

ILO Fundamental Conventions and Chinese Labor Law: From a Comparative Perspective

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Abstract:

In this article, through a comparative study between ILO fundamental Conventions and Chinese labor law, the writer points out several problems and shortcomings embodied in Chinese labor law. This article analyzes the status of Chinese trade unions and questions their ability to protect the interests of the Chinese working class. As for collective bargaining, the writer reviews the relevant Chinese labor law and discovers the reasons for the ineffectiveness of the collective bargaining system in China. In the case of forced labor, the writer critically evaluates three kinds of forced labor in today's China. With regard to child labor, according to a review on relevant legislations, the writer points out certain internal legislation as contradictory. As far as discrimination with regard to employment and occupation is concerned, after a general overview on related ILO conventions and Chinese legislation, the writer focuses on employment based on social origin in China, using a case study on Chinese farmer workers. In the writer's understanding, as a vulnerable group, farmer workers have not received enough attention and special protection from Chinese labor legislation.

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I. Introduction

In this article, through a comparative study between ILO Fundamental Conventions and Chinese labor law, the writer points out several problems and shortcomings of Chinese labor law.

The article will be divided into five parts. The first part is introduction; the second is an overview of ILO Fundamental Conventions; the third part is background information related to China; the fourth part is the comparative study between ILO fundamental Conventions and Chinese labor law; the last part is conclusion.

II. Introduction to ILO Fundamental Conventions

In the ILO Declaration on Fundamental Principles and Rights at Work 1998, the ILO governing body declares that “all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labor;
- (c) the effective abolition of child labor; and
- (d) the elimination of discrimination in respect of employment and occupation.”²

These rights are enshrined in eight ILO fundamental conventions,³ referred to in the 1998 Declaration as the Fundamental Conventions. They include: (1) Freedom of Association and Protection of the Right to Organize Convention, (1948 [No. 87]) which protects the right of workers and employers to establish and join organizations according to their own choices without prior authorization, and lays down a series of guarantees for the free functioning of organizations without any interference by the public authorities;⁴ (2) Right to Organize and Collective Bargaining Convention, (1949 [No. 98]) which guarantees workers the right to enjoy adequate protection against anti-union discrimination, prohibits mutual interference between worker’s and employer’s organizations, and provides for measures to promote collective bargaining;⁵ (3) Forced and Compulsory Labor Convention, (1930 [No. 29]) which requires member states to suppress the use of forced or compulsory labor in all its forms as soon as possible, with certain exceptions, such as military service, properly supervised convict labor etc;⁶ (4) Abolition of Forced Labor Convention, (1957 [No. 105]) which requires each member state to take effective measures to secure the immediate and complete abolition of forced or compulsory labor as a means of political coercion or education, punishment for the political dissenters, economic development, labor discipline, punishment for participation in strikes, or discrimination;⁷ (5) Minimum Age Convention, (1973 [No. 138]) which aims at the abolition of child labor and

² Int’l Labour Org. [ILO] Declaration on Fundamental Principles and Rights at Work, 86 Sess., Geneva (June 1998), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=D ECLARATIONTEXT, visit date: February 18, 2005, website name: official website of International Labor Organization (ILO).

³ ILO Fundamental Conventions, *available at* www.ilo.org/ilolex/english/convdisp2.htm, visit date: February 18, 2005, website name: official website of ILO.

⁴ *Id.* Freedom of Association and Protection of the Right to Organize Convention, C087. (July 9, 1948).

⁵ *Id.* Application of the Principles of the Right to Organize and to Bargain Collectively Convention, C098. (July 1, 1949).

⁶ *Id.* Forced or Compulsory Labor Convention, C029. (June 28, 1930).

⁷ *Id.* Abolition of Forced Labor Convention, C105 (June 25, 1957).

requires member states to specify a minimum age for admission to employment not be less than the age of completion of compulsory schooling;⁸ (6) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (1999 [No. 182]), which requires members to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor such as slavery, prostitution, drug trafficking etc.⁹ (7) Discrimination in Respect of Employment and Occupation Convention, (1958 [No.111]) which calls for a national policy to eliminate discrimination in access to employment, training, and working conditions on the basis of race, color, sex, religion, political opinion, national extraction or social origin and to promote equality of opportunity and treatment with regard to employment and occupation;¹⁰ and (8) Equal Remuneration Convention, (1951 [No. 100]) which calls for equal pay for men and women for work of equal value without discrimination based on sex;¹¹

So far, about 60 percent of ILO member states have ratified all eight of the fundamental conventions, including not only developed states but also a large number of developing ones.

III. Background Information on China

A. Background Information on China and Its Economic Development

Beginning in 1978, China started to engage in a wide range of economic reforms to expand and modernize its economy and as a result, “its high growth rate has been sustained with relatively minor fluctuations,”¹² leading the country away from a centrally planned economy¹³ towards a market economy with socialist characteristics.¹⁴

With a remarkably rapid economic growth over the last two and a half decades, according to statistics from several international organizations and experts, China has become the seventh largest economy in the world and it ranks first among the developing world in terms of total economic scale.¹⁵ However, China is still a developing country and it remains among the low-income countries as far as per-capita GDP is concerned.¹⁶ “China’s per capita GDP, though reaching the record high of \$1000 US dollars last year (2003), still ranks behind the 100th place in the world.”¹⁷ According to the China Modernization Reports of 2005, there is a 100 year

⁸ *Id.* Minimum Age for Admission to Employment Convention, C138 (June 26, 1973).

⁹ *Id.* Worst Forms of Child Labor Convention, C182. (June 17, 1999).

¹⁰ *Id.* Discrimination (Employment and Occupation) Convention, C111. (June 25, 1958).

¹¹ *Id.* Equal Remuneration Convention, C100. (June 29, 1951).

¹² Clement A. Tisdell & Joseph C.H. Chai, *An Introduction to China’s Economic Growth and Transition*, in *China’s Economic Growth and Transition: Macroeconomic, Environmental and Social/Regional Dimensions 1* (Clement A. Tisdell & Joseph C.H. Chai eds., Nova Science Publishers, 1997).

¹³ In the 1950s, China’s socialist government began bringing a majority of economic activity under state control and determining production, pricing, and distribution of goods and services. This system is called ‘planned economy’, or ‘command economy’ See Microsoft Encarta Online Encyclopedia 2005, at http://encarta.msn.com/encyclopedia_761572241_9/Communism.html#p122, visit date: February 13, 2005, website name: Encarta.

¹⁴ Fair Labor Ass’n, Annual Report 235 (2004) *available at* <http://www.fairlabor.org/2004report/pdf/CompleteReport-part4.pdf>, visit date: February 12, 2005, website name: Fair Labor Association.

¹⁵ Xinhua News Agency – Brief Introduction to China, *available at* http://202.84.17.11/english/china_abc/neconomy.htm, visit date: February 11, 2005, website name: Xinhua Net.

¹⁶ *Id.*

¹⁷ Hu Jintao, President, P.R.C., Keynote Address to Boao Forum for Asia (April 24, 2004) *available at* http://www.chinadaily.com.cn/english/doc/2004-04/24/content_326000.htm, visit date: April 25, 2005, website name: Chinadaily.

modernization gap between China and the United States, with estimates of China not joining the group of developed countries until 2080.¹⁸ Of course, its potential for continued growth is great given the size of its population, its broad territory, status of current industrial development and its leadership's positive economic policy pushing towards economic progress. As for the labor force in China, it is expected to grow from 755 million in 1990 to its maximum 1013 million in 2025.¹⁹ After that, it will start to fall to an estimated minimum of 898 million, and then begin to move up again and come to a standstill at about 900 to 920 million.²⁰ Nearly 50 percent of the country's population subsists on not more than two dollars a day, and according to the 2003 United Nations Development Program's Human Development Report, China ranked 104th with on the human development scale.²¹

Nevertheless, China's past development and its potential for continued growth have been widely recognized in international society as a whole. On December 11, 2001, China joined the WTO and is becoming one of the world's largest foreign direct investment (FDI) recipients.²²

In 2004, China's global trade reached 1154.7 billion, the highest mark in its history.²³ Nowadays, China not only dominates the international market for its traditional labor intensive exports such as apparel, footwear and toy production, but is also moving towards the technology sector where a wide range of mechanical and electric products like televisions, computers, DVD players and microwave ovens are produced.²⁴

B. China's Ratification Status of the ILO Fundamental Conventions

For a founding member of ILO, China's ratification record of ILO Conventions is not that satisfactory. So far, China has ratified twenty-three ILO Conventions,²⁵ constituting only twelve percent of the total 185 ILO Conventions. As far as the eight fundamental conventions are concerned, China has only ratified three of them:²⁶ Equal Remuneration Convention (No.100), Minimum Age Convention (No.138) and Worst Forms of Child Labor Convention (No.182).²⁷ China has not, however, ratified two fundamental ILO conventions concerning freedom of

¹⁸ *100 Years Modernization Gap between China and USA*, Laodong Daily, February 19, 2005, at 6.

¹⁹ He Dan, *Zhong Guo Wei Lai Fa Zhan Qu Shi Dui Lao Dong Jiu Ye De Ying Xiang* [The Influence of China's Future Development on Its Labor and Employment] (2004) available at http://www.chinapop.gov.cn/rkzh/zgrk/rkysh/t20040326_2639.htm, visit date: February 11, 2005, website name: National Population and Family Planning Commission of China.

²⁰ *Id.*

²¹ *See supra* note 14.

²² Available at <http://news.bbc.co.uk/2/hi/business/3846439.stm>, visit date: March 9, 2007, website name: BBC News.

²³ *China's 2004 Foreign Trade Volume Soars to New Heights* (video recording in Chinese), available at http://news.xinhuanet.com/video/2005-01/12/content_2449233.htm, visit date: February 12, 2005, website name: Xinhua Net.

²⁴ *See supra* note 14.

²⁵ Number of Ratifications of the ILO Conventions, available at <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>. Visit date: January 30, 2005, website name: ILO.

²⁶ Ratifications of the ILO Fundamental Conventions, available at <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN>. Visit date: January 30, 2005, website name: ILO.

²⁷ *Id.*

association: Freedom of Association and Protection of the Right to Organize Convention (No. 87) and the Right to Organize Convention (No. 98), nor has it ratified any fundamental Conventions against forced labor. As for Conventions with regard to employment and occupation discrimination, China only ratified Convention No. 100 but has not yet ratified Discrimination in Respect of Employment and Occupation Convention (No. 111).

IV. Contemporary Chinese Labor Law vs. ILO Fundamental Conventions

A. Freedom of Association and Collective Bargaining in China

i. Overview of ILO Conventions on Freedom of Association and Collective Bargaining

“Freedom of Association is the most basic of all principles underlying the work of International Labor Organization (ILO) and the activities of those who toil for social justice.”²⁸ The rights to freely associate and collectively bargain are identified as a fundamental worker’s rights by the ILO and are protected under the Universal Declaration of Human Rights.²⁹ Serving as a foundation stone upon which other labor rights could be built and respected, freedom of association provides workers with the chance to form and join organizations of their own choosing, thereby, defending worker’s rights and interests in every working place.

According to Convention No. 87, workers have the right to establish and to join organizations of their own choosing without previous authorization.³⁰ In addition, workers have the right to draw up their own constitutions and rules, to elect their representatives, to organize their administration and activities and to formulate their programs without interference from public authorities.³¹ Moreover, it is each member state’s obligation to take all necessary and appropriate measures to ensure that workers may exercise freely their right to organize.³²

Convention No. 98 further prohibits anti-union discrimination with respect to employment.³³ Trade unions are free from any interference from employers in their establishment, functioning or administration.³⁴ The Convention also states that measures shall be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers and trade unions, with a view to the regulation of terms and conditions of employment by means of collective agreements.³⁵

ii. Freedom of Association in China

a. Trade-Union Monopoly in China

The unions in China consist of the All-China Federation of Trade Unions (ACFTU), local all-level federation of trade unions, sectoral unions and basic-level unions.³⁶ They are organized on the principle of democratic centralism³⁷ which means that “individuals obey the organization,

²⁸ Online: < <http://www-ilo-mirror.cornell.edu/public/english/standards/norm/whatare/fundam/foa.htm> > (visit date: February 24, 2007).

²⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), Art. 20, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

³⁰ See *supra* note 3, C087, Art. 2.

³¹ *Id.* Art. 3.

³² *Id.* Art. 11.

³³ See *supra* note 3, C098 Art.1.

³⁴ *Id.* Art.2.

³⁵ *Id.* Art.4.

³⁶ Wang Quanxin, *Lao Dong Fa [Labor Law] 129* (Fa Lu Chu Ban She [Law Press], 1997).

³⁷ Trade Union Law, Art. 9 (2001) (P.R.C.) available at <http://www.lawinfochina.com/index.asp>, visit date: January 2, 2005, website name: Lawinfochina.

the minority obeys the majority, and unions at lower levels obey those at higher levels.”³⁸ Therefore, all of the other trade unions in China are subject to the leadership of the ACFTU which was founded on May 1, 1925 with the participation of 166 local unions and over 540,000 members.³⁹ In this sense, the leading global labor organization International Confederation of Free Trade Unions (ICFTU) calls the ACFTU a “trade union monopoly.”⁴⁰ Although Chinese Constitution provides that citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration⁴¹ and Chinese Trade Union Law 2001 further emphasizes that all laborers shall have the right to participate in and form trade union organizations pursuant to the law, regardless of their nationalities, races, sexes, occupations, religious beliefs or education, and no organization or individual may hinder them from doing so or restrict them,⁴² Article 11 of the Trade Union Law nevertheless restricts workers’ right to freedom of association in China. In specific, it provides that any establishment of a basic-level trade union, local all-level federation of trade unions or a national or local specific industry trade union must be reported to the trade union organization at the next highest level for approval.⁴³ As such, the establishment of trade union in China is subject to *de facto* previous authorization. Clearly, this provision is inconsistent with the principle of association embodied in the ILO Convention No. 87, which provides that workers shall have the right to establish and to join organization of their own choosing without previous authorization.⁴⁴

b. Double Roles of Chinese Trade Union

In accordance with Chinese Trade Union legislation, trade unions are mass organizations formed by the working classes of their own free will.⁴⁵ It follows that trade unions are supposed to be voluntary unity of the leading class, that is, working class, in China and their status should be superior to an ordinary social organization.⁴⁶ From the writer’s understanding, that is the unique characteristic of Chinese trade unions.

Roughly speaking, “democratic centralism” can be described as: “a principle of organization that can be used (or abused) by any functioning group. The democratic part of the term defines the equal participation and voice expected from all members of the organization. The centralism refers to the mandate that all members uphold all decisions made by the democratic process of the organization. In practical terms this translates into real participatory democracy within, but with strict discipline expected from all members. Even if one member disagrees with a decision, s/he is expected to uphold the decision externally while working from within to convince other members that they are wrong. This method of organization is based on the assumption that eventually the majority of the members of a group, presented with conflicting views, will be able to arrive at the best possible decision. This may be a prolonged process, and mistakes may be made, but the democratic element ensures that debate can go on until all members are satisfied.” This idea was first put forward by V.I. Lenin and it is regarded as a principle of communist democracy. Maoist Int’l. Movement, Democratic Centralism. *available at* <http://www.etext.org/Politics/MIM/wim/democent.html>.

³⁸ Albert Hung-yea Chen, *An Introduction to the Legal System of the People’s Republic of China* 50 (1992).

³⁹ Du Wanqi, *Zhong Guo Gong Hui Yun Dong De Qi Shi Nian [Seventy Years Chinese Trade Union Movement]*, 3 Beijing Dang Shi [Beijing Party History] 16 (1995).

⁴⁰ International Confederation of Free Trade Unions, *People’s Republic of China: Annual Survey of Violations of Trade Union Rights (2003)* *available at*

<http://www.icftu.org/displaydocument.asp?Index=991217713&Language=EN>. Visit date: February 14, 2005, website name: International Confederation of Free Trade Union.

⁴¹ Constitution art. 35 (P.R.C.) *available at* <http://www.lawinfochina.com/index.asp>, visit date: January 2, 2005, website name: Lawinfochina.

⁴² *See supra* note 37 Art. 3.

⁴³ *See supra* note 37 art. 11.

⁴⁴ *See supra* note 3, C087, art.2.

⁴⁵ *See supra* note 37 art. 2.

⁴⁶ Lin Feng, *Employment Law in China*, Chinese Law 461 (Wang Guiguo & John Mo, eds., 1999).

Chinese Trade Union Law provides that Trade Unions must focus on economic development, adhere to the Socialist road and people's democratic dictatorship, and insist on the leadership of Chinese Communist Party and the guidance of Marxism, Leninism, Mao Zedong Thought, and Deng Xiaoping Theory.⁴⁷ Trade unions in China should *assist* the people's governments in their work, uphold the leadership of the working classes and support the worker-peasant alliance which forms the basis of the people's democratic dictatorship of socialist state power.⁴⁸ In this sense, Chinese trade unions are required by law to work as an assistant to authority, i.e., in the interests of Chinese government. Of course, the Trade Union Law also provides that the basic function and duty of trade unions is to safeguard the legal rights and interests of the employees.⁴⁹ Trade unions must liaise closely with employees, listen to and reflect their views and requirements, care for their livelihood, assist them in overcoming difficulties and serve them wholeheartedly.⁵⁰ Thus, the law actually requires Chinese trade unions to play double roles: one role is to work for the interests of the socialist government, and the other role is to act in the interests of the workers. This is only possible when the state and the employees are sharing the same interests. Interestingly, the Trade Union Law does not incorporate any clauses dealing with situations when the interests of the State and the employees are conflicting. In other words, the assumption embodied in this legislation is that the interests of the state and employees are consistent.

In reality, however, this is not the case. It has been reported that more than one million workers in 30 cities joined the street demonstrations in 1995 with that number increasing to 3.6 million only three years later.⁵¹ Other evidence available shows the number is still increasing every year.⁵² The famous China Labor Bulletin, based in Hong Kong, confirms that the process of "economic restructuring has led to huge pressures on Chinese labor market... many workers laid off from State Owned Enterprises (SOEs) have expressed dissatisfaction with the long working hours, short-term contracts and miserly benefits that more than not await them in the private sector."⁵³ As a matter of fact, over 50,000 workers from the Daqing Oilfield have joined mass street demonstrations since March, 2002 to protest against Daqing Petroleum Administration Bureau's breaking of the agreement on the terms of retrenchment.⁵⁴ These protests were soon followed by large scale demonstrations by workers in several big industrial cities in China, including its capital, Beijing. The protesters there surrounded the government headquarters,

⁴⁷ See *supra* note 37 art.4.

⁴⁸ *Id.* art.5.

⁴⁹ *Id.* art. 6.

⁵⁰ *Id.*

⁵¹ Chen Feng, Zai Guo Jia Yu Lao Gong Zhi Jian: Shi Chang Jin Ji Xia Zhong Guo Gong Hui De Jiao Se Chong Tu [Between State and Labor: The Contradictory Roles of Chinese Trade Union Under the Market Economy], available at <http://www.yannan.cn/data/detail.php?id=6141>. Visit date: January 4, 2005, website name: Tian Yi.

⁵² Qiao Jian & Jiang Yin, Shi Chang Hua Jin Cheng Zhong De Lao Dong Zheng Yi He Lao Gong Qun Ti Xing Shi Jian Fen Xi, *Analysis on Labor Disputes and Mass Labor Movements in Marketization*, Beijing: Social Sciences Data Press, 2005.

⁵³ Unemployment in China, *China Labor Bulletin* (1999), available at <http://www.china-labour.org.hk/public/contents/article?revision%5fid=1403&item%5fid=1402>, visit date: February 22, 2005, website name: China Labor Bulletin.

⁵⁴ Han Dongfang, *50,000 Daqing Oilfield Workers Organise Independent Trade Union*, China Labor Bulletin (2002), available at <http://www.china-labour.org.hk/public/contents/news?revision%5fid=4565&item%5fid=4564>, visit date: February 23, 2005, website name: China Labor Bulletin.

blocked public traffic and demanded an official solution on the problem of retrenchment.⁵⁵ After an unusually long strike due to the problems caused by privatization at a Chinese factory acquired by China Resources Enterprises, one scholar commented: “There is similar unrest at factories all over the country at the moment and we expect more strikes as China continues its SOE reform.”⁵⁶ In fact, even a senior officer of ACFTU also admitted that the strike in China is a normal phenomenon.⁵⁷

Some scholars in China argue that the reason for the aforementioned phenomena is that while the interests of the State and employees may conflict in the short run, in the long run, they are consistent.⁵⁸ The argument is outlined as follows: when the efficiency of enterprises improves, the state benefits through the taxation of these enterprises, and since the state represents its people’s interests, its people will also benefit.⁵⁹ As such, in the long run, state and workers’ interests are consistent.⁶⁰ However, several questions arise: Why are worker’s short-term interest sacrificed for the sake of state’s long term interest? Could it be possible that the worker’s short-term interest might be the genuine long term interest of a state? At the end of the day, who has the last say to decide which interests, either short or long term, prevails? Moreover, if this long-term state interest argument could survive, it is doubtful as to whether unions in China can really protect the legitimate interests of employees or it just serves as a *de facto* “eye and ear” of the state inside every workplace. Some trade union leaders even make similar comments: if we are fighting for the interest of workers and then punished or fired by employers, who is going to fight for our interests?⁶¹ In addition, the ILO Committee on Freedom of Association has concluded that “many provisions of the Trade Union Act were contrary to the fundamental principles of freedom of association and had requested the Government to take the necessary steps to ensure that the provisions in question were modified”.⁶² The Committee found that many provisions under Chinese Trade Union Law, including sections 4, 11, and 13 result in “the imposition of trade union monopoly and the requirement that grass-root unions be controlled by higher-level unions and that their constitutions shall be established by the National Congress of Trade Union Members; all these constituted major constraints on the right of unions to establish their own

⁵⁵ *Id.* For more information on worker’s protests in 2002, see ICFTU, People’s Republic of China: Annual Survey of Violation of Trade Union Rights (2003), available at <http://www.icftu.org/displaydocument.asp?Index=991217713&Language=EN>. Visit date: February 14, 2005, website name: International Confederation of Free Trade Union.

⁵⁶ Justine Lau, *Strike highlights pressure on wages*, Financial Times, Oct. 27, 2004, available at <http://www.china-labour.org.hk/public/contents/news?revision%5fid=5561&item%5fid=5560>. Visit date: December 27, 2004, website name: China Labor Bulletin.

⁵⁷ Chen Yi, *Gai Ge Zhong De Gong Hui He Gong Hui Zhong De Gai Ge* [Trade Union Reform and Reform Inside Trade Union] 142 (1999).

⁵⁸ Please see generally in Zhang Youyu, *Some Issues on the Amendment of Constitution (Guan Yu Xiu Gai Xian Fa de Ji Ge Wen Ti)*, (Beijing China: The Mass Press (*Qun Zhong Chu Ban She*), 1982), from 10 to 15; Wu Jie, “Discussion on the Political Rights and Freedom of Chinese Citizen” (*Lue Lun WoGuo Gong Min De Zheng Zhi Quan Li He Zi You*) in Luo Yaopei, ed., *Thesis Collection on Constitutional Law (Xian Fa Lun Wen Ji)*, [Beijing China: The Mass Press (*Qun Zhong Chu Ban She*), 1982], from 180 to 184.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Available at <http://www.people.com.cn/GB/guandian/35560/2744402.html>, visit date: December 25, 2004, website name: Renmin Wang.

⁶² International Confederation of Free Trade Unions [ICFTU], Complaint against the Government of People’s Republic of China presented by International Confederation of Free Trade Unions (ICFTU): 321st Report (Case No. 2031), available at <http://www.oit.org.pe/sindi/english/casos/chn/chn200001.html>. Visit date: December 26, 2004, website name: ILO.

constitutions, organize their activities, and formulate programs.”⁶³ The committee reminds that the mission of trade unions should be to defend and promote the interests of their constituents rather than reinforcing the country's political and economic system.⁶⁴

As is widely accepted, trade unions play a very important role in keeping a balance between the power of government, business interests and worker’s interests in a modern industrial society. The fast development of Multinational Corporations (MNCs), the deregulation of finance, the end of Cold War and the wave of liberalizing trade have undermined the trade union’s role as leverage; however, the importance of trade union has only increased. As China becomes more and more involved in the global economy, especially after its entering into the WTO, the interests of the socialist government, especially government at the local level, and its workers are no longer as consistent as before. According to a social investigation report in China, in order to attract investment both foreign and domestic, and in order to collect more local annual revenue, some local Chinese governments tried to avoid the implementation of Chinese labor law within their regions.⁶⁵ Even worse, some of them have enacted certain local policies which sacrifice the dignity of the national labor legislation and the interests of workers while benefiting investors.⁶⁶ In this sense, local governments and employers are part of the same interest group. Take the city of Shenzhen as an example. Theoretically speaking, the main responsibility of labor bureau there is to adjust the worker-employer relationship and to protect the interests of both sides without prejudice.⁶⁷ In reality, the main task of it is to operate as a basic labor station which is a constituent of the local government.⁶⁸ As such, it has to follow the instruction of the local government, who at the same time shares the same interests as employers/investors. Therefore, it is difficult to expect the impartial performance of the basic labor station there.

As discussed above, the role of Chinese trade unions to protect the legitimate interests of workers has become more and more important recently, especially when local governments and employers start to share the same interests. Therefore, in the writer’s point of view, it is high time for Chinese labor law to be modified with regard to freedom of association and collective bargaining.

iii. Right to Collective Bargaining in China

a. General Legislation on Collective Bargaining in China

Chinese labor legislation does not contain an exact term for “collective bargaining.” The closest terminologies are “collective negotiation” and “collective contract.”⁶⁹ In accordance with Chinese Labor Law, the workers of an enterprise *may* sign a collective contract with the management regarding issues of pay, working hours, rest and vacation, safety and health, insurance and welfare.⁷⁰ Collective contracts are to be developed through collaboration between the labor union and management.⁷¹ In the absence of a trade union, they are to be signed by

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Tan Sheng & Liu Kai Ming, *Kua Guo Gong Si De She Hui Ze Ren Yu Zhong Guo She Hui* [Multinational Corporate Social Responsibility and the Chinese Society] 29 (2002).

⁶⁶ *Id.*

⁶⁷ *Id.* at 30.

⁶⁸ *Id.*

⁶⁹ Regulation on Collective Contracts, 1994, Art. 1 (P.R.C.) *available at* <http://www.lawinfochina.com/index.asp>. Visit date: October 1, 2004, website name: lawinfochina.

⁷⁰ *See Chinese Labor Law*, art. 33, para. 1 (P.R.C.) *available at* <http://www.lawinfochina.com/index.asp>. Visit date: October 1, 2004, website name: lawinfochina.

⁷¹ *Id.* at para. 2.

representatives of the workers and the management.⁷² The Regulation on Collective Contract of People's Republic of China established by the Ministry of Labor and Social Security further specifies every aspects of collective contract, such as its negotiation procedure, its content, its approval, examination and dispute settlement. With all of these inclusions, it seems that Chinese labor law has recognized worker's right to collective bargaining.

However, there are still difficult aspects worthy of mentioning. Chinese labor law only provides that the workers of an enterprise *may* sign a collective contract with the management⁷³ instead of recognizing the worker's specific right to sign a collective contract. Thus, the explanation of the word "may" brings about some controversy. Could it mean that both workers and employers have the right to choose either sign a collective contract or not? Or, if workers have required negotiating a collective contract, do employers have an obligation to cooperate or have a right to refuse?⁷⁴ So far, the law fails to provide a clear binding interpretation regarding this point.

b. The Efficacy of the Legislation with Regard to Collective Bargaining

According to data provided by the Department of Labor Relations and Wages, part of China's Ministry of Labor and Social Security, the number of collective contracts signed and registered with the Ministry exceeded 240,000 by the end of 2000 and covered more than 60 million workers, constituting only about six per cent of Chinese labor force.⁷⁵ Generally speaking, the quality of the collective contract is unsatisfactory. Most of them only reiterate the working conditions that already exist in the working place.⁷⁶ Even worse, some so called collective contracts are just copies of certain standard contracts embodying general and obscure clauses without *de facto* maneuverability.⁷⁷ Furthermore, most of these agreements were products of an administrative process between the ACFTU and management rather than the real fruit of collective bargaining.⁷⁸ Thus, it is probably better to call them "documents" rather than "collective contracts" that are the product of bargaining process between two different parties.

c. Reasons for the Failure of Collective Bargaining System in China

The lack of independence of Chinese trade unions is the primary problem in collective bargaining in China. As discussed above, it is questionable whether Chinese trade unions are actually able to protect worker's interests, or are just an administrative agency under the control of Chinese Communist Party.⁷⁹ Even worse, in some non-state sectors, the trade unions are actually under the control of the employers. It is reported that a large number of trade unions within non-state enterprises are, in fact, under the control of the bosses or their representatives.⁸⁰ It is rumored (sarcastically) that the chairwomen of those trade unions are actually the wives of

⁷² *Id.*

⁷³ *See supra* note 70.

⁷⁴ As for this point of view, several Chinese scholars such as Chang Kai and Zhou Changzheng share the same view as the writer.

⁷⁵ *See supra* note 14 at 238. For more information on Chinese labor force, *see supra* notes 19, 20.

⁷⁶ Yu Yu Lan, *Jia Qiang Gong Hui Ji Ti Tan Pan Neng Li, Ying Dui Lao Dong Guan Xi Guo Ji Hua Tiao Zhan [Strengthen the Capability of Collective Bargaining of Trade Union and Prepare For the Internationalized Labor Relations]*, 5 *Zhong Gong hang Zhou Shi Wei Dang Xiao Xue Bao [Journal of Hangzhou Chinese Communist Party School]* (2002).

⁷⁷ *Id.*

⁷⁸ *See supra* note 75.

⁷⁹ *See supra* Part III (A) (ii) (b), for more analysis on this issue.

⁸⁰ Chang Kai, *WTO, Lao Gong Biao Zhun Yu Lao Gong Quan Yi Bao Zhang [WTO, Labor Standards and Labor Interests Safeguard]*, 1 *Zhong Guo She Hui Ke Xue [Chinese Social Science]* (2002).

the bosses.⁸¹ Simply put, trade unions in China are either an attachment of government or of private employers without their own free will. “Collective bargaining” usually occurs between two parties: workers and enterprises, which are under the control of either government or private employers. Without independence, trade unions can not represent the interest of their workers; instead, they are under the influence of either government or employers, who at the same time are the other party during the process of collective bargaining. In other words, a rhetorical “two-party bargaining” is just window dressing. Simply put, there is hardly any bargaining at all.

Secondly, in the absence of trade unions in some industries, the chance to conclude an effective collective contract is very low. It is reported that there are more than 90 percent of non-state-owned enterprises failing to establish trade unions.⁸² Although the law has anticipated this situation, the feasibility of its provision is problematic. It provides that in the absence a trade union, it (a collective contract) shall be signed by representatives of the workers and managers.⁸³

Generally speaking, the background of labor relations in non-public sector assumes that capital resources are scarce and the labor supply is much larger than demand. Therefore, the bargaining power of workers and employers is quite unbalanced. When there is no trade union involvement, it is questionable whether those poorly organized workers dare to or are willing to choose their representatives to negotiate with employers given the fact that many desperate jobless are waiting to replace them at any time. Moreover, the candidature of the representative is another problem. Who is willing to take the risk of being fired to negotiate with employers? Very few, if anyone at all.

Thirdly, the right to strike is critical to the success of a collective contract.⁸⁴ Under the market economy, one of the critical incentives for workers and employers to reach a final collective agreement is that both sides have threats at their disposal: employers could close the factory and workers could go to strike --- a last resort, “whose use could be readily justified by good workers against bad employers in defense of established rights, or in furtherance of claims expressing minimum needs.”⁸⁵ The competition of these two threats guarantees the bargaining power of both sides. As far as right to strike is concerned, its existence compensates the comparative disadvantage of the workers and adjusts the unbalanced bargaining power. However, even more than twenty years after China established its socialist market economy, it is still not clear whether the right to strike exists in China. It is inaccurate to say that workers in China have no right to strike since this right has not been prohibited by law expressly.⁸⁶ However, neither the Chinese Constitution nor Chinese law provides for the right to strike. In other words, there is a vacuum within legislation with regard to the right to strike. This vacuum only decreases the

⁸¹ *Id.*

⁸² Boxun Net available at <http://www.peacehall.com/news/gb/laogong/2003/10/200310281141.shtml>. Visit date: October 2, 2004, website name: Boxun Net.

⁸³ See *supra* note 71.

⁸⁴ Some Chinese scholars share the same view of the writer, see Yu Yu Lan, *Jia Qiang Gong Hui Ji Ti Tan Pan Neng Li, Ying Dui Lao Dong Guan Xi Guo Ji Hua Tiao Zhan [Strengthen the Capability of Collective Bargaining of Trade Union and Prepare For the Internationalized Labor Relations]*, 5 *Zhong Gong hang Zhou Shi Wei Dang Xiao Xue Bao* [Journal of Hangzhou Chinese Communist Party School] (2002).

⁸⁵ L. J. Macfarlane, *The Right To Strike* 25 (1981).

⁸⁶ According to China Labor Bulletin, several strike leaders have been sent to jail in China. see <http://www.china-labour.org.hk/public/main>. (Visit date: January 15, 2005, website name: China Labor Bulletin). In some sense, this may reflect certain *de facto* governmental attitudes toward strikes in China. It is observed that there was right to strike in the Chinese Constitution of 1978, but this right was deleted in the 1982 version. As such, it might be argued that the Chinese government’s attitude towards the right to strike is negative.

chance to balance the bargaining power between workers and employers. As such, it is hard to expect a real fair bargaining in the foreseeable future.

B. Forced Or Compulsory Labor in China

i. Overview of ILO Fundamental Conventions Relating to Forced Labor

ILO Convention No. 29 defines “forced and compulsory labor” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁸⁷ Meanwhile, it also provides several exceptions to “forced labor,” including military service,⁸⁸ normal civic obligations,⁸⁹ prison labor,⁹⁰ emergencies,⁹¹ and minor communal services.⁹²

ILO Convention No. 105 further provides that member states shall take effective measures to secure the immediate and complete abolition of forced or compulsory labor⁹³ in the following forms:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilizing and using labor for purposes of economic development;
- (c) as a means of labor discipline;
- (d) as a punishment for having participated in strikes;
- (e) as a means of racial, social, national or religious discrimination.⁹⁴

China has not ratified either of the two conventions mentioned above.

ii. Forced Labor in China: Three Types of Forced Labor

a. The First Type of Forced Labor: Normal Workers

There are three kinds of forced labor in China, the first being normal workers. Both Chinese labor law and criminal law have explicitly prohibited forced labor of this type. Under the Labor Law, a worker may notify the employer of his decision to dissolve the labor contract at any time if the employer compels a worker to work by the use of force, threat or by means of illegally restricting personal freedom.⁹⁵ In addition, if an employer compels workers to work by use of force, threat or by restoring to the means of restricting personal freedom or insults, punishes physically, beats, illegally searches or takes workers into custody, the public security organ shall detain the persons responsible for less than 15 days or levy a fine or give a warning and, if the case is serious enough to constitute crime, a criminal responsibility is attached.⁹⁶ According to Chinese Criminal Code, where an employer, in violation of the laws and regulations on labor administration, compels its employees to work by restricting their personal freedom, if serious

⁸⁷ See *supra* note 3, C029, art. 2(1).

⁸⁸ *Id.* art. 2(2)(a).

⁸⁹ *Id.* art. 2(2)(b).

⁹⁰ *Id.* art. 2(2)(c).

⁹¹ *Id.* art. 2(2)(d).

⁹² *Id.* art. 2(2)(e).

⁹³ See *supra* note 3, C105, art. 2.

⁹⁴ *Id.* art. 1.

⁹⁵ Labor Law, 1995, art. 32 (P.R.C.), available at <http://www.lawinfochina.com/index.asp>. visit date: December 25, 2004, website name: lawinfochina.

⁹⁶ *Id.* art. 96.

enough, the persons who are directly responsible for the offense shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and/or be fined.⁹⁷

Forced labor of this type started to emerge with the development of the market economy in China and it is a trend that it is increasing. For the sake of making as much profit as possible, some private enterprises have actually engaged in forced labor practice. It is reported that workers in some private enterprises are forced to work overtime without extra pay.⁹⁸ Sometimes, security guards are employed whose main task is not for the security of factory or its personnel, but to monitor workers' action and prevent their exit.⁹⁹ Any worker who is even suspected to possibly run is subject to physical violence.¹⁰⁰ Forced labor of this type is not only existent in small sized private enterprises located in rural areas, but is also found in relatively bigger enterprises, even joint ventures, whose locations are in large cities such as Shanghai, Guangzhou, Fuzhou, among other cities.¹⁰¹ Thus, it is submitted that legislation itself is not the reason for the spread of the first type of forced labor in China. Implementation of the law is the critical issue.

b. The Second Type of Forced Labor: Convicted Labor Reform System (*Laogai*)

The second type of forced labor is that of the convicted criminal, that is, prison labor. As discussed above, the definition of forced labor under Convention No. 29 is subject to several exceptions, one of which is prison labor exception, that is, any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.¹⁰² Concretely put, the prison labor exception is qualified by three criteria: (a) conviction via judicial procedure, (b) supervision by public authority and (c) no private sector involvement. On its face, the prison labor system in China is consistent with the exception. Prisoners working in labor reform enterprises have gone through judicial process and have been convicted by court in accordance with relevant criminal provisions.¹⁰³ Moreover, the work carried out by prisoners is under the supervision and control of the prison,¹⁰⁴ which, at the same time, is subject to the supervision of people's procuratorate.¹⁰⁵ In this sense, two criteria have been met. The problem lies in failure to meet the third criterion.

After the Chinese Communist Party came into power, it stated that one of the purposes for labor reform system in China is to serve as a method of mobilizing and using labor for national economic development.¹⁰⁶ The then Minister of Public Security, Luo Ruiqing, pointed out that "forced labor...is possessed of the greatest political and economic significance...Compulsory labor will produce wealth for the Government."¹⁰⁷ Encouraged by

⁹⁷ Criminal Law, 1997, art.244 (P.R.C.), available at <http://www.lawinfochina.com/index.asp>. visit date: December 25, 2004, website name: lawinfochina.

⁹⁸ *Warning: Forced Labor's Reemerging*, Worker's Daily, Oct. 9, 2001.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See supra* note 3, C029, art 2(2)(c).

¹⁰³ Criminal Law, 1995, art. 41 & 43. (P.R.C.), available at <http://www.lawinfochina.com/index.asp>. visit date: December 25, 2004, website name: lawinfochina.

¹⁰⁴ Prison Law, 1994, art. 4. (P.R.C.), available at <http://www.lawinfochina.com/index.asp>. visit date: December 25, 2004, website name: lawinfochina.

¹⁰⁵ *Id.* art. 6.

¹⁰⁶ Central Committee of the Communist Party of China, Decision on Organizing Criminals Nation Wide to Join Labor Reform (1951) available at http://news.xinhuanet.com/ziliao/2004-12/16/content_2342435.htm.

¹⁰⁷ Ygael Gluckstein, Mao's China: Economic and Political Survey 291, 287-92 (1957).

China's great leader, Deng Xiaoping, labor reform camps became *de facto* enterprises.¹⁰⁸ In 1980, the national government created a dual responsibility system for prison labor, under which labor reform enterprises must meet individual achievement indexes for not only individual reform but production purposes as well.¹⁰⁹ Labor reform administrators are required to adhere to the traditional emphasis of reforming prisoners into new socialist persons, all the while reaching certain productivities and profit levels.¹¹⁰ Naturally, the so-called "double responsibility" resulted in an increased emphasis on production and a de-emphasis on the well being of prisoners.¹¹¹ In this sense, the Chinese labor reform system serves as a method of mobilizing and uses labor for the purpose of economic development, which is clearly conflicts with relevant ILO Convention provisions, including Article 2(b) within Convention No.105.¹¹²

Moreover, reports claim that the Chinese government has not only encouraged products from labor reform camps to enter the international market, but labor reform enterprises themselves enter foreign markets and even establish joint ventures with international businesses.¹¹³ According to official published Chinese statements, exports from prison labor total \$100 million each year.¹¹⁴ Harry Wu, one of China's famous human rights activists serving 19 years in Chinese labor reform camp, comments that "all the labor-reform officials talk about is getting more foreign money."¹¹⁵ The material well-being of the security personnel and the prisoners is only important as it is linked to the profitability of the labor reform enterprises.¹¹⁶ After an unrevealed percentage of money earned by the labor reform enterprises goes to the central government's pocket in the form of taxes and fees, the rest is allocated by the labor reform enterprises under their discretion.¹¹⁷ Generally speaking, more than forty percent of that money may go into the pockets of security personnel and other management in the form of bonuses while the prisoners, the working laborers, receive little or even nothing from the earnings of the enterprises.¹¹⁸

Furthermore, it is reported that most labor reform enterprises have registered as companies. For example, Shanxi Boiler Factory is also Provincial Prison No. 2.¹¹⁹ Thus, Chinese labor reform enterprises actually have two identities: labor reform camp and company. Usually, the prison designation is only used by the government internally, and the name of the company is displayed to the public, for the sake of business purposes and avoiding the suspicion of foreign visitors.¹²⁰ As such, there is a real labor-employment relationship between prison laborer and the

¹⁰⁸ Dinah Lee & Robert Neff, D., China's Ugly Export Secret: Prison Labor, *Business Week* (April 22, 1991), 42-43, 46.

¹⁰⁹ Sarah A. Thornton, *Importing Prison Labor Products From the People's Republic of China: Re-Examining U.S. Enforcement of Section 307 of the Trade and Tariff Act of 1930*, 3 Pac. Rim L. & Pol'y J. 437 (1995).

¹¹⁰ Laogai Research Foundation, What is the economic significance of the Laogai (2004) available at <http://www.laogai.org/news/newsdetail.php?id=1877>, visit date: December 26, 2004, website name: Laogai Research Foundation.

¹¹¹ *Id.*

¹¹² *See supra* note 93, 94.

¹¹³ For more information on this issue, see online: Laogai Research Foundation, available at <http://www.laogai.org/>. visit date: December 26, 2004, website name: Laogai Research Foundation.

¹¹⁴ *See supra* note 108.

¹¹⁵ *Id.*

¹¹⁶ *See supra* note 109.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See supra* note 108.

¹²⁰ *Id.*

labor reform enterprise with the prison laborers actually placed at the disposal of *de facto* private companies who at the same time are labor reform camps which is obviously inconsistent with the third criterion of no private sector's involvement.¹²¹

c. The Third Type of Forced Labor in China: Reeducation Through Labor (RTL) System (*Laojiao*)

1. Introduction to RTL System in China

The third type of forced Labor is the product of China's "Reeducation Through Labor" (RTL) system. China's RTL system, as a unique punishment system, is an administrative sanction with no judicial involvement and a mechanism for punishing law-breakers (excluding criminal law-breakers). As the foundation stone of the RTL system in China, the 1957 "Decision on the Question of Reeducation through Labor" ("1957 Decision") authorized RTL to be imposed for an uncertain period of time for the purposes of reforming those loafers, law and discipline breakers, or persons who are able to work but choose to lead an idle life into self-supporting socialist new persons, and further maintain public order, therefore, facilitating the socialist construction.¹²²

Specifically, persons of the following categories are subject to RTL:

- (1) those who will not engage in honest pursuits, involve themselves in hooliganism, commit larceny, fraud or other acts for which they are not criminally liable or violate public security rules and refuse to mend their ways despite repeated admonition;
- (2) Counterrevolutionaries and anti-socialist reactionaries who commit minor offences and are not criminally liable and who have been given sanctions of expulsion by government organs, people's organizations, enterprises or schools, and as a result have difficulty in making a living;
- (3) Employees of government organs, people's organizations, enterprises and schools who are able-bodied, but have refused to work for a long period, violated discipline or jeopardized public order, and have been given sanctions of expulsion, and as a result have difficulty in making a living; or
- (4) Persons who refuse to accept the work assigned to them or the arrangement made for their employment and settlement after their demobilization from military service, or who decline to take part in manual labor and production despite persuasion, keep behaving disruptively on purpose, obstruct public officials from performing their duties and refuse to mend their ways despite repeated admonition.¹²³

Other related legislation is the "Supplementary Provisions for Reeducation through Labor", which was promulgated by the State Council in 1979 ("1979 Provision"). The 1979 Provision provides that the administrative committees for reeducation through labor shall be composed of the persons responsible for civil affairs, public security and labor departments and that they shall be responsible for directing and administering the work of reeducation through labor.¹²⁴ In other words, there is no involvement of judicial process. As for the term of RTL, it

¹²¹ See *supra* note 102, 103.

¹²² Decision of the State Council Regarding the Question of Reeducation Through Labor, [1957 Decision], Preamble (1957) (P.R.C.) available at <http://www.lawinfochina.com/index.asp>. Visit date: January 26, 2005, website name: lawinfochina.

¹²³ *Id.* para. 1.

¹²⁴ *Supplementary Provisions of the State Council on Reeducation through Labor*, approved by the Standing Committee of the National People's Congress in November 1979

shall be one to three years with one year extension if necessary.¹²⁵ Only providing for rest allowances on Sundays and festivals.¹²⁶

The third related legislation is the “Trial Methods for Reeducation Through Labor”, which was passed in 1982 by the Ministry of Public Security with the approval of the State Council (“1982 Trial Methods”). This document extends RTL to anyone who commits a misdemeanor, joins a criminal organization for murder, robbery, rape, arson, or is involved in prostitution, theft, fraud and the like. where the circumstances of such crimes are not serious enough to be punished by criminal code.¹²⁷

2. Assessment of RTL System

According to ILO Convention No. 29, there are three necessary criteria needed before an exception to forced labor could be recognized.¹²⁸ As discussed above, the RTL system, by its nature, is an administrative sanction *with no involvement of judicial process*. Theoretically, an administrative committee for reeducation through labor, composed of officials from the civil affairs, public security, and labor departments, is responsible for directing and administering the work of reeducation through labor.¹²⁹ In practice, the whole process for deciding RTL is under the control of police department. The usual procedure is for the police, acting under its own discretion, to determine a reeducation term. As such, it is completely subject to the discretion of the internal administrative procedure. The recipient of a RTL sentence does not have the right to a public hearing, to counsel, or to any kind of judicial determination of his case. Thus, RTL could not meet the first criterion for an exception to prohibited forced labor of Convention No. 29, Art. 2(2)(c): “a consequence of a conviction in a court of law.” The RTL system fails to qualify as a legitimate exception to forced labor. In short, China’s RTL, by its nature, is an institutionalized forced labor system with official support.

C. Child Labor in China

i. Overview of ILO Fundamental Conventions relating to Child Labor

One of the most important conventions relating to child labor promulgated by ILO is Convention No.138. With the aim to establish a general instrument to achieve the total abolition of child labor,¹³⁰ the Convention provides that each member state is under the obligation to pursue a national policy to ensure the effective abolition of child labor and to raise progressively the minimum age for admission to employment, and that no one under that age shall be admitted to employment or work in any occupation.¹³¹ Article 2(3) sets the general minimum age at fifteen, although Article 2(4) states that countries with insufficient developed economies may set a minimum age of fourteen.¹³² Moreover, in the case of work that, by its nature or circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons, there is a blanket prohibition on employment or work of persons less than eighteen years old, providing that under certain circumstances, the age could be lowered to sixteen.¹³³

¹²⁵ See *supra* note 118, para. 3.

¹²⁶ *Id.*

¹²⁷ 1982 Trial Methods, art. 10, Qui Yang, trans.

¹²⁸ See *supra* note 102-103.

¹²⁹ See *supra* note 124.

¹³⁰ See *supra* note 3, C138, preamble, para. 4.

¹³¹ *Id.* art.1.

¹³² *Id.* art.2(3), 2(4)

¹³³ *Id.* art.3(1), 3(3)

ILO Convention No.182 further provides that member states shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency.¹³⁴ It outlines the worst forms of child labor as:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.¹³⁵

China has ratified both Convention No.138 and No.182.

ii. Child Labor Issue in China and Relevant Legislation

a. Child Labor in China

Great advances have been made in reducing child labor in China since 1949. In Mao's¹³⁶ time, one of the policies aimed at eradicating child labor was free and compulsory education. Shortly after the establishment of the People's Republic of China, the Chinese government put education as a priority of its working agenda, and made enhancing the cultural quality of the people the basis of the construction of this socialist regime.¹³⁷ It was estimated that only 20 percent of China's population was literate during that period of time.¹³⁸ The Chinese Communist Party made an ambitious program to establish universal public education for such a large population. At that time, there was a belief that everyone has the right and obligation to be educated. A desire for knowledge permeated the newly founded socialist state.

In addition, at that time, a large scale of nationalization movement was spreading all over China. By the 1960s, the government had finished the process of socialization by converting the means of production to public control.¹³⁹ Within strict governmental control, there is very little chance for the incidence of child labor to work in these state owned enterprises (SOEs). Therefore, it could be concluded that child labor was almost non-existent at that time.

However, the evil of child labor started to re-emerge along with the rapid economic development. The following are findings relating to child labor in the year 2001: In Wuhan,

¹³⁴ See *supra* note 3, C182, art.1.

¹³⁵ *Id.* art.3.

¹³⁶ Mao Zedong or Mao Tse-tung 1893-1976. One of the most charismatic communist leaders. His ideas on revolutionary struggle and guerrilla warfare were extremely influential, especially in the Third World. In this article, "Mao's time" means the time from 1949 (the establishment of People's Republic of China) to 1976 (the year Mao died). See InfoPlease.com, *Mao Zedong available at* <http://www.infoplease.com/ce6/people/A0831663.html>. visit date: March 9, 2007, website name: infoplease.

¹³⁷ Asian Info.org, *Education and Literacy in China, available at* <http://www.asianinfo.org/asianinfo/china/pro-education.htm>. visit date: December 25, 2004.

¹³⁸ See Microsoft Encarta Online Encyclopedia 2005, at http://encarta.msn.com/encyclopedia_761573055_9/China.html visit date: December 26, 2004.

¹³⁹ For more information on this issue, see R. M. Breth, *Mao's China: A Study of Socialist Economic Development* 23-29 (1977).

reports show that there were more than twenty garment factories employing child labor with reports of one child dying of calenture.¹⁴⁰ Also in Wuhan, in a small private Garment factory, there were more than two hundred child laborers working more than ten hours per day.¹⁴¹ In Neihuang county of Henan Province, within three days investigation, the government discovered that seven private enterprises have employed twenty-two child laborers (aging from thirteen to fifteen).¹⁴² In Zhenzhou, Henan province, during a one month investigation, the local government found twenty-eight cases relating to the employment of child labor, and more than fifty child laborers were sent back to their hometowns.¹⁴³ In Jiangxi Province, an explosion at one of its rural schools killed forty-two people and most of them were third and fourth year students making fireworks at the time of the blast.¹⁴⁴ In Shanghai, a Japanese-invested garment factory was also found to employ child laborers, many working as hard as adults and receiving much less pay.¹⁴⁵

As for the working condition of these child laborers, they could be reflected by one child's description of her own working condition in a garment small factory. She said, "We have been working from September 29th to September 31st for three consecutive days without any sleep. And in the morning of the 31st, I was too tired to work and fell asleep when I was working. The machine destroyed my nails. It is really painful..."¹⁴⁶

Although the extent of child labor remains difficult to assess due to a lack of official reporting on cases and the lack of transparency in statistics in China, child labor is not just a sporadic phenomenon. On the contrary, it is a spreading trend. The Asian-American Free Labor Institute (AAFLI) affirmed that "violations of minimum age standards occur more commonly in sub-contracting factories producing for export."¹⁴⁷ Some review of current literature suggests that child labor in China is found in export industries such as fireworks, garment/textiles, and toys.¹⁴⁸ In addition, allegations exist of child labor in Chinese electronics, handicrafts, such as artificial flowers, and gun factories, but these allegations" have not been documented.¹⁴⁹

¹⁴⁰ Wu Miwen, "Wu Han Child Labor Factories, Seventeen Years Old Girl Work To Death" (*Wu Han Tong Gong Zuo Fang, Shi Qi Sui Da Gong Mei Huo Huo Lei Si*), Available at <http://www.unn.com.cn/GB/channel281/282/1433/200108/13/92327.html>. visit date: March 10, 2007, website name: Zhong Guo Di Fang Lian Bao Wang.

¹⁴¹ Yi Mingming & Lu Yungeng, *Dui Zhong Guo Tong Gong Xian Xiang de Ren Shi [The Understanding of the Child Labor Phenomenon in China]*, 12 Qing Nian Yan Jiu [Youth Study] (2002).

¹⁴² "Twenty-two Child Laborers saved in Neihuang County, Henan Province, the Youngest Only Thirty Years Old" (He Nan Nei Huang Xian Jie Jiu Er Shi Er Ming Tong Gong, Zui Xiao Zhe Jin Shi San Sui), Available at <http://news.eastday.com/epublish/gb/paper148/20011120/class014800003/hwz542189.htm>. visit date: March 10, 2007, website name: Eastday.

¹⁴³ "Paying Attention To Child Labor Phenomenon: It Is not only Capital That Kidnaps Child Laborer", (Guan Zhu Tong Gong Xian Xiang: Bang Jia Er Tong De Bu Jin Jin Shi Zi Ben), available at http://www.ce.cn/law/over-bottom/hot-news/200605/26/t20060526_7109878.shtml, visit date: March 10, 2007, website name: China Economic Net.

¹⁴⁴ LA Times, "China Use of Child Labor Emerges from the Shadows", available at http://www.laborrights.org/press/childlabor_china_0505.htm visit date: March 10, 2007, website name: International Labor Rights Fund.

¹⁴⁵ See *supra* note 98.

¹⁴⁶ See *supra* note 141.

¹⁴⁷ U.S. Department of Labor, "China" available at <http://www.dol.gov/ilab/media/reports/iclp/sweat/china.htm#10>. visit date: March 10, 2007, website: U. S. Department of Labor.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

b. Evaluation of Relevant Legislation

Generally speaking, China has relatively competent legislation dealing with child labor.

1. Constitution

The Constitutional provisions explicitly dealing with welfare of children provide for:

- (1) Universal, compulsory and free education in China.¹⁵⁰
- (2) Stipulations that citizens of China not only have the right to education, but have the obligation to receive education as well.¹⁵¹
- (3) State guarantees that children have a healthy development both psychologically and physically.¹⁵²
- (4) State obligation to protect the children.¹⁵³

Thus, China's Constitution does guarantee special protection to its children.

2. Labor Law

The Labor Law prohibits the employment of people below the age of sixteen,¹⁵⁴ except in some extraordinary circumstances, such as in the area of arts, sports and *certain special arts and crafts*. Even under these special cases, the state's approval is a precondition, and the employers still must guarantee these employed minors' universal rights to the nine year free and compulsory education.¹⁵⁵ On its face, this article not only complies with China's obligations under Conventions No.138 and No.182, but also raises the standard, that is, the minimum age for employment is 16 instead of 15. However, the exception "certain special arts and crafts" provides the leeway. The law does not elaborate the special fields, nor does it provide the minimum age of employment for these special circumstances.

3. Compulsory Education Law

The Law on Compulsory Education, which took effect on July 1, 1986, established requirements and deadlines for attaining universal education in China and guaranteed school-age children the right to receive education. Generally speaking, any child in China above the age of six, regardless of gender, nation, or race, has the right to universal education (for those less developed areas, the schooling age could be delayed to seven.)¹⁵⁶ However, according to the Implementation Rule on Compulsory Education Law, it seems that there have been changes to these standards. In terms of this Implementation Rule, the provincial government is allowed to *take steps*, based on the status of its local economic and social development, to achieve *progressively* the full realization of the right to nine year compulsory education.¹⁵⁷ Thus, this provision actually provides a leeway for the local government to take a gradual step instead of immediate measures to universalize the nine-year-compulsory education without a clear deadline. Considering that the Chinese Constitution, together with its Compulsory Education Law, has

¹⁵⁰“The state establishes and administers schools of various types, universalizes compulsory primary education and promotes secondary, vocational and higher education as well as preschool education.” See *supra* note 40, art. 19(2) available at <http://www.lawinfochina.com/index.asp>. visit date: December 27, 2004.

¹⁵¹ *Id.* art 46 (1).

¹⁵² *Id.* art 46 (2).

¹⁵³ *Id.* art 49.

¹⁵⁴ See *supra* note 67, art. 15(1). available at <http://www.lawinfochina.com/index.asp>, visit date: October 1, 2004, website name: lawinfochina.

¹⁵⁵ *Id.* art. 15(2).

¹⁵⁶ Compulsory Education Law, art. 5 (1986) (P.R.C.) available at <http://www.lawinfochina.com/index.asp>.

¹⁵⁷ Implementation Rule on compulsory Education Law of People, art.4 (1992) (P.R.C.) (Qui Yang, trans.)

already provided the universal, compulsory and free education in China, it is actually unconstitutional and contradictory for the Implementation Rule to stipulate otherwise.

4. Minor Protection Law

The Minor Protection Law of PRC was especially drafted for the welfare of the people under the age of eighteen.¹⁵⁸ It obligates the state to protect minors and provides that it is actually not only the state's responsibility but the duty of the whole society as well.¹⁵⁹ It also provides in detail as to how families, schools and other social groups shall protect minors. However, this law fails to design any provisions directly relating to prohibition of child labor. It is possible that the government does not view child labor as a serious enough problem in China to merit mentioning in this law.

5. Criminal Law

Prior to the promulgation of the fourth amendment of Chinese criminal law¹⁶⁰ (2002), there was no provision relating to prohibition of child labor in Chinese Criminal Code. According to the fourth amendment, no one is allowed to employ child laborer under the age of sixteen to overwork, work in high altitude, in a mine, or let them be exposed to explosive, flammable, or hazardous surroundings. Punishment for violation has been fixed at three to seven years imprisonment.¹⁶¹ Thus, except for the special cases of overworking child laborers, or employing them in dangerous conditions, merely employing a child laborer is not a crime. Clearly, the criminal code fails to cover all incidence of child labor.

6. The Order of State Council of People's Republic of China (No. 364): Provisions on the Prohibition of Using Child Labor¹⁶²

In total, there are fourteen articles under this regulation. It mainly provides that the whole society, that is, the families, various civil societies, enterprises (both private and state-owned) and governments (both central and local), shall fight against the practice of employing child labor. Under the regulation, employers that employ child labor are to be fined 5000 Yuan¹⁶³ (RMB) for every child laborer.¹⁶⁴ Moreover, Article 11 also specifically criminalizes employing child laborers to work in the dangerous environment. However, when reading this article carefully, one may find certain problems.

Article 11 provides as follows:

If anyone abducts a child laborer, coerces a child laborer to work, uses child labor to work high above the ground, in a well, in radioactive, highly toxic, flammable or explosive environment, or to engage in the work of fourth level physical labor intensity provided for by the state, uses child laborers under 14 years old, or causes death or

¹⁵⁸ Minor Protection Law, art. 2 (1991) (P.R.C.) *available at* <http://www.lawinfochina.com/index.asp>. visit date: October 2, 2004, website name: lawinfochina.

¹⁵⁹ *Id.* art. 5.

¹⁶⁰ The fourth amendment of the criminal code of People's Republic of China is promulgated and entered into force on December 28, 2002, *available at* <http://www.lawinfochina.com/index.asp>. visit date: October 2, 2004, website name: lawinfochina.

¹⁶¹ *Id.* art 4. Actually, only this article in the whole criminal code deals directly with child labor.

¹⁶² This Rule is promulgated and enter into force on December 1, 2002.

¹⁶³ 5000 Yuan RMB equals to about \$604.59 USD.

¹⁶⁴ Rule of Prohibiting to Employ Child Labor, article 6(1) (2002) (P.R.C.). According to Article 6(2), if the same employer is discovered to use child labor again, the fine will be enhanced to 10000 Yuan for each child laborer, *available at* <http://www.lawinfochina.com/index.asp>, visit date: October 3, 2004, website name: lawinfochina.

serious disability to a child laborer, the criminal responsibilities shall be prosecuted for pursuant to the provisions of the criminal law on the crime of abducting children, the crime of coercing another person into labor or other crimes.¹⁶⁵

Following the logic of this clause, the crime of abducting a child laborer is punished under the name of “crime of abducting children.” According to the interpretation from Chinese People’s Supreme Court on the “crime of abducting children,” “child” here is defined as person under the age of 14.¹⁶⁶ However, in the case of child labor, the age is under 16.¹⁶⁷ If a child laborer is abducted under the age of 14, the crime is covered as the “crime of abducting children,” if a child laborer is abducted between the age of 14 and 16, however, the *chapeau* of “crimes of abducting children” is no longer suitable. It could be argued that abducting a female child laborer between the age of 14 and 16, falls under the crime of “abducting woman”.¹⁶⁸ However, as for the crime of abducting male child labor between the age of 14 and 16, so far, there is no provision under the PRC Criminal Code dealing with it directly. In other words, male child laborers aged 14 to 16 are less protected from abduction under the criminal code. This crime, notwithstanding its evil nature, failed to be criminalized under the PRC Criminal Code.

c. Summary of Findings

Generally speaking, China’s legislation prohibiting child labor is consistent with ILO Conventions No. 138 and No. 182. There is still some leeway both in Labor Law and Compulsory Education Law. The Minor Protection Law fails to design any provisions directly relating to child labor. There are some controversies within Chinese criminal legislation and it fails to cover all cases of child labor.

D. Discrimination with Respect to Employment and Occupation in China

i. Overview of ILO Fundamental Conventions No. 100 and No. 111

According to ILO Convention No. 100, men and women workers are entitled to equal remuneration for work of equal value,¹⁶⁹ which includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind.¹⁷⁰ Convention No. 111 further requires member states to eliminate any discrimination on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying, or impairing equality of opportunity or treatment in employment or occupation.¹⁷¹ China has ratified Convention No. 100 but not No. 111.

ii. Review of China’s Legislation with Regard to Discrimination in Respect of Employment and Occupation

¹⁶⁵ *Id.* art.11.

¹⁶⁶ According to the interpretation of the interpretation Criminal Code of People’s Republic of China, in the criminal law, “child” is defined as people under the age of 14.

¹⁶⁷ According to Minor Protection Law of People’s Republic of China art. 28(1) and Labor Law of People’s Republic of China art. 15, child labor involves people under the age of 16.

¹⁶⁸ Criminal Code, art. 244 (1997) (P.R.C.) *available at* <http://www.lawinfochina.com/index.asp>, visit date: October 2, 2004, website name: lawinfochina.

¹⁶⁹ *See supra* note 3, C100, Art.1(2).

¹⁷⁰ *Id.* art.1(1).

¹⁷¹ *See supra* note 3, C111, art.1(1).

Chinese Labor Law has explicitly provided that workers shall not be discriminated in aspects of nationality, race, sex and religious beliefs with regard to employment.¹⁷² The law emphasizes that women enjoy the equal rights of employment as men¹⁷³ and also provides special protection to female workers.¹⁷⁴ Moreover, the Woman Rights and Interests Protection Law provides special protection for the welfare of female workers and reemphasizes the principle of non-discrimination in terms of occupation and employment. However, compared with the aforementioned ILO Convention, the Chinese Labor Law keeps silent on the issues of discrimination with regard to color, political opinion and social origin.

In case of discrimination based on color, it is hardly a problem given more than 95 percent of China's population is ethnic Chinese and almost 100 per cent of its population is of the same race. As far as discrimination based on political opinion is concerned, this concept is very much dependent upon China's particular political environment.¹⁷⁵ Before China's economic reform, almost all the employees in governmental agencies and managers in SOEs were members of Chinese Communist Party ("CCP").¹⁷⁶ At that time, the government actually employed a preferential policy towards members of CCP.¹⁷⁷ However, with the prosperity of China's market economy, "political opinion" is becoming less relevant in employment decisions, especially in private enterprises that are playing an increasingly important role in China's developing economy.¹⁷⁸ Although preferential treatment to CCP members is still a *de facto* practice in some governmental agencies and SOEs, this phenomenon is much more of a political issue than a legal one. Thus, merely depending on legal approach to change it is unrealistic and unfeasible. Employment discrimination based on social origin may be the most serious form of employment discrimination in China. A relatively detailed discussion of this issue follows in the next section.

iii. Review of Employment Discrimination based on Social Origin in China

China's 130 million "farm workers" (one tenth of Chinese total population) actually constitute China's majority industrial workforce.¹⁷⁹ Most, although not all of them, are from rural areas,¹⁸⁰ meaning that their social origin is classified as "farmer" instead of "urban dweller". In contrast to the western understanding of a farmer, a profession taken up by people of various educational backgrounds and involving large scale mechanical equipment, the term farmer in China is often associated with poor, dirty, rude and uneducated people. As the major constituent of Chinese migrant workers, farm workers have been widely discriminated against based on their social origin, despite providing cheap and efficient labor force in China's ongoing economic development.

a. Discrimination in Payment

¹⁷² See *supra* note 67, art. 12.

¹⁷³ *Id.* art.13.

¹⁷⁴ *Id.* chapter 7, art. 58-64.

¹⁷⁵ Wikipedia, Communist Party China. available at

http://en.wikipedia.org/wiki/Communist_Party_of_China. visit date: October 4, 2004.

¹⁷⁶ Zhu Yan & Dai Liangtie, *Jiu Ye Qi Shi De Bi Jiao Yan Jiu [Comparative Study on Discrimination with Regard to Employment]*, 12 Jing Ji Wen Ti Tan Suo [Economic Problem Investigation] 22 (2002).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Marilyn Bechtel, *China's Union and Farmer workers: Building A Better Future Together*, People's Weekly World Newspaper, Nov. 9, 2004, available at www.pww.org/article/articleview/5753/1/231, visit date: January 1, 2005, website name: People's Weekly World.

¹⁸⁰ *Id.*

Farmer workers take on the heavy, dirty, dangerous work distained by their urban counterparts, and even when there are rural and urban workers on the same job, they do not receive the same benefits. For example, in Wuhan Hebei Province, compared with those cleaners with urban origin who are protected by long-term labor contract and paid more than 1000 Chinese yuan per month, cleaners with rural origin not only have no chance to be covered by long-term labor contract as such, but also paid only 400 yuan per month averagely.¹⁸¹ This is a common occurrence in many large cities throughout China, including Shanghai, Beijing, Guangzhou and Shenzhen. Laborers doing the same job, providing the same contribution, are compensated differently due to their different social origin.

Moreover, wage arrears is another wide spread problem for farm workers in China, especially in private enterprises. Some reports even claim that governmental officers are getting used to this phenomenon when receiving their pay.¹⁸² A survey published by the official New China News Agency found that nearly 75 percent of the farm workers have trouble collecting their salary.¹⁸³ Some farm workers have never even been paid as promised.¹⁸⁴ A majority of those polled shared a common view: begging from, bargaining with or intimidating their employers were the best ways to get their money, while only a very few considered seeking help from the government and less than two percent considered taking the matter to court to be a good choice.¹⁸⁵ One Chinese labor researcher studying the issue of farm worker's payment arrears estimated that at least 100 farm workers, most in construction industry, threaten to commit suicide due to unpaid wages each year in the Pearl River Delta region alone.¹⁸⁶ According to the official statistics from Shanghai Labor Monitoring Department, in 2004, there were more than 2702 cases in Shanghai relating to wage arrears of farm workers, involving approximately 176,300 workers.¹⁸⁷

b. Discriminatory Local Legislations

Occupational choices for farm workers are also artificially limited by biased local legislation. For example, in Shanghai, legislation has provided that more than twenty kinds of

¹⁸¹ Li Chen & Cong Yu, "Wuhan 10,000 Cleaners Not Paid Equal Remuneration For Work With Equal Value, Institutional Pain Behind Discrimination" (*Wu Han Wan Ming Huan Wei Gong Ren Tong Gong Bu Tong Chou, Qi Shi Bei Hou Shi Ti Zhi Zhi Tong*), Available at <http://www.people.com.cn/GB/huanbao/1072/2687588.html>, visit date: March 10, 2007, website name: Renmin Wang.

¹⁸² Du Lirong, Cheng Shi Ming Gong Sheng Cun Bao Gao [Report on Farmer Workers Living Condition in Urban Areas] 24 (2004).

¹⁸³ Philip P. Pan, *Suicide Threats Rise as Employers Deny Wages*, Washington Post Foreign Service, Feb. 13, 2003, available at <http://www.china-labour.org.hk/public/contents/article?revision%5fid=2531&item%5fid=2530>, visit date: January 4, 2005, website name: China Labor Bulletin.

¹⁸⁴ Zhang Jun & Wang Jinye, "A Hundred Days' Survival Record of A Farmer Worker, Three Months Only Paid Four Hundred Fifteen Yuan" (*Yi Ge Nong Min Gong De Bai Ri Sheng Cun Shi Lu, San Ge Yue Zhi De Xian Si Bai Yi Shi Wu Yuan*), available at <http://www.southcn.com/news/community/shzt/nmggq/sdbd/200311191138.htm> visit date: March 10, 2007, website name: Nan Fang Wang.

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* note 183.

¹⁸⁷ "2004 Demanding Outstanding Wages 0.17 Billion Yuan" (*2004 Nian Zhui Tao Qian Xin 1.7 Yi*), available at http://www.12333.gov.cn/zxfw/xw/xwall/t20050105_5360.htm, visit date: March 10, 2007, website name: Shanghai Lao Dong Bao Zhang Fu Wu.

occupations are only available to urban citizens.¹⁸⁸ In Wuhan, according to “Order of Employment of Farm Workers in Wu Han”, occupations are divided into three types: farm worker permitted, farm worker limited and farm worker prohibited.¹⁸⁹ Not only in Shanghai and Wuhan, some other cities in China such as Beijing, Shenzhen, Zhenzhou, also enacted similar discriminatory local legislation.¹⁹⁰ As a result, the jobs left for farm workers are either those with hazardous working conditions, or those that urban citizens are unwilling to do, such as construction work.¹⁹¹

c. Discrimination in Terms and Conditions of Employment

Generally speaking, farm workers have no chance to enjoy the same labor rights as urban citizens. Situations like working overtime with no extra pay, being chosen to do dangerous work without protective clothing or equipment are familiar to them. If they fall ill, or are injured and disabled, they are simply fired without any compensation. In Beijing, in the first 11 months of 2003, 86.7 percent of industrial-accident deaths involved farm workers.¹⁹² Moreover, workers with from rural areas get no medical insurance, subsidies, or social security insurance,¹⁹³ and their rural origin even precludes them from the right to apply for housing subsidies or home loans.

iv. Analysis of Reasons for Employment Discrimination Based on Social Origin

China used to completely prevent farmers from working in the cities, pressured by the inadequate economic opportunities.¹⁹⁴ The measures employed by the government to control the movement of people from rural areas include the rigid residence registration system,¹⁹⁵ grain

¹⁸⁸ Chen Xi & Yin Ningbo, *Nong Min Gong Jiu Ye Qi Shi De Zheng Zhi Jing Ji Xue Fen Xi [The Political Economic Analysis on Employment Discrimination of Farmer Workers]*, 2 *Nong Cun Jing Ji [Rural Economy]* 21 (2004).

¹⁸⁹ Order of Employment of Farmer workers in Wu Han, available at <http://www.china.org.cn/chinese/difang/112815.htm>, visit date: October 15, 2004, website: Zhong Guo Wang.

¹⁹⁰ See *supra* note 188.

¹⁹¹ More than 80 percent of construction workers are farm workers in China. See Zhou Hua Gong, *Min Gong Li “Shi Min Dai Yu” You Duo Yuan? [How Far Between Farmer Workers and ‘Citizen Treatment’?]*, 7 *Dui Hua Yu Zheng Ming [Dialogue and Argument]* 19 (2004).

¹⁹² “Industrial accidents kill 165 in Beijing this year”, Available at http://www.chinadaily.com.cn/en/doc/2003-12/11/content_289159.htm, visit date: March 10, 2007, website name: Chinadaily.

¹⁹³ See *supra* note 182 at 17.

¹⁹⁴ *China to Facilitate Free Flow of Migrant Workers*, Xinhua, May 30, 2004, available at www.chinadaily.com.cn/english/doc/2004-04/30/content_327721.htm. visit date: October 30, 2004, website name: Chinadaily.

¹⁹⁵ Each citizen in China is registered either as of urban origin or rural origin. Therefore, people in China are artificially divided into two different groups. Based on this dual system, there are dual social security systems, dual medical insurance systems, dual educational systems, dual taxation systems, dual organizational systems, even dual power supply systems. For more information on Chinese *hukou* system, please see generally in: “The Current Situation and The Future of Chinese Household Registration System” (*Zhong Guo Hu Ji Zhi Du Gai Ge De Xian Zhuang Yu Zhan Wang*), online: <<http://www.qzagri.gov.cn/xwdetail.asp?ID=13389>> (visit date: January 17, 2006); Chen Chengwen & Sun Zhongmin, “Dualism Or Monism: Choices of The Models on the Reform of Chinese Household Registration System” (*Er Yuan Hai Shi Yi Yuan: Zhong Guo Hu Ji Zhi Du Gai Ge De Mo Shi Xuan Ze*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4793> (visit date: January 17, 2006); “Chinese Household Registration System: The Shame of the City” (*Zhong Guo Hu Ji Zhi Du: Cheng Shi De Chi Ru*), Chinese Economic Daily (China), April 30, 2005, cited from online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4142> (visit date: January 17, 2006); Ge Zhihua, “Resolution for Chinese ‘Three Agricultural Problems’----- Rural Society in Transformation” (*Wei Zhong*

quota system, an employment and welfare system provided solely for urban residents, as well as the forbidding of home leasing or sales.¹⁹⁶ Although China lifted some of these restrictions in 1984, those discriminatory measures previously mentioned are still being used today.

Moreover, for a long time, China's trade unions would only embrace and fight for the interests of workers with city or township resident identification, leaving more than 100 million farmer workers excluded simply because of their rural origin.¹⁹⁷ Although the ACFTU announced in an August 9, 2003 circular that it would start recruiting as many farm workers as possible and categorize them as members of China's working classes, however in reality, more than 80 percent of farm workers are still uncovered.¹⁹⁸ Even worse, some autonomous farm workers organizations in the coastal province of Zhejiang, have been declared illegal.¹⁹⁹ This vulnerable group, without any organizational protection, is surely subject to unfair treatment in respect of terms and conditions of employment.

Some scholars argue that Chinese labor law has provided enough protection for farm workers. This argument assumes that farm workers belong to the working class in China, and since the working class is well protected by Chinese labor legislation, then farm workers are benefited.²⁰⁰ However, if this were the case, why does the social security system fail to cover them, why do trade unions refuse to represent them, why have they so often been subjected to the worst violations of labor standards provided by labor law, including unpaid overtime working, hazardous working conditions and wage arrears? Chinese farm workers are probably best classified as belong to a special social group: "half farmer half workers." This group is becoming larger and larger with the rapid development of the Chinese market economy. The government, both central and local, the law, the employers, and the urban dwellers have not regarded them as real workers belonging to Chinese working class. Admittedly, the central government started to realize the problem and called for nationwide efforts to safeguard the rights of farm workers,²⁰¹ but labor legislation in this area is still lacking provisions to provide them adequate special protection. Merely issuing documents or promulgating policies without providing clearly defined legal protection has no chance of bringing about the necessary fundamental changes.

V. Conclusion

Guo De San Nong Wen Ti Qiu Jie --- Zhuan Xing Zhong De Nong Cun She Hui [Jiang Su: Jiang Su People's Press (*Jiang Su Ren Min Chu Ban She*), 2004], from 60 to 65.

¹⁹⁶ *Id.*

¹⁹⁷ *Migrant Workers Flock to Join China's Trade Unions*, Xinhuanet, Sept. 21, 2003, available at http://news.xinhuanet.com/english/2003-09/21/content_1091989.htm. visit date: October 2, 2004.

¹⁹⁸ *Id.*

¹⁹⁹ Chen Feng, "Between State and Labor: The Conflicting Role of the Chinese Trade Union Under Market Economy" (*Zai Guo Jia He Lao Gong Zhi Jian: Shi Chang Jin Ji Xia Zhong Guo Gong Hui De Jiao Se Chong Tu*), available at http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=3996, visit date: June 5, 2005, website name: The Chinese University of Hong Kong.

²⁰⁰ As long as the farm workers have established an employment relationship with employers, labor law is applicable to farm workers. However, this document has no binding force, at most it just represents the central government's political attitude. Without clear legal protection, the future of farm workers is not that optimistic. Chinese Labor and Social Security Department, Reply to Questions Relating to the Application of Labor Law on Farmer Workers (2003).

²⁰¹ Available at http://chinadaily.com.cn/english/doc/2004-05/15/content_330991.htm (visit date: November 12, 2004). Moreover, according to the China News Agency (20 February, 2002), the Ministry of Labor and Social Security will adopt five measures to protect migrants legal rights. The measures will aim at manage a more systematic and rational labor market; prevent overcharging and swindling of migrants through job placement fees; provide better employment counseling services; and strengthen inspections to curb wage arrears and other infringements of the rights of farmer workers.

Considering that more than 80 percent of Fortune 500 companies have entered the Chinese market, China has become one of the world's largest FDI recipients. More and more labor-intensive products, labeled "Made in China" have appeared in international market, making China likely to become a *de facto* world factory in the foreseeable future. In addition, the hot debate on whether to introduce a Social Clause²⁰² in the WTO also requires China, as a relatively new member state of WTO, to take its internal labor rights issue seriously so that a criticism of social dumping from some WTO member states could be avoided in the future. As such, to compare China's labor standards with ILO Fundamental Conventions, and finally to internationalize China's standards has become a valuable topic.

In this article, the writer analyzes the unique status of Chinese trade unions and questions their ability to protect the interests of the Chinese working class. In the case of collective bargaining, the writer reviews the relevant Chinese labor law and analyzes the reasons for the ineffectiveness of the collective bargaining system in China. As for the issue of forced labor, the writer critically evaluates three kinds of forced labor in China: normal workers as forced labor, convicted labor reform system and the reeducation through labor (RTL) system. In the case of child labor, according to a review of relevant legislation, the writer pointed out certain internal legislation as contradictory and seriously lacking. In the area of employment discrimination, after a general overview of related ILO conventions and Chinese legislation, the writer focuses on discrimination with regard to employment based on social origin in China, analyzing a case study on Chinese farm workers. In the writer's understanding, as a vulnerable group, farm workers do not receive enough attention and special protection from Chinese labor legislation.

²⁰² "Social dumping" is "the process whereby manufacturers close down factories in high-wage areas and set them up in areas where labor is cheap". Europa, A Plain Language Guide To Eurojargon *available at* europa.eu.int/abc/eurojargon/index_en.htm). This concept is built on the assumption that countries with lower labor standards have artificially lower their labor costs in order to attract more Foreign Direct Investment (FDI). In order to compete with low labor cost countries, mainly those countries from the South where labor supply is plentiful, industrialized countries would have to decrease their high labor standards, i.e., harmonizing down----"race to the bottom". Based on this hypothetical social dumping thesis, a social clause is proposed to be included into trade agreement so that the unfair advantage in international trade caused by social dumping could be avoided. The rationale is that a social clause could promote fair competition between exporters in developing countries by guaranteeing that those who respect minimum labor standards are not penalized for their efforts to promote social development. Besides, it also could enable people to benefit from increased world trade. It is argued by some scholars that without such a clause, increased international competition might lead to a "destructive downward spiral in the condition of work and life of working people all over the world." Naturally, WTO becomes the focus on this debate at the international level. There is a heated debate between the developed states and the developing ones on whether to introduce a social clause into GATT, so that a link between trade and labor rights could be established. So far, this debate is inconclusive. It is observed that according to some scholars, such as professor Sornarajah M., there would never be a social clause in WTO, but the writer would like to argue that this view might be too extreme to be right. *see also* Adelle Blacket, *Without Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 Colum. Hum. Rts. L. Rev. 1 (1999). *also* Van Lieimt, Bilbert, *Minimum Labor Standards and International Trade: Would a Social Clause Work?*, 4 Int'l Labor Rev. 438-448.