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CHINA'S LABOR CONTRACT LAW AND THE LIBERALIZATION OF GLOBAL MARKETS: WILL EMPLOYEES' RIGHTS EQUATE TO EMPLOYERS' NIGHTMARES?

BY: S. BRECKENRIDGE THOMAS¹

Abstract: Lower labor costs and realization of profits have been key components in the expansion of the global market. As we continue to witness the prolific liberalization² of the global market, it is essential that we remember the importance of human capital. Workers³ play a paramount role in the realization of continued and sustained global market growth. Paradoxically, sustained growth in the global market is also fueled by the absence of workers' rights and the resulting reduction of labor costs. Thus, multi-national companies and workers employed by multi-national companies, have encountered a seeming contradiction of workplace realities. From a capitalistic economic perspective, it is necessary for multi-national companies to compete for market share and realize profits. However, in order to promote social harmony and ensure against large-scale social unrest, workers must be given basic rights ensuring economic security and workplace justice. China has enacted the Labor Contract Law to address challenges surrounding these issues. This paper will discuss the efficacy of China's embracing the rule of law so as to effectively enforce the Labor Contract Law. The paper will also give an overview of the concepts forming the foundation of the rule of law. Further, the paper will offer a brief comparative analysis of the United States' use of the rule of law in relation to resolving post-slavery labor issues. Finally, the paper will recommend a model system for use by China in enforcing the Labor Contract Law.

Key Words: Labor Contract Law, Rule of Law, Multi-National Companies, Social Harmony, Workers

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² "Liberalization" is defined as the promotion of foreign trade and business investment through deregulation, privatization, and the elimination of protectionist trade barriers. *See* Ignacio De Leon, Ph.D., Latin American Competition Policy From Nirvana Antitrust Policy To Reality-Based Institutional Competition Building, 83 CHI.-KENT. L. REV. 39, 42 (2008) ("The ultimate purpose of economic liberalization in transitioning and developing countries is promoting entrepreneurial creativity, innovation, and economic growth, all of which were stifled during previous decades of burdensome regulations, trade protectionism, and government dirigisme.").

³ "Workers" refers to China's rural and urban laborers.

1. Introduction

The right to work in China is both a fundamental human right and a constitutional right.⁴ In fact, according to the Chinese Constitution, citizens of China not only have a right to employment, but also a duty to work.⁵ The interplay between the right to employment and duty to work has a significant impact on China's economic growth.⁶ Currently China grapples with the challenge presented by the need to ensure job growth for tens of millions of individuals unemployed as a result of being laid-off from state-owned enterprises.⁷ Estimates suggest that from 100 million to 150 million surplus rural workers have migrated from the rural areas to the cities in search of permanent employment.⁸ If employment issues are largely unaddressed or employment laws ineffective, human nature dictates that social unrest will follow, which could result in significant negative implications for China's economy and the global economy. Thus, the Labor Contract Law, has been enacted to address the potential for large-scale social unrest resulting from the lack of adequate laws protecting workers' rights.

The general purposes of the Labor Contract Law are three-fold. The law has been designed to: (1) improve upon the employment contract procedures; (2) develop consensual and harmonious contractual relationships; and (3) protect the rights and interests of workers.⁹ This law complements China's move towards economic liberalization and social harmony.¹⁰ In achieving economic liberalization and social harmony, China faces the challenge of balancing the interests of multi-national companies and domestic workers. Generally, the implementation of workers' rights result in an increase in labor costs.¹¹ Thus, employers typically are opposed to substantial rights for workers in the workplace.¹² China's enactment of the Labor Contract Law exemplifies positive movement in addressing this challenge. However, enactment of the Labor Contract Law, alone, will not guarantee social harmony, or the absence of social labor unrest.

⁴ CONSTITUTION, PEOPLE'S REPUBLIC OF CHINA Art. 42 ("Citizens of the People's Republic of China have the right as well as the duty to work."); *see also* <http://www.china.org.cn/e-white/7/7-V.htm> ("A citizen's right to work is the essential condition for his right to subsistence. Without the right to work, there will be no guarantee for the right to subsistence.")

⁵ CONSTITUTION, PEOPLE'S REPUBLIC OF CHINA art. 42 ("Citizens of the People's Republic of China have the right as well as the duty to work.")

⁶ *See* Huang Lie, *Chinese Citizen's to Work*, in CONSTITUTIONALISM AND CHINA 484 (Li Buyun ed., 2006).

⁷ *See* CIA-The World Factbook, Economy Note on China, *available at* <http://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#Econ> (last visited December 20, 2008).

⁸ *Id.*

⁹ *See generally* LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON EMPLOYMENT CONTRACTS, CHAPTER 1, ARTICLE 1 (2008).

¹⁰ For an excellent discussion on social harmony *see* Joseph Kahn, *China Makes Commitment to Social Harmony*, N.Y. TIMES, October 12, 2006.

¹¹ *See e.g.*, David Barboza, *China Drafts Law to Boost Unions and End Abuse*, N.Y. TIMES, October 13, 2006.

¹² *Id.*

To effectively enforce the Labor Contract Law, China must consider allowing for the utilization of principles that form the foundation of the rule of law. One principle that is foundational to the rule of law is the establishment of a court system, independent of the government. In accordance with this principle, China should explore the establishment of an independent court system designed to administer the Labor Contract Law. This court system would operate to define the rights of domestic companies, multi-national companies, and workers. Additionally, the court system would operate to ensure that the Labor Contract Law would be equally applied to workers, multi-national companies and domestic companies. China's continued growth in the global market may very well be predicated upon operation of the rule of law in the enforcement of the Labor Contract Law.

2. Principles of rule of law have been adopted by democratic governments and undemocratic governments.

2.1 Overview of the Rule of Law

In its most basic form, the rule of law exemplifies the principle that no one is above the law. One crucial application of the rule of law mandates that governmental authority be legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced by procedural steps, referred to as due process. Typically, a Constitution supports the foundation of these laws. Pursuant to the rule of law, both citizens and governmental leaders are accountable under the law. Under this concept, legal systems operate to interpret the law and ensure impartial accountability. The rule of law, however, is not necessarily a democratic phenomenon. Some models of the rule of law place emphasis on how the legal system upholds the law and not necessarily the fairness of the law.¹³ Thus, it can be argued that dictatorships and undemocratic nations can operate under a rule of law.

2.2 The rule of law in the United States evolved over time.

In its current form, the rule of law in the United States came into existence after a prolonged process of political unrest, violence, revolutions, and a civil war. The United States

¹³ For example, many German philosophers writing before the First World War held that the law derives its legitimacy not as a manifestation of the popular will but as a function of the power of the state. *See, e.g.*, William L. Shirer, *THE RISE AND FALL OF THE THIRD REICH* 98-99 (MJF Books, 1990). "The State 'has the supreme right against the individual, whose supreme duty is to be a member of the State.'" *Id.* at 98. (quoting Georg Wilhelm Friedrich Hegel). "It does not matter what you think, so long as you obey [the State]." *Id.* at 99 (quoting Heinrich von Treitschke). These ideals were carried on and expanded by the Nazi party after Adolf Hitler became Chancellor of Germany in 1933.

Constitution formulates the foundation of the rule of law. In the American tradition, the rule of law embodies the notion of the supremacy of the law. There are four main principles that form the basis of the rule of law: (1) the supremacy of regular law over arbitrary power; (2) equality under the law for all classes of citizens; (3) the law of the constitution forms the foundation of the rights of individuals; and (4) the active role of the courts in administering the ordinary law, defining the rights of individuals and enforcing the laws. In its normative sense, the rule of law gradually has become associated with other concepts such as presumption of innocence¹⁴, double jeopardy¹⁵, habeas corpus¹⁶, legal equality,¹⁷ separation of powers between the executive, legislative and judicial branches of government,¹⁸ and court interpretation of the law¹⁹.

Theoretically, the principles forming the foundation of the rule of law are sound. However, human application of these principles can be flawed. For example, from 1619 to 1865, the United States upheld laws that permitted and condoned the practice of human slavery.

¹⁴ Presumption of innocence is defined as “the fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence.” BLACK’S LAW DICTIONARY 1225 (8th ed. 2004). See also *Woolmington v. Director for Public Prosecutions* [1935] A.C. 462, 481 HL (“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt . . .”).

¹⁵ Double jeopardy is “[t]he fact of being prosecuted or sentenced twice for substantially the same offense.” BLACK’S LAW DICTIONARY 528 (8th ed. 2004). The Supreme Court of the United States has interpreted the “Double Jeopardy Clause” of the Fifth Amendment to the United States Constitution (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .”) to encompass three important protections for criminal defendants. *Schiro v. Farley*, 510 U.S. 222, 229 (1994). First, criminal defendants may not be punished multiple times for committing a single offense. See *Blockburger v. United States*, 284 U.S. 299 (1932). Second, if a criminal defendant is tried for an offense and convicted, she may not be tried again for the same offense. *Schiro v. Farley*, 510 U.S. 222, 229 (1994). Third, if the defendant is tried for an offense and acquitted, the acquittal is a total bar to future prosecution for the same offense even when evidence is later found that conduces to establish the guilt of the person acquitted. See *Ball v. United States* 163 U.S. 662, 672 (1896) (“A verdict of acquittal . . . is a bar to a subsequent prosecution for the same offense.”).

¹⁶ “That you have the body.” BLACK’S LAW DICTIONARY 728 (8th ed. 2004) (“A writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.”).

¹⁷ “A number of distinct meanings are normally given to the provision that there should be equality before the law. One meaning is that equality before the law only connotes the equal subjection of all to a common system of law, whatever its content A second theory asserts that equality before the law is basically a procedural concept, pertaining to the application and enforcement of laws and the operation of the legal system A third meaning normally borne by declarations that all are equal before the law, perhaps no more than a variant of the second, is that State and individual before the law should be equal.” Polyvios G. Polyviou, *THE EQUAL PROTECTION OF THE LAWS* 1-2 (1980).

¹⁸ The Constitution of the United States “divi[des] governmental authority into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the other branches can [encroach](#).” BLACK’S LAW DICTIONARY 1396 (8th ed. 2004).

¹⁹ “A court’s power to review the actions of other branches or levels of government” BLACK’S LAW DICTIONARY 864 (8th ed. 2004).

Pursuant to these laws, individuals from the continent of Africa, were captured and sold into the U.S. slavery system. The slave laws denied basic human rights, encouraged ongoing systems of racial segregation, and caused economic disenfranchisement of those held in slavery.

Eventually, opposition to the slavery laws increased and led to social unrest and a four-year²⁰ Civil War.²¹ After the Civil War, the United States government enacted a number of laws to address issues of racial discrimination presented in the post-slavery nation.²² On January 31, 1865, the United States Congress ratified the Thirteenth Amendment to the United States Constitution, abolishing slavery.²³ However, the United States Supreme Court case law interpreted these laws in such a way as to limit the rights of freed slaves.²⁴ Indeed, in response to the implementation of these laws, a number of southern states²⁵ developed practices pursuant to “Jim Crow” laws²⁶ that operated to create a separate and unequal society based upon race. The United States Supreme Court interpreted these laws so as to allow for the proliferation of segregationist practices.²⁷ American citizens of different races and from different social classes organized, protested and sacrificed their lives to bring this horrific system of laws to an end.²⁸ To continue this evolutionary development of the law, the United States government, in response to national social unrest, enacted laws such as Title VII of the Civil Rights Act of 1964²⁹, and the

²⁰ The American Civil War between the northern and southern states occurred from 1861 to 1865.

²¹ For a thorough treatment of the history of the American Civil War, see generally James M. McPherson, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (1988).

²² See The Fourteenth Amendment to the U.S. Constitution, Civil Rights Acts of 1866 and 1875.

²³ The Thirteenth Amendment was fully ratified by the required three-fourths of the state legislatures on December 18, 1865.

²⁴ See e.g., *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896) (holding that laws requiring the separation of blacks and whites in the use of public facilities do not violate the 14th Amendment of the United States Constitution so long as the facilities are equal).

²⁵ Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Virginia, and West Virginia.

²⁶ “Jim Crow” laws enforced racial segregation primarily in the southern states of the United States from 1877 until the United States Supreme Court overturned *Plessy v. Ferguson* in 1954. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.”). See generally, Internet Modern History Sourcebook, U.S. Civil War available at <http://www.fordham.edu/hallsall/mod/modsbook27.html> (last visited December 20, 2008).

²⁷ See, e.g., *Scott v. Sandford*, 60 U.S. 393 (1857) (the “Dred Scott Case”); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁸ Post-slavery United States Supreme Court case law led to the national social unrest that birthed the U.S. Civil Rights Movement of the 1950s and 1960s. See generally Juan Williams, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-1965* (Penguin Books 1988).

²⁹ 42 U.S.C. §2000e, *et seq.* This Act prohibits employment discrimination based on race, color, sex, national origin, and/or religion.

National Voting Rights Act of 1965³⁰. These laws laid the foundation for the implementation of other laws that further guaranteed equal treatment for all.³¹

A casual study of United States' history with regard to slavery and racial inequality might lead one to assume that during this turbulent era, the rule of law was used to condone racial inequality and human exploitation.³² However, the enactment of racial segregation laws exemplified a perversion of the true essence of the principles of rule of law.³³ For the most part, the segregation laws of post-slavery America embodied the principles of rule by law.³⁴ The principles of rule of law, have continued to evolve to better emulate the Constitution that guarantees equal rights for all United States citizens. In the United States, the principles that form the basis of the rule of law continue this evolutionary process to ensure the notion of supremacy of the laws and equality for all citizens.³⁵

2.3. China's use of rule of law must also evolve over time, however, with regard to enforcement of the Labor Contract Law, time is of the essence.

As an emergent country, China may also evolve in relation to the implementation and use of the rule of law. China's government should explore using rule of law principles in enforcing the Labor Contract Law. In China, discussions centered upon the conceptual notions of the rule of law conclude that laws exist to enhance the power of the state and nation.³⁶ Thus, China's government is said to operate under the concept of rule by law rather than rule of law.³⁷ As China continues to develop and move from an isolated socialistic economy to an open market economy, the concept of rule of law will best complement global market goals.

³⁰ 42 U.S.C. §1973-1973ee-6.

³¹ See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206(d); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. § 794.; Titles I and V of the American with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, Civil Rights Act of 1991, 42 U.S.C. §§ 2000e *et seq.*

³² See generally *supra* note 6.

³³ *Id.*

³⁴ *Id.*

³⁵ Further evidence of this evolutionary process is seen by the recent election of Barack Hussein Obama as President of the United States. President Obama is the first American of African descent to be elected to the office of President. Obama's election refutes the misplaced opinions that suggested America would remain eternally racist.

³⁶ See Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law* 17 UCLA PAC. BASIN L.J. 125, 135 (2000) (noting that the promotion of rule through a "legal system" may be in conflict with the "rule of law" as it is commonly understood). "The problem with the term "legal system" (fazhi), which has been used (for example, in the call for "strengthening the socialist legal system") to the exclusion of "rule of law" for many years in the PRC, is that it may be interpreted to mean "rule by law" rather than "rule of law." *Id.*

³⁷ *Id.*

The Labor Contract Law is important to the open market economy because it signals to the citizenry of China that the government is aware of the plight of the disenfranchised and will work to resolve workplace issues that negatively affect workers. The law also signals to multi-national companies that China's government is serious about ensuring against exploitation of its working citizenry. In order to balance the interest between the workers' rights and employers' fears of increased labor costs, China's government should be intentional about ensuring the laws will be equally applied to both domestic and multi-national companies. The government must also ensure that the workers are educated about the law and have full confidence in the procedures designed to allow access to the benefits derived from the law. Thus, proper mechanisms must be in place to ensure that the law is followed and applied consistently. It is imperative to ensure that the Labor Contract Law is not only implemented, but also followed and enforced.

The United States' historical example with regard to slavery and post-slavery issues, clearly manifests a direct correlation between operation of the rule of law and the realization of basic human rights. If the current movement towards an open society in China allows for the embracing of the rule of law rather than rule by law, the result will likewise be the enforcement of laws to ensure human rights, which will naturally lead to enforcement of employee rights in the workplace. China has established mechanisms for the operation of a court system. However, with regard to the enforcement of the Labor Contract Law, it is of utmost importance that a separate court system is established to operate independent of the executive and legislative mandates.³⁸

3. A model system for enforcement of the Labor Contract Law

One of the most pressing challenges for China's government is to develop a system that enforces the enacted Labor Contract Law and facilitates oversight and accountability in the upholding of the laws.³⁹ Perhaps the enactment of the Labor Contract Law presents an

³⁸ See Huang Lie, *Rule of Law in China: Ideal and Reality*, in CONSTITUTIONALISM AND CHINA 184-85 (Li Buyun ed., 2006) (explaining that it is imperative for the Chinese government to establish a system of impartial administration of justice where the courts make determinations based upon the facts of the case).

³⁹ Victor Mallet, *The Centre and the Provinces: An Enduring Dysfunctional Relationship*, FINANCIAL TIMES, Oct. 16, 2007, available at http://www.ft.com/cms/s/2/9fbd4698-7561-11dc-b7cb-0000779fd2ac,dwp_uuid=07c92c3a-757f-11dc-b7cb-0000779fd2ac.html (“[T]he most important issue in Chinese politics and government today, as it has been for centuries, is arguably not the latest political maneuvering in Beijing but the enduringly dysfunctional relationship between the central government and the provinces. While the outside world imagines an authoritarian Communist party firmly imposing its will on the whole of China and its 1.3 billion inhabitants, the reality is that national policies and directives announced with great fanfare in Beijing are frequently ignored by party leaders at the provincial and city levels, even though these local leaders may themselves aspire to national office. The old Chinese saying about the limited writ of the central government—*shan gao, huang di yuan* (“the mountains are high, and the emperor is far away”)—is as relevant today as it ever was”).

opportunity to formulate a process that utilizes the concepts of the rule of law along with complementary mechanisms allowing for judicial interpretation of the law.⁴⁰

As a potential model for enforcement of the Labor Contract Law, China should consider the United States' regulatory scheme for ensuring adherence to laws prohibiting federal sector workplace discrimination.⁴¹ Under this model, laws have been established prohibiting certain instances of workplace discrimination.⁴² Pursuant to these laws, the Equal Employment Opportunity Commission (EEOC), an administrative agency, was created to conduct investigations and hearings with regard to allegations of federal workplace discrimination.⁴³ Cases are initially heard by an administrative judge and if not resolved, proceed to federal district court.⁴⁴ Parties have the right to proceed to the Circuit Court of Appeals and finally to the United States' Supreme Court.⁴⁵ The ruling by the United States Supreme Court constitutes a final disposition of the case.⁴⁶ Pursuant to this scheme, there is a developing body of United States case law that has interpreted the laws prohibiting workplace discrimination. This body of case law serves as precedent to be followed in other cases.⁴⁷

A similar scheme could be used in enforcing China's Labor Contract Law. However, the United States' model need not be strictly followed. As an emergent country, China has the benefit of studying a number of models so as to determine which model best complements its evolving global development.⁴⁸ For example, the United States' process requires lengthy inter-agency procedures that are duplicative in nature and unreasonably time consuming.⁴⁹ Thus, the model adopted by China's government could eliminate the time consuming aspects of the procedures and by so doing eliminate more than 100 days from the process. There are other United States' models for implementing mechanisms involving labor law issues. What is of utmost importance is the identification of processes that will complement the laws so as to provide the intended benefit to the citizenry and continue support to China's economic growth and development.⁵⁰

⁴⁰ See generally Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction of International Investors*, 7 CHI. J. INT'L L. 133-138 (2006).

⁴¹ Appendix A.

⁴² Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*

⁴³ Regulations can be found at 29 C.F.R. §1600, *et seq.* Regulations specifically governing federal sector workplace discrimination can be found at 29 C.F.R. §1614.

⁴⁴ *Id.* at §1614.310.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See e.g. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)(setting forth the requirements for establishing a prima facie case of discrimination based upon race).

⁴⁸ Two other models to consider are the regulatory schemes of the U.S. Merit Systems Protection Board and Federal Labor Relations Authority. These regulatory schemes can be found at www.mspb.gov and www.flra.gov.

⁴⁹ See Appendix A, *supra* note 56.

⁵⁰ Melissa S. Hung, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213, 227-241 (2008).

4. Conclusion

Despite the current dilemmas resulting from the economic downturn of the global market, China is in the enviable position of unprecedented economic growth and development. The continued growth and economic stability of China and the global market is predicated upon a number of factors. One of the most important factors is the implementation of laws designed to complement economic expansion.

Adopting and implementing the principles of the rule of law is imperative to continued global market growth. China should elect to follow the principles of the rule of law in relation to enforcing the Labor Contract Law. Pursuant to rule of law principles, China should design and operate a court system independent of the government. This court system must have the authority to interpret the laws enacted by the government. By so doing, the government will effectively engender the trust and confidence of the multi-national companies and the workers. Additionally, China must assure the citizenry that the government's paramount interest is to ensure the adoption of laws that guard against exploitation of workers. Further, China must continue the dialogue with multi-national companies and offer assurances that all laws will be applied equally to domestic and foreign companies doing business in China. Thus, if China will enforce the Labor Contract Law through an independent court system operating under the principles of the rule of law, employee rights will not equate to employer nightmares in the global market.

APPENDIX A



