional arrangements, dismissal and resignation, as two institutional categories in the labor law, changed from theoretical concepts to a pair of marginal legislative concepts to exert an impact on the core concepts (i.e. dissolution and termination). Looking back at the four decades of reform, this situation mainly happened at the first as well as the last decade. In the early of 1980s, beyond the domain of state-owned enterprises, the foreign-invested enterprises emerged. Consequently, in addition to the unified labor policies and regulations, the existing state-owned enterprises and emerging foreign-invested enterprises began to develop different adjustment methods. Another situation was at the end of 2010s. In addition to the highly regulated existing traditional labor relations, the civil contractual relationships, such as labor service relationships, were used to adjudicate the new-type employment relations in the new economy.

28 Liu Genrong: Sharing Economy: Disruptor of Traditional Economic Model, The Economist, 2017 edition, No. 5.

29 Opinions of the State Council on Doing a Good Work in Employment and Entrepreneurship in the Present and Certain Period in the Future (Guo Fa [2017] No. 28).

المنارة للاستشارات

These two situations turned out to be extremely similar. While existing legal adjustments still dominated labor relations, disunity began to emerge out of unity. New labor relations and traditional ones formed a dual track system. As marginal concepts prevailing in new labor relationships, dismissal and resignation were understood as equivalent and used as termination, while dissolution was basically kept out. Since China's dissolution system is subject to state regulation, the use of dismissal and resignation amounts to deregulation. Huge contrast with the core dissolution system. Both the 1980s and 2010s witnessed the rise of a "dual track" system in the labor law. The labor market paradox evolved into a reality where termination and dissolution split and went their own distinct ways. The existing traditional labor relationships and emerging new labor relationships were subject to completely different modes of adjustment.

The existing labor relationships are the primary employment relations, where the adjustment mode of dissolution applies. In the paradox of the labor market, the emphasis on the reality of strong capital against weak labor would easily lead to the social logic of abusing rights, constraining the autonomy of interested parties. In the 1980s, the state-operated enterprises were not market-oriented, and the labor relations were only subject to three modes of dissolution: expulsion, removal, and discharge. In the 2010s, subject to the restriction of Labor Contract Law, the market-oriented labor relations were greatly weakened. In both periods, labor relations were deeply subject to regulation. The infinite continuity features of continuing contracts are embodied in the indefinite term employment contracts, which can also be called non-fixed term contracts. During the two decades of the 1980s and 2000s, the Chinese-style lifetime employment was promoted in the former and non-fixed term contracts in the latter; for both, dissolution was not allowed without reasons prescribed by law. The goal of high stability was achieved through the use of strict statutory regulation. The social logic of the labor market paradox was stressed at the expense of the market logic of continuing contracts.

Emerging labor relationships constitute the secondary employment relationships, where only termination applies. In the labor market paradox, the market logic is to emphasis that continuing contractual relationships need to empower the parties to have the right of formation.[30] Continuing contract parties have the characteristics of interdependence, and there is no reason to continue a labor

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30 Larenz and Wolf summarized the right of formation as: "refers to the right of a particular person that he/she is entitled, is implemented through the formation of a unilateral act, aiming at establishing a legal relationship, or determining the content of a legal relationship, or changing a legal relationship, or terminating or abolishing a legal relationship which cause the right and obligation relationship to change." [Germany] Carl Larenz, Manfred Wolf: The Right of Formation in Germany Civil Law, translated by Sun Xianzhong, Global Law Review, 2006 edition, No. 4.

المنارة للاستشارات

relationship if it has lost its reliance basis. The US employment system reflects this idea, in which non-fixed term contracts are viewed as contracts that can be terminated at will. Dismissal and resignation, as a negative formation right, aim to eliminate the labor service relationship which has no reliance basis. Both the foreign-invested enterprises' labor relations in 1980s and the new-type employment relations in 2010s are regulated by the highly flexible termination system under private law. The difference is that, the basis for exercising formation right in foreign-invested enterprise in 1980s is the labor contract agreed by both parties, while the basis for the current new-type employment relation is industry practices, which use various forms of contract, including the labor service relationships, and implement at will dismissal and resignation. The latter is more flexible than the former.

The primary and secondary relationships could transform into each other. National regulation was applied in an all-or-zero manner to state-owned enterprise and foreign-invested enterprise in the 1980s as well as labor relationships and labor service relationships in the 2010s, representing the two extreme ends of the social and market logic. This pattern allowed emerging relationships to challenge existing ones. While they stood in contrast with each other, with permission from authorities, they could be transformed into each other. With the development of foreign-invested enterprises in the 1980s, China supported and encouraged employees to migrate from state-owned enterprises to foreign-invested enterprise. Some employees were able to carry over their years of service from their former employers to the new ones. In the 2010s, full autonomy applied to labor service relationships. While labor relations were heavily regulated, the sharing economy played the most important role in providing various social services. As new modes of hiring labor, the two parties in the labor market were allowed to choose their own mode of governance. The "Interim Measures for the Administration of Online Taxi Booking Business Operations and Services" promulgated in 2016 clearly states that the platform company may "sign various employment contracts or agreements with drivers."[31] While labor relations established through labor contracts are regulated by labor laws, relationships established through mutual agreements are civil ones, not subject to labor laws. Employees are thus offered

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31 On July 27, 2016, the Interim Measures for the Administration of Online Taxi Booking Business Operations and Services stipulates that: "An online taxi booking platform company shall ensure that drivers providing services have legal qualification. In accordance with the relevant laws and regulations, an online taxi booking platform company shall, according to work duration, service frequency, and other characteristics, conclude various employment contracts or agreements with drivers and specify the rights and obligations of both parties."

المنارة للاستشارات

two choices, regulation to obtain stability or autonomy to maintain flexibility. This availability of choices benefits workers.

When the labor market paradox presents itself in extreme manners, and social administrators allow the parties to choose, there will be a contest between dissolution which reflects government regulation and termination which reflects market autonomy. In the rise of sharing economy, many drivers resigned from their traditional labor relations and joined the non-labor relations developing in the new business. In 2016, Shanghai Labor Daily reported that because a large number of drivers resigned, nearly 3000 taxis became vacant, waiting for drivers.[32] In contrast, the business of ride-hailing enjoyed rapid growth.[33] Many workers voluntarily resigned from traditional labor relations and joined non-labor relations. In 2017, total transactions of China's sharing economy approached approximately RMB 4920.5 billion, a 47.2% increase over the previous year. Among them, non-financial transactions reached RMB 2094.1 billion, an increase of 66.8% over the previous year. In 2017, the number of participants in the sharing economy exceeded 700 million, an increase of about 100 million over the previous year. The number of service providers was about 70 million, an increase of 10 million over the previous year.[34] Between regulation and autonomy as well as between stability and flexibility, workers have chosen the latter.

It is worth noticing that China's highest level of administrators were always aware of the problem of rigidity in existing labor relations in the 1980s and 2010s caused by ignoring market orientation and the lack of autonomy. In the 1980s, with the pilot application of labor contract, the new labor contract system was applied to new workers. In the 2010s, after Opinions was published, the CPC Central Committee Political Bureau,[35] National Financial and Economic Committee,[36] Minister of

32 Nearly 3000 Taxis were not Driven in Shanghai, Labor Daily, May 18, 2016, No. 5.

33 "In the past three years, Didi not only occupied a large amount of the domestic market, but also extended its global cooperation network to more than 1000 cities in North America, Southeast Asia, South Asia, and South America, covering more than 70% of the global market." State Information Center Sharing Economy Research Center, China Internet Association Sharing Economy Working Committee: China's Sharing Economy Development Annual Report (2018), released in February 2018.

34 State Information Center Sharing Economy Research Center, China Internet Association Sharing Economy Working Committee: China's Sharing Economy Development Annual Report (2018), released in February 2018.

35 In July 2016, the CPC Central Committee Political Bureau Meeting pointed out: "the focus of cost reduction is to increase labor market flexibility."

36 Financial and Economic Committee of the National People's Congress has made two statements that it will try to include the amendment of the Labor Contract Law in the future legislative plan or annual legislative plan of the NPC Standing Committee.

المنارة للاستشارات

Finance,[37] Minister of Human Resources and Social Securities had respectively stressed the importance of flexibility in labor relations,[38] promoting in a top-down approach the legislative intention to reconstruct labor relations. However, once a stable social expectation is formed in society, the mindsets shaped by prevailing ideas and logics cast a strong impact on interested parties. It is difficult to push social change through legislation in the absence of social consensus. Similar to foreign-invested enterprises in the 1980s, new forms of employment in the 2010s used such marginal concepts as dismissal and resignation to adapt to the flexibility of market development. They challenged the over-regulated traditional labor relations from outside and affected the rebuilding of traditional employment relationships in a bottom-up approach. It was a wise decision for social administrators to avail to workers the dual-track system, allowing them to compare and vote with their feet, effectively undermining the stereotype mindset. When we have to start from the edge and gradually move to the core, it clearly shows the difficulties of changing people's ideas. To understand the historical evolution of the core concept of dissolution, we have to review the next decade after the 1980s to answer the question of where the "dual-track" system went. To understand where the current dual-track system came from, we have to review the decade before to the 2010s.

4 Distinction: Dissolution and Termination in the 1990s and 2000s

When the Labor Law was first promulgated, the aim was to apply the same set of rules and regulations to various employment relationships, especially state-owned

37 Twenty days after the Opinion was published, Lou Jiwei, then Minister of Finance, publicly criticized the Labor Contract Law and criticized the Labor Contract Law three times within a year, arguing that its "disadvantages are mainly the reduction of the liquidity and flexibility of the labor market." Former Minister of Finance Lou Jiwei delivered a speech at the School of Economics and Management of Tsinghua University (April 24, 2015), a speech at the 2016 Annual Meeting of the China Economic 50 People Forum (February 19, 2016), and an Answer to the Questions by Journalist in the 2016 "Two Sessions" (March 7, 2016), criticizing the Labor Contract Law for three times.

38 Yin Weimin, Minister of Human Resources and Social Securities, stated during the "Two Sessions" in 2016 that the problems in the implementation of the Labor Contract Law are concentrated in two aspects: "First, the labor market is not flexible enough. Second, the labor cost of enterprises is high." Human Resources and Social Securities: Advice on Labor Contract Law regarding New Forms of Employment, etc.," China News Network, http://www.chinanews.com/cj/2016/02-29/7777190.shtml, access date: April 11, 2018.

المنارة للاستشارات

enterprises and foreign-invested enterprises.[39] From this movement of separation to unification emerged some core concepts for labor legislation. The following reverse movement from unification back to separation shows that these core concepts have serious drawbacks and have to be improved. We may follow the idea of the Opinions and review the two decades of legislative adjustments from the 1990s to the 2000s, with the goal being heightened stability, limited autonomy, and strict regulation. The Labor Law swapped the positions of the two pair concepts, dismissal and resignation versus dissolution and termination, to avoid the political sensitivity of "dismissal" and take into account the emerging social reality of implementing labor contract to all workers. The Labor Contract Law kept the terms of dissolution and termination, but gave them different meanings. With similar concepts, different legal backgrounds and legislative goals, the two pieces of legislation give completely different answers to the labor market paradox.

If we compare the legislative purposes of the two laws, the expression is identical: "protecting the legitimate rights and interests of workers," which reflects the social logic of protecting the weak party under social law. Subsequently, the Labor Law emphasizes "adaptations to the socialist market economy."[40] By combing the former and the latter, the market logic is emphasized as well as the social logic. The practical need of unifying all forms of employment pushes the legislation to find a balance point between two logics – "to guarantee termination upon expiration and to restrict early dissolution," which has become the balance point of flexibility and stability. The Labor Contract Law subsequently stresses "harmony and stability."[41] When combined with the phrase of "protecting the legitimate rights and interests of workers," it emphasizes protecting the weak through the stabilization of labor relations, highlighting its social logic. Moreover, once separated from economic logic, social logic is bound to evolve into political logic. The responsible person of the Legislative Affairs Commission of the National People's Congress who directly participated in drafting the Labor Contract Law

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39 In the 1990s, China faced difficulties in transitioning to a market economy. Not only do foreign-invested and state-owned enterprises have different management systems, new and old employees have different endurances to the labor market.

40 The expression of the purpose of legislation by the Labor Law issued in 1994: "this Law is formulated in accordance with the Constitution of the People's Republic of China in order to protect the legitimate rights and interests of laborers, to regulate labor relations, to establish and safeguard a labor system that is adaptable to the socialist market economy and to promote economic development and social progress."

41 The provision of the purpose of legislation by the Labor Contract Law issued in 2007: "This Law is formulated for the purposes of refining the labor contract system, specifying the rights and obligations of the parties to a labor contract, protecting the legitimate rights and interests of laborers and building and developing harmonious and stable labor relationships."

المنارة للاستشارات

made an authoritative interpretation that "only when the labor relationships are stable can we talk about the harmony of social relations,"[42] which not only identify "harmony" with "stability," but also regard "labor relations stability" as a means of achieving the political goal of "harmonious social relations." The 2012's amendment to the Law Contract Law points out the need to "to understand [the law] from the level of maintaining the dominant position of the workers class and strengthening CPC's rule,"[43] further strengthening the political logic. This legislative purpose is embodied in three aspects of institutional design; any compatibility with the norms of the Labor Law is removed. We may set the United States as a reference framework to compare the differences between the two legislations, the Labor Law and the Labor Contract Law.

First, from the perspective of the termination of labor contracts, the main purpose is to restrict autonomy. Building on contractual agreements and assuming flexibility as its presupposition, termination in both legislations has the nature of private law. Dismissal and resignation in termination reflect the equality of contractual relations. In the United States, market logic is always stressed; the law respects the autonomy of both employers and employees. The employer is free to dismiss employees, even without reasonable grounds; meanwhile, employees can also resign with no reason. In contrast, the Labor Law of China stipulates that the rights of dismissal and resignation can be exercised only at contract expiration or when agreed conditions occur; this is far more restrictive compared to the case in the United States. The Labor Contract Law has narrowed the scope of termination and separated the right of formation from the autonomy of the parties. Dismissal and resignation are regulated in different fields after separated from the parties' autonomy – the former is strictly regulated for the employers and the latter is highly flexible for workers.

Second, employers' right of dissolution is strictly regulated. Building on the provisions of law and assuming stability as the presupposition, the dissolution right

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42 "At least I feel that labor relations are extremely unstable and it will not be a good thing for the development of enterprises, for the individual laborers and also for the country. In terms of labor relations, governments of various countries all strive to have a relatively stable labor relationship. Labor relationship is the most basic relationship in social relations. Only when the labor relationship is stable can we talk about the harmony of social relations. Therefore, we say that the Labor Contract Law put a lot of efforts in this regard. Regarding the stabilization of labor relations, we have laid down some provisions." Zhang Shicheng: The Impact of Labor Contract Law on the Civilization of Chinese Enterprise Management, http://www.zwgl.com.cn/News_list.asp? = 1776, access date: July 20, 2009.
43 Notes on the "Amendment to the Labor Contract Law (Draft)": "If the problem cannot be resolved as soon as possible, it will inevitably have a negative impact on harmonious labor relations and social stability. Leaders of the Standing Committee of the National People's Congress demand that this problem shall be understood from the perspective of maintaining the dominant position of the working class and consolidating the CPC's governance."

المنارة للاستشارات

of employers in both periods belongs to legal remedy, reflecting to a great extent its nature of public law. Different with the full regulation in the 1980s, the public law aspect of the Labor Law applies only to employers' right of formation; it has formed a special benchmark jurisprudence to which the United States dismissal system has nothing similar. On the basis of original provisions, the Labor Contract Law reduces the "dismissible" provisions[44] and adds provisions of "prohibition on dismissal" to tighten up grounds for dismissal;[45] meanwhile, it expands the scope of economic compensation for workers and adds double penalty provisions to enhance dismissal treatments. Restrictions on dismissal directly limit the use of dismissal; improving dismissal treatments indirectly limits dismissal by increasing dismissal costs. The objective of regulation in both cases is to stabilize labor relations.

Third, employees' right of dissolution can be exercised at free will. In the American system, both parties enjoy free will, which is the foundation to exercise autonomy. As long as proper price is paid, autonomy can be restricted through contract. Free will is linked to autonomy and self-discipline; this is the meaning of the freedom of contract. The Labor Law offers to employees a strong right of dissolution; the right of resignation is a primary right, which is a normal institutional arrangement. In cases where the right of dissolution is exercised, the remedy right applies only when liability is involved for the breach of contract. The statutory right to resign at will by employees is comparable to that of the United States. However, the Labor Contract Law adopts the institutional design of reducing employees' liability for the breach of contract[46] and increasing employers' liability for violations of law.[47] With the exceptions of individual circumstances prescribed by law, there is no way to compensate employees to restrict their breach of contract. In contrast, employees can extract economic compensation from their employer when they exercise the right of dissolution. As a result, such freedom enjoyed by employees goes way beyond the principle of autonomy and self-discipline. China's employees enjoy far more right of resignation at will than their American counterparts.

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44 In terms of reducing the grounds for dismissal, violations of rules and regulations and labor discipline are two reasons for immediate dismissal in the Labor Law. The Labor Contract Law removes the grounds of violation of labor discipline and sets extremely stringent procedures for rules and regulations to entering into force.

45 For increasing the reasons of prohibition of dismissal, provision of prohibiting dissolution was added to non-fault dismissal.

46 As far as "compressing laborers' liability for breach of contract," the Labor Law regards "liability for breach of contract" as a mandatory clause in a labor contract, allowing both parties to the labor contract to agree on the liability for breach of contract. This provision was deleted in the Labor Contract Law, and laborers' liability for compensation was also strictly restricted.

47 In terms of "increasing the liability of the employer for illegal acts," by expanding the presumed dismissal range, a variety of dissolution actions by laborers are presumed to be dissolution actions by the employer and therefore economic compensation can be obtained by laborers.

المنارة للاستشارات

Judging from the relationship between termination and dissolution in labor contract, the logic of "termination upon expiration and early dissolution" as stipulated in the Labor Law implies that the two parties of labor relations are equal as far as their right of termination is concerned. For statutory dismissal, the dismissal right of the employer is generally limited by public law obligations; for dismissal upon agreement, the resignation right of employees, on the basis of accepting new considerations, is also subject to the constraints of service period and other contractual agreements.[48] Therefore the two sides retain some measures of correspondence. With the "Single Protection" principle proposed by the Labor Contract Law, the rights of employees and employers are restructured. Termination and dissolution by employers are subject to stricter regulation, while the restraint on workers of service periods upon dissolution are weakened. The original relationship of correspondence no longer exists due to stricter regulation imposed on the employer and greater freedom enjoyed by employees.

Do stable labor relations necessarily lead to social stability? History has disproved it. Regulation is a form of outside rule. When the state heavily regulates labor relations, external interventions in labor relations are high. Especially when mandatory provisions of the labor law deviate from the logic of bottom-line control, a large number of negotiable matters are classified into external statutes and corresponding liabilities are imposed on violators. The mandatory provisions of the law therefore directly create many rights and obligations. This transformation, at the time of compressing the autonomous negotiable space, expands the legal demand space enjoyed by employees, directly encouraging them to resolve disputes through public authority channels, such as labor inspection, labor arbitration and the courts. This is the root cause of the explosion of labor dispute cases. As concluded by the Opinions, that "the number of labor dispute cases remains large without any sign of coming down" has become a major issue. The state-based outside rule also indirectly leads workers to pressure the government through mass incidents; this explains the

48 For laborers, the provision of "fixed-term contract permits early termination" was initially originated from the then pilot experience in Shanghai. When introducing this experience, Shanghai specifically emphasized "excluding when in the service period." If the employee violates the service period and dissolves the labor contract, he/she shall still bear the liability for liquidated damages. The Labor Law also makes the liability for liquidated damages a necessary provision, and reserves space for further exploration in various cities. After that, Shanghai and some other cities require that when employers establish new consideration relationships in the form of funding training, payment of special treatment, or agreements on non-competition with compensation, etc., both parties shall perform as agreed, and for the illegal dissolution of the service period, non-competition period, and advance notice period, the two parties may be held liable for breach of contract in accordance with the prior agreement. Such dissolution obviously is also a form of remedy for breach of contract.

المنارة للاستشارات

explosive growth of mass incidents. As noticed by the Opinion, "collective shutdowns and mass incidents still happen sometime"; this is another big question. As labor relations are subject to heavy external interventions, the tendency to seek external solutions are inevitable. In fact, the three major issues summarized in the Opinions are all related to such excessive external interventions.[49] When all disputes between employers and laborers spill out into the public space,[50] social stability is bound to be undermined; this is the why the Labor Contract Law has not brought stability to the society. After the Opinions was issued, China began to redefine harmonious labor relations, which were no longer identified with stable labor relations.[51] The value of flexibility in labor relations is re-recognized and the significance of internal autonomy is emphasized. Only through the improvement of internal mechanisms can true harmony and stability be brought back to labor relations.[52] The reformation of the Labor Law in the 2010s by the Labor Contract Law now faces various challenges, especially after China has entered an economic downturn, which triggers a call to return to normal.

5 Revelation: An International Comparation

As China continues to search for the best combinations of these four concepts, dismissal and resignation as well as dissolution and termination, it is necessary to study what we have learnt from the labor market paradox. On the one hand, the continuing contractual relationship needs to grant the parties the right to formation; on the other hand, once the right of formation is linked to the social reality of strong versus weak parties in labor relations, rights may be readily abused. The former is an inevitability and the latter a possibility. When the legislation evaluates

49 Opinions summed up three major issues, that is, "the number of labor dispute cases remains large without tendency of decreasing, in some places there are still outstanding issues related to migrant workers' wages and so harm the interests of laborers, collective shutdown and mass disturbance still happen sometime."

50 The author has analyzed the emergence of disputes caused by such externality. Dong Baohua: Legal Regulations on Group Disputes in the Labor Field, Law Science, 2017 edition, No. 7.

51 This is evident from the frequency of use of words in the Opinion. The word "harmony" appears 37 times in the Opinions, and the word "stability" only appears 5 times, of which three times are used to describe social stability rather than labor relationship stability, and one time involves the overall comment on labor relationship. The "non-fixed term labor contract," which was once a highlight of the Labor Contract Law, was not even mentioned in the Opinions.

52 The only "harmonious and stable labor relationship" that appeared in the Opinions was emphasizing the improvement of various internal mechanisms and "establishing standardized and orderly, fair and reasonable, mutually beneficial and win-win, harmonious and stable labor relations," not involving the long-term of employment contract.

المنارة للاستشارات

the transformation from possibility to reality, it inevitably makes certain assumptions about the legal personality of enterprises. In all the adjustment modes of the mainstream labor relations in China during the four periods, possibility is viewed as inevitability. For a long time, we have a fairly negative perceptions of corporate personality. As a result, many legal issues that belong to private law have fallen into the hands of public law. If we compare the mainstream legislation in the four periods, the level of governmental regulation established by the Labor Law is relatively low. However, if compared with other countries, it still embodies a relatively high standard of regulation. Therefore, we should find out where we stand in terms of the level of regulation in managing labor relations in the world.

In fact, if observed from the perspective of legal provisions, countries differ from each other in terms of the different relationship between dismissal and resignation, be it equivalence, correspondence or opposition. These countries often show a different score on the index of dismissal restrictions. According to the official statistics of the Organization for Economic Cooperation and Development ("OECD" for short), the overall level of dismissal protection (3.26) in China, except for Portugal, was higher than any other OECD members in 2012, and far exceeded the average (2.08). Also Portugal dropped its score in 2013 to 3.18.[53]

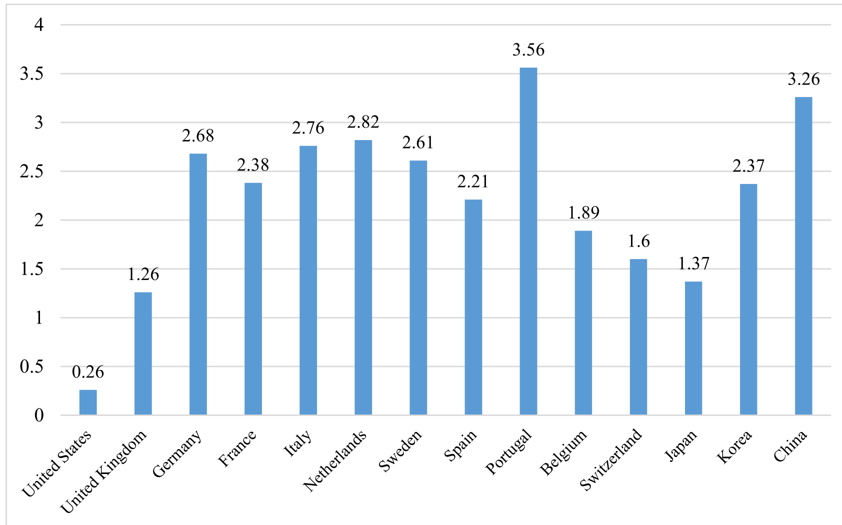

Chart 1: Strictness of employment protection.

53 Strictness of employment protection – individual and collective dismissals (regular contracts). http://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV. 2016-03-10.

المنارة للاستشارات

If we put together three internationally common theories, i.e. freedom of dismissal, prohibition of abusing dismissal right, and justification for dismissal,[54] we find that the common feature is that they all recognize that dismissal and resignation are private right of the parties involved. Their difference lies mainly in how the requirements of social justice are reflected in the exercise of this private right. First, the "employment freedom theory" and freedom of resignation are equivalent to each other. In this regard, in fairly free market environment, pressure to compete for talents will compel the employers to strengthen corporate social responsibility and establish a reasonable ethical structure to reflect social justice and resolve labor market paradox. This view holds a relatively positive view on corporate personality; the United States is a representative of this theory, with a rather low index of dismissal restrictions (0.26, which is far less than 1). Second, the other side of "prohibition of abuse of dismissal right" is "prohibition of abuse of resignation right," under which social justice is achieved through the abstract intervention of judicial power. Since the employer is the dominant party in labor relations, in judicial practice, the judicial restriction on the right of dismissal and resignation will tend to the former while in theory the former and the later should be equivalent. Representing countries are United Kingdom, Japan, Switzerland. From legal perspectives, the right of dismissal in these countries is still better protected than the right of resignation and the index of dismissal restrictions generally exceeds 1 but below 2. Third, the "theory of legitimate reason for dismissal" puts forward some specific requirements to make "social justice" "real and serious." Consequently, the jurisdiction is more involved in labor relations. Some European civil law countries such as France and Germany are typical representatives of this kind of theory. When the jurisdiction gets involved with legitimate reasons, the exercise of the dismissal right becomes subject to strong government intervention. But from the legislative perspective, it still corresponds to the right of resignation. They jointly become the subordinate concept under contract "termination." Intervention with legitimate reasons generally causes the index of dismissal restrictions to exceed 2, but below 3. From the jurisprudence aspect, the corresponding relationship between dismissal and resignation limits the state's excessive restrictions on the right of dismissal. These three theories are all based on the autonomy of labor relations.

China's statutory right of dissolution cannot be derived from any of these theories. Instead, a combination of the standard jurisprudence of public law and the just cause helps us understand China's statutory reasons. A scholar from Taiwan has summarized the characteristics of such legislation as follows:

54 Huang Yue Qin: The New Theory on Labor Law (fourth edition), Hanlu Book Publishing Co., 2012 edition, page 212.

المنارة للاستشارات

"Through the general provisions of civil law, employers' obligations under public law to protect workers generate employers' duty of care toward employees, which constitute the bridge affecting labor relations. Employers' obligations under public law imposed by the state through the provisions of the labor protection laws also have a great impact on the labor contract between the employer and the worker,which naturally includes the content of care and protection obligation of the employer based on the principle of good faith."[55] According to this theory, ex post intervention in the jurisdiction of private law is transformed into ex ante legislation of public law, autonomy is turned into a certain degree of public regulation and termination under private law is to a certain extent obscured by dismissal under public law. Nevertheless, as long as dismissal and resignation are still understood as a corresponding relationship, public law intervention with the goal of protecting workers can only intervene in a bottom-line manner, and the degree of freedom required for resignation indirectly restricts excessive regulation over dismissal. The Labor Law of China imposed the jurisprudence of public law onto the right of dismissal, which by its nature belongs to private law. The conditions of dismissal are ex ante legalized and combined with administrative law enforcement. As a result, the degree of public regulation is fairly strong. Nonetheless, it understands the relationship between dismissal and resignation as corresponding. Moreover, the existences of termination upon expiration and termination upon agreement put a limit on excessive regulation.

Regarding the nature of continuing contracts, the "relational contract theory" in sociology of law and the "incomplete contract theory" in law and economics have developed different perspectives. Building on German Rechtsdogmatik, Chinese law scholars have proposed the so-called "procedural contract theory," emphasizing that continuing contract is a dynamic procedural contract.[56] All these theories reveal that in the labor market paradox, market orientation is fundamental and primary. The theory of abusing dismissal right and the theory of legitimate reason suggest potential social problem. Both employ ex post intervention through judicial power to protect the right of dismissal, but the latter is more heavy-handed. All these theories underline that the content of labor contract cannot be determined from the beginning by the law, that the contract term has characteristic of indefinite uncertainty, and that both parties require a certain degree of freedom. Reform implemented under social law should not deny this essential nature of contract uncertainty. The theory of turning the ex post judicial

55 Huang Chengguan, chief editor: Labor Law, Xinxuelin Publishing Co., Ltd. 2014 edition, page 23.

56 Qu Maohui, Zhang Hong: Continuing Contracts: Multiple Considerations Based on the Jurisprudence of Contract and Legislative Technique, Chinese law, 2010 edition, No. 4.

المنارة للاستشارات

intervention by public power to ex ante legislation is pushed to the extreme by China's Law Contract Law. When dismissal and resignation is understood to be of opposite relationship, dismissal is left to run wild like a racing horse and overshadows termination, forcing autonomy to give room to regulation. From the perspective of government regulation, non-fixed term contracts are regarded as most certain.[57] It is such understanding that has pushed China's index of dismissal restrictions above 3, a high level of regulation rarely seen in any other countries. This high standard of dismissal is accompanied by a narrow scope of adjustment and weak law enforcement, reinforcing the trend that labor disputes spill out into public space.

6 Conclusion: Conflict and Reconciliation between the Logic of Reasoning and Logic of History

Every legislation will not only affect the adjustment of current labor relations, but also affect the long-term interest structure. The dual-track system in the 1980s turned into unification from separation and resulted in the Labor Law in the 1990s, while the system adjustment of Labor Contract Law in the 2000s caused the process of separation from unification in the 2010s and the revival of the dual-track system. As the making of labor law wanders between separation and unification, it reveals the difficulties of balancing regulation and autonomy. Now we have the window of amending the labor law, we are again at the crossroads of reflecting the past and guiding the future. Going over the history of the past 40 years, examining the evolutionary logic and historical performance of various labor institutions, we can draw the following conclusions.

First, the two dual-track systems that appeared in the 1980s and 2000s respectively were both transitional. On the one hand, from the perspective of regulation, an all-or-zero approach to cover the state-owned enterprise and foreign-invested enterprise in 1980s, or the traditional and new-type labor relationship in 2010s, is bound to create institutional frictions. On the other hand, from the perspective of social development, the existing labor relationships embody the past while the emerging new relationships point to the future. The new relationships are more influential in determining the future direction of social

57 The person in charge of drafting described this idea as "picking up the 'iron bowl' when the Labor Contract Law was just published. The Ministry of Labor: Beware of the Large-scale Reduction of Old Employees by Employers" Oriental Morning Post, August 12, 2007.

المنارة للاستشارات

development. The scope and speed of institutional adjustment are determined by the choice of future direction in social development and institutional frictions during the transition period. Any delay in our choice will have an impact on social stability. History does not leave us with much time or space for hesitation.

Second, the transitions, from separation to unification and from unification to separation, reflect tensions between the logic of reasoning and logic of history. During four decades of reform, the key lies in the two legislations that occurred in the middle 20 years. When adjustments in labor relations were deemed problematic, the legislators revised laws to create new institutional arrangements. From the promulgation of the Labor Law to that of the Labor Contract Law, the legislators were concerned about the so-called "dual protection" and "single protection" issues, respectively. Two cases dramatically affected the legislation of the Labor Contract Law: in the first case Prime Minister helped migrant workers to recover their compensations;the second was the infamous "black brick kiln" incident. The former triggered the labor contract law legislation,[58] and the latter prompted the unanimous passing of the law.[59] At that time, CCTV broadcast a report with the title "The Birth of the Labor Contract Law – The Black Brick Kiln Case Helping Its Passing."[60] The two cases greatly affected the public perception of workers and private enterprises. After a contract is signed by two parties, the idea of "single protection" – only protecting the interests of workers – can only be derived from the political or moral logic of "good workers versus evil capitalists." However, what was involved was labor service relations in the first case and criminal offenses in the second case. It is rather questionable to evaluate labor relations on

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58 The Prime Minister's assistance in assisting migrant workers in recovering wages is considered to be of great significance, marking that the central government's attention has begun to shift from "focusing on economic construction" to solving deep-seated social problems, and has poured more and more attention on many livelihood issues of vulnerable groups. It is in this historical context that the Labor Contract Law started the legislation.

59 The Labor Contract Law has been drafted since 2005, and there have been controversies during the drafting process. Two years later, the black brick kiln event occurred. NPC Standing Committee, in the afternoon of June 24, 2007, when reviewing the draft of Labor Contract Law in different groups, strongly criticized the Shanxi "Black Brick Kiln" case, and proposed to expedite the adoption of the Labor Contract Law, to effectively protect the legitimate rights and interests of laborers and strictly prevent similar incidents through the implementation of this law and other related laws. Four days later, the Labor Contract Law was passed.

60 Zhang Shicheng, the then deputy director of the administrative department of the NPC's Legal Work Committee and the person in charge of drafting the Labor Contract Law said, "A sudden incident has accelerated the issuance of the Labor Contract Law. If it did not happen, this law may have to be discussed for a while." The Birth of the Labor Contract Law-The Black Brick Kiln Case Helping Its Passing, Economic Half Hour, December 27, 2007.

المنارة للاستشارات

the basis of these two cases. Once law-making is politicized and moralized, it is difficult to find the requisite balance position for legislation.

Third, in the author's opinion, whether regulation can be properly positioned will determine the success or failure of future legislation. More than 10 years ago, the author proposed a legislative model for China: low standards, wide coverage, and strict enforcement.[61] Now we only have to add: expanding the middle. For the use of the regulation as a basic institution in managing labor relations, a practical path suggests itself: to absorb the experiences of legislating the Labor Law, to weaken the overly rigid institutional arrangements of labor relations, to strengthen the overly flexible institutional arrangements of labor service relationships. When it comes to the principle of institutional design, governance should be replaced by autonomy. Only then can labor legislation be transformed from separation to unification.

The biggest challenge facing policymakers in transitional countries is how to work out more innovative social and economic policies to deal with the changes in the labor market.[62] The difficulty of building up the legal system is to identify the balance point. If we can fully summarize and absorb the historical experiences from the legislation of China and the international society, perhaps we can be more comfortable in taking on the forthcoming legislative adjustments to lay the theoretical foundation for the development of the next decade.

61 Dong Baohua: Target Selection of China Labor Standards Law, Law, 2007 edition, No. 1.
62 Sandrine Katz and Jelena Naspolova: Labor Market in Transformation: Balance of Flexibility and Security, translated by the Labor Sciences Research Academy of Ministry of Labor and Social Security, China Labor and Social Security Press, 2005 edition, page 1–2.

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