

**TAKING WORKERS' FUNDAMENTAL RIGHTS SERIOUSLY:
A STUDY ON THE CHINESE LABOR LAW FROM THE
PERSPECTIVE OF INTERNATIONAL CORE LABOR
STANDARDS**

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DEDICATION

This thesis is dedicated to my loving parents. Without their knowledge, wisdom and support, I will not have the courage to strive and realize my dreams!

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TABLE OF ABBREVIATION

AAFLI	Asian-American Free Labor Institute
ACFTU	All-China Federation of Trade Union
BWAF	Beijing Autonomous Workers' Federation
CIL	Customary International Law
COC	Corporate Code of Conduct
CFA	Committee on Freedom of Association
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
EPZ	Export Processing Zone
FDI	Foreign Direct Investment
ILO	International Labor Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CEPAA	Council on Economic Priorities Accreditation Agency
ICFTU	International Confederation of Free Trade Union
KMT	Kuo Ming Tang
MNC	Multinational Corporations
MAC	Minimum Age Convention
MEA	Monetary Enforcement Assessment
NPC	National People's Congress
NGO	Non-governmental Organization
NAALC	North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development

PRC	People's Republic of China
RTL	Reeducation Through Labor
ROL	Rule of Law
SOE	State Owned Enterprise
SPC	Supreme People's Court
SAI	Social Accountability International
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
WFCC	Worst Forms of Child Labor Convention

SUMMARY

China is undergoing rapid economic growth and, in tandem, experiencing social transformations and rising social unrest. Growing inequalities among its citizens, the provision of jobs and job security, and the reform of state owned enterprises intersect with questions of governance and the expectations of ordinary citizens. Important stresses therefore arise for China's systems to ensure job security and the protection of workers. China's trade unions are not well prepared for these stresses. It has been designed to function in a typical Marxist socialist state and is struggling to adapt to the changed economic and social circumstances in China after decades of change and reform. The system faces conflicts that entwine to create a dilemma in its functions and render it unable to satisfy its members' urgent and legitimate needs. Labor related problems that were thought to have long disappeared under socialism -- such as forced labor and child labor -- have resurfaced. At the same time, a special social group has emerged: the "farmer workers" created by the dramatic influx of migrants from China's rural areas to the cities. Serious discrimination problems in employment in the urban areas have arisen that China's legal system, especially those that deal with labor rights, must adapt and respond to. What can and should China do? Even if the political need to deal with the issue has increased, questions remain on the approach that China should take. In this context, there is an urgent need to re-examine China's labor laws and the underlying institutions with a view of reforming them. In the effort to re-examine and reform, we would benefit from considering model laws that can guide China's legislative reform. Only then can the costs to the Chinese people be reduced in this time of great social transformations.

The main argument of this thesis is that the international core labor standards -- as crystallized by eight fundamental conventions of the International Labor Organization (ILO) that cover four fundamental aspects of labor rights -- can and should serve to **guide** China's legislative reform. Although ILO fundamental conventions never force a signatory party to obey their standards, its

influential power is beyond doubt. So too, in this writer's opinion, is its usefulness in helping China's labor laws and system change and evolve in tandem with the larger economic and social transformations. Accordingly, in this thesis, the writer conducts a comprehensive study on the Chinese labor legislation from the perspective of eight ILO fundamental conventions, to find out the gap between them and provide feasible gap-filling solutions, including but not limited to legislative reforms.

Chapter 1: Introduction

As China is undergoing rapid economic growth and social transformations, there are increasing concerns regarding the costs to its people. When China is moving from a centrally-planned economy towards a market economy with Chinese characteristics, its legal system, including those that deal with labor rights also needs to adapt to the change. In this context, this thesis argues that the international core labor standards crystallized by eight International Labor Organization (ILO) fundamental conventions can be of great help to China, to both its government and especially to its people. The core conventions have the potential to smooth the ongoing transition and minimize dissatisfaction and social unrest.

In this thesis, the writer will closely analyze the Chinese labor law from the perspective of international core labor standards. In so doing, the thesis seeks to examine the gap between these Chinese national legislation and international standards and to identify the gap-filling solutions, which not only take into account the international core labor standards but are adapted to the realities that China faces.

1.1 The Value of This Research

Why is it important for China to progressively adopt the core labor standards of the key ILO conventions? This thesis makes six arguments as follows:

First, with a remarkably rapid economic growth over the last two and a half decades, nowadays, nobody will deny the economic miracle that China has created. However, at the same time, China “is also experiencing rising social unrest, including protests, demonstrations, picketing, and group petitioning”.¹ Chinese official statistics have shown that “public order disturbance” have grown

¹ Thomas Lum, “Social Unrest in China”, CRS Report for Congress”, online: <<http://www.fas.org/sgp/crs/row/RL33416.pdf>> (date accessed: April 24, 2007). For more information,

dramatically during recent years, with the number of incidents in year 2003 being 58,000 to 87,000 in 2005.² It is observed by political observers that recent protests activities in China “have been broader in scope, larger in average size, greater in frequency, and more brash than those of a decade ago”.³ The growing income gap, together with the rise of a new class of wealthy officials and entrepreneurs, has stirred resentment among the poor which could lead to “all types of social instability”.⁴ As is pointed out by several experts both from China and overseas, a key dilemma for the Chinese Communist leadership is how to redistribute national wealth and opportunities so that the fruits of economic development can be shared among the majority of the Chinese population instead of the minority.⁵ In response to the rising social unrest and the key dilemmas that they face, the Chinese top leaders have made a series of announcements indicating the need for a new ideological campaign, i.e., shifting “the focus of official rhetorical from ‘economic growth’ to ‘social harmony’”.⁶ This means, “the development of ‘democracy, the rule of law, justice, sincerity, amity and vitality’ as well as a better relationship between the people and the government and ‘between man and nature’”.⁷ In order to implement this new ideological campaign, one of the most important actions the Chinese government should take is to protect labor rights, since labor rights protection, as closely linking with an ordinary people’s daily life, is one of the leverages for safeguarding a just distribution of wealth and diminishing social inequality.

please also see generally in Murray Scot Tanner, “Chinese Government Response to Rising social Unrest”, online: <http://www.rand.org/pubs/testimonies/2005/RAND_CT240.pdf> (date accessed: April 27, 2007); John Chan, “Chinese President Preaches the Need for ‘A Harmonious Society’”, online: <<http://www.wsws.org/articles/2005/mar2005/chin-m12.shtml>> (date accessed: April 27, 2007); Francesco Sisci, “Is China headed for A Social ‘Red Alert’?”, China Business, Oct 20, 2005, online: <http://www.atimes.com/atimes/China_Business/GJ20Cb01.html> (date accessed: April 27, 2007)

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Please see generally in online: <<http://ceoroundtable.chinadaily.com.cn/cdr/cdr27/cdr27.html>> (date accessed: April 13, 2009); online: <<http://english.peopledaily.com.cn/90001/90776/90883/6606195.html>> (date accessed: April 13, 2009); online: <<http://id.china-embassy.org/eng/xwtd/t301664.htm>> (date accessed: April 13, 2009).

⁷ John Chan, “Chinese President Preaches the Need for ‘A Harmonious Society’”, online: <<http://www.wsws.org/articles/2005/mar2005/chin-m12.shtml>> (date accessed: April 27, 2007).

Second, the international core labor standards set admirable goals and provide the framework, with principles and rights incorporated as means towards that end -- “sound and equitable economic development to improve the lives of all men and women”.⁸ These are principles and rights that enable the growth of human potential and the building of vibrant social institutions to help eradicate poverty.⁹ Evidence shows that countries that have both eliminated forced labor together with the worst forms of child labor and made substantial inroads against discrimination in employment are thriving economically.¹⁰ It is observed that respect for freedom of association reinforces popular participation and buttresses democratic institutions and system of collective bargaining.¹¹ Also social dialogue creates room for negotiations that have the potential to address an uneven distribution of the gains from economic growth, which is one of the key problems to be addressed in contemporary Chinese society as it is undergoing dramatic social transformations.¹²

Third, more than four fifths of the Fortune 500 companies have entered the Chinese market,¹³ and China has become one of the world’s largest foreign direct investment (FDI) recipients. As more and more labor-intensive products labeled “made in China” have appeared in the international market, China has become world’s factory. In order to attract more qualified FDI to come to China so that the Chinese workers can benefit more from FDI and avoid being exploited, it is necessary for China to improve its labor standards.

⁸ Roger Blanpain & Chris Engels, eds., *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Netherlands: Kluwer Law International, 2001), at 113.

⁹ *Ibid.*

¹⁰ *Ibid.*, at 114.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ He Yuxin, “Ninety Percent the Fortune 500 Companies Have Entered China”, online: <http://www.chinafdi.org.cn/chinese/news_view.asp?id=803> (date accessed: April 16, 2006).

Fourth, in order to improve China's international image, a positive labor rights record plays a critical role. As discussed below, the ILO has publicly criticized the Chinese Trade Union law due to its conflicts with the fundamental principles of freedom of association.¹⁴ In addition, several countries, represented by USA, have consistently criticized China for denying internationally recognized worker rights, especially forced labor practices.¹⁵ The recent exposure of forced labor scandals in brick kilns in central and northern China once again aroused not only domestic public outcry, but also strong international criticism.¹⁶ Thus, it is high time for China to take actions to improve its national labor standards and finally erase the negative image caused by these complaints.

Fifth, an ongoing debate on whether to introduce a Social Clause¹⁷ to the WTO regime also requires China, as a relatively new member state of the WTO, to take its internal labor rights

¹⁴ For more information, see text below accompanying note from 292 to 294.

¹⁵ "Human Rights Abuses Systematic Problem for China",

Online: <<http://usinfo.state.gov/dhr/Archive/2005/Apr/15-919613.html>> (date accessed: April 22, 2005).

¹⁶ It was discovered sometime in June 2007 that hundreds of people was forced to work under slave-like conditions in the brick kilns of Shanxi Province, China. Some workers there are found below age 16. The Chinese Premier Wen Jiabao has ordered a thorough probe and punishment of kilns owners and officials who abetted their activities. The governor of Shanxi Province issued an extraordinary apology to victims and the public. The recent development of the case is that the death sentence is imposed on a supervisor of a kiln in Hongtong County for beating a worker to death with a shovel. There are 29 men sentenced in Shanxi Courts, 2 of them are convicted of hiring a child laborer. Besides, verdicts for other 12 kilns owners and managers are due soon. 95 local officials have been punished for failure in crisis management, or lack of speedy action in the aftermath of the exposure of forced labor in illegal brick kilns -- probably one of the largest scale punishments of officials in communist China's history. In sum, this forced labor scandal involves not only "grave illegal employment problems, but forced abducting, restricting personal freedom, using coerced labor, employing children and maliciously wounding to the point of death". For more information, please see generally in "China Orders Crackdown on Labor Abuse", China Daily, online: <http://www.chinadaily.com.cn/china/2007-06/19/content_897777.htm> (date accessed: July 10, 2007); "Brick Kilns: Where Were Authorities?", China Daily, online: <http://www.chinadaily.com.cn/cndy/2007-06/20/content_897957.htm> (date accessed: July 10, 2007); "China Strikes at Root of Brick Kiln Slavery", China Daily, online: <http://www.chinadaily.com.cn/china/2007-06/21/content_898742.htm> (date accessed: July 10, 2007); "Premier Wen Vows to Stamp Out Slave Abuses", China Daily, online: <http://www.chinadaily.com.cn/china/2007-06/20/content_898701.htm> (date accessed: July 10, 2007); "Governor Makes Self-Criticism", China Daily, online: <http://www.chinadaily.com.cn/cndy/2007-06/21/content_898836.htm> (date accessed: July 10, 2007); online: <<http://chinadigitaltimes.net/tag/shanxi+brick+kiln>> (date accessed: August 21, 2007).

¹⁷ "Social dumping" is "the process whereby manufacturers close down factories in high-wage areas and set them up in areas where labor is cheap". (From online:

issue seriously. This can help reduce that criticism of “social dumping” and avoid the threat of sanctions imposed¹⁸ from some WTO member states -- mainly developed ones.

Sixth, the cooling Chinese economy immediately following the global meltdown and the credit crunch, “which saw growth slow to 9 percent in 2008 (down from 13 percent in 2007), is having a profound effect” on the Chinese society.¹⁹ As consumer demand for Chinese products dropped worldwide and factories all over southern part of China began to close down, massive layoff unfortunately becomes a fact of life.²⁰ As such, the issue of labor rights protection is becoming even more important when it is totally a buyer’s market for labor.²¹

1.2 Methodologies Adopted in The Study

<http://europa.eu.int/abc/eurojargon/index_en.htm> date accessed: June 23, 2005). 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. (For more information, please see generally in Adelle Blacket, “Without Social Clause? Human Rights, Trade Theory and Treaty Interpretation”, 1999, 31 Colum. Hum. Rts. L. Rev. 1 & Van Liemt, Bilbert “Minimum Labor Standards and International Trade: Would a Social Clause Work?” International Labor Review 128, no. 4:438-448.)

¹⁸ *Ibid.*

¹⁹ Please see generally in Andy Scott, “Opportunities within China’s Economic Stimulus Plan”, online: <<http://www.china-briefing.com/article/opportunities-with-china%E2%80%99s-economic-stimulus-plan-561.html>> (Date Accessed: April 13, 2009); online: <<http://news.bbc.co.uk/2/hi/business/7665515.stm>> (date access: April 13, 2009); Jaime FlorCruz, “Chinese Leaders Confront Economic Crisis”, online: <<http://edition.cnn.com/2009/WORLD/asiapcf/03/03/china.meeting.economy/index.html>> (date accessed: April 13, 2009).

²⁰ *Ibid.*

²¹ Ren Ke, “Global financial crisis spills over China's labor market”, online: <http://news.xinhuanet.com/english/2008-11/01/content_10293305.htm> (date accessed: April 13, 2009).

The main methodologies adopted in this thesis are as follows:

1) A way of comprehensive analysis: The writer begins her thesis with analyzing related ILO fundamental conventions, international and regional treaties in detail, and then links them to the relevant Chinese labor legislation by identifying the gaps between them. In addition, she tries to discover the deep reasons behind for the Chinese Communist Party's purposefully maintaining, sometimes even praising, certain domestic legislation in spite of its obvious inconsistency with the said conventions and treaties. Furthermore, the root causes of some labor related problems that were thought to have long disappeared under socialism – such as forced labor and child labor are highlighted and critically reviewed with a view of linking them with the proposed comprehensive gap-filling solutions, including but not only limited to domestic legislative reforms.

2) A comparative legal approach: In this thesis, the comparative legal approach is adopted in almost each chapter. A few examples are discussed as follows. In the case of the Chinese legislation regarding freedom of association, it is discovered that though the domestic law in general guarantees the Chinese citizens' freedom of association by emphasizing that all laborers shall have the right to participate in and form trade union organizations, and no organization or individual may hinder them from doing so or restrict them, certain problematic clauses which justify ACFTU's leading power of all local trade union federations and all national organizations of industrial unions are highlighted and reviewed. In so doing, it is concluded that the *de facto* trade union monopoly practice protected by the domestic law is indeed inconsistent with the ILO Convention No.87, which prohibits the situation where the relevant laws of the land institutionalize a factual monopoly and deny the workers' right to choose to set up unions outside

the established structure as they so wish.²² When it comes to the proper regulation of right to strike in the contemporary Chinese context, a three-step approach, including ① to define strike, ② to confine strike, and ③ to protect the participants of a lawful strike, is discussed based on some other countries' (both developing and developed ones') legislative experience.²³ In chapter 4, when evaluating the legality of the Chinese Convicted Labor Reform System (a.k.a. Chinese *Laogai* System) under the relevant international core labor standards, the writer compares the said system with the four tests of prison labor exception provided by Convention No.29 in connection with Convention No.105 one by one,²⁴ and then reaches her conclusion that the Chinese *Laogai* System is qualified to be regarded as a legitimate exception to the prohibited forced labor under the core labor standards. In the case of the Chinese Reeducation Through Labor System (the "RTL System"), a similar approach is adopted. By comparing the RTL system with the said four tests, it is discovered that the RTL system fails to be qualified as a legitimate exception, and therefore an absolute abolition of the said system is proposed and justified.²⁵ In Chapter 5, as far as the domestic legislation against child labor is concerned, by evaluating the relevant clauses under the Constitution, Labor Law, Compulsory Education Law, Minor Protection Law and Criminal Law etc. from the perspective of the Convention No.138 and No.182, it is argued that the relevant Chinese legislation is generally competent. In Chapter 6, when analyzing the legality of the Chinese Household Registration System (a.k.a. the Chinese *Hukou* System) under the international law on freedom of internal movement, a comparative approach is once again adopted by comparing the Chinese *Hukou* System with the permissible restrictions on freedom of internal movement under the International Covenant on Civil and Political Rights (the

²² For more information, please see text below accompanying note 246 to 255.

²³ For more information, please refer to text below under Section 3.3 (C) (iii) (c) (2) – "How to Regulate Right to Strike in the Context of the Contemporary Chinese Society".

²⁴ For more information, please refer to text below under Section 4.2 (B) – "The Second Type of Forced Labor: Convicted Labor Reform System (*Laogai*)".

²⁵ For more information, please refer to text below under Section 4.2 (C) (ii) – "Evaluating RTL in Terms of International Core Labor Standards".

“ICCPR”).²⁶ Put concretely, an in-depth analysis as to whether the Chinese *Hukou* System can satisfy the three criteria provided by ICCPR simultaneously is conducted. In so doing, the writer concludes that the *Hukou* System fails to satisfy any of the said criteria, and therefore its illegality under the international law on freedom of internal movement is beyond doubt.

3) A social legal approach: As labor law is directly and closely related to people’s daily life, the writer thereby adopts a social legal approach in her thesis. Through all-round on-site investigations, surveys and interviews with union leaders, child laborers, prison management officers, consumers, ordinary workers as well as farmer workers conducted mainly in Shanghai, the industrial and commercial centre of China, the writer has collected valuable first hand materials that are able to strengthen the argument and the theories proposed in this thesis.

1.3 Main Research Questions and Thesis in Summary

A. Four Main Research Questions

In the subsequent chapters of this thesis, the writer will try to provide substantial answers to several main research questions as follows:

1. Why international core labor standards (the “Core”) can be of great help to China to reduce the social costs to its people during the transitional period?
2. How does the Core influence China?
3. What is the gap between Chinese labor legislation and the Core?
4. What are the feasible gap-filling solutions that are not only taking into consideration the Core, but also adapted to the transformations that China is experiencing?

²⁶ For more information, please refer to text below under Section 6.3 (C) (i) (a) (2) – “Examining the Legality of the Chinese *Hukou* System under International Law on Freedom of Internal Movement”.

B. Contents of the Volume

In addition to this introduction, the thesis consists six other chapters to answer the abovementioned research questions.

In the second chapter, the major question that the writer addresses is about the reasons why international core labor standards are valuable to contemporary China. It is worthy to be emphasized that the eight ILO fundamental conventions do not have “teeth” to enforce the obligations they create. This is quite unlike the WTO dispute settlement rules where a victim state member can be authorized to take retaliatory trade measures against the state member in default.

However, notwithstanding this, the influential power of the ILO on its member states should not be underestimated. The author draws upon a literature in international law scholarship which suggests that, even without sanctions or “teeth”, states can be influenced so that compliance with international norms and practices can be fostered.²⁷

If and when, as this author hopes, China ratifies all the core conventions, a growing interaction is created between the fundamental conventions and relevant domestic legislation, interpretation provided by Chinese labor rights experts and other interested social groups. Such processes tend towards the internalization of the transnational legal process. As such, institutional habits of leading nations into default patterns of compliance of the fundamental conventions are expected to be cultivated gradually. As time goes on, the international core labor standards acquire its “stickiness”, and domestic decision-making structure will become “enmeshed” with international core labor standards. Consequently, China is likely to “obey” the core labor standards out of perceived self-interests rather than out of threat of sanction. In this sense, though ILO

²⁷ Professor Harold Hongju Koh argues that through “interaction”, “interpretation” and “participation”, international law could be brought home. For more information, please refer to text below accompanying note 128 to 131.

fundamental convention never forces its member states to obey its provisions, it nevertheless creates sparks for its members to follow its standards.

The third chapter discusses the issue of freedom of association and collective bargaining in China. This discussion is carried out from the perspective of ILO fundamental Convention No. 87 and No. 98. The writer discusses the trade union monopoly situation in China and casts doubt on the feasibility of its union's dual role practice during this transitional period. The legislative assumption in China is that the interests of the state and employees are always consistent with each other. Evidence however suggests that this may not always be true, especially under the circumstances of market economy. It is observed that workers in China "feel economically disadvantaged, socially disenfranchised and politically excluded"²⁸, whereas the state has shown its unwillingness to look after their interests. Consequently, the Chinese trade union's role as workers' protector, rather than its role as a government assistant, becomes more and more important. Therefore, the writer argues that to deal with the dilemma faced by the contemporary Chinese trade union, an independent trade union system shall be adopted. Taking into consideration the contemporary economic and political environment in China, there are numerous and various advantages and legal justifications for an independent trade union system, in the author's view.

However, the writer observes that the chances for the Chinese government to implement this ideal model via legislative reform are slim at present considering the Chinese government's serious apprehension on social instability. A more realistic model is thereby proposed in this thesis, with means such as direct democratic election, financial system reform in grass root trade unions and strengthening the legal protection on union leaders' rights. In chapter 3, an analysis is also given of the inefficacy of the Chinese collective bargaining system and several legal solutions are

²⁸ *Infra* 335.

offered. A critical issue regarding the value of right to strike to the collective bargaining system is discussed. Although right to bargain collectively does not automatically entail the right to strike, its efficacy nevertheless will be seriously impaired without this strike weapon. Under the market economy, one of the critical reasons for workers and employers to reach a final collective agreement is that both sides have their trumps, i.e., employers can close the factory and workers can strike. The competition of these two resorts guarantees the bargaining power of both sides. In contrast, the present prohibition creates an unequal position. “A general prohibition of strikes constitutes a considerable restriction of the opportunities opened to trade unions for furthering and defending the interests of their members.”²⁹ According to the writer’s observation, the current Chinese legislation has adopted a “no support, no direct prohibition” approach towards strikes in China. Considering the dramatic economic, social and political changes in China, the vulnerable Chinese working class needs the right to strike as a safeguard for themselves. Therefore, the chapter considers several countries’ experience on strike legislation (including but not limited to UK, US, New Zealand, Japan, Argentina, Finland), and also takes into consideration China’s special circumstances. From this, the writer proposes certain legislative suggestions to create the right to strike within the framework of the current Chinese legal system.

In chapter four, the writer categorizes the forced labor situation in China into three types and analyses them accordingly. First, are the cases in which subjects are normal citizens. Here, the Chinese legislation against it is generally competent. The problem mainly lies in the implementation of the law. A second type of forced labor is the Convicted Labor Reform System. Although, this is often the target of heated criticism from many human rights NGOs and developed countries, represented by the USA, the author conducts a comparative study between the current Chinese Convicted Labor Reform System and ILO fundamental conventions against forced labor, to find that the Chinese prison labor system is indeed a permissible exception under

²⁹ *Infra* 58.

the Core. It is undeniable that some current practices and certain former practices and policies relating to the Chinese Convicted Labor Reform System are conflicting with the criteria provided by ILO convention No. 29 and No. 105. In addition, some of the products made by inmates even entered into foreign market. However, no evidence shows that practices as such are systematic and with institutional support. The existence of certain illegal practices does not necessarily negate the value of the Convicted Labor Reform System as a whole. Indeed, it is proved that the Chinese legislation on its Convicted Labor Reform System is generally consistent with the relevant ILO fundamental conventions.

The third type of forced labor -- the Chinese Reeducation Through Labor System (the “RTL System”) -- creates the most problems. In the context of the international core standards, this may be argued to be an institutionalized forced labor system that deserves absolute abolition. Only via a complete abolition of the RTL System, can the labor legislation of China become more consistent with the international core labor standards against forced labor as well as the basic principles of Rule of Law (ROL), to which the Chinese government has made a serious commitment.

The fifth chapter is about the child labor in China. Generally speaking, the legislation against child labor in China is competent and consistent with ILO Convention No. 138 and No. 182 except for some leeway and relatively small controversies. It is observed that during Mao Zedong’s time, the socialist government made a decision to eradicate child labor. With rigorously enforced compulsory education system, strict governmental control on its State Owned Enterprises (the “SOEs”) coupled with its party’s determined guiding policies against child labor, there were few cases of child labor involved in the industries. However, this evil started to reemerge together with China’s rapid economic development. It is argued that poverty is no longer the primary reason for child labor in China. Instead, the degradation of public morality,

together with the changed belief system plays a vital role. The absence of publicly accepted set of moral values to define proper behavior that resulted from the steady decline of Maoism and Communism and its concomitant rise of commercialism has marked the intellectual and spiritual crisis, which might be China's core problem presently. As such, certain suggestions (beyond legislative reform) in curbing child labor that take account of the primary cause of child labor in China are discussed and critically reviewed. They are relating to issues of proper governmental role, social clause under the World Trade Organization (WTO), Code of Conduct (COC) movement and social labeling programs.

The sixth chapter explores issue of the employment discrimination in China. After a preliminary comparison between Convention No. 100, No. 111 and the related standards under the Chinese domestic law, the writer finds that these two standards are generally consistent. However, the Chinese labor law keeps silent about the issue of employment discrimination based on social origin. With an unprecedented pace of urbanization, a special social group -- farmer workers -- is created in China. During the busy season in farming, they are likely to return to their hometown to work in the field, and when the busy season ends, they will rush into the cities and become workers in enterprises located there. It is observed that most of them will end up with "3D"³⁰ jobs where discriminative treatment due to their rural origin is quite common. Thus, a relatively comprehensive case study on the employment discrimination that is faced by more than 130 million Chinese farmer workers and is based on the empirical evidence collected during the writer's field study in Shanghai, China is conducted. It covers aspects on how farmer workers are discriminated, why they are discriminated and how to reform the relevant legal system to eradicate employment discrimination as such.

Chapter seven is the conclusion of the study.

³⁰ *Infra* 116, "3D" stands for "dirty, dangerous and degrading".

Chapter 2: Why are International Core Labor Standards Valuable to Contemporary China?

2.1 Overview on International Core Labor Standards

A. Declaring the Core

It is observed that a host of scholars and experts take for granted the existence of international core labor standards. For instance, according to the former Director-General of ILO Michel Hansenne's 1997 report to the International Labor Conference, the existence of a set of core labor rights is beyond doubt.³¹ Labor rights scholar Sarah J. Adams Lien considers that a large number of international and regional conventions, agreements and covenants have recognized international core labor standards, and that the existence of such standards are beyond dispute.³² Professor Drusilla K. Brown argues that the establishment of universal core labor standards is justified on "both humanitarian grounds and notions of fair competition in international trade".³³ Of course, the articulation of a core raises certain controversy in the academia. For example, Professor Jagdish N. Bhagwati believes that it is difficult to arrive at a universal moral consensus

³¹ Mr. Michel Hansenne, Statement before the International Labor Conference, ILO, 85th Session, June 3, 1997, online: <<http://www.ilo.org/public/english/standards/relm/ilc/ilc85/dg.htm>> (date accessed: October 17, 2004).

³² Sarah J. Adams Lien, "Employer Beware? Enforcing Transnational Labor Standards In the United States Under the Alien Tort Claims Act", 2002, 6 J. Small & Emerging Bus. L. 311. For more information, please see generally in Kevin Kolben, "Trade, Monitoring, and the ILO: Working to Improve the Conditions in Cambodia's Garment Factories", 2004, 7 Yale Hum. Rts. & Dev. L.J. 79; Michael J. Trebilcock & Robert Howse, "Trade Policy and Labor Standards", 2005, 14 Minn. J. Global Trade 261; Marisa Anne Pagnattaro, "Leveling the Playing Field: Labor Provision in CAFTA", 29 Fordham Int'l L.J. 386; Patrick Macklem, "Labor Law Beyond Borders", 2002, 5 J. Int'l Econ. L. 605. Most of the writers actually took for granted the existence of a set of international core labor standards so that they even do not bother to spend too much space to justify it.

³³ Drusilla K. Brown, "International Trade and Core Labor Standards: A Survey of The Recent Literature", 2002, Organization for Economic Cooperation and Trade [hereinafter OECD] Labor Market And Social Policy Occasional Papers, No. 43, OECD Publishing. Online: <<http://caliban.sourceoecd.org/vl=6551785/cl=15/nw=1/rpsv/cgi-bin/wppdf?file=5lgsjhvj7rwd.pdf>> (date accessed: August 20, 2007).

as foundation for international core labor standards.³⁴ Professor Steve Charnovitz also doubts the possibility for creating an “internationally recognized labor standards”.³⁵ Professor Lance Compa argues that decent working conditions free from risk of injury or illness is as fundamental a right as working without discrimination.³⁶

Although these arguments represent different academic views, the idea of a core is strongly and clearly supported by consistent state practices around the world.³⁷ In such practice, the core is crystallized by eight ILO fundamental conventions.³⁸ We can see this consistent state practice in many different fora as follows:

1) Both the United Nations Social Summit in Copenhagen in 1995³⁹ and in the WTO Singapore Declaration in 1996⁴⁰ referred to “internationally recognized core labor standards”.

³⁴ From Professor Jagdish N. Bhagwati’s position, it would be difficult to arrive at a universal moral consensus as foundation for international core labor standards. Bhagwati suggests that labor standards can not be universalized -- unlike human rights such as right to free from torture -- simply by calling them “labor rights”. He sees that this is because the term equalizes two different ideas, i.e., culture-specific labor standards and universal human rights, which are hardly to be believed as consistent between each other. He argues that the diversity of labor practices and standards is widespread and reflects diversity of cultural values, economic conditions and analytical beliefs. [Jagdish Bhagwati, *Free Trade, “Fairness” and the New Protectionism* (London: The Institute of Economic Affairs, 1995), at 28].

³⁵ Steve Charnovitz, “Fair Labor Standards in International Trade,” (the justification offered is that “the nations of the world not share a common set of values), cited in Philip Alston, “Labor Provisions in U.S. Trade Law--Aggressive Unilateralism”, Lance A. Compa & Stephen F. Diamond, eds., *Human Rights, Labor Rights and International Trade* (Philadelphia : University of Pennsylvania Press, 1996).

³⁶ Professor Lance Compa questions the exclusion of worker health and safety rights within the core given the fact that they are actually closely related to welfare of a worker. [Lance Compa, “Promise and Peril: Core labor rights in global trade and investment” in George Andreopoulos (ed), *International Human Rights: A half century after the Universal Declaration* (New York: Peter Lang Publishing forthcoming 2002) at 8, cited in Patrick Macklem, “Labor Law beyond Borders”, 5 J. Int’l Econ. L. 605.]

³⁷ The writer wishes to emphasize that in this section, it is not her intention to argue that all international core labor standards have reached the status of customary international law, although some are and they will be justified by the text below on the case by case basis). By citing declarations made by WTO, UN, OECD, ILO and US, the positions of almost all the nations over the world on the international core labor standards are covered.

³⁸ For a brief introduction on the eight Conventions, please see text below accompanying note 48 to 56.

³⁹ Brian A. Langille, “The ILO and the New Economy: Recent Developments”, 15/3 Int’l J. Comp. Lab. L. & Indus. Rel. 229, 240-41 (Autumn 1999).

⁴⁰ Singapore Ministerial Declaration, it reads “We renew our commitment to the observance of *internationally recognized core labor standards*. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting

2) In a 1996 OECD report, the core labor standards were identified as follows: ① freedom of association and the right to bargain collectively, ② prohibition of forced labor, ③ prohibition of discrimination in employment, and ④ prohibition of exploitative forms of child labor.⁴¹ The study described these standards as “embodying basic human rights as exemplified in the Declaration of the World Social Summit”.⁴² Furthermore, a 2000 OECD report reconfirms a high degree of international political consensus on the contents of a set of core labor standards reflected in the list of fundamental principles and rights laid out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.⁴³

3) The US “Overview of Country Reports on Human Rights Practice for 1997” declares that there is an international consensus on core labor standards.⁴⁴ They are: ① freedom of association on which workers can form trade unions and defend their interests; ② the right to organize and bargain collectively; ③ freedom from gender and other discrimination in employment; ④ freedom from forced and child labor.⁴⁵

4) In a landmark pronouncement of ILO Declaration on Fundamental Principles and Rights at Work 1998, it declares that “all Members, even if they have not ratified the Conventions in

them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.”

Online:< http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> (date accessed: October 18, 2004).

⁴¹ OECD, *Trade, Employment and Labor Standards: A Study of Core Workers' Rights and International Trade* (Paris: OECD 1996) at 26.

⁴² *Ibid.*

⁴³ OECD, *International Trade and Core Labor Standards*, (Paris: OECD 2000) at 17-18.

⁴⁴ Online: <<http://www.hri.org/docs/USSD-Rights/97/Overview97.html>> (date accessed: October 26, 2004).

⁴⁵ *Ibid.*

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.”⁴⁶

This gives the fundamental principles and rights a universal reach, even to countries that have not ratified the relevant ILO conventions. As this is coupled with a reporting system with offers of assistance to governments, this is significant. ILO member states have thus acknowledged their obligation to respect, realize and promote the rights and principles in the very Declaration, whether through ratification of the Core or otherwise.⁴⁷ These rights and principles are enshrined in the eight ILO Conventions⁴⁸, 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

⁴⁶ ILO Declaration on Fundamental Principles and Rights at Work, 86 session, Geneva, June 1998, art. 2. Online: http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT (date accessed: October 22, 2004).

⁴⁷ Roger Blanpain & Chris Engels, eds., *The ILO and the Social Challenges of the 21st Century: The Geneva Lectures* (Netherlands: Kluwer Law International, 2001), at 106.

⁴⁸ Online: <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN> (date accessed: October 25, 2004).

authorities;⁴⁹ ② Right to Organize and Collective Bargaining Convention, 1949 (No. 98) which guarantees workers right to enjoy adequate protection against anti-union discrimination, prohibits mutual interference between workers' and employer' organizations, and provides for measures to promote collective bargaining;⁵⁰ ③ Forced and Compulsory Labor Convention, 1930 (No. 29) which requires member state 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;⁵¹ 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;⁵² ⑤ Minimum Age Convention, 1973 (No. 138) which aims at the abolition of child labor and requires member state to specify a minimum age for admission to employment not be less than the age of completion of compulsory schooling;⁵³ ⑥ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (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

⁴⁹ Convention concerning Freedom of Association and Protection of the Right to Organize, 9 July, 1948, (entered into force: 4 July, 1950). [hereinafter ILO Convention No.87].

Online: <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (date accessed: October 25, 2004).

⁵⁰ Convention concerning the Application of the Principles of the Right to Organize and to Bargain collectively, 1 July, 1949, (entered into force: 18 July, 1951). [hereinafter ILO Convention No.98].

Online: <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (date accessed: October 25, 2004).

⁵¹ Convention concerning Forced or Compulsory Labor, 28 June, 1930, (entered into force: 1 May, 1932).

Online: <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (date accessed: October 25, 2004). [hereinafter ILO Convention No.29].

⁵² Convention concerning the Abolition of Forced Labor, 25 June, 1957, (entered into force: 17 January, 1959). Online: <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (date accessed: October 25, 2004).

⁵³ Convention concerning Minimum Age for Admission to Employment, 26 June, 1973, (entered into force: 19 June, 1976). [hereinafter ILO Convention No. 138].

Online: <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (date accessed: October 25, 2004).

etc.⁵⁴ 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;⁵⁵ 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;⁵⁶

The ratification status of the ILO Fundamental Conventions as at 28 April 2007⁵⁷ was shown by the table 1 as follows:

Number of the fundamental conventions ratified by states	0	1	2	3	4	5	6	7	8
Number of states ratifying relevant fundamental conventions	4	1	2	3	6	11	10	19	124

⁵⁴ Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, 17 June, 1999, (entered into force: 19 November, 2000). [hereinafter ILO Convention No. 182].

Online: <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (date accessed: October 25, 2004).

⁵⁵ Convention concerning Discrimination in Respect of Employment and Occupation, 25 June, 1958, (entered into force: 15 June, 1960). [hereinafter ILO Convention No. 105].

Online: <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (date accessed: October 25, 2004).

⁵⁶ Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 29 June, 1951, (entered into force: 23 May, 1953). [hereinafter ILO Convention No.100].

Online: <<http://www.ilo.org/ilolex/english/convdisp2.htm>> (date accessed: October 25, 2004).

⁵⁷ Data are collected on April 28, 2007.

[Source: Online:

<<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN>> (date accessed: April 28, 2007)]

Based on the data above, almost 70 percent of the member states of ILO have ratified all eight fundamental conventions: some 124 states. These are not only the developed states but also a large number of developing ones.

B. Human Rights and the Core

In terms of the relationship between the universal human rights and international core labor standards, the writer's position may be summarized in this way: the core labor standards could be regarded as a further concretization of the relevant general principles of human rights. Although the ILO was founded before "human rights" was a current term in the international world and the Constitution of ILO does not use the exact term -- "human rights" but speaks of "social justice" instead, it is believed that there is no contradiction between these two terms.⁵⁸ To be precise, the core labor standards tend to be considerably more crystallized, containing more guidance on the means of implementation vis-à-vis the general human rights principles provided by the United Nations instruments on human rights.⁵⁹

For example, in the case of "freedom of association", the Universal Declaration of Human Rights (UDHR) has only provided that "everyone has the right to freedom of association ... [and] has the right to form and to join trade unions for the protection of his interests"⁶⁰ without any further description on what kind of workers have such freedom and how to implement this freedom in detail; whilst, the core labor standards on worker's right to freedom of association mainly

⁵⁸ Hector Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston, *The International Labor Organization: The International Standards System and Basic Human Rights* (Colorado: Westview Press, 1996), at 128.

⁵⁹ *Ibid.*

⁶⁰ UDHR, 1948, art. 17 (1) & art. 23 (4).

reflected by ILO fundamental convention No. 87 and No.98 provide more detailed guidance for workers to implement this freedom in practice. Put concretely, they provide that workers (excluding public servants) have the right to draw up their own constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs without interference from public authorities, which would restrict this right or impede the lawful exercise thereof.⁶¹ Besides, these conventions also stipulate the legitimate limitation on worker's right to organize and member states' positive and negative obligations to ensure the free exercise of the right to organize etc.⁶² Through these concretized provisions, the freedom of association adopted in UDHR in its general term has thus got its specific implementation code for workers.

This same reasoning applies to the remaining three aspects of the core labor standards.⁶³

2.2 Background Information of China

A. Socialist China and Its Economic Development

People's Republic of China, the world's most populous country and one of the largest by area, has been under one-party-ruling since the year 1949 when the Communist party won power. After ten years' social and political disaster -- Cultural Revolution⁶⁴ from 1966 to 1976, in 1978, the Chinese communist government finally announced that this socialist country would concentrate

⁶¹ ILO Convention No. 87, art. 2, 3 & Convention No. 98, art. 6.

⁶² ILO Convention No. 87, art.8 (1) & art. 11.

⁶³ Due to the limitation of space, the writer is not going to articulate the same reasoning applicable to the remaining three aspects of the core one by one in this thesis.

⁶⁴ Cultural Revolution, launched by Chinese Communist Party chairman Mao Zedong during his last decade in power from 1966 to 1976, was the biggest civil and political chaos in socialist China's national history. For more information on this incident, please see generally in Tang Tsou, *The Cultural Revolution and post-Mao reforms: a historical perspective* (Chicago: University of Chicago Press, 1986), Gray Jack, *Chinese Communism in Crisis: Maoism and the Cultural Revolution* (London: Pall Mall Publisher, 1968) and Jing Lin, *The Red Guards' Path to Violence: Political, Educational, and Psychological Factors* (New York: Praeger, 1991).

its efforts on economic construction instead of class conflicts.⁶⁵ From then on, China started engaging in a wide range of economic reforms to expand and modernize its economy. Consequently, “its high growth rate has been sustained with relatively minor fluctuations”⁶⁶. These steps have led the country away from a centrally planned economy⁶⁷ towards a market economy with socialist characteristics.⁶⁸ While the socialist system is claimed to remain as the basic system,⁶⁹ a number of reformative policies and movements -- the open-door-policy, the rapid development on market economy, the privatization, the introduction of the idea of rule of law and various influences of from the capitalist world -- have combined to bring about fundamental changes to this socialist system.⁷⁰ As some scholars observe, although “the Chinese Communist Party (CCP) has not formally abandoned the doctrine of historical determinism, it has replaced the purely Communist utopian ideal with a more realistic market-driven vision for China’s future”.⁷¹

With a remarkably rapid economic growth over the last two and a half decades, China has become the second largest economy in the world and it ranks first among the developing world in the size of its total economy.⁷² However, China is still a developing country and it is nevertheless

⁶⁵ Wang Guiguo, “The Legal system of China” in Wang Guiguo & John Mo, eds., *Chinese Law* (Boston : Kluwer Law International, 1999) at 1.

⁶⁶ Clem Tisdell & Joseph C.H. Chai, “An Introduction to China’s Economic Growth and Transition”, Clement A. Tisdell & Joseph C.H. Chai eds., *China’s Economic Growth and Transition: Macroeconomic, Environmental and Social/Regional Dimensions* (New York: Nova Science Publishers, 1997), at 1.

⁶⁷ “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’.” From database: Microsoft Encarta.

⁶⁸ Fair Labor Association Year Two Annual Report, published on Aug. 18, 2004, at 235. Online: <<http://www.fairlabor.org/2004report/pdf/CompleteReport-part4.pdf>> (date accessed: October 22, 2004).

⁶⁹ Constitution of the People’s Republic of China, 1982, art. 1, para. 2. [hereinafter Constitution of PRC].

⁷⁰ For more information, please text below accompanying note 910 to 936 and also see generally in Perry Link, “China’s ‘Core’ Problem”, Tu Wei-ming, ed., *China in Transformation* (Cambridge, Mass: Harvard University Press, 1994), from 189 to 205.

⁷¹ James M. Zimmerman, Esq., *China Law Deskbook: A Legal Guide for Foreign-Invested Enterprises* (2nd ed.) (Chicago: ABA Section of International Law, 2005), at 50.

⁷² Please see generally in World Bank, *2005 International Comparison Program: Preliminary Results December 2007* (Washington D. C.: by the International Bank for Reconstruction and Development/ The World Bank, 2007), at 15; Finfacts Team, “World Bank Study Says 12 Economies Account for More Than

among the low-income countries as far as per-capita GDP is concerned.⁷³ China's per capita GDP, though reaching the record high of 1,740 US dollars in 2005, still ranks behind the 100th place in the world.⁷⁴

According to the official China Modernization Report 2005, the modernization gap between China and USA is 100 years and China would have no chance to join the developed group until 2080.⁷⁵ Of course, its potential for continued growth is great, given the size of its population and territory, status of current industrial development and its leadership's positive and supportive policy towards economic progress. In terms of its labor force, China is expected to grow from 755 million in 1990 to its maximum of 1,013 million in 2025.⁷⁶ After that, it is expected to start falling until reaching 898 million, and then move up again and come to an equilibrium at about 900 to 920 million.⁷⁷ China's present development and potential for continued growth have been recognized by the international society. In terms of FDI, China has ranked the first among the developing countries and the second after the United States worldwide.⁷⁸ From the year 1996, the annual inflow of FDI has amounted to an average US \$40 billion.⁷⁹ Even in the year 2001, when

Two-thirds of World's Output; Chinese Economy Size Cut by 40%; Ireland is Fourth Most Expensive World Economy", online: <http://www.finfacts.ie/irishfinanceneews/article_1012158.shtml>, (date accessed: April 6, 2009).

⁷³ *Ibid.*

⁷⁴ "World Bank: China's GDP ranks 4th in the world but per capita GDP ranks only 128th worldwide", Online: xinhuanet < http://news.xinhuanet.com/fortune/2006-07/05/content_4796766.htm > (date accessed: February 12, 2008).

⁷⁵ "100 Years Modernization Gap between China and USA", *Laodong Daily (China)*, February 19, 2005 at 6.

⁷⁶ He Dan, "The Influence of China's Future Development on Its Labor and Employment" (*Zhongguo Weilai Fazhan Qushi Dui Laodong Jiuye De Yingxiang*). Online: <http://www.chinapop.gov.cn/rkzh/zgrk/rkysh/t20040326_2639.htm> (date accessed: January 24, 2005).

⁷⁷ *Ibid.*

⁷⁸ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2007*, at 16 & p.21.

⁷⁹ Wang Zhipeng, "When Will Spring Come to the Non- Public Owned Economic Sector?", Online: <<http://www.chinatoday.com.cn/English/e20026/business.htm>> (date accessed: October 24, 2004).

global direct investment started to shrink, China nevertheless attracted FDI to the amount of US \$45 billion.⁸⁰

On December 11, 2001, China joined the WTO. In the year 2006, China's global trade reached approximately USD1,760 billion, which is the highest within its history.⁸¹ Nowadays, China not only dominates the international market for its traditional labor intensive exports such as apparel, footwear and toy production, but also moves towards the technology sector including a wide range of mechanical and electric products like televisions, computers, DVD players and microwave ovens.⁸²

The economic reform and the constitutional amendments⁸³ accelerate the development of the non-public sector⁸⁴ in this socialist country. Before the push towards economic development, the ownership structure of the economy in China was straightforward -- socialist public ownership of

⁸⁰ *Ibid.*

⁸¹ Online: Xinhuanet <http://news.xinhuanet.com/video/2005-01/12/content_2449233.htm> (date accessed: February 12, 2008).

⁸² *Supra* 68.

⁸³ In the 1982 Constitution, i.e., the current valid constitution of PRC, there is virtually no room for the development of private sector of economy. However, in the 1988 constitutional amendment, a landmark paragraph was added into the 1982 constitution, which provides that “the state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy”. (Cite from database: lawinfochina <<http://www.lawinforchina.com/index.asp>>). With the ongoing development of market economy, the importance of private sector of the economy was gradually paid more and more attention by the PRC authority. In the 1999 constitutional amendment, it further pronounces, “the non-public sectors of the economy ... constitute an important component of the socialist market economy; the state protects the lawful rights and interests of the individual and private sectors of the economy, and exercises guidance, supervision and control over the individual and private sectors of the economy”. (Cite from database: lawinfochina <<http://www.lawinforchina.com/index.asp>>). Through constitutional amendments as such, a clear and powerful constitutional protection is provided to guarantee the healthy development of the private sector of economy in China. For more information, please see Liang Huixing, “The Constitutional Protection on the Non-Public Sector of Economy Provided by the State” (*Guojia Dui Feigongyoushi Jingji Tigong Le Xianfa Baohu*), online: <<http://www.southcn.com/nflr/llzhuanti/xfjd/200405190825.htm>> (date accessed: January 6, 2005).

⁸⁴ The definition of “non-public sector” in this thesis covers private enterprises, foreign-invested enterprises as well as collective ownership (ownership from both private part and the other part where private part is the majority shareholder).

the means of production.⁸⁵ Now, after more than two decades economic reform, the ownership structure of the economy in China can be divided into two groups. The first is the public sector, comprising state-owned enterprises (SOEs), collectively-run enterprises (*Jiti Suoyouzhi*) and public service units (*Shiye Danwei*), such as public universities and non-profitable public research institutions etc. The second sector is what is called, the “non-public” sector (rather than the private sector). This includes but is not limited to individual economy (*Geti Gongshanghu*), and private-owned enterprises (*Siying Qiye*) under the forms of sole proprietorships, partnerships, limited liability companies and shareholding cooperatives as well as foreign invested enterprises -- Sino-foreign joint venture, Sino-foreign cooperative enterprises, wholly foreign-owned enterprises and foreign-funded share-holding companies and other types of ownership.⁸⁶ According to a recent survey, jointly organized by All-China Federation of Industry and Commerce and the United Front Work Department of the Central Committee of the Communist Party of China, there were 3.44 million private companies⁸⁷ that hired more than 47.14 million employees by mid-2004.⁸⁸ As for its production value, it rose from 5.1 billion USD in 1989 to 241 billion USD in 2003.⁸⁹ It is expected that the growth rate of the gross of the non-public

⁸⁵ For more information, please see generally in Liu Jitong, “The Satisfactory of the Quality of Life and Needs: Overview on the Fifty Years Chinese Social Welfare System” (*Shenghuo Zhiliang He Xuyao Manzu: Wushi Nianlai Zhongguo Shehui Fuli Yanjiu Gaishu*), online:

<http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=3791> (date accessed: June 13, 2006); online:

<<http://www.cass.net.cn/file/2005020132574.html>> (date accessed: June 13, 2006); online:

<www.dxpilyj.net.cn/show_News.asp?id=3278> (date accessed: June 13, 2006).

⁸⁶ For more information, please see generally in “China to boost development of non-public economic sector”, online: <<http://www.china-embassy.org/eng/gyzg/t144001.htm>>, (date accessed: June 8, 2006); online:

<<http://www.chinadetail.com/Business/InvestmentChinaNameTranslation.php?PHPSESSID=7abcfaf720fa050b1aa5fc660c776ebe>> (date accessed: June 7, 2006); “How Is ‘Private’ Defined in The People’s Republic of China”, online: <www.adb.org/Documents/Reports/TAR3543/annex1.pdf> (date accessed: June 8, 2006).

⁸⁷ This number has increased to 3.8 million by the end of 2004. “Private enterprises expanding quickly”, Online: <http://www.chinadaily.com.cn/english/doc/2005-02/04/content_414858.htm> (date accessed: August 2, 2005)

⁸⁸ “Private enterprises expanding quickly”, Online: <http://www.chinadaily.com.cn/english/doc/2005-02/04/content_414858.htm> (date accessed: August 2, 2005).

⁸⁹ *Ibid.*

economy will go beyond 10 percent annually during the next five to ten years, accounting for 60 percent of the increase of the national economy.⁹⁰

B. Transformation Inside China and Its Impact on Labor Relevant Issues

With its rapid pace of economic development as stated above, China is experiencing certain transformations whose implications on labor rights related issues should not be underestimated.

First, the Chinese trade union is facing a dilemma in the conflict between its dual function. Designed to function in a typical Marxist socialist regime, the trade union's role is both to encourage labor productivity for the sake of state's interests and to protect workers legitimate interests. As the Chinese economy has changed, however, the Chinese trade union has met a host of new challenges that Mr. Marx never expected.⁹¹ As widely admitted by most communist union theorists, its dual function can only work properly when the interests of the state and workers are generally consistent.⁹² When there is such a consistent confluence of interest, it is possible for the trade union back then to work as "transmission belts" between state and masses, i.e., conveying state policy to labor and also sending information from the workplace to the state.⁹³ However, measures such as SOEs releasing shares for sale on the stock exchange, the privatization of small and medium sized SOEs, the transformation of economic mechanisms, and the rapid development of private enterprises⁹⁴ have changed the state's role as a protector of the working class. With the open door policy coupled with the dissolution of state's paternalistic function⁹⁵, the Chinese

⁹⁰ *Ibid.*

⁹¹ For more information, please see text below accompanying note 264 to 269.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Online:<<http://www.asianlabor.org/archives/002064.php>> (date accessed: July 29, 2005).

⁹⁵ Before China's rapid economic reform, as a typical situation, the Chinese government used to be in charge of every important aspect of life of an ordinary Chinese citizens located in the urban area -- the main source of the Chinese working class, from housing, schooling, kindergartens, job arrangement, and medical insurance to financial support after retirement till death. In such a paternalistic society, although urban people in China have relatively limited liberty in choosing the life style as they wish from a westerner's

government has started to focus more on economic development, and thus gives less attention to the welfare of the working class.

For example, life long employment⁹⁶ -- an important feature of the old socialist system -- has been substituted by labor contract. This carries the potential of contracting away workers' interests and rights as a master of an enterprise. Similarly, retrenchment policy (*Xia Gang*) and the reform to the retirement system have indicated the state's unwillingness to look after its workers' welfare as their major idea is to remove the burden of social security from the state to workers and employers, and make them fend for themselves⁹⁷.

As such, the competing power between the employers and workers becomes more and more unbalanced. The power of businesses to dominate the Chinese labor market has increased on one hand. On the other, labor's power to influence the business decision and to promote the worker's welfare has decreased. Thus, the Chinese trade union, while needed as a vital vehicle in protecting worker's legitimate interests, has become weaker during this transitional period. A sign of that unions are less able to effectively represent workers' interests is the number of the Chinese workers involved in street-demonstration. This is increasing year by year, 1 million workers in 1995 to 3.6 million only three years after.⁹⁸ When the Chinese workers "feel economically disadvantaged, socially disenfranchised and politically excluded"⁹⁹ and cry for help from their own organization, the Chinese union suddenly relapsed into a dilemma on how to play its dual function in this transitional period.

point of view, they have very few things to worry about because government has taken the responsibility to think and arrange for them.

⁹⁶ *Infra* 314.

⁹⁷ For more information, please see text below accompanying note 178 to 184.

⁹⁸ *Infra* 252. Evidence available shows the number is still increasing year by year. For more information, please see *infra* 279.

⁹⁹ *Infra* 335.

Second, with the fundamental and far-reaching social economic changes in the last decade, social evils that relate to workers have started to resurface in China. With government's policies focusing more on economic development and less on welfare of its citizens, coupled with years of disastrous socialist policies such as Cultural Revolution¹⁰⁰, there is a disillusioned reaction to social injustice. This view is more tolerant and even cynical of social inequalities, combined with a new pragmatic and utilitarian attitude that moves away from any socialist concern with communal well being, and only focuses on personal interests.¹⁰¹ As the great rush for improving standard of life accelerates, values that see the exploitation of people and workers as inevitable and even necessary, are starting to gain a certain ground.¹⁰²

Thus, a direct result of feverish pursuit of wealth is that exploitation is no longer an abhorrent evil in the minds of Chinese citizens.¹⁰³ An indication of this is that, just as China is experiencing rapid economic development, its public ethics are falling at the same time. The constant decline of Maoism and communism together with its concomitant rise of commercialism have marked a intellectual and spiritual crisis, i.e. an absence of a publicly accepted set of moral values to define proper behavior in today's China.¹⁰⁴ Confucian thinking has lost its place as China's state ideology and became the target of deliberate attack especially in the 1960s and 1970s;¹⁰⁵ Marxism and Maoism have fallen to an even lower place in popular acceptance by the 1990s.¹⁰⁶ Some social critics suggest that the ideology with the potential to fulfill the moral vacuum in China is the philosophy of "making money".¹⁰⁷

¹⁰⁰ *Supra* 64.

¹⁰¹ *Infra* 911. For more information, please see text below accompanying note 911 to 936.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Infra* 923.

¹⁰⁵ *Infra* 919, at 193 & 194.

¹⁰⁶ *Ibid.*, at 195 & 196.

¹⁰⁷ *Infra* 923.

From this, so many of the labor concerns -- which will be discussed in this thesis -- flow. Exploitative practices like forms of forced labor¹⁰⁸ and child labor, often claimed to be connected with poverty,¹⁰⁹ have started to resurface. Thus, ways to reduce the social costs in the case of the reemergence of forced labor and child labor during the transitional period must be considered as serious questions.¹¹⁰

Thirdly, with the rapid development of the Chinese market economy, China is also experiencing an unprecedented pace of urbanization.¹¹¹ “From 1978 to 2004, China’s urbanization rate rose from 17.9% to 41.8% and its urban population increased from 170 million to 540 million.”¹¹² Farmers swarmed into cities for work. Some statistics show that by the end of 2005, the number of the farmers migrating from rural area to cities had reached 200 million.¹¹³ Indeed, the migrating wave as such has created a special social group in China, i.e., farmer workers, whose social status is semi-farmer and semi-worker.¹¹⁴ During the busy season in farming, they will usually return to their hometown to work in the field and, when the busy farming season ends, they will rush into the cities and become workers working in enterprises.¹¹⁵ It is observed that

¹⁰⁸ For more information, please see text below 4.2 (A) (i) -- “Introduction to the First Type of Forced Labor and Relevant Legislation in China”. In this thesis, the writer divides the forced labor in China into three types: (1) the first type of forced labor whose subject is normal citizens, (2) convicted labor reform system, and (3) system of reeducation through labor.

¹⁰⁹ For more information, please see text below accompanying note 906 & 907.

¹¹⁰ In chapter 4 and 5 of this thesis, the writer will provide a thorough research on forced labor and child labor in China respectively.

¹¹¹ For more information, please see generally in “China’s Urbanization Encounters ‘Urban Disease’”, online: <<http://www.chinanews.cn/news/2005/2005-11-18/14441.html>> (date accessed: April 30, 2007); “Urbanization Benefits China’s Economy”, online: <<http://www.chinagate.com.cn/English/2285.htm>> (date accessed: April 30, 2007); “China Improves Sustainable Development of Urbanization”, online: <<http://english.cri.cn/4026/2007/04/21/167@218705.htm>> (date accessed: April 30, 2007); “Urbanization Reducing China’s Rural Population”, online: <http://www.chinadaily.com.cn/english/doc/2006-02/23/content_523256.htm> (date accessed: April 30, 2007).

¹¹² “China’s Urbanization Encounters ‘Urban Disease’”, online: <<http://www.chinanews.cn/news/2005/2005-11-18/14441.html>> (date accessed: April 30, 2007).

¹¹³ *Infra* 1268. For more information, please see text below accompanying 1267 to 1269.

¹¹⁴ The writer will provide a thorough study on this issue in chapter 6 of this thesis.

¹¹⁵ *Ibid.*

most of them will end up with “3D” jobs (dirty, dangerous and degrading).¹¹⁶ Moreover, in these jobs, they commonly face discriminatory treatment such as doing same job with different and reduced payments, wage arrears, and long working hours with no extra-payment.¹¹⁷ The phenomenon of the farmer workers has wider social impacts. A higher criminal rate has been observed among farmer workers in the cities, and this hints at the deeper social instability caused by the dramatic migrating wave.¹¹⁸ There is an urgent need to study the issues surrounding the farmer-workers, including their rights as workers, which is critical for building an equitable and harmonious society, as envisioned by the Chinese government.

C. China and the Core

i. China’s Ratification Status of the ILO Fundamental Conventions

Although it was a founding member of ILO,¹¹⁹ China’s ratification record of ILO Conventions is not that satisfactory. To date, China has ratified twenty-five ILO Conventions¹²⁰, which constitutes only some twelve percent of all ILO Conventions. As far as the eight fundamental conventions are concerned, China has only ratified four of them.¹²¹ They are the Equal Remuneration Convention (No.100), Discrimination in Respect of Employment and Occupation Convention (No. 111), Minimum Age Convention (No.138), and Worst Forms of Child Labor Convention (No.182).¹²² China has not ratified the two fundamental ILO conventions concerning freedom of association: the Freedom of Association and Protection of the Right to Organize

¹¹⁶ ILO Online No. 17, “Equality at work: Tackling the challenges -- Underpaid, Overworked and Overlooked: the plight of young foreign migrant workers in Thailand”, May 7, 2007.

¹¹⁷ *Ibid.* For more information, please especially see section 6.3(A) (ii) (iii) (iv).

¹¹⁸ *Ibid.* For more information, please especially see text accompanying note 1373 to 1378.

¹¹⁹ China joined the ILO as a founding member in 1919 when the then China was under the leadership of Kuomintang (Nationalist Party or KMT). However, after four years Civil War from 1945 to 1949, by 1949, the CCP occupied most of the country and established the People’s Republic of China (PRC) on October 1, 2007.

¹²⁰ Online: <<http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>> (date accessed: April 15, 2009).

¹²¹ Online: <<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN>> (date accessed: April 15, 2009).

¹²² *Ibid.*

Convention (No. 87), and the Right to Organize Convention (No. 98). Nor has it ratified either fundamental Conventions against forced labor.

ii. The Necessity for China to Ratify the Core Conventions

Why should China ratify the remaining four core Conventions of labor rights? In this thesis, the main arguments at the Chinese domestic law level will be undertaken by Chapters 3 to 6. At this point, however, it may be useful to foreground these arguments in overview. There are three broad reasons for China to ratify and act upon the Conventions.

a. An Implicit Call from the 1998 ILO Declaration

Ratification of the Core is a call from the 1998 ILO Declaration on Fundamental Principles and Rights at Work.¹²³ In light of the Declaration, China is under an expectation “arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith” these four categories of fundamental principles and rights at work crystallized by the eight ILO Fundamental Conventions.¹²⁴ Although the Declaration *per se* has not explicitly required every ILO member state to ratify the eight Fundamental Conventions, it does set up an expectation for every member state to “respect, to promote and to realize” the Core “in good faith”. In other words, it has laid down a step-by-step approach towards the end whose first step is to “respect” -- to avoid violation of or interference with the Core, the next is to “promote” -- to contribute to the progress or the growth of the Core, and finally to “realize” -- make real, fulfill the Core and each step shall be made in good faith.

¹²³ *Supra* 46.

¹²⁴ *Supra* 46.

As such, while ratification¹²⁵ of the fundamental Conventions is not the only means towards the final realization of the Core, it is, nevertheless, the most effective and straightforward way to show a member state's determination to respect the Core, to urge itself to move towards the direction of the Core with as little deviation as possible and ultimately to fulfill the Core in good faith. Although the Declaration *per se* has not explicitly provided any obligation for the ILO member states to ratify the fundamental Conventions, it is none the less an implicit call from the Declaration.

b. The Core Provides An Internationally Recognized Guidance on How to Reform the Relevant Chinese Labor Legislation

During China's transitional period, various labor related social problems have emerged as mentioned above, including but not limited to labor unrest, forced and child labor as well as the side effects caused by the drastic internal migrating wave from rural to urban area. In order to reduce the social costs as such, in order to create a harmonious society so that the fruit of economic development can be evenly shared, the Core Conventions regarding four fundamental aspects of labor rights -- freedom of association and collective bargaining, prohibition of forced and child labor and freedom from discrimination in employment do provide an internationally recognized **guidance** on how to amend the relevant Chinese labor legislation to reduce the social costs of capitalism with Chinese characteristics.

c. Ratification *per se* Will Influence the Domestic Practices to Move towards the Expectations Provided by the Core

By borrowing Professor Harold Koh's theory of "transnational legal process", the author would like to argue that ratification *per se* increases the chances that China's relevant practices will be

¹²⁵ It is worthy to be pointed out that one of the special features of the ILO Conventions is that the ILO procedure does not allow for signatures to ILO Conventions -- an intermediate step not amounting to ratification.

influenced to move towards the expectations provided by the Core Conventions.¹²⁶ This is not to suggest that the Conventions can be enforced against China. Rather, compliance with the Convention is promoted by other means. One important way that the Core will **influence** China is that ratification provides people and interested social groups inside China with objective standards of behavior. These can then be the standard against which they can measure the domestic labor law and subsequent practice of their own authorities.¹²⁷

Also, the ratification of the Conventions provides a good occasion for Chinese authorities to review the country's labor legislation and practice. This allows them to develop an in-depth understanding on whether they are in full conformity with these international labor standards, and ultimately to reach a stage of full compliance with all the fundamental Conventions. Such a process might start from the media, where more and more news reports and relevant comments appear. In this way, there would be more opportunities to make ordinary people and interested groups inside China more informed, and raise public awareness little by little, about labor rights and the Conventions. Of course, the academia would also start to react to the event of the ratification of the Core. For example, labor rights experts in China may launch their academic research, debates, interpretations and reviews on the relevant Chinese legislation under the framework of the Core.

As such, ratification would spark interaction between core Conventions and China's relevant domestic legislation, as well as interpretation provided by Chinese labor rights experts and other interested social groups. With participation of the media, academia and other interested groups,

¹²⁶ Please see generally in Professor Harold Hongju Koh (Dean of Yale Law School), "How is International Human Rights Law Enforced", 74 *Ind. L. J.* 1397; Harold Hongju Koh, "The 1998 Frankel Lecture: Bring International Law Home", 35 *Hous. L. Rev.* 623; Harold Hongju Koh, "Jefferson Memorial Lecture: Transnational Legal Process After September 11th", 22 *Berkeley J. Int'l L.* 337; Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process", 75 *Neb. L. Rev.* 181.

¹²⁷ Online: <<http://web.amnesty.org>> (date accessed: April 17, 2006).

this interaction could be repeated and increase in focusing and understanding on labor rights. From this, China might gradually be moved towards the understanding and observance of international core labor standards.

As time goes on, certain governmental officials, very possibly, including legal advisors and in-house lawyers of the Law Commission (*Falü Weiyuanhui*) of the National People's Congress (the "NPC") and other relevant organizations with right to propose a bill, might start to notice the existence of such academic research, debates and reviews and might be educated gradually thereafter. Hopefully, the institutional mandates to measure whether the relevant Chinese legislation and governmental policies conform to the international core labor standards or how far the gap between the Chinese standards and the international core ones is could be acquired. Thus, over time, domestic decision-making structure would become "enmeshed", as Professor Harold Hongju Koh observed, with international core labor standards.¹²⁸ When they are so enmeshed, institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes.¹²⁹ Gradually, ideologies of international core labor standards will "come to prevail among domestic decision-makers so that they seek to avoid perceptions that their action will be perceived as domestically unlawful".¹³⁰ This process would, in effect, "bring international law home" and create "strong process linkages exist across issue areas".¹³¹

An example of this can be seen in the events that followed after China ratified the ILO core convention No. 138 and No. 182. After ratification, the relevant domestic law reform process started gradually via amendment of the criminal code. The first step was to criminalize the

¹²⁸ Harold Hongju Koh, "How is International Human Rights Law Enforced", 74 *Ind. L. J.* 1397.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

employment of child laborers under certain dangerous circumstances. Later came the entry into force of the specialized legislation especially targeting the incident of child labor -- Rule of Prohibiting to Employ Child Labor.¹³² There was no provision directly against child labor in the Chinese Criminal Code (1997) until the promulgation of its fourth amendment in 2002. When this was promulgated, it explicitly prohibited any person from employing children under the age of sixteen for work at the high altitude, or in mines, or to expose to explosive, flammable, hazardous surroundings.¹³³ Any person in violation can be punished by three to seven years' imprisonment.¹³⁴ Immediately after the fourth amendment of the Criminal Code, the specialized legislation "Rule of Prohibiting to Employ Child Labor" particularly targeting incidence of child labor in China came into force. This not only criminalizes the behavior of employing child labor to work in the dangerous environment as an echo to the fourth amendment, but requires all the members of the Chinese society to fight against the practice of employing child labor as well.¹³⁵ As such, we should not be cynical about the potential effect of ratifying the ILO Core Conventions, even if these are relatively soft compared to, say, the WTO dispute settlement rules (which hold that "a government found to have failed to meet a WTO obligation can be required to put the matter right and, if it does not, the complaint may be authorized to take retaliatory trade measures"¹³⁶). We have to see that even without such clear powers to penalize, the ILO Core Conventions have a creeping power to influence as well as to guide a government's decision-making procedure.

¹³² The writer will discuss the relevant legislation thoroughly in the fourth chapter of this thesis. For more information, please see text below accompanying note 954 to 962

¹³³ *Infra* 955, art. 244 (1).

¹³⁴ *Ibid.*

¹³⁵ *Infra* 961, art. 2 to 5 & 11.

¹³⁶ "From Marrakesh to Seattle...and What's Ahead?", online: <http://www.wto.int/english/thewto_e/minist_e/min99_e/english/book_e/stak_e_4.htm> (date accessed: May 11, 2007).

As Professor Harold Hongju Koh comments, since “international legal obligations tend to be closely interconnected, even a single deviation tends to lead noncompliant nations into vicious cycles of treaty violation”.¹³⁷ He concludes that: “these institutional habits soon lead nations into default patterns of compliance. These patterns act like riverbeds, which channel conduct along compliant pathways. When a nation deviates from that pattern of presumptive compliance, frictions are created.”¹³⁸ In order to avoid such frictions in its continuing interactions, Koh argues that “a nation’s bureaucracies or interested groups may press their leaders to shift over time from a policy of violation into one of compliance”.¹³⁹ Thus, it is through this repeated cycle of interaction, interpretation, and internalization of this transnational legal process, the international core labor standards acquire its “stickiness”, and China would come to “obey” the Core out of perceived self-interest that become an institutional habit.¹⁴⁰

2.3 Introduction to the Chinese Legal System and the Chinese labor law

A. Introduction to the Chinese Legal System

i. Overview

China is a nation with civil law tradition. All Chinese laws are in written form and, in contrast to the common law system, principles of *stare decisis* are not applicable. From the time that the CCP came into power in 1949 to the death of Chairman Mao Zedong in 1976, the common methodology of the CCP’s leadership could be described as a “mass political campaign”, with accusations and struggles of different points of view and personalities in many different meetings.¹⁴¹ In that time and context, the law was regarded as a decadent relic from capitalist societies. A top-down contempt and negligence of judicial system permeated the Chinese socialist

¹³⁷ *Supra* 128.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Supra* 126.

¹⁴¹ Albert Hung-yea Chen, *An Introduction to the Legal System of the People’s Republic of China* (Hong Kong: Butterworths Asia, 1998) from 20 to 38.

regime.¹⁴² This phenomenon reached its extreme during the Cultural Revolution, where law was virtually substituted by Chairman Mao's thoughts.¹⁴³

However, during the last two and a half decades, the Chinese legal system has experienced substantial changes. Its theoretical foundation has changed from a centrally planned economy and Marxist socialist theory to a market economy and a socialist theory with Chinese characteristics.¹⁴⁴ The socio-economic reform in China, especially after 1978, requires good governance based on reliable legal structures and institutions.¹⁴⁵ Government with transparency and accountability in the management of state affairs is indispensable during the transitional period.¹⁴⁶ In this regard, the Chinese government has gradually realized that "the rule of law and a clear-cut legal system are the means to achieve this transparency, as well as being the foundation for all other aspects of society to develop in a way that guarantees fairness, equity and justice and predictability in terms of due process in cases of conflicts and controversies".¹⁴⁷ A significant political milestone came in 1997, when the Chinese government pronounced its goal of governing the country according to law and building up a socialist country with the rule of law. This was the first public recognition from the Chinese senior levels that the modernization of China depends on law, instead of programs, policies or plans.¹⁴⁸ In its third constitutional amendment, the concept of rule of law is officially incorporated into the Chinese Constitution.¹⁴⁹

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Wang Guiguo, "The Legal System of China", Wang Guiguo & John Mo, eds., *Chinese Law* (The Hague, Boston: Kluwer Law International, 1999), at 21.

¹⁴⁵ *Infra* 757.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

All these imply a conscious move from the ideology of “rule by man” or “rule by law” to “rule of law”, and an improved understanding of the concept of the rule of law, particularly its value towards market economy and sustainable development of the Chinese society.¹⁵⁰

ii. Lawmaking in China

a. National Level

The national legislative power is vested in both the NPC and its permanent body -- its Standing Committee.¹⁵¹ In exercising its legislative powers, the NPC enacts and amends criminal, civil and state organic laws¹⁵² and other basic laws and its Standing Committee enacts and amends laws other than those shall be enacted by the NPC.

As for administrative regulations, in accordance with the Constitution, they are enacted by the State Council, which is the central people’s government with the highest administrative authority over Chinese territory.¹⁵³ An administrative regulation enacted by State Council may prescribe any of the issues as follows: ① matters that demand the enactment of an administrative regulation for the purpose of implementing a law; ② matters within the scope of State Council’s administrative management authority in accordance with article 89¹⁵⁴ of the PRC Constitution.¹⁵⁵

¹⁵⁰ *Ibid.*

¹⁵¹ Constitution of PRC, art. 58.

¹⁵² If the term “law” is in its broad sense in the Chinese context, it includes all the legislation nationwide, even the Chinese constitution. In this part -- Lawmaking in China, “law” only refers to the Chinese **law in its narrow sense**, which only refers to the law whose legal authority is only subject to Constitution and higher than the rest legislation.

¹⁵³ Law on Legislation of PRC, art. 56.

¹⁵⁴ Constitution of PRC, art. 89 provides: “The State Council exercises the following functions and powers: (1) To adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes; (2) To submit proposals to the National People's Congress or its Standing Committee; (3) To lay down the tasks and responsibilities of the ministries and commissions of the State Council, to exercise unified leadership over the work of the ministries and commissions and to direct all other administrative work of a national character that does not fall within the jurisdiction of the ministries and commissions; (4) To exercise unified leadership over the work of local organs of state administration at different levels throughout the country, and to lay down the detailed division of functions and powers between the Central Government and the organs of state administration of provinces, autonomous regions and municipalities directly under the Central Government;

b. Local Level

The People's Congress and its Standing Committee of a province, autonomous region, or municipality directly under the Central Government may enact local regulations, according to the specific circumstances and actual needs of the jurisdiction, provided that such enactment does not conflict with any provisions of the Constitution, laws, or administrative regulations at the national level.¹⁵⁶ Additionally, the People's Congress and its Standing Committee of relatively large cities may enact local regulations under certain circumstances, as long as they do not conflict with the legislation at higher level, *viz.* Constitution, laws, administrative regulations or local regulations in force in the province or autonomous region in whose jurisdiction the city is located.¹⁵⁷

As for various administrative rules, they are usually enacted by the ministries and commissions of the State Council, the People's Bank of China, the General Administration for Auditing, and organs with administrative functions directly under the State Council within their respective authorities.

(5) To draw up and implement the plan for national economic and social development and the state budget; (6) To direct and administer economic work and urban and rural development; (7) To direct and administer the work concerning education, science, culture, public health, physical culture and family planning; (8) To direct and administer the work concerning civil affairs, public security, judicial administration, supervision and other related matters; (9) To conduct foreign affairs and conclude treaties and agreements with foreign states; (10) To direct and administer the building of national defense; (11) To direct and administer affairs concerning the nationalities and to safeguard the equal rights of minority nationalities and the right of autonomy of the national autonomous areas; (12) To protect the legitimate rights and interests of Chinese nationals residing abroad and protect the lawful rights and interests of returned overseas Chinese and of the family members of Chinese nationals residing abroad; (13) To alter or annul inappropriate orders, directives and regulations issued by the ministries or commissions; (14) To alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels; (15) To approve the geographic division of provinces, autonomous regions and municipalities directly under the Central Government, and to approve the establishment and geographic division of autonomous prefectures, counties, autonomous counties and cities; (16) To decide on the enforcement of martial law in parts of provinces, autonomous regions and municipalities directly under the Central Government; (17) To examine and decide on the size of administrative organs and, in accordance with the law, to appoint, remove and train administrative officers, appraise their work and reward or punish them; and (18) To exercise such other functions and powers as the National People's Congress or its Standing Committee may assign it."

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* art. 63.

¹⁵⁷ *Ibid.*

c. The Hierarchy of the Chinese Legislation

The Constitution is the fundamental law of the State with supreme legal authority in China.¹⁵⁸

The law is in the secondary position, with its legal authority being subject to Constitution. The authority of law is however higher than the rest of legislation, such as an administrative regulation, local regulation, administrative rule or local rule.¹⁵⁹

Among administrative regulations, local regulations and local rules, their legal authority is arranged in a descending order.¹⁶⁰ As for different local rules, the one made by the people's government of a province or autonomous region is with higher legal authority than the one made by the people's government of a relatively large city within the jurisdiction of the province or autonomous region.¹⁶¹

As far as various administrative rules either enacted by ministries or by local governments are concerned, they are within the same class regarding legal authority, and they are expected to be implemented within their respective realms of authority.¹⁶²

iii. Legal Institutions¹⁶³

a. Court System in China

The People's courts are the judicial organs of China¹⁶⁴, which consists of people's courts at various local levels, military courts and other special courts, such as maritime courts, railway

¹⁵⁸ Constitution of PRC, art. 5, para.2.

¹⁵⁹ The Law on Legislation of PRC, art. 79.

¹⁶⁰ *Ibid.* art.79 & 80.

¹⁶¹ *Ibid.* art. 80.

¹⁶² *Ibid.* art. 82.

¹⁶³ This part is applicable in mainland China but not the case in Chinese Hong Kong, Macau and Taiwan.

¹⁶⁴ The People's Courts Organic Law of People's Republic of China, 1983, [hereinafter People's Courts Organic Law of PRC], art. 1.

transportation courts and forestry courts. The Supreme People's Court, located in the Chinese capital city Beijing, is the highest judicial organ within the Chinese territory.¹⁶⁵

As far as people's courts at various local levels are concerned, they are divided into three levels, i.e., basic people's courts, intermediate people's courts and high people's courts.¹⁶⁶ Both parties of a case have the right to appeal to the court at the next higher level, but only one appeal is permitted.¹⁶⁷

b. The People's Procuratorate System in China

The people's procuratorate system, serving as the state organ for judicial supervision¹⁶⁸, consists of the Supreme People's Procuratorate, the highest procuratorial organ¹⁶⁹, and the people's procuratorates at various local levels, military procuratorate and other special people's procuratorates, say railway transportation procuratorates.¹⁷⁰ As a matter of fact, People's courts at various levels have their corresponding people's procuratorates so that judicial work in China could be supervised properly with no exception at each level.

B. Introduction to the Chinese Labor Law

i. Historical Review on the Chinese Labor Law and Relevant Policy Changes within Socialist China

From the time the CCP came into power in 1949 to the beginning of Cultural Revolution in 1966, various labor legislation was promulgated by Chinese government, including but not limited to: "Trade Union Law" (1950), "Labor Insurance Regulation" (1951), "Production Safety in Work

¹⁶⁵ *Ibid.* art. 2.

¹⁶⁶ *Ibid.* art. 2.

¹⁶⁷ *Supra* 164. art. 12.

¹⁶⁸ Constitution of PRC, art. 129.

¹⁶⁹ *Ibid.* art. 132, para. 2.

¹⁷⁰ Law of the People's Procuratorate of the People's Republic of China, 1983, [hereinafter Law of the People's Procuratorate of PRC], art. 2.

Place Regulation” (1956), “Temporary Regulation on Workers and Retirement” (1958) and “Several Rules on Strengthening the Industrial Production Safety Management” (1963).

During the ten years chaotic period¹⁷¹, however, even the existing labor legislation could not be effectively implemented, let alone the work of enactment of new labor legislation for the sake of labor welfare.¹⁷²

After the watershed third plenary session of the Eleventh Central Committee of the CCP in 1978, the Chinese government started to realize the value of a good legal system and the incompleteness of its own legal system, and hence, made its decision to strengthen it.¹⁷³ From 1978 to 1994, various labor related rules, regulations, concerning female workers’ welfare, mineworkers’ safety, child labor prohibition, labor contract system, labor dispute settlement etc., were enacted and promulgated.¹⁷⁴ In 1994, the landmark comprehensive legislation, the “Chinese Labor Law”, came into force, and this symbolized the growth of China’s labor legislation into a relatively mature period.¹⁷⁵ Recently, the long-awaited “Chinese Labor Contract Law” (*Laodong Hetong Fa*) was passed. This is considered as a further crystallization of labor contract under “Chinese Labor Law” and is expected to substantially improve the protection of employee’s legal rights.¹⁷⁶

Coupled with these legislative changes, there were other economic changes that have transformed the situation of laborers in China. Chief amongst these was that the lifetime employment system

¹⁷¹ For more information, please refer to footnote 64.

¹⁷² For more information on historical review of Chinese labor law, please see Wang Quanxin, *Labor Law (Laodong Fa)*, (Beijing China: Law Press (*Falü Chubanshe*), 1997) from 20 to 24.

¹⁷³ Albert Hung-yee Chen, *An Introduction to The Legal System of The People’s Republic of China* (Hong Kong: Butterworths Asia, 1998) at 33.

¹⁷⁴ *Supra* 172.

¹⁷⁵ *Ibid.*

¹⁷⁶ The Chinese Labor Contract Law was passed on June 29, 2007.

in China has become history and labor contract system, with the possibility of contracting away a worker's role as "master of an enterprise"¹⁷⁷, has been accepted since 1986.¹⁷⁸ The structural readjustment of SOEs¹⁷⁹ has come mainly under the control of government, and thus, workers have very limited chances to make their voices heard, let alone fighting for their interests, in the process of SOEs' structural readjustment. On the contrary, the managers in an enterprise, who once were claimed to be the people's servants in the socialist China, finally became the biggest stake holders. Meanwhile, a large amount of state owned assets were reported to disappear mysteriously (*Guoyou Zichan Liushi*).¹⁸⁰

Additionally, a new employment mechanism reform was introduced, i.e., the policy originating from the theory of a centrally planned economy that resulted in low salary, low efficiency, high employment rate (*digongzi, gaojiuye*), was substituted by the market economy ideas -- reducing the staff to improve efficiency and benefit (*jianyuan zengxiao*), competing to get the position (*jingzheng shanggang*). There has been a gradual increase of jobless rate from 1999 to 2008.¹⁸¹ By end of 2008, the number of registered urban unemployed was already 8.86 million.¹⁸² As such,

¹⁷⁷ Peter Feng, "Labor Law in China: An Overview" in Andrew Rowan, ed., *Labor Law in China* (Hong Kong: THC Press, 1999) at 15.

¹⁷⁸ The incidence of "lifetime employment" still exists in a very few number of governmental agencies and social organizations etc. Cited from Wang Quanxin, *Labor Law (Laodong Fa)*, (Beijing China: Law Press (*Falü Chubanshe*), 1997) at 52.

¹⁷⁹ To be precise, the readjustment of SOEs in China is to reform SOEs and make it in line with the modern corporate system. "China has put forward a strategy to maintain control over major corporations while lifting control over minor ones. It has incorporated the reforming, reorganizing, and remolding of enterprises, including the introduction of share-holding, a reform that has revitalized several SOEs. What is more, the central government's macroeconomic control system has shifted from direct administrative control towards indirect macroeconomic control based on the comprehensive application of economic and legal means." Cited from Gao Shangquan, *Two Decades of Reform in China* (New Jersey: World Scientific Publishing, 1999).

¹⁸⁰ Please see generally in online:

<http://news.xinhuanet.com/comments/2004-09/30/content_2041039.htm>,

<<http://www.codechina.net/resource/html/2004-09/03/13912.html>>,

<<http://www.codechina.net/resource/html/2004-09/03/13912.html>>, (date accessed: June 30, 2006).

¹⁸¹ Please refer to Table 3 below.

¹⁸² Online: <http://news.xinhuanet.com/english/2009-01/20/content_10688189.htm> (date accessed: April 15, 2009). For more information regarding the unemployment situation in China, please also see Qiao Jian, "China's Labor Relationship under the New Round Structural Adjustment and Trade Union's

it is fair to conclude that the “masters of an enterprise” in the socialist days has become one of the most vulnerable social groups in today’s Chinese society.¹⁸³

ii. Overview on the Current Chinese Labor Legislation

The main purposes of the Chinese Labor Law are to protect the legitimate rights and interests of workers, regulate labor relations, establish and safeguard a labor system under the socialist market economy and promote economic development and social progress.¹⁸⁴ Thus, *prima facie*, it is clear that to protect worker’s legitimate rights and interests is the first and foremost purpose of Chinese Labor Law. In order to serve this primary purpose well, this comprehensive law covers various aspects of worker’s rights and interests, including collective contract, labor welfare and insurance system, wage, safety and healthcare, job training, special protection for female workers and under-aged workers and labor dispute settlement mechanism. Admittedly, this comprehensive legislation together with other related laws, regulations and rules (such as Trade Union Law, Labor Contract Law, the Woman Rights and Interests Protection Law, Regulation on Collective Contract, Notice on Labor Contract System, Regulation on Special Protection on Under Aged Workers, Implementation Rule on Mine Safety Law, Temporary Regulation on the Management of the Crossing Provincial Border Farmer Workers) have established a relatively competent legal system for labor rights protection in China.

Yet, despite the fact that the Chinese Labor Law has improved a lot compared with what it was, the progress appears to be far from enough considering the dramatic downgrade of the social status of Chinese working class -- from “master of an enterprise” to one of the most vulnerable social groups. Indeed, substantial improvements are needed, especially in several sensitive and

Countermeasure” (*Xiyiulun Jiegou Tiaozheng Xia De Zhongguo Laodong Guanxi Ji Gonghui De Xiangying Duice*), Online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=3343> (date accessed: June 2, 2005).

¹⁸³ A handful of scholars in China including Zhang Yunmei, Chen Feng, Zhang Ming, Qiao Jian, Wang Licheng etc are sharing the same view with the writer regarding this aspect.

¹⁸⁴ Labor Law of People’s Republic of China, 1995[hereinafter Labor Law of PRC], art.1.

fundamental aspects, such as freedom of association and collective bargaining and freedom from forced labor or child labor.

To this end, for the rest of this thesis, the writer will examine the Chinese labor legislation in terms of the four main issues: (1) freedom of association and collective bargaining, (2) forced labor, (3) child labor, and (4) discrimination in respect of employment and occupation.

2.4 Conclusion on Chapter Two

When China is undergoing rapid economic growth and social transformations, it is also experiencing rising social unrest. When its trade union that is designed and functioning in a typical Marxist socialist regime relapsed into a conflicting dual functioning dilemma and cannot satisfy its members' urgent and legitimate needs, when the long disappeared labor related social evil such as child labor reemerged, when a special social group -- "farmer worker" created by its internal migrating wave has caused serious discrimination problems in terms of employment as well as other social problems in the cities, China urgently needs a set of model law to guide its legislative reform so that the costs to its people during the transitional period can be reduced.

Considered as a further concretization of the relevant general principles of human rights, the core labor standards covering four fundamental aspects of labor rights do provide internationally recognized labor standards to guide China and its leaders' decision-making procedure. It is observed that "countries that have eliminated forced labor and the worst forms of child labor and have made important inroads against discrimination in employment and occupation are thriving economically";¹⁸⁵ also "respect for freedom of association reinforces popular participation and buttresses democratic institutions that can address an uneven distribution of the gains from

¹⁸⁵ *Supra* 47.

economic growth”,¹⁸⁶ and thus promote social justice. As such, in the later part of this thesis, the writer will study the Chinese labor legislation in terms of eight ILO fundamental Conventions to find out the gap between them and provide feasible gap-filling solutions that not only taking into consideration the core labor standards but also adapted to the realities that China is facing.

¹⁸⁶ *Ibid.*

Chapter 3: Freedom of Association and Collective Bargaining: A Study on the Relevant Chinese Labor Law under the Framework of ILO Fundamental Conventions No. 87 and No.

98

3.1 International Labor Standards Relating to Freedom of Association and Collective Bargaining

A. The Value of Worker’s Right on Freedom of Association and Collective Bargaining

“Freedom of Association is the most basic of all principles underlying the work of International Labor Organization (the ‘ILO’) and the activities of those who toil for social justice”¹⁸⁷ As pointed out by the initial global report prepared by the ILO, the freedom of association and collective bargaining “can contribute to more participatory, transparent societies, which in turn promote economic growth and stability over time”.¹⁸⁸ “It involves the right to join, form and withdraw membership freely from groups, associations and partnerships of different kinds.”¹⁸⁹ When an association organizes and functions within the scope of national legislation, the “non-interference” is a minimum requirement to the outsiders -- both state, other individuals and organizations.¹⁹⁰ Besides, this right also implies that the state has a positive obligation to create and maintain an environment conducive to the proper exercise of this right.¹⁹¹

¹⁸⁷ Please see generally in online:

<<http://www.ilo.org/public/english/standards/norm/whatare/fundam/foa.htm>> (date accessed: February 9, 2005); Carolina Rodriguez Bello, “Freedom of Association”, online:

<<http://www.whrnet.org/docs/issue-association.html>>, (date accessed: May 13, 2007); Amy Gutmann *ed.*, *Freedom of Association* (Princeton, N.J. : Princeton University Press, 1998), from 3 to 63.

¹⁸⁸ *Supra* 47, at 108.

¹⁸⁹ Online:< <http://www.whrnet.org/docs/issue-association.html#Mechanisms>> (date accessed: June 1, 2005).

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

At the international level, the right to freely associate and bargain collectively is identified as a fundamental worker's right by the ILO and is protected under the UDHR, which provides that everyone has the right to freedom of peaceful assembly and association, including the right to form and join trade unions for the protection of his (her) interest, and is free from being compelled to belong to an association.¹⁹² Both the International Covenant on Civil and Political Rights (the "ICCPR") and International Covenant on Economic, Social and Cultural Rights (the "ICESCR") further emphasize that except for certain conditions prescribed by law or for the protection of national security or public interests in a democratic society, everyone shall have the right to freedom of association with others, including the right to form and join trade unions.¹⁹³ As a matter of fact, freedom of association exercised as one of the fundamental human rights have been reaffirmed by various international human rights conventions, such as Convention For the Protection of Human Rights and Fundamental Freedoms¹⁹⁴, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms¹⁹⁵ and Convention on the Elimination of All Form of Discrimination Against Women (the "CEDAW")¹⁹⁶ etc.

At the regional level, the right to freedom of association was recognized by the European Convention for the Protection of Human Rights and Fundamental Freedom and by the European Social Charter as well.¹⁹⁷ It was also incorporated into both the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man and the American

¹⁹² Universal Declaration of Human Rights (1948), General Assembly Resolution 217A (III), art. 20 & 23(4).

¹⁹³ International Covenant on Civil and Political Rights (1966), General Assembly Resolution 2200A (XXI), art.22; International Covenant on Economic, Social and Cultural Rights (1966), General Assembly Resolution 2200A (XXI), art. 8(1)(a).

¹⁹⁴ Convention For the Protection of Human Rights and Fundamental Freedoms (1950), art. 11.

¹⁹⁵ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1999), General Assembly Resolution 53/144, art. 5.

¹⁹⁶ Convention on the Elimination of All Form of Discrimination Against Women (1979), Assembly Resolution 34/180, art. 7.

¹⁹⁷ *Supra* 58, at 166.

International Charter of Social Guarantees.¹⁹⁸ More recently, the American Convention on Human Rights recognizes in general terms the right to associate freely for all kinds of purposes including those relating to labor.¹⁹⁹ “Its Additional Protocol on Human Rights in the Area of Economic, Social and Cultural Rights was adopted in 1988, and follows the wording of the UN’s Civil and Political Rights Covenant in respect of trade union rights.”²⁰⁰

Indeed, freedom of association is highlighted by the ILO as “a precondition for social dialogue” that is crucial to promote decent work for all and is fundamental to the achievement of the strategic objectives of decent work.²⁰¹ It provides workers with the opportunity to form and join organizations of their own and serves as a foundation stone upon which other labor rights could be built and respected. As such, freedom of association is one of the most effective means through which workers could defend their rights and interests in the workplace.

B. Introduction to ILO Convention No. 87

According to Convention No. 87, workers, without discrimination whatsoever, shall have the right to establish and to join organizations of their own choosing without previous authorization²⁰² (only the armed forces and the police may be exempted by national laws or regulations).²⁰³

The CFA of the ILO has pointed out specifically that where the authority competent to register a union has the discretionary power to refuse the registration, such power is tantamount to a requirement for prior authorization, which is incompatible with the requirement -- “without

¹⁹⁸ *Ibid.* For more information, please see Charter of the Organization of American States, Art. 45 (c), American Declaration of the Rights and Duties of Man, Art. 22.

¹⁹⁹ The American Convention on Human Rights, Art. 16.

²⁰⁰ *Supra* 58, at 166.

²⁰¹ Online: <<http://www.ilo.org/public/english/dialogue/actrav/genact/declar/freedial/>> (date accessed: June 1, 2005).

²⁰² ILO Convention No. 87, art.2.

²⁰³ *Ibid.*, art.9.

previous authorization”.²⁰⁴ In addition, the possibility of appealing to the courts against an administrative decision rejecting registration has been considered as an especially important safeguard.²⁰⁵ With regard to the entitlement of “the right to establish and to join organizations of their own choosing”, in principle, it does not prevent a voluntary decision by workers to choose to have a single organization to represent them. This is to avoid the potential problems that might be caused by parallel organization at the general, sectoral or enterprise levels.²⁰⁶ However, it does require that at the very least diversity should always remain possible.²⁰⁷ In other words, as the Committee of Experts observes, there is a fundamental difference between cases where a trade union monopoly is imposed or maintained by domestic law and situations where the workers or their unions voluntarily combined into one organization, independently of legislation.²⁰⁸

Besides, workers have the right to draw up their own constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs without interference from authorities, which would restrict this right or impede the lawful exercise thereof.²⁰⁹ Put concretely, the CFA has refused to accept provisions that appear to imply subordination of trade unions to the national economic policy; however, the Committee is content that if the intention is to guarantee the union members’ right to participate democratically, the law of land may require that the majority of the members of a trade union must decide on certain issues which affect the very existence or structure of a union such as adoption and amendment of the constitution, dissolution etc.²¹⁰ When a model constitution prepared by the authorities is made available to the unions to serve as a guideline rather than a compulsory model with legal obligations to follow, the ILO’s supervisory bodies have accepted its consistency with

²⁰⁴ *Supra* 58, at 185.

²⁰⁵ *Ibid.*

²⁰⁶ *Supra* 58, at 187.

²⁰⁷ Committee of Experts of ILO, General Survey, 1994, para. 91. Cited from *Supra* 58, at 187.

²⁰⁸ *Ibid.*

²⁰⁹ ILO Convention No. 87. art.3.

²¹⁰ *Supra* 58, at 191.

the very “right to draw up their own constitution and rules” under article 3 of Convention No. 87.²¹¹ In terms of the election of representatives in full freedom, the Committee of Experts on the Application of Conventions and Recommendations points out that the law of the land “should not establish very precise rules on the subject of trade elections, nor regulate the composition of its executive committee, nor fix the number of trade union leaders or the majority by which they must be elected, nor impose fines on members who do not participate in election”.²¹² In addition, the authority should not be allowed to have the power to approve the candidates or the result of the elections.²¹³ The political views, affiliation or activities of a person should not constitute a legal obstacle to occupy trade union offices either.²¹⁴ Furthermore, provisions restricting or prohibiting the re-election of trade union officers are a serious obstacle to the right of organizations to elect their representatives in full freedom.²¹⁵ Of course, the CFA has stated repeatedly that the rights protected in article 3 of the Convention No. 87 do not prevent the supervision of the internal activities of a trade union if those activities violate legal provisions or rules; however, it is important that such control and power to take measures for the suspension or dissolution of the union should be exercised by the judicial authorities instead of administrative ones to avoid the arbitrary risks.²¹⁶

Furthermore, the dissolution and suspension of workers’ organization shall be decided by the organization *per se* instead of by administrative authorities.²¹⁷ In terms of the law of the land, it is required not to impair the guarantees on right to freedom of association provided for in this Convention.²¹⁸ Moreover, it is each member state’s obligation to take all necessary and

²¹¹ *Ibid.*

²¹² *Ibid.* at 192.

²¹³ *Ibid.*

²¹⁴ *Ibid.*, at 193.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*, at 194.

²¹⁷ ILO Convention No. 87. art.4.

²¹⁸ *Ibid.* art.8(2).

appropriate measures to ensure that workers may freely exercise their right to organize.²¹⁹ In terms of international affiliation, unions are not only entitled to establish and join federations and confederations and any other organizations as such, but also entitled to affiliate with international organizations of workers.²²⁰

C. Introduction to ILO Convention No. 98

Convention No. 98 further prohibits anti-union discrimination in respect of employment.²²¹ Specifically put, acts, such as making the employment of a worker subject to a non-union member identity or dismissing or prejudicing a worker due to his/her union membership or participation in union activities, are prohibited explicitly by the Convention.²²² Indeed, the CFA together with the Committee of Experts have amassed a considerable jurisprudence on this point.²²³ It is submitted that acts of discrimination refer not only to those take place in hiring and firing, but to any discriminatory measures during employment, which includes transfers, downgrading and compulsory retirement, denial of promotion, disciplinary measures, blacklisting, and deprivations or restrictions on remuneration and social benefits.²²⁴

The Convention reconfirms that Trade Unions are free from any interference from employers' side in their establishment, functioning or administration. Especially, acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the objective of placing such organizations under the control of employers or employers'

²¹⁹ *Ibid.* art.11.

²²⁰ *Ibid.* art.5.

²²¹ ILO Convention No. 98, art.1(1).

²²² *Ibid.* art.1(2).

²²³ *Supra* 58, at 214.

²²⁴ *Ibid.*

organizations, are prohibited.²²⁵ The Committee of Experts has noted that governments that ratify the Convention are under the obligation to take specific actions, in particular through legislation, to ensure respect for such non-interference requirements.²²⁶ In addition, the CFA has stated that the issuance of circulars by a company requesting its employees to state to which trade union they belonged, even though not intended to interfere with the exercise of trade union rights, may naturally be understood as interference prohibited under the very Convention.²²⁷ It is observed by the Committee of Experts' 1994 General Survey that mere legislation prohibiting acts of anti-union discrimination is not enough if it is not accomplished by effective and rapid procedures to ensure its application in practice.²²⁸ Of course, as the CFA further points out, as long as protection against anti-union discrimination is in fact ensured, methods adopted to safeguard workers against such practices might vary from one state to another; however if there is such discrimination, it is the obligation of the government concerned to take all the necessary steps to eliminate it, irrespective of the methods normally used.²²⁹ In other words, it might be necessary for government to adopt methods not provided for in the legislation or to create new measures to supplement the existing uses or remedy of other deficiencies.²³⁰

Measures shall be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers and trade unions (with the armed forces, police and public servants exceptions)²³¹ with a view to the regulation of terms and conditions of employment by means of collective agreements.²³² According to the CFA's statement, generally speaking, trade unions should have the right, through collective bargaining and other lawful

²²⁵ ILO Convention No. 98, art.2.

²²⁶ *Supra* 58, at 216.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*, at 217.

²³⁰ *Ibid.*

²³¹ ILO Convention No. 98, art. 5 & 6.

²³² *Ibid.*, art.4.

means, to seek to improve the living and working conditions of those whom they represent.²³³ Thus, the public authorities are under the obligation to refrain from any interference that would restrict rights as such or impede the lawful exercises thereof.²³⁴ Put specifically, as the ILO's supervisory bodies have contented, the most representative unions -- the organization or organizations that have the largest membership compared with others, should be accorded exclusive or preferential rights for collective bargaining.²³⁵ Of course, under the situation where no union has such majority, the Committee of Expert has concluded that in these circumstances collective bargaining rights should be granted to all the unions in the unit, at least on behalf of their own members.²³⁶

3.2 Freedom of Association in China Vs. International Core Labor Standards on Freedom of Association

A. Brief Introduction to the Law and Practice regarding the freedom of Association in China

Generally speaking, 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.²³⁷

They are organized on the principle of democratic centralism²³⁸ which means “individuals obey

²³³ *Supra* 58, at 218.

²³⁴ *Ibid.*

²³⁵ *Ibid.*, at 219.

²³⁶ *Ibid.*

²³⁷ Wang Quanxin, *Labor Law (Laodong Fa)*, (Beijing China: Law Press (*Falü Chuban She*), 1997) at 129.

²³⁸ Trade Union Law of the People's Republic of China, 2001, art. 9. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

Roughly speaking, the meaning of “democratic centralism” could be explained as follows: “it is 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

the organization, the minority obeys the majority, and unions at lower levels obey those at higher levels.”²³⁹ Therefore, all the other trade unions in China are subjected 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.²⁴⁰ To date, ACFTU has a membership of 137 million in more than 1.713 million basic-level trade union organizations.²⁴¹ It opens to all manual and mental workers in enterprises, undertakings and offices inside China whose wages constitute their principal means of livelihood and who accept the Constitution of the Chinese Trade Unions. There is no discrimination based on their nationality, race, sex, occupation, religious belief or educational background. Under the leadership of ACFTU, there are 31 federations of trade unions of provinces, autonomous regions and municipalities directly under the Central Government and 10 national industrial unions, covering various departments namely, education, seamen, energy, machinery, building, forestry, railway, telecommunication, light industry and banking etc.²⁴² “The local trade union federation is the leading body of the local trade union organizations and the local industrial unions in its locality.”²⁴³ The ACFTU, established as the unified national organization, is the leading body of all local trade union federations and all national organizations of industrial unions.²⁴⁴

In order to have a clearer understanding on the organizational structure of the Chinese trade union system, please see Table 2 as follows:

prolonged process, and mistakes may be made, but the democratic element ensures that debate can go on until all members are satisfied.” Online: <<http://www.etext.org/Politics/MIM/wim/democent.html>> (date accessed: February 23, 2005). This idea is firstly put forward by V.I. Lenin and it is regarded as a principle of communist democracy.

²³⁹ Albert Hung-yee Chen, *An Introduction to the Legal System of the People’s Republic of China*, (Singapore: Butterworths Asia, 1992) at 50.

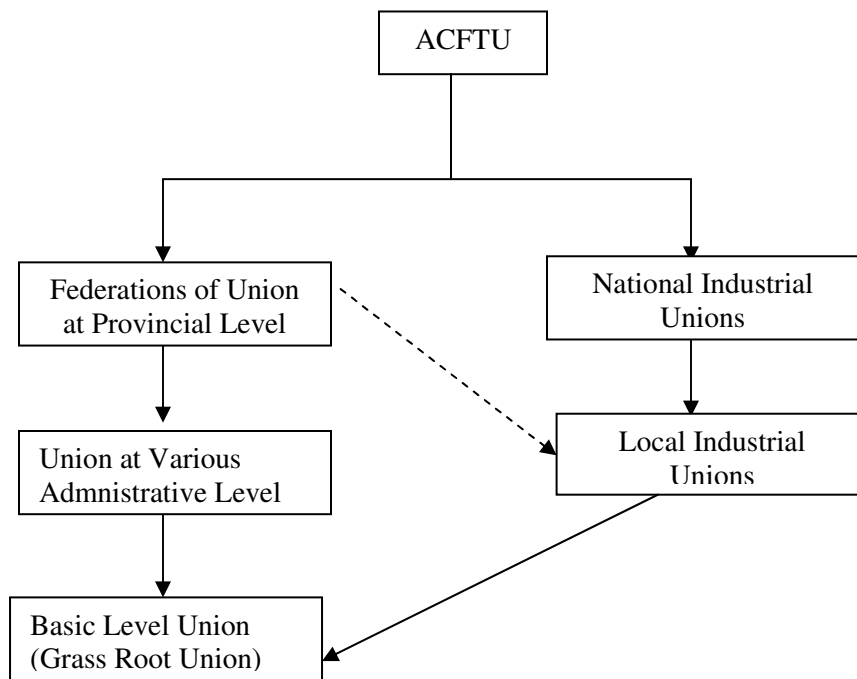
²⁴⁰ Du Wanqi, “Seventy Years Chinese Trade Union Movement” (*Zhongguo Gonghui Yundong De Qishi Nian*), Beijing Party History (*Beijing Dang Shi*), the third issue of 1995, at 16.

²⁴¹ “All-China Federations of Trade Unions”, online: <<http://www.acftu.org.cn/about.htm>> (date accessed: June 4, 2005).

²⁴² *Ibid.*

²⁴³ Constitution of ACFTU, art. 10 (2), online: <<http://www.acftu.org.cn/constitu.htm#2>> (date accessed: April 19, 2006).

²⁴⁴ *Ibid.*



Although China claimed in its report submitting to the ILO on the issue of freedom of association and collective bargaining that “government’s authorization is not required to establish a workers’ organization ..., [and] freedom of association can be exercised at enterprise, sector/industry, national and international levels by all workers in the public service, medical professionals, teachers, agricultural workers, workers engaged in domestic work, workers in Export Processing Zones (EPZs) or enterprises/industries with EPZs status, migrant workers, workers of all ages and workers in the informal economy”,²⁴⁵ the relevant domestic trade union law and the *de facto* practice seems not to be the case.

First, the writer would like to discuss the relevant legislation. Although the Chinese Constitution provides that citizens of the People's Republic of China enjoy freedom of speech, of the press, of

²⁴⁵ ILO Annual Review Regarding China, online: <http://www.ilo.org/public/english/standards/decl/download/facb_compilation.pdf>, at 22.

assembly, of association, of procession and of demonstration²⁴⁶, and the 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 their nationalities, races, sexes, occupations, religious beliefs or education), and no organization or individual may hinder them from doing so or restrict them²⁴⁷, article 10 and 11 of the Trade Union Law nevertheless provides the restriction on the worker's right to freedom of association in China. Put concretely, it provides that ACFTU shall be established as the unified national organization²⁴⁸ and the 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 higher level for its approval.²⁴⁹ In other words, the establishment of trade union in China is, by no means, purely subject to workers' own choosing without previous authorization as provided by Convention No. 87. For good measure, the Constitution of ACFTU reconfirms its leading power, namely all local trade union federations and all national organizations of industrial unions shall be led by ACFTU only.²⁵⁰ Indeed, according to some labor rights experts' observation, "these articles (in the Chinese Trade Union Law) not only shore up on the ACFTU's monopoly on organization, but also technically and procedurally block the road to workers' organizing independent union."²⁵¹ Reports have shown that as for the trade unions which are voluntarily organized by workers without subject to the control of ACFTU, they are absolutely illegal in the eyes' of Chinese authority. For example, several voluntarily organized worker associations for protecting farmers' interests when they were working in cities of Zhejiang Province were alleged as illegal by an official statement from the Federation Trade Union of Zhejiang Province. The official position is

²⁴⁶ Constitution of PRC, art. 35. From database: lawinfochina < <http://www.lawinfochina.com/index.asp>>.

²⁴⁷ *Supra* 238, art. 3.

²⁴⁸ *Ibid.* art.10.

²⁴⁹ *Ibid.* art. 11.

²⁵⁰ Constitution of ACFTU, art.10 para.2.

²⁵¹ "CLB Analysis of the New Trade Union Law", online: <http://www.china-labor.org.hk/iso/article.adp?article_id=1976&category_name=Laborpercent20Laws&article_id=1976&category_name=Laborpercent20Laws> (date accessed: June 4, 2005).

that organizations as such failed to obtain an approval from the union at the next higher level in advance.²⁵² Worse still, such an official conclusion is final, i.e., there is no other safeguard available for workers involved to seek for a chance to realize their freedom of association, such as appealing to the courts against a quasi-administrative decision as such.²⁵³ In this sense, it is fair for the leading global labor organization -- International Confederation of Free Trade Union (the "ICFTU") to call the ACFTU as "trade union monopoly".²⁵⁴ It shall be noted that the ILO Convention No. 87 has not banned the practice of trade union monopoly, if it is a voluntary choice made by workers themselves; however, it does prohibit the situation where the relevant laws of the land institutionalize a factual monopoly and deny the workers' right to choose to set up unions outside the established structure as they so wish.²⁵⁵ Therefore, these provisions under the Chinese Trade Union Law are, unfortunately, inconsistent with the basic principle of association embodied in the ILO Convention No. 87.

B. Dual Role of the Chinese Trade Union

i. Trade Union's Role under the Present Chinese Trade Union Law

In accordance with the Chinese Trade Union legislation, trade unions are mass organizations formed by the working classes of their own free will.²⁵⁶ Considering that trade unions in China are voluntary unity of the leading class -- the working class, their status seems to be superior to an ordinary social organization.²⁵⁷

²⁵² Chen Feng, "Between State and Labor: The Contradictory Roles of Chinese Trade Union under the Market Economy" (*Zai Guojia Yu Laogong Zhijian: ShiChang JinJi Xia Zhongguo Gonghui De Jiaose Chongtu*), online: <<http://www.yannan.cn/data/detail.php?id=6141>> (date accessed: June 5, 2005).

²⁵³ Please refer to text above accompanying note 205.

²⁵⁴ International Confederation of Free Trade Unions, People's Republic of China: Annual Survey of Violations of Trade Union Rights (2003).
Online: ICFTU <http://www.icftu.org/displaydocument.asp?Index=991217713&Language=EN> (date accessed: December 12, 2004).

²⁵⁵ *Supra* 58, at 187.

²⁵⁶ *Supra* 238, art. 2.

²⁵⁷ Lin Feng, "Employment Law in China" in Wang Guiguo & John Mo, eds., *Chinese Law* (Boston: Kluwer Law International, 1999), at 461. It might be worth mentioning here that there are some scholars with the view that the Chinese trade unions could be understood as government operated NGOs (GONGOs),

The 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 the Chinese Communist Party and the guidance of Marxism Leninism, Mao Zedong Thought and Deng Xiaoping Theory.²⁵⁸ Besides, trade unions in China shall **assist the people's governments** in their work, uphold the leadership of the working class and support the worker-peasant alliance which forms the basis of the people's democratic dictatorship of socialist state power.²⁵⁹ The general principles embodied in the Constitution of ACFTU reconfirm the trade union's role as such.²⁶⁰ Accordingly, the Chinese trade unions are required by law and its own constitution to work as an assistant to the Chinese authority, i.e., work for the interests of Chinese government, which seems to be contrary to the interpretation of Convention No. 87 offered by the CFA -- provisions that appear to imply subordination of trade union to the national economic policy are regarded as jeopardizing a union's freedom of its own operation guaranteed by article 3 of the Convention No. 87.²⁶¹ Meanwhile, the Trade Union Law also provides that the basic function and duty of a trade union is to safeguard the legal rights and interests of the employees.²⁶² 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.²⁶³ In fact, the law requires the Chinese trade unions to play dual role at the same time, i.e., one role is to work for the interests of the socialist government, and the other role is to act in the interests of

which was set up by government to look like NGOs in order to promote the interest of the government in question. The writer wishes to state that such view has certain merits; however, considering that the Chinese trade union is not directly set up by the government, but organized by the workers themselves "voluntarily" with certain beforehand approvals required by the union at the next higher level before its legality could be officially admitted, to understand it as a typical GONGO might not be very accurate.

²⁵⁸ *Supra* 238 art.4.

²⁵⁹ *Ibid.* art.5.

²⁶⁰ The Constitution of ACFTU provides that "Guided by Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping's theory, the Chinese trade unions implement the Party's basic line of centering on the economic construction, upholding the Four Cardinal Principles and adhering to the reform and opening-up...". Cited in Constitution of ACFTU, General Principles, para.2.

²⁶¹ *Supra* 8

²⁶² *Ibid.* art. 6.

²⁶³ *Ibid.*

the workers. This is only possible when the state and the employees are sharing the same interests. The Trade Union Law does not incorporate any clauses in dealing with the situation where the interests of the State and the employees are conflicting. In other words, there is a legislative assumption that the interests of the state and employees are consistent most of the time. Unfortunately, assumption as such may not always be true, especially under the circumstances of a market economy.

ii. Emergence of the Conflicting Interests between the State and Workers

Before China's radical economic reform, the Chinese trade union served dual functions just as what is described by Leninist doctrine of dual functioning trade unions in Communist country.²⁶⁴ The trade union back then was required both to encourage labor productivity and to protect workers legitimate interests from the employer's abuse.²⁶⁵ Admittedly, as certain communist union theorists have already observed, there might be certain internal contradiction when trade union is operating such dual function;²⁶⁶ however, considering the working class in China at that time was the genuine leading class and the state led by it was the actual employer²⁶⁷, chances were rare for the fundamental conflicts to exist between the union's two functions. Thus, it is observed that conflicts as such in the socialist regime back then without antagonistic class conflicts are only of minor severity.²⁶⁸ By the same token, it is possible for the trade union at that time to work as "transmission belts" between state and masses, conveying state policy to labor and also sending information from the workplace to the state.²⁶⁹ Consequently, the legislative

²⁶⁴ Alex Pravda & Blair A. Ruble, eds., *Trade Unions in Communist States* (Boston: Allen & Unwin, 1986) at 1.

²⁶⁵ *Ibid.* at 2.

²⁶⁶ From these theorists' point of view, since there is no antagonistic social conflicts exist within socialist society, there only could be some short-term difference in priorities and preferences, yet by definition this is of minor importance. Cited from *Ibid.* at 3.

²⁶⁷ For more information, please see generally in text above accompanying note 85.

²⁶⁸ *Ibid.* at 3.

²⁶⁹ *Ibid.* at 4.

assumption that most of the time the state and the employees were sharing the same interest as mentioned above did have its merits at that point of time.

Things have changed greatly. The Chinese state is no longer what it was. “The privatization of small and medium sized state-owned enterprises (SOEs), releasing shares for sale on the stock exchange by large SOEs, the transformation of all economic mechanisms”²⁷⁰, the rapid development of private enterprises both domestic and foreign related and the widely retrenchment policy (*xiagang*) etc.²⁷¹ have changed the state’s role as a working class protector; on the contrary, governments, especially the local ones, sometimes even stand on the opposite side of workers’ interests. According to a social investigation report in China, in order to attract investment, in order to collect more local annual revenue, in order to raise the chances to be promoted during their term, some local Chinese governments and its officers had tried to avoid the implementation of the Chinese labor law within their regions.²⁷² Even worse, some of them have enacted certain local policies with the nature to sacrifice the dignity of the national labor legislation and the interests of workers within its region but to benefit the investors.²⁷³ In this sense, local government as such and employers are sometimes, if not always, within the same interest group. Take the Shenzhen special economic zone as an example. Theoretically speaking, the major responsibility of a labor bureau there is to adjust the worker-employer relationship and to protect the interests of both sides without prejudice;²⁷⁴ however, the main task of the bureau is indeed operated by a basic labor station who is also a constituent of the local government.²⁷⁵ Logically, such labor stations have to follow the instruction of the local government, who

²⁷⁰ Online: <<http://www.asianlabor.org/archives/002064.php>> (date accessed: July 29, 2005).

²⁷¹ For more information, please see text 2.3 B (i) -- Historical Review on the Chinese Labor Law and Relevant Policy Changes within Socialist China.

²⁷² Tan Sheng, Liu Kaiming, *Multinational Corporate Social Responsibility and the Chinese Society (Kuaguo Gongsi De Shehui Zeren Yu Zhongguo Shehui)* (Beijing China: Social Science Literature Press (*Shehui Kexue Wenxian Chubanshe*) 2002) at 29.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.* at 30.

²⁷⁵ *Ibid.*

unfortunately is observed to share the same interests of employers/investors.²⁷⁶ Therefore, it is quite hard to expect the impartial performance of a basic labor station there.

In addition, according to the information from some non-governmental organizations (NGOs), such as China Labor Bulletin based in Hong Kong which is specialized in labor rights protection in China, “almost every week in Hong Kong and mainland China, newspapers bring reports of some kind of labor action: a demonstration demanding pensions; a railway line being blocked by angry, unpaid workers; or collective legal action against illegal employer behavior such as body searches or forced overtime”.²⁷⁷ It is reported that more than 1 million workers in 30 cities joined the street demonstration in the year 1995 and the number had increased dramatically to 3.6 million after only three years.²⁷⁸ Worse still, evidence available shows the number is still increasing year by year.²⁷⁹ The China Labor Bulletin further confirms that the process of "economic restructuring has led to huge pressures on the Chinese labor market... many workers laid off from State Owned Enterprises (SOEs)²⁸⁰ have expressed dissatisfaction with the long working hours, short-term contracts and miserly benefits”.²⁸¹ 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.²⁸²

²⁷⁶ *Ibid.*

²⁷⁷ Tim Pringle, “Industrial Unrest in China - A Labor Movement in the Making?”, Online: <<http://www.china-labor.org.hk/public/contents/article?revision%5fid=1559&item%5fid=1558>> (date accessed: September 26, 2005).

²⁷⁸ *Supra* 252.

²⁷⁹ Qiao Jian & Jiang Yin, “Analysis on Labor Disputes and Mass Labor Movements in Marketization” (*Shichanghua Jincheng Zhong De Laodong Zhengyi He Laogong Quntixing Shijian Fenxi*), online: <<http://www.liuzhi.gov.cn/wenzhang/list.asp?id=30>> (date accessed: July 27, 2005).

²⁸⁰ It is estimated by ILO that at least, there are 26million workers have lost their job due to the reform of SOEs in China. Online: <<http://www.ilo.org/public/chinese/region/asro/beijing/inchina.htm>> (date accessed: April 28, 2004).

²⁸¹ “Unemployment in China”, Online: China Labor Bulletin <http://www.china-labor.org.hk/iso/article.adp?article_id=1652> (date accessed: October 27, 2004).

²⁸² Han Dongfang, “50,000 Daqing Oilfield Workers Organize Independent Trade Union”, online: China Labor Bulletin <http://www.china-labor.org.hk/iso/article.adp?article_id=2059&article_id=2059> (dated accessed: October 27, 2004).

These were soon followed by large scale demonstrations by workers in several big industrial cities in China, including its capital city Beijing.²⁸³ The protesters there surrounded the government headquarters, blocked public traffic and demanded an official solution on the problem of retrenchment.²⁸⁴ After an unusual long strike at a Chinese factory acquired by China Resources Enterprises due to the problems caused by privatization, some scholar comments: “There is similar unrest at factories all over the country at the moment and we expect more strikes as China continues its SOE reform”.²⁸⁵ Surprisingly, even a senior officer of ACFTU also admitted that the strike in China is a normal phenomenon at present.²⁸⁶

iii. What Shall Be the Genuine Mission for A Trade Union in Today’s China in Terms of Convention No. 87 & No. 98?

Some scholars in China argue that the reason for the demonstration phenomena abovementioned is because the interests of the State and employees may conflict in the short run; in the long term, they are nevertheless consistent.²⁸⁷ The argument may go in this way: when the efficiency of enterprises improves, the state will benefit from taxation from enterprises and since the state represents its people’s interests, its people will also benefit thereupon.²⁸⁸ As such, in the long run, state and workers’ interests are consistent. In theory, this argument might work, if a few practical

²⁸³ Online: China Labor Bulletin <http://www.china-labor.org.hk/iso/news_item.adp?news_id=1849> (date accessed: February 3, 2005).

²⁸⁴ *Ibid.* 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)”, Online: <<http://www.icftu.org/displaydocument.asp?Index=991217713&Language=EN>> (date access: December 12, 2004).

²⁸⁵ Justine Lau, “Strike highlights pressure on wages”, Online: <http://www.china-labor.org.hk/iso/news_item.adp?news_id=3630> (date accessed: July 22, 2005).

²⁸⁶ Chen Yi, *Trade Union Reform and Reform inside Trade Union (Gaige Zhong De Gonghui He Gonghui Zhong De Gaige)* [Beijing China: Chinese Worker’s Publisher (*Zhongguo Gongren Chubanshe*), 1999] at 142.

²⁸⁷ Please see generally in Zhang Youyu, *Some Issues on the Amendment of Constitution (Guanyu Xiugai Xianfa de Jige Wentu)*, (Beijing China: The Mass Press (*Qunzhong Chubanshe*), 1982), from 10 to 15; Wu Jie, “Discussion on the Political Rights and Freedom of Chinese Citizen” (*Luelun Woguo Gongmin De Zhengzhi Quanli He Ziyou*) in Luo Yaopei, ed., *Thesis Collection on Constitutional Law (Xiang Lunwenji)*, [Beijing China: The Mass Press (*Qunzhong Chubanshe*), 1982], from 180 to 184.

²⁸⁸ *Ibid.*

issues could be properly addressed: (1) whether workers' short-term interests could be sacrificed for the sake of a state's long term interest; (2) whether it is possible that the so called workers' short-term interests might be the genuine long term interest of a state; and (3) who is authorized to decide which interests prevail. In addition, if this long-term state interests argument could survive, it will be doubtful whether a union in China can really protect the legitimate interests of employees or it just serve as a *de facto* "eye and ear" of the state inside every workplace.²⁸⁹ Some trade union leaders from Shanghai (China's economic centre) admit that the trade union has owed workers too much and cast doubt on its value since it fails to fulfill its missions.²⁹⁰ Some trade union leaders even comment in this way: if we are fighting for the interests of workers and are punished or fired by employers, who is going to fight for our interests?²⁹¹

In fact, the CFA has concluded that "many provisions of the [Chinese] 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".²⁹² The Committee found that the provisions under the Chinese Trade Union Law such as section 4, 11 and 13 "result in the imposition of trade union monopoly and the requirement that grass-root union be controlled by higher-level unions and that their constitutions shall be

²⁸⁹ To be fair, Chinese trade union nevertheless plays certain positive role in protecting its member's interests. It is reported that trade union in more than twenty provinces have established "Legal Assistant Center" in helping workers deal with labor disputes. During the past decade, local trade unions was involved in more than 30,000 labor dispute cases, among which trade unions actively represented workers to go to court. Of course, it does not mean Chinese trade union is willing to be involved in all the disputes. To be precise, when labor dispute involving a large number of workers with certain collective worker action like demonstration targeting institutionalized violation (such as merger, bankruptcy) of workers interests, trade union is likely to keep silent or even turn a blind eye on it. Cited in *Supra* 252.

²⁹⁰ *Supra* 252. This is also confirmed by the writer's interview of several grass root union chairmen in Shanghai in February of 2006.

²⁹¹ Online: <<http://www.people.com.cn/GB/guandian/35560/2744402.html>> (date accessed: February 9, 2005). In fact, through the writer's interview with the some Chinese trade union leaders in Shanghai in February of 2006, the pathetic situation abovementioned is confirmed.

²⁹² Complaint against the Government of People's Republic of China presented by International Confederation of Free Trade Unions (ICFTU): 321st Report (Case No. 2031). Online: <<http://www.oit.org.pe/sindi/english/casos/chn/chn200001.html>> (date accessed: February 1, 2005).

established by the National Congress of Trade Union Members constituted major constraints on the right of unions to establish their own constitutions, organize their activities, and formulate programs.”²⁹³ The committee reminds that the missions of trade unions should be to defend and promote the interests of their constituents rather than reinforcing the country's political and economic system.²⁹⁴ China Labor Bulletin also criticizes that “getting workers back to work as soon as possible, regardless of whether or not their demands have been met, has always been the priority of the ACFTU”.²⁹⁵ To be fair, the Chinese trade union none the less has played certain positive roles in protecting workers’ legitimate interest during the transitional period especially with respect to the non-public sector, though limited. For example, trade unions at various levels have placed special emphasis on unionizing non-state-owned sectors given the fact that the union establishment rate in the non-public sector including township enterprises, foreign invested enterprises etc. are quite low. “During the nationwide inspection by the National People's Congress (the “NPC”) of the Trade Union Law enforcement in 2004, the ACFTU sponsored a number of meetings, including the Workshop on Raising the Unionization Rate in Foreign-funded Enterprises, the 17th National Conference on Trade Union Work in Special Economic Zones and Development Areas, the National Conference on Trade Union Work in New and Hi-tech Development Zones and the Conference on Trade Union Work in *Jiujiang* Development Zone, so as to better guide the organizing drive in foreign-funded enterprises and development zones”.²⁹⁶ Ultimately, trade unions have been successfully established in certain Multinational Corporations

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Supra* 251.

²⁹⁶ ACFTU, “Blue Paper on the Role of Chinese Trade Unions in Safeguarding the Legitimate Rights and Interests of Workers 2004(Excerpt)”, online: <http://211.167.236.236/zl/magazine/20040200631103141.htm> (date accessed: June 6, 2006). For more information on this issue, please see generally in online: <http://www.xzxx.net.cn/disp.asp?id=3748>, <http://www.gansudaily.com.cn/20041112/213/2004B12A0025B002.htm>, http://www.legalinfo.gov.cn/zl/2004-11/17/content_151735.htm, http://www.cyj.com.cn/show_about.asp?id=42, <http://chinese.wsj.com/gb/20060515/chw172840.asp>, <http://clubhi.netsh.com/bbs/661239/messages/89715.html> (date accessed: June 6, 2006).

(MNCs) such as Carrefour, McDonald's as well as Samsung.²⁹⁷ Put aside the union's efficacy issue at the moment, the establishment of trade unions inside these work places *per se* is a sign of progress promoted by ACFTU in protecting workers' interests.²⁹⁸

As is widely accepted, trade unions play an important role in keeping a balance between the power of government, business interest and worker's interest in a modern industrial society.²⁹⁹ It is observed that the fast development of MNCs, the deregulated finance, the end of Cold War and the wave of Liberalizing Trade have undermined the trade union's role as leverage; however, its importance has only increased.³⁰⁰ As China becomes more and more involved in the global economy, especially after its entering into WTO, the interest of the socialist government especially government at the local level and its workers are no longer that consistent as before. Therefore, the role of the Chinese trade union to protect the legitimate interests of its workers, rather than its role as a government assistant, becomes more and more important, particularly when its members' basic interests are seriously threatened by the fact that local governments and employers start sharing the same interests.

C. Reorientation of the Chinese Trade Union

i. The Relationship Between Chinese Trade Union and CCP: A Historical Review

²⁹⁷ *Ibid.*

²⁹⁸ Some reports including the one from the Chinese official website, such as China.com.cn (Zhongguo Wang) have shown that though the union establishment rate is increasing year by year after 1999 when the ACFTU decided to put the task of unionizing non-state sector on the priority of its agenda, the efficacy of the union there is not satisfactory at all. It is quite logic to understand such circumstances in the sense that even the unions in the public sector could not function well to protect its members' legitimate interests, let alone the newly established ones inside the private sector. For more information, please see generally in online: <<http://www.china.org.cn/chinese/zhuanti/282893.htm>>, (date accessed: June 6, 2006); Chen Shengyong & Zhang Ming, "Reform on the Local Trade Unions in China and the Direct Election of the Grass Root Unions", online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=3948> (date accessed: June 6, 2006).

²⁹⁹ Please see generally in Janusz Symonides, ed., *Human Rights: New Dimensions and Challenges*, (Brookfield, VT: Ashgate, 1998) at 267; Geoge Tsogas, *Labor Relation in A Global Economy* (London: M. E. Sharpe, 2001) at 3-4.

³⁰⁰ *Ibid.*

Back to the first day of the birth of ACFTU, it had established a special relationship with CCP. To be precise, it is almost subject to the complete control of CCP. Under the leadership of CCP, the Chinese working class established ACFTU, enacted its constitution and elected its first executive committee in 1925.³⁰¹ Serving as a revolutionary power, ACFTU was fighting fiercely against imperialism and warlords during Great Revolution Period (from 1919 to 1927).³⁰² At that time, with the leadership of CCP, massive strikes for the sake of workers' interests were well organized in several large cities in China, including but not limited to Shanghai and Wuhan etc.³⁰³ After the outbreak of Sino-Japanese War, the ACFTU started playing an active supportive role in assisting CCP's anti-Japanese battle.³⁰⁴ During the civil war period, once again, the ACFTU worked as a loyal supporter of CCP via opposing Jiang Jieshi's ruling till CCP finally came into power in 1949.³⁰⁵ Due to this revolutionary history of ACFTU led by CCP, its status, which is supposed to be a voluntarily established workers' organization, is inclined to be heavily politicized even in today's China.

After the establishment of PRC, the relationship between ACFTU and CCP became even closer. As I have mentioned above in the "Dual Function Theory"³⁰⁶ part, the dual role has been reflected without any exception on the trade union's function in the socialist China back then. Moreover, due to the backwardness of the China and the permeating desire to develop a socialist economy at that time, naturally, there was a *de facto* bias in trade union's functioning, i.e., overemphasizing its productive function and neglecting its worker's guardianship role. Consequently, the trade union gradually became a semi-governmental agency in assisting state's

³⁰¹ "About ACFTU", online: <<http://www.acftu.net/>> (date accessed: February 19, 2006).

³⁰²For more information relating to this topic, please see Cao Yangping, "80 Years Fighting of ACFTU" (*Zhongguo Gonghui 80 Nian De Fengdou Lishi*), online: <<http://www.acftu.net/template/10001/file.jsp?cid=65&aid=1783>> (date accessed: June 6, 2005); Liu Mingkui, ed., *The History of Chinese Labor Movement (Zhongguo Gongren Yundong Shi)* (Guang Dong: Guang Dong People's Press, 2005).

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ Please refer to text accompanying note 264.

policy enforcement. Of course, during the period between 1949 till year 1989, certain heated debates³⁰⁷ on what shall be an appropriate role of trade union in China to protect its workers interests well were held by several Chinese unionists, such as Li lishan, Lai Ruoyu, Deng Zihui and Gao Gang etc.³⁰⁸ Below are few examples. Deng Zihui argued that the Chinese trade unions should only work for the legitimate interest of its workers; however, from Gao Gang's position, since there was no exploitation existing in an SOE, there would be no class conflict. Thus, theoretically there should be no differences and conflicts between union work and the administrative work in an SOE.³⁰⁹ His argument was refuted by Li Lisan who held that even in an SOE, there was still some conflicts such as the conflict between personal interests and the collective interests, long term interests versus workers' daily interests. As such, he emphasized the importance to strengthen the independence of the Chinese trade unions.³¹⁰ These views and theories, however, were either purposefully neglected or drastically criticized by the CCP. As a matter of fact, in ACFTU's "About Certain Ideas on Trade Union Reform" (1988) (*Guanyu Gonghui Gaige De Shexiang*), it publicly admitted its bureaucratic nature and expressed its hope to separate with CCP and to change the actual nomination practice on the leaders in grass root trade unions into democratic election in the future.³¹¹ Unfortunately, this dream broke after the political turmoil of Tiananmen Square in 1989, whose occurrence was partly because of the

³⁰⁷ These debates are mainly around the independence of Chinese trade union, i.e., separate with CCP and operate independently in protecting workers legitimate interests. For example, Deng Zihui in 1950 pointed out that trade union shall mainly represent and protect workers daily interests, otherwise, at the end of the day, it would become an attachment to the factory without its free will. Cited in Online: <<http://theory.cqnews.net/system/2005/03/22/000454295.shtml>> (date accessed: June 8, 2005); Gao Gang argued that during an SOEs in a socialist regime, there was no exploitation, no class conflict. Therefore, the factory and the workers are sharing the same interests. In this sense, there is no need to separate trade union and employers, namely state. Cited in online: <<http://book.sina.com.cn/nzt/cha/lilisan/173.shtml>> (date accessed: June 8, 2005).

³⁰⁸ Zhang Yunmei, "Harmony and Conflict: Chinese Trade Union and Party-State Relationship" (*Lishun Yu Chongtu: Zhongguo gonghui Yu Dang-GuoJia De Guangxi*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=2574> (date accessed: June 2, 2005).

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ Zhang Yunmei, Harmony and Conflict: Chinese Trade Union and Party-State Relationship (*Lishun Yu Chongtu: Zhongguo Gonghui Yu Dang-Guo Jia De Guangxi*), Online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=2574> (date accessed: June 2, 2005).

democratic activities of the Beijing Autonomous Workers' Federation (BAAF) whose original core group was made up of blue collar workers from steel factories, the railways, and the aviation industry, as well as shop assistants and casual workers.³¹² From then on, the CCP engaged in strengthening its control over Chinese trade unions via promulgating several state orders, such as “Notice on Strengthening the CCP’s Leadership on the Chinese Trade Union” (*Jiaqiang Dui Gonghui Lingdao Tongzhi*) etc. (merely looking at its name, CCP’s steadfast decision on strict control of ACFTU is beyond doubt).³¹³ Hence, CCP’s strict control over trade unions has become a normal political picture in the present China.

ii. Depoliticizing Chinese Trade Union

a. Dilemma of Trade Union in Transitional Period

Before China’s rapid economic reform, as a typical situation, the Chinese government used to be in charge of every important aspect of life of an ordinary Chinese citizens located in the urban area -- the main source of the Chinese working class, from housing, schooling, kindergartens, job arrangement, and medical insurance to financial support after retirement till death. In such a paternalistic society, although urban people in China have relatively limited liberty in choosing the life style as they wish from a westerner’s point of view, they have very few things to worry about because government has taken the responsibility to think and arrange for them. From 1980s, with the open door policy coupled with the dissolution of state’s paternalistic function, the Chinese government started focusing more on economic development, thus less on the welfare of its urban people, the majority of whom belong to the Chinese working class. Lifelong employment system, traditionally called “iron rice bowl policy”³¹⁴, did not exist any more, with

³¹² “The Chinese Labor Movement Since 1949”, Online: <<http://www.ihlo.org/item5/item5-1e.htm>> (date accessed: August 11, 2005).

³¹³ *Ibid.*

³¹⁴ This system is a typical socialist one to guarantee a worker’s lifelong employment. In fact, based on this system, a person once hired by an enterprise, he or she shall never be fired and only could be promoted, rather than demoted. What is more, this system not only guarantees one person’s own lifelong employment,

its substitute -- labor contract, carrying the potential of contracting away workers' interest and rights as a master of an enterprise. Even worse, retrenchment policy (*xiagang*) and reform on retirement system, i.e., removing burden of social security expense from the state to workers and employers themselves, have seriously affected workers' interests in a so called socialist society with market-economy characteristics. When the state is no longer willing to take the responsibility to protect workers welfare, logically, trade unions are obliged and expected to represent and guardian its members' interests.

It is a pity that traditional trade unions in China have been overemphasizing their productive role as a government assistant, and unduly neglecting their guardianship role for quite some time. As a consequence, when workers started to cry for help from a trade union, it suddenly relapsed into a dilemma on how to play its conflicting roles in this transitional period. In the later part of this chapter, the writer will propose certain solutions on how the Chinese trade unions will be able to walk out of this dilemma.

b. Ideal Model: Independent Trade Union

As the writer has mentioned above, the dual role of the Chinese trade union has already trapped it into a real dilemma. Even worse, it is because of this problem, trade unions have gradually lost their member's trust. According to several social investigation reports prepared by ACFTU itself, around 60 percent of the workers interviewed had a negative impression on the Chinese trade unions these days.³¹⁵ A survey conducted by the writer herself on 50 Chinese workers currently

but also his/her children under the sub-system--"substitution system". Put in detail, a worker retiring from his/her working position, could designate one of his/her children to succeed his/her as a permanent employee in the same enterprise, although not necessary the same position as his/her parents.

³¹⁵ *Supra* 252.

working or used to work in SOEs located in Shanghai, China shows the similar result.³¹⁶ In Tianjin, one of the Chinese municipalities, this number raises to 80 percent.³¹⁷ How to readjust the image of a trade union in workers' hearts? How to reestablish workers' almost-lost trust on a Chinese trade union? The answer could be: independent trade union.

1. The Legitimacy of an Independent Trade Union under ILO Convention No. 87

ILO Convention No. 87 provides workers with the right to establish and to join organizations of their own choosing without previous authorization.³¹⁸ Following a logical interpretation, this right shall not be confined to a mere freedom to join a single trade union, such as ACFTU. Though this provision *per se* favors neither unity, diversity for trade union, nor does it make trade union diversity an obligation, as discussed above, it does require that at the very least diversity should always remain possible.³¹⁹ In other words, it implies that the workers are entitled with the undeniable right to establish independent trade unions. This rationale is reconfirmed by the other provisions within this convention. For example, according to article 4 of Convention No. 87, in terms of its functioning and organization, a trade union shall be free from interference by the public authorities.³²⁰ In fact, a trade union is also entitled to affiliate with international organizations of workers.³²¹ Also, the interpretation offered by the Committee of Experts further confirms that there is a fundamental difference between cases where a trade union monopoly is imposed or maintained by domestic law -- which is the exact case under the Chinese labor legislation -- and situations where the workers or their unions voluntarily combined into one

³¹⁶ From February 15 to 20, 2006, the writer interviewed 50 Chinese workers (through personal interview and telephone interview) currently working or used to work in SOEs in Shanghai shows that among these 50 workers, 35 of them expressed the negative impression on today's Chinese trade union.

³¹⁷ *Supra* 252.

³¹⁸ ILO Convention No.87, art.2.

³¹⁹ *Supra* 58, at 187.

³²⁰ *Ibid.* art.4.

³²¹ *Ibid.* art.5.

organization, independently of legislation.³²² As such, although the Convention *per se* never explicitly uses the exact phrase “independent trade union”, it is believed to be implied by it. Of course, Convention No.87 provides certain restrictions on the freedom of association, i.e., when exercising this right, workers are required to respect the law of the land on the condition that the law in question has not impaired the guarantees provided for in this Convention.³²³ Considering that in Section 3.2 (A) of this paper, the writer has proved that the actual trade union monopoly structure in China legalized by its Trade Union Law has seriously impaired the fundamental principles of freedom of association, trade union in China is therefore justified to deviate from certain provisions of the Chinese Trade Union Law against the basic spirit of freedom of association.

2. The Value of an Independent Trade Union in Contemporary China

(1) Fulfilling China’s Obligation under the Treaty Law

As the writer has discussed in Section 3.1 of this thesis, both UDHR, ICCPR and ICESCR have provided everyone the right to form and join a trade union. In ICESCR, it further clarifies the right as follows:

“The right of everyone to form trade union and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;³²⁴ The right of trade unions to function freely subjected to no limitations other than those prescribed by law and

³²² For more information, please see text above accompanying note 206 to 208.

³²³ *Ibid.* art.8.

³²⁴ ICESCR, art.8(1)(a).

which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;”³²⁵

As such, it goes without saying that the right to organize and join an independent trade union has been guaranteed by these international bills of human rights. The Committee on Economic, Social and Cultural Rights has articulated that “government domination of a state Party’s trade unions contravenes this right, as it does not allow for trade union pluralism”.³²⁶

Given that China has not only signed but also ratified UDHR and ICESCR, it hereby became China’s treaty obligation to guarantee the appropriate performance of the right to form and join trade unions. Admittedly, when China ratified ICESCR, it made a statement that the Chinese government will only implement article 8 (1) (a) of the Covenant within the parameters of its Constitution, Trade Union Law and Labor Law.³²⁷ Given that certain provisions under Chinese Trade Union Law are conflicting with the fundamental principles of freedom of association³²⁸, this statement constitutes a *de facto* reservation.

Putting aside the issue of validity of the said reservation,³²⁹ except for article 8(1)(a), it is still China’s treaty obligation to obey the rest of the clauses under article 8. In

³²⁵ *Ibid.* art. 8(1)(c).

³²⁶ Aaron N. Lehl, “China’s Trade Union System Under the International Covenant on Economic, Social and Cultural Rights: Is China in Compliance with Article 8?”, 1999, 21 UHILR 203.

³²⁷ Decision of the Standing Committee of the NPC on Ratification of ICESCR, February 28, 2001, para.1.

³²⁸ For more information, please see above Section 3.2(A) & (B).

³²⁹ From the writer’s point of view, it reservation is arguable invalid. According to article 19 of Vienna Convention on the law of treaties (VCLT) , “object and purpose” test applies in deciding the validity of a treaty reservation. The Human Rights Committee in its General Comment No.24, applied the “object and purpose” test, and further declared that “the normal consequences of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.” Jurisprudence of the European Court of Human Rights (ECHR) has followed the “Strasbourg Approach” to invalid reservations and the former European Commission of Human Rights could be regarded as following the same track. The purpose of supporting this “severability doctrine” is for the sake of the integrity of a Human Rights Treaty (HRT). Contrary to a traditional treaty regulating

terms of article 8(1)(c), it entitles the trade union to function freely, and the only limitation is from the law of the land, which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. Because of this first limitation, some may argue that China is thereby entitled to restrict the free functioning of those independent trade unions since they are against the Chinese Trade Union Law. As far as the first limitation namely “subject to those prescribed by law” is concerned, however, following a holistic approach of treaty interpretation, it shall be understood and interpreted in light of the context of the whole Convention. Article 4 of ICESCR explicitly prescribes that the state may subject the rights provided by the Convention only to such limitations as are determined by law **so far as the law is compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.** Following a logical interpretation of this article, it has provided certain limitations on the law of the land, i.e., the law in question shall be compatible with the nature of these rights under ICESCR and for the purpose of promoting the

an exchange of rights and obligations between member states, in which incompatible reservation is inclined to nullify the ratification rather than the reservation per se, a HRT has no such contract-like nature. Thus, without a threat towards reciprocal obligation, member states seldom object others’ reservations. Even there is objection, “most objecting states are making perfunctory objection with no discernable policy.” In this sense, objecting state is unlikely to argue for a nullification of the ratification as a whole. Moreover, it would be inconsistent with a HRT’s purpose to free a state from all its commitments under the treaty only due to its refusal to accept certain obligation under one article. Following this logic, if China’s reservation on ICESCR fails to satisfy the “object and purpose test”, it arguably will lead to the application of the “severability doctrine”. In other words, its reservation on article 8 (1) (a) could be disregarded while China is still under the obligation to obey ICESCR. The focus now is turned to the question—whether China’s reservation could satisfy the “object and purpose” test. The writer’s early discussion has pointed out that there is a fundamental conflict between certain provisions in Chinese Trade Union Law, especially its article 10 and 11 which rule out the legitimacy of an independent trade union, and the fundamental principles of freedom of association. In this sense, it could be argued that this reservation is incompatible with the object and purpose of article 8 of ICESCR. The “severability doctrine” is thereby eligible to be applied. (For more information, please see generally in Konstantin Korkelia, “New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights”, 2002, 13 EURJIL 437, online: WL (Journals & Law Reviews); Roberto Baratta, “Should Invalid Reservations to Human Rights Treaties Be Disregarded?”, online: <<http://www.ejil.org/journal/Vol11/No2/ab10.html>> (date accessed: June 13, 2005); Human Rights Watch, “Appendix 4: China’s Statement Made upon Ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and What Effects That Statement Has on China’s Obligation Under the Covenant”, online: <http://www.hrw.org/reports/2002/chinalbr02/chinalbr0802-08.htm#P952_202757> (date accessed: June 14, 2005); Vienna Convention on the Law of Treaties (1969), art.19(c): “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless... the reservation is incompatible with the object and purpose of the treaty”.)

general welfare in a democratic society. In other words, it implies that the law, which is inconsistent with these two limitations, is prohibited in ICESCR. As such, the “law” in article 8(1) (c) shall be read in light of the scope provided by article 4, namely subjecting to those two limitations. Since certain provisions of Chinese Trade Union Law have been proved to be conflicting with the fundamental principles of freedom of association, in other words, being incompatible with the nature of the right to freedom of association, it thereby fails to satisfy those two limitations in article 4. In this sense, article 8(1)(c) is justified to be read and obeyed disregarding certain problematic provisions of the Chinese Trade Union Law, especially those justifying the union monopoly practice in China and prohibiting the legitimacy of an independent trade unions. In conclusion, notwithstanding China’s reservation on article 8(1) (a), China is nevertheless subject to the obligation in article 8(1) (c) which entitles a trade union to function freely. An independent trade union with a legitimate status recognized by its trade union legislation is the only solution for a trade union in China to enjoy real freedom within the meaning of ICESCR.

(2) Avoiding ACFTU’s Representative Crisis

After more than two and a half decades of transition from centrally planned economy towards market economy, the Chinese workers have become increasingly differentiated and stratified.³³⁰ “The expansion of the non-public sector, the establishment of Special Economic Zones on the eastern coastal board, the relaxation of residential controls and intra-country migration restrictions have shattered rigid urban/rural divides of the past and given birth to new categories of workers such as farmer workers³³¹, workers in foreign invested enterprises, workers in township and village enterprises, workers in private enterprises or individually owned enterprises

³³⁰ Jude Howell, “Trade Unionism in China: Sinking or Swimming”, online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=3341> (date accessed: June 1, 2005).

³³¹ In chapter 6 of this thesis, the writer argues that farmer workers, although they should belong to Chinese working class, but in practice, they have never been regarded as the real workers so far.

and contract workers.”³³² Moreover, with the restructuring of SOEs from 1993, came the new distinction between the unemployed and the retrenched workers.³³³ With the growing of this diversification and stratification trend, a representative crisis is attacking ACFTU. It is not clear how ACFTU is able to represent such a differentiated workforce with different and un-harmonized interests. To be honest, designed to function in a typical Marxist socialist regime which is indisputably not the case in today’s China, ACFTU has met a host of new challenges under such a new socialist structure that embraces capitalism, which both ACFTU and Mr. Marx have never expected before. Thus, to artificially and compulsorily maintain a unity amongst workers when their needs are so diverse and expectations are so different is unwise.³³⁴ An independent trade union, autonomously organized by workers with relatively the same type, with the workers’ own choosing leaders and own drafting charters, and based on its members’ common needs and expectations, is likely to avoid ACFTU’s representative dilemma.

(3) Creating a Virtuous Competing Environment for Both ACFTU Controlled Unions and Independent Unions

Imagine if the legitimacy of an independent trade union has been ultimately granted under the Chinese legislation, what might happen in the future? Since an independent trade union is relatively single-minded, purely-motivated and less politicized (it will only fight for the legitimate interests of its members without keeping the need to assist CCP in mind) its work and programs in protecting workers interest will definitely be more effective than a union with contradictory nature and over-diversified interests among its members under ACFTU. Generally speaking, workers are more willing to join a union that can represent its interests sincerely and effectively. Therefore, a gradual movement of members from ACFTU controlled unions to independent trade unions seems to be inevitable.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

At the same time, the trade unions under the ACFTU that have gradually lost their members will have to reflect on their own value and functioning. Naturally, if they do not want to lose most of its members, a heartfelt “sorry” decision has to be made. Very possibly, it will choose to adjust the priority of its function with a gradual change of emphasis on its guardianship role and a de-emphasis on its CCP’s assistant role. In this case -- after readjusting the role of a trade union under the ACFTU, it would become a powerful competitor of an independent trade union. Under such circumstances, there will be two types of trade union system in China. In order not to lose respective members, a virtuous competing circle with a blessing to race to the top regarding protection on workers’ legitimate rights could be created, with each system to fight for its workers’ interests devotedly.

(4) Increasing Social Stability

It is observed that the reason for the widespread worker’s protest in China is because workers “feel economically disadvantaged, socially disenfranchised and politically excluded”, whereas very few social safety networks are available to help them.³³⁵ With the development of an independent trade union, a workplace representative body with professional union personnel who will sincerely express workers’ concerns could come into stage.³³⁶ Rather than going to streets to protest and express their dissatisfaction in such a drastic way, taking the risk of even facing certain administrative sanctions, such as RTL³³⁷, reasonable workers, very possibly, would rather go to an independent trade union for help.³³⁸ Here, the writer does not mean that there would be no protests at all, but the number of protesters is expected to drop significantly.

³³⁵ Toby D. Merchant, “Recognizing ILO Rights to Organize and Bargaining Collectively; Grease in China’s Transition to a Socialist Market Economy”, 2005, 36 Case W. Res. J. Int’l L. 223, online: WL (Journals & Law Reviews).

³³⁶ *Ibid.*

³³⁷ For more information, please see generally in text below accompanying from 688 to 705.

³³⁸ *Ibid.*

As a matter of fact, certain independent trade unions have secretly emerged (although not officially recognized by the Chinese authority) and played a positive role in protecting workers' legitimate interests. For example, it is reported that an independent trade union in Shanxi, Xian Province, was established in 2004, which is the first independent trade union in Xian.³³⁹ Though without official recognition, this trade union has helped a host of farmer workers to solve their wage arrear problems. The total amount of arrear wages that finally returned to those farmer workers reached RMB 350,000, which is not a small amount especially to these blue collar workers surviving at the bottom of the Chinese society.³⁴⁰ Reports as such have shown that these independent trade unions, without any ambitious political purposes, let alone threatening the CCP's ruling, are performing their workers' guardianship role wholeheartedly and effectively.³⁴¹

(5) Raising Productivity in Workplace

Evidence has proved the positive economic benefits of well organized workplace and their higher productivity.³⁴² It is said that union activities, such as providing workers with a collective voice, balancing the power relationship between workers and management, limiting employer's arbitrary and exploitative or retaliatory behavior, establishing grievance and arbitration procedures, combined with an overall improvement in industrial relations can be conducive to higher efficiency and productivity.³⁴³ As China continues to transform its economic and social structure, it will be necessary for its factories and enterprises to introduce new technological changes and methods of accomplishing tasks to compete internationally. Organized firms will be

³³⁹ Yang Yinbo, "Chinese Farmer Workers Investigation: Farmer Worker's Crisis, Independent Trade Union and Begging Boy" (*Zhongguo Nongming Gong Diaocha: Minggonghuang, Duli Gonghui, Qitao De Nanhai*), online: <http://www.boxun.com/hero/yangyb/191_1.shtml> (date accessed: June 6, 2005).

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Supra* 335.

³⁴³ "International Labor Standards Contribute to Development", Online: <<http://www.ilo.org/public/english/standards/norm/whyneed/dev.htm>> (date accessed: July 27, 2005).

able to adapt to the requisite changes much faster than those that are unorganized.³⁴⁴ It has been submitted that “employees more readily accept technological and organizational change when their interests are expressed by credible representatives.”³⁴⁵

(6) Benefiting the Workers Involved in the Non-public Economy

Despite limited state protection and even policy reversals sometime in the 1980s and 1990s, the dynamic private economy in China nevertheless managed to develop at a miraculously rapid pace.³⁴⁶ As the writer has mentioned in Section 2.2 (A) above, China’s privately owned enterprises have become a visible player, accounting for 55.2 percent of tax revenue in year 2003.³⁴⁷ Unfortunately, the trade unions inside these privately owned enterprises are neither capable nor powerful. Reports have shown that most of the trade unions in privately owned enterprises are under the control of employers and some of them are merely puppets without free will.³⁴⁸ If an independent trade union system in China could develop well, naturally, those workers employed by private-owned enterprises would be attracted to join an independent trade union immuned from employer’s multifarious interference. It is expected that under the guidance of an independent trade union, those workers will be able to unite together tightly so that they could take collective action easily to fight for their legitimate interest with few or even no negative influence from the employer’s side.

c. Realistic Model: Bottom Up Approach

³⁴⁴ *Supra* 335.

³⁴⁵ *Ibid.*

³⁴⁶ Lai Hongyi, “Emerging Features of China’s Private Economy (II), East Asian Institute, National University of Singapore.

³⁴⁷ Lai Hongyi, “Surge of China’s Private and Non-State Economy”, EAI Background Brief No. 187, at 1.

³⁴⁸ For more information, please see text below accompanying note 409 & 410.

Despite various abovementioned advantages for the development of an independent trade union system in China, to be realistic, considering that the memories of Tiananmen Square Incident³⁴⁹ launched by students and later joined by workers in 1989 and Falun Gong demonstrations are still fresh, recognizing that the Chinese government has traditionally been sensitive and cautious on the development of NGOs including independent trade unions within its territory and inclined to regard them as an element causing social instability, which is valued as the most important preconditions for Chinese rapid economic development,³⁵⁰ realizing the revolutionary role once played by the independent and self-governing solidarity trade unions in Poland³⁵¹ during the

³⁴⁹ Tiananmen Square Incident: Originally launched by university students, the 1989 democratic uprising in China was later joined by many workers in Beijing to express their unsatisfactory towards double digit inflation, governmental corruption etc. This uprising with number of the protesters between three million to five million once led Chinese capital into anarchy. During this uprising, an autonomous workers organization named “Beijing Workers Autonomous Federation” actively accompanied the protesters. Due to this, many of its leaders were later sentenced to jail or to reeducation through labor camp. From then, CCP is suspicious about the role of an independent trade union in China, i.e., it is easily connected with uprising, demonstration, and social instability.

³⁵⁰ Some scholars comment that the CCP actually prizes stability above almost everything else. From *infra* 1156.

³⁵¹ The Solidarity Independent and Self-Governing Trade Union, which was created in 1980s, was the first independent union organization operating in Poland (actually it is the first anywhere in the former Communist bloc after the Second World War). This trade union later transformed into an enormous social movement with nearly 10 million members, which eventually become one of the reasons leading to the collapse of the communist state. In China, certain scholars are inclined to impute the collapse of the Polish communist state to the movement of its Solidarity trade union. However, these scholars have forgotten to take the general circumstances into consideration: (1) the current social situation in China is different from that of Poland in 1980s where Poland was under a centrally-planned economy, thus, there was no conflict between capitalist employers and workers, but only conflicts between SOEs representing government and the workforce. As a result, workers’ protests of all kinds could evolve only in one directly, i.e., political struggle, and ultimately -- in the form of solidarity -- a direct challenge to the central authority. In the case of China, after more than two decades economic reform, countless private held, foreign-invested and joint-venture enterprises have been established. Even the SOEs nowadays are not what they were twenty years ago in the sense that managers there have much more discretion to control the distribution of profits, set the wages and benefits of its workers, even hire and fire employees with more freedom than ever before. As for private enterprises, they have even more freedom in all these abovementioned areas. As such, as some Chinese labor rights activists comment, “The spearhead of China's emerging labor movement is directed at the owners and management ranks with no political goal (in general), unlike Poland's Solidarity movement, which was directed at the government.” (2) “Many Chinese workers still maintain a high level of trust and hope in the government”. What they believe is that “once the central government becomes aware of the inequality and suffering they are enduring, it will definitely come to their aid”. However, in Poland, the then communist party in Poland has totally lost its people’s trust and support after a wide scale of events happened violating workers’ interests. In this sense, “any independent union that arises would, of course, be very different from Poland's highly politicized Solidarity movement”. Indeed, even the famous Chinese leader Deng Xiaoping has pointed out that the collapse of the Eastern Bloc is because of its inside problem -- its communist party has lost its people’s heart completely. For more information, please see generally in Han Dongfang, the South China Morning Post on 3 June 2006.

social and political changes after 1980, at the current stage chances for the Chinese government to admit the legitimacy of an independent trade union in China via legislation are rare. Therefore, the writer plans to propose a soft solution with more feasibility based on the present circumstances, which is a reform happening inside the contemporary ACFTU system. Unfortunately, a soft approach as such may not be able to bring about certain fundamental changes. For instance, it could not disengage the ACFTU from its dual role dilemma thoroughly.

1. Direct Democratic Election in Grass Root Trade Union

Different from the trade unions at the higher level, the grass root trade unions based in work places are directly linked with workers and therefore are the first resort for workers to turn for help. Serving as the root of a trade union system, the Chinese grass root trade unions' role is critical to the healthy development of a national trade union system and to the effective protection of workers' interests in the future. Only when the leaders of grass root unions, who are serving as the core of unions' daily function, could be trusted by union constituents and represent them wholeheartedly, could the grass roots unions play their guardianship role well. In other words, a devoted and trustworthy union leader is crucial.

The Chinese Trade Union Law has not regulated the election of the leaders of grass root trade unions. In the Constitution of ACFTU, it provides the general right for its members to elect, to be elected and to vote democratically without any detailed description on how to implement this right.³⁵² Of course, ACFTU has promulgated the "Temporary Rule on the Work of Grass Root Trade Union Election" (*Gonghui Jiceng Zuzhi Xuanju Gongzuo Zanxing Tiaoli*)³⁵³ which

³⁵² Constitution of ACFTU, art. 3, 8 & 9.

³⁵³ It shall be noted that the Temporary Rule promulgated by the ACFTU *per se*, is not a real law, but a model rule whose nature could be regarded as an administrative guidance within Chinese context.

provides certain details on the election procedure of leaders of grass root trade unions in China. In accordance with this temporary model rule, the general procedure for the grass root union election can be divided into two stages.

The first stage is to elect the members of grass root union committee (*Gonghui Weiyuan Xuanju*). During this period, the name list of the candidature for grass root trade union committee members is recommended by the previous union committee in accordance with the name list suggested by each basic group of the grass root trade union and such a list will not be valid until it is approved by the CCP committee (*Tongji Dangwei*) at the same level³⁵⁴. Once the candidates are confirmed, members of the union committee will be elected based on the said name list through the union member representative assembly (*Huiyuan Daibiao Dahui*). At the second stage, after a democratic negotiation among elected members of the union committee, the candidature of the chairman and vice chairman for the standing committee of a grass root trade union will come into being and they shall be approved by the same level CCP committee in the work place together with the trade union at the next higher level; alternatively, the candidature of the chairman and vice chairman could also be nominated after the democratic negotiation between CCP committee and trade union at the higher level according to the elected members of union committee.³⁵⁵

First, it is worth pointing out that according to the spirit of ILO Convention No. 87, the principle that workers have the rights to elect their own representative in full freedom by no means implies that the authority could be allowed to have the power to approve the candidatures or the result of

According to the ILO Convention No. 87, model law as such is legitimate. For more information, please see text above accompanying note 212.

³⁵⁴ Temporary Rule on the Work of Grass Root Trade Union Election of PRC, art. 10 (1). Actually, during the first stage, the so called recommended name list is also a semi-official production because it has to be approved by the CCP committee. During my visiting to some enterprises in Shanghai, some union leaders have admit the negative administrative influence on the recommended name list.

³⁵⁵ Temporary Rule on the Work of Grass Root Trade Union Election, art. 10(2).

an election.³⁵⁶ Accordingly, in the case of the Chinese union election, CCP committee, as the very agent of the Chinese authority inside the work place, should not be allowed to interfere the union leader's election as such. Secondly, it is natural that the CCP committee would prefer to choose a candidature that could be trusted by itself, rather than by the workers, so that the said candidate could loyally follow CCP's instruction. In other words, chances for workers to elect a devoted union leader who can truly represent and be trusted by them to fight for their interests are limited. As for the election, especially its second stage, it is merely a smoke screen (even if it was directly elected by every union constituent) because the candidature available is usually hardly the one that workers are willing to choose. Thirdly, during the second stage election (which is not an election strictly speaking), most of the grass root unions do not adopt one worker one vote practice, namely workers do not have the right to choose the union leaders directly. The "election" is actually through a "union committee conference" (*Gonghui Weiyuanhui Quantu Huiyi*) constituted by all the union committee members (which is constituted by a small amount of union members). Through a democratic negotiation (*Minzhu Xieshang*) instead of an election in this conference, the chairman and vice chairman of a grass root union will finally come into stage.³⁵⁷ In light of the above analysis, it is not difficult to reach a conclusion as such, i.e., grass root union members in China have very limited opportunities to elect their representatives in full freedom.

Even worse, rather than following the Temporary Rule which is already problematic as discussed above, the election procedure in practice is sometimes even more disappointing. The writer would like to introduce a brief case study on the grass root trade union election in year 2005 of an enterprise "X" (a former public service unit, now is transformed into an SOE) located in Shanghai,

³⁵⁶ For more information, please see text above accompanying 213.

³⁵⁷ Indeed, there is no clear legislation with regard to how the chairman and vice chairman of the grass root union comes out. Based on the writer's own research and interview with the grass root union leaders in Shanghai, the general practice is that through a democratic negotiation instead of an election in the union committee conference, the chairman and vice chairman of a grass root union will be born finally.

China. During the first stage of this election in X, i.e., the election of members of union committee, among the total elected five union committee members, Mr. A won more than 95 percent of the voters while Mr. B had about 50 percent only. Clearly, these figures, at the very least, reflected union members' preference for Mr. A to be elected as chairman. After the second stage "election", however, Mr. B surprisingly became the chairman while Mr. A was only the vice chairman. Through the writer's further investigation, she was informed that at the second stage election, the general manager of enterprise X actually skipped the democratic negotiation procedure in the union committee conference and directly nominated B as the union chairman because B was regarded as a loyal follower of him.³⁵⁸

How to avoid such disappointing reality? How to guarantee a free election for workers to choose their own leaders? Based on the investigation abovementioned, the writer thereby provides her suggestion as follows: to realize direct democratic election in grass root trade unions. Simply put, each worker shall be entitled by the Chinese Trade Union Law to have a vote to choose their leaders in full freedom. As a matter of fact, the value of this direct election idea has already been recognized by ACFTU *per se*. In its "About Certain Ideas on Trade Union Reform" (1988), it explicitly pointed out that the candidatures of a grass root trade union leader shall be recommended by workers themselves alone, rather than nominated or approved by CCP committee and union at the higher level, and it further admitted that this "bottom to up" candidature recommendation system could avoid the former practice's shortcomings; if possible, the leader shall be directly elected by all of the constituents of a union.³⁵⁹ This idea, in spite of its value, has never been absorbed into the official Chinese legislation to secure its implementation by law. The writer, therefore, suggests that the current Chinese Trade Union Law shall be amended to incorporate several provisions which entitle each grass root union member a vote to

³⁵⁸ Materials of this case study is collected during my interview of several union committee members and workers of the trade union of enterprise X in Shanghai on July 10 to 20, 2005.

³⁵⁹ *Supra* 311.

choose their own leaders from the candidatures recommended by themselves without interference from CCP committee or any other higher level union. And the candidature that gets the most voters shall become the chairman spontaneously. A directly elected union leader as such will win workers' trust and support more easily vis-à-vis a union leader "elected" out of a disappointing procedure such as the one mentioned in the case study of enterprise X, and therefore strengthen the solidarity of a grass root union; meanwhile, given that the leader is elected directly, in practice he/she shall have much stronger sense of responsibility when they are fighting for workers' legitimate interests and practical needs.³⁶⁰ In fact, over the years, there are substantial progresses in the Chinese village-level democratic movements, in particular the improvement in electoral procedures.³⁶¹ The direct democratic election similar to the writer's proposal in this section has been adopted by certain Chinese provinces.³⁶² For example, in Jilin Province, all forms of CCP or other organizational nomination are prohibited.³⁶³ Village residents there pioneer "sea nomination" (after a Chinese proverb "to fish a needle out of the sea") to "nominate all candidates for offices, thus enabling them to discover and promote those neighbours" with capacity to represent them.³⁶⁴ By the same token, if such direct election at the village level is able to work, the direct democratic election in grass root union proposed in this thesis shall be worth trying and with feasibility.

³⁶⁰ In fact, certain grass root trade unions in Zhejiang province has realized the "democratic direct election" practice and the result is quite encouraging. From 1999, Yu Hang, Zhejiang province has started this trial practice. In the year 2003, there are more than 430 grass root trade unions have realized union leader's direct election, constitutes 43 percent of the total grass root trade unions within that region. It is reported that leaders elected as such have a stronger sense of responsibility, and is likely to actively and bravely fight for workers' interests, thus, the solidarity of a grass root union is strengthened as well. More than 95 percent of the workers interviewed admitted that a union leader elected directly is competent and they are satisfactory with what he/she has done. For more information, see online: <<http://www.sygh.com/Html/200559122733-1.Html>> (date accessed: June 1, 2005).

³⁶¹ Robert T. Gannett Jr., "Village-by-Village Democracy in China", online: <http://www.aei.org/publications/pubID.29717.filter.all/pub_detail.asp> (date accessed: April 25, 2009). For more information, please see generally in Shi Tianjian, *Electoral reform in rural China : the critical first step toward democracy*, (Singapore: East Asian Institute, National University of Singapore, 1999); Bradley Klein, "Democracy Optional: China and the Developing World's Challenge to the Washington Consensus", 22 UCLA Pac. Basin L.J. 89.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

2. Financial System Reform in A Grass Root Union

According to the Chinese Trade Union Law article 42, the sources of trade union funds are constituted by several parts, i.e., (1) membership dues paid by union members which equal to 0.5 percent of workers salary, (2) monthly allocations of 2 percent of the total wages of all its employees paid to a trade union as funds by the enterprises, public institution or government organ that establishes the said union, which is the major source of a union's fund, (3) income turned in by the enterprises or public institutions to which the trade union is subordinated, (4) central or local government's subsidies and other sources such as donation etc.³⁶⁵ The law also prescribes in its article 43 that where an enterprise delays or refuses to pay a trade union's funds without justified reasons, the union may apply to the local people's court for order of payment; if the enterprise still refuses to execute in accordance with the order, the trade union could apply to the people's court for compulsory enforcement.³⁶⁶ It is worthy to be mentioned that within the 1992 version of the Chinese Trade Union Law, there is no provision directly dealing with the situation when an enterprise purposefully delays or refuses to pay the union funds. As such, it is reported that almost 50 percent of the union funds nationwide could not be collected in due course.³⁶⁷ As such, a new clause was added into the Trade Union Law 2001 version to provide certain compulsory measures to secure the proper collection of union funds provided by article 43. Admittedly, this provision which is highly praised by some Chinese scholars is a progress on how

³⁶⁵ Trade Union Law of PRC, 2001, art. 42.

³⁶⁶ *Ibid.* art. 43.

³⁶⁷ Online: <<http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=297415&pdmc=010501>> (date accessed: June 21, 2005); Guan Hui, Praising the System of Compulsory Enforcement Order of Collecting Union Funds (*Zan Cuijiao Gonghui Jinfei Zhifulin Zhidu*), online: <<http://www.people.com.cn/GB/shehui/1063/1957114.html>> (date accessed: February 21, 2006).

to successfully collect union funds.³⁶⁸ However, after several interviews with some Chinese scholars and grass root union leaders, the writer realized that the phenomenon of refusing to pay union funds by the enterprises was nevertheless a serious problem in spite of the amended Trade Union Law.³⁶⁹

It is observed that although the added provision entitles a trade union to apply for a court's compulsory enforcement order, it still fails to impose any further personal liability on those who shall be directly responsible for the delay or refusal of the due payment. Considering the unenforceability of court decided cases is such a serious problem in China that a special academic terminology has been created to describe phenomena as such -- "the difficulty of enforcement" (*Zhixing Nan*)³⁷⁰, with 30 to 40 percent of the decided cases not being able to be enforced finally³⁷¹, even if a court issues a compulsory enforcement order upon collecting union's funds, the implementation of such an order is nevertheless a problem. What if an enterprise chooses not to cooperate with the court's executors? Under such circumstances, only one solution is available, i.e., imposing personal liability on those who is directly responsible for the due payment to union. After all, it is the person under the disguise of an enterprise to make the ultimate decision either to pay or not to pay the due. Only when the personal liability is imposed, such as in the form of administrative fine, public apology or even through media exposure, could the trade union law secure enough "threatening power" to increase chances of implementation. Also, only via

³⁶⁸ Guan Hui, Praising the System of Compulsory Enforcement Order of Collecting Union Funds (*Zan Cuijiao Gonghui Jinfei Zhifulin Zhidu*), online: <<http://www.people.com.cn/GB/shehui/1063/1957114.html>> (date accessed: February 21, 2006).

³⁶⁹ During January 11 to Feb. 26, 2006, the writer had a field study in Shanghai, and luckily, during her field study, she found several chances to interview some Chinese scholars either from Shanghai Jiao Tong University or Fudan University (both are top ten universities in China).

³⁷⁰ Shan Wenhua, "The Role of Law and Foreign Investment in China: View from EU Investors", East Asian Institute, National University of Singapore.

³⁷¹ Please see generally in online: <<http://www.people.com.cn/GB/14576/15177/2420988.html>> (date accessed: June 27, 2005); Shan Wenhua, "The Role of Law and Foreign Investment in China: View from EU Investors", East Asian Institute, National University of Singapore.

imposing personal liability as such, would the person in charge, especially the boss of a private enterprise take the issue of union funds seriously³⁷².

Besides, based on the writer's research, the source of the salary of a grass root union leader brings about another problem on the function of a union's guardianship role. Theoretically, the working personnel for a grass root union could be divided into two types in China, i.e., full-time working personnel who are only working for the trade union in a work place and part-time union working personnel who have other positions in the work place.³⁷³ Both of their salaries are paid by the employers. It is common sense that workers need salary to support their daily life and reasonable needs -- to buy food, necessary groceries, and support their families etc. As such, once their salaries are paid by employers, it implies that their economic status is, to some extent, subject to the control of the enterprise. Accordingly, when their employer's decision conflicts with workers' legitimate interests, it is hard to expect those union working staff to fight against their employers wholeheartedly without a second thought. Indeed, in the case of non-public sector, the situation is even worse. For example, as a business man, a boss of a private enterprise is likely to take the purpose of making more profit as his/her enterprise's priority. Thus, the chances that a privately owned enterprise's business decision may conflict with its employees' interests are much higher than that of an SOE. As long as a trade union leader in a private enterprise still wants to maintain his/her monthly payment, naturally, he or she would have to follow the instruction of the boss, or at the very least, to avoid direct confrontation against him or her. Moreover, considering that a union working personnel's own rights might be easily violated without adequate legal

³⁷² The writer here mainly refers to the private enterprises because the problem of delay or refusal to pay for union funds without a justified reason mainly exists in private enterprises. For more information on the enforcement issue on court decided cases in China, please refer to Liu Jingzhu, "Some thoughts on Court's Difficulties in Enforcement" (*You Fayuan Zhixingnan Yinqi De Falü Sikao*), online: <http://www.law-lib.com/lw/lw_view.asp?no=3261> (date accessed: June 27, 2005).

³⁷³ Trade Union Law of PRC, art. 13: "The trade union of an enterprise or public institution with 200 or more workers may establish full-time trade union chairman. The number of the full-time working personnel of the trade union shall be determined by the union and the enterprise or public institution through consultation."

protection³⁷⁴, it is hard to imagine that a union's guardianship role can be well implemented by those union working personnel when their own rights and interests are jeopardized.

A reasonable solution to this union working personnel dilemma could be divided into two steps. First step, it is better to give up the part-time union working personnel practice and only allow for full-time one. Once those professional union working personnel are solely subject to the grass root union without any direct connection with the enterprise, it is relatively easy for them to avoid the negative influence from the enterprise's side whatever its ownership. Second step, as far as their salary is concerned, it shall be disengaged from the enterprise and only come from union member's dues³⁷⁵. Through this practice, the union working personnel can be regarded as being employed by workers themselves rather than by the enterprises. Under such labor-employment relationship, a relatively independent union -- independent from employer's control -- coupled with the working personnel system with more willingness and freedom to fight for the interests of its employers, *viz.* workers, could be established. Only when the Chinese labor legislation manages to secure the said two steps practice, a union leader as such might be able to have a free will to fight for the workers' legitimate interests.

3. Taking Grass Root Trade Union Leader's Rights Seriously

It is reported that when grass root union leaders are performing their duties in protecting workers' legitimate interests, some of them have suffered revenge from their employers either through financial means, such as reducing salary, or demotion.³⁷⁶ Even worse, some of them are fired simply because they are discharging their duty -- performing a union leader's guardianship

³⁷⁴ For more information, please refer to below part 3.2 C ii (c) 3 -- "Taking Grass Root Trade Union Leader's Rights Seriously".

³⁷⁵ The membership due of a grass root trade union is 0.5 percent of a worker's salary.

³⁷⁶ Online: <<http://www.sygh.com/Html/2005499331-1.Html>> (date accessed: July 26, 2005). For more information, please visit online: <<http://beijing.qianlong.com/3825/2005/04/22/1060@2607920.htm> & <http://www.southcn.com/job/careercenter/hrheadlines/200411160671.htm>> .

role.³⁷⁷ According to some union leaders, they have apprehension and worries on their own interests when discharging their union leaders' duty. Therefore, although they have the will and intention to protect workers' interests, they may not have the due courage and power.³⁷⁸

Admittedly, the Chinese Trade Union Law does take situation as such into consideration. The law provides that union leaders shall not be arbitrarily transferred to other positions.³⁷⁹ If indeed necessary, the respective level union committee and higher level union's approval beforehand must be obtained.³⁸⁰ In the case of dismissal of a union leader, union general assembly or its representative assembly shall be held to discuss such an issue.³⁸¹ Only when all members of the general assembly or 50 percent of the representatives of the representative assembly approve, could the dismissal be valid.³⁸² Besides, those (mainly employers) making vindictive attacks by transferring union's working personnel who are performing their duties in accordance with law from his/her positions without justification shall be ordered by the administrative department of labor to make correction and compensation if loss is thereby caused.³⁸³ Clearly, legal protection on a union leader's interests is guaranteed to some extent via these well-intentioned provisions. However, if the legislation *per se* seems sound, when performing their duties, why union leaders nonetheless appear to be lacking of courage and having various concerns? The problems exist in the implementation and feasibility of the said provisions.

The related legislation does prohibit arbitrary transfer union leaders to other positions; whilst it is not clear that in the case of an enterprise violating this provision, what liability might be imposed

³⁷⁷ *Ibid.*

³⁷⁸ During my interview in Shanghai in February 21 and 22 of year 2006, 10 union leaders there interviewed told the writer so.

³⁷⁹ Trade Union Law of PRC, 2001, art. 17(1).

³⁸⁰ *Ibid.*

³⁸¹ Trade Union Law of PRC, 2001, art. 17(2).

³⁸² *Ibid.*

³⁸³ Trade Union Law of PRC, 2001, art. 51(1).

on the said enterprise, or any personal liability on those who are directly responsible for such violation. In other words, there is no driving force and “threatening power” for the said relatively soft legislation to create a “political will” to push enterprises and employers to show enough respect to the rights of a union leader. In the case of the occurrence of vindictive attacks to union leaders from employers, labor department’s administrative order to correct as the only safeguard appears far from enough to endow union working personnel with enough courage to perform their duty wholeheartedly. During the writer’s interview, several vice chairmen of some grass root trade unions admitted that they doubted whether an administrative order could bring about any changes when employers choose to ignore it.³⁸⁴ Unfortunately, the law fails to provide any further liability directly imposing on responsible personnel or the enterprises *themselves* when they choose to neglect an administrative order.

Based on the discussion above, the writer hereby suggests that in order to arouse employers’ serious attention on the relevant labor legislation, in order to create their respect to a union leader’s rights, certain provisions in relation to personal liability shall be introduced into the Trade Union Law. For example, personal liability imposing on those who are directly responsible for the vindictive attacks to union leaders in the form of public apology or financial compensation to the victims can be incorporated into the legislation. As such, employers may have a second thought before they take any unjustified action against a union leader.

D. Conclusion on Part 3.2

In this part, the writer discusses the trade union monopoly phenomena in China from the perspective of ILO Convention No. 87. She questions the Chinese union’s “dual role” practice during the transitional period of the Chinese society. It is submitted that economic reform and the opening-up policy have brought about some fundamental changes in the Chinese society, among

³⁸⁴ *Supra* 378.

which the Chinese workers have been proved to be demoted from their past master's status all the way down to the bottom class and became a *de facto* vulnerable social group. Accordingly, a trade union's role as workers' guardianship turns out to be more critical to the welfare of the Chinese workers than ever before. Thus, the writer proposes two models in dealing with the problems faced by the current Chinese trade union system. The ideal model is to recognize the value of an independent trade union. The legality and the advantages of an independent trade union in the Chinese context are discussed thereafter. However, given the contemporary economic and political environment in China as well as the Chinese government's serious apprehension on social stability, in spite of various advantages and legal justifications of an independent trade union illustrated in this thesis, the writer nevertheless observes that the chances for the Chinese government to implement this ideal model via legislation are rare. A realistic model is therefore proposed, with means such as direct democratic election, financial system reform in grass root trade unions and strengthening the legal protection on union leaders' rights. Of course, the writer admits that this realistic model may not be able to solve all the problems faced by today's Chinese trade union system because it is a relatively minor reform within the ACFTU system without touching some essential defects of ACFTU's structure. For example, it is not able to completely disengage ACFTU from its "dual function" dilemma. Neither would it be easy for ACFTU to tackle its representative crisis through this bottom up approach. In the case of some private enterprises with no existence of trade unions inside their work places, this realistic model appears to be largely irrelevant.

Indeed, only with limited amendment on certain provisions of the Chinese trade union law without the well establishment of ROL -- an ideology to which the Chinese government has made a serious commitment³⁸⁵-- in China, it is not easy to create enough driving force and respect from

³⁸⁵ For more information, please see text above 4.2 (C) (iii) (a) 1 -- "Serious Commitment to ROL with A 'Reservation'".

the employer's side to obey the relatively soft provisions under the Chinese Trade Union Law. However, it is believed that this milder yet doable model with chances to cause gradual improvement inside ACFTU might be the only positive comprise available at present.

3.3 Right to Collective Bargaining in China

A. General Legislation on Collective Bargaining in China

It is observed that collective bargaining and social dialogue are “necessary elements for creating an environment that encourages innovation and higher productivity, attracts foreign direct investment and enables the society and economy to adjust to external shocks such as financial crises and natural disasters”.³⁸⁶ As widely admitted, the mechanism of collective bargaining in a market economy is the basic way for a trade union to fully develop its role as a protector as well as a representative of workers' interests. Thus, the importance of a well-built collective bargaining system to the welfare of its working class inside transforming China is beyond doubt.

There is no exact terminology as “collective bargaining” under the Chinese labor legislation. The nearest ideas are the “collective negotiation” (*Jiti Xieshang*) and “collective contract” (*Jiti Hetong*).³⁸⁷ In accordance with the Chinese Labor Law, the workers of an enterprise **may** sign a collective contract with the management on pay, working hours, rest and vacation, safety and health, insurance and welfare.³⁸⁸ Collective contracts are to be developed through collaboration between a labor union and management.³⁸⁹ In the absence of a trade union, it shall be signed by

³⁸⁶ Sean Turnell, *Core Labor Standards and The WTO* (Sydney: Macquarie University, Dept of Economics, 2001), at 4.

³⁸⁷ Regulation on Collective Contracts of People's Republic of China, 1994, art. 1. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

³⁸⁸ Labor Law of the People's Republic of China, 1995, art. 33, para. 1. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

³⁸⁹ *Ibid.* para 2.

representatives of the workers and the management.³⁹⁰ The recently passed Labor Contract Law re-emphasizes that after bargaining on an equal basis, employees and their employers may conclude a collective contract on matters such as labor compensation, working hours, rest, leave, working safety, hygiene, insurance and benefits etc.³⁹¹ In addition, the “Regulation on Collective Contract of People’s Republic of China” (*Jiti Hetong Guiding*) established in December 5, 1995 by the Ministry of Labor and Social Security specifies every aspects of a collective contract, such as its negotiation procedure, its content, its approval, examination and the dispute settlement. Put concretely, according to the 1995 Regulation, the content of a collective contract can cover subjects including but not limited to wages, working hours, leave and holiday, insurance, working safety and sanitation, duration of the contract, amendment, dissolution and termination of the contract as well as responsibilities.³⁹² After a collective contract is reached, in order to obtain its validity, it shall be submitted to an official labor administrative department for examination within seven days’ after it is executed by both parties.³⁹³ The criteria for an official approval are based on contents as follows: ① whether both parties of the contract are legitimate under the relevant laws and regulations; ② whether the collective contract is negotiated in light of the principles and procedures specified by the relevant laws and regulations, mainly the 1995 Regulation; ③ whether the content of a contract conforms to the minimum labor standards laid down by relevant laws and regulations.³⁹⁴ According to the explanation of the Committee of Experts, a requirement of prior approval by government authorities before a collective agreement comes into effect, even if it is subjected to judicial review, is contrary to the spirit of voluntary collective bargaining; however, there is one exception to the prohibition as such, i.e., the official approval is based on the criteria such as whether the collective agreement has a procedural flaw

³⁹⁰ *Ibid.*

³⁹¹ Labor Contract Law, art. 51, unofficial translation prepared by Baker & Mckenzie.

³⁹² *Supra* 387, art. 6.

³⁹³ *Ibid.*, art. 22.

³⁹⁴ *Ibid.*, art. 24.

or whether it is consistent with the minimum standards provided by general domestic labor legislation.³⁹⁵ In this sense, the prior approval requirement provided by the 1995 Regulation is consistent with the principle of collective bargaining under the international core labor standards. Above and beyond this, the 1995 Regulation lays down general principles and specific provisions on dispute settlement relating to a collective contract as well. In terms of a dispute arising during the course of a collective negotiation, both parties can submit the dispute to a labor administrative department (*Laodong Xingzheng Bumen*) and such a department is under the obligation to make its decision regarding the disputed issue within 30 days.³⁹⁶ When the dispute is relatively complicated, the time limit of a dispute settlement as such could be extended to 45 days.³⁹⁷ During the period of such dispute, the enterprise is prohibited from firing the workers' representatives.³⁹⁸ If a dispute happens during the course of enforcement of a collective contract, the dispute settlement procedure shall follow the Rules on Handling Labor Disputes in Enterprises (*Qiyè Laodong Zhengyi Chuli Tiaoli*).³⁹⁹ In conclusion, the Chinese labor law, *prima facie*, has recognized worker's right to collective bargaining; its general provisions on collective bargaining is consistent with the requirements under the ILO Convention No. 98.

However, there are something worthy to be mentioned here. The Chinese Labor Law only provides that the workers of an enterprise **may** (*keyi*) sign a collective contract with the management⁴⁰⁰ instead of recognizing the workers' specific right to sign a collective contract. The recently passed Labor Contract Law adopts the same wording by stipulating that employees and their employers **may** conclude a collective contract.⁴⁰¹ Thus, the explanation of the word "may" brings about some controversy and uncertainty. Could it mean that both workers and

³⁹⁵ *Supra* 58, at 222 & 223.

³⁹⁶ *Supra* 387, art. 35.

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*, art. 36.

³⁹⁹ For more information, please see text below accompanying note from 1394 to 1403.

⁴⁰⁰ *Supra* 388.

⁴⁰¹ *Supra* 391.

employers have the right to choose either to sign or not to sign a collective contract? Or, when employers are required to negotiate a collective contract, do they have an obligation to cooperate or have a right to refuse? Moreover, if the requirement to negotiate a collective contract is turned down by employers, will the workers or their unions have a right to sue the employers -- is there a cause of action? To date, the law has not provided a clear interpretation regarding issues as such.⁴⁰²

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

According to the data provided by the Department of Labor Relations and Wages and records from China's Ministry of Labor and Social Security's, 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 which constitute only less than 10% of the Chinese labor force.⁴⁰³ In the end of year 2007, this figure has increased to about 50%,⁴⁰⁴ which is a substantial progress. However, the increment of the volume does not necessarily bring about the improvement of the quality of a collective contract. Indeed, it is always a problem. Reports show that most of the collective contracts are just like a document reiterating the working conditions as it is in an enterprise without substantial provisions with regard to the specific conditions of a certain enterprise.⁴⁰⁵

⁴⁰² As for this point of view, several Chinese scholars such as Chang Kai and Zhou Changzheng share the same view with the writer. For more information, please see Chang Kai, "WTO, Labor Standards and Labor Interests Safeguard" (*WTO, Laogong Biao zhun Yu Laogong Quanyi Baozhang*), Chinese Social Science (*Zhongguo Shehui Kexue*), the first issue of 2002; Zhou Changzheng, *Study on Globalization and Chinese Labor Law (Quanqiuhua Yu Zhongguo Laodong Fazhi Wenti Yanjiu)* (Nanjing China: Nanjing University Press, 2003), from 69 to 70].

⁴⁰³ *Supra* 68 at 238. For more information on Chinese labor force, see above text accompanying note 76 & 77.

⁴⁰⁴ Worker Daily, China, May 26, 2007, online: <http://www.labornews.com.cn/lbzb/xwzx/ylpl/19283.shtml> (date accessed: February 24, 2008).

⁴⁰⁵ Yu Yu Lan, "Strengthen the Capability of Collective Bargaining of Trade Union and Prepare For the Internationalized Labor Relations" (*Jiaqiang Gonghui Jiti Tanpan Nengli, Yingdui Laodong Guanxi Guojihua Tiaozhan*), Journal of Hangzhou Chinese Communist Party School (*Zhonggong Hangzhou Shiwei Dangxiao Xuebao*), the fifth issue of 2002; online: http://www.lm.gov.cn/gb/salary/2005-05/26/content_74710.htm (date accessed: February 24, 2008).

Even worse, some so called collective contracts are just copies of some standard contracts embodying certain general clauses without maneuverability by workers.⁴⁰⁶

Furthermore, it is observed that most of these agreements were products of an administrative process between ACFTU and the management rather than the real fruit of a process of collective bargaining.⁴⁰⁷ Among the fifty workers who are currently being employed or was employed by SOEs and were interviewed by the writer, thirty-five of them are not aware of the exact content of the collective contracts between their employers and unions, let alone being involved in the collective bargaining process.⁴⁰⁸ As such, it is better to name these so called collective contracts “notice, document or memo” instead of “collective contract” which shall be the product of a bargaining process between two different parties.

C. Elements Critical to Improve the Efficacy of the Collective Bargaining System in China

i. Independence of the Chinese Trade Union

Lack of independence of a Chinese trade union might be the primary reason for the lack of efficacy of the Chinese collective bargaining system. As discussed above mainly in Section 3.2 (B), it is doubtful whether a Chinese trade union is able to protect worker’s interests, or is just a semi-administrative agency under the control of the Chinese Communist Party. Even worse, in the case of the non-public sector, the trade unions are under the control of the private employers. It is reported that a large number of trade unions within non-state-owned enterprises are under the *de facto* control of the bosses or their associates.⁴⁰⁹ Ironically, some chairpersons of the trade unions

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Supra* 403.

⁴⁰⁸ *Supra* 316.

⁴⁰⁹ Chang Kai, “WTO, Labor Standards and Labor Interests Safeguard” (*WTO, Laogong Biaozhun Yu Laogong Quanyi Baozhang*), Chinese Social Science (*Zhongguo Shehui Kexue*), the first issue of 2002.

are relatives or even the wives of the owners.⁴¹⁰ Therefore, it might be fair to conclude in this way: the trade union in China is a puppet either under government or private employers' control without free will. It is common sense that a "collective bargaining" happens between two parties, i.e., workers and enterprises which are under the control of either government or private employers. Without independence, a trade union is not qualified to represent the interests of its workers; indeed, it is under the negative influence either from government or employers who are the very 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.

As far as the independence issue of a trade union is concerned, the writer has provided her solutions above, *viz.* both the ideal model and the realistic model, to deal with the Chinese trade union's independence conundrum in Section 3.2 (C) (ii) (b) and (c) . Of course, as the writer has commented in the conclusion part of section 3.2, although the realistic model has its shortcomings and may not be able to solve some inherent dilemma inside ACFTU, it nevertheless has its advantages though limited. As for the ideal model, it might be able to compensate the defects of the realistic model, hence, unites and guides workers inside each non-state-owned enterprise and therefore revitalizes the union movements in the non-public sector of China.

ii. In the Absence of A Trade Union in The Work Place, Who Is Going to Represent The Workers to Negotiate A Collective Contract With Employers?

⁴¹⁰ Please see generally in *Ibid* and Joseph Kahn, "When Chinese Workers Unite, the Bosses Often Run the Union", New York Times (US), December 29, 2003, online: <http://www.globalpolicy.org/socecon/inequal/labor/2003/1229shengzhen.htm> (date accessed: March 23, 2006).

During writer's interview with some Chinese scholars in Shanghai Jiao Tong University in February 20, 2006, she was told that sometimes the collective contract was signed without negotiation procedure at all.

In the absence of trade union in some enterprises, mainly non-state-owned enterprises⁴¹¹, the chance to reach an effective collective contract is very low. It is reported that more than 90 percent of the non-state-owned enterprises fail to establish trade unions.⁴¹² Although the law has anticipated the situation as such, the feasibility of its provision is problematic. It provides that in the absence a trade union, a collective contract shall be signed by representatives of the workers and managers.⁴¹³ Generally speaking, the basic background of the labor relations in the non-public sector is that capital resources are scarce and the labor supply is much larger than demand. It is observed that the nationwide registered urban unemployment rate in China is with increasing trend. For more information on the **registered urban** unemployment rate in mainland China published by the relevant Chinese authority, please see table 3 below:

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008
Registered Unemployment Rate (percent)	3.1	3.6	3.8	4.3	4.2	4.5	4.1	4.0	4.5

[(1) Figures of 2000 to 2005 are from source: online: <www.china.org.cn/chinese/zhuanti/166597.htm> (date accessed: June 14, 2006) ; (2) Figure of 2006 is from online :<www.china.org.cn/english/features/china/239631.htm> (date accessed: April 2, 2009);(3) Figure of 2007 is from online:<news.xinhuanet.com/fortune/2009-09/24/content_10878117.htm> (date accessed: April 2, 2009); (4) Figure of 2008 is from “Public Concern Over Jobs, Pay Gap”, China Daily, December 16, 2008)].

Yet these data have not covered the labor surplus accumulated in the rural economy under the Maoist development strategy,⁴¹⁴ nor have it included the retrenched workers (*Xiagang Gongren*)

⁴¹¹ In the case of SOEs, there are more than 90 percent of them having established trade unions. From Tong Xin, “Study on Trade Unions of Joint Ventures” (*Zhong Wai He Zi Qi Ye Gong Hui Yan Jiu*), Study of Zhejiang (*Zhe Jiang Xu Kan*), the second issue of 1998.

⁴¹² Online: Boxun Net <<http://www.peacehall.com/news/gb/laogong/2003/10/200310281141.shtml>> (date accessed: February 21, 2005).

⁴¹³ *Supra* 389 & Labor Contract Law Art. 51 (2).

⁴¹⁴ Please see generally in Judith Banister & Calla Wiemer, “China’s Demographic Window: The Boom and Bust in Prime-Age Workers”, East Asian Institute, National University of Singapore; “Public Concern Over Jobs, Pay Gap”, China Daily, December 16, 2008.

or university graduates who are still looking for jobs.⁴¹⁵ If all of them are taken into account, the unemployment rate is expected to be 8 percent to 9 percent.⁴¹⁶ As for the exact number, it is between a hundred million to two hundred million.⁴¹⁷ A report on China's labor and social security also shows that there are 13 million unemployed and laid-off urban workers nowadays, and a large number of surplus laborers from rural area need to find jobs in cities.⁴¹⁸ Indeed, the reserved army of migrant rural workers coupled with the massive layoff caused by the close down of numerous small and medium sized enterprises located at the southern part of China due to the current financial crisis had created a total buyer's market for labor.⁴¹⁹ In other words, bosses can afford to be cavalier about wages, working conditions and safety standards.⁴²⁰ As such, when there is no trade union's involvement, the writer is wondering whether these poorly organized workers dare to or are willing to elect their representatives to negotiate with employers given that lots of desperate jobless are in the waiting list to replace them anytime and anywhere. Moreover, the candidate of a representative is another problem. Who is willing to take the risk of being fired to negotiate with the employers?

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.* In fact, these data are mainly from government statistic which is believed to be conservative. According to some statistic from other sources, the unemployment rate is far more beyond that. For example, US Central Intelligence Agency, by the end of 2004, the unemployment rate of China is 9.8 percent. [Online: <<http://www.cia.gov/cia/publications/factbook/rankorder/2129rank.html>> (date accessed: August 4, 2005)]; During an interview, a professor from Beijing University Jiao Zhuoji, member of China's National Consultative Conference, claimed that the real unemployment rate in Chinese urban areas is between 15 percent to 20 percent, without taking into account labor surplus in rural area which is expected to be 0.1 billion.[Online: <<http://www.zaobao.com/special/npc/pages2/npc080302b.html>> (date accessed: August 4, 2005)].

⁴¹⁷ Online: <http://www.gdass.gov.cn/news_view.jsp?cat_id=1001026&news_id=1137> (date accessed: October 7, 2005).

⁴¹⁸ Information Office of State Council of PRC, "White Paper of the Government--Labor and Social Security in China", online: <<http://www.china.org.cn/e-white/>> (date accessed: February 23, 2006); Information Office of State Council of PRC, "White Paper of the Government -- China's Employment Situation and Policies", online: <<http://www.china.org.cn/e-white/>> (date accessed: February 23, 2006).

⁴¹⁹ *Supra* 19.

⁴²⁰ Lincoln Kaye, "Worker Unrest" in Frank Ching, ed., *China in Transition* (Hong Kong: Review Publishing Company Limited, 1994).

How to deal with a “no trade union phenomenon” as such? A simple and effective solution will be the abovementioned ideal model -- independent union system, i.e., when workers in non-public sector are attracted to join an independent union due to its effective guardianship function, through the work of an independent union representative, who is also a professional union staff without any interest or connection with the employer’s side, an effective collective contract with more chances to protect worker’s interests is expected to come into being.

However, the ideal model is nevertheless ideal. Its feasibility might be hindered by CCP’s sensitive and cautious ruling policy. Thus, a backup plan is proposed with more feasibility and less revolutionary ideas.

Admittedly, in general terms, the Chinese Trade Union Law has expressed its supportive attitude towards the establishment of trade unions in non-public sector. It is stipulated that all laborers doing physical or mental work in enterprises, public institutions and government organs within the Chinese territory who earn their living primarily from wages shall have the right to join and form trade union organizations regardless of their nationalities, races, sexes, occupations, religious beliefs or education status and this right is immune from any organizational or individual interference.⁴²¹ In the Chinese Temporary Rules on Private Enterprises (*Siying Qiye Zanxing Tiaoli*), it reemphasizes that workers in private enterprises have the right to organize trade unions.⁴²² It is therefore clear that the problem of the low establishment rate of trade unions in non-public sector is not caused by legislation but by the unfeasibility and poor implementation of the law.

⁴²¹ Chinese Trade Union Law, 2001, art. 3.

⁴²² Temporary Rules on Private Enterprises of PRC, 2002, art. 4.

Specifically put, the model law “Temporary Rule on the Work of Grass Root Trade Union Election” promulgated by the ACFTU⁴²³ has not taken the special circumstances of the non-public sector into consideration. It assumes that the process of establishing a union in a private enterprise shall be the same as in an SOE, despite that the circumstances for establishing a trade union in an SOE and in a private enterprise is indeed very different.⁴²⁴ Comparing with the situation in SOEs, the workers in non-public sector may appear to be seasonal and most of them may fail to sign formal labor-employment contracts with their employers. Hence, one of the features of the union members in non-state-owned enterprises is its instability, which will create more practical difficulties in establishing a union in the private sector than in an SOE. Besides, in the case of the election of a union leader in an enterprise no matter private or public, according to the Temporary Rule on the Work of Grass Root Trade Union Election, its very first step is the name list recommendation procedure to be approved by CCP committee in every work place.⁴²⁵ Unfortunately, very few enterprises of non-public sector have CCP committees inside its work place because most workers there are not CCP members. As such, it is fair to say that the election procedure lacks its maneuverability from the very beginning, let alone its further procedure. In order to fundamentally solve the problem as such, a specific model law promulgated by the ACFTU solely targeting the trade union in private sector and especially designed in accordance with its features (in particular its differences from the union of an SOE), covering every aspect of a trade union’s healthy development in the private sector -- from its establishment and operation to its member’s and leader’s rights and obligations etc.-- is expected to be enacted.

⁴²³ *Supra* 353.

⁴²⁴ Generally speaking, SOEs have a relatively better tradition than that of private enterprises in terms of union establishment and union movement.

⁴²⁵ For more information, please refer to text accompanying 352 & 355.

In addition, as argued above, the bargaining power between the workers in non-public sector and employers are very unbalanced.⁴²⁶ As such, government's active interference to guarantee the implementation of the right to organize in a non-public enterprise is valuable. The writer hereby proposes a "simultaneous approach" (non-public enterprise and its union shall be established at the same time) to borrow the government's power to assist the establishment of a trade union in a private enterprise. Put specifically, when a non-public enterprise is applying a business licence, the related government authority shall require it to prepare for the establishment of a trade union inside its work place within a reasonable period after its establishment. If this requirement can not be met during the required period, its business licence might be suspended. Through this relatively compulsory method, the union establishment rate in non-public sector is expected to increase in the foreseeable future. To the already established non-state-owned enterprises, the governmental authority in charge of its registration can also link its renewal of licence with its union establishment status.⁴²⁷

iii. Right To Strike -- A Necessary "Evil" in Today's China

a. Value of Right to Strike On Collective Bargaining

Right to strike is critical to the success of a collective contract. Although right to collective bargaining does not automatically entail the right to strike, its efficacy nevertheless will be seriously impaired without a strike weapon as such. Under the market economy, one of the critical reasons for workers and employers to reach a final collective agreement is that both sides have their trumps, i.e., employers can close the factory and workers can go to strike (a last resort,

⁴²⁶ For more information, please see text above accompanying note 413 & 418.

⁴²⁷ Some scholar in China such as Bo Ningxiang in his "Discussion on Chinese Union Operation in Private Enterprises" (*Dui Goujian Woguo Siying Qiye Gonghui Yunxing Jizhi De Tanta*), *Journal of Union Theory and Practice* (*Gong Hui Li Lun Yu Shi Jian*), the tenth issue of 1998 also suggested as such.

“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”).⁴²⁸ The competition of these two resorts guarantees the bargaining power of both sides. As far as right to strike is concerned, its existence compensates the comparative disadvantages on the worker’s side and adjusts the unbalanced bargaining power. As stated in the Committee of Experts’ 1973 General Survey, “a general prohibition of strikes constitutes a considerable restriction of the opportunities opened to trade unions for furthering and defending the interest of their members”⁴²⁹. Thus, it is fair to regard the right to strike as a necessary precondition of a successful collective bargaining system. Indeed, the CFA of the ILO “has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests”.⁴³⁰

If a collective bargaining process is to be carried out in a relatively fair and equal way, right to strike, as closely associated with democratic ideas of freedom, is the necessary and desirable counterpart against the combination of power on the employers’ side. As most labor rights lawyers observed, a general prohibition on the right to strike has a severe negative impact on the “essential means” available for workers to defend their interests and rights.⁴³¹ An absolute ban on right to strike is tantamount to authorizing a police to shoot the murderer without giving him a gun. Legislative protection on the collective bargaining system without a guarantee on right to strike is no more than an empty promise.

b. Is There A Right To Strike in China?

⁴²⁸ L. J. Macfarlane, *The Right To Strike* (N.Y.: Penguin Books 1981) at 25.

⁴²⁹ *Supra* 58, at 197. Also, in the European Social Charter (ESC), it provides that the right to strike is viewed as a critical weapon to ensuring the effective exercise of the right to bargain collectively. From Lammy Betten, *The right to strike in Community law: the incorporation of fundamental rights in the legal order of the European Communities* (Amsterdam : North-Holland, 1985), at 190.

⁴³⁰ R. Thiagarajah, C.C. Noriel & T’en Kuet Fui etc., *The Right to Strike and Lockout: A Survey of the Current Situation in ASEAN* (Geneva: International Labor Organization 1988) at 3-4.

⁴³¹ Jared S. Gross, “Yet Another Reappraisal Of The Taft-Hartley Act Emergency Injunctions” (2005) 7 U. Pa. J. Lab. & Emp. L. 305.

Although neither the Chinese Constitution nor the Chinese Labor law explicitly entitles workers the right to strike, it might be inaccurate to reach any rush conclusion on whether workers in China have or have no right to strike before a thorough study on the relevant legislation.⁴³² To have a better understanding on this issue, a historical review on the Chinese legislative attitude towards right to strike appears to be necessary.

1. Four Constitutions and Right to Strike

Back to the history before the establishment of PRC, especially the period of the first forty years of twentieth century, saw massive waves of strikes organized by CCP shaking the then Kuo Ming Tang (KMT) authority. For example, during the year 1925 only, there were 318 strikes in the whole nation. And in 198 cases where figures were reported, 784,821 workers were involved, and the average duration of a strike was about 19 days.⁴³³ However, this tradition, once recognized and actively supported by CCP, seems to lose its charm after CCP came into power.

From the establishment of the socialist China by CCP till today, the Chinese government has enacted four Constitutions. Passed by First National People's Congress on September 20, 1954, the first Constitution granted People the freedom of speech, correspondence, press assembly, association, procession, demonstration and religion without a single word referring to the right to

⁴³² According to China Labor Bulletin, there are several leaders of strike have been sent to jail in China.

For more information, see online:<http://www.china-labor.org.hk/iso/search_result.adp?str=protest&type=article> (date accessed: February 20, 2005) In some sense, this may reflect certain *de facto* governmental attitudes towards strike in China. It is observed that there was right to strike in Chinese Constitution 1978, but this right has been deleted in 1982 version. As such, it might be argued that Chinese government's attitude towards right to strike in China is negative.

⁴³³ Nym Wales, *Chinese Labor Movement* (N.Y.: Books for Libraries Press, 1945) at 46. In fact, the Chinese labor movement before the establishment of new China could be divided into five stages. For more information on this aspect, please see generally in Nym Wales, *Chinese Labor Movement* (N.Y.: Books for Libraries Press, 1945).

strike.⁴³⁴ Considering the social and economic background at that time, i.e., China had just experienced eight years Sino-Japanese War and four years Civil War, and faced serious inflation and unemployment, it is understandable for the government to exclude the right to strike from its first Constitution for the sake of economic recovery as well as social and political stability. This Constitution, confirming the tasks of the state during the transitional period (from capitalism to socialism) and establishing the people's congress system, was later highly appraised not only for the direction towards which it led the nation, but also for its democratic drafting process.⁴³⁵

The second Constitution namely the 1975 Constitution emerged during the ten years' national disaster -- Cultural Revolution⁴³⁶. Its article No. 28 explicitly provides that "citizens... enjoy the freedom to strike". However, because of its special background -- unprecedented period of political disaster, the Chinese official comments on this Constitution is that it was negatively influenced by the leftist thoughts⁴³⁷ and was a big step back from the 1954 Constitution.⁴³⁸ Although it played a relatively slight role in the Chinese constitutional history, it was nevertheless the first Constitution in the socialist China that granted the right to strike to the Chinese working class.

Three years after the end of Cultural Revolution (the "Gang of Four"⁴³⁹ was removed from the political arena), the 1978 Constitution came into being with the purposes of bringing the state back to its normal status.⁴⁴⁰ Its number of articles has been doubled from 30 to 60 vis-à-vis that

⁴³⁴ "Introduction to The First Chinese Constitution", Online:

<http://news.xinhuanet.com/ziliao/2004-02/18/content_1320274.htm> (date accessed: August 12, 2005).

⁴³⁵ Lin Feng, *Constitutional Law In China* (Hong Kong: Sweet & Maxwell Asia, 2000) at 15.

⁴³⁶ For more information, please refer to above note 64.

⁴³⁷ "The Enactment and Amendment of Chinese Constitution", Online:

<http://news.xinhuanet.com/ziliao/2003-01/18/content_695288.htm> (date accessed: August 12, 2005).

⁴³⁸ *Supra* 435 at 16.

⁴³⁹ In China, the "Gang of Four" refers to a group of Communist politicians based in Shanghai, who were among the main leaders of the Cultural Revolution.

⁴⁴⁰ *Ibid.*

of 1975 Constitution.⁴⁴¹ The court and the procuratorate systems, which were minimized or dumped altogether in the 1975 Constitution, were restored to a certain degree.⁴⁴² Furthermore, citizens' rights were reinstated with its article 45 being read as follows:

“Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and **the freedom of strike**, and have the right to speak out freely, air their views fully, hold debates and write big-character posters.”⁴⁴³

Unfortunately, this constitution still had the scar from the Cultural Revolution that had just ended with the revolutionary language's persisting, especially an insistence on class struggle.⁴⁴⁴ Indeed, 1978 constitution can be understood as a product of compromise -- not entirely abolishing Chairman Mao Zedong's thoughts and partly reflecting his successor Hua Guofeng and Deng Xiaoping's political ideas of modernization and rapid economic development.

To date, the 1982 Constitution is the longest one within the socialist China's history, with a preamble and four chapters -- including 138 articles.⁴⁴⁵ This Constitution purposefully deemphasizes the idea of class struggle, places priority on economic development and recognizes the values and contributions and interests of non-party groups towards China's modernization.⁴⁴⁶ Actually, it erases almost all the rhetoric associated with the Cultural Revolution included in 1978 version.⁴⁴⁷ As for the rights of citizens, its article 35 states that “citizens of the PRC enjoy freedom of speech, of the press, of assembly, of association, of procession, and of

⁴⁴¹ *Supra* 435.

⁴⁴² Please see Constitution of the PRC, 1978, Section 5 (from Art. 41 to Art.43).

⁴⁴³ Constitution of the PRC, 1978, art. 45. Cited from Xiao Weiyun, Wang Yu & Zhang Xiang, eds, *Reference Materials on Constitutionalism I (Xianfaxue Cankao Ziliao Shangce)*, (Beijing China: Beijing University Press, 2003), at 61.

⁴⁴⁴ *Supra* 435, at 16.

⁴⁴⁵ Constitution of PRC 1982.

⁴⁴⁶ *Supra* 435, at 16.

⁴⁴⁷ Constitution of the PRC, 1982..

demonstration.”⁴⁴⁸ Compared with 1978 version, the so called “four big rights”-- to speak out freely, air views fully, hold great debates, and write big-character posters, together with the right to strike, are missing.⁴⁴⁹ Despite the removal of various rights in the 1982 version, the constitution is nevertheless praised by the Chinese official as the best one, which not only takes into consideration of the social and economic circumstances back then but the future development of China as well.⁴⁵⁰

2. Why Right To Strike Is Finally Removed From The 1982 Constitution?

Before starting my analysis on this section, it is worthy to be highlighted here that indeed countries, such as France, Italy, Spain, Japan and South Korea have either explicitly or implicitly provided for constitutional protection for the right to strike.⁴⁵¹

(1) Mis-linking Right To Strike to Revolutionary Idea

Due to China’s special history, right to strike is traditionally classified by the Chinese socialist government as a pure political right. As mentioned above, before CCP came into power, the Chinese workers had a good tradition in practising their rights to strike.⁴⁵² Admittedly, during those revolutionary days, such strikes were carried out for more political reasons (fighting against KMT’s authoritative regime and Japanese invasion) than for economic needs. Naturally, after the new China was established, CCP is likely to understand this right in its political sense -- linking it with revolution, and therefore regards it as a potential threat to its sovereignty -- worrying about the replaying of the history. As such, CCP fails to understand the essence of the right to strike which is for workers to use strike as a means to reach their **economic goals** during peaceful era.

⁴⁴⁸ *Ibid*, art.35.

⁴⁴⁹ *Ibid*.

⁴⁵⁰ Liu Ronggang, “Peng Zhen and The Enactment of 1982 Constitution” (*Peng Zhen Yu 1982 Nian Xianfa De Zhiding*), online: <<http://www.rdyj.com.cn/2004/rdqk-9-12.html>> (date accessed: August 15, 2005).

⁴⁵¹ For more information, please see *Infra* note 460.

⁴⁵² For more information, please refer to the part 3.2 C (i) --The Relationship between Chinese Trade Union and CCP: A Historical Review.

In addition, the inclusion of the right to strike into ICESCR⁴⁵³ rather than into ICCPR has served as direct and hard evidence that this right has been internationally recognized as belonging to social and economic rights instead of a pure political right.

This is especially right when taking into consideration the features of strikes happening in today's China. Some Chinese scholars have concluded the major reasons for strikes happening in contemporary China as follows:⁴⁵⁴

1. Lack of safety and industrial accidents happen frequently without appropriate compensation;
2. Wage arrears;
3. Unduly prolonged working hours;
4. Sweatshop-like working conditions and unfair payment, especially for female workers and child laborers;
5. Through illegal fine or deposit system, employers have actually stolen worker's money under a disguise.⁴⁵⁵
6. Ill-regulated Privatization Process -- corrupted SOEs managers sell the factories together with its facilities to foreigners or other private owners without taking into consideration any workers' basic legitimate interests.

⁴⁵³ ICESCR, art. 8(1)(d).

⁴⁵⁴ Please see generally in Su Miaohan, Yao Hongmin & Zhen Lei, "Recognition and Regulation on Right to Strike in China" (*Dui Bagongquan De Falü Queren*), online: http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=2092; Liu Yajun & Zhang Li, "Finding The Long Lost Right to Strike" (*Xunzhao Shiluo De Bagongquan*), online: http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4010 (date accessed: July 12, 2005).

⁴⁵⁵ For example, during my research in Guang Dong province, I found that several joint ventures there would require their newly employed workers to submit certain amount of money from RMB 100 Yuan to 500Yuan as so called "deposit", and only when the workers have fulfilled their employment contract, would the money be returned. It is not clear what is the real purpose of these money and the employers simply refused to talk about it.

This list might not be complete, but there is one thing that is clear -- the reasons for strikes in today's China have nothing to do with political purposes.⁴⁵⁶ In other words, the political strike once prosperous in the Chinese history no long exists, whilst its twin brother -- economic strike comes into stage. To ask for a decent salary or a safer and better working condition is always the theme. Sometimes, in order to avoid government's suspicion, some strikers have demonstrated their slogans as follows: "we are not here for the purpose of turmoil, we just want a job and our salary back", "we are supporting CCP's leadership and its four basic principles"⁴⁵⁷ etc.⁴⁵⁸

Besides, it is not difficult to find out that only when the basic conditions for living have become seriously unsecured and no other peaceful solutions available, will workers in China choose strike as a means to express their dissatisfaction. Based on the writer's field study, most of the Chinese workers interviewed tended to consider strike as a last resort to expressing their dissatisfaction on economic predicament.⁴⁵⁹ Different from the circumstances in some developed countries, represented by France, where strikes are as common as daily meals and used by those who have already been well-off and wish to be better off⁴⁶⁰, almost all the strikes happened in today's China are simply because most of the participants have felt either their working or living conditions are

⁴⁵⁶ For more information, please see generally in the argument provided in note 461.

⁴⁵⁷ Four basic principles in China refer to "the socialist road, the people's democratic dictatorship, Marxism-Leninism and Mao Zedong Thought, and the leadership of the Communist Party of China". From Chart of Chinese Communist Party, para 10.

⁴⁵⁸ Online: <<http://secrechina.com/news/gb/articles/2/6/5/18482.html>> (date accessed: August 23, 2005).

⁴⁵⁹ *Supra* 316.

⁴⁶⁰ France, commented by some writers as "home of strike", provides constitutional protection on right to strike. (From: Violaine Messenger, "Strikes in France: A Tale of Pension Reforms", online: <<http://goinside.com/03/5/strike.html>>, date accessed: August 22, 2005). Other countries, such as Italy, Spain, Japan and South Korea either explicitly or implicitly provide for constitutional protection for the right to strike. [From: Online: < <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/709.htm>>, <<http://www.oefre.unibe.ch/law/icl/it000000.html>>, <<http://www.state.gov/g/drl/rls/hrrpt/2003/27865.htm>>, date accessed on September 7, 2005, Zhou Changzheng, *Study on Globalization and Chinese Labor Law (Quanqiuhua Yu Zhongguo Laodong Fazhi Wenti Yanjiu)* (Nanjing China: Nanjing University Press, 2003), from 69 to 70].

beyond forbearance.⁴⁶¹ In sum, CCP's concern that strikes launched by the Chinese workers would endanger its ruling seems to be groundless.

(2) Misunderstanding the Nature of Right to Strike: Regarding It As A method For Class Struggle Only Belonging to The Capitalist World

Some Chinese scholars and CCP leaders are inclined to link the phenomena of strike to the capitalist world, i.e., strike is a mirror reflecting the labor-employment relationship inside the capitalist world and it is also a method used for class struggle which is believed to be the principle contradiction that exists in the capitalist states;⁴⁶² whilst in socialist states, for example in China, there are no fundamental conflicts between workers and employers (in theory, most enterprises in socialist states are owned by the states who are under the people's democratic dictatorship led by the working class)⁴⁶³ As such, class struggle is by no means the principle contradiction in today's China.⁴⁶⁴ For that matter, in China, the interests of the workers and the

⁴⁶¹ The only exception to economic strike arguably existing is what happened in 1989 political turmoil -- a student led demonstration. The demonstrators, mainly students later followed by a number of people from all walks of life believed the CCP government was too corrupt and economic reform had gone too far which had resulted rampant inflation and widespread unemployment. For more information, please see generally in online:

<http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid_2496000/2496277.stm>, (date accessed: April 5, 2006); online: <<http://news.bbc.co.uk/2/hi/asia-pacific/4960762.stm>>, (date accessed: April 5, 2009); online: <<http://www.cnn.com/2004/WORLD/asiapcf/06/01/tiananmen/>>, (date accessed: April 5, 2009). Indeed, from the writer's view, even this event is later labeled by the CCP as a political turmoil, the motivations for the workers to join such event is nevertheless **purely driven by economic reasons**, such as inflation, unemployment and livelihood. As such, to understand the involved workers' movement separately from the whole Tiananmen incident, in essence, it is no more than economic strike..

⁴⁶² To Marxism, "all members of the working class have an objective obligation, derived from the combination of historic destiny and social justice, to further the cause and interests of that class in its struggles against the bourgeoisie ... Strikes are of especial concern for Marxists, since the strike weapon is by its nature a weapon of working-class struggle against the employing class. To assert the right to strike is thus for Marxists an assertion of the right of workers to fight capitalism". From *Supra* 428, at 28.

⁴⁶³ Constitution of PRC, art. 1.

⁴⁶⁴ In China, it is believed that the principle contradiction within contemporary China is no longer the one between the working class and the bourgeoisie, or between ourselves and the enemies, but the one between people's daily growing material and cultural demands and the backwardness of social production. Albeit, class struggle will continue to exist within certain bounds for a long time to come, it is no longer the principle contradiction. For more information, please see generally in online:<http://www.marxists.org/chinese/13/marxist.org-chinese-mandel-1992.htm>, <<http://china-week.com/info/03976.htm>>, <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4010> (date accessed: June 14, 2006).

interests of the state, which are dependent on SOEs performance, are generally consistent. Accordingly, if workers are entitled to the right to strike, the suspension of production in a work place as a logical consequence of every strike will not only bring about disadvantageous to the enterprise, but indirectly harm the state's interests as well, which are consistent with the workers' interests in theory.⁴⁶⁵ In this sense, it seems that it is better for the labor employment disputes happening in China to be resolved via peaceful methods such as mediation, negotiation, arbitration or lawsuit etc.

This argument might be correct in theory, however, it is no longer applicable to the contemporary China who has transformed from a socialist state in Marxist sense into a socialist state that embraces capitalism. As is mentioned above⁴⁶⁶, the Chinese working class has lost its status as a leading class, but all the way down to become a vulnerable group – surviving at the bottom of the current Chinese society. Moreover, in terms of the number of participants, duration and scale of the economic strikes in today's China, they are increasing day by day. Therefore, it is time for the CCP leaders and the Chinese scholars to envisage realities and reevaluate the nature as well as value of the right to strike in China.

3. *De Facto* Statutory Attitude towards Right to Strike in China -- Unsupportive Attitude

Based on the above discussion, it is not difficult to reach a conclusion that the right to strike is not a constitutional right in China. Indeed, the current Chinese Constitution has adopted a “no support, no direct prohibition” approach towards strikes in China. As for the other statutory attitude towards this right, it is going to be discussed in this part of the thesis.

⁴⁶⁵ For more information, please see Wu Jie, “Discussion on the Political Rights and Freedom of Chinese Citizen” (*Luelun Woguo Gongmin De Zhengzhi Quanli He Ziyou*) in Luo Yaopei, ed., *Thesis Collection on Constitutional Law (Xianfa Lunwenji)*, (Beijing China: The Mass Press, 1982), from 180 to 184.

⁴⁶⁶ For more information, please see above text part 3.2 (B).

(1) The Chinese Labor Law and Right to Strike

Within its 13 chapters, the Chinese Labor Law spends a whole chapter⁴⁶⁷ discussing the issue of labor disputes. Consultation, mediation, arbitration and court trial are all the legitimate dispute settlement mechanisms available⁴⁶⁸ among which consultation, mediation is optional and the process of labor arbitration is the precondition for court trial.⁴⁶⁹ As for the detailed rules of these mechanisms, some relevant implementation rules such as “Organization Rules on Labor Disputes Arbitration Committee 1993” (*Laodong Zhengyi Zhongcai Weiyuanhui Zuzhi Guize*), “Rules on the Organization and Working of Labor Dispute Mediation Committee in Enterprises 1993” (*Qiyue Laodong Zhengyi Tiaojie Weiyuanhui Zuzhi Ji Gongzuo Guize*) and the like are promulgated to serve as complementary provisions.

Despite various dispute settlement mechanisms available in the Chinese labor legislation, the right to strike is found nowhere. In addition, in the “Rules on Handling Labor Disputes in Enterprises” (*Qiyue Laodong Zhengyi Chuli Tiaoli*), it provides that during the process of labor dispute settlement, the parties involved are prohibited in any extremist activities that could worsen the contradiction.⁴⁷⁰ As to the meaning of the “extremist activities”, no further interpretation is provided in this rule. Indeed, even if this so called “extremist activities” is not expressly linked to strike, it is believed to refer to strike implicitly since strike is widely recognized by the Chinese official as a means reflecting revolutionary ideas and a cause of social and political instability. The writer hereby argues that the right to strike is at least not supported by the Chinese labor legislation; consequently, there is no legislative protection available for strikers. In other words, once the strikers cause certain material losses in their work places or

⁴⁶⁷ Labor Law of PRC, chapter 10.

⁴⁶⁸ *Ibid.* art.77.

⁴⁶⁹ *Ibid.* art.84.

⁴⁷⁰ Rules on Handling Labor Disputes in Enterprises of PRC, 1993, art.6 (2).

other places during the course of their strikes, they have no chance to enjoy either impunity of civil or criminal liability which might be available otherwise if there is a strike clause.

(2) Criminal Law and Right to Strike

Quickly go through the Chinese Criminal Code and its six amendments, there is no crime directly related to strike. Based on the principle of “a legally prescribed punishment for a specified crime” which is widely accepted by the Chinese academe,⁴⁷¹ strike is not criminalized in China. Besides, there is no report from the Chinese official sources relating to the issue of criminalizing a worker due to its attending or organizing strikes. However, from some oversea sources, a small amount of leaders, organizers and other active participants in strikes are sentenced under the criminal charges of “intentional destruction of property” or other relevant crimes.⁴⁷² Certain NGOs even offer a name list of those detained labor rights activists together with their brief experiences and the reasons for their imprisonment.⁴⁷³ It shall be noted that in most cases, the reasons for them to be sentenced to jail are not directly linked with their behavior of organizing or attending a strike, but because of the destruction of property or public order during the course of a strike, which has a chance to get certain immunity from civil or criminal responsibility if there were strike legislation in China.⁴⁷⁴ In this sense, it might be arguably right to comment that in practice the Chinese authority adopts a *de facto* antagonistic policy against strikes in China, even if they are purely economically driven.

⁴⁷¹ Zhang Minkai, *Theory of Criminal Law I (Xingfa Xue)* (Beijing: Law Press, 1997), from 29 to 45.

⁴⁷² ICFTU, “Letter to President Hu Jintao protesting prison sentences on Stella workers”, online: <http://www.china-labor.org.hk/public/contents/article?revision%5fid=3875&item%5fid=3874> (September 22, 2005).

⁴⁷³ Online: <http://www.china-labor.org.hk/public/contents/article?revision%5fid=9153&item%5fid=9137> (date of accessed: September 26, 2005). It shall be noted that even if the information provided by the China Labor Bulletin are trustworthy, the number of the labor activists that are sentenced to jail are quite limited and always under the name of other crimes, such as intentional destruction of property. Thus, it is by no means a systematic practice in China to criminalize strikers.

⁴⁷⁴ *Ibid.*

c. Rethinking the Value of Right to Strike and How to Appropriately Regulate This Right in the Context of the Contemporary Chinese Society

1. Rethinking the Significance of Right to Strike in Today's China

First, as mentioned several times in the text above, China has transformed from a centrally-planned economy towards a market one, with official recognition of this transform via its 1993 constitutional amendment.⁴⁷⁵ Based on this dramatic political and social change, the once prosperous public ownership labor relationship -- state and workers are the two parties -- have been substituted by labor relations colored by capitalism.

In today's China, the rising of its non-public sector -- privately owned, foreign-invested as well as collectively owned enterprises -- shall be not underestimated at all. With the development of this non-state force, the labor relations start to become complicated. The workers' interests are to increase wages, enhance the safety standards and be covered by social insurance, whilst their employers are focusing more on cutting costs as much as possible and increasing the profits eventually. Obviously, this inborn structural antagonism of interests will lead to more labor employment tension than ever before in the socialist Chinese history.

Secondly, even in the case of SOEs nowadays, it is different from the former central planning era where SOEs had very little freedom on their enterprises' running and management. During those days, SOEs' total production amount was decided by government in advance and almost all of their profits would have to be turned in to the state to be redistributed.⁴⁷⁶ Under the rigid

⁴⁷⁵ 1993 Constitutional Amendment of PRC, art.7.

⁴⁷⁶ Xu Xianglin, "SOEs Reform in China: Relationship between Government and Enterprise during Reform" (*Zhongguo Guoyou Qiye Gaige: Biange Zhong De Zhengfu Yu Qiye Guanxi*), Online: <<http://www.chinaelections.org/readnews.asp?newsid=%7B22FA25BD-EF71-4126-BF76-A74292D2524B%7D>> (date accessed: September 28, 2005). For more information, please see generally in Zhou Shulian, "Theoretical Analysis on 20 Years Experience on the Chinese SOEs Reform" (*20 Nian Zhongguo Guoyou*

governmental control as such, wages, working conditions and profit distribution, sales, technical reform and research and development on new products had already been pre-decided so that there was almost no necessity of a collective bargaining.⁴⁷⁷ On the contrary, in today's China, rather than strictly following governmental directives, SOEs are granted more freedom for them to make decisions on their own production, sales, and management as well as candidates of employee. In addition, instead of handing over the state all of their profits, SOEs are required to pay certain amount of tax to the state and entitled to keep the rest under their discretion.⁴⁷⁸ Under such circumstances, it is not difficult to understand that the SOEs want to get more profits just as those non-state-owned enterprises do. As such, a contradiction of interests between SOEs and their employees appears to be inevitable, although not as dramatic as in the non-public sector.

Moreover, as the writer has mentioned above, the labor contract system with the potential to contracting away workers' master's role in an SOE has already substituted the traditional "iron rice bowl" policy.⁴⁷⁹ In short, the Chinese working class has much less job security than it used to have.

As such, the rise of private economy, the freedom granted to SOEs together with the labor contract system have transformed the Chinese working class into a relatively vulnerable group with their interests conflicting with both non-state-owned enterprises and SOEs. How to ease the tension as such and balance such disproportionate bargaining power between the Chinese workers and their employers? It is high time for the Chinese authority to enact certain special legal

Qiyè Gǎigé Jīngyán De Lìlun Fēnxi), Journal of Postgraduate Students of Chinese Institute of Social Science (*Zhongguo Shehui Kexue Yuanjunsheng Xuebao*), the third issue of 2000; Gao Youcai, "The Trace of SOEs Reform and Development" (*Guoyou Qiyè Gǎigé Yu Fazhan De Guiji*), Journal of Zhen Zhou University (*Zhen Zhou Da Xue Xue Bao*), the second issue of 2002; Ma Hong, "Discussion on the Establishment of Modern Enterprise and Reform on SOEs" (*Lun Jianli Xiandai Qiyè Zhidu Yu Guoyou Qiyè Gǎigé*), Journal of Study on Finance (*Caijin Yanjiu*), the sixth issue of 1994.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

⁴⁷⁹ Please see above text accompanying footnote 314 and the note *per se*.

protection on the Chinese working class' right to strike so that the disadvantageous can have a legal weapon to help themselves.

2. How to Regulate Right to Strike in the Context of the Contemporary Chinese Society

The purpose of this section is to propose certain legislative suggestions with feasibility on right to strike, which not only taking into consideration the other countries' relevant legislation,⁴⁸⁰ but adapted to the current Chinese context as well.

(1) Legal Foundation for Right to Strike in China

Under the ICESCR, article 8(1)(d) requires its member states to ensure “the right to strike, provided that it is exercised in conformity with the laws of the particular country”⁴⁸¹. Considering that China has officially signed and ratified this convention without reservation on this particular clause, based on the principle of *Pacta Sunt Servanda*, China is under the obligation to grant the right to strike to its working class.

(2) Several Steps to Regulate Right to Strike in China⁴⁸²

The first step is about the definition of a strike in China. What is a strike? Different legislation from different countries may offer slightly different answers⁴⁸³; however, the core is generally the

⁴⁸⁰ In this section, in order to propose a strike legislation adapted to the Chinese context, the writer refers to a number of countries' legislative experiences, including but not limited to UK, US, Canada, New Zealand, Ireland, Argentina, Japan, Swiss, Finland, Malaysia, Singapore, Philippines and Thailand.

⁴⁸¹ ICESCR, article 8 (1)(d).

⁴⁸² This part is based on the writer's research on several industrial countries' strike legislation, including UK, US, New Zealand, Canada, Japan, Australia, Ankara, Germany, Argentina, Swiss, Finland and several continental European countries.

⁴⁸³ It is noted that there is no legislative protection on right to strike and a worker who engage in a strike may expose him/herself to great legal liability in UK. “Besides, the law allows an employer to operate during a strike by replacing strikers and offering them permanent status. At the conclusion of the strike the employer need not reinstate striking workers if no vacancies exist because replacements occupy the strikes' positions. However, the requirement that the British employer dismiss all strikers, or reinstate or reengage all strikers to avoid employee claims of unfair dismissal poses a significant restraint on the British

same, i.e., a strike is a collective withholding of labor services by workers who are unsatisfied with the payment, working condition, benefits package and the like offered by employers.⁴⁸⁴

The second step is to confine the right to strike. As the supervisory bodies of ILO observe, right to strike is not an absolute right.⁴⁸⁵ It is important to note that despite its importance towards worker' rights, a strike may reduce an enterprise' productivity, therefore negatively influence its taxation turned in to the government indirectly. As such, nobody would argue against the idea that to some extent, a strike has its side effects. Moreover, based on the writer's studies on the

employer", in the sense that very few employers would like to dismiss their entire employees without negatively influence their daily operation. Therefore, **the law implicitly imposes serious limitation via this all-or-nothing reinstatement fashion on the employer's right to dismiss and to some extent, guarantees worker's right to reinstate at the end of a strike.** Cited from Jeffrey A. Spector, "Replacement and Reinstatement of Strikes in the United States, Great Britain, and Canada" (1992) 13 Comp. Lab. L.J. 184; Zhou Changzheng, *Study on Globalization and Chinese Labor Law (Quanqiuhua Yu Zhongguo Laodong Fazhi Wenti Yanjiu)* (Nanjing China: Nanjing University Press, 2003), from 69 to 70].

⁴⁸⁴ For example, under the labor law of US, the Section 501(2) of the Labor Management Relations Act defines the term "strike" as "any concerted stoppage of work, concerted slowdown or other concerted interruption of operations by employees". From Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston : Kluwer Law International, 1996), at 327; Though in English law there is no comprehensive legal definition of a strike or industrial action, the closest might be Lord Denning's attempt in the Court of Appeal in 1975 when he said that "a strike is a concerted stoppage of work by men done with view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or supporting or sympathizing with other workmen in such endeavour". From K. D. Ewing, *The Right to Strike* (Oxford : Clarendon Press, 1991), at 4; According to Employment Protection Act of UK, "strikes means the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any person or body of persons employed, or to aid other employees in compelling their employer or any person or body of persons employed, to accept or not to accept terms or conditions of or affecting employment". From K. D. Ewing, *The Right to Strike* (Oxford : Clarendon Press, 1991), at 4; In the LR Act 1987 of New Zealand, strike is defined as "the act of any number of workers who are or have been in the employment of the same employer or of different employers -- (a) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or (b) in breaking their contracts of service; or (c) in refusing or failing after any such discontinuance to resume or return to their employment; or (d) in refusing or failing to accept engagement for any work in which they are usually employed; or (e) in reducing their normal output or their normal rate of work -- the said act being due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any workers; but does not include a union meeting allowed under this Act or authorized by an employer". From A. J. Geare, *The System of Industrial Relations in New Zealand* (Wellington : Butterworths, 1988), at 275; under the Ireland legislation, a strike is defined as "a cessation of work by any number or body of workers acting in combination or a concerted refusal or a refusal under a common understanding of any number of workers to continue to work for their employer done as a means of compelling their employer, or to aid other workers in compelling their employer, to accept or not to accept terms or conditions of or affecting employment". From Ivana Bacik, "Labor Law Profile: Ireland", online: <<http://www.ilo.org/public/english/dialogue/ifpdial/ll/ire.htm>> (date accessed: June 23, 2006).

⁴⁸⁵ *Supra* 58, at 197.

strike legislation of several countries including but not limited to New Zealand, UK, US, Canada, Japan and Argentina, to date, there is no legislative protection on an absolute right to strike.⁴⁸⁶ Therefore, to confine this right appears to be necessary.

The details are as follows:

First, the purpose of a lawful strike shall be purely economically driven. In other words, political strikes (they are likely to be linked with dramatic political movements and revolutions and their purposes are not “directed against the employers but against State government, to induce it to give to the workers more political rights, or to dissuade it from obnoxious acts”)⁴⁸⁷ and other non-economically motivated strikes, such as “solidarity strike”⁴⁸⁸ and “sympathy strike” shall be

⁴⁸⁶ Please see generally in From A. J. Geare, *The System of Industrial Relations in New Zealand* (Wellington : Butterworths, 1988), from 280 to 283; Simon Honeyball & John Bowers, *Textbook on Labor Law*, 7th ed. (New York : Oxford University Press, 2002), from 438 to 445; Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston : Kluwer Law International, 1996), from 327 to 350; Lammy Betten, *The right to strike in Community law : the incorporation of fundamental rights in the legal order of the European Communities* (Amsterdam : North-Holland, 1985); R. Thiagarajah, Sivananthiran Alagandram & Carmelo C. Noriel etc., *The Right to strike and lockout : a survey of the current situation in ASEAN* (Geneva : International Labor Organisation, 1988) -- a book covering strike legislation of Brunei, Malaysia, Singapore, Philippines and Thailand; John Grogan, *Collective Labor Law* (Cape Town : Juta, 1993), from 65 to 111; K.D. Ewing & Aileen McColgan, *Law at Work*, 2nd ed., (London : UNISON Open College, 1995), from 213 to 241; K. D. Ewing, *The Right To Strike* (Oxford : Clarendon Press, 1991); Chris White, “The Right to Political Strike”, online: <<http://evatt.labor.net.au/publications/papers/139.html>> (date accessed: June 22, 2006); Arturo Bronstein, National Labor Law Profile: Republic of Argentina, online: <<http://www.ilo.org/public/english/dialogue/ifpdial/ll/arg.htm>> (date accessed: June 22, 2006); Liliane Jung, National Labor Law Profile: Federal Republic of Germany, online: <<http://www.ilo.org/public/english/dialogue/ifpdial/ll/ger.htm>> (date accessed: June 22, 2006); Niels Petersen, “National labor law profile: The Swiss Confederation”, online: <<http://www.ilo.org/public/english/dialogue/ifpdial/ll/ch.htm>> (date accessed: June 22, 2006); Jorma Oskari Saloheimo, National Labor Law Profile: Republic of Finland, online: <http://www.ilo.org/public/english/dialogue/ifpdial/ll/fin.htm#_ftn1> (date accessed: June 22, 2006);

⁴⁸⁷ Online: <http://www.geocities.com/~johngray/wcon203.htm> (date accessed: September 29, 2005). Generally speaking, the main characteristics of a political strike could be concluded as follows: : “it is never directly against an employer; it appears as a protest against a certain policy and the political striker acts not only in his capacity as

⁴⁸⁸ There are different definitions offered by different scholars on the “solidarity strike” and “sympathy strike”. For example, Kahn Freund writes that sympathetic strike “includes a strike in sympathy with workers anywhere from China to Peru”; from the Dutch author Rood, he regards the solidarity strike as a strike out of solidarity with other workers in a collective labor conflict, while sympathetic strike is a strike to support other workers to achieve an aim for which the other workers themselves did not strike. All in all, strikes as such have no immediate aim at improving wages and working conditions of the striking workers

completely banned in order to maintain social stability and protect public interests in China. In fact, most strike legislation promulgated by the developing countries and quite a few strike legislation of the developed world have explicitly or implicitly prohibited the non-economically motivated strike. According to the Committee of Experts' 1983 report, "in many countries political strikes are explicitly or tacitly recognized as unlawful".⁴⁸⁹ Below are a few legislative examples:⁴⁹⁰ ① in the Collective Labor Agreement, Strike and Lock-out Act of Ankara, "a strike called for political purposes ... shall be unlawful";⁴⁹¹ ② in the Workplace Relations Act (1996) of Australia, it provides that "only strikes in enterprise bargaining at a single business have protections against statutory and common law penalties";⁴⁹² ③ according to the German strike law, a political strike is completely prohibited.⁴⁹³ Even the ILO's attitude towards politically motivated strike is negative. The CFA clarifies that "a prohibition of strikes is not an infringement of the freedom of association if the reasons are as follows: ① their non-occupational character; ② they are designed to coerce a government with respect to a political matter; or ③ they are directed against the government's policy and are not in

themselves. Indeed, apart from abovementioned different views, these terms sometimes are promiscuously used by some scholars. For more information, please see Lammy Betten, *The right to strike in Community law: the incorporation of fundamental rights in the legal order of the European Communities* (Amsterdam: North-Holland, 1985), from 144 to 150.

⁴⁸⁹ Lammy Betten, *The right to strike in Community law: the incorporation of fundamental rights in the legal order of the European Communities* (Amsterdam: North-Holland, 1985), at 201.

⁴⁹⁰ In fact, "it is safe to state that the political strike *pur sang* is prohibited in every [Europe Union] Member State". From Lammy Betten, *The right to strike in Community law: the incorporation of fundamental rights in the legal order of the European Communities* (Amsterdam: North-Holland, 1985), at 151.

⁴⁹¹ Collective Labor Agreement, Strike and Lock-out Act of Ankara, art.25 (3). Online: <<http://www.ilo.org/public/english/region/eurpro/ankara/legislation/act2822.htm>> (date accessed: June 22, 2006).

⁴⁹² *Ibid.*

⁴⁹³ Liliane Jung, National Labor Law Profile: Federal Republic of Germany, online: <<http://www.ilo.org/public/english/dialogue/ifpdial/ll/ger.htm>> (date accessed: June 22, 2006). Of course, in some developed countries such as Germany, a solidarity strike is considered to be lawful on two conditions: (a) the original strike must be lawful, and (b) the addressee of the solidarity action must in some way be capable of influencing the fulfillment of the demands of the original strikers. From Lammy Betten, *The right to strike in Community law: the incorporation of fundamental rights in the legal order of the European Communities* (Amsterdam: North-Holland, 1985), at 163.

furtherance of a labor dispute”.⁴⁹⁴ “The term ‘political strike’ is the term associated with illegality and disapprobation [and] the reason is that ‘the political strikes’ are viewed as disruptive of democratic processes”.⁴⁹⁵ Based on the circumstances in today’s China, especially CCP’s emphasis on social stability, it is believed that to follow those legislative models is rational.

Second, the participants of a strike shall be confined to those workers either under the labor contract or those employees although not covered by a labor contract but has established a *de facto* labor employment relationship with employers. As for the civil servants and those employed by certain essential services -- “services whose interruption would endanger life, personal safety or health of the whole or part of the population”⁴⁹⁶, such as hospital sector, furnishing of water and electricity, and the telephone service and air traffic controllers,⁴⁹⁷ shall be prohibited from enjoying this right.⁴⁹⁸ Under common law, it is well-known that there is a traditional ban on public employees’ strikes which is justified by the principle argument referred to as “sovereignty argument”, i.e., a strike by public employees constitutes a denial of governmental authority and would contravene common good.⁴⁹⁹ Of course, the writer has observed that this traditional blanket ban on public employee strikes has changed to some extent in the case of *County*

⁴⁹⁴ *Supra* 489, at 201.

⁴⁹⁵ Chris White, “The Right to Political Strike”, online: <<http://evatt.labor.net.au/publications/papers/139.html>> (date accessed: June 22, 2006);

⁴⁹⁶ This is a definition offered by the Freedom of Association Committee. From S. Nakatani, Thiagarajah & C.C.Noriel etc., *The Right to strike and lockout: a survey of the current situation in ASEAN* (Geneva: International Labor Organisation, 1988), at 6 & 7.

⁴⁹⁷ *Supra* 58, at 198.

⁴⁹⁸ For instance, in the New Zealand strike legislation, it is specifies that a strike is unlawful if it concerns an essential service and a full list on the essential service is provided by relevant legislation. From A. J. Geare, *The System of Industrial Relations in New Zealand* (Wellington: Butterworths, 1988), at 280 & 281. Under the UK law, statutory restrictions on industrial action are given covering but not limited to areas such as armed forces, police, postal workers, and those endangering life. From Simon Honeyball & John Bowers, *Textbook on Labor Law*, 7th ed. (New York: Oxford University Press, 2002), at 444 & 445; in the Ireland strike legislation, it provides that “breaching of [employment] contract is a criminal offence where the probable consequences are to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury”. From Ivana Bacik, “Labor Law Profile: Ireland”, online: <<http://www.ilo.org/public/english/dialogue/ifpdial/ll/ire.htm>> (date accessed: June 23, 2006).

⁴⁹⁹ Daniel P. Ryan, “Has County Sanitation District (No. 2) v. Los Angeles County Employees Association Trashed the Traditional Prohibitions Upon Public Sector Strikes?” (1987) 62 Notre Dame L. Rev. 435.

Sanitation District No. 2 v. Los Angeles County Employees' Association, Local 660, where the California Supreme Court concluded that the threat posed to the public by public employees' strikes has not provided enough justification to warrant a blanket prohibition of public employee strikes, thereby granting public employees a limited right to strike under certain circumstances.⁵⁰⁰ Despite this change, the writer nevertheless suggests that under the current circumstances of China -- ① social stability and a healthy and safe community are critical to China's current economic development and its peaceful rise, ② chances for public employee to strike are rare since almost all of them enjoy relatively good salary, safe working conditions and well-designed social security system, a blanket ban on strikes of public employees is necessary, reasonable and tallies with China's contemporary national condition. Therefore, to critically borrow common law's experience without taking into consideration certain unsuitable changes is strongly recommended in this thesis.

Third, the timing of strike shall be limited. For example, according to the National Labor Relations Act of America, "a strike that violates a no-strike provision of a contract is not protected by the Act, and the striking employees can be discharged or otherwise disciplined, unless the strike is called to protest certain kinds of unfair labor practices committed by the employer."⁵⁰¹ By the same token, in the case of China, if a collective contract is reached through collective bargaining and a no-strike clause is included, during the period of the contract, right to strike shall be prohibited accordingly. Of course, if the conditions of the contract are seriously violated by the employer, a right to strike is hereby justified based on the principle of fairness. Moreover, a work stoppage whose sole purpose is to avoid abnormally dangerous conditions

⁵⁰⁰ *Ibid.*

⁵⁰¹ "Basic Guide to the National Labor Relations Act (NLRA)", online: <http://www.nlr.gov/nlr/shared_files/brochures/basicguide.asp#righttostrike> (date accessed: September 30, 2005). In fact, in the American context, an employer can bring a suit for breach of contract or initiate an arbitration proceeding to recover damages from the union if the union authorizes a work stoppage which violates an express or implied peace clause. Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston : Kluwer Law International, 1996), at 339.

cannot be the basis for an unfair labor practice charge even there is a peace clause included in the collective agreement.⁵⁰² Besides, during the period of national emergency such as natural calamity, wartime, serious conflict and insurrection where the normal conditions for the functioning of the society are absent, right to strike shall be suspended for a limited period and to the extent necessary to meet the requirements of the situation for the sake of public interests and national security.⁵⁰³

Fourth, strikers' behavior shall also be well confined within peaceful action. In the course of a strike, workers who engage into serious misconduct, such as "physically blocking persons from entering or leaving a struck plant"⁵⁰⁴, "threatening violence against non-striking employees"⁵⁰⁵ and intentional "attacking management representatives"⁵⁰⁶, may lead to the unlawfulness of the strike and shall be expressly prohibited by the future Chinese strike legislation. Logically, if a striker's misconduct constitutes a criminal offence, the Chinese penal code could be enforced against the striker.⁵⁰⁷ Also, an employer shall be allowed to sue based on the cause of action of

⁵⁰² For more information, please see Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston: Kluwer Law International, 1996), from 340 to 341.

⁵⁰³ For example, under the UK legislation, in the event of national emergency -- "event of such a nature as to be calculated by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community of a substantial proportion of the community's essentials of life", the state retains very wide powers to make it an offence to take part in a strike or peacefully persuade others to do so. From Simon Honeyball & John Bowers, *Textbook on Labor Law*, 7th ed. (New York: Oxford University Press, 2002), at 445.

⁵⁰⁴ *Supra* 501.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

⁵⁰⁷ For example, according to the US case law, if a striker's misconduct constitutes a criminal offence, the normal criminal law can be enforced against the strike in question; also, the strike can be held liable under the law of tort for any damage "so long as the theory of the action is one that is generally available, is not specific to labor disputes, does not conflict with rights protected by the NLRA -- [National Labor Relations Act], is not rooted in the collectively bargained agreement, and does not turn on the merits of an underlying labor dispute". From Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston: Kluwer Law International, 1996), at 344.

an illegal strike and the damages caused by it, so that the illegal strike as such can be stopped and the normal production will not be impacted seriously.⁵⁰⁸

Fifth, certain restrictions on the procedure of a strike might be important. Under Canadian case law, the only lawful strikes are timely ones -- “they follow exhaustion of compulsory dispute resolution procedures such as conciliation, mediation, dispute inquiries”.⁵⁰⁹ Also under the case law of Swiss as well as the strike legislation of Argentina, a strike is only admissible after conciliation has failed.⁵¹⁰ According to these legislative experiences, it is suggested that in the case of collective labor disputes, the Chinese strike legislation can provide that during the process of negotiation, mediation, arbitration or trial, strikes shall be prohibited.⁵¹¹ Only when these means are not able to solve the problem, could strikes be allowed as a last resort. Moreover, in order to organize a strike well so that it represents the idea of the majority, a ballot system might be introduced so that only when the majority of workers in an enterprise are agreeable to launch a strike, could a strike be legally initiated. In fact, this practice is well regulated under the Trade Union Law of Japan, Canadian legislation as well as British law on strike. For instance, according to Trade Union Law of Japan, union members shall hold a secret balloting before a strike is allowed.⁵¹² In the context of Canadian legislation, a “majority principle” is provided so that only

⁵⁰⁸ *Supra* 486. Indeed, according to the British legislation, in 1993 consumers were giving statutory rights to pursue trade unions in respect of unlawful industrial action and the normal remedy is an interim injunction to restrain such action. From Simon Honeyball & John Bowers, *Textbook on Labor Law*, 7th ed. (New York: Oxford University Press, 2002), at 442.

⁵⁰⁹ Jeffrey A. Spector, “Replacement and Reinstatement of Strikes in the United States, Great Britain, and Canada” (1992) 13 *Comp. Lab. L.J.* 184.

⁵¹⁰ For more information, please see generally in Niels Petersen, “National labor law profile: The Swiss Confederation”, online: <<http://www.ilo.org/public/english/dialogue/ifpdial/ll/ch.htm>> (date accessed: June 22, 2006) and Arturo Bronstein, “National Labor Law Profile: Republic of Argentina”, online: <<http://www.ilo.org/public/english/dialogue/ifpdial/ll/arg.htm>> (date accessed: June 22, 2006).

⁵¹¹ In fact, under the IR Act 1973 of New Zealand, it specifies that strikes are illegal during conciliation proceedings. From A. J. Geare, *The System of Industrial Relations in New Zealand* (Wellington: Butterworths, 1988), at 277.

⁵¹² Please see generally in Michael R. Curran, “On Common Ground: Using Cultural Bias Factors to Deconstruct Asia-Pacific Labor Law” (1996-1997) 30 *Geo. Wash. J. Int'l L. & Econ.* 349; Trade Union Law of Japan, art. 5, cited from Meng Fanhai, Discussion on Chinese Strike Legislation (*Guan Yu Zhong*

when the majority of the bargaining units vote in favor of a strike could a strike be legally launched.⁵¹³ In the case of British legislation, the immunity of unions and individual strike organizers could only be granted when a majority of union members have approved such an industrial action in a properly held ballot in secret.⁵¹⁴ Of course, in order to be fair to both sides and also for the sake of reducing the unnecessary side effects of a strike, an advance notice of a strike from the employee's side to the employers might be introduced into the future Chinese strike legislation.⁵¹⁵ As the CFA suggests, the future Chinese strike legislation could incorporate some procedural requirements before a union is able to declare a strike, such as the exhaustion of conciliation or mediation procedure and a cooling off period etc.⁵¹⁶

Sixth, since workers are entitled to the freedom to launch a strike, they shall be entitled to have the same freedom to opt not to attend a strike. "Thus, it is an unfair labor practice for a union [or other striking workers] to coerce or attempt to coerce a worker into joining a strike."⁵¹⁷

Guo De Ba Gong Li Fa Wen Ti Tan Tao), online: <<http://www.hroot.com/publish/html/5608.htm>> (date accessed: February 19, 2006).

⁵¹³ *Ibid.*

⁵¹⁴ Simon Honeyball & John Bowers, *Textbook on Labor Law*, 7th ed. (New York: Oxford University Press, 2002), at 438.

⁵¹⁵ For example, according to the UK law, the trade union is under the obligation to take steps as are reasonably necessary to ensure that the employer receives a specified advance notice of industrial action which includes information that would help the employer to make plans and bring information to the attention of those of his employees. From Simon Honeyball & John Bowers, *Textbook on Labor Law*, 7th ed. (New York : Oxford University Press, 2002), at 441 & 442; According to the strike legislation in Finland, "any one intending to commence a strike ... has to give notice to the opposite party and to the office of the National Conciliation Officers at least 14 days beforehand". Jorma Oskari Saloheimo, National Labor Law Profile: Republic of Finland, online: <http://www.ilo.org/public/english/dialogue/ifpdial/II/fin.htm#_ftn1> (date accessed: June 22, 2006); In terms of the US legislation, it is "an unfair labor practice to institute a work stoppage seeking a change in terms or conditions of work ... without first giving the other side a sixty day notice of intention to terminate or modify the existing collectively bargained agreement and without giving at least thirty days' prior notice of the labor dispute to the Federal Mediation and Conciliation Service and to any state mediation agency". From Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston: Kluwer Law International, 1996), at 336.

⁵¹⁶ *Ibid.*

⁵¹⁷ For more information, please see From Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston: Kluwer Law International, 1996), from 346 to 347.

The third step is to provide a lawful strike with certain legal protection. Admittedly, in spite of its values, strike is nevertheless a destructive power to the production of an enterprise. Therefore, it is better to entitle strikers engaged in a lawful strike to certain legislative immunity during the course of a lawful strike so that certain unavoidable consequences of a lawful strike can be immune from any civil, administrative or criminal liability. As the ILO supervisory bodies observes, “arrests and dismissals of strikers on a large scale involve serious risks of abuse, and place freedom of association in grave jeopardy; and generally, the authorities should not have recourse to imprisonment for the mere fact of organizing or participating in a peaceful strike”.⁵¹⁸

Besides, after a lawful strike, strikers shall be allowed to return to its former working positions and to get the same salary and treatment as before. According to the American experience, a striker who returns to work shall be treated as a returning worker -- returning from eligible leave, which implies that there shall be no change in the striker’s tenure or seniority status;⁵¹⁹ otherwise, right to strike would be under certain potential threat from the employer’s side once the employer hires a permanent replacement and refuses to reinstate the striker at the end of a strike.⁵²⁰ This legislative protection is especially important under the Chinese context. Based on Professor Atleson’s theory, to allow employer to hire permanent replacement during the course of a strike has its most devastating impact on those employees in the weakest bargaining position, where

⁵¹⁸ *Supra* 58, at 200.

⁵¹⁹ From Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston: Kluwer Law International, 1996), at 335. To illustrate, if an employer gave to all workers who did not participate in a strike, and to all who abandon the strike early, seniority privileges greater than those enjoyed by the workers who participate in the strike from its beginning to the end, it is regarded as a violation of the principle of regarding strikers as returning workers.

⁵²⁰ Actually, although under the US National Labor Relations Act (NLRA), right to strike has been guaranteed, whilst through the Mackay Doctrine established by its case law in the case of *NLRB v. Mackay Radio and Telegraph Co.*, employers have several economic countermeasures during the course of a strike, among other things, right to hire permanent replacement, which is commented as affording the employer of striking employees a nearly equivalent weapon. As a matter of fact, the Mackay Doctrine has attracted various criticisms from both academia and US’ National Labor Relation Board (NLRB) on the ground that permanent replacement actually threatens an employee with loss of his job if he exercises right to strike, constitutes *de facto* serious interference towards right to strike entitled under NLRA and discourages collective bargaining. From Jeffrey A. Spector, “Replacement and Reinstatement of Strikes in the United States, Great Britain, and Canada” (1992) 13 *Comp. Lab. L.J.* 184.

“the union is relatively weak, the community is not pro-union, the strikers are unskilled, and the supply of unemployed persons in the labor market is high”, which unfortunately is the exact picture of today’s China.⁵²¹ Of course, in order to reach a balance, employer shall have the right to adopt certain countermeasures such as to employ temporary replacement to keep its business operating, lockout⁵²² -- right to close the employer’s place of business during the course of a strike, so that its losses could be decreased to the minimum level. Following the American experience, in terms of employer’s right to employ a replacement, once the strike in question is to protest against a substantial employer’s unfair labor practice and the employer is proved guilty of the said unfair labor practice, at the end of the strike, the striking worker shall be entitled to have his job back even if he is replaced by another worker during the strike.⁵²³ In terms of the “right to close”, it needs certain limitations and qualifications to avoid abuses of this right too. For example, through a series of cases, such as the case of *Fiberboards Paper Products Corp. v. NLRB*, *Textile Workers Union v. Darlington Manufacturing Co.* and *NLRB v. William J. Burns International Detective Agency, Inc.* etc., the US appellate courts decided that when an employer was making a “closing enterprise” decision, as long as management reasons for such a decision were economical, there was no requirement of collective bargaining on this decision in

⁵²¹ *Supra* 509.

⁵²² Under the New Zealand strike legislation, the definition of a lockout is: the act of an employer -- (a) in closing the employer’s place of business or suspending or discontinuing the employer’ business or any branch thereof; or (b) in discontinuing the employment of any workers, whether wholly or partially; or (c) in breaking some or all of the employer’s contracts of service; or (d) in refusing or failing to engage workers for any work for which the employer usually employs workers -- with a view to compelling any workers, or to aid another employer I compelling any workers, to accept terms of employment or comply with any demands made by the employer. From A. J. Geare, *The System of Industrial Relations in New Zealand* (Wellington: Butterworths, 1988), at 276.

⁵²³ According to US experience, the US Supreme Court has decided that “an employer faced with a strike is entitled to try to keep its business operating ... thus, as a general rule, it is not treated as anti-union discrimination for an employer to refuse to reinstate a worker while that worker’s job is occupied by a replacement hired the worker was on strike”. However, “if the strike is in protest against a substantial employer unfair labor practice, and if the employer in fact is guilty of that unfair labor practice, the employee is entitled to his job back even if he is replaced by another worker during the strike”. From Alvin L. Goldman, *Labor and Employment Law in the United States* (Boston: Kluwer Law International, 1996), at 332.

advance.⁵²⁴ By the same token, if the decision to close is for the anti-union purpose, the employer shall have no right to act unilaterally -- a requirement of beforehand collective bargaining on this issue shall be met.⁵²⁵ It is suggested that the legislative experience as such shall be borrowed by the future Chinese strike legislation in order to reach a balance between right to strike and right to close.

Considering that the strike legislation *per se* is complicated and in need of being modified from time to time, the three steps proposed above are obviously incomplete. To be honest, various details and issues with minor importance have not been covered. For example, (1) the issue of whether the striking workers have any right to claim payment during the strike if the strike is to protest against an employer's unlawful conduct; (2) the issue of partial strike -- the refusal to work at a normal work pace -- is not discussed as well. Indeed, the purpose of this part -- "Several Steps to Regulate Right to Strike in China" is mainly to highlight the most important aspects in China's future strike legislation based on the writer's study on the strike laws of several countries such as UK, US, Canada, Japan, Ireland and Argentina etc.⁵²⁶ As for how to regulate this strike legislation under the Chinese legal system in practice (either through constitutional amendment, Labor Law reform or other relevant legislative changes, such as under the frame of collective contract legislation, or even enact a totally new law mainly on strike) it shall be decided by the Chinese legislator in the future. Regardless of the form of China's future strike legislation, it is better to incorporate the said three steps so that it is able to help China's economic reform develop in a healthy way -- a way not to sacrifice the Chinese working class' interests.

⁵²⁴ Timothy J. Heinsz, "The Partial-Closing Conundrum: the Duty of Employers and Unions to Bargain in Good Faith" (1981) 1981 Duke L.J. 71.

⁵²⁵ *Ibid.*

⁵²⁶ Please see generally in Discussion on Strike Legislation in China (*Guanyu Zhongguo De Bagong Lifa Wenti De Tanta*), online: <<http://www.labornet.com.cn/ldzy/ziliao/zl7.asp>> (date accessed: February 23, 2006); Liu Yajun & Zhang Li, "Finding The Long Lost Right to Strike" (*Xunzhao Shiluo De Bagongquan*) http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4010 (date accessed: July 12, 2005).

(3) Certain Conundrums Linking the Implementation of Right to Strike under the Chinese

Context

As far as the implementation of right to strike is concerned, trade union plays a critical role. As above mentioned, based on the writers' study on the strike legislation from other countries, most strikes shall be organized by trade unions so that they can truly represent their members' interests.⁵²⁷ Unfortunately, the lack of independence of the Chinese trade union, which has been proved in the text above, creates a practical difficulty in implementing right to strike. Therefore, the writer has to emphasize once again the value of a union's independence as well as the importance that the relevant legislative amendment proposed in the previous part. Only when the suggested legislative amendment is followed and trade unions start to represent their members sincerely without unreasonable interference, could the right to strike be implemented in practice.

D. Conclusion on Part 3.3

In this part, the writer discusses the general legislation on collective bargaining in China and points out the related inefficacy of the legislation. In the writer's view, the independence of the Chinese trade union plays a critical role in developing the efficacy of the Chinese legislation on collective bargaining. In the absence of a trade union in a work place, especially in the non-public sector, the writer proposes the "independent union system." The writer, however, is aware that the feasibility of this ideal model is seriously blocked due to CCP's sensitivity on the development of independent organizations within its regime. As such, a backup plan is proposed. A specific model law promulgated by the ACFTU solely targeting union in non-public sector and especially designed to accommodate its feature is expected to be enacted. A "simultaneous approach" is proposed as well to borrow the government's power in assisting the establishment of a trade union in a private enterprise. Moreover, it is proved that right to strike is critical to the success of a collective bargaining system. After a historical review on the attitudes of the four Chinese

⁵²⁷ For more information, please see *Supra* 486.

constitutions towards right to strike and a review on the *de facto* statutory attitudes towards right to strike, it is argued that under the current Chinese legislation, this right is not supported by the Chinese law at all. The writer hereby suggests the CCP to reevaluate the importance of right to strike in the context of contemporary Chinese society. Moreover, the writer proposes several legislative proposals based on a number of countries' legislative experiences on strike to help protect the interests of the Chinese working class during the transitional period.

3.4 Concluding Remarks on Chapter Three

First, the general international law on freedom of association and collective bargaining is introduced. After that, the writer starts to analyze the trade union monopoly phenomenon in China and queries the Chinese union's "dual role" practice. Two models in dealing with the problems as such are proposed, with the ideal model of legitimizing independent trade union system and the realistic model of introducing certain amendments on the current labor law in China. In the third part of chapter 3, the writer discusses the collective bargaining system in China, points out its inefficacy and proposes her solution to activate this system, including strengthening the independence of the Chinese trade union system, enacting a specific administrative rule solely targeting trade union problem in the non-public sector as well as introducing right to strike in China.

Chapter 4: Forced or Compulsory Labor in China versus ILO Convention No. 29 and No.

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4.1 General International Law on Forced Labor

A. Under the Treaty Regime

i. General Introduction of International Treaties Relating to Forced or Compulsory Labor

At the end of World War II, the UDHR was given birth with its article 4 explicitly prohibiting slavery in all its forms.⁵²⁸ After the majority of states all over the world have officially abolished slavery and its related trade, certain slave-like practices, including serfdom, bonded labor as well as forced labor started to attract international attention. As a response to such phenomena, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was adopted under the UN treaty regime with the purpose of targeting “slavery, the slave trade and institutions and practices similar to slavery which have not yet been eliminated in all parts of the world”.⁵²⁹ Besides, under one of the international bills of rights -- ICCPR, once again, slavery, slave trade in all its forms, servitude and forced or compulsory labor are expressly prohibited.⁵³⁰

Moreover, the ILO conventions especially aiming at forced labor crystallize the general terms within UDHR and ICCPR etc. Under ILO Convention No. 29, 1930, the definition of “forced and compulsory labor” is provided as follows: “the term forced or compulsory labor shall mean 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”.⁵³¹ The same wording could also be found in article 5 of the Slavery Convention adopted by the League of Nations in 1926, which was

⁵²⁸ UDHR, 1949, art.4.

⁵²⁹ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, preamble, para. 6.

⁵³⁰ ICCPR, 1966, art.8.

⁵³¹ ILO Convention No.29, art. 2(1).

retained by the ILO in order to maintain similar terminology.⁵³² “As used in the Convention, the terms ‘forced’ and ‘compulsory’ are synonymous, and this kind of compulsion can be encountered in all kinds of situations: in cities as well as in rural areas, in factories, workshops, business and other closed undertakings as well as on the streets and in full public view.”⁵³³ As for the term “work or service” under the general definition, it is observed that the generality of these terms without providing scope or limitation in detail might cause some problems in practice.⁵³⁴ So far, however, there is no comprehensive interpretation provided by the ILO supervisory bodies.⁵³⁵ The only interpretation available is case-based.⁵³⁶ For example, in the case of compulsory vocational training which includes practical exercises in condition similar to employment, according to the interpretation provided by the Committee of Experts, it shall be “by reference to the elements involved in a particular training scheme that one may determine whether it is unequivocally one of vocational training, or involves the exaction of work or service within the definition of ‘forced or compulsory labor’, infringing the Convention”.⁵³⁷ Another element in the definition is that the prohibited forced or compulsory labor must be exacted “under the menace of any penalty”; it is agreed by the Committee of Experts in its 1979 General Survey that the Convention refers to the menace of a “penalty” involving “a sanction that goes beyond the normal elements of an employment relationship or contract for the delivery of services ... and it does not only refer to ‘penalties’ in the strict sense of penal sanction, (but) also includes deprivation of any rights or privileges”.⁵³⁸ Besides, as for some national constitutions including the duty to work as a counterpart to the right to work, the Committee has concluded that so long

⁵³² *Supra* 58, at 136.

⁵³³ *Supra* 531.

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*, at 137.

as it does not take the form of a legal obligation enforced by sanctions, such constitutional duty is compatible with the spirit of the Convention.⁵³⁹

ii. Exceptions to Forced or Compulsory Labor under ILO Convention No. 29

Convention No. 29 provides several exceptions to “forced labor” as well -- military service exception⁵⁴⁰, normal civic obligations exception⁵⁴¹, prison labor exception⁵⁴², emergency exception⁵⁴³ and minor communal services exception⁵⁴⁴. In the case of military service exception -- “any work or service exacted in virtue of compulsory military service laws for work of a purely military character”, according to the Committee of Experts, it applies only to members of the armed services recruited under compulsory military service laws, whereas it does not apply to career military personnel, nor to soldiers enlisting voluntarily.⁵⁴⁵ Since it is required that the exclusion of compulsory military service is compatible with the Convention only when work concerned is of a purely military character, it implies that the employment of conscripts on public works, for instance, is contrary to the Convention.⁵⁴⁶ “Otherwise, governments could establish systems of forced or compulsory labor for public works contrary to the basic purpose of the Convention, which is to eliminate such compulsion.”⁵⁴⁷

In terms of the exception of normal civic obligation, examples such as minor communal services, work in the event of an emergency, compulsory jury service and the duty to assist a person in

⁵³⁹ *Ibid.* It shall be noted that under the article 42 of the Chinese Constitution, citizens of the PRC have the right as well as the duty to work. According to the interpretation provided by the Committee of Experts above, Constitution as such is consistent with the spirit of the ILO Convention 29.

⁵⁴⁰ *Ibid.* art. 2(2)(a).

⁵⁴¹ *Ibid.* art. 2(2)(b).

⁵⁴² *Ibid.* art. 2(2)(c).

⁵⁴³ *Ibid.* art. 2(2)(d).

⁵⁴⁴ *Ibid.* art. 2(2)(e).

⁵⁴⁵ *Supra* 58, at 138.

⁵⁴⁶ *Ibid.*, at 138.

⁵⁴⁷ *Ibid.*

danger or to assist in the enforcement of law and order are regarded as within the scope of “normal civic obligations” by the Committee of Experts.⁵⁴⁸

In the case of the third exception, i.e., prison labor exception -- “any work or service exacted from any person as a consequence of a conviction in a court of law”, to understand it literally, “conviction” implies that it is inconsistent with the Convention to impose prison labor on persons who have been deprived of liberty but have not been convicted.⁵⁴⁹ Indeed, the 1979 General Survey conducted by the Committee of Experts further confirmed that the usage of the term “conviction” implied that the person concerned must have been found guilty of a criminal offense.⁵⁵⁰ In the absence of such a finding, compulsory labor imposed cannot be regarded as legitimate exception, even if it is a result of a decision made by a court of law.⁵⁵¹ Besides, the “conviction” is required to be a decision made “in a court of law”. Thus, neither administrative decision, by no matter how high an authority, nor a decision by any other authority, is sufficient.⁵⁵² In addition, it is submitted that the purpose of such provision is to guarantee respect for the rules of due process.⁵⁵³ Furthermore, prison labor must be carried out under the supervision and control of a public authority and the prisoner must not be hired to or placed at the disposal of private individuals, companies or associations.⁵⁵⁴ During the course of adopting this provision, the International Labor Conference expressly rejected an amendment permitting the hiring of prison labor to private undertakings engaged in the execution of public works.⁵⁵⁵

⁵⁴⁸ *Ibid.*, at 140.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

⁵⁵⁴ ILO Convention No. 29, art. 2 (2) (c).

⁵⁵⁵ *Supra* 58, at 141.

As for the “emergency” exception -- “in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population”, the Committee of Experts has emphasized the restrictive nature of the notion of emergency, and has insisted that the power to call up labor should be limited to genuine cases of emergency -- “a sudden, unforeseen happening calling for instant measures”.⁵⁵⁶

As for the exception of “minor communal service”, the performance of which must be “in the direct of the said community” and a precondition must be met -- the members of the community or their direct representatives shall have the right to be consulted with regard to the need for such services.⁵⁵⁷ The Committee of Experts has insisted that the concerned service must be of “minor importance”: mainly maintenance work and in some exceptional cases -- to the erection of certain buildings intended to improve the social conditions of the population of the community *per se*, such as a small school, a medical consultation and treatment room etc.⁵⁵⁸

It is required as well that the competent authorities of a member state “shall not impose or permit the imposition of forced or compulsory labor for the benefit of private individuals, companies or associations”⁵⁵⁹ and no concession involving any form of forced or compulsory labor for the production or the collection of products shall be granted to private individuals, companies or associations.⁵⁶⁰ Besides, chiefs who exercise administrative functions may, with the express permission of the competent authority, have recourse to forced or compulsory labor, subjecting to several tests, i.e., a) “direct interest”, b) “present or imminent necessity”, c) “not too heavy a

⁵⁵⁶ *Ibid.*

⁵⁵⁷ ILO Convention No. 29, art. 2 (2) (e).

⁵⁵⁸ *Supra* 58, at 142.

⁵⁵⁹ ILO Convention No.29, art. 4.

⁵⁶⁰ *Ibid.* art. 5.

burden”, d) “no removal from worker’s habitual residence” and e) “exigencies of religion, social life and agriculture”.⁵⁶¹ Meanwhile, where forced or compulsory labor is exacted as a tax, and where recourse is had to forced or compulsory labor for the execution of public works by chiefs (which is already required by the convention *per se* to be abolished progressively) who exercise administrative functions, the authority concerned is also required to meet the five tests abovementioned.⁵⁶² In addition, this convention also regulates the premedical examination, remuneration, daily working hour, rest, maximum working period within one year, compensation for accident and sickness, medical advice in the case of necessary transfer, working safety, living condition, worker’s physical development and underground working prohibition and other relevant issues in detail.⁵⁶³

iii. Immediate and Complete Abolition of Forced or Compulsory Labor in the Forms Provided by ILO Convention No. 105

In ILO Convention No. 105, it further provides that member states shall take effective measures to secure the immediate and complete abolition of forced or compulsory labor⁵⁶⁴ in the forms as follows:

“(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;

⁵⁶¹ *Ibid.* art. 7 & 10.

⁵⁶² *Ibid.* art. 10.

⁵⁶³ *Ibid.* arr.11-21.

⁵⁶⁴ ILO Convention No. 105, art. 2.

(e) as a means of racial, social, national or religious discrimination.”⁵⁶⁵

In terms of the forced or compulsory labor for political purpose, the ILO supervisory bodies have developed certain jurisprudence on this point.⁵⁶⁶ One “relates to the range of activities which should be protected against sanctions involving forced or compulsory labor”, i.e., “activities relating to the right of free expression of political or ideological ideas, whether verbally or by other means, and particularly through the press or other writings”.⁵⁶⁷ The other relates to “the limitations or restrictions which may be accepted on these rights and freedoms in normal times as reasonable safeguards against the abuse of these rights”, such as “laws on libel, incitation to violence, rebellion and racial hatred, restrictions on meetings and demonstrations in public places etc”.⁵⁶⁸ The Committee of Experts has pointed out that when dealing with such an issue on deciding the reasonable limitations, it is important to “take into account criteria similar to those contained in the UDHR and the ICCPR, which accept certain limitations on the exercise of rights as such, in particular in order to preserve the values of democratic societies”.⁵⁶⁹ Linking with the above comments, “the Committee has stated that the Convention does not prohibit punishment involving forced or compulsory labor of persons who use violence or engage in preparatory acts aimed at violence, nor judicial imposition of certain restrictions on persons convicted of crimes of this kind.”⁵⁷⁰ Thus, an allegation stating that this provision defends any kind of political violence is surely problematic.⁵⁷¹ “What the Convention does prohibit is the imposition of forced labor for the **mere** expression of political or ideological opinions.”⁵⁷² Of course, when a state of emergency or martial law is declared, general restrictions or limitations of expression or other

⁵⁶⁵ *Ibid.* art. 1.

⁵⁶⁶ *Supra* 58, at 151.

⁵⁶⁷ *Ibid.*, at 151.

⁵⁶⁸ *Ibid.*, at 152.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*, at 153.

rights relating to the Convention might be imposed; however, as the Committee of Experts stated, “the recourse to such exceptional powers should be limited under the Convention to what is necessary to meet circumstances that would endanger the existence or well-being of the whole or part of the populations”.⁵⁷³

In the case of forced or compulsory labor for the purposes of economic development, the *Ad Hoc* Committee on Forced Labor noted that “the system of forced labor for economic ends was the result of various penal measures implying forced recruitment and the compulsory mobilization of manpower”.⁵⁷⁴ “These measures, combined with other restrictions on freedom of employment and vigorous labor discipline, and with severe penalties in case of refusal to comply, went beyond the ‘normal civic obligation’ and the rules applicable in times of emergency” permitted within the scope of Convention No. 29.⁵⁷⁵

As for forced or compulsory labor as a means of labor discipline, generally speaking, it can be divided into two types.⁵⁷⁶ One “consists of measures to ensure the due performance by a worker of his service under compulsion of law (in the form of physical constraint or the menace of a penalty)”; the other “consists of a sanction for breaches of labor discipline with penalties involving an obligation to perform work”.⁵⁷⁷ To the latter, the Committee of Experts has distinguished between penalties imposed to enforce labor disciplines which are prohibited by the Convention and penalties imposed for the protection of a general public interests, which might not fall within the Convention’s prohibition if certain preconditions are met -- “there is a real

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*, at 154.

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.*, at 156.

⁵⁷⁷ *Ibid.*

danger, and that the workers concerned remain able to terminate their employment by reasonable notice”.⁵⁷⁸

As for the forced or compulsory labor adopted as a punishment for having participated in a strike, certain references are useful for evaluating different situations that arise in practice.⁵⁷⁹ For example, the International Labor Conference “considered that ‘in certain circumstances penalties could be imposed for participation in illegal strike and that these penalties might include normal prison labor’; and that in particular such penalties might be imposed where there were ‘national laws prohibiting strikes in certain sectors or during conciliation proceedings’ or ‘where trade unions voluntarily agreed to renounce the right to strike in certain circumstances’”.⁵⁸⁰ In addition, the Committee of Experts has agreed that the application of sanctions involving forced or compulsory labor as a punishment for having participated in a purely political strike is in principle compatible with this provision of the Convention.⁵⁸¹

When dealing with the forced or compulsory labor as a means of racial, social, national or religious discrimination, the Committee of Experts “has considered that the prohibition envisaged in this provision is applicable to any discrimination based on one of the stated motives, in relation to compulsory military service, labor imposed as part of normal civic obligations, work imposed in cases of force majeure, or in obligatory minor communal services”.⁵⁸²

iv. Regional Treaties against Slavery or Slavery-Like Practice

In fact, not only the international treaties, but the regional ones as well provide legal protections against slavery or slave-like practice. For example, American Convention on Human Rights 1969

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid.*, at 158.

⁵⁸⁰ *Ibid.*, at 158.

⁵⁸¹ *Ibid.*

⁵⁸² *Ibid.*, at 159.

states that “no one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms” and “no one shall be required to perform forced or compulsory labor”.⁵⁸³ In addition, both African Charter on Human and People’s Rights 1981 and European Convention for the Protection of Human Rights and Fundamental Freedom 1950 publicly condemned the slavery and forced labor practice.⁵⁸⁴ Even in the Muslim world, the sixth World Muslim Congress -- the oldest Muslim organization founded in 1926 -- has pledged global support for all anti-slavery movements.⁵⁸⁵

B. Under Customary International Law (CIL)

As widely accepted, CIL consists of two elements, i.e., usage -- state practice and *opinio juris* -- sense of legal obligation. State practice refers to consistent and general practice by states which traditionally need a certain period of time as “duration test” before it is qualified as one of the element of CIL; whilst *opinio juris* means that the practice is followed by states out of a sense of legal obligation.⁵⁸⁶ Slavery and slave-like practice, such as forced labor, are arguably prohibited under CIL. Back to the 19th century, a host of countries have already started abolishing slavery and slave trade. “In 1781, Holy Roman Emperor Joseph II abolished serfdom in the Austrian Habsburg dominions”.⁵⁸⁷ During French Revolution, the famous Declaration of the Rights of Man was adopted with its well-known statement “men are born and remain free and equal in rights”.⁵⁸⁸ Later, Denmark, Britain, Sweden, Netherlands, Spain, Argentina, Peru, Chile, Brazil, Russia, America etc. had officially abolished slavery and slave trade.⁵⁸⁹ In the first half of the 20th century, the success of the campaign of the Congo Reform Association (CRA) to end forced

⁵⁸³ American Convention on Human Rights, 1969, art.6.

⁵⁸⁴ African Charter on Human and People’s Rights, 1981, art. 5; European Convention on Human Rights, 1950, art. 4.

⁵⁸⁵ “Slavery throughout History”, online: <<http://www.freetheslaves.net/slavery/timeline/>> (date accessed: October 5, 2005).

⁵⁸⁶ D. J. Harris, *Cases and Materials on International Law*, 5th edition (London: Sweet and Maxwell, 1998), from 24 to 45.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

labor 1909, the birth of the International Convention for the Suppression of the White Slave Trade, Forced Labor Convention under ILO and UDHR etc., and the legally abolishing slavery in Sierra Leone even Burma⁵⁹⁰, witnessed the long-lived state practice of abolishing slavery, slave trade and slave-like practice. Besides, given the law-making nature of most of the slavery, or slave-like practice related treaties mentioned in the previous part --“Under the Treaty Regime”, these multilateral treaties are qualified to be considered as international legislation signed and ratified by its member states under the sense of legal obligation. Accordingly, the second criterion -- *opinio juris* is thereby met.

Moreover, it is believed that one of the least controversial peremptory norms of CIL is the prohibition against slavery and slave-like practices.⁵⁹¹ Some scholars argue that the general prohibition against slavery, slave trade and slave-like practice, such as forced labor, has been widely accepted as a *jus cogens* norm. The ILO has also publicly stated that forced labor practice is a violation of *jus cogens* norm under international law, especially “when it is practiced in a manner equivalent to slavery; signified, for example, by imposing forced labor for an indefinite amount of time (thereby presuming ownership rights by the perpetrator and a loss of personhood of the victim) and in highly abusive conditions”.⁵⁹²

Under the international human rights law regime, it is arguably right that in spite of the disagreement over priorities of human rights among western industrialized states who traditionally emphasize civil and political rights, and the developing world whose focus is often placed on social and economic rights, the international instruments and state practices reveal a

⁵⁹⁰ *Ibid.*

⁵⁹¹ Dinusha Panditaratne, “Rights-Based Approaches to Examining Waiver Clause in Peace Treaties: Lessons from The Japanese Forced Labor Litigation in Californian Courts” (2005) 28 B.C. Int'l & Comp. L. Rev. 299.

⁵⁹² *Ibid.*

core of civil, political and economic rights that enjoy almost-universal recognition, *inter alia*, prohibition against forced labor.⁵⁹³

4.2 Forced Labor in China: Three Types of Forced Labor

A. The First Type of Forced Labor -- Normal Workers as Its Subjects

i. Introduction to the First Type of Forced Labor and Relevant Legislation in China

In the case of the first type of forced labor, its subject is normal workers under employment contract either in written or in oral fashion. Both the Chinese labor law and its 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 use of force, threat or by means of illegally restricting personal freedom.⁵⁹⁴ Besides, if an employer compels workers to work by use of force, threat or by restoring to the means of restricting personal freedom or insults such as punishes physically, beats, illegally searches or takes workers into custody, the public security organ shall detain the persons responsible for such behavior 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.⁵⁹⁵ In terms of the recently passed Labor Contract Law, “if a labor administration authority, another competent authority or a member of its working personnel neglects its/his duties, fails to perform its/his statutory duties or exercises its/his authority in violation of the law, thereby causing harm to a worker ... , liability for damages shall be borne and the leading official directly in charge and other persons directly responsible shall be subjected to administrative penalties in accordance with the law; if a criminal offense is constituted, criminal liability shall be pursued in accordance

⁵⁹³ Sarah H. Cleveland, “Norm Internalization And U.S. Economic Sanctions” (2001) 26 Yale J. Int'l L. 1.

⁵⁹⁴ Labor Law of People's Republic of China, 1995, art. 32. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

⁵⁹⁵ *Ibid.* art. 96. Provisions as such have been re-emphasized by art. 38 & art. 88 of the recently passed Labor Contract Law.

with the law”.⁵⁹⁶ According to the Chinese Criminal Law, 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 enough, the persons who are directly responsible for the said offence shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined.⁵⁹⁷ Other relevant provisions in the Chinese Criminal Law which might be cited to curb the first type of force labor include provisions relating to intentional injury crime⁵⁹⁸ and crime of unlawful detention⁵⁹⁹.

With the development of the market economy in China, forced labor of this type started to emerge and there is a trend that it is spreading gradually. Influenced by some negative capitalistic ideas such as Mammonism,⁶⁰⁰ in order to make profit as much as possible, some privately owned enterprises have engaged in the *de facto* forced labor practice. It is reported that workers in some privately owned enterprises are forced to work overtime.⁶⁰¹ Sometimes, security guards are hired whose main task is not for the security of a factory or its personnel, but to monitor the workers’ behavior and prevent them from running away.⁶⁰² Any worker who is suspected to run away will be subject to physical violence or quarantine.⁶⁰³ The recent shocking news regarding hundreds of people being forced to work under slave like conditions in the brick kilns located at the mountainous area of Shanxi Province once again reflects the severity of the problem as such.⁶⁰⁴ Even worse, news reveals that forced labor as such is not only discovered in small privately

⁵⁹⁶ *Supra* 391, art. 95.

⁵⁹⁷ Criminal Law of People’s Republic of China, 1997, art.244. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

⁵⁹⁸ *Ibid.*, art. 294.

⁵⁹⁹ *Ibid.*, art. 238.

⁶⁰⁰ For more information, please see text below accompanying note 910 to 936.

⁶⁰¹ “Warning: Forced Labor’s Reemerging”, *Worker’s daily*, (China), October 9th, 2001; For more information, please see text below accompanying note 910 to 936.

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*

⁶⁰⁴ *Supra* 16.

owned enterprises located in rural area, but found in relatively bigger enterprises and even joint ventures located in large cities, such as Shanghai, Guangzhou, Fuzhou etc.⁶⁰⁵

To be fair, China's legislation on this aspect is relatively competent. It imposes not only civil liabilities but also proportionate criminal liabilities to those who are responsible for the forced labor practice as such. Thus, it is submitted that legislation *per se* is not the reason for the spread of the forced labor as such in today's China. Implementation of the law is the major issue. As for the issue of implementation, it mainly depends on the aspects covering but not limited to improvement of judicial independence, professionalization of judges, and anti-corruption movement.

ii. How to Deal with the Ineffective Implementation of Legislation against Forced Labor in China

a. Judicial Independence

According to the Chinese Constitution, the courts in China are free from any interference from any administrative agencies, social groups or persons.⁶⁰⁶ Only interference from NPC, as the highest organ of state power, and its standing committee are legally permitted and protected.⁶⁰⁷

This is much like the UK system where parliament supremacy is beyond the confinement of judicial review.⁶⁰⁸ As such, it is fair to say that the Chinese court has been guaranteed judicial independence by Constitution and such independence is only submissive to NPC and its standing committee.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ Constitution of PRC, 1982, art. 126.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ "Parliamentary sovereignty or Parliamentary supremacy is the concept in British constitutional law that a parliament [parliament: A legislative assembly in certain countries (e.g., Great Britain)] has sovereignty. This means it is supreme to all other governmental institutions including the monarch and the courts, and may change or repeal any legislation passed by previous parliaments with a majority." From "Parliamentary Sovereignty", online: <http://www.absoluteastronomy.com/reference/parliamentary_sovereignty> (date accessed: February 23, 2006).

To better understand the issue of judicial independence, one must be clearly aware that the Chinese judicial system is, in practice, placed alongside the pre-existing institutions of the Maoist model of party-state.⁶⁰⁹ In fact, the problem of the Chinese courts in terms of judicial independence is mainly relating to interference from the CCP and local governments as well.

For example, since judges are appointed, promoted and removed not by Supreme People's Court (SPC) or the Chinese Ministry of Justice but by local governmental elite, and the courts are mainly financed by the government, who are under the control of the CCP, logically, when making a court decision, it might be difficult for judges to practise in a neutral way without extrajudicial influence.⁶¹⁰ In other words, judicial impartiality is an impossible mission in the Chinese context. In fact, reports have shown that courts often favor enterprises on which local governments depend their revenues.⁶¹¹ As a logical consequence, it is not difficult to imagine that if enterprises as such adopt forced labor practice, possibly, the court will choose to keep a blind eye, or even if it finally decides against those enterprises, the penalty might be too mild to threat those enterprises and their owners to fully give up forced labor.

It is observed as well that judges and their courts are inclined to be responsive to local influences rather than legal norms. Both the SPC's annual report and the speech presented by the vice president of SPC Mr. Cao Jianming condemned such a phenomenon of local protectionism. In his speech on China's entering into WTO and the rule of law implication, Mr. Cao criticized the courts harshly "for their unwillingness to enforce judgments rendered by courts elsewhere in

⁶⁰⁹ Stanley Lubman, "Prospects for the Rule of Law in China after Accession to the WTO", online: <<http://www.law.berkeley.edu/institutes/cslls/lubmanpaper.doc>> (date accessed: November 1, 2005).

⁶¹⁰ *Ibid.*

⁶¹¹ *Supra* 609.

China against local defendants”⁶¹² For that matter, even if an enterprise is found guilty and fined subsequently for its forced labor practice by a local court elsewhere, the enforcement of such a judgment by the local court where the enterprise is located is nevertheless problematic.

b. Professionalization of Judges and the Issue of Corruption

Most papers dealing with rule of law in China would express their concerns on the lack of professional training of the Chinese judges.⁶¹³ Throughout 1980s, most Chinese judges, in spite of their lacking either a university degree or legal training, were transferred from the CCP or from the military to the positions as judges.⁶¹⁴ It is observed that only ten to fifteen percent of all currently serving Chinese judges have completed their four-year law school education.⁶¹⁵ In other words, the majority of the Chinese judges failed to have enough professional training. Fortunately, all new judges will have to succeed in a unified “National Judicial Examination” (*Sifa Kaoshi*); whilst, to those formerly appointed judges, there is nevertheless no qualification required.⁶¹⁶ In this sense, with neither adequate legal training, nor enough “cultivation of the sense of being members of an independent profession with its own ethics and professional attitude”⁶¹⁷, it is difficult to expect them to practise impartially.

⁶¹² *Supra* 609.

⁶¹³ Please see generally in Guo Zhixiang & Peng Xiaoling, Judge’s Quality -- From A Rule of Law Perspective (*Fa Zhi Shi Ye Zhong De Fa Guan Su Zhi*), Journal of Jiang Su Police Institute (*Jiangsu Jingguan Xueyuan Xuebao*), the first issue of 2003; Chen Bo & Yan Wenjiao, Discussion on Rule of Law and Judicature (*Lun Fazhi He Sifa De Guanxi*), Journal of Yu Lin Teacher’s Institute (*Yu Lin Shizhuan Xuebao*), the first issue of 2000; Liu Xuebin, Discussion on the Necessary Qualities of Judges in Socialist Rule of Law State (*Lun Shehui Zhuyi Fazhi Guojia Faguan De Yingyou Suzhi*), Journal of Jiang Xi Finance University (*Jiangxi Caijin Daxue Xuebao*), the second issue of 2002; Zhang Guojun, Three Contradictions Faced by Chinese Rule of Law (*Zhongguo Fazhi Miandui De Sanchong Maodun*), Nan Pin Teacher’s Institute (*Nan Pin Shizhuan*), the third issue of 2004; Shan Wenhua, Shan Wenhua, “The Role of Law and Foreign Investment in China: View from EU Investors”, East Asian Institute, National University of Singapore.

⁶¹⁴ Karen Halverson, “China’s WTO Accession: Economic, Legal, and Political Implications”, online: <http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicltr/27_2/06_TXT.htm> (date accessed: November 2, 2005).

⁶¹⁵ *Supra* 609.

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

In terms of professionalization of judges, when they have not received enough legal education and have not been cultivated to have the professional ethics that judges should have, as most judges in US for instance, they are much more easily to be corrupted. In other words, it is hard for them to resist the temptation of various bribes, *inter alia*, bribery from those enterprises involved in forced labor practice.

Of course, the writer is aware that corruption in the Chinese legal system is a complicated issue. It is not solely because of the lack of professionalization of the Chinese judges, but also because of some other reasons, such as the institutional problem of the Chinese courts, the monopoly of power by CCP in law and in practice, lack of competent monitoring system available and no clear separation of powers etc., which are beyond this thesis' reach.⁶¹⁸ What the writer tries to argue is that to increase the judicial competence of the Chinese judges can serve as one of the important means in fighting against corruption in the Chinese judicial system. As such, chances for ineffective implementation of laws, *inter alia*, legislation against the first type of forced labor, can be reduced.⁶¹⁹

c. Conclusion

In sum, to have a better implementation of law is a long term task. From the micro point of view, at the least, the issues of judicial independence, judge's professionalization and corruption shall be dealt with; however, in order to change the implementation dilemma of legislation in China

⁶¹⁸ For more information, please see generally in Tan Qingshan, "Reforming the Chinese Communist Party: Strengthening Internal Supervision", East Asian Institute, National University of Singapore; Yang Dali, "Has Corruption Peaked in China?", East Asian Institute, National University of Singapore.

⁶¹⁹ Moreover, although the writer is also aware that corruption at other areas such as administrative agencies and police departments are also serious⁶¹⁹ which will indirectly link with the implementation of the laws against the first type of forced labor in China, the writer will not discuss these issues in this thesis since they are beyond its scope

thoroughly, from the macro point of view, the construction of rule of law⁶²⁰ in China shall be furthered and strengthened, which is by no means an easy and short-term task.

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

i. Re-visit the ILO Convention No. 29 & 105

The subject of the second type of forced labor in China is convicted criminals -- prison laborers. According to ILO Convention No. 29, prohibited forced labor is subject to several exceptions, *inter alia*, prison labor exception, i.e., 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 or placed at the disposal of private individuals, companies or associations.⁶²¹ In other words, the prison labor exception is qualified by three criteria: (a) convicted via judicial procedure, (b) supervised by public authority, and (c) no private sector's involvement. In addition, to read Convention No.29 in connection with No. 105, an immediate and complete abolition of forced or compulsory labor as a method of mobilizing and using labor for purpose of economic development is required.⁶²² In sum, prison labor exception is subject to four tests, *viz.*, “convicted via judicial procedure”, “supervised by public authority”, “no private sector's involvement” and “not serving as a method of mobilizing and using labor for purpose of economic development”.

ii. Introduction to the Chinese Convicted Labor Reform System (*Laogai*)

The major function of the existence of China's prison system is to help inmates who have gone through judicial process and have been convicted by court in accordance with relevant criminal

⁶²⁰ For more information, please see text below accompanying note from 745 to 757.

⁶²¹ ILO Convention No.29, art 2(2)(c). For more information on this exception, please see text above accompanying note from 549 to 555.

⁶²² ILO Convention No.105, art. 1 (b). For more information on this point, please see text above accompanying note 574 & 575.

provisions to correct thoughts and behaviors.⁶²³ Through the means of combining labor of criminals organized by prison with education⁶²⁴, it is believed by the Chinese authority as well as its academia that most prisoners could be cultivated to have an awareness of making their own living and learning certain means and techniques of making a living themselves, thus, preventing them from re-committing any crimes in the future.

According to the Chinese Prison Law (*Jianyu Fa*), any prisoners with labor capacity shall participate in labor.⁶²⁵ Accordingly, there is a legal obligation for a prisoner with good health and physical condition to take part in working. The law also stipulates that a prison shall, in the light of the individual conditions of prisoners, rationally organize them to do labor so as to correct their bad habits, to cultivate their habits of working, to acquire production skills and to create conditions for employment after their returning to society.⁶²⁶ It is observed that the intention of such legislation is to “make the prisoners change their guilty minds, to cultivate good behavior through labor based on the individual conditions of each prisoner, to learn the rules of living and also to prevent trouble caused by idleness which leads to depression, unpredictable actions and low morale and which hence, threatens the safety and order of prison life”.⁶²⁷

In addition, it is state’s obligation to ensure enough expenditures of prison for the reform of prisoners, as well as to provide production facilities and expenses necessary for prisoners to do

⁶²³ Please see generally in Dai Yanling, *The Reform and Development of the Prison System in China (Zhongguo Jianyu Zhidu De Gaige Yu Fazhan)* (Beijing: Chinese People’s Public Security University Press, 2004); Zhang Xiufu, *The Modernization Construction of Chinese Prison (Zhongguo Jianyu Xiandaihua Jianshe)* (Beijing: Law Press, 2001); Dai Yanling, “The Labor of Criminals in Chinese Prison”, online: <http://www.iuscrim.mpg.de/forsch/onlinepub/chinese_prisons.pdf> (date accessed: October 13, 2005).

⁶²⁴ Prison Law of PRC, 1994, art. 3.

⁶²⁵ *Ibid.* art. 69.

⁶²⁶ *Ibid.* art.70.

⁶²⁷ Dai Yanling, “The Labor of Criminals in Chinese Prison”, online: <http://www.iuscrim.mpg.de/forsch/onlinepub/chinese_prisons.pdf> (date accessed: October 13, 2005).

labor.⁶²⁸ In other words, prisons not only force the convicted criminals to perform their obligation of labor, but under the legal obligation to open employment chances for them as well.⁶²⁹ Besides, the current Prison Law also provides detailed regulations on the daily working hours (usually eight hours per day)⁶³⁰, secures prison labor's right to rest on statutory festivals and holidays⁶³¹ and right to get payment.⁶³² If a prison laborer is injured, disabled or dead in the course of executing his or her duties, certain labor insurance shall be guaranteed.⁶³³

As far as the working activities are concerned, for quite a long time, farm production is the principal work for the Chinese criminals, because many Chinese prisons are located in remote countryside, and mountain areas, by river rapids or lake area.⁶³⁴ Factories are set up by those prisons in and near cities, so that prisoners could participate in industrial manufacture.⁶³⁵ In addition, there are prisoners undertaking to produce handicrafts.⁶³⁶ Official statistics show that about 90 percent of the prisoners are involved in various working activities in today's China.⁶³⁷

To minor criminals, there is a remarkable change of policy, i.e., from "full-time labor to correct thoughts and behavior" to "education as a major means to correct thoughts and behavior,

⁶²⁸ *Supra* 624, art. 8.

⁶²⁹ *Supra* 627.

⁶³⁰ This is confirmed by the writer's investigation on some prisons in Shanghai in January 22, 2006. According to the correctional officers from certain prison in Shanghai, the average daily working hours for prisoners there is eight and during Sunday and other public holidays, prisoners are entitled to have a good rest.

⁶³¹ *Supra* 624, art. 71.

⁶³² *Ibid.* art. 72.

⁶³³ *Ibid.* art.73.

⁶³⁴ *Supra* 627 and please also see Dai Yanlin, *The Reform and Development of the Prison System in China (Zhong Guo Jian Yu Zhi Du De Gai Ge Yu Fa Zhan)* (Beijing: Chinese People's Public Security University Press, 2004), from 13 to 14.

⁶³⁵ *Ibid.* This is confirmed via the writer's interview with several correctional officers from some prisons in Shanghai. Please refer to *Supra* 630.

⁶³⁶ *Ibid.*

⁶³⁷ "Situation of Reform of Prisoners in China" (*Zhongguo Gaizao Zuifan De Zhuangkuang*), Online: http://news.xinhuanet.com/zhengfu/2002-11/15/content_630826.htm (date accessed: October 13, 2005).

accompanied with part-time light labor”⁶³⁸. By law, labor for juvenile delinquents shall be suitable for the characteristics of minors and its main objectives shall be for them to acquire an elementary education and production skills.⁶³⁹ Generally speaking, minor criminals will have to participate in labor program for four hours and take literacy classes for another four hours per day.⁶⁴⁰ They are usually involved in programs such as cooking, hairdressing and repairing machines so that their professional skills for employment or for vocational training after returning to society can be enhanced gradually.⁶⁴¹ Of course, under certain circumstances, for instance, in the peak season of production, prisons might have some discretion to adjust the working hours to be more than four hours.⁶⁴² In addition, a prison is under the legal obligations to cooperate with the state, society and educational institutions in providing necessary conditions for the juvenile to receive compulsory education.⁶⁴³

In terms of female criminals, special treatment is given in accordance with their physical and psychological characteristics.⁶⁴⁴ Most female criminals are arranged by prisons to take part in household and vocational labor, such as manual knitting, sewing, dressmaking, planting etc.⁶⁴⁵ The guiding principle is for female prisoners to “exercise the psychological quality with patience and calmness”,⁶⁴⁶ and meanwhile accumulate useful experience as well as employment skills.

⁶³⁸ Lin Xiaopei, “Countermeasures on Managing and Educating Minor Criminals and Reflection on Related Legislation” (*Shaonianfan Guanli Jiaoyu Duice Yu Lifa Sikao*), Issues on Juvenile Crimes Delinquency, the 6th Issue of 2000.

⁶³⁹ *Supra* 624, art. 75.

⁶⁴⁰ *Supra* 627.

⁶⁴¹ *Ibid.*

⁶⁴² *Ibid.*

⁶⁴³ *Supra* 639.

⁶⁴⁴ *Supra* 624, art. 39. Please see also in Dai Yanlin, *The Reform and Development of the Prison System in China (Zhongguo Jianyu Zhidu De Gaike Yu Fazhan)* (Beijing: Chinese People’s Public Security University Press, 2004), at 86.

⁶⁴⁵ *Supra* 627.

⁶⁴⁶ *Ibid.*

To compare China's convicted labor reform system as introduced above with the said four tests of prison labor exceptions' prescribed by ILO Convention No.29 and 105 -- "convicted via judicial procedure", "supervised by public authority", "no private sector's involvement" and "not serving as a method of mobilizing and using labor for purpose of economic development", *prima facie*, China's convicted labor reform system is qualified to be considered as a legitimate exception to the prohibited forced labor. Considering that prisoners working in labor reform enterprises have gone through judicial process, have been convicted by court in accordance with relevant criminal provisions⁶⁴⁷ and they are under the supervision of prison authority⁶⁴⁸, who is subject to the supervision of people's procuratorate⁶⁴⁹, the first two criteria have been met. Besides, in terms of the third standard -- no private sector's involvement, it is stipulated expressly by the Chinese law that prisons are purely led and owned by the state and are obliged to organize and arrange prisoners to various working activities.⁶⁵⁰ As such, it seems that during the whole process of labor reform, there are no private elements involved. As far as the last criterion is concerned, it has been emphasized from time to time by both the Chinese government and its legislation that the main purpose for the labor reform system is to "cultivate the prisoners' awareness of earning their own living and to learn means of earning a living in order to prevent them from re-offending".⁶⁵¹ Based on this statement, it seems that the fourth criterion is met as well. In sum, merely looking at China's legislation in relation to its convicted labor reform system, it is consistent with the said four requirements provided by ILO fundamental conventions No.29 and 105.

iii. Different Stories on the Chinese Convicted Labor Reform System

⁶⁴⁷ Criminal Law of People's Republic of China, 1995, art. 41 & 43. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

⁶⁴⁸ Prison Law of People's Republic of China, 1994, art. 4. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

⁶⁴⁹ *Ibid.* art. 6.

⁶⁵⁰ *Supra* 648, art. 2(1).

⁶⁵¹ *Supra* 627.

Despite the said legality argument of China's convicted labor reform system, there are some different reports available from other sources instead of the Chinese authority telling a totally different story as follows.

Immediately after the Chinese Communist Party came into power, it stated that one of the purposes for the labor reform system in China is to serve as a method of mobilizing and using labor for national economic development.⁶⁵² The former 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."⁶⁵³ Encouraged by China's former leader Deng Xiaoping, labor reform camps became *de facto* enterprises.⁶⁵⁴ In 1980, it was reported that the Chinese national government created a dual responsibility system for prison labor, under which labor reform enterprises must achieve both individual reform purposes and production purposes.⁶⁵⁵ Labor reform administrators are required not only to adhere to traditional emphasis of reform of prisoners into new socialist persons, but also to reach certain productivities and profit levels.⁶⁵⁶ In the eyes of some commentators, the so-called "dual responsibility" ended up with an over-emphasis on production and a de-emphasis on the well being of prisoners.⁶⁵⁷ In this sense, it seems that in practice the Chinese labor reform system

⁶⁵² Decision on Organizing Criminals National Wide to Join Labor Reform, 1951, promulgated by the Central Committee of the Communist Party of China. Online: <http://news.xinhuanet.com/ziliao/2004-12/16/content_2342435.htm> (date accessed: February 9, 2005).

⁶⁵³ Ygael Gluckstein, *Mao's China: Economic and Political Survey* (London: George Allen & Unwin Ltd., 1957), at 291. For more information on forced labor issue during the first decade of Chinese Communist Party came into power, see Ygael Gluckstein, *Mao's China: Economic and Political Survey* from page 287 to 292.

⁶⁵⁴ Dinah Lee & Robert Neff, "China's Ugly Export Secret: Prison Labor". Online: <<http://www.artsci.wustl.edu/~veap/barnathanarticles>> (date accessed: October 18, 2004). For more information, please also see Hongda Harry Wu, *Laogai -- The Chinese Gulag* (Colorado: Westview Press, 1992) from 119 to 141.

⁶⁵⁵ 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", 1995, 3 Pac. Rim L. & Pol'y J. 437, online: WL (Journals & Law Reviews).

⁶⁵⁶ Online: Laogai Research Foundation <<http://www.laogai.org/news/newsdetail.php?id=1877>> (date accessed: February 12, 2005).

⁶⁵⁷ *Ibid.*

serves as a method of mobilizing and using labor for purpose of economic development, which is arguably conflicting with the fourth test provided by ILO Convention No.105 -- “not serving as a method of mobilizing and using labor for purpose of economic development”.⁶⁵⁸

Moreover, it is reported that the Chinese government not only encouraged products from labor reform camp to enter the international market to earn hard currency, but labor reform enterprises as well to even establish joint ventures with international businesses.⁶⁵⁹ In one of the State Department documents, U. S. diplomats claimed that the published official Chinese statements put the prison-exports figure at \$100 million each year.⁶⁶⁰ There have been accusations that a host of prisoner made goods constitute a large amount of China’s legitimate export goods; therefore, plays an important role in China’s economic development.⁶⁶¹ Harry Wu, one of China’s famous human rights activists serving 19 years in the Chinese labor reform camp from the age of 23, once commented: “all the labor-reform officials talk about is getting more foreign money.”⁶⁶² Although this statement might be too absolute to be true, some might be inclined to believe that it, at the very least, reveals that a substantial number of labor-reform officers are keen to earn foreign exchange. Besides, it is also reported that the material well-being of both the security personnel and the prisoners is directly linked to the profitability of the labor reform enterprises.⁶⁶³ 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

⁶⁵⁸ For more information, see text above accompanying 564 and 565.

⁶⁵⁹ For more information on this issue, see online: Laogai Research Foundation <<http://www.laogai.org/>>.

⁶⁶⁰ *Supra* 654.

⁶⁶¹ Please see generally in Patricia Pylman, “Forced Prison Labor in China”, online: <<http://www.epm.org/articles/laogai.html>> (date accessed: October 10, 2005); 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”, 1995, 3 Pac. Rim L. & Pol’y J. 437; Dinah Lee & Robert Neff, “China’s Ugly Export Secret: Prison Labor”; Hongda Harry Wu, *Laogai -- The Chinese Gulag* (Colorado: Westview Press, 1992) from 119 to 141.

Online: <<http://www.artsci.wustl.edu/~veap/barnathanarticles>> (date accessed: October 18, 2004);

⁶⁶² *Ibid.*

⁶⁶³ *Supra* 655.

labor reform enterprises under their discretion.⁶⁶⁴ Some sources reveal that generally speaking, more than forty percent of the money goes to the pocket of security personnel and other management in the form of bonuses while prisoner, as the real hard working laborers, receive very few, sometimes even nothing, from the products made by themselves.⁶⁶⁵

Furthermore, evidence shows that some labor reform enterprises have registered as companies.⁶⁶⁶ For example, it is found that Shanxi Boiler Factory is also Provincial Prison No.2.⁶⁶⁷ As such, some scholars including some Chinese ones believe that the Chinese labor reform enterprise has two identities, i.e., labor reform camp and company. Usually, the prison designation is only used by the government internally, whereas, the name of the company is displayed to the public, for both business purposes and the purpose of avoiding foreign visitors' suspicion.⁶⁶⁸ Very often, these so called companies have also entered into certain partnership agreement with some private enterprises for production purposes.⁶⁶⁹ Based on the discoveries above, it seems that there is a *de facto* labor-employment relationship between some prison laborers and some labor reform camps and the prison laborers, at least part of them, are placed partly at the disposal of some private companies who have established certain business cooperative relationship with labor reform camps. Practice as such is clearly inconsistent with the third test abovementioned -- no private sector's involvement.

iv. Critical Evaluation of the “Different Story”:

⁶⁶⁴ *Supra* 655.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ Zhou Changzheng, “Social Clause Debate in WTO and Chinese Labor Standards” (*WTO De Shehui Tiaokuan Zhi Zheng Yu Zhongguo De Laodong Biaozhun*), Commercial Law Study (*Fashang Yanjiu*), the third issue, 2001, at 101.

⁶⁶⁷ *Supra* 654.

⁶⁶⁸ *Ibid.*

⁶⁶⁹ *Ibid.*

It might be true that the statements above reveal part of the stories. However, merely based on the discoveries as such, it is not fair to deny the value of the whole convicted labor reform system in China, let alone classify its nature as the forced labor practice with official support, which is prohibited by ILO Convention No. 29 and No.105.

First, the writer is not going to deny the fact that there was a period of time when the Chinese labor reform system was used as a method for national economic development; however, it is no longer the case. After CCP came into power in 1949, China's economic situation was seriously troubled. After twelve years' war – eight years Sino-Japanese war immediately followed by four years civil war, China's national economy was on the edge of collapse. Issues on how to establish a socialist nation on the ground of a large scale of ruins left by war and colonization and how to feed its starving people as quickly as possible were the priority of the CCP agenda. Above and beyond this, when leader Deng Xiaoping made his statement to encourage production by prisoners, it was just after the ten years national disaster -- Cultural Revolution, when, once again, the Chinese national economy was on the edge of collapse. Under such critical circumstances, it might be understandable and forgivable for the Chinese government at that point of time to adopt a national policy to use prison labor as a means for national economic development to satisfy the needs of the general public and save the endangered nationhood. However, things have changed dramatically as China is no longer what it was. As I have mentioned in the above text, according to Prison Law of PRC promulgated in year 1994, labor of criminals is mainly for the good of prisoners themselves rather than for the sake of national economic development.⁶⁷⁰ According to the writer's interview with several officers from a prison in Shanghai, the ideology that prison

⁶⁷⁰ Actually, this purpose of convicted labor reform system is re-emphasized by China's administrative legislation -- Rules about Restatement on Prohibition against Exports Made by Prison Labor-- promulgated in year 1991 where it states expressly that the purpose of Chinese convicted labor reform system is to cultivate and educate prisoners via labor into self-supporting workers and create more opportunity to be employed after returning to the society. From "Rules about Restatement on Prohibition against Exports Made by Prison Labor", 1991, art.2.

labor reform system could contribute to national economic development, therefore, shall be adopted as an important means to that end had been completely abolished by the authority for years.⁶⁷¹ To criticize China for its past wrongdoings without opening eyes to its positive changes may be unfair to today's Chinese convicted labor reform system. In addition, in accordance with the official statistics calculated in 1990s, the gross production from the Chinese prison system is merely around 2.5 billion Chinese yuan per year, constituting only 0.8 ‰ of GDP of the corresponding year.⁶⁷² My interviews with several correctional officers (*Jianyu Guanjia*) have also confirmed that technical and professional training to help the inmates to repent as well as to learn certain skills for future life is always the only goal of today's convicted labor reform system. Indeed, the production made by prisoners *per se* is far from enough to support prisoners' own daily consumption, let alone playing an important role in China's economic development.⁶⁷³ Prisoners usually work for five or six days a week, less than eight hours a day and are entitled to rest during public holidays.⁶⁷⁴ In fact, the writer was informed that the CCP government had to allocate a large amount of governmental fund for the proper operation of the Chinese prison system and the welfare of prisoners.⁶⁷⁵ In terms of the salary paid to the labor reform officers, the writer was informed by some officers interviewed, who are currently in charge of some prisons in Shanghai, that their salary is strictly prohibited to be linked with the work load of the inmates, but is purely from the governmental source.⁶⁷⁶ As such, the accusation claiming that prison labor plays a very important role in China's economic development must have been exaggerated. In

⁶⁷¹ The writer has conducted certain investigation on the prison labor reform system in Shanghai, China and interviewed several officers from some prisons located in there in January, 2006.

⁶⁷² Online:< <http://www.people.com.cn/GB/channel1/10/20000905/218003.html>>, (date accessed: February 23, 2006). It is possible that this figure might be increasing year by year, but it will be impossible for Chinese Laogai system to substantially contribute to the national economic development based on the said statistics in 1990s.

⁶⁷³ *Supra* 630.

⁶⁷⁴ *Ibid.* Indeed, the writer was told that in some prisons in Shanghai, due to the fact that there was not enough work created for prisoners to do, the usual working hours for prisoners are less than eight hours per day for sure.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Supra* 630.

addition, the statement accusing that all the officers in charge of the prisons are thinking about making as much foreign exchange as possible seems to be groundless. In fact, it is time for some human rights activists to reflect their static point of view on the Chinese convicted labor reform system and open their eyes to the fundamental progress that China has made.

Second, in terms of the accusation which links China's export with prison labor production, it might be partly true that there are some prison-labor made products unfortunately and secretly entering into the international market. "\$100 million each year" is claimed to be an official statement made by the Chinese government itself regarding its annual prison labor related exports; however, the credibility of the accusation as such is questionable. In fact, no official permission from the Chinese authority is promulgated to allow export of prisoner made products, let alone a so called official statistics that was published by the Chinese government disclosing the exact exports value made by prison products. Furthermore, an official administrative legislation "Rules about Restatement on Prohibition against Exports Made by Prison Labor" (*Guanyu Chongsheng Jinzhi Laogai Chanpin Chukou Guiding*) jointly promulgated by the Ministry of Foreign Trade and Ministry of Justice and later approved by the Chinese State Council in 1991 especially emphasized that companies in charge of export affairs were prohibited to buy products related to prison labor and prisons were banned to become suppliers of such companies.⁶⁷⁷ In addition, no joint ventures between prisons and foreign investors were permitted.⁶⁷⁸ After all, it does not make sense that on one hand, a government seriously declares its determination against any exports of prison made products, and even promulgated relevant legislation against practices as such; on the other hand, it nevertheless published its official statistics informing the whole world the exact figure of its prison labor related exports. From the writer's point of view, it might be too subjective to state, as what the famous Chinese human rights activist Harry Wu commented, that

⁶⁷⁷ Rules about Restatement on Prohibition against Exports Made by Prison Labor, 1991, art.4.

⁶⁷⁸ *Ibid.* art. 5.

“all the labor reform officials talk about is getting more foreign money”. (As for Harry Wu himself, assuming he is a trustworthy person,⁶⁷⁹ he might be unfairly put into prison from 1959 to 1979 and might be terribly mistreated for almost twenty years; however, all his personal stories and testimonies about the Chinese *Laogai* system, be it true or not, are only about the *Laogai* practice in 1960s and 1970s .⁶⁸⁰ After he left China in 1985 and finally became an American citizen, he returned to China once for 38 days only.⁶⁸¹ Logically, he will not have any chances to understand the well developed Chinese convicted labor reform system in 1990s, let alone to experience the gradual progress after year 2000.) Actually, it is believed that there are nonetheless some exports involving prisoner-made products entering into foreign markets through illegal means. However, practice as such is by no means systematic with the support from the Chinese central government. As for the prisoner’s payment, the Prison Law has stipulated clearly that prisoners in China are entitled to get payment as well as enjoy working safety and welfare.⁶⁸² It is possible that there are prisons refusing to follow the law as such since the implementation of law is a problem in China, but phenomenon as such does not necessarily mean the existence of a systematic practice of exploiting prison laborers in China. To be fair, minor defects could not be used to deny the virtue of a person as a whole since it is human nature to err. By the same token, no matter how carefully the Chinese government and its legislator design and manage its convicted labor reform system, it is inevitable that at the level of implementation, power misuses and abuses might happen.

⁶⁷⁹ Wei Fusheng, “The True About Harry Wu”, online:
<<http://www.iowastatedaily.com/media/storage/paper818/news/1997/09/11/316603/The-Truth.About.Harry.Wu-1072237.shtml?norewrite200604240512&sourcedomain=www.iowastatedaily.com>> (date accessed: April 24, 2006).

⁶⁸⁰ Anthony C. LoBaido, “Harry Wu on the real China: WND interviews former political prisoner, human-rights champion”, online:
<http://worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=22295> (date accessed: March 7, 2006).

⁶⁸¹ *Ibid.*

⁶⁸² *Supra* 677, art.3.

Third, in terms of the accusation on the double identities of some Chinese prisons, the writer is not going to deny the existence of the phenomena as such; however, there are very few reports about the double identities problem at present. It is true that there was a period of time when prisons in China had double identities -- both prison and enterprise with inmates being organized to work as employees.⁶⁸³ During those days, due to the nationwide economic plight -- the state's appropriation to prisons is not enough, some prisons had to manage their finances on their own.⁶⁸⁴ As such, it is commented by some human rights activists that "reform" has taken a step back while "profit making" has been pushed to the front.⁶⁸⁵ However, things have changed dramatically. The issue of separation between enterprises and prisons (*jianqi fenkai*) has become a national policy at the top of the Chinese governmental agenda.⁶⁸⁶ A few examples are illustrated as follows. The former Labor Machine Factory (*Laodong Gongju Chang*) -- a factory established partly by a prison in Shanghai has been divided into two independent entities, i.e., *Wujiao Chang* Prison and Star Labor Machine Company (*Minxin Laodong Gongju Youxian Gongs*) with no connection ever after; the former prison-built Flat Glasses Factory (*Pingban Boli Chang*) is now divided into a self-reliant factory and *Zhoupu* Prison.⁶⁸⁷ Of course, during the course of the implementation of such a national policy, there might be some persistent objectors to place some prisoners in China at the disposal of some privately owned companies. At any rate, however, it is no longer a widespread phenomenon in today's China. In this sense, to deny the value of the Chinese convicted labor reform system merely based on some sporadic violations

⁶⁸³ Liu Shieng, "Thoughts on the Production of Prison after the Separation of Prison and Enterprise", online: <http://www.legalinfo.gov.cn/moj/zgsfzz/2004-07/26/content_119995.htm> (date accessed: March 7, 2006).

⁶⁸⁴ Laogai Handbook, Laogai Research Foundation, online: <<http://www.laogai.org/news2/book/part-1.pdf>> (date accessed: March 8, 2006).

⁶⁸⁵ *Ibid.*

⁶⁸⁶ Please see generally in online: <http://www.legalinfo.gov.cn/gb/moj/2003-04/10/content_23299.htm>, <<http://www.southcn.com/news/community/shzt/prison/outline/200405101067.htm>>, <<http://www.studytimes.com.cn/chinese/2004/Nov/716914.htm>>, <http://news.bbc.co.uk/hi/chinese/china_news/newsid_3143000/31434901.stm>, (date accessed: March 8, 2006).

⁶⁸⁷ This is informed by the prison officers in Shanghai during an interview conducted by the writer January, 2006.

and illegal practices inconsistent with the ILO fundamental conventions that prohibit forced labor might be unfair.

v. Concluding Remarks

Although the convicted labor reform system in China, by its nature, is forced labor, it is believed to be qualified as a permissible exception to prohibited forced labor practice in light of four criteria provided by ILO Convention No.29 and No.105. It is undeniable that some current practices and certain former policies in relation to prison labor are conflicting with the four criteria. Some of its products do enter into foreign market, therefore, play a role in making foreign currency to support national economic development. However, phenomena as such are argued not to be systematic with institutional support. The existence of certain illegal practices does not necessarily negate the value of the convicted labor reform system and its related legislation. To be objective, in general, China's current convicted labor reform system is designed to educate and cultivate criminals into self-supporting workers through means of labor. Above and beyond this, the relevant legislation is indeed consistent with ILO conventions and other international laws in general. There are a few inconsistent incidents, but no systematic violation of international labor law against forced labor. In fact, the problem lies in how to improve the implementation of relevant domestic laws in China rather than denying the value of the Chinese convicted labor reform system. As for improving implementation of laws, it mainly depends on the capacity building of rule of law in China that is beyond the reach of this thesis

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

In this part, the writer will provide a comprehensive study on the Chinese RTL system.

i. RTL System in China

China's RTL system, by its definition, is an administrative sanction⁶⁸⁸ with no judicial involvement and a mechanism for punishing law-breakers (excluding criminal law breakers). For a better understanding, at the very beginning, the writer is going to give a brief comparison between the RTL system and the Chinese convicted labor reform (*Laogai*) system. Although both systems limit recipients' freedom, they are applied in a different way. As for convicted labor reform system, it is applicable to criminals convicted by courts, whereas to RTL recipients who have committed offence that is not serious enough to be punished by the Chinese penal code will be sentenced by a special RTL committee instead of a court, and to work in RTL institutions instead of prisons. Simply put, the RTL recipients are not criminals in nature.

a. Major Legislation in Charge of the Chinese RTL System

To date, RTL system in China is mainly governed by three administrative regulations.⁶⁸⁹ As the foundation legislative document of the RTL system in China, the 1957 "Decision on the Question of Reeducation through Labor" (*Guowuyuan Guanyu Laodong Jiaoyang Wenti De Jueding*) ("1957 Decision") authorized RTL to be imposed for an uncertain period of time for the purposes to reform those loafers, law and discipline breakers, or persons who are able to work but choose

⁶⁸⁸ Actually, there is a debate on how to understand the nature of RTL system in China. On one side, some scholars argue that the nature of this system is a criminal sentence in the sense that people working in the RTL camps have lost their freedom. On the other hand, the majority view is that this RTL system by its nature is an administrative sanction. Later, this majority view is officially adopted by Chinese government in its "White Paper on Human Rights in China" (1991). Online: <http://www.gov.cn/zwgk/2005-05/24/content_488.htm> (date accessed: October 2, 2005).

⁶⁸⁹ As for the nature of first two administrative regulations, namely 1957 Decision and 1979 Provision, there are two conflicting views available in China. For the first one, it argues that they belong to law (in its narrow sense); whereas the other view believes that they are administrative regulations in nature. From the writer's point of view, according to "Law on Legislation" of PRC promulgated in March 2000, laws (in its narrow sense) could only be enacted by People's Congress and its Standing Committee; to those enacted by State Council, they belong to administrative regulations. (From "Law on Legislation" of PRC, 2000, art.7, 9, 56 & 57). For more information on the hierarchy of Chinese legislation, please refer to the text of part 2.3(A)(ii)(c)--"The Hierarchy of Chinese Legislation".

to lead an idle life into self-supporting socialist new persons, and further maintain public order to facilitate socialist construction.⁶⁹⁰

Another administrative legislation is the “Supplementary Provisions for Reeducation through Labor” (*Guowuyuan Guanyu Laodong Jiaoyang De Buchong Guiding*), which was promulgated by the State Council in 1979 (1979 Supplementary Provision). The 1979 Provision specifies that the administrative commission for reeducation through labor (hereinafter RTL committee) shall be composed of the persons responsible for civil affairs, public security and labor departments and they shall be responsible for directing and administering the work of reeducation through labor.⁶⁹¹ In other words, there is no involvement of judicial process. As for the term of RTL, it shall be one to three years with one year extension if necessary.⁶⁹² It further provides that rest shall be allowed on Sunday and public holidays.⁶⁹³

The third related legislation is the “Trial Methods for Reeducation Through Labor” (*Laodong Jiaoyang Shixing Banfa*), 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 misdemeanor, join criminal organization for murder, robbery, rape, arson, or involve in prostitution, theft fraud etc. where the circumstances of such crimes are not serious enough to be punished by criminal law.⁶⁹⁴

In addition to these three administrative regulations either promulgated by State Council or approved by it, there are numerous administrative rules, enacted either by Department of Public

⁶⁹⁰ The preamble of 1957 Decision of the State Council Regarding the Question of Reeducation Through Labor, People’s Republic of China. [hereinafter 1957 Decision]. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

⁶⁹¹ 1979 Supplementary Provision, para. 1.

⁶⁹² 1979 Decision, para. 3.

⁶⁹³ *Ibid.*

⁶⁹⁴ 1982 Trial Methods, art. 10, translated by the writer.

Security, or Ministry of Justice, regulating and guiding various aspects of the RTL system. For example, based on almost five-decade practices of RTL, the “Detailed Regulation on the Administrative of Reeducation Through Labor” (*Laodong Jiaoyang Guanli Gongzuo Zhifa Xize*) promulgated by the Ministry of Justice in year 1992 is considered a relatively detailed legislation to guide the RTL management process. It covers almost every aspect of the RTL management work, including its general principles⁶⁹⁵, rules of acceptance⁶⁹⁶, classification of laborers,⁶⁹⁷, laborers’ communications⁶⁹⁸ and meeting families⁶⁹⁹, vacation and leave permission⁷⁰⁰, reward, punishment⁷⁰¹ and medical treatment outside RTL camp⁷⁰², confinement under certain circumstances⁷⁰³ and release⁷⁰⁴ etc.

Above and beyond this, there is some other relevant administrative legislation belonging to the category of administrative rules as well. To name but a few, they are “Measures on RTL Recipients’ Life and Sanitation Management” (*Laodong Jiaoyang Renyuan Shenghuo Weisheng Guanli Banfa*) (1991), “Several Systems on Management Work of RTL” (*Laodong Jiaoyang Guanli Gongzuo Ruogan Zhidu*) (1992), “Code of Conduct of Recipients of RTL” (*Laodong Jiaoyang Renyuan Shouze*) (1992), “Rules on RTL Education Work” (*Laodong Jiaoyang Gongzuo Guiding*) (1993) etc. serving as supplementary rules in guiding the operation of RTL system in China. In addition, there are other regulatory documents under the name of interpretation, reply, answer, joint notice and even a host of internal document (*Neibu Wenjian*),

⁶⁹⁵ Detailed Regulation on the Administrative of Reeducation through Labor, 1992, chapter 1.

⁶⁹⁶ *Ibid.*, chapter 2.

⁶⁹⁷ *Ibid.*, chapter 3.

⁶⁹⁸ *Ibid.*, chapter 4.

⁶⁹⁹ *Ibid.*, chapter 5.

⁷⁰⁰ *Ibid.*, chapter 6.

⁷⁰¹ *Ibid.*, chapter 7.

⁷⁰² *Ibid.*, chapter 13.

⁷⁰³ *Ibid.*, chapter 8.

⁷⁰⁴ *Ibid.*, chapter 14.

although not law in nature, but nevertheless having certain binding force in regulating the daily operations of the Chinese RTL system.⁷⁰⁵

b. Historical Review of RTL System and Its Development

1. Birth

The birth of RTL system could be traced back to 1955, when the CCP government planned to suppress counterrevolutionary elements (they were believed to be remnants from the former KMT government) to protect the newly established socialist state. In terms of 1955 “Order to Thoroughly Wipe Out Counterrevolutionary Elements in Hiding” (*Zhonggong Zhongyang Guanyu Chedi Suqing Ancang De Fangeming Fenzi De Zhishi*), to those counterrevolutionary elements whose crimes are not serious enough to be sentenced to jail by court, whereas leaving them in their original positions or releasing them to society may cause potential danger to the **stability** of the newly established socialist country and increase unemployment rate, the CCP government decided to concentrate them in a specific place to work for the state and get payment from government.⁷⁰⁶ Right after the 1955 Order, another order under the name of “Order for all Provinces and Municipal Governments to Make Immediate Preparations for the Establishment of Institutions for RTL” (*Guanyu Geshengshi Junying Liji Zhuoshou Chouban Laodong Jiaoyang Jigou De Zhishi*) was promulgated in 1957, to require the governments at provincial or municipal level to establish RTL institutions. As such, the RTL system was given birth in China. During this period, the purpose of the RTL is to suppress “counterrevolutionary elements” and other so called “bad elements” (*Huai Fenzi*) and arrange employment for them.

⁷⁰⁵ Xia Zhongsu, ed., *Theory on RTL (Laodong Jiaoyang Xue)*, [Beijing: Mass Publisher (*Qunzhong Chubanshe*), 2002] at 94.

⁷⁰⁶ Xing Jie, ed., *Regulations on Public Security Department in Management of Reeducation Through Labor (Gongan Jiguan Banli Laodong Jiaoyang Anjian Guiding)* [Beijing: Round and Square Press (*Fang Zheng Chubanshe*), 2002], at 2.

It shall be noted that during the initial period, the main task for RTL recipients was to be educated rather than laboring. Besides, now that there was an official guiding principle, i.e., “*yi nong wei zhu*”, when they were arranged to work, they were mainly engaged in farm work.⁷⁰⁷

2. The First Stage of Development (1957-1966)

The first regulation on RTL -- 1957 Decision was promulgated by State Council on August 1, 1957. In light of the first legislation, the RTL recipients were extended from the former two elements -- “counterrevolutionary elements” and “bad elements”, to loafers, law and discipline breakers, or persons who are able to work but choose not to but lead an idle life.⁷⁰⁸ In fact, beginning from this administrative regulation, RTL recipients were no longer limited to two elements inside governmental agencies and enterprises but anyone, as long as he/she could be classified into one of the four types, i.e., “(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

⁷⁰⁷ Online:

<<http://spaces.msn.com/members/laojiao/?partqs=cat%3D%25e6%259d%25a5%25e9%25be%2599%25e5%258e%25bb%25e8%2584%2589>> (date accessed: November 2, 2005).

⁷⁰⁸ For more information, please see text accompanying note 690.

behaving disruptively on purpose, obstruct public officials from performing their duties and refuse to mend their ways despite repeated admonition.”⁷⁰⁹ Besides, the Decision makes it clear that the purpose of RTL was to reform the recipients into self-supporting socialist new persons, to maintain public order as well as to facilitate socialist construction. Due to the negative influence from leftist thoughts and the incompleteness of such legislation, *inter alia*, no clear time limit for the term of RTL is provided⁷¹⁰, at that time once people became subjects of RTL, chances for them to work in RTL institutes for several years, sometimes even decades, are high.⁷¹¹ In fact, the Chinese official statistics⁷¹² show that there were 499,523 RTL recipients in the year 1960⁷¹³, which is claimed to reach the maximum in China’s RTL history.⁷¹⁴

At the first stage, the main labor task was still focusing on farm work, though, industrial work started to be involved. Take Guangdong Province as an example, generally speaking, most RTL recipients there were still engaged in farm work; however, around 20 to 30 percent of them were arranged to work in factories making bricks, fans, machines etc.⁷¹⁵

3. The Second Stage: Period of Suspension (1966-1978)

⁷⁰⁹ 1957 Decision, para. 1.

⁷¹⁰ In fact, an internal “Supplementary Decision on Ten Specific Policies of Public Security”, not open to the public, was promulgated in 1961 to try to shorten the time limit for RTL, providing that generally speaking two to three years shall be the normal term for RTL with good performance for earlier release and bad performance for extension. However, it is just an internal document enacted by Public Security without legislative power. Besides, its language is quite soft in the sense that it only provides for the general term of RTL without affirmative term. Thus, authorities in charge of the extension of the term of RTL or earlier release still have lots of discretion.

⁷¹¹ *Supra* 487, at 11.

⁷¹² *Supra* 705, at 28.

⁷¹³ Working Group of Ministry of Justice on Reform and Improvement of RTL, “Reform and Improvement of Chinese RTL System” (*Gaige Yu Wanshan Zhongguo Laodong Jiaoyang Zhidu*), online: <http://www.legalinfo.gov.cn/moj/zgsfzz/2004-07/19/content_117972.htm> (date accessed: October 24, 2005).

⁷¹⁴ According to other sources, the number of recipients of RTL is much larger, reaching four million. [From Hongda Harry Wu, *Laogai -- The Chinese Gulag* (Colorado: Westview Press, 1992)] at 90.

⁷¹⁵ *Supra* 707.

During Cultural Revolution when rule of law was neglected in general, the whole nation was undergoing a political and social disaster. Naturally, RTL system could not be immune from its impact. During this stage, government officers who were in charge of RTL were largely oppressed and persecuted by the Red Guards and Rebels.⁷¹⁶ The whole RTL system was purposefully misinterpreted as a system for the purpose of “supporting and cultivating enemies” (*Zi Di Yang Di*)⁷¹⁷.

4. The Third Stage of Development: Recovering from Chaos (1978 to 1991)

After the collapse of Gang of Four and the third plenary session of the Eleventh Central Committee of the CCP, the system of RTL started to recover. Two important administrative regulations -- 1979 Supplementary Provision and 1982 Trial Method were promulgated at this stage with the effect of further expansion of the scope of RTL not only to those who lived in large and medium-sized cities, but also those having habitual residence in rural area whilst still choosing to wonder into cities, regions along railroad routes, large factories and mines and be involved in illegal activities there.⁷¹⁸ In fact, this Trial Method extended RTL to anyone who commits misdemeanor, joins criminal organization for murder, robbery, rape, arson, or is involved in prostitution, theft fraud etc., where the circumstances are not serious enough to be punished by criminal code.⁷¹⁹ Besides, the terms of RTL has been fixed from one to three years with one year extension if necessary.⁷²⁰ As such, the former practice -- RTL recipients would have to stay in the RTL camp forever (*zhi jin bu chu*) -- was changed completely.⁷²¹

⁷¹⁶ *Supra* 705, at 30.

⁷¹⁷ *Ibid.*

⁷¹⁸ 1982 Trial Methods, art. 9.

⁷¹⁹ *Ibid.*, art. 10.

⁷²⁰ 1979 Supplementary Provision, art. 3.

⁷²¹ Online: <<http://www.laogai.org/news2/newsdetail.php?id=430>> (date accessed: October 22, 2005).

A special committee in charge of the management composed of heads of civil administration organs, public security bureaus and labor departments, is established by People's Government at the provincial level, at the level of municipalities or at the level of large and medium-sized cities in accordance with 1979 Supplementary Provisions and 1982 Trial Method⁷²². As such, in theory a specific government agency (*ad hoc* by nature) came into stage in dealing with relevant issues of RTL.

Above and beyond this, a new improvement was also made during this stage, i.e., well-managed RTL institutions can convert to RTL schools subject to the RTL management committee's approval.⁷²³ At the end of 1988, the Ministry of Justice made a decision to completely separate the RTL management system from that of the convicted labor reform system.⁷²⁴ From that day onwards, theoretically, a clear dividing line has been drawn between the RTL system and the *Laogai* system. However, it is nonetheless criticized by many a scholar that in practice the treatment of the RTL recipients is still much more like that of prisoners.⁷²⁵ From the writer's point of view, considering that for decades, the system of RTL and prisons failed to be well separated by any legislative documents, it may take a long time for the officials in charge of RTL to change their mindset and truly manage the RTL system in a way that is different from prisons.

⁷²² *Supra* 720, art.1. Actually, in 1957 Decision art.3, there is no special governmental agency in charge of RTL. Instead, to those who need RTL, civil administrative organs, public security department, the institutions, groups, enterprises, schools and the units they work for, together with their parents and guardians, civil administrative organs, could submit applications to the people's commissions at the provincial level, at the level of autonomous regions, or at the level of municipalities, or their precatory agencies.

⁷²³ 1982 Trial Method, art.7(3).

⁷²⁴ Online: <<http://cnprison.org/pub/Theoretics/2005-1-21/2229-1.htm>> (date accessed: November 7, 2005).

⁷²⁵ Please see generally from online: <<http://www.people.com.cn/digest/200104/20/bt042010.html>> (date accessed: November 7, 2005); online: <<http://cnprison.org/pub/Theoretics/2005-1-21/2229-1.htm>> (date accessed: November 7, 2005);

In the recovering period, the guiding principle for RTL labor had been changed from the former “farm work based” to “industrial production based”.⁷²⁶ Most recipients were arranged to work in labor intensive industries, such as architectural materials production.⁷²⁷

5. The Fourth Stage of Development (1991-Present)

During this stage seven administrative rules⁷²⁸ particularly targeting RTL system were promulgated by Ministry of Justice, which provide more specific rules on the management of sanitation work of RTL subjects, code of conduct of guards who are directly in charge of RTL recipients, management work of RTL and education of RTL recipients etc. For example, to those “who have committed a minor crime only once, or have been dealt with for the criminal offence in the past and committed no new offence, or have confessed on their own initiative and showed sign of repentance; and those who have not reached the age of 16, or are disabled, mental patients, pregnant women, etc. are expressly exempted from RTL sentence”.⁷²⁹ In addition, in 1995 State Council promulgated a “Notice on Further Strengthen the Management of Prison and RTL Work” (*Guowuyuan Guanyu Jinyibu Jiaqiang Jianyu Guanli He Laodong Jiaoyang Gongzuo De Tongzhi*). At the same year, the very first local regulation on RTL based on the RTL legislation at

⁷²⁶ *Supra* 707.

⁷²⁷ *Ibid.*

⁷²⁸ These seven administrative regulations include “Measures on RTL Recipients’ Life and Sanitation Management” (1991) (*Laodong Jiaoyang Renyuan Shenghuo Weisheng Guanli Banfa*), “Code of Conduct of Guards of RTL and Convicted Labor Reform” (1991) (*Laogai Laojiao Gongzuo Ganjing Xingwei Zhunze*), “Detailed Regulation on the Administrative of Reeducation through Labor” (1992) “*Laodong Jiaoyang Guanli Gongzuo Zhifa Xize*”, Code of Conduct Recipients of RTL (1992) (*Laodong Jiaoyang Renyuan Shouze*), “Several Systems on Management Work of RTL” (1992) (*Laodong Jiaoyang Gongzuo Ruogan Zhidu*), “Rules on RTL Education Work” (1993) (*Laodong Jiaoyang Jiaoyu Gongzuo Guiding*), and “Trial Methods on Strengthening the Vigilance of RTL Camps” (1993) (*Guanyu Jiaqiang Laodong Jiaoyang Changsuo Jingjie Gongzuo De Zanxing Banfa*).

⁷²⁹ Zou Keyuan, “Reeducation through Labor: China’s Outmoded Reformatory Practice”, 2001, EAI (of National University of Singapore) Background Brief No.98. “Detailed Regulation on the Administrative of Reeducation through Labor” (*Laodong Jiaoyang Guanli Gongzuo Zhifa Xize*), art. 5.

the national level, was introduced by Anhui Province, which stipulates more details on how to operate RTL system within its region.⁷³⁰

An official statistics from China's Bureau of RTL Administration shows that there are more than 300 RTL institutions with total 260,000 laborers working and being educated there.⁷³¹

Admittedly, compared with its initial period where only very few administrative regulations were available in providing general principles on RTL without operative details, through the rules mentioned above the Chinese RTL system is heading towards a relatively bright future,

ii. Evaluating RTL in Terms of International Core Labor Standards

To evaluate RTL system is mainly to assess it in accordance with the four criteria abovementioned that are required for a permissible prison labor, namely, (a) convicted via judicial procedure, (b) controlled and supervised by public authority, (c) no private sector's involvement and (d) not serving as a method of mobilizing and using labor for purpose of economic development.⁷³²

From the very first day of RTL's birth, its main purpose is to cultivate its subjects into self-supporting socialist new person. During its recovering period, CCP once again emphasized the guiding principle of RTL is through means of education and labor to change those recipients into valuable persons with the capacity to contributing to the socialist China.⁷³³ In addition, the RTL camps are classified as special state owned institutions (or schools) by 1982 Trial Method

⁷³⁰ RTL Implementation Regulations of Anhui Province (*Anhuisheng Laodong Jiaoyang ShiShi Tiaoli*), database of Current Chinese Laws and Regulations (*Zhongguo Xianxing Falü Fagui Shujuku*).

⁷³¹ Online: <http://www.legalinfo.gov.cn/moj/ldjyglj/2003-05/28/content_19622.htm> (date accessed: October 24, 2005).

⁷³² For more information, please refer to part 4.2 B (i) -- ILO Convention No. 29 & 105.

⁷³³ "Report on How to Improve RTL" (*Guanyu Zuohao Laodong Jiaoyang Gongzuo De Baogao*), 1980, drafted by department of public security, promulgated by CCP's Central Committee and State Council, para.5, online: <<http://www.cnread.net/cnread1/flfg/fldd/103/015.htm>> (date accessed: October 24, 2005). In fact, this principle is reconfirmed by several legislative documents, such as 1982 Trial Method, art.3.

with no private elements' involvement⁷³⁴. As such, the last two criteria provided by ILO fundamental Convention No.29 and No.105 have been met. In terms of the second criterion -- "supervised by public authority", it is true that there was a period --from its birth to year 1966 -- the RTL system was relatively free from any public authority's supervision, whereas, with the development of the RTL system and relevant legislation, today both in law and in practice, generally speaking, it is People's Procuratorate's obligation to supervise the daily operations of RTL institutions.⁷³⁵

Indeed, the problem is mainly embodied in the first criterion -- "convicted via judicial procedure". Theoretically, a special but *ad hoc* committee composed of heads of civil administration organs, public security bureaus and labor departments, is established by People's Government at the provincial level, at the level of municipalities or at the level of large and medium-sized cities to control RTL's approval and management.⁷³⁶ Due to the *ad hoc* nature of the RTL committee, however, in practice the whole process for the decision of RTL cases is under the control of public security department. Therefore, some Chinese scholars describe such situation with a specific term -- the same governmental agency with the same employees under two chapeaus (*Liangkuai Paizi, Yitao Banzi*)⁷³⁷. Put specifically, Ministry of Public Security is in charge of the RTL's approval nationwide, whilst at provincial level, the local police bureau controls the investigation and approval of RTL cases.⁷³⁸ In sum, it is a normal phenomenon for public security department under the name of RTL committee to see to the investigation, its final approval as well as the dismissal of an appeal of the RTL case.⁷³⁹ It should be pointed out that

⁷³⁴ 1982 Trial Method, art. 4 (2).

⁷³⁵ 1979 Supplementary Provision, art. 5; 1982 Trial Method, art. 6.

⁷³⁶ *Supra* 706, at 43.

⁷³⁷ *Supra* 705, at 117.

⁷³⁸ *Ibid.*

⁷³⁹ *Ibid.* In fact, based on the writer's on site investigation and interviewing, the officials in China admit that it is quite a normal practice with the public security department in charge almost every aspects of a RTL case, both its investigation and its approval.

the practice as such was formed gradually in the process of the work of RTL *per se* without any legislative support. Therefore, either based on law in paper or based on *de facto* practice, the recipient of a RTL sentence has no right to public hearing, to counsel, nor has right to any kind of judicial determination of his/her case.

The Convention No. 29 provides that an allowed exception of prison labor shall be “a consequence of a conviction of a court of law”, which implies that two requirements shall be satisfied simultaneously: ① “neither an administrative decision, by however high an authority, nor a decision by any other authority” is sufficient; and ② the person concerned must be found guilty of a crime, which is the typical and usual literal meaning of the word “conviction”. In this sense, the RTL system fails to meet the first criterion to become a legitimate exception to prohibited forced labor practice. Due to this defect, it is fair to say that the Chinese RTL system by nature is an institutionalized forced labor system with official support.

Some might argue that although there was no judicial involvement in RTL system, through the promulgation of “Administrative Procedural Law” (*Xingzheng Susong Fa*) in 1990, there was judicial element of RTL decision procedure ever since. According to article 11 of Administrative Procedural Law, the court must hear the lawsuit relating to an action against any administrative sanction to limit the subjects’ personal freedom.⁷⁴⁰ Logically, now that RTL seriously limits its recipients’ freedom by confining them working in a RTL camp or school, its recipients are eligible to apply this clause in their cases. In addition, the 1991 judicial interpretation from SPC on several provisions of Administrative Procedural Law (with the same legislative power as law) makes it clear that if a recipient of RTL does not agree with the RTL committee’s decision, he/she has the right to bring the case to a court and the court must accept this **administrative**

⁷⁴⁰ Administrative Procedural Law of PRC, art. 11.

lawsuit against RTL Committee's decision.⁷⁴¹ Admittedly, the legislative development as such is a progress of the Chinese RTL system. However, it nevertheless cannot be understood as the kind of judicial involvement under the sense of ILO Convention No.29. What the Convention requires is that a legitimate "forced labor" shall be "a **consequence of a conviction in a court of law**"⁷⁴². In other words, it actually requires the judicial involvement to be incorporated into the course of RTL's decision making and approval procedure, rather than merely be a means of afterwards relief as what the SPC's interpretation provides -- recipients have been enforced to work immediately after the decision of RTL committee for a certain period of time.⁷⁴³ Besides, the condition -- a legitimate forced labor shall be a consequence of a conviction in a court of law -- implies that the judicial involvement shall be a compulsory procedure rather than an optional one. Given the contingent nature of the afterward relief under the 1991 judicial interpretation, it is by no means the kind of judicial involvement required by the ILO Convention No.29, article 2(2)(c). In fact, even if the judicial involvement discussed above is compatible with the very provision of the Convention No. 29, the RTL by its nature is merely an administrative sanction rather than a penal one. As such, the person concerned is not found guilty of a criminal offence, but an administrative offence. For that matter, both requirements implied by the first criterion -- "convicted via judicial procedure" are not satisfied.

⁷⁴¹ "Opinions on Several Questions on the Implementation of 'Administrative Procedural Law of PRC' (Trial)" [*Guan Yu Guan Che 'Zhixing Zhonghua Renmin Gongheguo Xingzheng Susongfa' Ruogan Wenti De Yijian (Shxing)*], 1991, promulgated by People's Supreme Court, art. 2.

⁷⁴² ILO Convention No.29, art. 2(2)(c).

⁷⁴³ Actually, some scholar questions the efficacy and feasibility of the so called administrative lawsuit challenging RTL committee's decision. It is reported that "aggrieved parties are often too intimidated by the fear of reprisals to sue administrative organs, especially public security organs, which have wielded extensive power over the populace for decades in China". Besides, it is also believed that interference from administrative organs and from CCP is also a serious practical difficulty encountered in an administrative litigation. Usually, interference as such would "occur throughout the course of an administrative case, but it is especially common before the case is accepted." "At subsequent stages, judges may be pressured to uphold the administrative act, and aggrieved parties may be pressured to withdraw the case." [From Veron Mei-Ying Hung, "Reassessing Reeducation Through Labor", Domestic Developments China Rights Forum second issue of 2003. online: <<http://12.150.189.35/publications/index.cfm?fa=view&id=1331>> (date accessed: June 12, 2005)].

iii. How to Fill the Gap between the Chinese RTL System and the ILO Fundamental Conventions at the Legislative Level?

As analyzed above, among the four criteria, the problem mainly lies in the first criterion -- convicted via judicial procedure, which seems to be the critical criterion with a re-emphasis by ICCPR's relevant provisions -- a legitimate forced labor practice shall be a consequence of a lawful order from a court.⁷⁴⁴ In other words, as long as RTL committee is substituted by people's court and the RTL is categorized as penal sanction rather than administrative one, the RTL system is therefore consistent with the requirements under ILO fundamental conventions No.29 and No.105. However, after so many years, despite facing various criticism from western media that terms RTL as the Chinese gulag contravening international human rights law, and from UN High Commission for Human Rights that calls for its abolition,⁷⁴⁵ China as a state famous for cherishing its reputation, nevertheless chooses to ignore such criticism and refuses to make a **seemingly** small step -- subjecting RTL to a criminal court's decision. It is believed that there must be some deep reasons behind.

a. Commitment to Rule of Law⁷⁴⁶ (ROL) with Reservation -- Ideal Level

1. CCP's Commitment to ROL

Despite that some orientalist and static view holders are likely to deny the existence of the Chinese legal system or the possibility of constructing ROL within "authoritarian" China, considering China's legal history, its past 10 years national disaster, its current rapsid economic development, its increasing interaction with the outside world and especially its being the official

⁷⁴⁴ ICCPR, 1966, art. 8(3)(c), provides that forced or compulsory labor shall not include "any work or service,... normally required of a person who is under detention **in consequence of a lawful order of a court**, or of a person during conditional release from such detention".

⁷⁴⁵ Please see generally in online: <www.laogai.org/news2/book/part-1.pdf> ,

<<http://www.faluninfo.net/displayAnArticle.asp?ID=1248>> (date accessed: February 27, 2006).

⁷⁴⁶ Although there are different versions and ways of expression of definition of ROL, the basic concept is usually the same, i.e., "the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power". Helen Yu and Alison Guernsey, "What is the Rule of Law?" online: <http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml>, (date accessed: April 19, 2009).

member of WTO, the sincerity of China's commitment to constructing a state with ROL and its progress in building a modern legal system shall not be denied.

In China, "law has traditionally equated with the concept of criminal law and related punishment"⁷⁴⁷. For thousands of years, feudal China was under the rule of man, to be precise, rule of only one man -- the emperor.⁷⁴⁸ The initial reform on traditional Chinese legal system could be traced back to the late Qing Dynasty (the early 20th century), where the first time in the Chinese history, its traditional practice of combination of various departments of laws into one body (*Zhufu Heti*) was transformed into a variety of codes, modeled after the legal system of Japan and the continental European system, for the ultimate goals to "secure the emperor's position permanently, to alleviate foreign aggression and to quell internal disturbance"⁷⁴⁹. Despite the collapse of the last feudal empire and the frequent changes of government and constitutions in the early period of the Republic, the pace of westernization of the Chinese law was not suspended but accelerated.⁷⁵⁰ The promulgation of Six Codes (*Liufa*) by the then KMT government covering major aspects of social life, which included constitutional law, civil law, criminal law, civil and criminal procedural law as well as administrative law, officially established a Continental-style judicial system in China.⁷⁵¹ A commentator comments as follows:

Through these revolutionary changes, "for the first time, Western law and legal systems were introduced into China. As a result, they broke down traditional systems, values and practices and separated private law from public law, civil law from criminal law, and the legal system from the

⁷⁴⁷ Wang Zhenmin, "The Developing Rule of Law in China", online:
<<http://www.fas.harvard.edu/~asiactr/haq/200004/0004a007.htm>> (date accessed: October 25, 2005).

⁷⁴⁸ *Ibid.*

⁷⁴⁹ Chen Jianfu, *Chinese Law: Towards An Understanding of Chinese Law, Its Nature and Development* (The Hague: Kluwer Law International, 1999), at 21-22.

⁷⁵⁰ *Ibid.*, at 23-24.

⁷⁵¹ Wu Haiyan, "Exploration on the Basic Features of Six Codes" (*Liufa Quanshu Jiben Tedian De Yizhong Tanxi*), 2004, Journal of Institute of Yu Nan Administration (*Yunnan Xingzheng Xueyuan Xuebao*), the 2nd issue of 2004.

administrative hierarchy. Most importantly, they laid down a foundation for Western law and legal systems to be further studied, developed and adapted in China. In this sense, the late Qing and KMT legal reforms may well be said to have brought about a revolution in Chinese legal thought and to have provided a foundation upon which modern Chinese law is being developed in the PRC. [Of course, this] does not necessarily mean the total disappearance of the influence of traditional conception of law on contemporary development of law. Indeed, the instrumentalist, utilitarian and authoritarian approach to law and law reform, both under Qing and the KMT, clearly reflected and continued the influence of the traditional conception of law as an instrument of the authoritarian state, with its focus on state interests as defined by the state itself.”⁷⁵²

After CCP came into power, KMT’s Six Codes were abolished without realization of the potential legal vacuum. Under Mao’s leadership, the use of law was regarded as “a terroristic means for class struggle”.⁷⁵³ In Cultural Revolution, rule of law was heavily criticized as interfering with class struggle and the necessity of a legal system was widely denied.⁷⁵⁴

The present Chinese legal system is mainly a product after Deng Xiaoping came into power. Learning from past lessons, China began to understand the idea of citizens’ rights and freedoms and the meaning of ruling the country in accordance with law.⁷⁵⁵ “Party leaders repeatedly emphasized the importance of law for providing a social order conducive to economic development”.⁷⁵⁶ The promulgation of the 1982 Constitution and its four amendments, the

⁷⁵² *Supra* 749, at 30.

⁷⁵³ *Supra* 749.

⁷⁵⁴ Please see generally in “Cultural Revolution”, online:

<http://news.bbc.co.uk/hi/english/static/special_report/1999/09/99/china_50/cult.htm> (date accessed: April 25, 2009); “The Great Proletarian Cultural Revolution in China, 1966-1976”, online:

<<http://www.sjsu.edu/faculty/watkins/cultrev.htm>> (date accessed: April 25, 2009); “The People's Republic Of China: III -- The Cultural Revolution Decade, 1966-76”, online:

<<http://www.google.com.sg/search?hl=en&q=umd%2C+university&meta=&aq=f&oq=>> (date accessed: April 25, 2009).

⁷⁵⁵ *Supra* 747.

⁷⁵⁶ *Supra* 749, at 40.

enactment new civil and economic legislation, the promulgation of an unprecedented white paper under the name of “the situation of human rights in China”, all reflect CCP’s serious commitment to ROL. In 1997, as a significant political milestone, the Chinese government pronounced its goal to govern the country according to law and to build up a socialist country with rule of law, which is the first recognition at the Chinese senior levels that the modernization of China depends on laws rather than programs, policies or plans.⁷⁵⁷ In its third constitution amendment, the concept of rule of law is officially incorporated into the current Chinese constitution. It is observed that all these reflect a conscious move from the ideology of “rule by man” or “rule by law”⁷⁵⁸ to “rule of law”, and an improved understanding of the rule of law, especially its value towards market economy and sustainable development of the Chinese society.

2. Serious Commitment to ROL with A “Reservation”

In spite of various competing thick versions of rule of law, such as “statist socialist”, “neo-authoritarian”, “communitarian and liberal democratic”, there is a general agreement by most scholars all over the world (including the majority of the Chinese legal scholars) that rule of law requires at minimum that laws shall be general, published, prospective, clear, **consistent on the whole**, capable of being followed, relatively stable, fairly applied, and “there must be procedural rules for law making and laws must be made by an entity with the authority to make laws in accordance with such rules to be valid”, (hereinafter the “thin version of ROL”).⁷⁵⁹ In fact, the existence of RTL system not only has an obvious conflict with internationally recognized

⁷⁵⁷ “The Rule of Law in All Aspects of China’s Changing Society”, online:

<http://www.unchina.org/about_china/html/rule.shtml> (date accessed: October 27, 2005).

⁷⁵⁸ Rule of law indicates that some special group of a society, or a single person, for example, a monarch or sovereign should be exempted from being governed by law, instead they should use law to control the others. As Edward J. Epstein observed, rule by law in China implies that law was conceived and operated “as an instrument with which to uphold the Socialist political order and perpetuate party domination ... and also used to carry out and consolidate institutional, primarily economic, changes according to predetermined policies”. (From Edward J. Epstein, “Law and Legitimation in Post-Mao China”, in Pitman B. Potter, ed., *Domestic Law Reform in Post-Mao China* (London: M. E. Sharpe, 1994)).

⁷⁵⁹ Randall Peerenboom, “Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China”, 2002, 23 Mich. J. Int’l L. 471. In fact, these are Lon Fuller’s eight principles towards rule of law and usually described as the thin version of ROL.

labor standards against state supported forced labor whose status has arguably become customary international law⁷⁶⁰, but also creates an internal contradiction with CCP's serious commitment to even the thin version of ROL.

First, as an administrative sanction, the legal nature of RTL system is not compatible with the degree of its severity.⁷⁶¹ Judging from the term and the degree of personal freedom that it takes away, considering that RTL is to target law-breakers but not serious enough to be punished by penal code, the severity of its sentence seems quite unreasonable. For example, by the Chinese criminal law, the term of public surveillance as one of the five principal punishments⁷⁶² is from three months to two years⁷⁶³; as for the case of criminal detention as another principal punishment, its terms is from one to six months⁷⁶⁴. To those criminals who are sentenced to public surveillance, they are confined to the city or county where they live and are under the surveillance of public security bureau.⁷⁶⁵ When they are engaged in working, they must be paid as other fellow workers, i.e., equal pay for equal work.⁷⁶⁶ In other words, except for not being able to freely leave for other cities or counties, and being restricted when exercising certain civil and political rights, such as freedom of speech, of press and of assembly⁷⁶⁷, the convicted under sentence of public surveillance are living just like ordinary citizens. However, in the case of RTL subjects, they are required to gather in the special institutions to work and live there with tight guard.⁷⁶⁸ Even in the

⁷⁶⁰ For more information, please see above, Part 4.1 (B) -- Under Customary International Law.

⁷⁶¹ For this point of view, some scholars in China, such as Liu Renwen, Lin Xiaochun, Song Yafang etc. are also taking the same view.

⁷⁶² The five principal punishments under PRC criminal code include: public surveillance, criminal detention, fixed-term imprisonment, life-time imprisonment and death penalty. (From criminal law of PRC, 1997, art.33)

⁷⁶³ Criminal Law of PRC, 1997, art. 38.

⁷⁶⁴ *Ibid.* art. 43.

⁷⁶⁵ *Ibid.* art. 38.

⁷⁶⁶ *Ibid.* art. 39.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ Detailed Regulation on the Administrative of Reeducation through Labor (*Laodong Jiaoyang Guanli Gongzuo Zhifa Xize*), 1992, chapter 5 & 6.

public holiday, they can only rest on the premises within the institutions.⁷⁶⁹ Furthermore, to compare criminal detention with the punishment of RTL, the time limit of the former is one to six months only (of course, detainees lose their freedom completely), whereas the latter are much longer, whose maximum term could reach four years -- eight times longer than the term of detention. What is more, the detainees are allowed to go home once or twice a month, whilst, to RTL subjects, only half year consecutive good performance could entitle them to pay a visit home.⁷⁷⁰ In addition, probation may be granted to a criminal sentenced to detention or to fix-term imprisonment less than three years⁷⁷¹; however, no similar grace is available for the sentence of RTL. Hence, it is fair to say that the disproportionate severity of the punishment of RTL brings about a serious **consistency dilemma** within the Chinese legislation.

Second, the legal foundation for the system of RTL is problematic as well. As discussed above, in spite of the serious limitation of its recipients' freedom, the major legislation in charge of RTL, by its nature, belongs to the category of administrative regulation (*Xingzheng Fagui*)⁷⁷². According to "Law on Administrative Sanction" adopted by the National People's Congress in 1996, any administrative penalty that restricts personal freedom could only be provided by law (in its narrow sense whose legal hierarchy is only subordinated to the Chinese constitution);⁷⁷³ to those laws on administrative penalties promulgated before the said "Law on Administrative Sanction", they should be amended to be consistent with this new law by the end of 1997.⁷⁷⁴ This principle is reconfirmed by the later "Law on Legislation" (*Lifa Fa*) promulgated in year 2000 which stipulates that only law (in its narrow sense) can provide punishment to limiting

⁷⁶⁹ *Ibid.* art. 24.

⁷⁷⁰ *Ibid.* art. 25.

⁷⁷¹ *Supra* 763, art. 72.

⁷⁷² For more information, please see text 4.2(C) (i) (a) and note 689.

⁷⁷³ Law on Administrative Sanction of PRC, 1996, art. 9. For more information, please see text above part 2.3 (A) (ii) (c) -- "The Hierarchy of the Chinese Legislation".

⁷⁷⁴ *Ibid.* art.64.

people's freedom.⁷⁷⁵ In other words, administrative regulations whose legal authority is lower than law (in its narrow sense) are not eligible to provide the administrative sanctions whose main function is to limit people's freedom. For that matter, as administrative regulations promulgated by State Council, the 1957 Decision, the 1979 Supplementary Provision, together with the 1982 Trial Methods, have been proved to be lack of sufficient legal basis for their legitimate existence.⁷⁷⁶

In spite of the disproportionate nature of the punishment of RTL, the validity issue of its relevant legislation and the inconsistency they have caused within the Chinese legal system, the CCP none the less chooses to support this practice, disregarding its serious commitment towards the construction of ROL. Of course, to be realistic, it may take time to reform the RTL system to be consistent with the international core labor standards provided by ILO Convention No. 29 and No. 105; however, this argument still can not justify CCP's unduly positive praise on the system of RTL -- describing it as an indispensable element of China's construction of ROL with socialist characteristics regardless of its problematic nature against the basic principles of ROL⁷⁷⁷.

In fact, from the writer's view, one of the reasons for CCP to keep the RTL system as it is is to try to use it as a non-legal shortcut to maintain its one party control and to restore social and political stability from any kind of turmoil as soon as possible. Back to its birth, RTL was used as a political tool to attack counterrevolutionary elements and rightists that were believed to hide among people; later, in the 1989 Tiananmen political turmoil, the RTL served as an effective and

⁷⁷⁵ Law on Legislation of PRC, 2000, art.8 (5).

⁷⁷⁶ Some scholars in China argue that since 1957 Decision and 1979 Provision have been approved by the Standing Committee of People's Congress, it could be regarded as "law" (in its narrow sense). However, even this argument could be squeezed through, it by no means suitable for the 1982 Trial Method, the most extensive and detailed administrative regulations covering RTL system so far.

⁷⁷⁷ *Supra* 705, at 15.

quick instrument to confine and reeducate political dissenters.⁷⁷⁸ Since 1999, a worldwide attention has been paid to China's RTL system again, because it was used to deter and punish Falun Gong believers.⁷⁷⁹ Recently, two elderly women both in their late 70s were sentenced to a year of RTL sanction due to their request for permission to protest during Beijing Olympics.⁷⁸⁰ Without any involvement of the relatively long court procedure, hence, avoiding the dilemma of no criminal charges under the Chinese penal code applicable to these political dissenters or Falun Gong believers and also avoiding the dilemma caused by the gradual expansion of defendant's rights in the formal criminal justice system in China, thousands of people were quickly and quietly sentenced to work and to be educated at RTL institutions for several years -- a fairly long cooling period. It shall be pointed out that among these political dissenters, some of them have merely expressed their discontent or concerns of the current political system and certain social problems, such as corruption, in a non-violent way. To sentence people as such to the RTL institutions is inconsistent with the spirit of ILO Convention No. 105 where an immediate and complete abolition of forced or compulsory labor for the mere expression of political or ideological opinions is required.⁷⁸¹

The second reason for CCP to keep RTL is to prevent CCP from being criticized for certain human rights abuses.⁷⁸² For instance, based on the UDHR, "no one shall be subject to arbitrary arrest, detention or exile" and "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of

⁷⁷⁸ In fact, this practice also conflicts with the ILO Convention No. 105 which requires immediate and complete abolition of forced or compulsory labor "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".

⁷⁷⁹ David Hsieh, "Falungong on the Defensive within China", The Strait Times, 25 July, 2001, online: <<http://taiwantt.org.tw/books/cryingtaiwan3/content/200107/20010725a-102.htm>> (date accessed: October 31, 2005)

⁷⁸⁰ Please see Kent Ewing, "An Olympic Triumph for China", online: <www.atimes.com/atimes/China/JH26Ad01.html> (date accessed: April 2, 2009); Michael Bristow, "China's Push for the Perfect Games", online: <news.bbc.co.uk/2/hi/asia-pacific/7576240.stm>

⁷⁸¹ For more information, please see text above accompanying note 566 to 573.

⁷⁸² Some scholars, such as Zou keyuan also held the same point of view. Please see *supra* 729.

any criminal charge against him”.⁷⁸³ Apparently, now that RTL is emphasized to be an administrative sanction rather than criminal regardless of its disproportionately severe punishment, its detention and decision making process will not be subject to the universal human rights norms as such. Therefore, RTL system could **circumvent** the application of the standards regarding fair trial provided by UDHR to certain criminals; as such, CCP is able to be immune from criticism for human rights abuses to some extent.⁷⁸⁴ Accordingly, no matter how big a contradiction between the system of RTL and the principles of ROL, the non-judicial nature of the former that can lead to a quick restore of social and political stability and an efficient maintenance of CCP’s one party control, as well as its importance for CCP to be immune from criticism for human rights abuses are too valuable to be given up. Indeed, although the current legislation of the RTL in paper has nothing to do with “political purpose”, its *de facto* practice implies its unbroken link with “political purpose” -- restoring social and political stability and strengthening one party control as soon as possible. In this sense, it is partly right to understand the RTL 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”⁷⁸⁵, which is required by the Convention No. 105 for a state to “take effective measures to secure the **immediate and complete abolition** of forced or compulsory labor”⁷⁸⁶ of such kind.

3. Where Will the Political Will to Push the CCP to Give Up Its Reservation towards ROL Come from? (General Comments)

⁷⁸³ UDHR, 1948, art.9 & 10.

⁷⁸⁴ *Supra* 729. This article also points out that although China was proud of its low criminal rate, i.e., average 0.2 percent per year, it actually conceals a fact that many of the cases, which have reached the threshold of criminal offence, are nevertheless be handled directly by the department of public security through the RTL system. From the writer’s point of view, this might be a reason for CCP to keep RTL system as it is, but it by no means any important reason.

⁷⁸⁵ ILO Convention No. 105, art.1 (a).

⁷⁸⁶ *Ibid.*, art. 2.

As for how to create the CCP's motivation to give up its reservation about ROL, it is not an easy or short term task. First, it depends on the further development of the ROL inside China to create internal public awareness of ROL, including CCP members' own awareness, together with the deeper understanding of human rights by public and government officials,⁷⁸⁷ a more democratic government, as well as a further development of the market economy in China⁷⁸⁸.

Second, international pressure is also indispensable. Assistance from ILO -- a labor right expert international organization (albeit its strategies are mainly limited to moral and diplomatic persuasion and embarrassment of government who fail to obey their voluntary responsibilities), is nonetheless helpful in cultivating public awareness and understanding of international core labor standards against forced labor. From early 2003, the ILO has been providing assistance for the reform of RTL via technical seminars held in China and study tours overseas.⁷⁸⁹ Besides, now that China has joined WTO -- "the only global trade organization dealing with the rule of trade between nations"⁷⁹⁰ and famous for its trade related international rule of law capacity building --

⁷⁸⁷ There is a positive sign from CCP because it amended its constitution in year 2004 which include government's protection on human rights, the first in Chinese legislative history to include the phrase "human rights".

⁷⁸⁸ It is believed that rule of law is a must to market economy. Just as Alan Greenspan comments in his speech delivered to 2003 Financial Markets Conference of the Federal Reserve Bank of Atlanta, Sea Island, Georgia, "market economies require a rule of law". [from online: <<http://www.federalreserve.gov/BoardDocs/speeches/2003/20030404/default.htm>> (date accessed: November 11, 2005)]; Besides, as Li Buyun, a famous Chinese jurist also observed, market economy is based on self-determination and equality among all kinds of economic stakeholders involved and the respect for their respective invested material interests. Its feature includes diversified stakeholders, clear property rights, competition-based operation, norm-based market behavior and scientific macro control. In order to have a better operated market economy merely depending on the economic rules is not enough. A legal method to regulate, guide, confine, protect and serve a healthy development of market economy in china seems indispensable. Therefore, an internal requirement for market economy is rule of law rather than rule of man. [from Li Buyun, Rule of Law, Establishing A Socialist State with Rule of Law" (Yifa Zhiguo, Jianshe Shehui Zhuyi Fazhi Guojia), online: <<http://www.people.com.cn/GB/14576/15097/1912676.html>> (date accessed: November 10, 2005)].

⁷⁸⁹ Report of the Director-General of ILO, *A Global Alliance against Forced Labor* (Geneva: International Labor Office, 2005), at 27.

⁷⁹⁰ Online: <http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> (date accessed: November 4, 2005).

at the end of year 2001 after fifteen years arduous negotiations, from an optimistic point of view, it is believed that in spite of its limitation to trade related area, WTO's impact on the ROL construction in China would be unprecedented as well as profound, and China's entry to the trade related rule of law regime would "call for higher standards for China's judicial system".⁷⁹¹ As such, China's entering into the WTO would be helpful for cultivating a legal habit of the Chinese governmental officials to obey the principles of ROL, at least to obey the principles of its "thin" version -- principles of transparency, judicial review and uniform, impartial and reasonable administrative legislation.⁷⁹² Despite that the improvement as such is currently limited to the area of the trade related law, its potential for spreading to other non-trade-law areas, and therefore indirectly improving the CCP's ROL construction shall not be underestimated. Hopefully, through the cooperation between the internal and external impulse, the CCP's political will of giving up its reservation to ROL, in particular its RTL system might be created gradually.

b. Suggestions on the Future Development of the Chinese RTL System

In this section, the writer categorizes various academic suggestions in terms of the future development of the RTL System into three major groups and is going to analyze them one by one as follows:

1. Retain and Strengthen the RTL System

⁷⁹¹ See generally in Cao Jianming, "WTO and the Rule of Law in China", 2002, 16 Temp. Int'l & Comp.L.J. 379; Grant D. Aldonas, "WTO: Will China keep Its PromisesCan It?", online: <<http://cecc.gov/pages/hearings/060602/index.php?PHPSESSID=c458216f15159b7c0dad704c0a615dee>> (date accessed: October 21, 2005); online: <<http://www.uschina.org/public/wto/9905.html>> (date accessed: November 1, 2005); Martin G. Hu,, "WTO's Impact on the Rule of Law in China", online: <http://www.mansfieldfdn.org/programs/program_pdfs/08hu.pdf> (dated accessed: October 24, 2004).

⁷⁹² *Ibid.* Generally speaking, most scholars would likely to agree that china's entering into the WTO would bring about certain legal reform inside china, mainly focusing on "transparency", "judicial review" and "uniform, impartial and reasonable administrative legislation", more or less, these areas are linking to the principles of ROL's thin version, i.e., publicity, clarity, consistency, prospectiveness and stability.

The first one is to retain and strengthen the RTL System.⁷⁹³ Some Chinese scholars insist that RTL, as a system with unique Chinese characteristics, has educated and reformed about three million people for more than four decades. Hence, it has contributed a lot to the stabilization of the Chinese society, especially during the transitional period.⁷⁹⁴ However, considering RTL's conflicts with certain basic principles of ROL⁷⁹⁵ as well as its serious inconsistency with international core labor standards and principles of human rights against state-supported forced labor, there is no excuse for CCP to keep RTL as it is, let alone to strengthen it.

2. Completely Abolish the RTL System

The second suggestion is to completely abolish RTL on an urgent basis.⁷⁹⁶ Supporters of this view have several reasons as follows:

- (1) Considering that the RTL system fails to satisfy the tests required by the prison labor exception provided by the Convention No. 29 as well as its controversial nature -- an institutionalized forced labor system partly served as a means for punishing people for their expression of political or ideological opinion, it is incompatible with China's obligation under the customary international law against forced or compulsory labor;

⁷⁹³ China's Ministry of Justice, "Inheriting the Past and Creating the Future, Making Good Progress--Commemorating the Forty Year Anniversary of the Birth of RTL System" (*Jiawang Kailai, Zaichuang Jiaji -- Jinian Laodong Jiaoyang Zhidu Chuangjian Sishi Zhounian*), Chinese Judicatory (*Zhongguo Sifa*), the eighth issue of 1997, at 1.

⁷⁹⁴ *Ibid.*

⁷⁹⁵ For more information, see above, text accompanying note from 759 to 776.

⁷⁹⁶ For more information, please see generally in Shen Fujun, "Some Thoughts on Abolishing RTL" (*Guanyu Feichu Laodong Jiaoyang Zhidu De Sikao*), Legal Science (*Faxue*), the seventh issue of 1997; Chang Wenye, Chen Zhicai, "Must Abolishing RTL" (*Feichu Laodong Jiaoyang Zhidu Shizai Bixing*), Journal of Institute of Liao Ning Province on Public Security and Judicial Management (*Liaoningshen Gongan Sifa Guanli Ganbu Xueyuan*), the third issue of 2000; Tao Zifeng, "Argument on the Necessity to Abolish RTL" (*Lun Fei Chu Lao Dong Jiao Yang De Bi Ran Xing*), Journal of Institute of Yi Yang Teacher-Training (*Yiyang Shizhuan Xuebao*), the fourth issue of 2001; Luo Yong, Yang Jing, "Thoughts on Abolishing RTL" (*Feichu Laodong Jiaoyang De Sikao*), Oil Training (*Shiyou Jiaoyu*), the fifth issue of 2003; Meng Zhe, "Reflection of the Legislative Method of Reeducation Through Labor" (*Dui Laodong Jiaoyang Lifa Fangan De Fansi*), Current Legal Study (*Dangdai Faxue*), seventh issue of 2003.

- (2) RTL system is against certain basic principles of ROL, i.e., the related legislation is lack of legitimacy,⁷⁹⁷ and the related punishment is unreasonably harsh compared with the other principal punishments under the Chinese penal code, such as criminal detention and public surveillance⁷⁹⁸;
- (3) In practice, this system lacks effective monitoring mechanism on its investigation, decision making and appeal. It can easily bring about power abuses by public security department to violate citizen's basic rights;
- (4) The rules and regulations on RTL are numerous, sometimes conflicting between each other and some are out of dated. For example, in the 1957 Decision, it provides that RTL shall be applied to those "counterrevolutionary" elements (*Fan Geming*), which is a term being amended into persons "endangering national security" in the first amendment of the Chinese Criminal Law in 1999.⁷⁹⁹ Besides, some RTL related rules and codes of conducts are not promulgated to the public but only serve as "internal documents" (*Neibu Wenjian*).⁸⁰⁰ Without proper publication, the conflicts among various internal documents appear to be inevitable.

3. Gradually Reform the RTL System

The third suggestion is the so called "gradual reform approach", i.e., gradually reforming RTL to make it more consistent with the principles of ROL and international core labor standards.⁸⁰¹ To be precise, the "gradually reforming" approach can be divided into several steps as follows:

⁷⁹⁷ For more information on this point, please see above, text accompanying note 772 & 776

⁷⁹⁸ For more information on this point, please see above, text accompanying note 761 & 771.

⁷⁹⁹ First amendment of Chinese criminal law, 1999, art.17.

⁸⁰⁰ *Supra* 796.

⁸⁰¹ Please see generally in Wang Zhaihua, "Discussion on the Chinese Reeducation Through Labor System: Current Situation and Future Development" (*Lun Woguo Laodong Jiaoyang Zhidu De Xianzhuang Ji*

First and foremost, the non-judicial nature of RTL's decision making process is suggested to be changed. Considering that there might not be enough judges who are experts on RTL decision making at present, an alternative serving as a transitional mechanism could be designed as follows: allowing RTL committee to make an initial decision, however, its decision must be subject to court's final approval before being publicized and applied to relevant persons. It is also suggested that the procedures on the final approval must follow the basic principles of the Chinese laws in charge of administrative processes, especially those about the participation of the relevant persons and due process. Through practice as such, a judicial examination and monitoring mechanism is guaranteed during the process of decision making on RTL cases, which not only makes up the non-judicial nature of RTL's decision making, but also serves as a safety valve against discretion of RTL Committee. Of course, the way of the final approval by judges shall not be as complicated as usual judicial procedure. Generally speaking, a simplified procedure might be introduced -- they might be paper work based in principle. As such, it will be able to avoid the dilemma of lack of manpower in the current Chinese court system. As for those hard cases or when the relevant person applies for a hearing, judges nevertheless reserve the right to hold open hearings with both sides' as well as their lawyers' attendance (just like usual administrative judicial procedures in China). Gradually, those judges who are assigned to sit on RTL's final approval will become experts in the said area. When time is mature, the whole procedure of RTL decision making could be incorporated into the Chinese judicial system, i.e., the RTL Committee's role will be completely substituted by courts with judges who are experts.

Fazhan), Current Legal Study (*Dangdai Faxue*), the first issue of 2001; Liu Renwen, "Reeducation Through Labor and Its Reform" (*Laodong Jiaoyang Zhidu Jiqi Gaige*), Administrative Law Study (*Xingzheng Faxue Yanjiu*), fourth issue of 2001; Liu Zhongfa, The Reform of Reeducation Through Labor (*Laodong Jiaoyang Zhidu De Gaige Chulu*), Sino-Foreign Legal Study (*Zhongwai Faxue*), sixth issue of 2001.

Second, in order to be consistent with the said consistency principle of ROL, the degree of the punishment of RTL system shall be generally consistent with the severity of its offences. As mentioned above in part -- “Serious Commitment to ROL with A ‘Reservation’”, the severity of RTL’s punishment in nature is more serious than one of the principal punishments under the penal code -- public surveillance. In addition, although the punishment of the RTL system only limits its recipients’ freedom to some extent whereas detainees of criminal detention have completely lost their freedom, given its unreasonably long term -- maximum of four years, sometimes one would rather choose to be punished by criminal detentions than by the administrative sanction under the RTL. It is suggested by some scholars that the term of the punishment of RTL shall be shortened substantially so that the disproportionately severe nature of the RTL’s punishment could be made up to some extent. Above and beyond this, probation is suggested to be introduced to RTL; otherwise, it does not make sense for those convicted by penal code to be granted probation⁸⁰², whereas, for less severe offenders -- RTL subjects, they are enforced to work and live in a confined place without any opportunity to be pardoned. Of course, as probation is not allowed to apply to recidivists in the Chinese penal code, by the same token, for offenders who are subject to RTL punishment more than one time, probation should not be allowed either.

4. The Writer’s Position

To be objective, there are some merits of this “gradual reform approach”. After adjusting the disproportionate punishment of the RTL, this system will be more consistent with the basic principles of the ROL. In addition, via introducing the judicial examination and monitoring mechanism as such, one of the two requirements under the first criterion of the permissible prison labor exception to forced or compulsory labor provided by the Convention No. 29 -- “decided by a court of law” could be satisfied thereafter. However, as long as the nature of the RTL system is

⁸⁰² Penal Code of PRC, 1997, art. 72.

classified as a means of administrative sanction and the person concerned is not “convicted”-- found guilty of a criminal offense, according to the Committee of Experts, “in the absence of such a finding, compulsory labor may not be imposed, even as a result of a decision by a court’.⁸⁰³

In sum, after discussing the pros and cons of the three available suggestions on the reform of the RTL system, the best way available would be to abolish the RTL so that China could fulfill its obligation under the CIL against forced labor, in particular the obligation crystallized by the ILO fundamental Convention No. 29 and No. 105,⁸⁰⁴ as well as make a great progress on its way to the construction of ROL.

iv. Concluding Remarks

In this chapter, the writer conducts a comprehensive case study on the Chinese RTL system. First, the writer introduces this system from its birth, its gradual development to its present situation. To be objective, the current Chinese RTL system has been improved substantially compared with its beginning status and what it was during the Cultural Revolution. Later on, an evaluation on RTL system in relation to international core labor standards against forced labor is made. From the writer’s analysis, mainly because of lack of judicial involvement and the person concerned is not “convicted”, the Chinese RTL system fails to meet the requirement of legitimate prison labor exception under the ILO fundamental convention No. 29 and No. 105. As such, RTL system is not able to be qualified as a permissible exception to prohibited forced labor. Accordingly, the writer tries to provide her comments on the three approaches on the reform of the Chinese RTL system under the framework of the ILO Fundamental Conventions against forced labor. The writer starts with analyzing the hidden reasons for CCP’s refusal to reform its RTL system,

⁸⁰³ *Supra* 58, at 140.

⁸⁰⁴ For more information on this respect, please see generally in Ibrahim F.I. Shihata, “The Treaty as a Law Declaring and Custom-Making Instrument”, 1966, 22 *Egyptian Rev. Int’l L.* 51; Anthony D’Amato, *Treaties as a Source of General Rules of International Law*, 1962, 3 *Harv. Int’l L.J.* 1. [Online: <<http://anthonydamato.law.northwestern.edu/Adobefiles/A62a.pdf>> (date accessed: June 27, 2006)].

regardless of the fact that the CCP is aware of its problematic nature. And then the writer talks about the driving force that is able to help create CCP's political will to engage into reforming RTL system. Finally, after a critical review on the three available approaches, the writer supports the approach of a complete abolition of the RTL system to make the Chinese labor legislation much more consistent with both the international core labor standards and the basic principles of ROL.

4.3 Conclusion on Chapter Four

In chapter four, at the beginning, the writer introduces the general international law against forced labor and proves that practice against forced labor has obtained the legal status as CIL. And then the writer starts analyzing the three types of forced labor in China. As for the first type, its subjects are ordinary workers. In fact, the Chinese legislation against the first type of forced labor is competent and provides proportionate liabilities for law breakers. The inadequacy lies in the implementation of the related legislation. Therefore, the writer provides the suggestions on how to sort out the problems as such: (1) improvement of judicial independence, and (2) professionalization of judges in China to reduce the chances of corruption during the procedure of decision making and enforcement of court decisions against such type of forced labor.

In terms of the second type of forced labor -- the convicted labor reform system, from the writer's view, it is undeniable that some past and present practices and certain former governmental policies on prison labor in china is inconsistent with the relevant requirements under the ILO fundamental conventions No. 29 and No.105. However, it is proved that the inconsistency as such is no longer systematic. Indeed, both the present legislation and the governmental policies are consistent with the ILO Conventions No. 29 and No.105. As such, it is fair to say that today's Chinese convicted labor reform system is designed to educate and cultivate criminals through means of labor instead of adopting it as a means to develop national economy. A few incidents

conflicting with the international core labor standards should not be used as the evidence to deny the value of this system. After all, no matter how elaborately planned, each system will inevitably carry some problems, in particular in the course of its implementation.

It is worthy to be pointed out that some Human Rights NGOs have accused China for its adopting forced labor as a punishment for having participated in strikes.⁸⁰⁵ They argue that China has sentenced a certain amount of leaders, organizers and other active participants to work in the convicted labor reform camps. Be that as it may, accusation as such suffers at least one defect. The said NGOs have admitted that in most cases, if not all, the reasons for the strikers to be sentenced to prison labor are not directly because of their behavior of organizing or participating a strike, but due to the destruction of property or public order during the course of a strike.⁸⁰⁶ If following the literal explanation of the requirement provided in Convention No. 105 -- “immediate and complete abolition of forced labor ... as a means of punishment for having participated in strikes”, it only prohibits a direct causal relationship to be established between behavior of having participated in a strike and forced labor instead of including a remote causal relationship as what has happened in the Chinese context. As such, different from the statement made by certain overseas NGOs, forced labor as a means of punishment for having participated in strikes is by no means a serious problem in China and there is no hard evidence to prove that practice as such is with institutional support.

As far as the third type of forced labor in china is concerned, it might be where the most serious violation of ILO conventions against forced labor lies. After a comprehensive introduction to the Chinese RTL system, a comparative study between the Chinese RTL system and the ILO Convention No. 29 and 105 is conducted. Through the analysis as such, the Chinese RTL system

⁸⁰⁵ For more information, please see text above accompanying note 472 to 474.

⁸⁰⁶ *Ibid.*

has been proved to be a prohibited forced labor practice under the ILO fundamental conventions. Accordingly, the writer provides her support on a complete abolition of the RTL system and points out that only via such an approach could the Chinese labor legislation be more consistent with the international core labor standard against forced labor as well as the basic principles of ROL to which the Chinese government has made a serious commitment.

Chapter 5: Studying Child Labor in China from the Perspective of Relevant International Core Labor Standards

5.1 What is Child Labor?

A. General Definition of Child and Child Labor in Accordance with International Law

As for the definition of child, except for some extreme cases, where childhood might be viewed biologically instead of chronologically, most states all over the world would be willing to define child by his/her age. Under the United Nations Convention on the Rights of the Child (the “UNCRC”), a child means every human being below the age of eighteen years unless domestic law provides otherwise.⁸⁰⁷ According to the ILO Convention No. 138 -- the Convention Concerning the Minimum Age for Admission to Employment (Minimum Age Convention), the minimum age for work must not be less than the age of completion of compulsory schooling and, in any case, shall not be less than fifteen.⁸⁰⁸ Of course, the convention allows countries “insufficiently developed” to temporarily lower the minimum age to 14.⁸⁰⁹ For work that is likely to “jeopardized the health, safety or morals of young persons”, the minimum age for employment is 18.⁸¹⁰ When “the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity”⁸¹¹, the minimum age for dangerous work can be lowered to 16.⁸¹² Besides, the convention also permits “the employment or work of persons 13 to 15 years of age on light work”, which is not likely to harm their health or development or prejudice their chances to get appropriate education and training.⁸¹³ Once again, some member states could reduce this

⁸⁰⁷ UNCRC, 1989, art.1.

⁸⁰⁸ ILO Convention No.138, art. 2(3).

⁸⁰⁹ *Ibid.*, art. 2(4).

⁸¹⁰ *Ibid.*, art. 3 (1).

⁸¹¹ *Ibid.*, art. 3(3).

⁸¹² *Ibid.*

⁸¹³ *Ibid.*, art. 7(1).

age by one year.⁸¹⁴ In sum, although there are various exceptions based on different circumstances, at international level, the general line of demarcation to define child labor is 15 years old.

B. Distinguishing Acceptable and Unacceptable Child Labor

Obviously, not all work is bad for children. In limited amounts and under certain circumstances, children’s involvement of certain kinds of work could be beneficial for them to develop a sense of responsibility, to exercise their bodies, to earn a little pocket money and even to prepare them for a mature and successful adult life in the future. Hereinafter, child labor as such would be called as **child work** in the later part of this thesis. To distinguish child work from unaccepted child labor, the key point is to draw a dividing line between them. After a research on various definitions provided by different international organizations, NGOs and other relevant groups,⁸¹⁵ the writer will provide a comparison between child work and child labor in the following table: (table 4)

	Child Labor	Child Work
Purpose	The purpose is to economically exploit children;	The purpose is to improve children’s quality of life;
Nature	The nature of it tends to bind children to poverty, and therefore create a vicious circle for endless misery such as unemployment when	The nature of it is mainly to cultivate and help children, such as to help them have a sense of responsibility, a better understanding of the world and to

⁸¹⁴ *Ibid.*, art. 7(4).

⁸¹⁵ Please see generally in “Child Work Versus Child Labor”, online:

<http://www.unicef.org/protection/index_childlabor.html> (date accessed: November 22, 2005); Child Work, online: <<http://www.childinfo.org/eddb/work/>> (date accessed: November 22, 2005); “Images of Child Labor”, online: <<http://www.childlaborphotoproject.org/childlabor.html#whatis>> (date accessed: November 22, 2005); online: <<http://www.tqnyc.org/NYC040624/THE%20FIGHT%20FOR%20THE%20RIGHT%20OF%20THE%20SILENCED%20CHILD2.htm>> (date accessed: November 13, 2005); online: <http://library.thinkquest.org/03oct/01908/800/whatisit_childlabor.htm> (date accessed: November 12, 2005); Sandy Hobbs, Jim McKechnie, & Michael Lavalette, *Child Labor: A World History Companion* (Santa Barbara, California: ABC-CLIO, 1999).

	they grow up;	prepare themselves for future;
Work	The work is usually prohibited by legislation, and child laborers have no chances to be covered by social security as well as benefits for ordinary adult workers;	The work is regulated by suitable legislation or governed by community values and norms;
Rewards	No fair rewards provided for these child laborers;	Child workers are paid reasonably according to their contribution;
Workplace Environment	The working environment is hazardous to child laborers' healthy development either psychologically or physically;	Workplace is safe and child friendly, not hazardous to children's healthy development;
Supervision	No suitable supervision or guidance is provided by responsible and well-trained adults;	Appropriate supervision and guidance is provided by responsible and caring adults with enough professional training;
Working Hours	Unreasonably long working hours jeopardize child laborers' right to education and right to rest, and cause harmful memories of their childhood as well;	Limited working hours without interfering children's right to education, rest and right to a childhood with nice memories;
Workload	Considering children's age and capabilities, the workload is too heavy to be carried out by an immature body, such as working as construction worker, machinist and coal breaker etc;	The work is suitable for children's age and physical and mental capabilities, such as newspaper delivery, washing dishes, other light chores etc;
Impact on Children	Child laborers are easily to be subject to verbal, psychological and physical abuses.	Rather than being negatively influenced, children's physical and mental well-being is nourished in working environment.

C. The Evil Nature of Child Labor

Among many serious crimes, “none is more brutal, horrible, disastrous, insane” than the exploitation of children, because exploitation as such is equivalent to the deprivation of “health, vitality, childhood and education as well as the destruction of the body and the soul of future generations”.⁸¹⁶ Generally speaking, the types of harm caused by child labor can be divided into four categories: (1) physical harm; (2) psychological harm; (3) developmental harm; (4) harm to society.

i. Physical Harm

Obviously, children are more likely to suffer workplace accident than adults due to fatigue, poor judgment and insufficient knowledge and experience of work process.⁸¹⁷ In addition, the machinery, tools, and other layout of most work places are designed particularly for adults. Accordingly, it not only adds difficulties for children to operate them, but enhance the risks when children are using them.⁸¹⁸ The rates of occupational injury and death reveal the consequences of the hazards faced by child laborers.⁸¹⁹ Although statistics appear to be patchy, evidence still could be found in studies conducted in the developed world, where hospital records and awards under workers’ compensation schemes have been investigated.⁸²⁰ For example, in US, “the rate of injury per hour worked appears to be almost twice as high for children and adolescents as it is for adults”.⁸²¹ Worse still, when child laborers get injured, because their bodies are still in the

⁸¹⁶ Sandy Hobbs, Jim McKechnie, & Michael Lavalette, *Child Labor: A World History Companion* (Santa Barbara, California: ABC-CLIO, 1999), at 199.

⁸¹⁷ Charles T. Mantei, “It Takes A Village To Raise A Child: The Role Of The Organization of American States in Eliminating The Worst Forms of Child Labor in Brazil”, 2001, 32 U. Miami Inter-Am. L. Rev. 469.

⁸¹⁸ *Ibid.*

⁸¹⁹ “A Future Without Child Labor: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work”, online:

<http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=1566> (date accessed: October 13, 2005).

⁸²⁰ *Ibid.*

⁸²¹ *Ibid.*

process of development, they tend to be hurt more seriously than adult workers.⁸²² Besides, an increasing number of academic research and writing on child labor have provided empirical evidence on its negative physical impact on children in general.⁸²³ For instance, a study of the working children in Tel Aviv shows that 42 percent of them had visible signs of poor health, including poor teeth, paleness, short stature and a malnourished appearance.⁸²⁴

ii. Psychological Harm

Being denied a chance of education and a normal childhood, child laborers are easily subject to incurable psychological harm when they grow up.⁸²⁵ Exposed to the child unfriendly working environment, child laborers lose the chance to improve their learning skills necessary for their future development, as well as the chance to become increasingly mature, able and confident to assume greater responsibilities in the school, in the community and generally in life.⁸²⁶ In addition, as almost known to all, traumatic experience either physical or psychological that happened during childhood, which is easily caused by child labor, might lead to morbid even self-destructive pattern of behavior in a person's future life.⁸²⁷ For example, a victim of child

⁸²² *Ibid.*

⁸²³ For more information, please see generally in David L. Parker, "Child Labor: The Impact of Economic Exploitation on The Health and Welfare of Children", 1999, 21 Whitter L. Rev. 177; Charles T. Mantei, "It Takes A Village To Raise A Child: The Role Of The Organization of American States in Eliminating The Worst Forms of Child Labor in Brazil", 2001, 32 U. Miami Inter-Am. L. Rev. 469; Valentina Forastieri, *Children at work : health and safety risks* (Geneva : International Labor Office, 1997); "A Future Without Child Labor: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work", online: <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=1566> (date accessed: October 13, 2005).

⁸²⁴ David L. Parker, "Child Labor: The Impact of Economic Exploitation on The Health and Welfare of Children", 1999, 21 Whitter L. Rev. 177.

⁸²⁵ Online: <<http://www.hrw.org/children/labor.htm>> (date accessed: December 5, 2005).

⁸²⁶ Marta Santos Pais, "The Question of Child Labor in A Child Rights Perspective", online: <<http://www.gddc.pt/atividade-editorial/pdfs-publicacoes/7374-c.pdf>> (date accessed: December 5, 2005).

⁸²⁷ A Japanese research group from Kagoshima University also found that the traumatic experience during childhood would dramatically increase the chance for self-injuring when growing up. Actually the risk of self-injuring is 8.7 times than children without such experience. From Xinmin Evening News, (China), January 24, 2006, at A1 14.

prostitution is inclined to suffer an inability to trust others in his/her adulthood.⁸²⁸ As such, a person with an unusual childhood caused by child labor will be likely to be emotionally needy, unstable, aggressive, suspicious and distrustful of society.⁸²⁹

iii. Developmental Harm

Even where child labor is not physically dangerous, it is nevertheless harmful when it interferes with a child's opportunity to get appropriate education or vocational training.⁸³⁰ Considering that most work involving child labor is dull and repetitive with no elements of professional skills, it is not able to help a child laborer develop any special skills that might be useful for improving the chances of employment in his/her adulthood.⁸³¹ In other words, lack of education along with no special skills is equivalent to exploiting a child's opportunity to break the vicious circle between poverty and child labor so that he/she will be able to have an opportunity to enjoy a decent life in the future.⁸³²

iv. Harm to Society

Child labor is not only harmful for an individual child laborer, but is able to bring about damaging effects on a society in general.⁸³³ As the future of every country, if children have no chance to receive necessary education but have to work for the sake of their or their families' survival instead, the general quality of a state's population will decline gradually as a logical consequence. With an undeveloped or underdeveloped human capital resource, it is hard to imagine a state as such is able to have a sustainable booming future. Indeed, no nation can maintain economic development in the long run if it keeps a blind eye on child labor, because

⁸²⁸ "Psychoanalysis", online: <<http://skepdic.com/psychoan.html>> (date accessed: December 2, 2005).

⁸²⁹ *Supra* 817.

⁸³⁰ *Ibid.*

⁸³¹ *Ibid.*

⁸³² *Ibid.*

⁸³³ *Ibid.*

child labor “retards the development of human resources, reduces lifetime earnings of the individual, and lowers the level of productivity and economic growth for the society at large”.⁸³⁴

5.2 Introduction to International Law against Child Labor

It is not exaggerated to declare that governments all over the world carry almost universal agreement on the idea that children are not only entitled to all the rights guaranteed by the fundamental human rights conventions, but also entitled to special protection and care from both their families and states. Starting from UDHR, special attention has been paid to children already -- “childhood [is] entitled to special care and assistance”.⁸³⁵ Later on, in the international bill of rights, every child’s right to get protection from family, society and the state as required in accordance with his status as a minor is secured.⁸³⁶ In ICESCR, it explicitly prohibits economic and social exploitation on children and requires states to punish the paid employment of child labor below age limits through national legislation.⁸³⁷

The very first international document promulgated by UN, expanding and amplifying the theme -- “Childhood [is] entitled to special care and assistance”⁸³⁸ within UDHR is the 1959 Declaration of the Rights of the Child.⁸³⁹ However, it only provided a general moral framework to arouse people’s attention rather than a legal obligation with binding force. Thirty years after the 1959 Declaration, the UNCRC came into stage and it is the most comprehensive and the only human rights treaty specialized in the rights of a child, covering all spectrums of the civil, political,

⁸³⁴ Anjali Garg, “A Child Labor Social Clause: Analysis and Proposal for Action”, 1999, 31 N. Y. U. J. Int’l L. & Pol. 473.

⁸³⁵ UDHR, 1948, art.25(2).

⁸³⁶ ICCPR, 1966, art.24(1).

⁸³⁷ ICESCR, 1966, art.10(3).

⁸³⁸ UDHR, 1948, Art.25(2).

⁸³⁹ Online: <<http://www.cirp.org/library/ethics/UN-declaration/>> (date accessed: December 15, 2005).

economic, social and cultural rights of a child.⁸⁴⁰ It was adopted by the United Nations General Assembly in year 1989 and entered into force in the year after.⁸⁴¹ Indeed, the UNCRC has been signed and ratified by almost all the UN member states, except for Somalia where there is no internationally recognized central government and United States who has signed but not ratified it due to concerns by the US Senate of some national sovereignty issues.⁸⁴² As one of the very few international conventions obtaining near-universal support, UNCRC “guarantees children the right to be free from discrimination, to be protected in armed conflicts, to be protected from torture and cruel, inhuman, or degrading treatment or punishment, to be free from arbitrary deprivation of liberty, to receive age-appropriate treatment in the justice system, and to be free from economic exploitation and other abuses, among other rights”.⁸⁴³ In particular, state parties are under the obligation to take legislative, administrative, social and educational measures to ensure the rights of a child to be protected from economic exploitation and to protect a child from performing any work that is likely to be hazardous or to interfere with his/her opportunity to enjoy education, or to be harmful to child’s health or physical, mental, spiritual, moral or social development.⁸⁴⁴ Besides, state parties shall provide for a minimum age or ages for admission to employment and enact appropriate legislation on the hours and conditions of employment as well as proportionate penalties and other sanctions to ensure the effective enforcement of the legislation as such.⁸⁴⁵

⁸⁴⁰ Children’s Rights, online: <<http://www.amnestyusa.org/children/document.do?id=B0275B42F3B4C25380256900006933EF>> (date accessed: November 15, 2005).

⁸⁴¹ *Ibid.*

⁸⁴² For more information on the reasons for the US refused to ratify the CRC, please see generally in Robert J. Haggerty, MD, “Convention on the Rights of the Child: It’s Time for the United States to Ratify”, online: <<http://www.cirp.org/library/ethics/haggerty/>> (date accessed: December 15, 2005).

⁸⁴³ Human Rights Watch, online: <<http://www.hrw.org/children/>> (date accessed: November 15, 2005)

⁸⁴⁴ UNCRC, 1989, art.32 (1)(2).

⁸⁴⁵ *Ibid.*, art.32(2). Besides, for the sake of completeness, the writer also wants to have some words on the regional convention on children’s rights. In fact, the only regional treaty on children’s rights is the African Charter on the Rights and Welfare of the child (the African Children’s Charter), which was adopted by the Organization of African Unity in year 1990. Taking consideration of the social and cultural values of Africa, including those related to family, community and society, recognizing the need to take appropriate measures to promote and protect the rights and welfare of the African child, noting with concern that the

The expert international institution for protecting child laborers' rights is the ILO. It has passed over twenty-five conventions⁸⁴⁶ relating to child labor, among which Convention No.138 -- Minimum Age Convention 1973 (the "MAC") and No.182 -- Worst Forms of Child Labor Convention 1999 (the "WFCC") are the fundamental ones. Considering that the time has come to establish a general instrument with the view of achieving total abolition of child labor,⁸⁴⁷ the MAC provides that each member shall specify a minimum age for admission to employment or work within its territory to a level consistent with the fullest physical and mental development of young persons.⁸⁴⁸ Although article 2(3) of MAC sets the general minimum age at fifteen, article 2(4) states that countries with insufficient developed economies, after consultation with the organizations of employers and workers concerned, could set minimum age for fourteen. Where the type of employment or work by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons, a blanket ban on employment or work of persons less than eighteen years is set.⁸⁴⁹ Under certain circumstances, however, where national laws or regulations provide otherwise, or by the competent authority after consultation with the organizations of employers and workers concerned, the age could be

situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, the African Children's Charter strengthens the protections provided by the CRC. Put specifically, it makes clear that everyone under eighteen is a child, hence enjoins states parties special care and protection, such as not recruiting them to military service, eliminating harmful social and cultural practices, particularly those that are discriminatory or that put the health of the child in danger. [For more information on this regional treaty, please see online: <http://www.ilo.org/public/english/employment/skills/recomm/instr/afri_3.htm#PREAMBLE> (date accessed: November 12, 2005)].

⁸⁴⁶ To name but a few of them, they include: the Minimum Age (Industry) Convention, 1919, the Minimum Age (Sea) Convention, 1920, the Minimum Age (Agriculture) Convention, 1921, the Minimum Age (Trimmers and Stokers) Convention, 1921, the Minimum Age (Non-Industrial Employment) Convention, 1932, the Minimum Age (Sea) Convention (Revised), 1936, the Minimum Age (Industry) Convention (Revised), 1937, the Minimum Age (Non-Industrial Employment) Convention (Revised), 1937, the Minimum Age (Fishermen) Convention, 1959, and the Minimum Age (Underground Work) Convention, 1965 etc.

⁸⁴⁷ ILO Convention No.138, preamble, para.5.

⁸⁴⁸ *Ibid.* art.1.

⁸⁴⁹ *Ibid.* art.3(1).

lowered to 16.⁸⁵⁰ In terms of WFCC, considering the need to adopt new instruments for the prohibition and elimination of the worst forms of child labor as the main priority for national and international action,⁸⁵¹ this convention 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.⁸⁵² The term of the worst forms of child labor comprises;

“(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.”⁸⁵³

So far, China has ratified all the said conventions in relation to the protection of children or child laborers.

5.3 Child Labor in China -- Rearing Its Ugly Head Again

A. Historical Review on the Issue of Child Labor in China

i. Child Labor in the Early Twentieth Century’s China

⁸⁵⁰ *Ibid.* art.3(2).

⁸⁵¹ ILO Convention No.182, preamble, para.2.

⁸⁵² *Ibid.*, art.1.

⁸⁵³ *Ibid.*, art.3.

During the early part of the twentieth century, it was because of the development of the capitalist economy, the lack of relevant legislation and the social instability caused by warlords' conflicts, colonization and Sino-Japanese War immediately followed by Civil War, the number of child laborers in China back then was increasing year by year. Although there was a lack of official statistics on the nationwide problems of child labor, according to some non-governmental sources, it was estimated that young workers under the age of eighteen accounted for one fourth of the total Chinese work force back then.⁸⁵⁴ In accordance with an official investigation made by the KMT government in 1930, in nine provinces, including Anhui, Jiangxi, Hubei, Shandong etc., the number of industrial workers was around 1,204,317, *inter alia*, 55,605 workers were child laborers.⁸⁵⁵ The investigation also showed that child laborers were involved in the metal and construction materials production as well as chemical and textile industries etc.⁸⁵⁶ The data reflected by the table below which includes both number of adult workers and that of child laborers involved in Shanghai's textile industry is just the tip of the iceberg: (table 5)

	No. of Male workers	No. of Female workers	No. of Male Child Labor below age of 12	No. of Female Child Labor below age of 12
Textile Factories Opened by Chinese	2,274 (9.6%)	17,895 (74.5%)	105 (0.4%)	3,461 (15.5%)
Textile Factories Opened by Italian	203 (3.4%)	3,160 (48.2%)	440 (7.0%)	2,020 (41.4%)
Textile Factories Opened by French	219 (3.9%)	2,650 (48.4%)	372 (6.8%)	2,227 (40.9%)
Textile	235 (3.4%)	3,618 (52.6%)	55.2 (8.0%)	2,469 (35.9%)

⁸⁵⁴ Yin Minmin & Lu Yungeng, "Study on Chinese Child Labor in the Early Twentieth Century" (*Ershi Shiji Chu Zhongguo De Tonggong Wenti Yanjiu*), Journal of Shang Dong Teacher-Training University (*Shandong Shifan Daxue Xuebao*), the third issue of 2003.

⁸⁵⁵ Lu Yungeng & Liu Changfei, "Study on Child Labor in the Early Years of Republic of China" (*Minguo Chunian De Tonggong Yanjiu*), Files of Republic of China (*Minguo Dangan*), the second issue of 2002.

⁸⁵⁶ *Ibid.*

Factories Opened by English				
Textile Factories Opened by American	140 (3.1%)	3,050 (68.6%)	Data Not Available	1,280 (28.1%)

[source: Yin Minmin & Lu Yungeng, "Study on Chinese Child Labor in the Early Twentieth Century" (Ershi Shijichu Zhongguo De Tonggong Wenti Yanjiu), *Journal of Shangdong Teacher-Training University* (Shangdong Shifan Daxue Xuebao), the third issue of 2003]

Although the table above only reflects the situation in textile industry in Shanghai, at the minimum, it implies that the child labor problem, in particular, the female child labor problem was serious at that time.

As for the terms and working conditions for the child laborers, generally speaking, they were miserable. Before 1912, the usual working hours in China was between 12 and 14 and there was almost no night work.⁸⁵⁷ However, statistics showed that after 1912 (the founding of Republic of China)⁸⁵⁸, things had changed dramatically -- the longest working hours had been extended to 17, sometimes even 18 hours per day.⁸⁵⁹ Meanwhile, phenomenon of night work started spreading. In fact, for relatively large factories in the urban areas, almost all of them adopted night work system after year 1912.⁸⁶⁰ A 1933 investigation report on the Chinese textile industries disclosed that the average working hours for child laborers were 12 but sometimes it could be extended to 16 even 18.⁸⁶¹ In terms of working environment, most of the factories at that time did not provide suitable working safety equipment even for adult workers, let alone for those vulnerable child

⁸⁵⁷ *Ibid.*

⁸⁵⁸ Since the founding of the Republic of China, its history was marked by numerous conflicts among warlords and fragmentation by foreign powers.

⁸⁵⁹ *Ibid.*

⁸⁶⁰ *Ibid.*

⁸⁶¹ *Ibid.*

laborers.⁸⁶² From 1919 to 1923, almost 17 percent of the work related injury cases that were sent to hospitals in Shanghai were child laborers (without taking into consideration the injured child laborers who have no chance to get medical treatment).⁸⁶³ It was reported that most child laborers in the textile factories were bony, pale, obviously malnourished, and most of them had been infected by tubercle bacillus.⁸⁶⁴ Worse still, some reports discovered that some child laborers were not only subject to torture-like treatment, but became the victims of sexual abuses as well.⁸⁶⁵

ii. Child Labor in the Socialist China

After CCP came into power in 1949, especially in Mao Zedong's time, based on the understanding that child labor is the capitalist dregs and the children are the future of the nation,⁸⁶⁶ the socialist government at that time made a decision to completely eradicate child labor. One of the policies to reach the said goal is the policy of compulsory education. "Shortly after the founding of the People's Republic of China, the Chinese government took education as a matter of primary importance, and made enhancing the cultural quality of the people the basis of the construction of the nation."⁸⁶⁷ At that time, it was estimated that only 20 percent of the Chinese population was literate.⁸⁶⁸ The CCP made an ambitious decision to establish universal public education for a large population around the whole nation. For example, from 1949 to 1951, "more than 60 million peasants enrolled in winter schools, or sessions, which were established to

⁸⁶² *Ibid.*

⁸⁶³ *Ibid.*

⁸⁶⁴ *Ibid.*

⁸⁶⁵ For more information on this issue, please refer to Lu Yungeng & Liu Changfei, "Study on Child Labor in the Early Years of Republic of China" (*Minguo Chunian De Tonggong Yanjiu*), Files of Republic of China (*Minguo Dangan*), the second issue of 2002.

⁸⁶⁶ For more information on this issue, please refer to Lu Yungeng, "Earlier Understandings and Propositions on the Issue of Child Labor by the Communist Party of China" (*Zhongguo Gongchandang Dui Tonggong Wenti De Zaoqi Renshi He Zhuzhang*), Journal of Shandong Normal University (Humanities and Social Sciences Edition) (*Shandong Shifan Daxue Xuebao (Renwen Shehui Kexueban)*), the third issue of 2004.

⁸⁶⁷ "Education and Literacy in China", online:

<<http://www.asianinfo.org/asianinfo/china/pro-education.htm>> (date accessed: November 17, 2005).

⁸⁶⁸ From Database Microsoft Encyclopedia Encarta, key word--China.

take advantage of the slack season for agricultural workers”.⁸⁶⁹ At that time, there was a nationwide belief that everybody in China, regardless of his/her family background, had the right and the obligation to be educated. It was also believed by most Chinese that education could change a person’s life. As such, there was a thirsty desire for knowledge permeating the newly founded socialist state.⁸⁷⁰

In addition, at that time, a large scale of nationalization movement was spreading all over China. In 1960s, the government had finished the process of socialization of means of production subject to public control, which implied that almost all the enterprises were state owned.⁸⁷¹ With strict governmental control, there was little chance for a child laborer to work in the SOEs. Indeed, from the date of CCP’s birth, its position on child labor was always clear and consistent, i.e., to protect the child laborers from economic exploitation, physical or mental abuses and to adopt universal compulsory education for every child in China.⁸⁷² In the CCP’s “Declaration of Secondary Nationwide Representative Conference” (*Zhongguo Gongchandang Dierci Quanguo Daibiao Dahui Xuanyan*), it had explicitly pronounced its goal to abolishing bonded labor, adopting eight hours working time, and establishing special sanitary as well as care system for child laborers.⁸⁷³ In its “Labor Law Outline”, it reemphasized the eight hours working time and its blanket ban on children below 16 to be employed.⁸⁷⁴ For children between age of 16 and 18, only light work without harming their health and development was allowed.⁸⁷⁵ In sum, with strict governmental control on the SOEs and partly because of the strict migration control from rural

⁸⁶⁹ *Ibid.*

⁸⁷⁰ *Ibid.*

⁸⁷¹ For more information on this issue, please see: R. M. Breth, *Mao’s China: A Study of Socialist Economic Development* (Melbourne: Longman Cheshire 1977) at 23-29.

⁸⁷² *Supra* 866

⁸⁷³ *Ibid.*

⁸⁷⁴ *Ibid.*

⁸⁷⁵ *Ibid.*

areas to urban ones as well⁸⁷⁶, together with a clear party's guiding policy, it is fair to conclude that there were very few cases in relation to child labor in the Chinese industrial sector back then.⁸⁷⁷

However, this evil started to reemerge together with China's rapid economic development and there is a trend of spreading. Below are some examples relating to child labor in China in recent years: in Wuhan City, reports showed that there were more than twenty garment factories employing child laborers and one of the children was confirmed dead due to calenture;⁸⁷⁸ also in Wuhan City, a small private garment factory hired more than two hundred child laborers working there for more than ten hours per day;⁸⁷⁹ in Neihuang county of Henan Province, through a three days' investigation, the local government discovered that seven private enterprises within its region had employed twenty-two child laborers (aging from 13 to 15);⁸⁸⁰ in Zhenzhou City, Henan Province, during a one month's investigation, the local government found twenty-eight cases in relation to the employment of child labor, and more than fifty child laborers were sent back to their hometowns;⁸⁸¹ in Jiangxi Province, an explosion at one of its rural schools killed

⁸⁷⁶ For more information, please see text below part 6.3 B (i) (b) -- Historical Review on the Household Registration System in China (*Hukou System*).

⁸⁷⁷ Of course, in the rural areas, there were still children working for their parents as an assistant for farming. However, considering that the Chinese people at time believed education could change their lives, and even the elderly illiterate joined various schools, training courses to get education, although some children in the rural areas might have to work domestically or in the farm, their chance to education is unlikely to be denied. Besides, since they usually worked for their families, they were not child laborers, but child workers by nature.

⁸⁷⁸ Wu Miwen, "Wu Han Child Labor Factories, Seventeen Years Old Girl Work To Death" (*Wuhan Tonggong Zuofang, Shiqi Sui Dagongmei Huohuo Leisi*), online <<http://www.unn.com.cn/GB/channel281/282/1433/200108/13/92327.html>> (date accessed: March 10, 2007).

⁸⁷⁹ Yi Mingming & Lu Yungeng, "The Understanding of the Child Labor Phenomenon in China" (*Dui Zhongguo Tonggong Xianxiang de Renshi*), 12 Youth Study (*Qingnian Yanjiu*) (2002).

⁸⁸⁰ "Twenty-two Child Laborers saved in Neihuang County, Henan Province, the Youngest Only Thirty Years Old" (*Henan Neihuangxian Jiejiu Ershier Ming Tonggong, Zuixiaozhe Jin Shisansui*), online <<http://news.eastday.com/epublish/gb/paper148/20011120/class014800003/hwz542189.htm>> (date accessed: March 10, 2007).

⁸⁸¹ "Paying Attention To Child Labor Phenomenon: It Is not only Capital That Kidnaps Child Laborer", (*Guanzhu Tonggong Xianxiang: Bangjia Ertong De Bujinjin Shi Ziben*), online:

forty-two people and most of them were third and fourth grade students who were making fireworks at the time of the blast;⁸⁸² among 160 glass factories located in Qi County, Shanxi Province, 20 of them had been found to employ child laborers;⁸⁸³ in Shanghai, a Japanese-invested garment factory was found to employ child laborers who were working as hard as adults but receiving much less pay;⁸⁸⁴ the recent forced labor scandal in Shanxi Province involved some forced child laborers as well -- the youngest was only eight years old.⁸⁸⁵

As for the working condition of these child laborers, it is usually child unfriendly. Sometimes child laborers are required to work more than ten hours a day without any appropriate supervision from adults. Below are a few examples: ① a female child laborer's description of her working condition in a small garment factory is that: "we had been working from Sep. 29th to Sep. 31st for three consecutive days without any sleep and in the morning of 31st, I was too tired to work and fell asleep when I was working. The machine destroyed my nails. It was really painful..."⁸⁸⁶; ② in late 2003, a reporter from Guangzhou Southern Metropolis Newspaper visited a local textile factory and found that some workers there were as young as twelve but worked around sixteen hours a day and slept at a 200 square meter workshop filled with heaps of leftover textiles scraps mixed with trash;⁸⁸⁷ ③ it was reported that due to substandard condition of a private company located in Luancheng County, Shijiazhuang City, Hebei Province, five female child laborers were

<http://www.ce.cn/law/over-bottom/hot-news/200605/26/t20060526_7109878.shtml> (date accessed: March 10, 2007).

⁸⁸² LA Times, "China Use of Child Labor Emerges from the Shadows", online: <http://www.laborrights.org/press/childlabor_china_0505.htm> (date accessed: March 10, 2007).

⁸⁸³ Child Labor Bulletin, "Report on Child Labor in China" (*Guanyu Zhongguo Tonggong Xianxiang De Shidi Kaocha Baogao*), amended version of September 2006, online: <labor.org.hk/gate/gb/big5.clb.org.hk/fs/view/downloadables/Child_Labor_Report_Chinese_updated.pdf> (date accessed: May 27, 2007).

⁸⁸⁴ *Supra* 601.

⁸⁸⁵ "Confirmation of Employing 12 Child Laborers Working in the Illegal Brick Kilns of Shanxi, 9 of Them Are Still Being Investigated" (*Shanxi "Hei Zhuanyao" Yi Queren Shiyong Tonggong 12 Ren, 9 Ren Renzai Heshi*), online: <<http://news.sohu.com/20070622/n250722060.shtml>> (date accessed: August 21, 2007).

⁸⁸⁶ *Supra* 879.

⁸⁸⁷ *Infra* 930.

found unconscious from inhaling charcoal fumes at the end of 2004. Without calling for any medical assistance or at least checking whether they were still alive, the owner of the company put them into coffins for cremation. Indeed, two of the girls apparently alive in the coffins died of asphyxiation;⁸⁸⁸ ④ an investigation on child flower sellers in the Chinese cities reflected that at the bottom rung of the Chinese labor market, the young flower sellers “must endure economic exploitation, physical mistreatment and other cruelties at the hands of their employers, who place little if any priority on the rights and personal safety of the children in their employ”.⁸⁸⁹ “Working long hours, these children usually ply their trade at night, usually from around sundown until the hours before dawn. In northern cities, the child flower sellers often wear thin clothing and are forced to endure the cold winter weather. These children have very little adaptive capacity, lacking the ability to cope with dangerous circumstances; disappearances and traffic accidents are common among child flower sellers in large cities. Abused by customers, persecution from police and even sexual assault are common. Far from being able to turn to authorities for help, these children must avoid at all cost city authorities, which can subject them to expulsion or detention.”⁸⁹⁰

As for the number of child laborers in today’s China, different sources provide with conflicting numbers. According to the estimation of ILO, based on the 1995 Chinese Population Census, there were about 8.34 million child laborers in China by the end of 1995 and the number was

⁸⁸⁸ “HRIC: Cover-up of Child Labor Deaths in Hebei”, online:
<<http://www.china-labor.org.hk/public/contents/article?revision%5fid=7010&item%5fid=7009>> (date accessed: April 26, 2006).

⁸⁸⁹ Child Flower Sellers Research Team, “An Investigation into the Phenomenon of Rural Children Selling Flowers in Chinese Cities”, online:
<<http://www.china-labor.org.hk/public/contents/article?revision%5fid=15886&item%5fid=15885>> (date accessed: April 26, 2006).

⁸⁹⁰ *Ibid.*

going to rise to 10 million soon.⁸⁹¹ The response from the officers of the Chinese Labor Ministry was that the ILO number was exaggerated.⁸⁹² However, to date there is no official statistics on the number of child laborers in China published by the Chinese authority. Although the extent of child labor remains hard to estimate due to the lack of official statistics, some other related statistics nevertheless imply the severity of the child labor in China and its tendency of spreading. For example, China's famous nationwide "Hope Project" (*Xiwang Gongcheng*) is trying to help above 30 million children to return to school,⁸⁹³ *inter alia*, more than 60 percent of them have started engaging in various kinds of work⁸⁹⁴. One fourth of the 14 million Chinese farmer workers working in the construction areas are below age of 16.⁸⁹⁵ In addition, according to the fifth nationwide population census of China, at present there are more than 0.1 billion floating population all over china, 19.37 percent of which are children.⁸⁹⁶ Among these children, 9.3 percent of them have no chance to get any education and almost half of them could not receive proper education in time.⁸⁹⁷ Besides, according to a survey conducted by the China Association for Promoting Democracy, the rate of dropouts in the rural junior high schools has reached nearly 40 percent on average.⁸⁹⁸ Above and beyond these shocking data, the Asian-American Free Labor Institute (the "AAFLI") affirmed that violations of minimum age standards occur more commonly in sub-contracting factories producing for export in China.⁸⁹⁹ Some reviews of current literature suggest that child labor in China is found in the export industries such as fireworks,

⁸⁹¹ Li Chunlin & Wang Daming, "Investigation Report on the Condition of the Chinese Children in Poverty" (*Zhongguo Chujin Qunnan Ertong Zhuangkuang Fenxi Baogao*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=2521> (date accessed: April 26, 2006).

⁸⁹² *Ibid.*

⁸⁹³ Gong Weimin, "Crying Little 'Suns'" (*Kuqi De Xiao Taiyang*), *Journal of Hu Nan Economics (Hunan Jinji)*, the first issue of year 1997.

⁸⁹⁴ Online: <<http://news.sina.com.cn/c/2004-05-14/16023231841.shtml>> (date accessed: April 24, 2004).

⁸⁹⁵ *Supra* 893.

⁸⁹⁶ *Supra* 894.

⁸⁹⁷ *Ibid.*

⁸⁹⁸ "China Experiencing Rising School Dropout Rate", *China Daily*, March 4, 2005. Cited from Gu Xin, "Towards A Harmonious Society for China: Hu -Wen's Social Policy Change", East Asian Institute, National University of Singapore.

⁸⁹⁹ Online: U.S. Department of Labor, online: <www.dol.gov/iab/media/reports/iclp/sweat/china.htm> (date accessed: May 15, 2004).

garment/textiles, and toys.⁹⁰⁰ Of course, there are allegations of child labor in the Chinese electronics, handicrafts (artificial flowers), coal mines, and gun factories as well, though they are not documented.⁹⁰¹ A regional investigation undertaken by the government agency in charge of monitoring labor conditions in Jinan City, Shandong Province shows that child labor is most prevalent in the following industries: toy production, textiles, construction, food production, and light mechanical work where child laborers are particularly in demand due to their smaller hands and undamaged eyesight.⁹⁰²

Admittedly, in light of both the ILO and the US experts' investigation on the problem of child labor in China, compared with the other developing countries, child labor in China is not as serious a problem as in the others -- the proportion of child labor in terms of the whole Chinese population is relatively lower.⁹⁰³ Nevertheless, due to the large population base, the absolute number is by no means neglectable.⁹⁰⁴ From the writer's position, it might be true that child labor in China has not reached the crisis proportion yet; however, it might be merely a matter of time.⁹⁰⁵

B. The Reasons for Child Labor in China: Poverty -- the Root Cause?

There might be various reasons for child labor's reemergence in China; however, poverty is always cited as the major sometimes the root cause of the child labor by both the Chinese academia and the government.⁹⁰⁶ Just like the view of the majority of the other developing

⁹⁰⁰ *Ibid.*

⁹⁰¹ *Ibid.*

⁹⁰² *infra* 930.

⁹⁰³ *Ibid.*

⁹⁰⁴ *Ibid.*

⁹⁰⁵ Bruce Gilley, "Following the Money: China's Growth Spurt Tempts Children into Jobs", *Far Eastern Economic Review*, March 7, 1996.

⁹⁰⁶ See generally in "Focusing on Child Labor: Poverty Enveigling Child Labor", online: <http://news.xinhuanet.com/video/2004-08/17/content_1805224.htm> (date accessed: November 22, 2005); Yin Minmin & Lu Yungen, "Understanding on Child Labor Phenomenon in China" (*Dui Zhongguo*

countries, the Chinese scholars believe that there is a causal relationship between poverty and child labor, and children cannot be rescued from child labor unless their economic plight and that of their families is improved.⁹⁰⁷ Following this logic, it seems that there is an unbroken link between poverty and child labor, and only when China enters an era of economic prosperity, will child labor be eradicated. From the writer's position, this plausible argument suffers several defects as follows.

This argument presumes that there is a causal relationship between poverty and child labor. As such, economic development will lower the rates of child labor. It is a pity that statistics have shown some counter-evidence. Although the international economy has kept its positive trend of development for decades, the number of child labor has not decreased at all. On the contrary, it is increasing rapidly. In 1986, the ILO's estimated that the number of child laborers all over the world was only 88 million, whilst the number dramatically raised to 200 million after 12 years.⁹⁰⁸ Moreover, the empirical evidence in China also defeats this child-labor-poverty link. During Mao's time, China had just experienced eight years Sino-Japanese War followed by four years civil war coupled with the scar left by colonization, the Chinese people and the nation were in the extreme poverty⁹⁰⁹. Even in such a hard time, the CCP nevertheless tried to eradicate child labor, and achieved a substantial progress as mentioned above. In the 21st century, nobody will deny China's miracle in its economic development and the rapid improvement of its people's living standards; however, child labor reemerged as a creeping plague. It is believed that poverty is no

Tonggong Xianxiang De Renshi), Journal of Youth Study (*Qinnian Yanjiu*), the twelfth issue of 2002, in this article, the writers clearly pointed out that "the root cause for child labor in China was poverty"; Claudia R. Brewster, "Restoring Childhood: Saving the World's Children from Toiling in Textile Sweatshops", 1997, 16 J.L. & Com. 191; Li Chunlin & Wang Daming, "Investigation Report on the Condition of the Chinese Children in Poverty" (*Zhongguo Chujin Qunnan Ertong Zhuangkuang Fenxi Baogao*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=2521> (date accessed: April 26, 2006).

⁹⁰⁷ *Ibid.*

⁹⁰⁸ Anna Quindlen, "Child Labor is World Trade's Dirty Little Secret", Detroit Press, Nov. 25, 1994, at 19.

⁹⁰⁹ Charlie Hore, "China: Whose Revolution?", online: <<http://www.marxists.de/china/hore/05-conc.htm>> (date accessed: March 1, 2006).

longer the primary reason for child labor in China; instead, the degradation of public morality together with the change of belief system plays a vital role.

After years of disastrous socialist policies and revolutions, such as the Great Leap Forward (*Dayujin*), the creation of People's Communes (*Renmin Gongshe*) and the Cultural Revolution,⁹¹⁰ there was a disillusioned reaction to social injustice -- a view tolerating social inequalities, combined with a new pragmatic and utilitarian attitude to moving away from the former concern with communal well being, but only focusing on personal interests.⁹¹¹ As some commentators' description, the CCP's new mission is money and power rather than "commitment to world revolution, international brotherhood, national liberation and the communist utopia".⁹¹² Ironically, "even the political dissenters jump on board to raise funds for their future fight for democracy".⁹¹³ A direct result of the feverish pursuit of wealth is that exploitation, in the event of child labor, is no longer such an abhorrent evil in the minds of some Chinese citizens, in particular from some businessmen's point of view. Even worse, a report published in Guangzhou's Southern Metropolis Newspaper about a primary school headmaster in Huizhou City, Guangdong Province, revealed a rather depressing story.⁹¹⁴ This headmaster was found employing students from his school to work in a private toy factory owned by him without realizing the illegality of his behavior. On the contrary, he thought he was helping his students by offering them an opportunity to earn some pocket money.⁹¹⁵

⁹¹⁰ For more information, please see Maurice Meisner, *Mao's China: A History of the People's Republic* (New York: Free Press, 1977), from 167 to 256 and from 311 to 383.

⁹¹¹ Immanuel C. Y. Hsu, 6th ed., *the Rise of Modern China* (New York: Oxford University Press, 1995), from 898 to 901.

⁹¹² *Ibid.* at 951.

⁹¹³ *Ibid.*

⁹¹⁴ *Infra* 930.

⁹¹⁵ *Ibid.*

As the great rush for improving the standards of life accelerates, values emphasizing exploitation as inevitable, even necessary are starting to gain public recognition. As some scholars observed, “so fundamental and far-reaching have been the social economic changes in China in the last decade that if chairman Mao were to return for a visit, he would be stunned beyond belief by what he would see”.⁹¹⁶ Communist ideology and Maoism are largely ignored in practice, whereas the entrepreneurial spirit fills the air, and the new religion is money.⁹¹⁷ For example, many local economic policies of Guangdong Province and those of the SEZs have transformed the southern part of China into a dynamic region of growth, as well as the major destination for the migration of skilled and unskilled laborers from other parts of China.⁹¹⁸ Abundant opportunities in the labor market in those places are creating a misconception that education may not be that important. “School dropout rates have risen as state investment in education has continued to decline.”⁹¹⁹ It is a popular slogan in coastal areas that primary school pupils make big money while college students make much less.⁹²⁰ Surprisingly, the mindset as such was further proved during the writer’s field study in Shanghai, China, where she interviewed 12 child laborers who were selling flowers in the streets, *inter alia*, nine children mentioned that they would rather earn wages than returning to school.⁹²¹ Contrary to what happened in Mao’s time, education has lost its charm in many persons’ hearts. Worse still, education, particularly its non-compulsory part, has become a *de facto* business. A spokesperson of the Chinese Ministry of Education states publicly that non-compulsory education has become a sheer market product in today’s China, and students as

⁹¹⁶ *Supra* 912, at 950.

⁹¹⁷ *Ibid.*

⁹¹⁸ *Ibid.*, from 895 to 898.

⁹¹⁹ Perry Link, “China’s ‘Core’ Problem”, Tu Wei-ming, ed., *China in Transformation* (Cambridge, Mass: Harvard University Press, 1994), at 190.

⁹²⁰ *Supra* 905.

⁹²¹ The writer spent 44 days from January 13 to February 26, 2006 in Shanghai for the sake of collecting more first hand materials. Some other sources also show that some child laborers are willing to work for the sake of money. (From online: <http://www.legalinfo.gov.cn/pfzx/2003-07/15/content_38124.htm> (date accessed: April 28, 2004).

well as their families should buy what they can afford.⁹²² Via such a depressing official statement, students from poverty-stricken families might deliberately choose to discontinue their studies before they finish their nine-year-compulsory education, as there is no need to waste time in school since they cannot afford higher education anyway. It is observed that when China is experiencing perhaps the rapidest rate of economic development in its history, its public ethics are falling at the same time, perhaps with the same speed. As some scholars point out, the absence of a publicly accepted set of moral values to define proper behavior in today's China caused by the steady decline of Maoism and Communism and its concomitant rise of commercialism has marked the intellectual and spiritual crisis, which might be China's core problem.⁹²³ Confucianism lost its place as China's state ideology and had become the target of a deliberate attack especially in the 1960s and 1970s;⁹²⁴ by the 1990s, Marxism and Maoism had fallen to an even lower place in popular acceptance.⁹²⁵ The short-term ideology with the potential to temporarily fill the moral vacuum in China is "making money".⁹²⁶ "In the money-first ethos, the underlying cultural values of education and proper behavior are receding".⁹²⁷ A pun--*Xiang Qian Kan*, "which homonymously means 'looking forward' or 'looking to money'", becomes popular.⁹²⁸ The idea of profit-orientation has started permeating in people's mind. The enterprises, in particular those privately owned ones, in order to maximize their profit, deliberately recruit children under 16, sometimes even recruit abducted children and force them

⁹²² "Education Not A Cheap Suit", online:

<http://www.chinadaily.com.cn/chinagate/doc/2006-03/14/content_535320.htm> (date accessed: March 14, 2006).

⁹²³ Barbara Wang, "Book Annotation: China In Transformation", 1995, 27 N.Y.U. J. Int'l L. & Pol. 555. In fact, "this is not only a Chinese problem. The same kind of morality-vacuum is visible in Eastern Europe and in the former Soviet Union where the collapse of Communist authority has been even more abrupt than in China. Thus, Vaclav Havel, looking at the Czechoslovak society emerging from decades of oppression, speaks of 'an enormous and dazzling explosion of every imaginable human vice.' And, in Russia, the New York Times reporter Craig Whitney finds that '... values, as well as buildings, fall into decay. A year after the end of the Soviet Union, anything goes in Moscow.'" Cited from *Supra* 919, at 191.

⁹²⁴ *Supra* 919, at 193 & 194.

⁹²⁵ *Ibid.*, at 195 & 196.

⁹²⁶ *Supra* 923.

⁹²⁷ *Supra* 919.

⁹²⁸ *Supra* 911, at 899.

to work⁹²⁹ due to the lower labor cost and the vulnerability of the child laborers;⁹³⁰ some so called labor export companies or job agencies purposefully recruit workers without checking their ages as their main concern is to charge both the workers and the enterprises;⁹³¹ some police stations' household registration management sections offer under-aged people forged identification card just for money;⁹³² some local governments keep a blind eye on the problem of child labor within their region;⁹³³ some parents ignore the importance of education and require their children to find a job as early as possible so that they can contribute to the family income;⁹³⁴ and many kids from relatively poor rural areas deliberately drop off from schools and fly to cities to find jobs or other chances to make money.⁹³⁵

In sum, as the writer observes, the mammonistic ideology is corrupting people's morality and causing them to tolerate the intolerable in China. Rather than arguing poverty as the primary cause of child labor in China, the writer believes that the corrupted public morality and the new religion of money play the major role. Of course, the writer is aware as well that causes such as poverty, poor quality of education and the lack of access to education, the process of privatization

⁹²⁹ *Supra* 16.

⁹³⁰ A report from Chinese official newspaper People's Daily shows that child labor is prevalent in industries, including "toy production, textiles, construction, food production and light mechanical work". The reason for the particular demand for child labor in these industries mainly because children's smaller hands and eyesight undamaged, "making them more desirable than adults for certain kind of work". From "As China's Economy Grows, So Does China's Child Labor Problem", online: <<http://www.china-labor.org.hk/public/contents/article?revision%5fid=18577&item%5fid=15889>> (date accessed: November 22, 2005).

⁹³¹ It is observed that some of the job agencies in China are involving into certain illegal activities, such as recruiting child labor.

⁹³² For example, in May 1998 three children under 15 wanted to enter a joint venture producing electricity. The factory told them that they would not employ any underage workers. Then, these children went to the local police station and each of them paid 100 yuan (RMB) for a temporary ID card, showing they were 18 years old. From online: <<http://www.cwa.tnet.co.th/boolet/china.htm>> (date accessed: April 28, 2004).

⁹³³ *Supra* 16.

⁹³⁴ It is reported that in some rural areas, some parents take it for granted to ask their children to work below 16. From online: <http://www.legalinfor.gov.cn/pfzx/2003-07/15/content_38121.htm> (date accessed: April 28, 2004).

⁹³⁵ Huang Shunxiang & Zheng Yinhong, "Contemplation on Juvenile Crimes caused by minors with rural origin working in the cities" (*Dui Jincheng Wugong Shaonianfan Wenti De Sikao*), online: <<http://www.chinacourt.org/public/detail.php?id=183705>> (date accessed: January 19, 2006).

without proper legislation and monitoring system, rural-to-urban migration wave, the growing economic disparity have added to the increase of child labor incidents in the urban areas of China.⁹³⁶

5.4 Regulation against Child Labor in China

A. Constitution

The Constitutional provisions explicitly dealing with welfare of children are provided as follows:

- (1) The Constitution provides the universal, compulsory and free education in China.⁹³⁷
- (2) The Constitution stipulates that people in China not only have the right to education, but are under the obligation to receive education as well.⁹³⁸
- (3) The Constitution provides that the state shall guarantee its children to have a healthy development (both psychologically and physically).⁹³⁹
- (4) The Constitution obligates the state and parents to protect children; and children are prohibited from any abuses.⁹⁴⁰

As such, China's Constitution does guarantee special protection to its children and provide a strong legal foundation for the future legislation on children's rights.

B. Labor Law

⁹³⁶ For more information, please see "Child Labor in China: Causes and Solutions", online: <<http://www.china-labor.org.hk/public/contents/article?revision%5fid=3305&item%5fid=3304>> (date accessed: November 22, 2005); "As China's Economy Grows, So Does China's Child Labor Problem", online: <<http://www.china-labor.org.hk/public/contents/article?revision%5fid=18577&item%5fid=15889>> (date accessed: November 22, 2005).

⁹³⁷ Constitution of PRC, art 19 (2) provides "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." From database: lawinfochina < <http://www.lawinfochina.com/index.asp>>.

⁹³⁸ *Ibid.* art 46 (1).

⁹³⁹ *Ibid.* art 46 (2).

⁹⁴⁰ *Ibid.* art 49.

The Labor Law prohibits the employment of people below the age of sixteen⁹⁴¹, except in some extraordinary circumstances, such as in the area of sports and **certain special arts and crafts**.⁹⁴² Even under these special cases, the state's approval is a precondition, and the employers shall guarantee these employed minors' rights to the nine years free and compulsory education.⁹⁴³ This article, *prima facie*, not only complies with China's obligation under the Convention No.138 and No.182, but also raises the standard under the said Conventions -- the minimum age for employment is raised from 15 to 16. However, the exception -- "certain special arts and crafts" -- provides the leeway.⁹⁴⁴ The law does not elaborate the special fields, nor does it provide the minimum age of employment for these special circumstances.⁹⁴⁵ By law, the minor workers (from age 16 to 18) shall not be arranged to engage in work down the pit of mines, work that is poisonous or harmful, work with Grade IV physical labor intensity as stipulated by the State, or other work that they should be avoiding in consideration of their special nature.⁹⁴⁶ Besides, the employers are under the statutory obligation to provide them with regular physical examinations.⁹⁴⁷ Though the Chinese Labor Law has not borrowed the exact wording from article 3 (1) of the ILO Convention No. 138 -- "the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons shall not be less than 18 years", it is believed that the said provisions have achieved a similar legislative fruit.

C. Compulsory Education Law

⁹⁴¹ Labor Law of People's Republic of China, 1995, art. 15(1). From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

⁹⁴² *Ibid.* art. 15(2).

⁹⁴³ *Ibid.*

⁹⁴⁴ *Supra* 942.

⁹⁴⁵ Some Chinese scholars, such as Zhou Changzheng, share the same view with the writer in this point.

⁹⁴⁶ Labor Law of PRC, art. 64.

⁹⁴⁷ *Ibid.*, art. 65.

The Law on Compulsory Education, which took effect on July 1, 1986, specifies requirements and deadlines for attaining universal education in China and guarantees school-age children the right to receive education. Generally speaking, any child in China above age six, regardless of its gender, nation and race, has the right to universal education; for those less developed areas, the schooling age can be delayed to seven.⁹⁴⁸ According to the Implementation Rule on Compulsory Education Law, however, it seems that the provisions in the Law on Compulsory Education have been adjusted. In terms of this Implementation Rule, provincial government can **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.⁹⁴⁹ Indeed, this provision provides a leeway for some local governments to take a gradual step instead of immediate action to universalize the nine-year-compulsory education without a clear deadline.⁹⁵⁰ Considering that the Chinese Constitution, together with its Compulsory Education Law, has already provided the universal compulsory and free education in China without any exception, it is unconstitutional for the Implementation Rule to stipulate otherwise.

D. Minor Protection Law

The Minor Protection Law of PRC is specifically drafted for the welfare of the people under the age of eighteen.⁹⁵¹ It obligates the state to protect the minors. Indeed, it is not only the state's responsibility but that of the whole society to protect minors.⁹⁵² It also provides in detail as to how families, schools and other social groups shall protect the minors.⁹⁵³ However, what is

⁹⁴⁸ Compulsory Education Law of the People's Republic of China, 1986, art. 5.

⁹⁴⁹ Implementation Rule on compulsory Education Law of People's Republic of China, 1992, art.4.

Translated by author herself.

⁹⁵⁰ Indeed, such situation usually happens in the Chinese rural areas where economic and social development is relatively much slower vis-à-vis the situation in the urban cities.

⁹⁵¹ Minor Protection Law of People's Republic of China, 1991, art. 2. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

⁹⁵² *Ibid.* art. 5.

⁹⁵³ *Ibid.*, chapter 2 to 5.

missing in this law is that it fails to incorporate any direct provisions in relation to the prohibition of child labor.

E. Criminal Law

There was no provision directly linking to the prohibition of child labor in the Chinese Criminal Law until the promulgation of the fourth amendment of the Chinese Criminal Law⁹⁵⁴ at the end of 2002. Before the promulgation of the fourth amendment, there were several provisions under the Chinese Criminal Law directly linking with the protection of the children's rights (below age 14) and therefore indirectly related to the prohibition of the child labor. To name but a few: ① whoever has sexual relations with a girl under the age of 14, no matter whether the girl has agreed or not, is to be deemed to have committed rape and is to be given a heavier punishment than rape a woman (above the age of 14);⁹⁵⁵ ② whoever molests a child, including both boy and girl, is to be sentenced to fix-term imprisonment or criminal detention;⁹⁵⁶ ③ those who visit young girl prostitutes under 14 are to be sentenced to at least five years' imprisonment together with a certain amount of fine.⁹⁵⁷

With the coming into effect of the fourth amendment, the Chinese Criminal Law has explicitly provided that nobody is allowed to employ child laborers (under the age of 16) to overwork; nor is he/ she allowed to employ child laborers to work in the high altitude, under the mine, or expose them to explosive, flammable, hazardous surroundings. Otherwise, he/she would be punishable by three to seven years' imprisonment.⁹⁵⁸

⁹⁵⁴ The fourth amendment of the criminal code of People's Republic of China is promulgated and entered into force on December 28, 2002. From database: lawinfochina <<http://www.lawinfochina.com/index.asp>>.

⁹⁵⁵ Criminal Law of PRC, art. 236 (2).

⁹⁵⁶ *Ibid.*, art. 237.

⁹⁵⁷ *Ibid.*, art 360.

⁹⁵⁸ *Ibid.* art 244 (1). Actually, only this article in the whole criminal code is directly dealing with child labor.

Admittedly, the amendment as such has essentially improved the standards of the Chinese criminal legislation against child labor. However, this improvement appears far from adequate. Except for the case of employing child laborers to work under a dangerous condition or overwork, it is not a crime if one just employs child laborers to work as long as the working condition is not dangerous and working hour is not longer than normal period. Clearly, the criminal code fails to cover all incidence of child labor. Above and beyond this, except for the criminal offence under the name of “molestation of a child” (including not only girls but boys as well), other criminal provisions in protecting children’s rights, such as “having sexual relations with a girl” or “visiting girl prostitutes”, only cover girl’s interests without taking boy’s rights into consideration. In other words, in spite of the evil nature of visiting boy prostitutes or having sexual relations with boys, behavior as such is nevertheless not a crime in China.

F. The Order of the State Council of People’s Republic of China (No. 364) -- “Rule on Prohibiting Employment of Child Laborers”⁹⁵⁹

There are fourteen articles in total under this Rule. It mainly provides that the whole society, i.e., the families, various civil societies, enterprises whatever their ownerships and governments (both central and local), shall fight against the employment of child laborers. The employer who is discovered to employ child laborers will be fined RMB 5,000 *Yuan*⁹⁶⁰ for every child laborer employed.⁹⁶¹ Moreover, it also criminalizes the behavior of employing child laborers to work in the dangerous environment under its article 11, which echoes the fourth amendment of the Chinese Criminal Law abovementioned. To date, it is the only comprehensive legislation

⁹⁵⁹ This Rule was promulgated and entered into force on December 1, 2002.

⁹⁶⁰ 5000 Yuan RMB equals to about 604.59 US\$.

⁹⁶¹ Rule of Prohibiting to Employ Child Labor, 2002, article 6(1). 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 labor.

particularly targeting incidences of child labor in China. However, when reading its article 11 carefully, the writer finds out a problem as follows.

Article 11 provides that if anyone abducts child laborers, coerces child laborers to work, uses child laborers to work high above the ground, under the well, in radioactive, highly toxic, inflammable 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 serious disability to child laborers, the criminal responsibilities shall be imposed in accordance with the relevant provisions under the criminal law on the crime of abducting children, the crime of coercing another person into labor or other crimes.⁹⁶²

Following the logic of this clause, the behavior of abducting child labor shall be sentenced under the name of “crime of abducting children”. According to the interpretation of the Chinese People’s Supreme Court on the “crime of abducting children”, “child” in this context is defined as person under the age of 14⁹⁶³. However, in the case of child laborer, the age is under 16⁹⁶⁴. If a child laborer is abducted under the age of 14, it can be considered under the coverage of the “crime of abducting children”; whereas, if a child laborer is abducted between the age of 14 and 16, the *chapeau* of “crimes of abducting children” is no long suitable. It might be argued that in the case of abducting female child laborers between age of 14 and 16, it shall be sentenced under the name of “abducting women”.⁹⁶⁵ However, as for the crime of abducting male child laborers between age of 14 and 16, there is no provision under the PRC Criminal Law dealing with it

⁹⁶² *Ibid.* art.11.

⁹⁶³ 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.

⁹⁶⁴ 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 is defined as people under the age of 16.

⁹⁶⁵ Criminal Code of People’s Republic of China, 1997, art. 244.

directly. In other words, there is a loophole in the case of abducting male child laborers between age of 14 and 16 under the Criminal Law. In spite of its evil nature, this crime fails to be criminalized to date.

G. Summary of Findings

1. Generally speaking, China's legislation in prohibition of child labor is consistent with ILO Conventions -- both No. 138 and No. 182.
2. There is some leeway both in Labor Law and Compulsory Education Law.
3. Minor Protection Law fails to incorporate any provisions directly relating to child labor.
4. There are some internal controversies within the Chinese criminal legislation and it fails to cover all types of child labor.

5.5 Suggestions beyond Legislative Reform regarding Curbing Child Labor in China

As clearly suggested in the previous part, generally speaking, the Chinese legislation against child labor is competent and the relevant sanctions are proportionate. However, as the writer observes, merely depending on competent domestic legislation may not be able to solve this social illness. To solve the problem as such, some other suggestions beyond legislative reform particularly targeting this issue are going to be discussed as below. The driving force from outside china and private sector is going to be weighed in the following text as well.

A. The Role of the Chinese Government

Considering child labor is not only a legal problem but a social one, the role of the Chinese government in eradicating it shall be emphasized, especially when China is undergoing a fundamental social and economic transition. After all, a government has the greatest responsibility for eliminating child labor as well as the broadest resources for addressing this social problem.⁹⁶⁶

First and foremost, it is necessary for the Chinese government to adjust its own understanding on the cause of child labor. After doing some researches via the internet and going through the leading newspapers in China, it is not difficult to find out that the Chinese government and its leading media are inclined to believe that there is an unbroken link between child labor and poverty.⁹⁶⁷ Therefore, they are not that surprised by the spreading of the child labor in today's China.⁹⁶⁸ What they believe is that only via rapid and sustainable economic development, can child labor be eradicated finally.⁹⁶⁹ Following this logic, in order to eradicate child labor, the priority is to develop national economy.⁹⁷⁰ It is a pity that both the Chinese government and its media are not able to figure out that corrupted people's morality with no publicly accepted set of moral values to define proper behavior intertwined with mammonistic thoughts is indeed the root cause of the spreading of child labor in today's China; whereas, economic development *per se* will not necessarily bring about an eradication of child labor if other causes remain, such as inadequate social protection, under-resourced and poor quality of educational system, and particularly the continuously degrading public morality.

⁹⁶⁶ Online: <<http://www.dol.gov/dol/ilab/public/media/reports/iclp/sweat5/chap6.htm>> (date accessed: February 13, 2003).

⁹⁶⁷ Please see generally in online: <<http://opinion.people.com.cn/GB/51863/3714184.html>>, <[http://bbs.cctv.com/forumthread.jsp?id=7088503](http://gb.china-labor.org.hk/gate/gb/big5.clb.org.hk/ifbase644-base12-L3B1YmxpYw~~/-base12-Y29udGVudHM~/base12-YXJ0aWNsZQ~~?-base48-cmV2aXNpb24lNWZpZD02MzMzNyZpdGVtJTVmaWQ9NjMyODU~>, <<a href=), <<http://dskb.hangzhou.com.cn/20050801/ca880778.htm>>, <<http://www.dfdaily.com/ReadNews.asp?NewsID=67027>>, <http://www.cpd.com.cn/gb/newspaper/2005-09/23/content_502315.htm>, (date accessed: March 1, 2006).

⁹⁶⁸ *Ibid.*

⁹⁶⁹ *Ibid.*

⁹⁷⁰ *Ibid.*

Second, it is important to understand that when the Chinese governments at various levels are expressing their concerns towards child labor, they shall avoid, even only rhetorically avoid, linking poverty with child labor directly. Sometimes, the language, especially statement from authority, may exert a subtle influence on people's attitude. "Terms used to describe phenomena reveal varying perspective."⁹⁷¹ The linkage of the term child labor and poverty not only provides a blank excuse for inaction, or at least, inactive response from government's side, but also creates an illusion to the public that child labor cannot be stopped without eradicating poverty and developing national economy first. By the same token, if the Chinese government is able to positively link child labor with the ideas of right to education, sustainable development and development of national human resources, the ground for that blank excuse for inaction will hardly exist any more. Very possibly, a slight change in way of expression by government officials to describe a phenomenon may create a subtle influence not only on people's understanding of child labor, but their response to it as well.

Third, it is not only necessary for the Chinese government *per se* to understand child labor problem, but also important for government to take the responsibility to educate its people, especially the media, to have a right attitude towards the said social illness. China used to be famous for its strict governmental control especially in the area of the public morality against any thoughts from the capitalist world.⁹⁷² Of course, for quite a long time, policies as such have been heavily criticized not only by the outside world but also by the internal commentators. However, to date, it seems that the government's policy is moving towards another extreme -- an extreme paying no attention to guide public morality to develop towards a healthy direction, no matter

⁹⁷¹ Simon SC Tay, "South East Asian Fires: The Challenge for International Law and Sustainable Development", 1999, 11 *Geo. Int'l Envtl. L. Rev.* 241.

⁹⁷² For more information on this issue, please refer to Immanuel C. Y. Hsu, 6th ed., *The Rise of Modern China* (New York: Oxford University Press, 2000), from 658 to 660.

how degraded it is going to be.⁹⁷³ It is observed that the same release of controls that has allowed the Chinese economy to grow rapidly has also created space for a variety of serious social problems: “corruption is practically taken for granted; crime rates, including those for robbery and murder, have risen sharply; prostitution has returned and is flourishing again; in some areas a market has developed in kidnapped peasant women and children; and fraudulent products and services have appeared in the marketplace”.⁹⁷⁴ Although John Stuart Mill⁹⁷⁵ offered a strong argument against a paternalistic society in the sense that it interferes in people’s liberty, the writer nevertheless argues that a paternalistic society in a less degree, i.e., government does not **control** the direction of public morality, but **guide** it towards a positive direction to reach a common good, might have a role to play in a transitional society like China. When Mammonism started invading people’s mind, it is the duty of the government to guide its people to deviate the negative influence as such. Just like a father has the responsibility to appropriately teach and guide his son to correctly respond to the temptations from the degraded part of this world during his adolescence, the Chinese government has the duty to educate its people to understand the immorality and intolerability of child labor practice, especially when its people’s mind is occupied with profit-oriented ideas.

Fourth, the Chinese government shall invest more to the nine-year-compulsory education. In 2006, China only spent 2.86 percent of its GDP in education,⁹⁷⁶ which was much lower than the

⁹⁷³ Of course, the CCP is still relatively strict on the psychological control on the public in terms of topics that may endanger national security and one party rule. However, as for the part of public morality, its control has been loosened in a large scale, therefore, the writer comments that it goes to another extreme.

⁹⁷⁴ *Supra* 919, at 190.

⁹⁷⁵ “In the classic work of nineteenth-century liberalism, Mill argues that the only legitimate restrictions on individual liberty are those that will prevent harms to others.” (From John Stuart Mill, *On Liberty*, in David Dyzenhaus & Arthur Ripstein, eds., *Law and Morality: Readings in Legal Philosophy* (Toronto: University of Toronto Press, 2001), at 260.

⁹⁷⁶ Online: <<http://jjckb.xinhuanet.com/Article.asp?TempNum=41259>> (date accessed: May 20, 2004). Indeed, some other sources show that public expenditure is only about 3.3 percent of GDP. From Gu Xin, “Towards A Harmonious Society for China: Hu -Wen’s Social Policy Change”, East Asian Institute, National University of Singapore. Please also see online: <<http://www.zaobao.com/special/npc/pages3/npc070310.html>> (date accessed: March 13, 2008).

average level of the developing states, let alone the standard of the developed world that invested an average 6 to 7 percent of their GDP in education.⁹⁷⁷ Actually, such low public spending on education is not in line with the Chinese government's own 1994 policy guideline -- "Outline of Chinese Government's Own Policy", which stipulates that public expenditure on education shall be gradually raised to 4 percent of GDP by year 2000.⁹⁷⁸ The Chinese Development Research Center of the State Council also pronounced that, in order to maintain sustainable national development, China must deal with the country's shortage of investment in education and training.⁹⁷⁹ According to the present Chinese premier Wen Jiabao, education is the foundation of a country; however, he admits that during his past years' work, he has not been able to better sort out the problems that a government should concern about the most, in particular education.⁹⁸⁰ Considering that China is able to be the top five military spender all over the world,⁹⁸¹ its powerful financial capacity has been proved beyond doubt. In other words, if the state is really willing to, it has the potential to raise its education investment, at least, to the average level of the developing world. In addition, as for how to spend the education expenditure, it is another issue worthy to be studied. Generally speaking, the urban areas have a large amount of education funds compared with the amount invested in the rural educational system;⁹⁸² the percentage spent on

⁹⁷⁷ "Experts Say Education Input Vital", online: <<http://www.china.org.cn/english/null/134351.htm>> (date accessed: November 29, 2005).

⁹⁷⁸ Gu Xin, "Towards A Harmonious Society for China: Hu -Wen's Social Policy Change", East Asian Institute, National University of Singapore.

⁹⁷⁹ *Ibid.*

⁹⁸⁰ Please see generally in online:

<http://www.chinadaily.com.cn/english/doc/2006-03/14/content_536583.htm>,

<http://www7.chinesenewsnet.com/gb/MainNews/SinoNews/Mainland/2006_3_13_23_6_40_353.html>,

(date accessed: March 14, 2006).

⁹⁸¹ For more information, please see generally in "China's Defense Budget", online: <<http://www.globalsecurity.org/military/world/china/budget.htm>> (date accessed: November 29, 2005); Online: <<http://www.moneychina.cn/d/2005/08/18/1124331728006.html>> (date accessed: November 30, 2005); Online: <<http://www.epochtimes.com/gb/5/3/4/n836121.htm>> (date accessed: November 28, 2005).

⁹⁸² In 2001, the public education investment to each primary school student in rural area of China was only 28 Chinese Yuan, equals to 3.5 US Dollar per year. Thus, some experts estimated that even a primary school could enrolled about 100 students, the total public education investment was only 28x 100=2800 Chinese Yuan, which is even not enough to cover the school's one year pub fee. From online: <<http://www.epochtimes.com/gb/3/9/23/n380567.htm>> (date accessed: May 16, 2004). "In rural areas, the

the university education is disproportionately higher than that on primary and secondary education. Consequently, despite that there is a huge income gap between rural residents and urbanites in China,⁹⁸³ the proportion of payable tutorial and miscellaneous fees to total operational funding in rural primary and junior secondary schools is disproportionately higher than that in urban areas.⁹⁸⁴ How to readjust the limited amount of education investment to reach a reasonable balance is worthy to be studied in the future. Once the universal-free-nine-year education provided by the Chinese Constitution is realized, not only the chances of a child to work will be reduced, but also those that are already working will be attracted to leave their work places and return to school. Moreover, when a child laborer is saved from a sweatshop, an appropriate follow-up measure -- access to school shall be guaranteed so that child laborers will not end up with changing his/her work places from one sweatshop to another. After all, “the importance of providing free and compulsory primary education cannot be underestimated in the fight to end the economic exploitation of children”⁹⁸⁵. “Education opens up the whole future to a child, offering the chance for improved health, safety, and greater economic opportunity, and the full enjoyment of their rights”.⁹⁸⁶

In sum, considering child labor is a complicated issue, it requires comprehensive solutions.⁹⁸⁷

The multi-faceted and comprehensive programs guided by government are always the most

Chinese central government pays for less than 2 percent of the cost of compulsory education, with township governments footing as much as 78 percent of the bill.” From online: <<http://www.china.org.cn/english/null/134351.htm>> (date accessed: November 29, 2005).

⁹⁸³ For more information, please see Gu Xin, “Towards A Harmonious Society for China: Hu -Wen’s Social Policy Change”--Part “No. 1 Issue: Widening Urban-Rural Gaps”, East Asian Institute, National University of Singapore. This paper cites some Chinese economists’ comments, i.e., “China’s urban-rural income gap might be the biggest in the world”.

⁹⁸⁴ *Supra* 978. In fact, the compulsory education in China is not entirely free in the sense that students still have to pay for tutorial and some miscellaneous fees to cover textbooks and other expenses.

⁹⁸⁵ “Promises Broken: An Assessment of Children’s Rights on the Tenth Anniversary of the Convention on the Rights of the Child”, online: <<http://www.hrw.org/campaigns/crp/promises/labor.html>> (date accessed: December 1, 2005).

⁹⁸⁶ *Ibid.*

⁹⁸⁷ *Supra* 966.

effective in eliminating and preventing the economic exploitation of children.⁹⁸⁸ Public awareness and education programs initiated by the official sector can also play an essential role.⁹⁸⁹ Ultimately, the participation of all social actors, including families, public officials, trade unions, industry groups, NGOs and international community are necessary for the final success of the fight against child labor in China.⁹⁹⁰

B. Seeking Driving Forces from both External and Private Sector to Catalyze Change from Inside China

In the previous part of this chapter, emphasis has been mainly put on analyzing domestic legislation and the role of the Chinese government in curbing child labor. In this part, the driving force against child labor from the participation of international community and movements initiated by private sector will be evaluated.

i. Child Labor and Trade Sanction?

a. Proposals Pro Linking Child Labor and Trade Sanction under the WTO Regime

Currently, the interrelationship between international trade policy and labor standards is perhaps one of the most controversial issues that the world trading regime is confronting.⁹⁹¹ Back to the very date of its birth, a linkage between labor standards and multilateral trade rules has been repeatedly proposed⁹⁹² under the former GATT regime and today's upgraded WTO⁹⁹³, which

⁹⁸⁸ *Ibid.*

⁹⁸⁹ *Ibid.*

⁹⁹⁰ *Ibid.*

⁹⁹¹ Robert Howse, "The World Trade Organization and the Protection of Worker's Rights", 1999, 3 J. Small & Emerging Bus. L. 131.

⁹⁹² For example, the Havana Charter for an International Trade Organization specifically link fair labor standards and trade. Later US argues that trade problems attribute to unfair labor standards shall be actionable under GATT article XXIII and since 1987, US has consistently proposed the establishment of a working party to examine the interrelationship between internationally recognized labor standards and international trade and the objectives of the GATT; UK proposes to introduce a fair labor clause within

covers not only trade in goods as was in GATT era, but in services, intellectual property as well. Many scholars, trade unions⁹⁹⁴, NGOs and western countries have suggested that since “labor is an input in the production of goods that entered the international trading system, violation of international labor standards should be enforced through trade sanctions”.⁹⁹⁵ Some scholars believe that “well-established rules of international law compel the harmonization of international trade rules with international labor and human rights norms that prohibit the most exploitative or extreme, forms of child labor”;⁹⁹⁶ Some heatedly criticize both the persistent resistance within the WTO to any formal linkage between trade and the core international labor standards and the idea that labor rights issues are simply a matter for the ILO. It is argued that views as such “ignore the existing and continuing role the WTO has been playing in constraining one important instrument available to improve compliance with core labor rights: trade measures aimed at punishing noncompliance with core labor rights”;⁹⁹⁷ Some try to reinterpret several GATT clauses so that trade sanction under the WTO regime can be justified. For example, some scholars argue that the shrimp/turtle case, which overturns some human rights unfriendly dictums of the case of Tuna/Dolphin, creates a chance for the broad interpretation of GATT/WTO article XX – General Exception. As such, free trade is no longer considered as the singular objective of the WTO regime and chances allowing countries to unilaterally discriminate products made by child

GATT as well as to use GATT article XXIII to impose sanctions on countries refuse to take steps to give up unfair labor standards.

⁹⁹³ For a list of members in detail, please refer to Online:

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (date accessed: October 10, 2005).

⁹⁹⁴ It is observed that many workers’ groups within the developed world tend to favor a linkage between labor standards and trade. (From David M. Smolin, “Conflict and Ideology in the International Campaign against Child Labor”, 1999, 16 Hofstra Lab. & Emp. L.J. 383.)

⁹⁹⁵ Daniel S. Ehrenberg, “The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor”, 1995, 20 Yale J. Int’l L. 361. For more information, please also see Anjali Garg, “A Child Labor Social Clause: Analysis and Proposal for Action”, 1999, 31 N. Y. U. J. Int’l L. & Pol. 473.

⁹⁹⁶ David A. Levy, “Child Labor, Trade and Investment: Towards the Harmonization of International Law”, 1997, 91 Am. J. Int’l L. 663.

⁹⁹⁷ *Supra* 991.

laborers under the WTO rules are thereby increased.⁹⁹⁸ Article VI on dumping is also cited when contending that suppressed labor rights, such as the incidence of child labor, in export industries constitute social dumping;⁹⁹⁹ some even try to justify the link through re-interpreting the basic principles of the WTO. It is argued that goods produced via unfair labor practices, such as the exploitation of child laborers should not be treated as the like products that manufactured in the “usual” course of production, and therefore not entitled to one of the WTO basic principles -- trade without discrimination.¹⁰⁰⁰

In sum, justification for the linkage between child labor and trade sanction includes but not limited to the reasons that: (1) abusive labor standards, such as the case of child labor, are a form of “social dumping”¹⁰⁰¹ which may cause unfairness in international trade;¹⁰⁰² (2) emergence of an increasingly integrated global economy requires an integrated world labor market that is based on a set of universally applied minimum labor standards, including prohibition of child labor;¹⁰⁰³ (3) the existence of the unfair comparative advantages partly because of the problem of child labor paid by very low wage and subject to poor working conditions is arguably one of the

⁹⁹⁸ Axel Bree, “Article XX GATT -- Quo Vadis? The Environmental Exception after the Shrimp/Turtle Appellate Body Report” (1998) 17 Dick. J. Int’l L. 99.

⁹⁹⁹ Brewster Grace, “In Focus: WTO Trade and Labor Standards”, online: <<http://www.lightparty.com/ForeignPolicy/FPIP-5-15.html>> (date accessed: April 15, 2005).

¹⁰⁰⁰ Robert Wai, “Countering Branding, Dealing: Using Economic and Social Rights in and Around The International Trade Regime”, 2003, 14 Eur. J. Int’l L. 35.

¹⁰⁰¹ “Social dumping” is a term to describe the decision of multinational enterprises that move their facilities from countries with high labor wages to those less developed countries, where wage rates and other social costs are significantly lower. “This concept is built on the premise that countries with low labor standards (or do not enforce those standards) have artificially low labor costs; Capital, which is mobile especially nowadays, shops for low cost labor, which enables it to produce at a lower overall cost per unit. However, labor is not as mobile as capital, in this sense, in order to compete with low labor cost countries of the South, where the labor supply is plentiful, some industrialized countries would have to decrease their labor costs by decreasing labor standards, in other words, harmonizing ‘down’”. So far, this theory of social dumping is just a hypothesis. For more information on social dumping, please refer to Adelle Blackett, “Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation” (1999) 31 Colum. Hum. Rts. L. Rev. 1.

¹⁰⁰² Adams, Roy J., and L. Turner, “The Social Dimension of Freer Trade” in Maria. Lorena. Cook & Harry. C. Katz, eds., *Regional Integration and Industrial Relations in North America: Proceedings of a Conference Held at the New York State School of Industrial and Labor Relations*, (New York: M. E. Sharpe, 1994), from 82 to 104.

¹⁰⁰³ George Tsogas, *Labor Regulation in A Global Economy* (New York: M. E. Sharp, 2001), at 30.

reasons for the increasing jobless rate in the industrialized countries;¹⁰⁰⁴ (4) since child labor is regarded as “the most heinous human rights violation”¹⁰⁰⁵, the view of using international trade as a coercive tool to eradicate child labor is therefore justified.

Based on the reasons abovementioned, as some scholars conclude that trade-based approaches to the problem of child labor might be theoretically justified on the basis that one can establish link between human rights regime and trade on the grounds as follows:

“(1) normative (because linkage is demanded by justice and fairness¹⁰⁰⁶); (2) coherence (because a free trade regime simply would not make sense if human rights are ignored); (3) consequentiality (because free trade will adversely affect human rights); (4) strategic (because linking these issues in creative package deals leads to more effective negotiations as to both); or (5) effectiveness (because the more effective WTO approach to dispute settlement can be usefully ‘borrowed’ to the benefit of human rights).”¹⁰⁰⁷

¹⁰⁰⁴ “Many officials in developing countries believe the campaign to bring labor issue into the WTO is actually a bid by industrial nations to undermine the comparative advantage of lower wage trading partners.” Online: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm> (date accessed: December 1, 2005). For more information on the interrelationship between Comparative Advantage, Trade and Labor Standards, please refer to Matthias Busse, “Comparative Advantage, Trade and Labor Standards”, online: <<http://www.economicsbulletin.uiuc.edu/2002/volume6/EB-02F10002A.pdf>> (date accessed: December 1, 2005).

¹⁰⁰⁵ Anup Shah, “Child Labor”, online: <<http://www.globalissues.org/TradeRelated/ChildLabor.asp>> (date accessed: December 1, 2005).

¹⁰⁰⁶ As for the fairness of the linkage, the writer has some reservation on this point of view. Imagine to stand in the shoes of those less developed countries who are the victim of colonization, during which they were heavily exploited by the colonizing states, i.e., UK, USA, Japan etc. Take China as an example, during the Opium War, China was forced to cede Hong Kong, and to compensate the so called value of the lost Opium to Britain. Yesterday’s colonized one is today’s poor state. It is partly because of the colonization, there is such a huge gap between the developed and the less developed states nowadays. Is it really fair for these less developed states to accept the labor standards proposed by those developed colonizers to offset the only comparative advantage the less developed have? If pursuing fairness is the genuine goal, how could they explain the property and resources they have already taken from the colonized countries, and how could they justify the slave plantations and the cruelty to the indigenous people? How about compensating China’s loss during the Opium War first and then returning to talk about the “unfair” comparative advantage that China have in the present international market?

¹⁰⁰⁷ Claire R. Kelly, “Enmeshment as A Theory of Compliance”, 2005, 37 N.Y.U. J. Int’l L. & Pol. 303.

b. Critically Evaluating the Efficacy of Trade Sanction against Child Labor

In theory, it might be justified for trade to be used as a “stick” to address the issue of child labor, the prohibition against whom might be one of those very few things that an almost universal agreement has been reached; however, it does not necessarily mean that trade sanction is the best way, especially in practice. “Being able to justify a trade measure as legitimate under the trade regime is not the same as showing that the trade measure will be helpful for the child labor regime.”¹⁰⁰⁸ In order to answer the efficacy query, it is necessary to move beyond the theoretical justification to evaluate some practical stumbling blocks.¹⁰⁰⁹

First, as for trade sanction which is already been described by WTO as a “conventional form of penalty”¹⁰¹⁰ in the WTO, it is indeed a complicated issue whose efficacy shall not be overestimated. The arguably self-punishment nature¹⁰¹¹ of trade sanction under the WTO may end up with “collateral damage to innocent victims” and is likely to “raise barriers to trade, which is generally detrimental to the interests of the country that does so”.¹⁰¹² After all, sanction will be inevitably perceived as an attempt to impose sanctioning state’s will, standards of conduct and value structure on the sanctioned one.¹⁰¹³ As such, trade sanction may lead to domestic distortion, half-hearted commitment, or even generate resentment and resistance¹⁰¹⁴ from the targeted

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ *Ibid.*

¹⁰¹⁰ Online: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> (date accessed: December 1, 2005).

¹⁰¹¹ Take American the active proponent for trade sanction as an example, it is estimated that economic losses from unilateral trade sanctions imposed by US are 15 billion to 20 billion in forgone exports annually. (From William H. Lash, “An Overview of the Economic Costs of Unilateral Trade Sanctions”, in Solveig Singleton & Daniel T. Griswold, eds., *Economic Casualties: How U.S. Foreign Policy Undermines Trade, Growth and Liberty* (Washington, DC: Cato Institute, 1999), at 13.

¹⁰¹² Steven Charnovitz, “Rethinking WTO Trade Sanction”, 2001, 95 Am J. Int’l L. 792.

¹⁰¹³ Clayton Yeutter, “Unilateral Sanctions: A politically Attractive Loser”, in Solveig Singleton & Daniel T. Griswold, eds., *Economic Casualties: How U.S. Foreign Policy Undermines Trade, Growth and Liberty* (Washington, DC: Cato Institute, 1999), at 86.

¹⁰¹⁴ Jagdish Bhagwati, “Afterword: The Question of Linkage”, 2002, 96 Am. J. Int’l L. 126.

governments.¹⁰¹⁵ Accordingly, the final victims of the trade sanction might be the very workers and their families inside the targeted state that the sanction intends to protect. In the case of sanction against child labor, degraded public morality, misguided social understanding,¹⁰¹⁶ a lack of affordable schooling together with poverty leave many children in developing countries with no choice but to work. As such, if a link between child labor and trade sanction under the WTO is established someday -- a general ban on products made by child labor is officially permitted within WTO framework without other constructive mechanisms available, such as education facilities etc., those youngsters would be enforced to leave factories before they have better alternatives. Indeed, they might be pushed to engage in more dangerous jobs, such as child prostitution, drug trafficking and production of pornography.¹⁰¹⁷ In fact, empirical evidence has shown that when the Bangladesh garment industry was threatened by US boycott, the manufacturers there fired almost all the child laborers.¹⁰¹⁸ It is a pity that far from helping the working little creatures, this drastic trade approach made things even worse because these children's families were abruptly deprived of necessary income.¹⁰¹⁹ Worse still, the alternative income sectors available for these kids would likely to be the informal sector which can often be worse than working in a factory.¹⁰²⁰ The logic behind this phenomenon is that "exports produced in the formal sector are the products most [easily] hit by trade measure, the effect will be to force child laborers into the informal sector where working conditions are worse"¹⁰²¹. In this sense, mere trade sanction without positive capacity building mechanism, even well intended, may end up with doing more harm than good.

¹⁰¹⁵ Hossein G. Askari, John Forrer, Hidly Teegen & Jiawen Yang, *Economic Sanctions: Examining Their Philosophy and Efficacy* (Westport Connecticut London: Praeger Publishers, 2003), at 1.

¹⁰¹⁶ Jonathan Silvers, "Child Labor in Pakistan", *The Atlantic Monthly*, February 1996. In this article, it is believed by some industrialist in the developing world that "child labor is a tradition the West cannot understand and must not attempt to change".

¹⁰¹⁷ Gordon Fairclough in Dhaka, "It Isn't Black and White", *Far Eastern Economic Review*, March 7, 1996.

¹⁰¹⁸ *Supra* 1007.

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ *Ibid.*

¹⁰²¹ *Ibid.*

Second, the scope of trade sanction is limited. After all, there are only 5 percent of child laborers all over the world involved in export-related jobs.¹⁰²² In the case of China, given the fact that China's foreign trade record is improving year by year, although there is no clear statistics available, the percentage of child laborers' involvement might be slightly higher than the average 5 percent. Even if trade sanction does drive the children out of those jobs, at most, it is only able to save around five percent of them. However, things are far from that simple. It is observed that "abolishing child labor in one economic sector may be accompanied by its re-emergence in another".¹⁰²³ Very possibly, these kids are just moving from export-related industries to some other formal or informal domestic sectors. Considering the phenomena as such as well as the "not just unproductive, but also counterproductive"¹⁰²⁴ nature of trade sanction, trade sanction is by no means a properly targeted trade policy against child labor.

Third, a targeted country's capacity to resist the trade sanction, such as Iraq¹⁰²⁵ who refused to bend after so many years' all-dimensional sanction instead of mere trade one, might be beyond the bounds of any intelligent planner's expectation. UN Resolution 661 did not achieve its goal of driving Iraqi troops out of Kuwait and finally gave way to the First Gulf War.¹⁰²⁶ "Nor have sanctions succeeded in forcing full compliance with Gulf War cease-fire Resolution 687 (1991), especially its disarmament mandate for the destruction, removal or rendering harmless of Iraq's weapons for mass destruction".¹⁰²⁷ Worse still, the consequence of this coercive tool combined with the destruction caused by the war, "created one of the worst humanitarian crises of the

¹⁰²² *Supra* 819.

¹⁰²³ *Supra* 1022.

¹⁰²⁴ *Supra* 1014.

¹⁰²⁵ For more information on the sanction on Iraq, please refer to "Autopsy of A Disaster: The U.S. Sanctions Policy on Iraq", online: <<http://www.accuracy.org/article.php?articleId=1028>> (date accessed: October 11, 2005).

¹⁰²⁶ David Cortright, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (US: Lynne Rienner Publishers, 2000), at 37.

¹⁰²⁷ *Ibid.*

decade, resulting in hundreds of thousands of premature deaths among Iraqi children”.¹⁰²⁸ As the most populous country with its comprehensive national power ranking No. 4 all over the world¹⁰²⁹, China’s capacity to resist the trade sanction shall not be underestimated. In this sense, once the sanction applies to China, a lose-lose situation is likely to happen with very few chances for China to voluntarily propose a compromise.

Fourth, sanction approach, as an outgrowth of John Austin’s command theory of law, carries certain in-born conundrums which may lead people to go astray. From John Austin’s view, law is the general command or order with a sanction attached.¹⁰³⁰ “Sanction is part of law which the command constitutes; it is the sanction, i.e., the likelihood of evil consequences from breach that imposes the duty on the subjects of the law: duty and sanction are corrective terms.”¹⁰³¹ Despite the fact that certain people obey law due to the threat of sanction, as Hartian description on his rule based thesis and his criticism on Austin’s theory, most people obey law because of their “critical reflexive attitude”¹⁰³², i.e., “members of the social group will share a criticism including a self criticism of those that deviate from the rule”¹⁰³³. By the same token, trade sanction is likely to overemphasize the significance of “command” to drive a state to follow certain standards and values, though, unduly neglect what shall deserve more attention, such as means of internal capacity building to offering better alternatives via external assistance and other constructive engagement ways, which might help a state and its government, such as the Chinese government create an internal “reflexive attitude” or, at any rate, a “spark” to obey certain international standards.

¹⁰²⁸ *Ibid.*

¹⁰²⁹ Online: <<http://www.chinaiiss.org/top/>> (date accessed: August 21, 2007).

¹⁰³⁰ Lord Lloyd & M.D.A. Freeman, eds., *Lloyd’s Introduction to Jurisprudence*, 5th ed. (London: Steven & Sons, 1985), at 264.

¹⁰³¹ Rowel Genn, *Jurisprudence And Legal Theory Textbook* (London: HTL Group Ltd, 1988) at 34 &35.

¹⁰³² *Ibid.* at 48.

¹⁰³³ *Ibid.*

Fifth, considering the causes of child labor in China, especially its root cause -- corrupted public morality intertwined with the new religion of money, sanction is hardly a suitable means to touch, let alone to alter these profit-oriented minds, in particular those shortsighted parents' views to regard education as wasting money and only wish their kids to work as soon as possible. After all, mental aberration needs more psychotherapy than physiotherapy. By the same token, considering that public morality is not constituted overnight, but is gestated gradually through decades, to expect to adopt a relatively short-term coercive trade method to target the said root cause formed under the influence of various trends of thoughts, values by decades is hardly a wise or effective proposal.

Sixth, the consistent opposition against the labor-trade link from the developing world implies their concern that such link might open a flood gate to generate too many risks of abuse and protectionism.¹⁰³⁴ Given the fact that the link proponents are mostly governments, NGOs, trade unions in the North and a lack of specific rules regulating a permitted trade sanction under the WTO,¹⁰³⁵ suspicion as such is reasonable. In fact, WTO -- as a trade expert is obviously unsuitable to solve the problems in relation to labor standards' identification, surveillance and enforcement etc. In other words, the involvement of ILO -- the international labor expert seems inevitable. How to cooperate between these two international organizations in practice -- either through establishing a new joint regime or via mutual reporting system or other means might become another complicated issue necessary to be sorted out in the first place.¹⁰³⁶ Much detailed rules and procedures need to be considered, negotiated, discussed, drafted, amended, and finally get approval before officially introducing a fair link -- a well designed link excluding the chance of maneuvering trade sanction as a disguised protectionist ploy.

¹⁰³⁴ Andrew T. Guzman, "Trade, Labor, Legitimacy", 2003, 91 Cal. L. Rev. 885.

¹⁰³⁵ *Ibid.*

¹⁰³⁶ Indeed, "several commentators have proposed a regime for labor rights enforcement built upon a combination of the ILO and the WTO." Cited in Katherine Van Wezel Stone, "To the Yukon and Beyond: Local Laborers in A Global Labor Market", 1999, 3 J. Small & Emerging Bus. L. 93.

Of course, the purpose of analyzing the efficacy of trade sanction in practice is not to deny its value, especially its threatening power, but to point out that a speculative analysis on its potential impact on a targeted country particularly like China need to be carefully studied before the coercive trade tool is emotionally proposed to impose on member states accused of violating international core labor standards against child labor.¹⁰³⁷

¹⁰³⁷ In fact, between carrot -- moral persuasion and stick -- sanction, the writer proposes a golden middle approach -- a fine system. This idea is inspired by the remedy mechanism of North American Agreement on Labor Cooperation (NAALC). Failure of a signatory country to fully implement a mutually agreed action plan, or an action plan recommended by the arbitral panel to remedy the “persistent pattern of failure” to effectively enforce a party’s domestic labor law, could lead to the imposition of a monetary enforcement assessment (MEA) of up to \$20 million in the first year of operation of the agreement; the amount of MEA in subsequent years will be based on the value of trade. If a country fails to pay a MEA, the complaining country may suspend North American Free Trade Agreement (NAFTA) benefits in an amount no greater than sufficient to collect MEA. As for the money collection, the NAALC provides that the proceeds “shall be paid into a fund established in the name of the commission by the Council to improve or enhance the labor law enforcement in the party complained against, consistent with its law”. Presumably, the Commission and the government involved would negotiate the manner in which the funds would be spent and released to the government for the sole purpose agreed upon. However, the MEA mechanism under the NAALC carries several subsequent problems: ① this MEA within NAALA is actually backed up by trade sanction (if strictly follow this practice, the chances for a fine system as such under the ILO regime to be approved by the developing states are very low); ② intrusive on sovereign equality/integrity. (it is provided that the proceeds “shall be paid into a fund established in the name of the commission by the Council and shall be expended at the direction of the Council to improve or enhance the labor law enforcement in the Party complained against, consistent with its law”. Presumably, the Commission and the government involved would negotiate the manner in which the funds would be spent and released to the government for the sole purpose agreed upon. Thus, several problems arise. Since domestic law enforcement is mainly an internal affair, and ‘non-intervention of internal affairs’ is one of the fundamental principles of public international law (PIL), chances for the developing states to voluntarily surrender its right under the PIL are quite small; besides, on what basis should the party complained against trust the Council’s judgment on the money spending to enforce its own labor law? Obviously, the country in question knows its domestic situation much better than any outsiders, thus lots of countries might ask the same question: “who are you to teach me how to enforce my own labor law when we know ourselves much better than you do?” Based on the abovementioned concerns, the chances for the MEA to be approved without any change at the international level are quite low. What the writer is going to propose below is a fine system which could avoid the defects embedded into the NAALC’s MEA and could get the most supporters worldwide. The basic idea of this fine system could be put in this way: when ILO finds a large scale and persistent child labor practice within a certain country, this country will be submitted to a Fine System based on ILO. Besides, the fine will be cumulated to become a “Fine Fund” (FF). Once the targeted country has started improving its practice, even with only a minor improvement, the money would be repaid together with the interests to the targeted country gradually. As for the method in which the country would use this amount of money, it is purely up to the country itself. When the country in question has made a fundamental improvement, it may even be rewarded by this FF. The advantages of this Fine System are: ① punishing the right person. (When using the trade sanction, the child laborers, very possibly, would become the final victims; however, this fine system would directly aim at the government, who is supposed to have the responsibility to protect its children); ② Proportionality. (The effect of trade sanction would be very hard to control. Very possibly, the effect of the sanction and the weight of wrongs

ii. Initiative from Private Sectors against Child Labor

a. Corporate Code of Conduct (the “COC”)and Child Labor

“The eve of twenty-first century is marked by economic globalization, expansion in the number of free enterprise economies, and by privatization.”¹⁰³⁸ There were some seven thousand MNCs all over the world in seventies, whilst the number now has become more than five times of the former.¹⁰³⁹ It is estimated that the three hundred largest MNCs now control about one fourth of the world’s productive assets.¹⁰⁴⁰ Indeed, some UN member states have economies smaller than the annual revenues of some large MNCs.¹⁰⁴¹ For example, Ford’s economy is larger than Saudi Arabia’s and Norway’s,¹⁰⁴² let alone that of those small states in Africa. With the increasing power of MNCs, the real power of national governments is shrinking accordingly.¹⁰⁴³ As such, there is a trend of shifting social responsibility from the public sector to the private one.¹⁰⁴⁴ Not until the early 1990s, there were very few COCs aiming at moral “issues raised by the behavior of

are greatly disproportionate, however the amount of fine and its subsequent effect is relatively easy to estimate and control; ③ Incentives. (Even when a certain country is punished, it may still have chance to regain its fine when it improves its practice, sometimes, even get more than the amount it is fined, i.e., rewarded. In this sense, more governments from the developing world might prefer to improve its labor practice within its regime; ④ compared with the abovementioned MEA, the system proposed by the writer herself has avoided the intrusion of sovereignty of the wrongdoers since it is completely within the own control of the state in question to use the reward. To be honest, when there are persistent rejecters, this fine system may not work effectively either. Thus, in terms of the writer’s design, once a state has committed to join this fine regime, trade sanction shall be banned forever because the suggested Fine Agreement under the writer’s design is supposed to provide a clause that completely abolishes the trade sanction as the last resort. In this sense, the member states, especially the developing ones would feel relatively safe. However, the Fine Agreement shall also incorporate another clause which provides that if a country persistently rejects to pay the fine, it would be regarded as an autonomous withdrawal from this Fine regime. After its withdrawal, the trade sanction might be imposed. It is believed that on the basis of a fine system as such, the chances for the developing government to choose to join this fine regime are much higher than a fine system under the NAALC. [From NAALC, art. 39 & 41 and NAALC Annex 39 (1) & (3)].

¹⁰³⁸ Douglass Cassel, “Corporate Initiatives: A Second Human Rights Revolution?”, 19 Fordham Int’l L.J. 1963, 1984 (1996).

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ *Ibid.*

¹⁰⁴¹ *Ibid.*

¹⁰⁴² *Ibid.*

¹⁰⁴³ *Ibid.*

¹⁰⁴⁴ *Ibid.*

the company and its vendors in the supply chain except for prohibition on bribery and favors”.¹⁰⁴⁵ Labor issues such as child labor came a long way behind.¹⁰⁴⁶ In fact, for a long time, labor issues were not regarded as the issues of corporate ethics at all, “but were kept at arm’s length behind the veil of subcontracting”.¹⁰⁴⁷ However, for the sake of a company’s own image, as well as partly because of the awakening of its social conscience, coupled with the pressure from various consumer associations, “code of conduct for labor rights are taking shapes as part of a broader movement of corporate social responsibility”.¹⁰⁴⁸ At present, it is observed that more and more MNCs have adopted company policies against child labor through its COC that governs their labor practices and those of their outsourcing suppliers.¹⁰⁴⁹

Generally speaking, COC can be categorized into two types. The first is the internal one -- they are generated and drafted by the MNCs themselves. Most Fortune 500 companies in US have adopted codes of conduct as such, many of which deal with core labor standards.¹⁰⁵⁰ Indeed, other non-US MNCs also adopted codes as such, including Honda, Sony, Siemens and SmithKline Beecham etc.¹⁰⁵¹ In terms of the estimation made by the Institute of Business Ethics, 60 percent of the top 500 companies in UK have COCs, whose percentage was only 18 percent decade ago.¹⁰⁵² COCs as such mainly aim at regulating labor standards which cover issues of payment, forced labor, employment discrimination, freedom of association and the bargaining

¹⁰⁴⁵ George Tsogas, *Labor Regulation in a Global Economy* (London: M. E. Sharpe, 2001) at 12-13.

¹⁰⁴⁶ *Ibid.*, at 13.

¹⁰⁴⁷ *Ibid.*, at 13.

¹⁰⁴⁸ Nicole J. Krug, “Exploiting Child Labor: Corporate Responsibility and the Role of Corporate Codes of Conduct”, 1998, 14 N.Y.L. Sch. J. Hum. Rts. 651.

¹⁰⁴⁹ “Issue Brief: Child Labor”, online:

<<http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=49773>> (date accessed: December 20, 2005).

¹⁰⁵⁰ Organization For Economic Cooperation And Development (OECD), *International Trade and Core Labor Standards* (Paris: OECD Publication, 2000), at 73.

¹⁰⁵¹ *Ibid.*

¹⁰⁵² *Ibid.*

collectively etc.¹⁰⁵³ The second type is the external COCs -- COCs generated externally by multilateral government like United Nations, international organizations such as OECD and the labor specialist ILO, and by NGOs such as Social Accountability International (SAI), which “seek to create an ‘auditable’ COC [offering for company’s acceptance] that can be applied across consumer products industries”¹⁰⁵⁴.

It is believed by some optimistic scholars that the practical solution of the labor rights abuses, in particular in the case of child labor, is finally on these private shoulders.¹⁰⁵⁵ Admittedly, COC movement does encourage most corporations around the world to do “good”¹⁰⁵⁶ business and regulates corporate behaviors. Indeed, it serves as an important moral indicator of the will of the international society.¹⁰⁵⁷ Despite such positive functions, COC movement has nevertheless attracted lots of criticism. According to some critics, codes especially internal codes are rarely in the interests of workers.¹⁰⁵⁸ “They view codes as a vehicle for corporations to ① distract and confuse conscience-laden consumer, who have demanded that the goods they buy not be made or handled by exploited workers, ② distract and confuse workers regarding their fundamental rights, and ③ distract and confuse national policy makers.”¹⁰⁵⁹ In sum, COCs are believed to be “nothing more than public relations shams and subterfuges for avoiding real efforts to improve

¹⁰⁵³ For more information, please refer to OECD, “Codes of Corporate Conduct: Expanded Review of their contents”, online: <<http://www.oecd.org/dataoecd/57/24/1922656.pdf>> (date accessed: December 20, 2005).

¹⁰⁵⁴ “Child Labor”, online: <http://www.indianngos.com/corporate/humanrights/childlabor.htm> (date accessed: January 6, 2006).

¹⁰⁵⁵ Please see generally in Nicole J. Krug, “Exploiting Child Labor: Corporate Responsibility and The Role of Corporate Codes of Conduct”, 1998, 14 N.Y.L. Sch. J. Hum. Rts. 651; Pall A. Davidsson, “Legal Enforcement of Corporate Social Responsibility within the EU”, 2002, 8 Colum. J. Eur. L. 529; Cynthia A. Williams, “Corporate Social Responsibility in An Era of Economic Globalization”, 2002, 35 U.C. Davis L. Rev. 705.

¹⁰⁵⁶ Paul Hawken & McDonough, “Seven Steps to Doing Good Business”, online: <<http://www.inc.com/magazine/19931101/3770.html>> (date accessed: March 2, 2006).

¹⁰⁵⁷ Janelle M. Diller & David A. Levy, “Child Labor, Trade and Investment: Towards the Harmonization of International Law”, 1997, 91 Am. J. Int’l L. 663.

¹⁰⁵⁸ Owen E. Herrstadt, “Voluntary Corporate Code of Conduct: What’s Missing?”, 2001, 16 Lab. La.

349.

¹⁰⁵⁹ *Ibid.*

workers' lives".¹⁰⁶⁰ Statement as such might be too extreme; however, some empirical evidence based on various studies of numerous voluntary COCs samples does show that most COCs are encumbered with some inborn flaws. It is believed that "despite the apparent agreement that prohibition against child labor represents a minimum in any corporate code, few COCs address them".¹⁰⁶¹ Even when this minimum standard is addressed, it is always inadequate because the appropriate ILO core standards reflected in its fundamental conventions No. 138 and No. 182 are not explicitly referenced.¹⁰⁶² These empirical studies conclude that "only a few codes contained any mention of human rights, and even fewer contain explicit references to ILO standards".¹⁰⁶³ Worse still, to those very few codes where human rights are mentioned and explicitly references are given to appropriate ILO standards, they "offer virtually no details or explanation as to the precise nature of these fundamental rights".¹⁰⁶⁴ Indeed, a study conducted by the Investor Responsibility Research Center, involving both "S&P 500 companies and 80 major retailers" and 121 internal codes indicates that among all the codes investigated, only one defined child labor in accordance with "United Nations standards or local laws, whichever are higher".¹⁰⁶⁵

Above and beyond this, the implementation and enforcement of the COCs bring about lots of practical conundrums. In terms of implementation, theoretically, workers, all levels of management and all departments within an enterprise, as well as its subcontractors and suppliers shall not only be informed, but understand the content of the very COC as well.¹⁰⁶⁶ Unfortunately, in practice, it is found that in most cases, to those who should understand the code and should

¹⁰⁶⁰ *Ibid.*
¹⁰⁶¹ *Ibid.*
¹⁰⁶² *Ibid.*
¹⁰⁶³ *Ibid.*
¹⁰⁶⁴ *Ibid.*
¹⁰⁶⁵ *Ibid.*
¹⁰⁶⁶ *Ibid.*

have the knowledge of the code and, at the least, a basic understanding of the concepts, rights included in the code are totally absent.¹⁰⁶⁷

As far as the issue of enforcement is concerned, one method necessary for increasing the effectiveness of enforcement is the mechanism of monitoring.¹⁰⁶⁸ In the case of internal monitoring, very often, its credibility and objectiveness are questionable.¹⁰⁶⁹ After all, internal monitors usually have strong ties to the company in question.¹⁰⁷⁰ To external monitoring, only a limited number of corporations adopt it.¹⁰⁷¹ Even if companies do use external monitors, many auditing firms and NGOs neither have necessary experience in applying fundamental rights in the workplace, nor have enough neutrality -- many of them more or less have a previous relationship with the corporation that they are monitoring.¹⁰⁷² For example, the New York based Council on Economic Priorities Accreditation Agency (CEPAA) which developed the famous Social Accountability 8000 (SA 8000) has been perceived as being “too close to business” and “too cozy” with some consultants in the field to neglect workers as well as NGOs’ views.¹⁰⁷³ The Labor Rights in China comments that the whole business of SA8000 smacks too much of self-appointed regulatory mechanism or even “insider-trading”.¹⁰⁷⁴ Besides, other issues, such as meaningful remedies available when corporation violates its own code or the code it subscribes to

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ *Ibid.*

¹⁰⁶⁹ Robert J. Liubicic, “Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives”, 1988, 30 L. POL’Y & INT’L BUS. 111, online:<http://www.findarticles.com/p/articles/mi_qa3791/is_199810/ai_n8826624/pg_6> (date accessed: January 14, 2006).

¹⁰⁷⁰ *Supra* 1058.

¹⁰⁷¹ *Ibid.*

¹⁰⁷² *Ibid.* “Some have argued that social labeling and codes of conduct are impossible to monitor. Most firms subject to industry-wide codes and labeling programs rely on subcontractors and sub-subcontractors for their production... and the subcontracting companies are far-flung and often nameless entities, impervious to meaningful efforts at monitoring...The monitoring issue has become the focus of much controversy in the area, and the issue is far from settled.” Cited in Katherine Van Wezel Stone, “To the Yukon and Beyond: Local Laborers in A Global Labor Market”, 1999, 3 J. Small & Emerging Bus. L. 93.

¹⁰⁷³ *Supra* 1045, from 74 to 76.

¹⁰⁷⁴ *Ibid.*, at 75.

obey, termination of business relationship between subcontractors or suppliers breaking the code (this might be especially relevant to the Chinese context because China is becoming the world factory and many suppliers' subcontractors originate from China)¹⁰⁷⁵, public disclosure and transparency etc.¹⁰⁷⁶ shall be carefully and seriously studied before the COC movement could develop in a healthy way -- to serve as a *de facto* protector of labor rights, in particular prohibiting the incidence of child labor, rather than serving as a window dressing only.

b. Social Labeling and Child Labor

“A label is information that the manufacturer or marketer of a product provides to the consumer at the point of sale”.¹⁰⁷⁷ Social labels are intended to inform consumers about the social conditions of production, i.e., whether the products to be purchased are produced under fair and equitable working conditions.¹⁰⁷⁸ The proponents of most social labeling initiatives against child labor “are trying to initiate change by starting from the consumer and moving back through the market chain to affect modes of production and improve the lives of working children, either by pressing for the complete removal of child laborers from the production process or the amelioration of their working and living conditions”.¹⁰⁷⁹ To date, there are several famous social labeling programs especially targeting child labor involved in the textile production process, including but not limited to Rugmark campaign, Kaleen label, Care & Fair label, STEP Label for

¹⁰⁷⁵ For more information, please see *Supra* 272.

¹⁰⁷⁶ For more information, please see generally in Owen E. Herrnsstadt, “Voluntary Corporate Code of Conduct: What’s Missing?” 2001, 16 Lab. La. 349; Robert J. Liubicic, “Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives”, 1988, 30 L. POL’Y & INT’L BUS. 111, online: <http://www.findarticles.com/p/articles/mi_qa3791/is_199810/ai_n8826624/pg_6> (date accessed: January 14, 2006). Elisa Westfield, Globalization, “Governance, And Multinational Enterprise Responsibility: Corporate Codes of Conduct In The 21st Century”, 2002, 42 Va. J. Int’l L. 1075; Bob Hepple, “A Race to The Top? International Investment Guidelines and Corporate Codes of Conduct”, 1999, 20 Comp. Lab. L. & Pol’y J. 347.

¹⁰⁷⁷ Janet Hilowitz, *International Program on the Elimination of Child Labor (IPEC) Labeling Child Labor Products: A Preliminary Study*, online: <<http://www.ilo.org/public/English/standards/ipecl/publ/policy/papers/labeling/part1.htm>> (date accessed: January 16, 2006).

¹⁰⁷⁸ *Ibid.*

¹⁰⁷⁹ *Ibid.*

carpets and ABRINQ labeling etc.¹⁰⁸⁰ Considering that ecological and “green” labels have proliferated in many markets and are now easily recognized by consumers, there is a ground to believe the opportunity for the “child-label-free” labels to win enough adherents and meet with success in the consumer markets of the developed world.¹⁰⁸¹

Despite the influential power of the labeling initiatives, almost all the labeling programs as such carry several weak points that are worthy to be discussed in this paper. First, most famous social labeling initiatives are based in the developed states to influence the export industries in the developing countries. In other words, only about 5 percent child laborers that are involved in the export industries of the developing world might have the chance to be saved.¹⁰⁸² Given the situation of child laborers in China -- there are more than 90 percent child laborers are working in the domestic industries, the influence brought about by the social labeling programs as such shall be only marginal. As such, even if a social labeling program is effectively tackling child labor problem in China, the labeling program *per se* shall not be limited to export related industries only.

Second, considering social labeling initiatives finally depend on the choice made by consumers themselves, it is not clear whether the majority of them are really willing to buy “child-labor-free” labeled products with higher price. After all, personal taste plays a very

¹⁰⁸⁰ For more information, please see generally in Janet Hilowitz, “International Program on the Elimination of Child Labor (IPEC) Labeling Child Labor Products: A Preliminary Study”, online: <<http://www.ilo.org/public/English/standards/ipecc/publ/policy/papers/labeling/part1.htm>> (date accessed: January 16, 2006); Alakh N Sharma, “Impact of Social Labeling on Child Labor in Carpet Industry”, online: <<http://hdrc.undp.org.in/childrenandpoverty/REFERENCE/REPORTS/EPW/imptcl-crpt.htm>> (date accessed: January 6, 2006); Linda F. Golodner, “A Consumer Perspective on Social Responsibility”, online: <<http://www.nclnet.org/notredam.htm>> (date accessed: January 16, 2006); “Child Labor”, online: <<http://www.indianngos.com/corporate/humanrights/childlabor.htm>> (date accessed: January 6, 2006).

¹⁰⁸¹ *Supra* 1077.

¹⁰⁸² *Supra* 819 and please also refer to the previous text: “In the case of China, given the fact that China’s foreign trade record is improving year by year, although there is no clear statistics available, the percentage of child labor involvement might be a little bit higher than the average 5 percent. Even if trade sanction does drive the children out of those jobs, at most, it only could save 5 percent plus of them”.

important role in deciding whether to buy or not to buy a product no matter socially labeled or not.¹⁰⁸³ Should personal taste dictate a preference for an unbalanced price, there must be very compelling reasons to reject it.¹⁰⁸⁴ Some small and informal surveys concerning consumer's attitude to social labeling done in the US and Europe indicate consumer's willingness to bear the **slightly** higher retail cost of socially labeled products.¹⁰⁸⁵ However, a small survey carried out by the writer herself before 2006 Chinese New Year in Shanghai, one of the largest and most developed cities in China shows that only less than 10 percent of the consumers have heard of social labeling programs, *inter alia*, less than 5 percent would buy a socially labeled product with relatively higher price.¹⁰⁸⁶ The conflicting results at least imply two points: ① the evidence of consumer receptivity is scattered and inconclusive; ② if the social labeling program is hoped to enlarge its influence rather than only limited to the export related industry, the domestic consumers' attitude in a developing country like China will not be easily altered without enough preparatory work conducted in the first place. In addition, as mentioned in the previous parts of this thesis, the root cause of the reemergence of child labor in China is because of the degrading of public morality; therefore, to educate the Chinese consumers to have the understanding and to create their moral aspiration to sacrifice part of their limited salary to buy the socially labeled products with relatively higher price is by no means a short term or easy task. Indeed, it may take decades to change the consumers' attitude and make them socially aware enough to purchase the "child-labor-free" labeled products so that the labeling system is able to develop in the future to touch the rest 90 percent of the child laborers in China.¹⁰⁸⁷

¹⁰⁸³ *Ibid.*

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ *Supra* 1077.

¹⁰⁸⁶ From January 14, 2006 to January 18, 2006, during these five consecutive days, the writer interviewed 100 consumers in front of a big supermarket in China. Among these 100 consumers, including 70 females, and 30 males, only 9 persons said they have heard of social labeling programs from the media, and only 4 of them showed their willingness to buy the products labeled with higher price. From the writer's view, considering the situation of Shanghai (the industrial and commercial centre of China) is so disappointing, that of the other parts of China shall be much worse.

¹⁰⁸⁷ *Ibid.*

Third, the majority of the famous labeling programs are originated from the developed world -- Rugmark from Germany, Care & Fair from German and STEP from Switzerland. Considering that a social labeling initiative based on the developed world would have a substantial effect on production practice in an entire export industry in a large country like China,¹⁰⁸⁸ it surely will affect certain stakeholders' feelings of national and personal independence.¹⁰⁸⁹ To some, social labeling is perceived as one form of restraint of trade -- the imposition of social costs and the restraint of freedom in the pursuit and practice of business.¹⁰⁹⁰ For that matter, in order to use labeling programs to tackle child labor in China, social labeling initiative originating from China would be more attractive and effective. Take Kaleen program as an example. It is a labeling program initiated by the Indian government to eradicate child labor and the welfare of weavers in the Indian carpet industry.¹⁰⁹¹ It is observed that the Kaleen label not only attracts almost the full support of the carpet industry, but also satisfies the demands of some carpet exporters who regard social labeling initiative originated from the west, such as Rugmark, as unnecessary foreign intervention in the domestic commercial affairs due to its partly German affiliations.¹⁰⁹² Following the Kaleen approach, it might be desirable and feasible for the Chinese government and society to develop its own social labeling system to target the problem of child labor in China. Of course, it is a long-term task to arouse the public awareness and ultimately trigger the public will to initiate a labeling system as such.

¹⁰⁸⁸ *Ibid.*

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ *Ibid.* For more information, please see generally in online:

<<http://finance.sina.com.cn/review/20050829/0102285991.shtml>> (date accessed: June 27, 2006); online:

<http://www.intking.com/tech/newsdetail_155.html> (date accessed: June 27, 2006); online:

<http://www.chinatradenews.com.cn/news/article_show.asp?ArticleID=17321> (date accessed: June 27,

2006); online: <http://www.ce.cn/new_hgjj/dujia/200412/08/t20041208_2513571.btk> (date accessed: June 27, 2005).

¹⁰⁹¹ Alakh N Sharma, "Impact of Social Labeling on Child Labor in Carpet Industry", online: <<http://hdrc.undp.org.in/childrenandpoverty/REFERENCE/REPORTS/EPW/imptcl-crpt.htm>> (date accessed: January 6, 2006); For more information, please also see online: <http://www.india-carpets.com/modules.php?name=Kaleen_Label> (date accessed: January 17, 2006).

¹⁰⁹² *Supra* 1077.

Above and beyond this, the credibility of labeling programs, such as the practical difficulty like corruption involved in the monitoring procedure, is not an easy problem to sort out.¹⁰⁹³ In sum, in spite of the good idea and intention embraced in a social labeling program to target child labor, its practical effect is merely marginal in the Chinese society at the current stage.¹⁰⁹⁴ At present, considering that the social labeling program is a relatively new phenomenon in the Chinese society and both the government and the consumer's awareness is not mature enough to accept it, and the labeling program *per se*, in general, is only in its infant period and limited to certain industry represented by textile, its efficacy and potential influence to curb the child labor in China shall not be overestimated.

5.6 Concluding Remarks

In this chapter, at the beginning, the writer tries to distinguish child labor and child work and points out the evil nature of child labor. Through a historical review of the child labor phenomenon in China, the writer argues that the root cause of child labor in contemporary China is not poverty, but the corrupted public morality and the new religion of money. In order to effectively fight against this evil in China, first, the writer tries to evaluate the major relevant Chinese legislation -- Constitution, Labor law, Compulsory Education Law, Minor Protection Law, and Criminal Code etc. under the framework of ILO Convention No. 138 and No. 182. From her view, although the domestic legislation still leaves something to be desired, generally speaking, it is competent and consistent with the ILO fundamental conventions No. 138 and No.

¹⁰⁹³ For more information, please see Janet Hilowitz, *International Program on the Elimination of Child Labor (IPEC) Labeling Child Labor Products: A Preliminary Study*, online: <<http://www.ilo.org/public/English/standards/ipecc/publ/policy/papers/labeling/part1.htm>> (date accessed: January 16, 2006); Alakh N Sharma, "Impact of Social Labeling on Child Labor in Carpet Industry", online: <<http://hdrc.undp.org.in/childrenandpoverty/REFERENCE/REPORTS/EPW/imptcl-crpt.htm>> (date accessed: January 6, 2006); For more information, please also see online: <http://www.india-carpets.com/modules.php?name=Kaleen_Label> (date accessed: January 17, 2006).

¹⁰⁹⁴ *Supra* 1091.

182. Besides, considering child labor is a social ill and the relevant domestic legislation is generally competent, the writer proposes certain suggestions beyond legislative reform including: ① a proper government role in curbing child labor under the Chinese context; ② critically evaluate child labor social clause under the WTO; and ③ evaluate the influence from private sector, i.e., COC movement and social labeling program -- it may not be panacea¹⁰⁹⁵ and its efficacy might only be marginal in the Chinese context. As a complicated legal and social issue, child labor needs a comprehensive solution, including but not limited to the aspects abovementioned. Indeed, other multilateral instruments, such as the ILO Convention guidelines (cooperation between the Chinese government and the ILO), certain legal solution in regulating the second generation of the migrant workers in China,¹⁰⁹⁶ along with other international or domestic agencies and NGOs, should fight against child labor all together.

¹⁰⁹⁵ From the writer's position, the private initiatives are not panacea. For example, the heavily praised Sullivan Principle has been proved with merely marginal effect on improving the worker rights in South Africa. From Jorge F. Perez-Lopez, "Promoting International Respect for Workers' Rights Through Business Codes of Conduct", 1993, 17 FORDHAM INT'L L.J. 1 (1993).

¹⁰⁹⁶ Please see text below accompanying note 1363 & 1364.

Chapter 6: Discrimination in Respect of Employment and Occupation in China under the Framework of ILO Convention No. 100 and No. 111

6.1 Overview on ILO Fundamental Conventions No. 100 and No. 111

A. Introduction to ILO Fundamental Convention No. 100

Having decided upon the adoption of proposals regarding the principle of equal remuneration for men and women workers for work of equal value,¹⁰⁹⁷ ILO convention No. 100 stipulates that men and women workers for work of equal value are entitled to equal remuneration, including “the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment”¹⁰⁹⁸. The Committee of Experts has stressed that the purpose for a very wide terms of the definition of “remuneration” is to ensure that the right to equal treatment is not limited to the ordinary wage, and that it cannot be restricted in any way by semantic arguments.¹⁰⁹⁹ For instance, the phrase “any additional emoluments” is considered to include, *inter alia*, “seniority raises, marriage benefits, cost of living raises, use of dwelling and family subsidies paid by employers, as well as payment in kind such as cleaning work clothing”.¹¹⁰⁰ As for the principle of equality without discrimination based on sex established by this Convention, it is worthwhile pointing out that principle as such “does not require the abolition of differences in the general level of wages between regions, sectors or even undertakings, so long as these differences apply equally to men and women”.¹¹⁰¹ When problem concerning implicit discrimination based on sex -- “cases where apparently objective criteria such as performance or job difficulty are explicitly defined or applied with reference to worker’s sex”

¹⁰⁹⁷ ILO Convention No. 100, preamble para.3.

¹⁰⁹⁸ ILO Convention No. 100, art. 1(2).

¹⁰⁹⁹ *Supra* 58, at 242.

¹¹⁰⁰ *Ibid.*

¹¹⁰¹ *Ibid.*, at 245.

-- arises, the Convention's attitude is that it covers not only open discrimination against either sex, but also cases concerning implicit discrimination as such.¹¹⁰² In particular, it is submitted by the Committee of Experts that it is not sufficient at all to merely replace separate wage scales for "male" and "female" jobs by similar scales worded in neutral language but preserving the inherited job profiles and existing wage differentials alike.¹¹⁰³

When dealing with the application of the principle of equal remuneration for work of equal value based on sex, every member "shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value".¹¹⁰⁴ Put concretely, means for application of the principle include: ① national laws or regulations; ② legally established or recognized machinery for wage determination, such as arbitration tribunals or wage councils¹¹⁰⁵; ③ collective bargaining; and ④ a combination of these various means listed above.¹¹⁰⁶

In addition, article 3 of the Convention provides that it is also an obligation to promote objective appraisal of jobs on the basis of the work to be performed regardless of sex and the scope of the obligation to promote such objective appraisal shall be with no limitation as to the undertakings and workers concerned.¹¹⁰⁷ According to the Committee of Experts, obligation as such has been necessarily implied by the very concept of paying remuneration to men and women according to the value of their work.¹¹⁰⁸ "It considers that such a technique is essential in determining whether jobs involving different work may none the less have the same value for the purpose of

¹¹⁰² *Ibid.*

¹¹⁰³ *Ibid.*

¹¹⁰⁴ ILO Convention No. 111, art. 2(1).

¹¹⁰⁵ *Supra* 58, at 246.

¹¹⁰⁶ ILO Convention No. 100, art. 2 (2).

¹¹⁰⁷ *Supra* 58, at 247.

¹¹⁰⁸ *Ibid.*

remuneration, and that a technique to measure the relative value of jobs with varying content is critical to eliminating discrimination in the remuneration of men and women.”¹¹⁰⁹

B. Introduction to Convention No. 111

Convention No. 111 further requires member states to eliminate any discrimination -- distinction, exclusion or preference, made on the basis of race, color, sex, religion, political opinion, national extraction, social origin or results after consultation with representative employers' and workers' organizations, which has the effect of nullifying, or impairing equality of opportunity or treatment in employment or occupation.¹¹¹⁰ In terms of “race or color”, though the Convention refers separately to these two ideas, these two grounds for discrimination were actually considered as two parts of the same idea.¹¹¹¹

As for discrimination based on sex, according to the Committee of Experts, “it includes those that are made explicitly or implicitly, to the disadvantage of one sex or the other, though it has noted that it is relatively rare to find cases in which discrimination on the basis of sex prejudice men”.¹¹¹²

When dealing with employment discrimination on the basis of religion, the Committee of Experts has found that such discrimination “often arises from an absence of religious freedom, or from a climate of intolerance and, in many cases, from the existence of a state religion”.¹¹¹³ Under the circumstances where religious considerations hold a large place in public and social life, and especially where one religion has been established as the religion of the state, the Committee

¹¹⁰⁹ *Ibid.*, at 247 to 248.

¹¹¹⁰ ILO Convention No. 111, art. 1.

¹¹¹¹ *Supra* 58, at 259.

¹¹¹² *Ibid.*, at 261.

¹¹¹³ *Ibid.*, at 262.

points out that action has to be taken to ensure that situation as such will not lead to discriminative consequence regarding employment and occupation.¹¹¹⁴

As far as employment discrimination on the basis of political opinion is concerned, in a democratic and pluralistic society, the political opinion of candidates for employment in the public sector are not taken into account, except for policy-making posts.¹¹¹⁵ As a general principle, in accordance with the Committee of Experts, the Convention implies that this protection against employment discrimination based on political opinion shall be afforded in respect of activities -- expressing or demonstrating opposition to the established political principles in a peaceful way, such as expressing liberal or capital ideas in a communist state or vice versa.¹¹¹⁶ In addition, the Committee has endorsed the comments made by an ILO Commission of Inquiry that mere membership in a political party, whatever its program, cannot be a valid reason to discriminate against the member in relation to employment.¹¹¹⁷ Although the employment discrimination based on political opinion happens most often in the public sector, it none the less has a possibility to appear in the private employment.¹¹¹⁸ Therefore, the Committee has indicated that “the Convention contains no restriction or limitation as to the economic sectors concerned, and therefore applies also to discrimination on the basis of political opinion which may take place in the private sector”.¹¹¹⁹

In terms of the criterion of discrimination -- “national extraction”, it was actually a subject of long discussions.¹¹²⁰ During the course of preparation of the Convention, the expression used was “national origin” which was intended to cover both distinction on the basis of foreign ancestry

¹¹¹⁴ *Ibid.*

¹¹¹⁵ *Ibid.*, at 262.

¹¹¹⁶ *Ibid.*, at 263.

¹¹¹⁷ *Ibid.*, at 264.

¹¹¹⁸ *Ibid.*

¹¹¹⁹ *Ibid.*

¹¹²⁰ *Ibid.*

and the legal point of nationality.¹¹²¹ However, this idea is not acceptable to many governments as it might oblige a ratifying State to grant equality of treatment to foreigners, i.e., to workers who were not nationals of the ratifying state.¹¹²² The term “national extraction” was thus suggested and finally introduced to the final version of the Convention so that it could have no implication referring to nationality.¹¹²³ In the Report of the Committee on Discrimination, it is clarified that “distinctions, exclusions or preferences made on the basis of national extraction meant distinctions between nationals of the ratifying country made on the ground of foreign ancestry or foreign birth”.¹¹²⁴

To the employment discrimination based on social origin, the Committee of Experts in its 1988 General Survey has commented that “the problem of discrimination on the basis of social origin arises when an individual membership in a class, a social-occupational category or a caste determines his or her occupational future either by denying access to certain jobs or activities or, on the contrary, assigning him or her to certain jobs”.¹¹²⁵

To date, China has ratified both Conventions No. 100 and Convention No. 111.

6.2 Brief Review on China’s Legislation with Regard to Discrimination in Respect of Employment and Occupation

The Chinese labor law has provided explicitly that with regard to employment, the workers shall not be discriminated in aspects of national extraction (*Minzu*), race (*Zhongzu*), sex and religious

¹¹²¹ *Ibid.*, at 265.

¹¹²² *Ibid.*, at 264 & 265.

¹¹²³ *Ibid.*

¹¹²⁴ *Ibid.*, at 266.

¹¹²⁵ *Ibid.*, at 267.

beliefs.¹¹²⁶ It emphasizes that women enjoy the equal labor rights as men¹¹²⁷ and adopts the same terms as provided in the Equal Remuneration Convention -- “equal remuneration for men and women workers for work of equal value” (*Nannv Tonggong Tongchou*)¹¹²⁸. In addition, it also provides special protection to female workers,¹¹²⁹ including but not limited to prohibition of arranging underground work for women workers at mines, or any labor with Grade IV physical labor intensity as stipulated by the state,¹¹³⁰ prohibition of engaging women workers in work at high places, under low temperatures, or in cold water during their menstrual periods or labor with Grade III physical labor intensity as stipulated by the state,¹¹³¹ and prohibition of engaging women workers in work with Grade III physical labor intensity as stipulated by the state or any other work that is bad for the health of a pregnant worker¹¹³². Moreover, the “Woman Rights and Interests Protection Law” (*Funv Quanyi Baozhang Fa*) guarantees special protection on the welfare of female workers and re-emphasizes the principle of non-discrimination based on sex in terms of occupation and employment. In accordance with this legislation, any distinction, exclusion or preference based on sex during the course of decision making of employment, payment, appraisal of jobs on the basis of the work to be performed and the additional emolument such as housing subsidy, job security system financed by the employer, promotion and so on shall be forbidden all together.¹¹³³

When dealing with the employment discrimination based on race, it is true that the Chinese labor law regarding this point has not provided enough subsequent regulations and rules to crystallize this principle. However, given that virtually 100 percent of the Chinese population belonging to

¹¹²⁶ Labor Law of People’s Republic of China, 1995, art. 12. From database: lawinfochina <<http://www.lawinforchina.com/index.asp>>.

¹¹²⁷ *Ibid.* art. 13.

¹¹²⁸ Woman Rights and Interests Protection Law of People’s Republic of China, art. 23.

¹¹²⁹ *Ibid.* from art. 58 to 65.

¹¹³⁰ *Ibid.* art. 59.

¹¹³¹ *Ibid.* art. 60.

¹¹³² *Ibid.* art. 61.

¹¹³³ Woman Rights and Interests Protection Law, from art. 21 to art. 26.

the mongoloid race, it is fair to conclude that the employment discrimination based on race is hardly a problem.

In the case of employment discrimination based on religion, a constitutional principle of non-discrimination on the ground of religious attitude was established in 1982 -- "Citizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion. The state protects normal religious activities".¹¹³⁴ In addition, other laws, including but not limited to Law on National Regional Autonomy (*Minzu Quyu Zizhi Fa*), General Principle of the Civil Law (*Minfa Tongze*), Labor Law (*Laodong Fa*), Compulsory Education Law (*Yiwu Jiaoyu Fa*), Electoral Law of the People's Congresses (*Quanguo Renmin Daibiao Dahui He Difang Geji Renmin Daibiao Dahui Xuanju Fa*), Advertisement Law (*Guanggao Fa*), have crystallized the constitutional principle of non-discrimination based on religious belief by stipulating that "all citizens, regardless of their religious beliefs, have the right to vote and stand for election; the legitimate property of religious bodies is subject to legal protection; education is separate from religion, and all citizens, regardless of their religious beliefs, enjoy equal educational opportunities in accordance with the law; the people of all ethnic groups should respect each other's languages, customs and habits, and religious beliefs; citizens shall not be discriminated against in terms of employment because of different religious beliefs; and no advertisements or trade marks shall include discriminatory contents against any ethnic group or religion"¹¹³⁵. Above and beyond this, judicial and administrative guarantees have also been offered. For example, persons unlawfully depriving Chinese citizens of their freedom of religious belief, when the circumstances are

¹¹³⁴ Constitution of PRC, art. 36.

¹¹³⁵ Information Office of the State Council of the PRC, "Freedom of Religious Belief in China", online: <http://news.xinhuanet.com/employment/2002-11/18/content_633195.htm> (date accessed: June 1, 2006).

serious, are to be sentenced to two years fixed-term imprisonment or criminal detention.¹¹³⁶ With respect to administrative guarantee, government at various levels have set up religious affairs departments to administer and supervise the implementation of the laws pertaining to religion and to put the policy ensuring the freedom of religious belief into effect without interfering in the internal affairs of religious organizations and sites.¹¹³⁷ As a result, statistics have shown that the number of believers in Christianity had increased from 700, 000 in 1949 to 10 million in 2000, and the annual increase of Catholic was 50,000 in recent years.¹¹³⁸ Therefore, it is fair to conclude that the Chinese constitution and other fundamental laws have given statutory effect to the principle of non-discrimination based on religion.

What might be a problem is that such a principle may not be very well implemented in practice, which has led to consequences contrary to the established constitutional principle against discrimination on the basis of religion. Problem as such may need comprehensive solutions such as the further development of ROL, educations of both the Chinese average citizens and its officials, which are not the focus of this thesis. As for the relatively recent case of **Falun Gong**, to be fair, the Chinese government's attitude towards this "religion" was "noninterference" at the very beginning. Only after the events of more than 3,000 Falun Gong practitioners gathering at the campus of Tianjin Normal University to protest against the publication of an article by the journal of this university about a postgraduate student's developing mental disorder through practicing Falun Gong as well as more than 10,000 Falun Gong believers' surrounding the central government's office at *Zhongnanhai* (the compound housing the headquarters of the Communist Party of China Central Committee in downtown Beijing) on April 25, 1999,¹¹³⁹ the CCP finally

¹¹³⁶ Criminal Law of PRC, art. 251.

¹¹³⁷ *Supra* 1135.

¹¹³⁸ *Ibid.*

¹¹³⁹ Online: <http://www.people.com.cn/english/199907/25/enc_19990725001015_TopNews.html> (date accessed: June 19, 2006).

decided to take measures to crackdown what is regarded as an “evil cult” (*Xiejiao*) rather than a typical religion.

After listening to the news reports from the media based on the western world, for instance VOA, BBC, CNN etc., many foreigners especially from western world, would be inclined to believe that the Chinese government was and is persecuting the Chinese citizens’ freedom of religion, and therefore the constitutional principle on religious freedom was in fact terribly implemented in China. It is a pity that most westerners have no chance to get access to the responses from inside China. In fact, to many common Chinese citizens, the nature of Falun Gong is suspicious in the sense that this so called religion is actually a plagiarism from various teachings from Daoism, Buddhism, even Chinese superstitious folk including but not limited to weasel and fox spirits etc.¹¹⁴⁰ As such, to classify it as an “evil cult” is not that surprising in the eyes’ of many Chinese, particularly after many terrible cases released, such as believers’ refusing to receive medical treatment, fasting to death, or even committing suicide via way of brutal belly-cutting etc.¹¹⁴¹ Indeed, opinions to criticize Falun Gong as an unstable element blended with foreign interference which endangers the healthy development of the Chinese society and its solidarity are quite common and available in many famous Internet Discussion Forums based in both China and overseas alike such as Tsinghua BBS, Fudan BBS, Wenxuecity, Zhengqing BBS etc.¹¹⁴²

When talking about the employment discrimination based on “national extraction”, from the Chinese Constitution all the way down to the rules and regulations promulgated by the local

¹¹⁴⁰ Julie Ching, Institutes of Asian Studies, University of Toronto, online: <http://www.rickcross.com/reference/falun_gong/falun258.html> (date accessed: June 19, 2006).

¹¹⁴¹ Please see generally in online: <<http://www.southcn.com/english/features/falun/condemn/200202280390.htm>>, <<http://news.tom.com/1002/20050120-1779063.html>>, <<http://www.chinaembassycanada.org/chn/zt/jpxjflg/t28389.htm>>, <http://news.bbc.co.uk/chinese/simp/hi/newsid_1140000/newsid_1144800/1144802.stm>, (date accessed: June 19, 2006).

¹¹⁴² For more information, please visit online: <<http://bbs.fudan.edu.cn>>, <<http://bbs.tsinghua.edu.cn>>, <<http://www.wenxuecity.com>>, <<http://www.zhengqing.net>>.

governments concerning ethnic minorities in China, it is fair to conclude that the principle of equality and special protection for ethnic minorities has been well incorporated. The Constitution stipulates that: “all ethnic groups in the People's Republic of China are equal. The state protects the lawful rights and interests of the ethnic minorities and upholds and develops a relationship of equality, unity and mutual assistance among all of China's ethnic groups. Discrimination against ... any ethnic group are prohibited.” The 1952 “Decision about Employment” (*Guanyu Laodong Jiuye Wenti De Jueding*) promulgated by State Council emphasizes that any ethnic groups in China have the right to equality of opportunity or treatment in employment or occupation, and special favor shall be offered to them because of their special social status as minority.¹¹⁴³ Among 31 provinces, autonomous regions and municipalities in China, 15 of them have promulgated local rules or regulations dealing with issues of ethnic groups living within its region¹¹⁴⁴ and almost all these local legislation have provided a specific clause explicitly prohibiting employment discrimination based on race. Below are a few examples. According to the “Rule of Protection of the Interests of the Dispersed Ethnic Minorities in Jilin Province” (*Jilin Sanju Shaoshu Minzu Quanli Baozhang Tiaoli*), when under the same condition, a citizen belonging to a minority group has the privilege to be employed.¹¹⁴⁵ In terms of the “Rule of Protection of the Interest of the Dispersed Ethnic Minorities in Liaoning Province” (*Liaoningshen Sanju Shaoshu Minzu Quanyi Baozhang Tiaoli*), governmental agencies at various level, enterprises whatever their ownership and public units are prohibited from refusing to employ a citizen who belongs to a minority group on the ground of his/her different customs, language etc.¹¹⁴⁶

¹¹⁴³ Wang Jie, “Jurisprudential Thinking on the Improvement of the Protection of the Interests of Dispersed Ethnic Minorities” (*Dui Wanshan Sanju Shaoshu Minzu Quanyi Baozhang Lifa De Sikao*), online: <http://www.law-lib.com/lw/lw_view.asp?no=6437> (date accessed: May 31, 2006).

¹¹⁴⁴ *Ibid.*

¹¹⁴⁵ Rule of Protection of the Interests of the Dispersed Ethnic Minorities in Jilin Province, art. 12.

¹¹⁴⁶ Rule of Protection of the Interest of the Dispersed Ethnic Minorities in Liaoning Province, art. 6. In fact, some scholars (though very few) are with the view that as many ethnic minorities in China enjoy special privileges guaranteed by various legislation, it could be a discrimination against Han Chinese. The

As discussed above, compared with the ILO Convention abovementioned, the Chinese labor law keeps silent on the issues of discrimination with regard to color, political opinion and social origin.

In the case of discrimination based on color, it is hardly a problem given that almost 100 percent of the Chinese population is with yellow skin.

In the case of discrimination based on political opinion, it is decided by China's special political environment -- one party control. Before China's economic reform, almost all the employees in the governmental agencies and managers in SOEs were members of CCP.¹¹⁴⁷ Thus, the government had adopted a *de facto* preferential policy to members of CCP.¹¹⁴⁸ However, with the prosperous of market economy in China, "political opinion" is no longer that relevant in terms of employment especially in the case of non-public sector which is going to play a more and more important role in Chinese economy.¹¹⁴⁹ Although preferential treatment to CCP members is none the less a *de facto* practice in some governmental agencies and SOEs, this problem is much more a political issue rather than a legal one and not that serious vis-à-vis employment discrimination based on social origin. Indeed, merely depending on legislation to change it is unrealistic and unfeasible given that a necessary political premise for the principle of non-discrimination based on political opinion to work effectively is that the state in question shall be a democratic and

writer wishes to argue that the reasons for the Chinese legislation to provide special protection on the ethnic minorities are because they have various comparative disadvantages, such as much less developed economy, very different culture and language and much less population compared to Han Chinese etc. As such, without endowing them with special legislative protection, chances for them to enjoy the economic, social and cultural development inside China are very rare. Having said that, the writer has reservation to the said view that Han Chinese are discriminated by the relevant legislation specialized in protecting ethnic minorities in China.

¹¹⁴⁷ Zhu Yan & Dai Liangtie, "Comparative Study on Discrimination with Regard to Employment" (*Jiuye Qishi De Bijiao Yanjiu*), Economic Problem Investigation (*Jingji Wenti Tansuo*), the 12 issue of 2002, at 22.

¹¹⁴⁸ *Ibid.*

¹¹⁴⁹ *Ibid.* For more information on the proliferation of private economy in China, please see text accompanying note 83 to 90.

pluralistic one, which unfortunately seems to be not the case in the contemporary Chinese context.¹¹⁵⁰ Accordingly, the writer is not going to pay much attention on the said issue in this thesis.¹¹⁵¹

As far as employment discrimination based on social origin is concerned, according to the writer's research, it might be the most serious aspect of discrimination with regard to employment in China, which involves at least more than one tenth of the Chinese population. Therefore, the writer will give an all-round case study on this issue in this chapter.

6.3 Discrimination in Respect of Employment Based on Social Origin in China -- A Case Study on the Chinese Farmer Workers (*Mingong*)

A. The Situation of Farmer Workers in Contemporary China

i. The Scope and General Description on the Chinese Farmer Workers

The definition of the Chinese "farmer workers" can be understood in this way: a Chinese citizen with rural origin but involved in non-agricultural industry.¹¹⁵² It is reported that there are at least 130 million¹¹⁵³ "farmer workers" (one tenth of Chinese total population) in China today, whose

¹¹⁵⁰ *Supra* 58, at 262.

¹¹⁵¹ The writer wishes to re-emphasize here that she is fully aware of the existence and severity of the discrimination based on political opinion in China. However, as it is more a political issue rather than a legal one, merely depending on legislation to change it is unrealistic and unfeasible given that a necessary political precondition for the principle of non-discrimination based on political opinion to work effectively is that the state in question shall be a democratic and pluralistic, which unfortunately seems to be not the case in the contemporary Chinese context. As such, due to the limitation of space, the writer is not prepared to focus on the issue in this thesis.

¹¹⁵² Please see generally in Ge Zhihua, *Resolution for Chinese 'Three Agricultural Problems'-- Rural Society in Transformation (Wei Zhongguo De Sannong Wenti Qiujie-- Zhuanxing Zhong De Nongcun Shehui)* [Jiang Su: Jiang Su People's Press (*Jiangsu Renmin Chubanshe*), 2004], at 131; Du Lirong, *Report on Farmer Workers Living Condition in Urban Area (Chengshi Mingong Shengcun Baogao)*, [Beijing: China Time Economy Press (*Zhongguo Shidai Jingji Chubanshe*), 2004], preamble, at 1.

¹¹⁵³ In fact, this number is increasing year by year, some statistics even show that by the end of 2005, the number of Chinese farmer workers have increased to 200 million. Zhou Xiaoyan, "From the Protection of Farmer Workers--Discussion on the Defect and Improvement of Social Policy" (*Cong Nongmingong Quanyi Baohu -- Tan Woguo Shehui Zhengce De Quexian Yu Baohu*), online: <<http://www.sachina.edu.cn/Htmldata/article/2005/11/522.html>> (date accessed: February 6, 2006); online: <http://www.cnr.cn/news/t20051026_504120408.html> (date accessed: February 17, 2006).

number is much larger than settled urban workers and has constituted China's majority industrial workforce.¹¹⁵⁴ The reason for them to be called "farmer workers" (*Mingong*) is mainly because of their social origin, i.e., "farmer" rather than "urban dweller". They migrate from rural areas to cities to work and then remit money that they earn in cities back to their families in rural areas. Different from contemporary western understanding where farmer is usually a profession taken up by well-educated person and involves large-scale mechanical operation, the term "farmer" in China is the synonym of poor, dirty, rude and uneducated person with rural origin.¹¹⁵⁵ In the early 1980s, the term "farmer worker" mainly referred to those laborers from rural areas engaging in major public projects such as building bridges, dams and skyscrapers.¹¹⁵⁶ Though their jobs still are inclined to be unskilled or semi-skilled, their occupations are no longer limited to construction works.¹¹⁵⁷ Indeed, they could be skyscraper window washers in large cities such as Shanghai, assembly line workers in Dongguan, or shop assistants in Lhasa.¹¹⁵⁸ Of course, the majority male farmer workers are nevertheless likely to be construction workers; however, there are significant numbers of them working in manufacturing, transportation, commerce, food service, and maintenance industries.¹¹⁵⁹ According to the fifth nationwide Population Census conducted by the Chinese authority in 2000, 46.5 percent of the workers involved in the secondary and tertiary industry are from rural origin.¹¹⁶⁰ Put specifically, 52 percent of the workers in service industry were constituted by farmer workers; in manufacturing industry, more than 60 percent of its workers were with rural origin; in terms of construction industry, only less

¹¹⁵⁴ Marilyn Bechtel, "China's Union and Farmer workers: Building A Better Future Together", *People's Weekly World Newspaper*, November 9, 2004. Online:<www.pww.org/article/articleview/5753/1/231> (date accessed: November 17, 2004).

¹¹⁵⁵ Du Lirong, Report on Farmer Workers Living Condition in Urban Area (*Chengshi Mingong Shengcun Baogao*), [Beijing: China Time Economy Press (*Zhongguo Shidai Jingji Chubanshe*), 2004], preamble, at 2.

¹¹⁵⁶ Ling Li, "Towards A More Civil Society: Mingong and Expanding Social Space in Reform-Era China", 2001, 33 *Colum. Hum. Rts. L. Rev.* 149.

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ Ge Zhihua, *Resolution for Chinese 'Three Agricultural Problems'-- Rural Society in Transformation (Wei Zhongguo De Sannong Wenti Qiujie-- Zhuanxing Zhong De Nongcun Shehui)* [Jiang Su: Jiang Su People's Press (*Jiangsu Renmin Chubanshe*), 2004], at 131.

than 20 percent of the workers were not farmer workers.¹¹⁶¹ Besides, it is observed that the population of farmer workers is predominantly young and male. A survey found that “81.8 percent of those on the move were men, and 58 percent were between the ages of 18 and 30, whereas 25 percent were between 31 and 40 years old”.¹¹⁶² As the major constituent of the Chinese migrant workforce, the Chinese farmer workers have been widely discriminated based on their social origin -- farmer, in spite of being hard working taxpayers and cheap, efficient and indispensable laborers for China’s ongoing economic development.¹¹⁶³

ii. Discrimination in Payment

Generally speaking, farmer workers take on heavy and dirty work from which their urban counterparts tend to distance themselves, and even when there are rural and urban workers working on the same job, usually they do not receive the same benefits. In spite of the same contribution, farmer workers are paid much less than their urban counterparts.¹¹⁶⁴ For example, in Changchun, the capital city of Jilin Province, a cleaner from urban origin is entitled for RMB ten *yuan* for cleaning a window, whereas her counterpart from rural area could only get RMB five *yuan*;¹¹⁶⁵ in Wuhan, Hubei Province, compared with those cleaners with urban origin who are protected by long-term labor contracts and paid more than RMB1,000 *yuan* per month, cleaners

¹¹⁶¹ *Ibid.*

¹¹⁶² *Ibid.*

¹¹⁶³ *Supra* 1160.

¹¹⁶⁴ Please see generally in Lian Jun, “Being Nice To Farmer Workers Equals to Being Nice To Yourself” (*Shandai Nongmingong Jiushi Shandai Ziji*), online: <http://www.cnradio.com/luntan/t20050911_504104294.html> (date accessed: February 5, 2006); “Issue of Farmer Workers and The Establishment of Harmonized Labor Relationship” (*Nongmingong Wenti Yu Jianxi Hexie Laodong Guanxi*), online: <<http://www.acftu.net/template/10001/file.jsp?cid=195&aid=31095>> (date accessed: February 5, 2006); online: <<http://www.people.com.cn/GB/huanbao/1072/2687588.html>> (date accessed: February 5, 2006); “A Knife Above Farmer Worker’s Head: Same Job, Different Payment” (*Nongmingong Touding Yiba Dao: Tonggong Bu Tongchou*), online: <<http://www.people.com.cn/GB/guandian/30/20030320/947509.html>> (date accessed: February 5, 2006); Liu Weijia, “Investigation on Issues of Chinese Farmer Workers” (*Zhongguo Nongmingong Wenti Diaocha*), online: <http://news.xinhuanet.com/politics/2006-01/18/content_4066810.htm> (date accessed: February 6, 2006).

¹¹⁶⁵ Online:

<<http://www.chinaelections.org/readnews.asp?newsid=%7B6102646E-A094-494F-8B9D-9633C0352FC8%7D>> (date accessed: November 17, 2004).

with rural origin not only have no chance to be covered by the said long-term labor contracts, but are paid only RMB 400 *yuan* per month on average.¹¹⁶⁶ Indeed, discriminated treatment as such happened in other cities of China as well, such as Nanjing, Guangzhou, Shanghai and Beijing etc.¹¹⁶⁷ Although the same job, same contribution, they are awarded differently merely because of their rural origin.

Moreover, issue of wage arrears is another widespread problem faced by farmer workers in China. It is observed that wage arrear on farmer workers has become such a normal phenomenon particularly in private enterprises that people even governmental officers started to get used to it.¹¹⁶⁸ A survey published by the official New China News Agency found that nearly 75 percent of the farmer workers had difficulties in collecting their salary.¹¹⁶⁹ As a matter of fact, some farmer workers even had never been paid as promised.¹¹⁷⁰ A majority of the polled shared a common view, i.e., begging from, bargaining with or intimidating their employers were the best ways to get their money back, while only one fourth considered seeking help from the government and less than 20 percent believed going to court was a good choice.¹¹⁷¹ A survey conducted by the writer herself reflected a darker picture.¹¹⁷² Among the forty interviewed Chinese farmer workers working in various construction sites in Shanghai, none of them was immune from the nightmare of wage arrear; all of them preferred to adopt self-relief method when they met problems as such; and none of them believed that seeking help from governmental

¹¹⁶⁶ Online: <<http://www.people.com.cn/GB/huanbao/1072/2687588.html>> (date accessed: February 5, 2006).

¹¹⁶⁷ “A Knife Above Farmer Worker’s Head: Same Job, Different Payment” (*Nongmingong Touding Yiba Dao: Tonggong Bu Tongchou*), online: <<http://www.people.com.cn/GB/guandian/30/20030320/947509.html>> (date accessed: February 5, 2006).

¹¹⁶⁸ *Supra* 1155, at 24.

¹¹⁶⁹ Philip P. Pan, “Suicide Threats Rise as Employers Deny Wages”, Washington Post Foreign Service. Online: <www.china-labor.org.hk/iso/article_id=4073&category_name=Migrant%20Workers> (date accessed: November 14, 2004).

¹¹⁷⁰ XinMinWanBao, (China), October 1, 2004, at 16.

¹¹⁷¹ *Ibid.*

¹¹⁷² From January 14, 2006 to January 24, 2006, the writer visited various construction sites in Shanghai, China, and interviewed totally forty Chinese farmer workers there.

agencies or through the court system could really help them out.¹¹⁷³ As a Chinese labor researcher specialized in studying the issue of payment arrear estimated, at least 100 farmer workers, mostly in construction industry, threatened to commit suicide due to unpaid wage issue each year in the Pearl River Delta.¹¹⁷⁴ Indeed, according to the official statistics from Shanghai Labor Monitoring Department, in 2004 alone, there were more than 2702 cases in relation to wage arrear of farmer workers in Shanghai, and about 176,300 workers were involved.¹¹⁷⁵ The statistics provided by ACFTU showed that the cumulative amount of wages in arrears owed to farmer workers was around RMB 100 billion as at end December 2004.¹¹⁷⁶

iii. Discriminatory Local Legislation and Policies

As for occupations available for farmer workers, they are usually divided artificially by biased local legislation and policies.¹¹⁷⁷ For example, in Shanghai, one of the local legislation has provided that more than twenty kinds of occupation are only available for urban citizens.¹¹⁷⁸ In Wu Han, according to “Order of Employment of Farmer workers in Wu Han”, occupations are divided into three types, i.e., farmer worker permitted, farmer worker limited and farmer worker prohibited.¹¹⁷⁹ From 1998, Beijing local government started to enact a series of local policies in limiting the number of farmer workers that could be employed by almost twenty kinds of

¹¹⁷³ *Ibid.*

¹¹⁷⁴ *Supra* 1169. For more information, please see generally in “Chinese Household Registration System: The Shame of the City” (*Zhongguo Huji Zhidu: Chengshi De Chiru*), Chinese Economic Daily (China), April 30, 2005, cited from online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4142> (date accessed: January 17, 2006); Gao yifei, “Tragedy on Wage Arrears, Who Push Farmer Workers to the Serbonian bog?” (*Taoxin Quanju Pingfa, Sheibi Nongmin gong Zoushang Juelu*), online: <http://news.xinhuanet.com/comments/2005-09/27/content_3550492.htm> (date accessed: April 2, 2006).

¹¹⁷⁵ Laodong Daily, (China), January 10, 2005, at 2.

¹¹⁷⁶ Zhou Xiaoyan, “From the Protection of Farmer Workers--Discussion on the Defect and Improvement of Social Policy” (*Cong Nongmingong Quanyi Baohu -- Tan Woguo Shehui Zhengce De Quexian Yu Baohu*), online: <<http://www.sachina.edu.cn/Htmldata/article/2005/11/522.html>> (date accessed: February 6, 2006).

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ Chen Xi & Yin Ningbo, “The Political Economic Analysis on Employment Discrimination of Farmer Workers” (*Nongmingong Jiuye Qishi De Zhengzhi Jingji Xue Fenxi*), Rural Economy (*Nongcun Jingji*), the second issue of 2004, at 21.

¹¹⁷⁹ Online: <<http://www.china.org.cn/chinese/difang/112815.htm>> (date accessed: November 12, 2004).

occupations. What is more, in Beijing, before a farmer worker could be legally employed, he/she must get three certificates and one card (*Sanzheng Yika*) issued by local government, including Certificate of Temporary Residence (*Zanzhu Zheng*), Employment Certificate (*Beijing Shi Wailai Renyuan Jiuye Zheng*), a special registration certificate for female farmer workers on their marital status (*Hunyu Zheng*), and a Card on Migrant's Floating Employment (*Waichu Renyuan Liudong Dengji Ka*).¹¹⁸⁰ In addition, farmer workers there must pay more than RMB 300 *yuan* per year for the renewal of the aforesaid certificates and card.¹¹⁸¹ Not only Shanghai, Wu Han and Beijing, but also some other relatively small cities of China such as Shenzhen, Zhenzhou, Qingdao and Fuzhou etc. enacted discriminatory local legislation as such.¹¹⁸² For example, in Qingdao, Shandong Province, the local occupation reservation law deprives residents with rural origin of the chance to seek the same employment opportunities as their urban counterparts.¹¹⁸³ In fact, the only difference between these local discriminatory policies and legislation enacted by various cities of China is the matter of degree. As a Chinese scholar used to commented, the Chinese local government was not the opponent against the discriminatory policies, but became the “talented” creator as well as loyal supporter of the policies as such.¹¹⁸⁴ As such, it is fair to conclude that discriminative treatment to the Chinese farmer workers has been institutionalized and legalized to some extent. As a logical consequence, what is left for farmer workers are mainly those occupations with hazardous working conditions, or those that urban citizens are unwilling to do -- a typical example is construction work.¹¹⁸⁵

¹¹⁸⁰ “Chinese Household Registration System: The Shame of the City” (*Zhongguo Huji Zhidu: Chengshi De Chiru*), Chinese Economic Daily (China), April 30, 2005, cited from online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4142> (date accessed: January 17, 2006)

¹¹⁸¹ *Ibid.*

¹¹⁸² *Supra* 1178.

¹¹⁸³ Zhu Lijiang, “The *Hukou* System of the People's Republic of China: A Critical Appraisal under International Standards of Internal Movement and Residence”, 2003, 2 Chinese J. Int'l L. 519.

¹¹⁸⁴ *Supra* 1177.

¹¹⁸⁵ There are more than 80 percent construction workers are farmer workers in China. See Zhou Huagong, “How Far Between Farmer Workers and ‘Citizen Treatment’”? (*Mingong Li “Shimin Daiyu” You Duoyuan?*), Dialogue and Argument (*Duihua Yu Zhengming*), the seventh issue of 2004, at 19. Please also see in Hayden Windrow & Anik Guha, “The *Hukou* System, Migrant Workers, And State Power In The People’s Republic of China”, 2005, 3 Nw. U. J. Int'l Hum. Rts. 3.

iv. Discrimination in Terms and Conditions of Employment

Based on the survey made by the writer herself on forty Chinese farmer workers,¹¹⁸⁶ a comparison on the terms and conditions of employment between workers with urban origin and farmer workers is reflected by the table as follows: (table 6)

Workers with urban origin (excluding retrenched workers)	Farmer workers (40 farmer workers interviewed by the writer herself working in the construction sites of Shanghai, China)
Average daily working hour is around 8 and there is at least one day off each week; in fact, most of them employed in the public sector have two days off per week (violation of the workers' right to rest happens but there is no systematic violation);	Average daily working hour is around 12 ¹¹⁸⁷ and there is not a single day off per week; indeed, among these 40 farmer workers, 35 of them(87.5 percent of them) had the experience of working at least two consecutive days without sleep; ¹¹⁸⁸
Generally speaking, overtime working is with certain kind of extra payment, though not always in accordance with the relevant Chinese labor legislation;	None of them had been paid any overtime allowance;
Wages are paid on a monthly basis usually. (Reports show that there are some cases of wage arrear happening to them in the North Eastern part of China, but such phenomena do not happen on a large scale);	All of their wages are paid on a yearly basis, which has become a standard practice, though it is clearly against the labor legislation. ¹¹⁸⁹ (Each month, they will have to borrow some money from the employers to cover their living

¹¹⁸⁶ *Supra* 1172.

¹¹⁸⁷ The State shall adopt a working hour system wherein laborers shall work for no more than eight hours a day and no more than 44 hours a week on the average. And the work hours to be prolonged, in general, shall be no longer than one hour a day, or no more than three hours a day if such prolonging is called for due to special reasons and under the condition that the physical health of laborers is guaranteed. The work time to be prolonged shall not exceed, however, 36 hours a month. Labor Law of PRC, art. 36 & 41.

¹¹⁸⁸ The employer shall guarantee that its laborers have at least one day off a week. Labor Law of PRC, art. 38.

¹¹⁸⁹ Wages shall be paid to laborers in the form of currency on a monthly basis. Labor Law of PRC, art. 50.

	expenses in advance, and this amount will be deducted accordingly from their final payment at the end of each year);
They are usually protected by the local minimum wage standards;	None of them are protected by the local minimum wage standards; ¹¹⁹⁰
Most of them have signed labor contracts with the employer;	Only two workers (merely five percent of them) have signed the labor contract with their employers; ¹¹⁹¹
The majority of them have participated in the social insurance program financed by their employers.	None of them was covered by any medical insurance, subsidies or social security insurance, let alone housing subsidy financed by their employers. ¹¹⁹²

In sum, as reflected by the table above, it is clear that farmer workers have no chance to enjoy the same rights as workers with urban origin are entitled to in practice. Despite the degrading social status of the Chinese working class and the fact that the rights and interests of the urban workers are not that well protected nowadays as mentioned in the previous chapters, compared with the situation of the Chinese farmer workers, the working conditions of the workers with urban origin are much better off. It was reported that in Beijing, in the first 11 months of 2003, 86.7 percent of the victims caused by industrial accident were farmer workers.¹¹⁹³ A nation wide survey conducted recently also showed that more than 90 percent of the victims of occupation related

¹¹⁹⁰ The State shall implement a system of guaranteed minimum wages. Specific standards on minimum wages shall be stipulated by provincial, autonomous regional and municipal peoples governments and reported to the State Council for registration. And the employer shall pay laborers wages no lower than local standards on minimum wages. Labor Law of PRC, art. 48.

¹¹⁹¹ Labor contracts are agreements reached between laborers and the employer to establish labor relationships and specify the rights, interests and obligations of each party. And Labor contracts shall be signed if labor relationships are to be established. Labor Law of PRC, art. 16.

¹¹⁹² The employer and individual laborers shall participate in social insurance in accordance with law and pay social insurance costs. And under the circumstances such as (1) Retire; (2) Suffer diseases or injuries; (3) Become disabled during work or suffer occupational diseases; (4) Become jobless; (5) Give births, laborers shall be entitled to social insurance treatment. Labor Law of PRC, art. 72 & 73.

¹¹⁹³ Online:

<http://www.china-labor.org.hk/iso/article.adp?article_id=5484&category_name=Migrant%20Workers> (date accessed: November 11, 2004).

death due to unsafe working conditions were farmer workers.¹¹⁹⁴ Indeed, working overtime without extra payment and being chosen to do dangerous work without personal protection equipment seem to be too common to them.¹¹⁹⁵ If they are sick or get injured, very possibly, they are simply fired without any compensation.¹¹⁹⁶ As such, it is high time for the Chinese government and its academia to confront the employment discrimination against its farmer workers, to try to discover the reasons behind, and to search for solutions with feasibility against such unfairness.

B. Analysis on Reasons for Employment Discrimination Based on Social Origin

i. Root Cause -- Rigid Household Registration System with Chinese Characteristics (*Hukou* System)

Before discussing the Chinese *hukou* system, some historical facts of the Chinese history are worth mentioning in advance. It is submitted by most historians that the idea that the city represents either a distinct style or, more substantial, a higher level of civilization than the countryside is a cliché of the western cultural traditions; however, it had not been so in traditional China, where the sharp division into distinct urban and rural civilizations disappeared very early in China, although it remained characteristic of much of the rest of the world until recent times and produced distinct urban attitudes in other civilizations.¹¹⁹⁷ Indeed, the conditions to allow the existence of the attitude as such in China have vanished by the beginning of the imperial era -- 202 B. C.¹¹⁹⁸

¹¹⁹⁴ Online: <http://www.cnr.cn/news/t20051026_504120408.html> (date accessed: February 17, 2006).

¹¹⁹⁵ This is concluded based on the writer's interview of 40 farmer workers.

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ Myron L. Cohen, "The Case of the Chinese 'Peasant'", Tu Wei-ming, ed., *China in Transformation* (Cambridge, Mass: Harvard University Press, 1994), at 156.

¹¹⁹⁸ *Ibid.*

a. Overview on the Chinese Household Registration System

The socialist China used to completely prevent farmers from working in the cities.¹¹⁹⁹ The major mechanism adopted by the government back then to control the internal movement of its people is the rigid household registration system -- called “*hukou*” in mandarin, through which each citizen in China is registered either with urban or with rural origin.¹²⁰⁰ In other words, people in China are artificially divided into two categories. Based on this dual system, there are dual social security system, dual medical insurance system, dual educational system, dual taxation system, dual organizational system, and even dual power supply system.¹²⁰¹ Although there is certain sign indicating that the state is going to reform the residence registration system as such so that people will be able to have more freedom of movement within China, the reform speed seems to be very slow.

b. Historical Review on the Household Registration System in China (*Hukou* System)

To have a better understanding on the current migration wave from rural to urban areas in China and the root cause of the employment discrimination against the migrating Chinese farmer workers in urban areas, a historical review on the Chinese *hukou* system is necessary. Throughout most of the PRC history, the *hukou* system played a critical role in controlling internal migration.¹²⁰² Initiated in 1953,¹²⁰³ popularized in light of an instruction of the State Council, legalized by the Regulation Regarding the *Hukou* Registration in 1958 and substantiated as well

¹¹⁹⁹ “China to Facilitate Free Flow of Farmer workers”, Xinhua, online: <www.chinadaily.com.cn/english/doc/2004-04/30/content_327721.htm> (date accessed: November 18, 2004).

¹²⁰⁰ Regulation Regarding the *Hukou* Registration of PRC, (*Hukou Dengji Tiaoli*), art. 4 & 10.

¹²⁰¹ Hu Xingdou, Suggestions of Constitutional Review on Dual Residence Registration System and Rural-Urban Dualism (*dui Eryuan Hukou Tizhi Ji Chenxiang Eryuan Zhidu Jinxing Weixian Shencha De Jianyi Shu*), online: <<http://wlccg.blogchina.com/217573.html>> (date accessed: February 8, 2006).

¹²⁰² Xin Frank He, “Regulating Rural-Urban Migrants In Beijing: Institutional Conflict and Ineffective Campaigns”, 2003, 17 Colum. J. Asian L. 121.

¹²⁰³ “In 1953, the State Council formulated the Instruction on Limiting Peasants Blindly Migrating to Urban Cities.” Cited from *Supra* 1202.

as fine-tuned by numerous, often *ad hoc*, regulations, provincial rules, directives, decrees, and documents,¹²⁰⁴ the *hukou* system has been existing in the PRC history for six decades.¹²⁰⁵

During the first decade of CCP's coming into power, more than 20 million Chinese farmers rushed into the cities due to the allure of the urban areas coupled with the poverty and economic devastation pervading the rural areas caused by decades of wars,¹²⁰⁶ despite that the urban industry back then had no capacity to absorb them at all.¹²⁰⁷ Indeed, the influx of migrants from rural areas exacerbated the dilemma of urban unemployment and also caused social instability for the newly established socialist regime.¹²⁰⁸ Moreover, influenced by the Soviet Model, despite the economy was largely agrarian and there was a desperate shortage of capital investment during those days, the state nevertheless placed the priority on heavy industry to speed up its industrialization at the cost of the interests of its agricultural industry -- "the state under-priced agricultural products and overpriced industrial products to induce an unequal exchange between the agricultural and industrial sectors".¹²⁰⁹ In doing so, the state obtained the necessary original accumulation of capital, which was generally called the "scissors balance" (*Gongnong Jiandao*

¹²⁰⁴ Wang Feiling, "Brewing Tensions While Maintaining Stabilities: The Dual Role of *Hukou* System in Contemporary China", *Asian Perspective*, Vol.29, No. 4, 2005, online: <<http://www.asianperspective.org/articles/v29n4-c.pdf>> (date accessed: March 23, 2006).

¹²⁰⁵ Weidong Ji, "Power And People In Relational Network: Dutton On Chinese Social Control", 1995, 29 *Law & Soc'y Rev.* 553.

¹²⁰⁶ Hayden Windrow & Anik Guha, "The *Hukou* System, Migrant Workers, And State Power in the People's Republic of China", 2005, 3 *Nw. U. J. Int'l Hum. Rts.* 3.

¹²⁰⁷ *Supra* 1202.

¹²⁰⁸ *Ibid.*

¹²⁰⁹ *Supra* 1183. For more information on Chinese *hukou* system, please also see "The Current Situation and The Future of Chinese Household Registration System" (*Zhongguo Huji Zhidu Gaige De Xianzhuang Yu Zhanwang*), online: <<http://www.qzagri.gov.cn/xwdetail.asp?ID=13389>> (date accessed: January 17, 2006); Chen Chengwen & Sun Zhongmin, "Dualism Or Monism: Choices of The Models on the Reform of Chinese Household Registration System" (*Eryuan Haishi Yiyuan: Zhongguo Huji Zhidu Gaige De Moshi Xuanze*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4793> (date accessed: January 17, 2006); "Chinese Household Registration System: The Shame of the City" (*Zhongguo Huji Zhidu: Chengshi De Chiru*), *Chinese Economic Daily (China)*, April 30, 2005, cited from online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4142> (date accessed: January 17, 2006); Ge Zhihua, "Resolution for Chinese 'Three Agricultural Problems'-- Rural Society in Transformation" (*Wei Zhongguo De Sannong Wenti Qiuji-- Zhuanxing Zhong De Nongcun Shehui*) [Jiang Su: Jiang Su People's Press (*Jiangsu Renmin Chubanshe*), 2004], from 60 to 65.

Cha), to achieve the goal of industrialization focusing on its heavy industries located in its urban areas.¹²¹⁰ In order to maintain the artificial unbalance as such and the social stability, *hukou* system was introduced to block free flow of resources, especially labor force between industry and agriculture as well as between city and countryside.¹²¹¹

Under the *hukou* system, every family has a permanent residence booklet (*Hukou Bu*), which lists a family's place of permanent residence, temporary residence, births, deaths, out-and in-migration, race, native place (*Jiguan*), educational level, class status, political labels as well as military record if any.¹²¹² In terms of the 1958 Regulation Regarding the *Hukou* Registration, every citizen must report any change of domicile to the local authorities.¹²¹³ For example, if a citizen resided temporarily outside his permanent residence over three days, he/she or a household head (*Huzhu*) should report and register for his/her temporary residence at the authority in charge of the local household registration within three days, and before leaving he/she would have to report again and nullify the temporary residence registration accordingly;¹²¹⁴ if a citizen wanted to move from rural area to city, first of all, he/she must hold proof from the urban labor department, proof of a school's admission notice, or proof of an immigration permit issued by the institution responsible for registering permanent residency of that city.¹²¹⁵ As a matter of fact, procedure as such was just the beginning. He/she had to go to the institution responsible for registering his permanent residency and applied to go through various complicated emigration procedure before his migration goal could be finally achieved.¹²¹⁶

¹²¹⁰ *Ibid.*

¹²¹¹ *Ibid.*

¹²¹² *Ibid.* This is also double checked by the writer herself during her field study in Shanghai via checking several permanent residence booklets.

¹²¹³ *Supra* 1205. Please also see Regulation Regarding the *Hukou* Registration in 1958, art.10 & 13.

¹²¹⁴ *Supra* 1200, art. 15(1).

¹²¹⁵ *Supra* 1206. Please also see Chen Chengwen & Sun Zhongmin, "Dualism Or Monism: Choices of The Models on the Reform of Chinese Household Registration System" (*Eryuan Haishi Yiyuan: Zhongguo Huji Zhidu Gaike De Moshi Xuanze*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4793> (date accessed: January 17, 2006).

¹²¹⁶ *Ibid.*

In fact, with the implementation of such rigid internal movement control, it was almost impossible for most residents with the rural origin to move to and reside in urban areas.¹²¹⁷ Thus, it was observed that a pyramid-shaped social hierarchy was created, with ordinary grain-growing farmers (more than 0.9 billion) strictly bound to the rural land at the bottom of the Chinese society and residence of large cities like Beijing and Shanghai at the top.¹²¹⁸ Indeed, horizontal movement between places at the same level was sometimes not easy to accomplish, let alone upward mobility.¹²¹⁹ Some scholars even state that “the urban-rural gap has been likened to the distance between heaven and earth” -- changing from rural *hukou* to urban *hukou* is much more difficult than “climbing to heaven”.¹²²⁰ Above and beyond this, the *hukou* system was actually playing a more comprehensive function than merely controlling the Chinese citizens’ internal migration. A person registered with urban origin is entitled to free compulsory education, basic food supply, urban unemployment relief, urban minimum wage protection, medical insurance,

¹²¹⁷ *Supra* 1183. It is commented by a Chinese scholar that in terms of relevant regulations, there are a few narrow channels by which to cross the *hukou* barriers: passing college entrance exams, joining the military and becoming an officer as well as some marriage schemes. Indeed, even through these ways, the vertical movement is still quite difficult. “Firstly, since the educational level in the urban areas is much higher than that in the rural areas, a small number of all the students with rural *hukou* can pass college entrance exams to become college students in the urban areas and therefore residents with an urban *hukou* annually. Sometimes some students who have passed the exams cannot afford to study in the urban areas because of the low income of their poor families. Secondly, for those with rural *hukou*, it is even more competitive to be selected to join the military and become an officer. As a matter of fact, most of those soldiers with the rural *hukou* will return to the rural areas when three years’ services in the army are finished. Finally, the last channel, the change of one’s *hukou* through marriage schemes, is perhaps the most difficult. Under the 1958 Regulations, a person’s *hukou* is determined by his or her mother’s *hukou* rather than by birthplace. A mother with the rural *hukou*, for example, could only give her children the rural *hukou* despite the fact that the children may have been born in a city and even fathered by an urban resident. As a result, a young male with the urban *hukou* will not marry a young female with the rural *hukou* because their children would become residents with the rural *hukou*; a young female with the urban *hukou* will not marry a young male with the rural *hukou* because of the poor living conditions in the rural areas. Therefore, the marriage schemes make it almost impossible for a resident with the rural *hukou* to become a resident with the urban *hukou*.” Cited from Zhu Lijiang, “The Hukou System of the People’s Republic of China: A Critical Appraisal under International Standards of Internal Movement and Residence”, 2003, 2 Chinese J. Int’l L. 519.

¹²¹⁸ *Supra* 1156.

¹²¹⁹ *Ibid.*

¹²²⁰ Research Directorate of the Immigration and Refugee Board of Canada, “China: reforms of the Household Registration System (*Hukou*)”, online: <http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=279&cid=50&sec=CH02&disclaimer=show> (date accessed: February 12, 2006).

social security protection, housing subsidy and pensions etc.¹²²¹ On the contrary, farmers -- people registered as rural population, are not only denied all of the benefits abovementioned, but are locked to the land to take care of their own subsistence and consumption needs.¹²²² It is observed that the majority of the Chinese rural residents have not benefited from China's dramatic economic development over the past two decades; some even do not have the chance to "enjoy elementary conditions for their basic livelihood".¹²²³ Clearly, via the rigid internal movement control mechanism coupled with the domestic differential treatment as such, there is an intangible wall with institutional support between the urban and the rural areas in China.¹²²⁴ Despite the fact that they are all Chinese citizens and shall be entitled to enjoy the same citizenship under the Chinese constitution¹²²⁵, urban dwellers are inclined to feel much superior to the people with rural origin.

Admittedly, many countries around the world adopt the residential registration system internally, though under different names, including Japan, Thailand, Iran, Mongolia, France, Belgium and

¹²²¹ *Ibid.* Please also see generally in Zhu Lijiang, "The Hukou System of the People's Republic of China: A Critical Appraisal under International Standards of Internal Movement and Residence", 2003, 2 Chinese J. Int'l L. 519. For more information on Chinese *hukou* system, please also see "The Current Situation and The Future of Chinese Household Registration System" (*Zhongguo Huji Zhidu Gaige De Xianzhuang Yu Zhanwang*), online: <<http://www.qzagri.gov.cn/xwdetail.asp?ID=13389>> (date accessed: January 17, 2006); Chen Chengwen & Sun Zhongmin, "Dualism Or Monism: Choices of The Models on the Reform of Chinese Household Registration System" (*Eryuan Haishi Yiyuan: Zhongguo Huji Zhidu Gaige De Moshi Xuanze*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4793> (date accessed: January 17, 2006); "Chinese Household Registration System: The Shame of the City" (*Zhongguo Huji Zhidu: Chengshi De Chiru*), Chinese Economic Daily (China), April 30, 2005, cited from online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4142> (date accessed: January 17, 2006); Ge Zhihua, "Resolution for Chinese 'Three Agricultural Problems'-- Rural Society in Transformation" (*Wei Zhongguo De Sannong Wenti Qiujie-- Zhuaxing Zhong De Nongcun Shehui*) [Jiang Su: Jiang Su People's Press (*Jiangsu Renmin Chubanshe*), 2004], from 60 to 65; Xu Feng, *Women Migrant Workers in china's Economic Reform* (New York : St. Martin's Press, 2000), from 122 to 125; Qiao Wenbao, *Rural-Urban Migration and Its Impact on Economic Development in China* (Brookfield, USA: Avebury , 1996) from 53 to 56.

¹²²² *Ibid.*

¹²²³ *Supra* 978.

¹²²⁴ *Supra* 1202.

¹²²⁵ *Infra* 1341.

Romania etc.¹²²⁶ Compared with the domestic residential registration systems as such, China's *hukou* system shows several unique features as follows:

First, the principle purpose of the Chinese *hukou* system is to **control** its own citizen. The adoption of the household registration system is to prove its citizen's identity, maintain social security, control a citizen's movement area, in particular serve as a safety valve in controlling rural-to-urban migration.¹²²⁷ Yet the main goal for the other countries' residential registration system is for the sake of the convenience of its own people -- **servicing** its own people rather than controlling their movement.¹²²⁸ Second, the Chinese *hukou* system serves a relatively comprehensive function, i.e., ① serving as a main basis in distributing social interests and resources, which covers all kinds of state-subsidized benefits like food supply, unemployment relief, medical insurance, housing subsidy etc.¹²²⁹, ② controlling citizen's internal movement, ③ proving citizen's identity.¹²³⁰ Whilst the others' function is relatively simple -- to prove a person's identity.¹²³¹ Third, through the introduction of the Chinese *hukou* system, a hereditary¹²³² and dual system that artificially divides the Chinese agricultural and non-agricultural populations, and effectively binds the farmers to the land was erected.¹²³³ It might be a fact of life that each society is hierarchical as each society has the poor and rich

¹²²⁶ Chen Chengwen & Sun Zhongmin, "Dualism Or Monism: Choices of The Models on the Reform of Chinese Household Registration System" (*Eryuan Haishi Yiyuan: Zhongguo Huji Zhidu Gaige De Moshi Xuanze*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4793> (date accessed: January 17, 2006).

¹²²⁷ *Ibid.*

¹²²⁸ *Ibid.*

¹²²⁹ Most states around world that adopted residential registration system de-link the social welfare system and a person's residential registration status. From "Comparison between Foreign Residential Registration System and Chinese Hukou System" (*Guowai Huji Zhidu Jiejian Yu Zhongguo Huji Zhidu Bijiao*), Journal of Shanghai Comprehensive Economy (*Shanghai Zonghe Jingji*), the 10th of 2001. (Author's name is not available).

¹²³⁰ *Ibid.*

¹²³¹ *Ibid.*

¹²³² Under the former Chinese *hukou* system, a person's social origin is not determined by his/her place of birth, but by his/her mother's only. For more information, please see the text below accompanying 1246.

¹²³³ Hayden Windrow & Anik Guha, "The Hukou System, Migrant Workers, And State Power In The People's Republic of China", 2005, 3 Nw. U. J. Int'l Hum. Rts. 3.

division, the minority and majority division as well as the powerful and less powerful division; however, different from other countries' residential registration systems where the creation of which is not to maintain the social hierarchy among its own people but to avoid it, or at the least ameliorate the *status quo*, the Chinese *hukou* system not only fails to mitigate the already-existed hierarchy, but creates as well as maintains a new division with strong institutional support.¹²³⁴

c. Loosening *Hukou* System

Since the late 1970s when China launched its economic reform, the internal rural to urban migration has risen up to an unprecedented scale.¹²³⁵ It is concluded by several Chinese scholars that the major reasons for such unusual internal movement are as follows:¹²³⁶ ① the success of the agricultural reforms¹²³⁷ under Deng Xiaoping era not only improved agricultural efficiency, but also set large surplus of nearly 200 million laborers in rural areas free from the land; ② the rapid economic development in the cities, especially the light labor-intensive industry, engendered great need for a large amount of cheap laborers and craftsmen, whereas the *hukou* system has negatively influenced on the progress of China's urbanization¹²³⁸ and healthy

¹²³⁴ For more information, please see *Supra* 1226.

¹²³⁵ *Ibid.*

¹²³⁶ Please see generally in U.S. Library of Congress, "Migration", online: <<http://countrystudies.us/china/35.htm>> (date accessed: February 12, 2006); Ran Tao & Zhigang Xu, "Urbanization, Rural Land System and Social Security for Migrant Farmers in China", online: <http://mumford.albany.edu/chinanet/shanghai2005/taoran_en.doc> (date accessed: February 12, 2006); Xin Frank He, "Regulating Rural-Urban Migrants In Beijing: Institutional Conflict and Ineffective Campaigns", 2003, 17 Colum. J. Asian L. 121; Zhu Lijiang, "The Hukou System of the People's Republic of China: A Critical Appraisal under International Standards of Internal Movement and Residence", 2003, 2 Chinese J. Int'l L. 519; "Chinese Household Registration System: The Shame of the City" (*Zhongguo Huji Zhidu: Chengshi De Chiru*), Chinese Economic Daily (China), April 30, 2005, cited from online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4142> (date accessed: January 17, 2006).

¹²³⁷ The Chinese government adopts "in the countryside of the household responsibility system, which provided for production quotas to be divvied up among individual households instead of large agricultural collectives." Cited from *Supra* 1202.

¹²³⁸ Urbanization: "a process in which an increasing proportion of an entire population lives in cities and the suburbs of cities. Historically, it has been closely connected with industrialization. When more and more inanimate sources of energy were used to enhance human productivity (industrialization), surpluses increased in both agriculture and industry. Larger and larger proportions of a population could live in cities. Economic forces were such that cities became the ideal places to locate factories and their workers." Online:

economic development; ③ the emergence of a private market as well as the dismantling of food rationing and other relevant structures have necessitated the adoption of more flexible policies on rural-to-urban migration. Considering the inevitability of the urban-to-rural migration tendency, certain policies were adopted to loosen the former over-rigid internal movement control in some degree.

At the regional level, the typical reforms in the household registration system have been the adoption of two special types of residential registration mechanism to allow increased yet controlled labor mobility.¹²³⁹ One is called “Certificate of Temporary Residence” (*Zanzhu Zheng*), the other is named “Blue-Stamp *Hukou*” (*Lanyin Hukou*).¹²⁴⁰ Via paying a certain amount of money at first, and later on an annual registration fee, as well as finding a valid local job, or buying some properties in the urban areas, a Chinese citizen with rural origin might be entitled to apply for the special residential registration in the urban areas.¹²⁴¹ In fact, via introducing the *blue-stamp hukou* system, the former *hukou* system is commercialized.¹²⁴² With the precondition of paying certain amount of money or purchasing some properties before applying the urban blue-stamp *hukou*, some rural governments are actually indirectly selling the urban *hukou*.¹²⁴³ In some other areas of China, it is reported that some more radical reforms are being considered. Take Jiangsu Province as an example. In terms of the Opinions on Further

<<http://www.faculty.fairfield.edu/faculty/hodgson/Courses/so11/population/urbanization.htm>> (date accessed: March 23, 2006).

¹²³⁹ *Supra* 1183.

¹²⁴⁰ *Ibid.* The reason for such *hukou* is called “blue-stamp” is because it is different from the original *hukou* with red-stamp.

¹²⁴¹ *Ibid.* Please also see generally in “Shanghai Temporary Management Regulation on Blue-Stamp *Hukou*” (1998), online: <<http://www.goldaim.com/lanyinhukou2.htm>> (date accessed: February 13, 2006); online: <http://news.xinhuanet.com/legal/2003-06/04/content_903611.htm> (date accessed: February 11, 2006); online: <<http://www.gujia.com.cn/zhengce.htm>> (date accessed: February 13, 2006); online: <<http://www.netcity.net.cn/estate/fnew/fd5/g24.htm>> (date accessed: February 13, 2006); “Guangzhou Implementation Rules of the Management Regulation on the Blue-Stamp *Hukou*”, online: <http://www.smers.com.cn/site49/news_6143.htm> (date accessed: February 13, 2006).

¹²⁴² For more information on the commodification of the Chinese *hukou* system, please see *Supra* 1233.

¹²⁴³ For more information, please see Hayden Windrow & Anik Guha, “The *Hukou* System, Migrant Workers, And State Power In The People’s Republic of China”, 2005, 3 *Nw. U. J. Int'l Hum. Rts.* 3.

Deepening the Reform of the *Hukou* System (*Guanyu Jinyibu Shenhua Huji Guanli Zhidu Gaige De Yijian*),¹²⁴⁴ Jiangsu has proposed to adopt a universal *hukou* registration system across the region. In other words, the former agricultural *hukou*, non-agricultural *hukou*, local township *hukou*, blue-stamp *hukou* etc. are going to be substituted by only one type of *hukou* system without any further classification.¹²⁴⁵

At the national level, reform is taking place gradually as well. For example, the State Council approves the reform plan proposed by the Ministry of Public Security to allow a child to be registered at the location of *hukou* of either parent rather than only determined by his/her mother's *hukou* as before.¹²⁴⁶ If a man over 60, or a woman over 55 with rural origin lives alone in the rural area whereas he/she has a son or daughter lives in the urban area and is registered with urban origin, the elderly is entitled to apply for an urban *hukou* and live there ever after.¹²⁴⁷ If a rural *hukou* holder invests in the urban area, sets up enterprises, or purchases certain properties in the urban areas, he or she will be qualified to apply for an urban *hukou* of a relative small city.¹²⁴⁸

To be fair, reforms both at the national and regional level are making progress. It is observed that the latest reform on *hukou* system as such has, to some extent, relaxed and decentralized China's

¹²⁴⁴ Online: <http://www.zjda.gov.cn/show_hdr.php?xname=CPOGHU0&dname=SORNHU0&xpos=3> (date accessed: February 13, 2006).

¹²⁴⁵ *Supra* 1183. Please also see online: <<http://www.china.org.cn/chinese/difang/245134.htm>> (date accessed: February 13, 2006).

¹²⁴⁶ Please see generally in *Supra* 1183; "Chinese Household Registration System: The Shame of the City" (*Zhongguo Huji Zhidu: Chengshi De Chiru*), Chinese Economic Daily (China), April 30, 2005, cited from online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4142> (date accessed: January 17, 2006); *Women Migrant Workers in china's Economic Reform* (New York : St. Martin's Press, 2000), at 124.

¹²⁴⁷ *Ibid.*

¹²⁴⁸ *Ibid.* For more information, please see "Reform Plan on Management of Small City and Town Hukou System" (*Xiao Chenzheng Hukou Guanli Zhidu Gaige Shidian Fangan*) and "Suggestions on Improvement of Management of Rural Hu Kou System" (*Guanyu Wanshan Nongcun Huji Guanli Zhidu De Yijian*), online: <http://www.ce.cn/law/jjyftz/hjgg/zcfg/200601/24/t20060124_5934728.shtml> & online: <<http://www.law-lib.com/lawhtm/1997/13344.htm>> (date accessed: February 14, 2006).

internal migration control mechanism mainly in small cities and towns.¹²⁴⁹ However, it seems that they are unstable, piecemeal-based and superficial in nature. For instance, the blue-stamp *hukou* policy which was adopted by various large cities of China, including Shenzhen, Guangzhou, Shanghai, and Wuhan etc. and existing for several years, now has been abolished by most of the cities.¹²⁵⁰ Besides, the commercialization of the *hukou* system¹²⁵¹ implies an unequal result, i.e., only the rural rich (very few of the rural population) is able to be qualified to apply for an urban *hukou*. In other words, with the establishment of an official money-*hukou* link, the unfairness carried by the former *hukou* system was indeed strengthened -- urban *hukou* is endowed with more financial meaning than ever before. As far as the relatively radical reform in Jiangsu Province is concerned, it merely universalized different types of *hukou* in name without entitled all the people within its region to the same treatment. It is discovered that in spite of the alleged universalization of the *hukou*, rural people still have no opportunity to freely move from the rural to the urban areas.¹²⁵² To those farmer workers migrating to the urban areas for work, they are nevertheless subject to various discriminative local policies and regulations.¹²⁵³ Worse still, the reform has not universalized the state subsidized benefit. In other words, urban dwellers are nevertheless enjoying various benefits as before merely based on their social origin, whilst its rural counterparts are entitled to none.¹²⁵⁴

In sum, neither the reforms at the regional level nor the ones at the national level touched the core of the Chinese *hukou* system -- artificially denying the **equality** among its own citizens. As widely understood that institutionalized inequality leads to unavoidable *de facto* discrimination, it

¹²⁴⁹ *Supra* 1204.

¹²⁵⁰ Please see generally in online: <<http://news.sh.sina.com.cn/1/2002-04-03/5638.html>>, <<http://www.china.org.cn/chinese/2002/Apr/125711.htm>>, <<http://www.01city.com/news/article/1/2005/04/29/1962.html>> (date accessed: February 14, 2006). In fact, Guangzhou is the only city still keeping the blue-stamp *hukou* policy. Online: <<http://www.southcn.com/estate/jiaodian/200311100203.htm>> (date accessed: February 14, 2006).

¹²⁵¹ For more information, please see text above accompanying 1243.

¹²⁵² *Supra* 1245.

¹²⁵³ *Ibid.*

¹²⁵⁴ *Ibid.*

will not be hard to imagine the quick emergence of discriminatory treatment on farmer workers not only by urban employers, but by urbanites in general as well, though the legislation of *hukou per se* might not be designed to reach such an end on purpose. In fact, the empirical evidence supports the position as such. For example, a sample survey made by Chongqing Municipal Agricultural Bureau shows that 92 percent of the migrant farmer workers there feel that they are discriminated by urbanites.¹²⁵⁵ Such a conclusion is further confirmed by the writer's own survey on the 40 Chinese farmer workers, all of whom claim that they were born unequally and feel that they are discriminated by the majority of the city dwellers.¹²⁵⁶

ii. Other Causes

a. ACFTU's Excluding Policy

Because of the artificial division on its people's social origin created by the Chinese *hukou* system, the identity of Chinese farmer workers working in the urban areas becomes obscure. Despite the fact that they are employed and are working in the cities, they are nevertheless excluded to the only legal Chinese workers' organization -- ACFTU. In fact, in spite of its constitution pronouncing that the membership of ACFTU is open to "all manual and mental workers in enterprises, undertakings and state organs within the territory of China who rely on wages or salaries as their main source of income and who accept the Constitution of the Trade Unions of the People's Republic of China", China's trade union, for quite a long time, only embraced and "faught" for the interests of the workers with city or township resident identification; in other words, more than 100 million farmer workers were completely excluded simply because of their rural origin reflected in their permanent residence booklet (*Hukou Bu*).¹²⁵⁷

¹²⁵⁵ "China Says 'No' to Bias against Migrant Farmer Workers", People's Daily (China), online: <http://english.people.com.cn/200509/24/eng20050924_210701.html> (date accessed: February 17, 2006).

¹²⁵⁶ *Supra* 1172.

¹²⁵⁷ Online: <http://news.xinhuanet.com/english/2003-09/21/content_1091989.htm> (date accessed: November 18, 2004). For more information on "permanent residence booklet", please see text above accompanying 1212.

Although the ACFTU announced in an August 9, 2003 circular that it was going to recruit as many farmer workers as possible and categorized them as members of China's working class, the reality is that more than 80 percent of farmer workers failed to be covered yet and chances for them to be covered in the near future are unfortunately slight.¹²⁵⁸ In terms of the 40 farmer workers interviewed by the writer herself, only 4 had joined the trade union.¹²⁵⁹ In other words, 90 percent of them are excluded from trade unions. Worse still, among these 36 farmer workers who have never joined trade union, 4 of them stated that they had never heard of trade union, let alone understood its nature and value.¹²⁶⁰ Indeed, some autonomous farmer workers' organizations in the coastal province of Zhejiang have been declared as illegal organization by the authority.¹²⁶¹ As such, this vulnerable group, without enough organizational protection (even just in formality), is doomed to be subject to unfair treatment in respect of terms and conditions of employment.

b. Inadequate Legal Protection

Albeit the Chinese labor legislation's protection on its working class is relatively competent,¹²⁶² from the writer's view, legal protection as such has not been delivered to the Chinese farmer workers at all in reality. It is observed that in the view of some experts the Chinese labor legislation has provided enough protection on its farmer workers.¹²⁶³ This argument assumes that farmer workers belong to the working class in China, and since working class is relatively well

¹²⁵⁸ *Ibid.*

¹²⁵⁹ *Supra* 1172.

¹²⁶⁰ *Ibid.*

¹²⁶¹ Online: <http://www.china-labur.org.hk/iso/news_item.adp?news_id=2156> (date accessed: November16, 2004).

¹²⁶² For more information, please see text above 2.3 (B): Introduction to the Chinese Labor Law.

¹²⁶³ Please see generally in Cui Lu, "Investigation on Issues of Social Protection on Farmer Workers" (*Nongmingong Shehui Baozhang Wenti Chutan*), Journal of Xuchang Institute (*Xuchang Xueyuan Xuebao*), third issue, 2004; Fu Lijie, "Discussion on Legal Protection of Farmer Workers' Labor Rights" (*Lun Nongmingong Quanyi De Falü Baohu*), Journal of Chinese Agricultural Industry University (Social Science Edition) (*Zhongguo Nongye Daxue Xuebao*), third edition, 2004.

protected by the Chinese labor legislation, so do farmer workers.¹²⁶⁴ Theoretically, this position is arguably right in the sense that according to ACFTU's Constitution and the Chinese Trade Union Law, a worker is defined as a person (regardless of his/her social origin) doing physical and mental work in enterprises, undertakings and state organs within the territory of China who rely on wages or salaries as their main source of income, regardless of their nationality, race, sex, occupation, religious belief or educational level.¹²⁶⁵ However, if that is the case, better explanations probably are needed to address the aforesaid issues, such as social security system fails to cover them, trade unions refuse to accept them as members, and they have often been subjected to the worst forms of violation of labor standards prohibited by the Chinese labor law.¹²⁶⁶

According to the writer's observation, in practice, farmer workers in China belong to a special social group, i.e., their identification is "half farmer half workers". During the busy season in farming, their role might be farmers because they are likely to return to their hometown in rural areas and work in the field with their families; when the busy farming season ends, they will rush into the cities and become workers working in enterprises located there despite that their social origin is still registered as farmer. With the rapid development of the Chinese market economy coupled with the speedy urbanization pace, this social group is becoming larger and larger. Official statistics show that the total number of internal migrating people in 1982 was only 30

¹²⁶⁴ Actually, according to a document "Reply to Questions Relating to the Application of Labor Law on Farmer Workers" (promulgated by Chinese Labor and Social Security Department in 2003), as long as the farmer workers have established the *de facto* employment relationship with employers, Chinese labor law is applicable to them. However, this document has no binding force; at most, it just represents the central government's policy inclination. From the writer's point of view, without a clear legal protection, the future of farmer workers is not that optimistic.

¹²⁶⁵ Art. 3 of Chinese Trade Union Law; art 1 of ACFTU's Constitution.

¹²⁶⁶ For more information, please see text above 6.3: Discrimination in Respect of Employment Based on Social Origin in China--A Case Study on Chinese Farmer Workers (*Mingong*).

million, while the number in 1997 had ascended to more than 100 million already.¹²⁶⁷ Some semi-official statistics show that by the end of year 2005 the number of farmer workers had reached 200 million;¹²⁶⁸ other sources show that the number had even increased to 250 million already by the end of 2005.¹²⁶⁹ Whatever the real number is, one thing is for sure, i.e., the population of this special social group is increasing exponentially year by year. Based on the previous discussion, especially the discriminatory treatment on farmer workers in terms of employment, it will not be hard to reach a conclusion that the government both central and the local, the law, the employers and the urban dwellers have not recognized them as real workers belonging to the Chinese working class in practice.

Admittedly, the central government has started realizing the problem. Within recent years, it has called for a nationwide effort to safeguard the rights and interests of farmer workers. For example, the administrative document -- “2003 Reply to Questions Relating to the Application of Labor on Farmer Workers” (*Guanyu Nongmingong Shiyong Laodong Falü Youguan Wenti De Fuhuan*) (2003 Reply) issued by National Labor and Social Security Department states that as long as the farmer workers have established the *de facto* employment relationship with employers, the Chinese labor law is applicable to farmer workers;¹²⁷⁰ the “2004 Notice Regarding Further Improving Employment Condition of Farmer Workers” (*Guanyu Jinyibu Zuohao Nongmin Jincheng Jiuye Huanjing Gongzuo De Tongzhi*) (2004 Notice) issued by State Council calls for various relevant governmental agencies to sort out the wage arrear problem and other

¹²⁶⁷ “The Current Situation and The Future Development of Chinese Household Registration System” (*ZhongGuo Huji Zhidu Gaige De Xianzhuang Yu Zhanwang*), online: <<http://www.qzagri.gov.cn/xwdetail.asp?ID=13389>> (date accessed: January 17, 2006).

¹²⁶⁸ Online: <http://www.cnr.cn/news/t20051026_504120408.html> (date accessed: February 17, 2006).

¹²⁶⁹ Zhao Guoqing, “Strict Enforcement of Law Leaves No Space for Sweat Shop” (*Gangxing Zhifa Bugei Xuehan Gongchang Shengcun Turang*), *Shenyang Daily* (China), February 13, 2006, online: <http://bf3.syd.com.cn/gb/syrb/2006-02/13/content_2210431.htm> (date accessed: February 17, 2006).

¹²⁷⁰ “2003 Reply to Questions Relating to the Application of Labor on Farmer Workers” (*Guanyu Nongmingong Shiyong Laodong Falü Youguan Wenti De Fuhuan*), Online: <<http://www.666job.com/news/html/law/2005-06-07/82.htm>> (date accessed: February 17, 2006).

discriminative treatment faced by farmer workers in the urban areas;¹²⁷¹ “2005 Notice Regarding Strengthening the Management of Labor Contracts of Farmer Workers in the Construction Industry” (*Guanyu Jiaqiang Jianshe Deng Hangye Nongmingong Laodong Hetong Guanli De Tongzhi*) (2005 Notice) promulgated by the National Labor and Social Security Department requires employers who employ farmer workers to sign labor contracts with them in accordance with relevant labor legislation, and the contracts shall be registered at the local labor security department for record.¹²⁷² To be fair, through the promulgation of various administrative documents as such for protecting the interests and rights of farmer workers, the central government is taking farmer workers’ rights seriously in a progressive though slow way. However, the problem is that both the 2003 Reply and the 2004/2005 Notices are merely administrative decisions¹²⁷³ in nature, and only targeting specific problems faced by farmer workers without providing a comprehensive and detailed **legislative** protection on their labor rights in general.

C. Legislative Solutions on Erasing Employment Discrimination of Farmer Workers Based on Social Origin

i. Reform of the Chinese *Hukou* System

As discussed above, certain reforms on the *hukou* system are already on the way.¹²⁷⁴ The problem is that they are superficial and piecemeal-based in nature.¹²⁷⁵ What the writer is going to discuss in this part is to propose several guiding principles on how to reform the Chinese *hukou*

¹²⁷¹ “2004 Notice Regarding Further Improving Employment Condition of Farmer Workers” (*Guanyu Jinyibu Zuohao Nongmin Jincheng Jiuye Huanjing Gongzuo De Tongzhi*), para. 1, online: <http://www.gov.cn/zwqk/2005-08/15/content_23262.htm> (date accessed: February 17, 2006).

¹²⁷² “2005 Notice Regarding Strengthening the Management of Labor Contracts of Farmer Workers in the Construction Industry” (*Guanyu Jiaqiang Jianshe Deng Hangye Nongmingong Laodong Hetong Guanli De Tongzhi*), para. 1.

¹²⁷³ As for the legal authority of “administrative decision”, it is not clear under the current Chinese legal system. Some scholar would argue that they belong to law in its general sense, and some deny its status as law. Put aside this academic argument for a moment, at least, it is beyond doubt that such governmental policy is regarded as one of the legal sources in China by the Chinese court in practice.

¹²⁷⁴ For more information, please see above part 6.3 (B) (i) (c) --“Loosening of *Hukou* System”.

¹²⁷⁵ *Ibid.*

system so that its essential core, i.e., artificially denying the equality among Chinese citizens, could be shaken and gradually transformed to reach a fair end.

a. Primary Principle: Freedom of Internal Movement as Its Final Goal

Only through the realization of the right to travel to, reside in, and work in any part of China as a Chinese citizen wishes without unreasonable official interference, could those discriminatory local legislation and policies be aborted completely; meanwhile, only through realizing the goal as such, could the current two-tier, well-segregated labor market between local urban *hukou* holders and migrant farmer workers, which directly leads to inequalities and discriminations, be attacked by a fatal blow.¹²⁷⁶

1. International Law on Freedom of Internal Movement

(1) Overview on the International Treaty Law on Freedom of Internal Movement

“Freedom to move about and to choose a place of residence within states is intrinsically one of the most natural and basic human rights protected by international law.”¹²⁷⁷ As stated in the preparatory work of the ICCPR, the right to freedom of internal movement and residence constitutes an important human rights as well as an essential part of the right to personal liberty.¹²⁷⁸ It is observed that “freedom of movement at home ... is important for job and business opportunities -- for cultural, political and social activities -- for all the commingling which a gregarious (person) enjoys”.¹²⁷⁹ It is submitted that despite freedom of movement may seem on the surface to be a fairly minor and obvious human rights, it actually is one of the most

¹²⁷⁶ *Supra* 1204.

¹²⁷⁷ Chaloka Beyaki, *Human Rights Standards and the Free Movement of People Within States*, (New York, Oxford University Press, 2000) at 1.

¹²⁷⁸ *Ibid.* at 1-2.

¹²⁷⁹ *Ibid.* at 3.

basic rights and essential for the effective enjoyment of other human rights,¹²⁸⁰ and when violated, can lead to profound effects upon other basic human rights outline in the UDHR as well as other human rights treaties, and therefore causes numerous problems and cases of suffering.¹²⁸¹ As such, arbitrary restrictions upon this right is likely to lead to the denial of economic social and cultural rights covering employment as well as civil and political rights, such as personal liberty and freedom of assembly and association etc.¹²⁸² According to some scholars, freedom of internal movement is the “hall mark of a democratic society”,¹²⁸³ and the denial of which is the source of much unnecessary suffering throughout the world.¹²⁸⁴

Starting from the unanimously adopted UDHR, the freedom of internal movement has been gradually strengthened by a series of international treaties, including but not limited to ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention Relating to Status of Refugees, International Convention on the Protection of the Rights of all Migrants Workers and Members of Their Families etc.¹²⁸⁵ Put concretely, in the UDHR, it pronounces that “everyone has the right to freedom of movement and residence within the borders of each state.”¹²⁸⁶ In the later ICCPR, one of the most important conventions of international bills of human rights, it further translates this principle under UDHR into a more detailed legal form by providing that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his

¹²⁸⁰ Stig Jagerskiold, “The Freedom of Movement”, Louis Henkin ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), at 166.

¹²⁸¹ Human Rights Education Associates, “Freedom of Movement”, online: <<http://www.hrea.org/learn/guides/freedom-of-movement.html#intro>> (date accessed: March 17, 2006).

¹²⁸² *Ibid.*

¹²⁸³ *Supra* 1183.

¹²⁸⁴ *Supra* 1280, at 167.

¹²⁸⁵ *Supra* 1277, at 7; *supra* 1281.

¹²⁸⁶ UDHR, 1948, art.13 (1).

residence”.¹²⁸⁷ Via a reasonable linguistic explanation, citizens of a state are surely lawfully within the territory of a state and the territory of a state shall include all parts of a state no matter rural or urban areas.

(2) Permissible Restrictions on Freedom of Internal Movement under the Treaty Law

Of course, freedom of internal movement is not an absolute right since the ICCPR actually restricts it within certain demarcation -- it shall be subject to restrictions “which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”.¹²⁸⁸ In other words, restrictions allowed under ICCPR on the right of freedom of internal movement shall be in full compliance with the three criteria **simultaneously** as follows:¹²⁸⁹

- ① provided by **law**;
- ② **necessary** to protect national security, public order, public health or morals or the rights and freedoms of others;
- ③ **consistent** with the other rights recognized in the ICCPR *per se*.

Generally speaking, to date there are three main schools of thoughts on the interpretation of treaties, including the school of “founding fathers”, the “textual” school as well as the “teleological school”.¹²⁹⁰ The ideas as such have been absorbed as well in the Vienna Convention on the Law of Treaties, which provides that the general rule of treaty interpretation shall be “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

¹²⁸⁷ ICCPR, 1966, art. 12(1).

¹²⁸⁸ ICCPR, 1966, art. 12(3).

¹²⁸⁹ *Infra* 1294.

¹²⁹⁰ *Supra* 586, at 810.

context and in the light of its object and purpose”.¹²⁹¹ Accordingly, the first criterion on the restriction of the freedom of internal movement shall be legitimately understood in this way: the restriction as such shall be provided by the domestic law of a state in accordance with the legislative procedure of the state in question and law as such shall be consistent with a state’s constitution logically.¹²⁹² In addition, theoretically, the domestic law in question shall at least be consistent with the basic principles of rule of law, that is general, accessible to the public, prospective, clear, consistent on the whole, capable of being followed, relatively stable, fairly applied, and “there must be procedural rules for law making and laws must be made by an entity with the authority to make laws in accordance with such rules to be valid” as discussed.¹²⁹³ Furthermore, Human Rights Committee’s general comments suggest that “in adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right”.¹²⁹⁴

As for the interpretation of the second criterion on the permissible restriction, indeed merely based on the context of the ICCPR *per se*, neither “good faith”, “textual” principles nor “teleological” approach could provide a clear definition of the concepts such as “national security”, “public order”, “public health or morals” or “the rights and freedoms of others”. Under such circumstances, the supplementary means of treaty interpretation in accordance with Vienna

¹²⁹¹ Vienna Convention on the Law of Treaties, 1969, art. 31(1).

¹²⁹² To some scholars, in terms of human rights jurisprudence, the meaning of the term “law” here shall be sought in the context of an international law of a state party rather than in the domestic law of a state and attaches certain conditions on the quality of the domestic laws in question. For example, the “law” could not be disassociated from the nature and origin of certain inviolable attributes of the individual. “These attributes cannot be legitimately restricted through the exercise of governmental power since they constitute individual domains beyond the reach of the state or to which the state has but limited access.” From *Supra* 1277.

¹²⁹³ *Supra* 759. For more information, please see text above 4.2 (C) (iii) (a) (2) --“Serious Commitment to ROL with A ‘Reservation’”.

¹²⁹⁴ Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), online: <<http://www1.umn.edu/humanrts/gencomm/hrcom27.htm>> (date accessed: March 16, 2006).

Convention shall be eligible to apply.¹²⁹⁵ The restrictions considered as legitimate by the Human Rights Commission during the drafting of article 12 (3) of the ICCPR were those: ① imposed during a national emergency, ② for the control of epidemics, prostitution, and migrant workers; and ③ for the protection of indigenous populations.¹²⁹⁶ Clearly, based on the *travaux préparatoires as such*, certain interpretative guiding principles on how to understand those concepts embodied in the second test of permissible restrictions on freedom of internal movement have emerged. Accordingly, going back to the general rules of treaty interpretation stipulated by Vienna Convention, via both the “good faith”, “textual” principles and especially the “teleological” approach, even if a state that imposes restrictions on freedom of movement and residence on the ground of public interest, such restrictions shall nevertheless act consistently with the treaty obligation under the ICCPR and shall be open to scrutiny to the international protection mechanism as well.¹²⁹⁷ In this sense, in spite of a state’s undoubted sovereign discretion to restrict its people’s internal movement and residence for the sake of public interest, human rights standards provided by the international bill of rights shall be legitimate to constrain the said discretion by providing an external safety valve.¹²⁹⁸

Above and beyond this, even the restrictions provided by the law of a state are on the basis of public interests, it still shall be “necessary”. In other words, the measures taken to limit the scope of freedom of movement and residence shall be in compliance with the principle of proportionality -- there shall be a reasonable relationship and balance between an end and the

¹²⁹⁵ *Ibid.* art. 32: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

¹²⁹⁶ *Supra* 1277, at 10.

¹²⁹⁷ *Ibid.* at 11.

¹²⁹⁸ *Ibid.* at 11.

means adopted to achieve that end.¹²⁹⁹ As Human Rights Committee states in its twenty-seventh General Comment, it is not enough that the restrictions serve the permissible purposes only; rather they must be necessary as well, i.e., they must be appropriate to achieve their protective function, they must be the least intrusive instruments among those means available to achieve the desired goal, and they must be proportionate to the interest intended to be protected.¹³⁰⁰ In particular, the Committee heavily criticizes domestic legislation “requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications”.¹³⁰¹ In addition, it is noteworthy that during the preparation of this article of freedom of movement under ICCPR, one state delegate suggested that it should be legitimate to forbid movement to an urban area where an adequate supply of labor already existed and housing accommodations were inadequate.¹³⁰² It is controversial whether a state could legitimately require its citizen to have a job, certain skill, or a promise of housing as a precondition to move from the countryside to city.¹³⁰³ The conclusion offered by the Commission on Human Rights is that “while the state may have a legitimate interest in planned development of its cities, such (pre)conditions would severely restrict an individual right to move from country to city and would in effect curtail his ability to enjoy other rights guaranteed by the Covenant (ICCPR)”.

For the third criterion on the permissible restriction, it requires that the restriction on the freedom of internal movement and residence shall be compatible with other rights guaranteed in the ICCPR, such as the right not to be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence,¹³⁰⁴ and right to get equal protection of the law without any

¹²⁹⁹ *Supra* 1183.

¹³⁰⁰ *Supra* 1294.

¹³⁰¹ *Ibid.*

¹³⁰² *Supra* 1280.

¹³⁰³ *Ibid.*

¹³⁰⁴ ICCPR, 1966, art.17 (1).

discrimination on any ground¹³⁰⁵, as well as be compatible with fundamental principles of equality and non-discrimination.¹³⁰⁶ For a better understanding on the third criterion, it might be worthwhile mentioning two cases as follows.

The issue of the first case of *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* is about the legality of the Mauritian Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977 under the ICCPR.¹³⁰⁷ The plaintiff contended that under the newly enacted legislation, alien husband of Mauritian women lost their residence status in Mauritius and had to apply for a “residence permit” which may be refused or removed at any time by the Minister of Interior; whereas, alien women married to Mauritian husbands retaining their legal rights to residence in the country without the same legislative interference.¹³⁰⁸ The Human Rights Committee held that the common residence of husband and wife shall be considered as the normal behavior of a family.¹³⁰⁹ Hence, the exclusion of a person from a country where close members of his family (for example, his wife) were living amounted to an interference within the meaning of article 17 (1) of ICCPR which stipulates that no-one shall be subject to arbitrary or unlawful interference with his family.¹³¹⁰ It further stated that the exclusion of residence caused by the Immigration legislation in question was “subject to the principle of equal treatment of the sexes which followed from several provisions of the ICCPR”.¹³¹¹ For example, under its article 2 (1), it was an obligation of a state to respect and ensure the rights entitled by ICCPR without distinction of any kind, such as sex, and more particularly under article 3 to ensure the equal right of men and women to enjoy all these rights, as well as under article 26 to provide with no

¹³⁰⁵ *Ibid.* art. 26.

¹³⁰⁶ *Supra* 1294.

¹³⁰⁷ *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Communication No. 35/1978, U.N. Doc. CCPR/C/OP/1 at 67 (1984), online:

<http://www1.umn.edu/humanrts/undocs/html/35_1978.htm> (date accessed: March 15, 2006).

¹³⁰⁸ *Ibid.*

¹³⁰⁹ *Ibid.*

¹³¹⁰ *Ibid.*

¹³¹¹ *Ibid.*

discrimination for the equal protection of the law.¹³¹² After applying the third criterion in this case, the Committee found that there had been a violation of other rights as well as the principle of non-discrimination recognized by the ICCPR.¹³¹³ Based on this case, restrictions placed upon a person's rights to move and reside inside a state ought not to negate his/her ability to enjoy other rights guaranteed by the ICCPR, and at any rate, principle of non-discrimination shall be secured.¹³¹⁴

In the second case of *Sandra Lovelace v. Canada*, the Human Rights Committee found that “statutory restrictions affecting the right to residence ... must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, as a whole”.¹³¹⁵ Once again, the Committee emphasized the holistic approach in treaty interpretation. In other words, based on whatever “royal” purposes, restrictions on the right of persons to move and reside inside a state have to be compatible with the enjoyment of the rights and principles, such as principle of non-discrimination, recognized in the ICCPR as a whole.¹³¹⁶

(3) Freedom of Internal Movement -- A Rule of Customary International Law

Indeed, a host of evidence has showed that the right to freedom of internal movement has been recognized widely as customary international law. As mentioned in the text above, generally speaking, both state practice and *opinio juris* -- sense of legal obligation are indispensable complementary elements to constitute customary international law.¹³¹⁷ In order to be qualified as “state practice”, the practice shall be constant, uniform as well as passing through a reasonable

¹³¹² *Ibid.*

¹³¹³ Please both see *Supra* 1277 at 12 & *Ibid.*

¹³¹⁴ *Supra* 1277, at 12.

¹³¹⁵ *Sandra Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), online: <<http://www1.umn.edu/humanrts/undocs/session36/6-24.htm>> (date accessed: March 15, 2006).

¹³¹⁶ *Supra* 1277, at 13.

¹³¹⁷ For more information, please see text above part 4.1 (B) -- “Under Customary International Law”.

period of time.¹³¹⁸ As far as this aspect is concerned, there is a rich array of treaties not only at international level as mentioned above, but at regional level in guaranteeing this right. Back to the 1940s, during the preparation of European Convention on Human Rights, right to internal movement and residence had been assumed as an inherent component of personal liberty.¹³¹⁹ Article 2 of its Fourth Protocol concluded in 1963 finally secured this right and its permissible restrictions in paper by borrowing almost the same wordings that are used in ICCPR article 12. In the American Convention on Human Rights adopted in 1969, it also provides that “every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provision of law”, and the permissible restrictions on this right shall be “necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights and freedoms of others”.¹³²⁰ The later regional conventions, such as African Charter on Human Rights and Peoples’ Rights, the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms and Arab Charter on Human Rights, all have recognized right to freedom of internal movement as one of the fundamental human rights and indeed the essential part of the right to personal liberty.¹³²¹

In addition, this right is not only guaranteed by the abovementioned long-standing regional treaties, but also supported by lots of national legislation. For example, in the 1993 Russian legislation titled “On the Right of Russian Citizens to Freedom of Movement and Choice of Place of Sojourn and Residence within the Borders of the Russian Federation”, its opening article clearly grants the right to freedom of movement, choice of place of sojourn and residence -- a

¹³¹⁸ For more information, please see generally in Rebecam. M. M. Wallace, *International Law: A Student Introduction*, 2nd edition (London: Sweet & Maxwell, 1992), from 9-18; D. J. Harris, *Cases and Materials on International Law*, 5th edition (London: Sweet and Maxwell, 1998), from 23-44; Martin Dixon, *International Law*, 3rd edition (Glasgow: Bell and Bain Ltd, 1990), from 27-35; Mark W. Janis, *An Introduction to International Law*, 4th edition (New York: Aspen Publisher, 2003), from 41-53.

¹³¹⁹ *Supra* 1277, at 13.

¹³²⁰ American Convention on Human Rights "Pact Of San Jose, Costa Rica", art. 22 (1) & (3).

¹³²¹ African Charter on Human Rights and Peoples’ Rights, 1981, art. 12; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, 1995, art. 22; Arab Charter on Human Rights, 1997, art. 20.

remarkable departure from its traditional *propiska*.¹³²² Through adoption of its new Constitution, Cambodia, as most other former communist states used to strictly control freedom of movement, had progressively lifted the limitations on this right after 1993.¹³²³ The German Constitution makes it clear that all Germans enjoy freedom of movement throughout the Federal territory; and the only permissible restrictions shall be “pursuant to a statute, and only in cases in which an adequate basis of existence is lacking and special burdens would arise to the community, or in which the restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or a Land, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect or to prevent crime”.¹³²⁴ Indeed, this freedom of internal movement is recognized by many twentieth century constitutions, including but not limited to the constitution of Japan, Sweden, Italy, Spain, Finland¹³²⁵ and even the 1954 Chinese constitution¹³²⁶ etc.¹³²⁷ Based on the writer’s research, the right to freedom of movement, including internal movement, has been officially recognized by most states worldwide as a constitutional right.¹³²⁸

¹³²² Noah Rubins, “The Demise And Resurrection Of The *Propiska*: Freedom Of Movement In The Russian Federation”, 1998, 39 Harv. Int'l L.J. 545. “*Propiska* (Russian: прописка; full term Прописка по месту жительства, “The record of place of residence”): was a regulation in the Soviet Union designed to control internal population movement by binding a person to his or her permanent place of residence.” For more information, please see online: <<http://www.answers.com/topic/propiska>> (date accessed: March 17, 2006).

¹³²³ Stephen P. Marks, “The New Cambodian Constitution: From Civil War to a Fragile Democracy”, 1994, 26 Colum. Hum. Rts. L. Rev. 45.

¹³²⁴ Basic Law for the Federal Republic of Germany, 1990, art. 11.

¹³²⁵ Finnish Constitution, 1919, art. 7.

¹³²⁶ Art 9 (2) of 1954 Chinese constitution provides that Chinese citizen has freedom of movement and residence. However, this freedom is denied in the later three Chinese constitutions. For more information, please see Sun Wenguang, Developing Rural Area and Freedom of Movement Shall be incorporated into Chinese Constitution (*Fazhan Nongcun, Qianxi Ziyou Bixu Ruxian*), online: <<http://www.ncn.org/asp/zwginform/da-KAY.asp?ID=68111%20&ad=3/6/2006>> (date accessed: March 31, 2006).

¹³²⁷ Huang Renzong, “Urbanization Or Freedom of Movement” (*Chengzhen Hua Yihuo Qianxi Ziyou*), Journal of Qiu Shi (*Qiu Shi*), the 5th issue of 2002.

¹³²⁸ Please see generally in Hu Mianwei, “On Constitutional Protection of Freedom of Movement”, online: <<http://www.sss.net.cn/ReadNews.asp?NewsID=1699&BigClassID=12&SmallClassID=36&SpecialID=0&belong=sc>> (date accessed: March 17, 2006); Liu Wujun, “Reform on Hukou System Shall Not Be Delayed” (*Huji Zhidu Gaike Buyi Huanxing*), Journal of Reading (*Du Shu*), the 12th issue of 2001.

Above and beyond this, there are a rich array of both domestic and regional courts' decisions to guarantee the right to freedom of internal movement. For instance, in the case of *Kent v. Dulles* 357 U.S. 116 (1958), the US Supreme Court holds that "freedom of movement, both within and across our national borders, is basic in its scheme of values".¹³²⁹ In *Shapiro v. Thompson* 394 U.S. 618 (1969), the US Supreme Court contends that for quite a long time, the nature of American and its constitution concepts of personal liberty have united to require that all citizens are free to travel throughout the length and breath of the land "uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement".¹³³⁰ Other cases, such as *Corfield v. Coryell*, 6 F. Cas. 546 (US)¹³³¹, *Edwards v. California*, 314 U.S. 160¹³³², *Aptheker v. Secretary of State*, 378 U.S. 500,¹³³³ *Zemel v. Rusk*, 381 U.S. 1,¹³³⁴ *Loizidou v. Turkey* (by European Court of Human Rights, ECHR),¹³³⁵ and *Cyrus v. Turkey* (by ECHR),¹³³⁶ either has directly recognized the right to freedom of movement or indirectly referred to this right as the legal foundation of the existence of other human rights.¹³³⁷ Given the existence of so many long-standing international, regional conventions supported by the majority states worldwide to guarantee the right to freedom of internal movement, as well as the constitutional and judicial recognition of the right as such, it is fair to conclude that the said two complementary elements of customary international law have been met. Therefore, even if a state like China has not ratified any of the international or regional conventions that guarantee the right to freedom of internal movement, it is none the less bound by the customary international law that recognizes this right. Accordingly, it is China's

¹³²⁹ Matthew A. Dombroski, "Securing Access to Transportation for the Urban Poor", 2005, 105 Colum. L. Rev. 503.

¹³³⁰ *Shapiro v. Thompson*, 394 U.S. 618, 1969, online:

<<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/shapiro.html>> (date accessed: March 17, 2006).

¹³³¹ *Ibid.*

¹³³² *Ibid.*

¹³³³ *Ibid.*

¹³³⁴ *Ibid.*

¹³³⁵ *Supra* 1277, at3.

¹³³⁶ *Ibid.*

¹³³⁷ *Ibid.*

international obligation under the customary international law to respect and protect right to freedom of internal movement.

2. Examining the Legality of the Chinese *Hukou* System under International Law on Freedom of Internal Movement

The means adopted by the Chinese government to restrict its people's freedom of internal movement is mainly the *Hukou* system. As stated above, in order to maintain the “scissors balance”, to achieve the goal of industrialization which emphasized particularly on its heavy industry located in its urban areas, and meanwhile to maintain social stability, *hukou* system was created to block free flow of resources, in particular labor force from rural to urban area.¹³³⁸ With the existence of this institution, there is a *de facto* intangible wall between the rural and urban areas in China.¹³³⁹ In this part, the writer is going to evaluate the Chinese *hukou* system in accordance with the three permissible restrictions on freedom of internal movement under the ICCPR, to see whether the *hukou* system could satisfy the three tests, and therefore be qualified as legitimate restriction on the Chinese people's freedom of internal movement.

(1) Test One: Provided by Law

The Chinese *hukou* system is, *prima facie*, consistent with this test since it is legalized by the 1958 “Regulation Regarding the *Hukou* Registration”. However, as abovementioned, the “law” in question has to meet certain qualifications, such as be consistent with the basic principles of rule of law:¹³⁴⁰ general, accessible to the public, prospective, clear, consistent on the whole, capable of being followed, relatively stable, fairly applied, and “there must be procedural rules for law making and laws must be made by an entity with the authority to make laws in accordance with such rules to be valid”. Take the principle of “consistent on the whole” as an example. At the

¹³³⁸ For more information, please see text accompanying note 1210 & 1211.

¹³³⁹ For more information, please see text accompanying note 1224.

¹³⁴⁰ For more information, please see text accompanying note 1292 & 1293.

least, it implies that the “law” shall be consistent with a state’s constitution. Under the current Chinese constitution, it states seriously that as long as a person is with the PRC nationality, he/she is the citizen of PRC and all citizens of the PRC are **equal** before the law.¹³⁴¹ In terms of the Chinese *hukou* system which is legalized by 1958 legislation and strengthened and specified by a series of rules and regulations, considering that only based on limited reasons such as passing college entrance exam, marrying someone with urban origin and joining the army etc., could a rural person be allowed to legally reside in urban area for a long term, the freedom of a citizen with rural origin to move from rural to urban areas has been seriously blocked.¹³⁴² The direct impact of such a system is that a pyramid-shaped social caste was created, with the majority (around 70 percent)¹³⁴³ of the Chinese population, viz. the Chinese farmers, being bound to the land at the bottom of the Chinese society, whereas the residents from large cities such as Shanghai, Beijing at the top.¹³⁴⁴ Although the 1958 law has not stipulated directly that it only limits the right to freedom of internal movement of the Chinese farmers, given the fact that a person registered with urban origin is entitled to various protection from the Chinese social welfare system,¹³⁴⁵ whereas his/her rural counterparts are entitled to none of them, and given that there are actually no restriction at all for an urban Chinese to give up his/her urban household registration identity (in other word, converting to be rural Chinese), whereas there are only few approaches available¹³⁴⁶ for a rural Chinese to become an urban one, the *hukou* system has indeed denied the equality between the urban people and rural ones in China. As such, it is not difficulty to conclude the unconstitutionality of the Chinese *hukou* system.

¹³⁴¹ Constitution of PRC, 1982, art. 33.

¹³⁴² For more information, please see text accompanying note 1213 to 1220.

¹³⁴³ Zhang Zhiyong, “Hukou System: The Root Cause of Employment Discrimination on Chinese Farmer Workers” (*Huji Zhidu: Nongmin Gong Jiuye Qishi Xingcheng Zhi Gengyuan*), *Journal of Rural Economy (Nongcun Jingji)*, the 4th issue of 2005.

¹³⁴⁴ For more information, please see text accompanying note 1218.

¹³⁴⁵ For more information, please see text accompanying note 1221.

¹³⁴⁶ For more information, please see text accompanying note 1215 & 1217.

Besides, according to the fourth constitutional amendment in 2004, a sentence -- “the state respects and protects human rights” is added into article 33 of the Chinese constitution as its third paragraph. As discussed above, freedom of internal movement has been proved as one of the most natural and basic human rights protected by both international and regional treaty law as well as customary international law.¹³⁴⁷ Accordingly, freedom of internal movement as the precondition for a person’s liberty and enjoyment of other cultural, political and social rights, is surely within the scope of “human rights” stated in the fourth constitutional amendment. Realizing that the Chinese *hukou* system has unreasonably blocked the individual’s right to freely move from rural to urban areas, considering that the Human Rights Committee had heavily criticized the domestic practices to require individual to apply for permission in advance to change their residence or to seek the approval from the local authorities of the place of destination, and bearing in mind the Human Rights Committee’s explicit disapproval of a state delegate’s suggestion to legitimize the prohibition of the movement from countryside to urban areas where an adequate labor supply exists already and housing accommodation is inadequate,¹³⁴⁸ the unconstitutionality of the Chinese *hukou* system is beyond doubt, which directly leads to the *hukou* system’s failure to meet the first test -- “provided by law”.

(2) Test Two -- Necessary to Protect National Security, Public Order, Public Health or Morals or the Rights and Freedoms of Others

It might be true that one of the purposes of the Chinese *hukou* system is to control its internal migrant workers, and therefore maintain social stability. In this sense, the purpose might be qualified in light of one of test two’s several eligible intentions -- “public order”, whose purpose could be for the control of migrant workers as contended by the Human Rights Commission

¹³⁴⁷ For more information, please see above part 6.3 (C) (i) (a) (1) -- International Law on Freedom of Internal Movement.

¹³⁴⁸ For more information, please see text above accompanying note 1301.

during the drafting period.¹³⁴⁹ In spite of that, this test nevertheless requires such a restriction to be **proportionate** to achieve the purpose of maintaining social stability.¹³⁵⁰ In other words, *hukou* system should be qualified as the least intrusive instruments among other means available to achieve the desired goal.¹³⁵¹

Looking back at the nature of the Chinese *hukou* system, it has caused the individual's movement from rural to urban area extremely difficult, particularly under the 1958 Regulation Regarding the *Hukou* Registration. In spite of the introduction of some reformative practices, such as the adoption of "Certificate of Temporary Residence"¹³⁵² and the introduction of blue-stamp *hukou* system,¹³⁵³ the essence of the *Hukou* System is never touched.¹³⁵⁴ Indeed, it is fair to conclude the nature of the *hukou* system as a system that denies the majority of the Chinese population the freedom of internal movement and residence.¹³⁵⁵ In addition, it is necessary to note that one of the reasons to introduce *hukou* system is to maintain the dramatically unbalanced development status between the rural and urban area caused by the "scissor balance" via controlling individual's freedom of internal movement and residence.¹³⁵⁶ Furthermore, it should be mindful that a dual social structure with dual welfare system has been created and maintained in China for decades mainly because of the *hukou* system.¹³⁵⁷ As such, the *hukou* system is clearly against the principle of proportionality and is by no means the least intrusive method. In fact, there are various instruments adopted by different states around the world in managing its people's internal movement and residence, whereas none of them is as strict and unreasonable as the Chinese

¹³⁴⁹ For more information, please see text above accompanying note 1296.

¹³⁵⁰ For more information, please see text above accompanying 1299 to 1301.

¹³⁵¹ *Ibid.*

¹³⁵² For more information, please see text accompanying note 1240.

¹³⁵³ *Ibid.*

¹³⁵⁴ For more information, please see text accompanying note 1250 to 1256.

¹³⁵⁵ *Supra* 1183.

¹³⁵⁶ For more information, please see text accompanying note 1210.

¹³⁵⁷ For more information, please see text accompanying note 1201.

hukou system.¹³⁵⁸ Because of this “evil” system, a series of social unfairness¹³⁵⁹ has been created, among which employment discrimination based on social origin is only the tip of the iceberg.

(3) Test Three -- Consistent with the Other Rights Recognized in the ICCPR

Understanding that the Chinese *hukou* system has artificially denied the equality among Chinese citizens -- urban *hukou* holders are entitled to a relatively rich social welfare system’s protection while the rural ones are denied by any protection at all, realizing that the Chinese farmer workers have been seriously discriminated in terms of employment mainly based on social origin, and recognizing that the limited reforms on the *hukou* system either at the regional level or at the central level are far from touching its essential core, the *hukou* system is inconsistent with other rights and principles guaranteed by the ICCPR, such as the right to get equal protection of the law without discrimination on **any ground** and the principle of non-discrimination which impenetrates the ICCPR.

Indeed, the Chinese *hukou* system is not able to satisfy any of the permissible restrictions on freedom of internal movement whereas the ICCPR requires that a permissible controlling mechanism shall be consistent with the three tests simultaneously; therefore, *hukou*’s illegality under the international law on freedom of internal movement is beyond doubt.

b. Second Principle: Abolishing Dualism

Designed and strengthened under the circumstances of centrally planned economy, the Chinese *hukou* system was initially introduced to maintain the endangered social stability caused by the

¹³⁵⁸ For more information, please see text accompanying not 1226 to 1234.

¹³⁵⁹ For example, the existence of *hukou* has actually denied the right to education of the farmer workers’ children in the urban areas when they migrate with their parents to the cities. Indeed, even if they are born in the cities, as long as their parents are farmer workers, they are supposed to return to their place of origin and studied there and they are not allowed to study in any public primary, senior or junior high school located in the cities where they migrate.

unequal exchange between the agricultural and the industrial sectors in China back then.¹³⁶⁰ However, with the proliferation of the market economy, the economic and political background for the further existence of the *hukou* system has been challenged dramatically. Today, part of the function of *hukou* system designed to maintain the situation of centrally planned economy has become largely irrelevant. As such, it is time to abolish the dual social system based on *hukou* registration. Rather than keeping the artificial division between the urban and the rural *hukou* holders, which has directly caused the existence of the current two-tiered and well-segregated labor market in China, the *hukou* registration shall be universalized without any further division as such. Put concretely, the future registration shall be merely based on a Chinese citizen's place of residence instead of hereditary. In other words, the reformed *hukou* registration shall not be once-for-all-fashion, but dynamic -- modifying registration in accordance with the change of place of residence.¹³⁶¹ Only with reform as such, could the internal labor market be universalized. And thereafter, the farmer workers would no longer be regarded as the second class laborers.

c. Third Principle: De-linking Social-Welfare System and the *Hukou*

As the writer mentioned above, today's *hukou* system serves a rather comprehensive function. It not only records personal information, but also serves as a main basis for distributing social interests and resources, including state-subsidized benefits like food supply, medical insurance, housing subsidy, minimum living subsidy as well as education opportunity etc. With the existence of the linkage as such, the connotation of the *hukou* system has been changed. It is no

¹³⁶⁰ For more information, please see text above accompanying note 1209 to 1211.

¹³⁶¹ On the issue of abolishing dualism in the Chinese hukou system, please also see generally in Zhang Xueliang, "Reform of Census Register System and Realization of Civil Equality" (*Huji Zhidu Gaige Yu Gongmin Pindeng Quan De Shixian*), Journal of North-west No. 2 Peoples' Institute Social Science Edition (*Xibei Dier Mingzu Xueyuan Xuebao*), the fourth issue of 2004; Wu Hang, "Investigation on The Reform of Current Chinese Hukou System" (*Dangdai Zhongguo Huji Zhidu Gaige De Tansuo*), Journal of Population (*Renkou Xuekan*), the second issue of 2002; Shen Weidong, "Three Suggestions on the Reform of Hukou System" (*Dui Huji Zhidu Gaige De Santiao Jianyi*), Journal of Public Security Study (*Gongan Yanjiu*), the first issue of 2003; Zhang Ping & Lin Xin, "The Development of Market Economy and the Reform of Hukou System" (*Shichang Jingji De Fazhan Yu Woguo Huji Zhidu De Gaige*), Journal of Population and Economy (*Renkou Yu Jingji*), the sixth issue of 2000.

longer merely a booklet containing personal information and for the Chinese authority to know the relevant information of its people, but transformed into a labeling mechanism -- to categorize the Chinese citizens into different classes.

As such, the writer hereby proposes to de-link the social welfare system and *hukou*, i.e., to simplify the function of the *hukou* system – it purely serves as a means to prove people’s identity and provide his/her personal information to government. As for the practice of distributing social interests based on *hukou*, it is unfair to deny the national treatment to the Chinese citizens from rural areas when the overwhelming majority of them are hardworking taxpayers.¹³⁶² In fact, such a principle is not only important to the issue of employment discrimination based on social origin, but is also meaningful in curbing the child labor problem in China. It shall be pointed out that the existence of *hukou* has actually denied the right to education of the farmer workers’ children when they migrate with their parents to the cities. In addition, even if they are born in the cities, as long as their parents are with rural origin, they must return to their place of origin and study there. In other words, they are not allowed to study in any public primary, secondary or senior high school located in the cities where they migrate.¹³⁶³ Only when the de-linking principle is well absorbed by the *hukou* reform, will the place of education be disconnected with the place of *hukou* registration. In so doing, the second generation of the Chinese migrant workers will be able to have a chance to be educated in the public schools located in the cities where their parents work rather than being forced to leave their parents and return to their so-called place of origin to accept education or to attend certain private schools in the cities especially targeting the second

¹³⁶² For more information, please see generally in *Ibid*.

¹³⁶³ For more information, please see generally in Xiang Jiquan, Wu Licai & Liu Yiqiang, “Institutional Guarantee on the Educational Rights of the Children of Farmer Workers -- Analysis and Suggested Policy on the Issue of Education of Farmer Worker’s Children” (*Wei Nongmingong Zinv De Jiaoyu Tigong Zhidu Baozhang -- Guanyu Nongmingong Zinv Jiaoyu Wenti De Diaocha Fenxi Yu Zhengce Jianyi*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=5005> (date accessed: July 12, 2006); online: <<http://www.bass.gov.cn/common/EMPdissertation.jsp?id=333>> (date accessed: July 12, 2006).

generation of farmer workers (*Mingong Zidi Xuexiao*) usually with unqualified educational facilities and teaching staff.¹³⁶⁴

d. The Feasibility of the Three Abovementioned Principles

Some scholars have cast doubt on the suggestions of introducing the abovementioned three principles into the reform of the Chinese *hukou* system.¹³⁶⁵ They contend that with the dramatic reform as such, a large number of rural residents will swarm into the urban area, which might lead to an outbreak of urban illness (congestion, pollution, urban crowdedness, rise of criminal rate etc.)¹³⁶⁶; in addition, once the freedom of internal movement is realized, after a certain period of time, an undesirable phenomenon might happen, viz, the developed eastern part of China will become over-crowded while the underdeveloped western part will become even less developed with the loss of both skilled intellectual and technical labor through the free movement of such laborers towards more favorable economic, geographic or professional area; furthermore, if the social welfare system is universalized, part of the Chinese citizens (mainly urbanites) might not be able to accept such dramatic changes, which might lead to social instability because most urbanites have taken it for granted for years that they are born superior to the rural residents, yet suddenly they lose both their privileges and vested interests alike.¹³⁶⁷

¹³⁶⁴ Indeed, by doing so, the chances for the second generation of the Chinese farmer workers to become child laborers will be lower. For more information, please see generally in online: <<http://www.njnews.cn/k/ca520803.htm>>, <<http://www.pep.com.cn/200406/ca460718.htm>>, <<http://pic.people.com.cn/GB/1098/4162291.html>> (date accessed: July 12, 2006).

¹³⁶⁵ Please see generally in Cui Yuanfeng & Feng Hua, "No Rush for the Reform of Hukou System" (*Huji Zhidu Gaige Buke Maojin*), *Journal of Opening Tide (Kaifang Chao)*, the ninth issue of 2001; Wu Ming, "No Rush Abolition of the Chinese Hukou System" (*Zhongguo Huji Zhidu Zanshi Buneng Qvxiao*), the eleventh issue of 2001; Chen Chengwen & Sun Zhongmin, "Dualism Or Monism: Choices of The Models on the Reform of Chinese Household Registration System" (*Eryuan Haishi Yiyuan: Zhongguo Huji Zhidu Gaige De Moshi Xuanze*), online: <http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4793> (date accessed: January 17, 2006).

¹³⁶⁶ Ding Chengri, "City Development Strategy: Spatial Structure and City Competitiveness", University of Maryland, online: <http://www.cdb.com.cn/meeting/07/07_012.pdf> (date accessed: March 30, 2006).

¹³⁶⁷ *Supra* 1365.

These concerns, *prima facie*, have their merits; however, at the most, they are only hypothesis without the support by empirical evidence. On the contrary, to date, the empirical evidence available appears to be supporting the introduction of a dramatic reform on *hukou* system as the writer proposes above. For example, as discussed, many countries over the world have adopted residential registration systems that are apparently different from China's *hukou* and the systems as such are working well in practice.¹³⁶⁸ The critical differences between those systems and the Chinese *hukou* are that: ① their function is relatively simple -- to prove a person's identity and to provide the necessary information to government on its population, rather than serving as an important basis in distributing social interests, resources as well as binding the farmers to the land with very limited chances to improve their quality of lives; ② the creation of the other residential registration systems is not for the purpose of maintaining dual social structure, whilst the introduction of *hukou* not only is responsible for the creation of the dual structure but also actively strengthens it for more than five decades.¹³⁶⁹ In addition, according to the writer's interview of the forty Chinese farmer workers in Shanghai, she was informed that in their villages, as long as people there want to leave their hometown, they have already managed by all means to leave and migrated to the cities to work there; as for the rest, they are unwilling to leave their hometown to work as farmer workers in the cities even if revolutionary changes on *hukou* do happen.¹³⁷⁰ Indeed, to those that are worried to happen have already happened, and to those that have yet to happen, the chances for them to occur in the future are rare. As for those who

¹³⁶⁸ For more information, please see text above accompanying note 1227 to 1234.

¹³⁶⁹ *Ibid.* For example, in USA, all legal residents and citizens must apply for a valid social security card with a social security number containing nine digits on it, the first three of which is relating to the zip code for the area the applicant lives in when he/she first applies for the card. As long as a person has a valid social security number, he/she is eligible to apply for federal loan, worker's compensation from the Department of Labor and other certificates that are necessary for people's daily life. Besides, social security number also contains various personal information including income tax, criminal or law-breaking record if any etc. Without any division on the number based on place of origin, also with no unreasonable interference on the freedom of internal movement of the legal number holders, this residential registration system works well from 1930s. Cited from "The Social Security in the USA", online: <http://www.rapidimmigration.com/usa/1_eng_coming_social.html> (date accessed: March 31, 2006).

¹³⁷⁰ *Supra* 1172.

ultimately choose to stay in the rural areas, country life is more attractive than urban one which is a symbol of congestion, polluted air, noisy environment and too much competition.¹³⁷¹ In other words, the occurrence of an uncontrollable population swarming into the cities from the rural areas is not necessary to happen, even if a dramatic reform covering the three principles proposed by the writer does happen. This position is further confirmed by the fact as follows: due to some governmental policy in Zhejiang Province, residents of some villages are required to give up their social status as farmer and become urban *hukou* holders, however a small amount of them refuse to accept such a seemingly nice offer in spite of various benefits awaiting them.¹³⁷²

Furthermore, as for the concern of the social instability caused by the de-linking process, the writer could not stop wondering: could the inequality artificially maintained by the *hukou* system against the Chinese constitutional principle of equality¹³⁷³ and the rule of customary international law on freedom of internal movement¹³⁷⁴ really lead to the so called desirable social stability? Would that be possible that at the end of the day, the majority of the Chinese population, *viz.* farmers, could no longer bear the dual social structure and its subsequent effects -- such as no social security system to protect them and the discriminatory treatment when employed, and therefore become the cause of social instability? Once again, the empirical evidence appears to be supportive on the writer's speculation. In the case of *Wang binyu* (September 4, 2005), having failed to receive his overdue wages urgently needed for his father's operation and seriously being humiliated by his foreman, this desperate 25-year-old farmer worker stabbed the foreman and his three family members and wounded a co-workers.¹³⁷⁵ In the same month, two similar cases

¹³⁷¹ *Ibid.*

¹³⁷² Pan Xipan, "Would Chaos Come If Loosening Hukou System" (*Fangkai Huji Hui Tianxia Daluan Ma*), *Journal of Opening Policy (Kaifang Daobao)*, the twelfth issue of 1996.

¹³⁷³ For more information, please see text above accompanying note 1340 to 1346.

¹³⁷⁴ For more information, please see text above accompanying note 1317 to 1338.

¹³⁷⁵ Please see generally in Wang Zhenghua, "Convicted migrant worker killer waits for final verdict", online: <http://www.chinadaily.com.cn/english/doc/2005-09/21/content_479492.htm> (date accessed: April 3, 2006); For Wang Binyu Case, please see generally in online:

caused by the issue of wage arrears happened in Harbin, the capital city of Heilongjiang Province. One was about *Hu Xingying*, a Hubei farmer worker who chose to burn himself and his foreman together to death, after failing to collect his overdue payment of 4,000 yuan RMB;¹³⁷⁶ the other was about the case of *Cao Qing*, which happened three days after *Hu Xingying's* death. In this case, in a fit of anger over no hope to collect more than 100 thousand yuan RMB that belongs to his co-workers and himself, he committed suicide by burning himself.¹³⁷⁷ Have these tragedies happened in the same month implied a sign of social instability? Have the tragedies brought about the unharmonious sound to the establishment of a harmonious society advocated by the CCP itself? Indeed, the high criminal rate of farmer workers happening in the cities also drops a hint on the possibility of social instability caused by the social inequality as such. For instance, official statistics have shown that more than 60 percent criminal cases happening in Beijing in recent years are committed by farmer workers, and in the case of Shanghai and Guangzhou, this number ascend to more than 70 percent and 69 percent respectively.¹³⁷⁸ From a perspective of civil equality, the improvement of the urbanites' living standards shall not be built on the sacrifice of the Chinese farmers which constitute over 70 percent of the Chinese population. The costs and benefits of economic development and industrialization shall be evenly shared by every Chinese citizen, rather than merely benefiting the minority, whilst sacrificing the interests of the majority.

<<http://news.sina.com.cn/c/2005-09-12/23496926774s.shtml>> (date accessed: April 25, 2009); online: <http://zoniaeuropa.com/20050913_1.htm> (date accessed: April 25, 2009); Marie Holzman, "Death penalty in China", online: <www.hrwf.org/uploads/speech%20marie%20ENG.doc> (date accessed: April 25, 2009).

¹³⁷⁶ "Warning of the Frequently Happened Tragedies Caused by Wage Arrears on Farmer Workers" (*Nongmin Gong: Taoxin Canju Jielian Fachu De Jinshi Xinhao*), online:

<http://news.xinhuanet.com/zhengfu/2005-09/23/content_3533059.htm> (date accessed: April 3, 2006); online: <<http://www.peacehall.com/news/gb/china/2005/09/200509292208.shtml>> (date accessed: April 3, 2006).

¹³⁷⁷ *Ibid.*

¹³⁷⁸ Chen Liu, "Features, Causes and Solutions on Floating Population" (*Wailai Renkou Fanzui De Tedian, Chengyin Ji Duice*), online:

<<http://www.baojian.gov.cn/science/detail.aspx?articleid=492&classcode=00060006>> (date accessed: April 4, 2006). Please also see online: <http://v15.huasing.org/bbs.php?B=105_10996087> (date accessed: April 13, 2008).

Of course, it is understandable that dramatic reform as such takes time; however, no matter how long it takes, it is high time for the Chinese government to set up its mind and take substantial actions from now on.

ii. Independent Trade Union -- A Means of Self-Relief

As discussed above, ACFTU's excluding policy is partly responsible for the employment discrimination against the Chinese farmer workers. As a vulnerable social group -- leaving hometown and families and migrating to the unknown cities, farmer workers rarely have chances to get organizational protection. Yet, even after the amendment of ACFTU's excluding policy, the efficacy of the organizational protection provided by ACFTU is nevertheless limited.

In chapter 3 of this thesis, the writer has criticized the phenomenon of trade union monopoly and cast doubts on the feasibility of the dual and mutual conflicting function of the trade union in China.¹³⁷⁹ It is likely that the Chinese trade union has become the "eye and ear" of the state inside every SOE, or the "eye and ear" of the employers inside every private-owned enterprise.¹³⁸⁰ Accordingly, on one hand, even if the ACFTU's announcement of year 2003 did work, chances for it to improve the treatment on the Chinese farmer workers in terms of employment are non the less slight. On the other hand, an efficient organizational protection on farmer workers can be provided by an independent trade union so that the dilemma of ACFTU's representative crisis can be effectively avoided. Actually, certain independent trade unions organized by the Chinese farmer workers themselves have emerged in spite of no authoritative recognition. For instance, it is reported that an independent trade union organized by farmer workers established in 2004 had successfully help its members sort out the wage arrear problem, i.e., the overdue payment of RMB 350,000 *yuan* has been returned to those hard working

¹³⁷⁹ For more information, please see text above part 3.2 (A) --"Brief Introduction to the Law and Practice Regarding the Freedom of Association in China" and 3.2 (B) --"Dual Role of Chinese Trade Union".

¹³⁸⁰ For more information, please see text above accompanying note 288, 289, 348, 409 and 410.

members' pockets.¹³⁸¹ With the development of these autonomously organized farmer workers' own unions, this vulnerable social group finally has a means to save themselves out of unfair treatment, especially when the legislative protection on them is proved to be far from adequate.¹³⁸² Considering that in Chapter 3 the writer has provided a relatively thorough discussion on the legality and value of an independent trade union in China, in particular, its advantages compared with the trade unions under the ACFTU system, the writer is not going to reiterate it again in this part.¹³⁸³

iii. Farmer Worker's Protection Law -- A Comprehensive Legal Protection

a. The Necessities of Such Legislation

In the above text, the writer has justified that although in theory, the Chinese farmer workers might be argued to belong to the Chinese working class, in practice, they are excluded because of their obscure social identity, i.e., they are registered as "farmer" in the household registration booklet whilst migrating to the urban areas and establishing the *de facto* labor-employment relationship with their employers, rather than engaging into agricultural production in the countryside.¹³⁸⁴ Various discriminative treatments against them existing for decades, including but not limited to endless nightmares of wage arrears, no protection from social security system, discriminatory local legislation, high rate of working injury as well as same contribution but different payment, have strongly implied that the current Chinese labor legislation has failed to provide enough legal protection on farmer workers.

¹³⁸¹ *Supra* 339.

¹³⁸² For more information, please see generally in part 6.3 (B) (ii) (b) -- "Inadequate Legal Protection".

¹³⁸³ For more information, please see text above part 3.2 (C) (ii) (b) -- "Ideal Model: Independent Trade Union", in particular, text above accompanying note 318 to 334, 335 to 341, and 346 to 348. Of course, to be realistic, at the current stage, chances for the Chinese government to recognize the legitimacy of an independent union organized by farmer workers are low because there is palpable concern that if admits the legitimacy of independent union as such, a Pandora's Box will be open since the authority actually views farmer workers as huge disaffected constituents (*Infra* 1156). In this sense, there is an urgent need to propose a special legislation especially targeting farmer workers' rights and interests.

¹³⁸⁴ For more information, please see text above of part 6.3 (B) (ii) (b) -- "Inadequate Legal Protection".

Besides, a number of social investigations conducted either by some local governments or by the writer herself have reflected that the overwhelming majority of the Chinese farmer workers feel that they have been treated as if they were second class citizens in China when they are working in the cities,¹³⁸⁵ which implies that in the minds of most Chinese urban dwellers and urban governmental officials, farmer workers are not regarded as the real members of the Chinese working class, let alone enjoying the same labor rights. Accordingly, a special legal protection is necessary for protecting the interests and rights of a vulnerable social group as such. Considering that China has enacted specific and comprehensive legislation to target the interests and rights of its children and women alike -- the “Woman Rights and Interests Protection Law” and “Minor Protection Law”,¹³⁸⁶ a special legislation under the name of “Farmer Worker Protection Law” is surely with the feasibility.

Admittedly, some scholars have cast doubt on the necessities to enact a special legislation to protect farmer workers.¹³⁸⁷ They argue that merely through certain amendment on the current Chinese labor legislation, in particular, clarifying that farmer workers belong to the Chinese working class, the discriminatory treatment in terms of employment against them shall be able to disappear gradually as time goes on.¹³⁸⁸ In addition, some contend that as long as the radical reform on *hukou* system could happen, the dual social structure will collapse accordingly, and therefore the same treatment in terms of employment could finally come to farmer workers in the long run. In this sense, there is no need to waste the costs of legislation to enact a specific

¹³⁸⁵ For more information, please see text above accompanying note 1255 & 1256.

¹³⁸⁶ For more information, please see text above note 1127 to 1133, and note 951 to 954.

¹³⁸⁷ “Understanding the Legal Protection on Farmer Workers”, *Legal Daily (China)*, March 31, 2005, online: <http://www.nmpx.gov.cn/zonghexinwen/biaotixinwen/t20050331_33828.htm> (date accessed: April 6, 2006).

¹³⁸⁸ *Ibid.*

legislation as such. Put aside the issue as to whether these positions have their merits or not,¹³⁸⁹ the critical point here is that both plans proposed above take a relatively long time to work.

In the case of the proposal to amend the existing labor law -- to clarify that the definition of “worker” includes farmer worker, it not only intends to clarify the legal definition of “worker”, but also expects a quantum shift in urbanites’ and urban governments’ attitude towards farmer workers via a legislative amendment as such. Indeed, only when the stereotype of “farmer worker” is changed, could the urban employers start to understand that farmer workers are under the same legal protection of the relevant labor law and could have a second thought before they deny the application of labor law on farmer workers. Considering that it takes decades to constitute the stereotype in their minds that farmer workers are the *de facto* second class citizens in the cities and are not protected by the relevant labor law, it shall not be easy to alter it in a short term logically.

In the case of the proposal of a dramatic reform on *hukou*, it does provide a solution to eradicate the root cause of the discriminatory treatment in terms of employment; however, as stated in the above text, the fundamental and profound change as such on the Chinese residential registration system takes a relatively long time to happen as the reform shall absorb the abovementioned three principles -- (1) principle of freedom of internal movement, (2) principle of abolishing the

¹³⁸⁹ From the writer’s position, as far as the former position--amendment of the current labor law is concerned, its efficacy is limited. In terms of protecting women workers’ interests, the Chinese Labor Law has already emphasized that women enjoy the equal rights of employment as men and also provided special protection to female workers, covering but not limited to prohibition of arranging underground work for women workers at mines, or any labor with Grade IV physical labor intensity as stipulated by the state, prohibition of engaging women workers in work at high place, under low temperatures, or in cold water during their menstrual periods or labor with Grade III physical labor intensity as stipulated by the state, and prohibition of engaging women workers in work with Grade III physical labor intensity as stipulated by the state or any other work that is bad for the health of a pregnant worker. Despite the existence of such special clauses guaranteeing women workers’ rights and interests, a special legislation under the name of “Woman Rights and Interests Protection Law” is nevertheless enacted as a further legislative specification. This is the same case on the legislative protection of children’s rights and interests in China. By the same token, merely through limited amendment on the current labor legislation shall be far from enough based on the former legislative experience in China.

practice of dualism, and (3) principle of de-linking social welfare system and *hukou*.¹³⁹⁰ Given that the rights and interests of the Chinese farmer workers were violated and are still being violated everyday, and there is an urgent need to stop the discriminatory treatment as such, a specific law especially targeting the interests and rights of farmer workers appears to be necessary to satisfy such an urgent need.¹³⁹¹

b. Law Enactment Proposals on “Farmer Worker Protection Law”¹³⁹²

The purpose of this part is to propose certain indispensable aspects to be covered in the “Farmer Worker Protection Law”, in particular targeting the present prevailing discriminatory treatment in terms of employment.

1. General Principles of “Farmer Worker Protection Law”

In the part of “General Provision” of this legislation, it is necessary to emphasize that (1) farmer workers -- the Chinese citizens with rural origin reflected in the household registration booklet but engaged in non-agricultural industries located in the urban areas -- belong to the Chinese working class and no discriminatory treatment based on social origin in terms of employment is allowed; and (2) they are entitled to be employed on an equal basis, i.e., having the same rights as their urban counterparts do in choosing occupations, obtaining remuneration, taking rests, having holidays and leaves, receiving labor safety and sanitation protection, getting training in professional skills, enjoying social insurance protection and welfare treatment and submitting applications for settlement of labor disputes, and other labor rights stipulated by this law and other relevant labor legislation in China.

¹³⁹⁰ For more information, please see text above part 6.3 (C) (i) (d) -- “The Feasibility of the Three Abovementioned Principles”.

¹³⁹¹ For more information, please see *supra* note 1383.

¹³⁹² This proposal is based on a research conducted by the writer herself on the previous legislative experience on Chinese labor legislation.

2. Wage Security

Considering the wage arrear on the Chinese farmer workers is one of the most serious problems facing farmer workers today, the part of “wage security” is surely at the priority of this legislation.

Distribution of wages shall follow the principle of distribution in accordance with work load and principle of equal pay for equal work. The law shall provide explicitly that farmer workers are entitled to be paid the same as their urban counterparts and any wage difference solely based on social origin shall be explicitly prohibited. In addition, the wage paid to farmer workers shall be in the form of currency and on a monthly basis. No wages payable to farmer workers are allowed to be deducted or delayed without legitimate reasons. Furthermore, since farmer workers are lawful residents in the cities, they shall be protected by the local minimum wage system. Therefore, the employer shall pay their wages not less than the local minimum standards. Any violation of such provisions shall be punished accordingly. Indeed, from the writer’s view, the punishment on the violation of this aspect shall be more seriously vis-à-vis the violation of the other urban workers’ rights since farmer workers are groundless, seasonal residents in the cities who usually have no savings, acquaintance and stable domicile.

3. Labor safety and Sanitation

As mentioned above, farmer workers are often engaged in the dirtiest and the most dangerous works, such as construction work. As such, employers shall be obliged to establish a necessary system for farmer workers’ safety and sanitation that is consistent with the rules and standards provided by relevant authorities. Besides, before a farmer worker is assigned to any special operation, relevant professional training shall be provided and necessary qualification shall be obtained in advance. In addition, employers are under the obligation to carry out regular health examination for farmer workers who are exposed to hazardous working conditions. Last but not

the least, a special reporting system in relation to the working injuries and deaths of farmer workers shall be established so that it would be much easier for governmental agencies to monitor the progress in practice or the lack thereof.

4. Working Hours, Leaves and Public Holidays

Through writer's interview of forty Chinese farmer workers mainly reflected in Table 6 above, it is typical that farmer workers are required to work about 12 hours per day with neither overtime working payment nor a single day off per week. Aiming at the serious violation of farmer workers' labor rights as such, the law in question shall emphasize that the daily working hours for farmer workers are eight and employers are under the obligation to provide farmer workers with at least one day off per week. Besides, the law shall entitle farmer workers the right to rest during public holidays. Any overtime working shall be paid extra remuneration accordingly. And the prolonged working time could not exceed 36 hours in total per month, which could find an echo in the relevant provision under the present Chinese Labor Law.¹³⁹³ As for the amount of overtime working payment, relevant Labor Law provision shall be borrowed directly in order to emphasize this aspect.¹³⁹⁴ In terms of annual leave, farmer workers shall be entitled to annual leave with payment just as their urban counterparts are entitled to if they have worked for the same employer continuously for more than one year.

5. Social Security System

At present, the overwhelming majority of the farmer workers are excluded from the social security system. Through the birth of this law, a social insurance system covering not only urban dwellers but farmer workers as well shall be built so that farmer workers are able to receive

¹³⁹³ Please refer to Labor Law of PRC, art. 41.

¹³⁹⁴ Please refer to Labor Law of PRC, art. 44.

necessary help and compensation when they grow old, get occupational diseases or work-related injuries, or become jobless etc.

6. Dispute Settlement

The general procedure for labor dispute settlement under the relevant Chinese labor legislation at present could be divided into four steps. The first step is consultation, i.e., when a labor dispute takes place, the parties involved shall seek a settlement through consultation.¹³⁹⁵ If the dispute could not be settled via consultation, or either party refuses to attend the consultation, the second step -- mediation is applicable. At this stage, the parties involved could apply to the labor dispute mediation committee set up inside the enterprise for mediation.¹³⁹⁶ If the mediation fails, either party is allowed to apply for the third step, viz., labor arbitration. Either party that is unsatisfied with the arbitration result is able to bring the case to the court.¹³⁹⁷ And the labor arbitration is the precondition for court procedure.¹³⁹⁸ In practice, system as such might work relatively well when the disputes mainly involve urban workers; however, its practicability is questionable when being applied to farmer workers.

For example, as for the second step -- mediation, the said mediation committee shall be composed of representatives from workers, employers and trade union respectively, and the chairman of such a committee shall be a representative from trade union.¹³⁹⁹ A practical dilemma for the procedure as such is that the overwhelming majority of farmer workers are not union members as they are mainly employed by the privately owned enterprises where the union coverage rate is

¹³⁹⁵ Rules on Handling Labor Disputes in Enterprises of PRC (*Qiye Laodong Zhengyi Chuli Tiaoli*), 1993, art. 6.

¹³⁹⁶ *Ibid.*

¹³⁹⁷ *Ibid.*

¹³⁹⁸ Labor Law of PRC, art. 79 & Regulation on Labor Dispute Settlement in Enterprises of PRC, art. 6.

¹³⁹⁹ Labor Law of PRC, art. 80 (1).

low -- less than 10 percent.¹⁴⁰⁰ Of course, when there is no union inside a work place, the chairman of such a mediation committee is expected to be decided through negotiation between workers and employers.¹⁴⁰¹ Considering the existing severe labor-capital conflict awaiting mediation, such a negotiation to find an impartial chairman who could be trusted by both sides is surely a tough job. Therefore, the composition of a mediation committee inside the work place has become a mission virtually impossible. Worse still, the time needed for finalizing a labor dispute is unnecessarily long.¹⁴⁰² Even without taking the days spent on the first step -- consultation which has no clear time limit provided by the law, the time needed for fulfilling the rest steps is at least 12 months without taking into consideration any legitimate extension:¹⁴⁰³ one month for mediation, two months for labor arbitration and nine months for court procedure.¹⁴⁰⁴ As such, it is hard to image that as a *de facto* passing traveler of the cities, farmer workers will be able to afford to wait in the cities for more than one year till the final conclusion of the dispute. In fact, one year is considered as an optimistic estimation. A host of cases have shown that the time needed in general for the conclusion of a labor dispute will be often more than two years.¹⁴⁰⁵ For example, in a labor dispute between a railway station and its employees occurred in *Zhelimupeng*, Inner Mongolia Autonomous Region, more than two years time had passed after it was finalized

¹⁴⁰⁰ For more information, please see text above accompanying note 407, 409 & 412. Please also see Wu Jixue, "The Major Contradiction of Contemporary China Is Labor Capital Relationship" (*Dangdai Zhongguo Jinji Shehui Zhong De Zhuyao Maodun Shi Laozi Guanxi*), online: <<http://www.economics.com.cn/writing/review/ChinaZYMD.htm>> (date accessed: April 10, 2006).

¹⁴⁰¹ *Supra* 1395, art. 9.

¹⁴⁰² Actually, the design for such labor dispute settlement procedure is unreasonable. For example, arbitration is supposed to be based on the principle of free will, however, in the Chinese labor law context, it becomes a compulsory procedure. For more information, please see Mao Weiting, "Analysis on the Defects of Compulsory Arbitration as A Precondition for Court Procedure and Its Solution" (*Laodong Zhengyi Chuli Zhongcai Qianzhi Chengxu De Quexian Fenxi Jiqi Duice*), online: <http://www.law-lib.com/lw/lw_view.asp?no=5565> (date accessed: April 10, 2006).

¹⁴⁰³ The time limit for labor arbitration shall be 60 days, however, it is allowed to be prolonged for another 30 days if the case is complex; the time limit for the trial court to make a decision is six months and the legitimate extension could be six months.

¹⁴⁰⁴ *Ibid.*, art.10 & 32; Civil Procedural Law of PRC, 2003, art. 135 & 159.

¹⁴⁰⁵ *Supra* 1402.

by the court.¹⁴⁰⁶ Ironically, the court decision is exactly the same as the decision of labor arbitration.¹⁴⁰⁷

As discussed above, considering that the major disputes between farmer workers and their employers lie in wage arrear, the writer could not stop wondering how these farmer workers could afford their daily expenses in cities as well as the subsequent arbitration fee and litigious cost without getting their wages in the first place. In this sense, the cost that farmer workers have to pay for such a labor dispute settlement system is simply too much for them to bear. An official social investigation report -- “Investigation Report on the Cost Paid by Chinese Farmer Workers for Defending Their Rights” (*Zhongguo Nongmingong Weiquan Chengben Diaocha Baogao*) covering eight provinces of China finished in 2005 had further confirmed the writer’s argument.¹⁴⁰⁸ According to this report, based on a conservative estimation, the comprehensive cost¹⁴⁰⁹ for a farmer worker to get back his wage of RMB 1000 *yuan* is at least RMB 3000 *yuan*.¹⁴¹⁰ For some cases, the comprehensive cost could reach RMB 10,000 *yuan*.¹⁴¹¹ Accordingly, it is beyond doubt that there is a practical need for a relatively tidy labor dispute settlement system especially targeting the disputes between farmer workers and their employers on wage issue. A feasible suggestion might be to skip the first two steps and to make the third and fourth step mutually exclusive, i.e., if both parties agree to apply for the labor arbitration, the decision of arbitration commission is final and with binding force; otherwise, either part has the right to launch a lawsuit directly.

¹⁴⁰⁶ *Ibid.*

¹⁴⁰⁷ *Ibid.*

¹⁴⁰⁸ For more information, please see generally online:

<<http://society.people.com.cn/GB/41158/3485993.html>>;

<<http://www.peacehall.com/news/gb/china/2005/06/200506231016.shtml>> (date accessed: April 10, 2006).

¹⁴⁰⁹ Comprehensive cost includes financial cost, time cost, legal service cost and cost to government. For more information, please see *Ibid.*

¹⁴¹⁰ *Ibid.*

¹⁴¹¹ *Ibid.*

7. The Legal Hierarchy of “Farmer Worker Protection Law”

From the writer’s position, the legal hierarchy of the legislation in question shall be law (in its narrow sense), i.e., its legal authority is equal to the Chinese Labor Law and is only subjected to Constitution.¹⁴¹² The reasons for the above suggestion can be understood as follows: ① As a vulnerable social group with more than 130 million population,¹⁴¹³ the Chinese farmer workers shall deserve the same level of legal protection as is provided to other vulnerable social groups in China, such as women, children and the disabled¹⁴¹⁴; ② as yet, the administrative documents, notices promulgated by the Chinese central government to target certain aspects of discriminatory treatment against farmer workers failed to make a substantial progress on the employment situation of farmer workers. As such, to categorize the legal authority of “Farmer Worker Protection Law” as law (in its narrow sense) shall be much easier to arouse people’s serious attention than to label its legal hierarchy as rule, regulation or administrative decision.¹⁴¹⁵

D. Concluding Remarks

In this part, the writer provides a relatively comprehensive case study on the Chinese farmer workers, including its definition, the jobs that they are usually engaged in and the discriminatory treatments faced by them when they are employed in the cities, such as same job same contribution with different payment, serious wage arrears, chances for employment being limited to certain types of jobs often with dirty and hazardous working conditions, being denied labor rights to rest and overtime working payment as well as no coverage by social security system. Through the writer’s analysis, the root cause behind such employment discrimination is the household registration system with Chinese characteristics. With the introduction of a residential

¹⁴¹² For more information on the Chinese Legal Hierarchy, please see part 2.3 (A) (ii) -- “Lawmaking in China”.

¹⁴¹³ For more information on the exact population of Chinese farmer workers, please see text above accompanying note 1267 to 1269.

¹⁴¹⁴ The Disabled Protection Law of People’s Republic of China (*Canjiren Baozhang Fa*), 1990.

¹⁴¹⁵ For more information on the status of administrative decision, please see above note 1273.

registration system as such, the Chinese rural citizens' basic human right to freedom of internal movement has been seriously denied. Moreover, the Chinese *hukou* system is not only controlling the Chinese citizens' freedom to migrate internally but serving a relatively comprehensive function in practice as well -- a person registered with urban origin under the *hukou* booklet is entitled to governmentally subsidized social welfare system, meanwhile his/her rural counterpart is locked to the land to take care of his/her own subsistence and consumption without any access to the said social benefits. Indeed, there is a *de facto* intangible wall with institutional support between the urban and the rural areas in today's China. Logically, a sense of urban superiority is easily formed under such circumstances. Admittedly, both central and local governments have adopted certain policies to loosen such an overly rigid *hukou* control; yet from the writer's position, these policies are inconstant, piecemeal-based and superficial in nature without touching the core of *hukou* -- artificially denying the equality among its own citizens. Of course, some other causes such as ACFTU's excluding policies as well as a lack of comprehensive legislative protection on farmer workers also have played a role in worsening such employment discrimination based on social origin.

Aiming at the causes abovementioned, the writer hereby proposes certain legal solutions as follows. First and foremost, a reform of the present *hukou* system is critical. Three guiding principles on how to reform today's Chinese *hukou* system are proposed: ① incorporating freedom of internal movement into the *hukou* system, ② abolishing dualism to universalize the current two-tiered, well-segregated labor market, ③ de-linking social-welfare system and *hukou* to realize national treatment to every Chinese citizen. In fact, the writer not only proposes the reform, but also justifies the feasibility of such a dramatic reform on *hukou*. The second solution is to establish independent trade unions so that this vulnerable social group can finally receive some organizational protection especially when necessary legal protection is far from enough.

Last but not the least, considering that there is an urgent need to stop the serious discriminatory treatment on Chinese farmer workers, whereas the former two proposals shall take a relatively long time to work, as a relatively quick and handy solution, a specific law especially to target the current discriminatory treatment faced by farmer workers appears to be desirable. It is believed that only when the three abovementioned proposals work together, could the employment discrimination against the Chinese farmer workers disappear in the near future.

In fact, employment discrimination based on social origin in China is not solely happened to the Chinese farmer workers, but sometimes to citizens even they are with urban origin. For example, in 1998, when the Chinese Supreme People's court planned to recruit ten senior judges from experienced legal professionals, one of the pre-conditions was that the applicant should be a Beijing *hukou* holder.¹⁴¹⁶ In other words, even a Chinese citizen is an urban *hukou* holder (as long as not Beijing *hukou* holder), he/she is nevertheless disqualified to apply for this job. However, such phenomenon is not common and has not happened on a large scale compared with what had happened to the Chinese farmer workers. Besides, from the writer's position, if a dramatic *hukou* reform proposed above can be adopted so that the *hukou* system is finally transformed into a registration purely to prove personal identity and their place of residence with no other additional functions, phenomenon as such is expected to vanish as time goes on. As such, the writer is not going to pay too much attention on this issue in her thesis.

6.4 Conclusion on Chapter Six

After introducing ILO's fundamental convention No. 100 and No.111 on prohibition against discrimination in respect of employment and occupation and China's relevant labor legislation alike, the writer finds out that the general Chinese legislation against employment discrimination is competent; however, the Chinese law keeps silent on the issue of employment discrimination

¹⁴¹⁶ *Supra* 1183 & 666.

based on social origin, which is indeed the most serious aspect of employment discrimination in China, which covers more than 130 million Chinese citizens. With a relatively thorough research coupled with the empirical evidence collected during the writer's field study in Shanghai, China, a comprehensive case study on employment discrimination against the Chinese farmer workers is accomplished, which covers: ① how farmer workers are discriminated when they are employed in the cities, ② why they are discriminated, and ③ how to reform the contemporary Chinese legal system to eradicate such discrimination.

Admittedly, in practice, the basis for discrimination in respect of employment and occupation in China is not limited to social origin only. To be precise, employment discrimination also happens on the basis of gender though there are plenty of domestic legislation not only guaranteeing women's equal rights with man when being employed, but also taking care of women workers' special needs. Accordingly, the problem is not located in legislation *per se*, but in the implementation of law, which is not the focus of this thesis.

Chapter 7: Conclusion: Summary, Problems and Suggestions

7.1 Thesis in Summary

As China is undergoing rapid economic and social transformations, there are increasing concerns in terms of the costs to its people. When moving from a socialist state to one that embraces capitalist concepts, China's legal system, especially those deal with labor rights, needs to adapt to the profound changes. In this context, urgent need arises for China to re-examine its labor law and underlying institutions with a view of reforming them. Even if the political need to deal with the issue has increased, questions remain on the approach that China should take. By mainly adopting a utilitarian approach to the international core labor standards, this thesis provides an original argument for the introduction of certain substantial legislative reform with feasibility in the current Chinese context, which covers four fundamental aspects of labor rights.

Considered as a further concretization of the relevant general principles of human rights, the international core labor standards that are crystallized by eight ILO fundamental conventions and covering four fundamental aspects of labor rights do provide internationally recognized labor standards to **guide** China's legislative reform and its leaders' decision-making procedures. It is observed that "respect for freedom of association reinforces popular participation and buttresses democratic institutions that can address an uneven distribution of the gains from economic growth", and therefore promote social justice;¹⁴¹⁷ it is observed as well that "countries that have eliminated forced labor and the worst forms of child labor and have made important inroad against discrimination in employment and occupation are thriving economically."¹⁴¹⁸ Although ILO fundamental conventions never force a signatory member to obey their standards, its

¹⁴¹⁷ *Supra* 47.

¹⁴¹⁸ *Supra* 10.

influential power is beyond doubt. Once China ratifies the remaining four fundamental conventions, a repeated circle of interaction, interpretation and internalization is expected to be created. As time goes on, institutional habits of leading nations into default pattern of compliance of the fundamental conventions are to be cultivated accordingly. As such, the international core labor standards acquire its “stickiness”, and domestic decision-making structure will become “enmeshed” with international core labor standards. Subsequently, China is likely to “obey” the core conventions out of perceived self-interests. In this thesis, the writer conducts a comprehensive study on the Chinese labor legislation from the perspective of eight ILO fundamental conventions, to find out the gap between them and provide feasible gap-filling solutions.

7.2 Problems Discovered

First, with the transfer from centrally planned economy to market economy, with the dissolution of state’s paternalistic function, with the reform of labor related institutions, it is observed that the interests of Chinese government, especially local governments, and its working class are no longer as consistent as before. When Chinese workers “feel economically disadvantaged, socially disenfranchised and politically excluded”¹⁴¹⁹, whereas state has shown its unwillingness to look after them, Chinese trade union’s monopoly situation as well as its dual function practice have met unprecedented challenges.

Second, in terms of the right to collective bargaining, the relevant Chinese legislation is, *prima facie*, competent. However, its efficacy is questionable. Research has indicated that most of the so-called collective contracts are merely products of an administrative process between the ACFTU and management rather than the real fruit of collective bargaining. As far as the content of the contract is concerned, the lack of substantial provisions to guarantee worker’s rights is the

¹⁴¹⁹ *Supra* 335.

common feature. The issue as to “how to improve the efficacy of the collective bargaining system in China” is worthy to be studied.

Third, this study categorizes the forced labor situation in China into three types based on the subjects involved: ① the subjects of the first type are normal citizens, ② the second type is *laogai* system whose subjects are prisoners, and ③ the third type is RTL system whose subjects are non-criminal law breakers. Although Chinese *laogai* system is always the target heatedly criticized by many human rights NGOs and countries, after a comparative study between ILO Convention No. 29, No. 105 and the domestic legislation on the *laogai* system, this system is argued to be qualified as a permissible exception under the core labor standards. It is undeniable that certain present practices and some previous policies in relation to the *laogai* system are conflicting with the criteria provided by the Core. In addition, some of the products made by inmates do end up with entering into foreign markets. However, no evidence shows that practice as such is systematic and with institutional support at present. The existence of certain illegal practices does not necessarily justify the denial of the value of the Chinese Convicted Labor Reform System as a whole. Indeed, the problem mainly lies in the first and the third type of forced labor. For the first type of forced labor, it is observed that within recent years, with the rapid economic development, forced labor as such started spreading. The recent illegal brick kilns scandal in Shanxi Province once again highlights the severity of the problem. As for the Chinese RTL system, a study between the related ILO fundamental conventions and the relevant domestic legislation shows that the Chinese RTL system is a *de facto* institutionalized forced labor system.

Fourth, a historical review on the child labor problem inside China has indicated that in spite of the substantially increased living standards, this social illness, rather than disappearing thoroughly, started reemerging. The comparative study between the ILO fundamental

conventions against child labor and the relevant Chinese domestic law has pointed out that the Chinese legislation is generally competent. In addition, from the writer's observation, the root cause of the resurface of this social evil in China is neither poverty, nor legislative flaw but the absence of publicly accepted set of moral values to define proper behavior which directly caused a spiritual crisis inside China. After years of disastrous socialist policies and revolutions, there is a disillusioned reaction to social injustice in the Chinese society. A new pragmatic and utilitarian attitude that moves away from the former concern with communal well being but only focuses on personal interests has come into being. As the great rush for improving living standards accelerates, values that emphasize exploitation in the event of child labor as inevitable even necessary start gaining ground. When China is experiencing perhaps the rapidest economic development in its history, its public ethics are falling quickly at the same time.

Fifth, the rapid development of market economy has caused an unprecedented pace of urbanization in China. Farmers, whose social origin is registered as rural citizen, swarmed into cities for working. By the end of year 2005, the number of farmers migrating from rural area to cities had reached 200 million. In this context, a special social group -- farmer workers -- is created. During the busy farming season, they are likely to return to their hometown to work in the field, whereas after that they will fly back to the cities to work. Literature review together with empirical study has shown that most of them will end up with "3D" jobs and discriminative treatment in terms of employment is common. As such, it is fair to conclude that they are the *de facto* second class citizens in the urban areas of China.

7.3 Suggestions

Based on the problems summarized as above, the writer proposes solutions as follows:

First, in order to better represent and guard the Chinese working class during the transitional period, the Chinese trade union's role must be reoriented. ACFTU's heavily politicized nature that overemphasizes a union's productive role as a government assistant, whereas unduly neglects its guardianship role needs substantial reform. An ideal model -- independent trade union system is proposed to sort out the said problems. Justified under the ILO fundamental convention No. 87, the value of the an independent trade union system is outlined as follows: ① fulfilling China's obligation under the treaty law; ② avoiding ACFTU's representative crisis; ③ creating a virtuous competing environment for both ACFTU controlled union and independent union; ④ increasing social stability; ⑤ raising productivity in workplace; and ⑥ benefiting the workers involved in the non-public economy. In spite of various advantages of an independent trade union system, it is observed that its feasibility in contemporary China is not optimistic. The writer therefore proposes a milder solution with more feasibility (a realistic model), which in nature is a bottom up reform inside the current ACFTU system. Such reform includes three aspects, which are ① direct democratic election in grass root trade union, ② reform of the financial system in the grass root union, and ③ taking grass root union leaders' rights seriously. Admittedly, this realistic model might not be able to solve all the problems faced by today's Chinese trade union system, because it is a relatively small step within the ACFTU system without touching certain essential defects -- such as its double function dilemma. However, it is believed that this milder yet doable model that creates a chance to bring about gradual improvement inside ACFTU might be the only positive compromise available at the moment.

Second, as for how to deal with the inefficacy problem of the collective bargaining system in China, the writer tries to sort out the issue from three aspects. The independence of the Chinese trade union is proved to be critical to the establishment of an efficient collective bargaining system. In the absence of a trade union in a work place, especially in the non-public sector, an

effective solution is proposed --“independent union system”. Admittedly, the feasibility of such a model is seriously blocked due to CCP’s sensitivity on the establishment of an independent organization in China. A backup plan is hereby proposed. A specific model law promulgated by the ACFTU solely targeting union in non-public sector and especially designed to accord with its features is suggested. Meanwhile, a “simultaneous approach” is proposed in order to borrow governmental power to assist the establishment of a trade union in a private enterprise. Finally, right to strike is argued to be critical to the success of a collective bargaining system. A legislative review shows that due to the fact that right to strike is both mis-linked to revolutionary ideas and misunderstood as a method for class struggle only belonging to the capitalist world by the Chinese authority, the *de facto* domestic statutory attitude towards this right is “unsupportive”. In fact, the rise of private economy, the freedom granted to SOEs, together with the introduction of the labor contract system in China have already transformed the former leading class into a vulnerable social group. In order to balance the disproportionate bargaining power between the Chinese working class and their employers so that an environment conducive to a healthy collective bargaining system can be built, the writer proposes three steps based on some other countries’ legislative experience on strike to regulate the right to strike in China, which includes ① properly define right to strike, ② carefully confine right to strike, and ③ reasonably protect a lawful strike.

Third, to curb the spreading of the first type of forced labor, the focus is to improve the implementation of the Chinese legislation against forced labor. Admittedly, to have a better implementation of law is a complicated long term task. The issues of judicial independence, judges’ professionalization as well as corruption are discussed for a better legislative implementation system in China. As for the Chinese RTL system, a complete abolition of such system is suggested. The justification of such an approach is outlined as follows: ① RTL system

is argued to be an institutionalized forced labor system that partly serves as a means for punishing people for their mere expression of political or ideological opinion, which is incompatible with China's obligation under the CIL; ② RTL is inconsistent with certain basic principles of ROL in that its legislation is lack of legitimacy and its punishment is unreasonably harsh compared with the offence and other principal punishments under the Chinese penal code; ③ the lack of effective monitoring mechanism of RTL's investigation, approval and administrative appeal may bring about power abuses that can endanger Chinese citizens' basic rights; and ④ some rules and regulations of RTL are highlighted as conflicting against each other. In addition, the deep reason for China to maintain RTL as it is has been discussed in this paper as well. It is discovered that no matter how big the gap between RTL system and the basic ROL principles, and the gap between RTL system and the core labor standards against forced labor, the efficiency and non-judicial nature of the RTL that can lead to a quick restoration of social and political stability and the maintenance of CCP's one party control, as well as its help to immune CCP from or reduce the chances for it being exposed to criticism for human rights abuses are too cherished to be given up easily.

Fourth, as a complex legal and social issue, child labor needs a comprehensive solution. Although the domestic legislation still leaves something to be desired, generally speaking, it is competent and consistent with the ILO fundamental conventions No. 138 and No. 182. Based on the characteristics of child labor phenomena in China, the writer proposes certain suggestions beyond legislative reform to curb the reemergence of child labor. These suggestions are as follows: ① proper governmental role: after all, government has the greatest responsibility for eliminating child labor as well as the broadest resources for addressing this social problem. Building correct understanding on the root cause of child labor, de-linking the ideas of poverty and child labor, guiding public morality towards a positive direction to reach common good and establishing a

competent educational system are four crucial aspects for the Chinese government to take into consideration to curb child labor; ② critically evaluating the link between child labor social clause and trade sanction: the writer reviews trade sanction's self-punishment nature, limited scope and effect, questionable jurisprudential origin, potential risk of causing trade protectionism as well as the humanitarian crises that sanction might bring about. It is submitted that a speculative analysis on trade sanction's effect on a targeted country like China needs to be studied carefully before the coercive trade tool is emotionally proposed to impose; and ③ COC movement and social labeling program: both literature review and empirical study have shown that their effects to curb child labor are only marginal in the current Chinese context.

Fifth, a comparative study between the Chinese legislation with regard to discrimination in respective of employment and occupation and ILO fundamental Convention No. 100 and No. 111 has shown that the Chinese labor law keeps silent on the issue of discrimination with regard to color, political opinion and social origin. According to the writer's research, employment discrimination based on social origin is the most serious aspect of discrimination with regard to employment in China, which involves at least more than one tenth of the Chinese population. An all-round case study on the Chinese farmer workers has pointed out that they are the *de facto* second class citizen in the urban areas of China. The root cause of such discrimination is argued to be the Chinese *hukou* system, which is directly responsible for building an intangible wall with institutional support between the urban and the rural areas of China. In order to equally share the fruits of economic and social development, three guiding principles on how to reform the *hukou* system are proposed. They are principles of: ① incorporating freedom of internal movement into the *hukou* system, ② abolishing dualism to universalize the current two-tiered, well-segregated labor market, and ③ de-linking social-welfare system and *hukou* to realize national treatment to every Chinese citizen. In addition, the value of an independent trade union

in protecting farmer workers from being discriminated is discussed. Considering that the abovementioned reforms take a relatively long time to happen, whereas the rights and interests of the farmer workers are being violated everyday, there is an urgent need to stop such serious discrimination. Therefore, a specific law -- “Farmer Worker Protection Law” especially targeting the interests and rights of farmer workers are proposed. Certain important aspects of this law are discussed. They are: ① the general principles of the law, ② wage security, ③ labor safety and sanitation, ④ working hours, leaves and public holidays, ⑤ social security system, ⑥ dispute settlement and ⑦ the legal hierarchy of the said law.

7.4 Concluding Remarks

To be honest, the legislative reforms proposed in this thesis are not able to sort out all the problems highlighted. After all, legislation *per se* is not panacea. Indeed, the general construction of ROL, the improvement of public awareness, the development of market economy, the establishment of democracy, the cooperation between the Chinese government and international organizations such as ILO should all work together to help China fill the gap between international core labor standards and the Chinese labor law so that the costs to its people during the transitional period can be reduced.

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