

LEGAL EMPOWERMENT OF LABOUR: From Perspectives of Non-discrimination and Legal Inclusion

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Abstract

This paper mainly deals with labour rights in terms of how the most disadvantaged workers, here particularly referring to migrant workers, can have their entitled human rights protected through legal empowerment in the context of China. To address this problem, this paper firstly goes through the literature on legal empowerment to clarify its significance. Then it portrays a picture of the rights situation of migrant workers in China, stressing that migrant workers need to be empowered to fight against discrimination. In the third chapter, experiences from the U.S. and the Philippines in respect of how to empower the disadvantaged are learned. Finally, the paper applies the lessons to the China context and proposes an integral framework of legal empowerment of labour in China.

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Introduction

The notion of legal empowerment was put forward in response to the seemingly false hypothesis that legal reform will necessarily lead to poverty alleviation, which is one of the millennium goals. It is found that problems do not only lie in the imperfection of the legal system, but also whether those who are affected by the legal system have the capacity to make use of it and assert their entitled human rights. Legal empowerment provides an initial answer to this question, by saying that a capacity building process would probably enable people to actively and effectively take advantage of legal tool to strengthen their control over their own lives. This notion comes from good practices in various countries and is applying to practices all over the world.

In China, the labour, especially the migrant workers, is a very disadvantaged group vulnerable to human rights violations. Due to structural discrimination, they do not equally enjoy human rights as others and feel difficult to access justice to obtain remedies. The paper then tries to explore how to empower the migrant workers so as they can use legal tools to assert their rights.

Experiences from the U.S. and the Philippines are examined. It is found that an integral framework of legal empowerment seems really effective.

Therefore, the paper finally turns to the context of China, exploring the way of empowering migrant workers in China through abovementioned strategies in combination with the current legal system.

Chapter1 Legal Empowerment—The Conceptual

Framework

1. 1 Origin

The research on legal empowerment could be traced back to the Law and Development Movement in 1960s. Launched by U.S Agency for International Development (USAID) and Ford Foundation, this movement tried to explore how law as a tool could contribute to the socioeconomic development in developing countries, through practical programmes as well as academic projects. The general assumption of this movement was an instrumentalist one originated from “liberal legalism”, suggesting that social change could be achieved by rule of law, thus through reforming substantive laws and judicial systems, development will be realized. In addition, it was suggested that educating legal professionals contributes the most to the reform process. A decade later, the movement was declared a failure for several reasons such as lack of guiding theories in respect of the relationship between law and development, insufficient local participation resulting from over-reliance on foreign resources, exclusion of informal justice systems and essentially, unreasonable optimism on the transplantation of American legal system (i.e. liberal legalism) into developing countries.¹

¹ The World Bank, “Law and Development”, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LawandDevelopmentMovement.pdf>. It is necessary to mention that there were alternative views on law and development (such as positivism and eclectic critic). However, they were not as dominant or relevant as the “instrumentalism” and didn’t overturn the underlying principle of liberal legalism. Further reference: International Legal Centre, “Law and Development – The Future of Law and Development Research”, published by the International Legal Centre, New York and the Scandinavian Institute of African Studies, Uppsala, 1974.

However, research on this area didn't die away like this. Rather, scholars and organizations exerted to prove that development couldn't be achieved within a short time on one hand, and on the other hand, to revise and improve their research. In a publication by the Asian Development Bank (ADB) in 1995, it is recognized that there is "vital connection between sound and responsible systems of public administration and the effective and equitable operation of the economy" which needs "participatory democratic framework" and "strengthening the legal system and regulatory agencies".² While stressing the importance of law reform, the publication perceives law more as a facilitator of economy rather than controller and prefers to involve civil society into this process instead of insisting on the primacy of the government. Besides this, a country-specific consideration doubting the simple transplantation of American legal system has been noted.

The Ford Foundation, which began to support law-related activities to promote human rights and development around the world, published a volume in 2000 summarizing its main work in this area since 1950s. As the editors have addressed the volume, the Foundation has explored "many roads to justice" including university legal aid clinics, public interest litigation, non-lawyers as legal resources etc.³ These fruitful programmes carried out by the Foundation have proven that it is too early to deny the potential of law and development research just one decade after its commencement. However, these programmes don't apply the exactly same logic and approach as the above mentioned "instrumentalist" ones, rather, the absolute top-bottom model has been abandoned and multi-actors are involved. What's more, context has been taken as a critical factor. This new approach appears as an early form of legal empowerment the conception of which will be discussed in details next.

² Asian Development Bank, Governance: Sound Development Management, August 1995, www.adb.org/documents/policies/governance/govpolicy.pdf, p.1.

³ Mary McClymont and Stephen Golub, Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World, Ford Foundation, 2000.

The conception of Legal Empowerment was first articulated by Stephen Golub, the leading researcher in this area currently, in one of his articles written for the ADB. As mentioned above, the ADB has noted the significant role of good governance playing in the socioeconomic development, in one of its policy papers in 1999, stating that “*in ADB's view, poverty is a deprivation of essential assets and opportunities to which every human is entitled...Beyond income and basic services, individuals and societies are also poor and tend to remain so – if they are not empowered to participate in making the decisions that shape their lives*”.⁴ It could be inferred from this point that poverty is not just a simple fact of paucity of income and cannot be reduced by direct provision of money and services. Rather, it results from the deprivation of fundamental human rights and opportunities that everyone is inherently entitled and should be solved through the enhancement of capacity to participate in decision-making process, thus they can gain more control of their own lives. Since then, the Bank had been trying to explore how could legal literacy⁵ effectively help the disadvantaged in asserting their rights thus to achieve poverty reduction. The report in which Golub has introduced the new conception is one of the outcomes for an ADB’s research project. As an experienced law professor who has been devoting to development and human rights related research, Golub has published a great quantity of books and articles on law-related development issues, much focus being placed on civil society involvement and democracy process in developing countries.⁶ The introduction of the conception of legal empowerment is systematization of the previous legal literacy work done by the ADB as well as similar activities in other development organizations.

⁴ ADB. Fighting Poverty in Asia and the Pacific: The Poverty Reduction Strategy of the Asian Development Bank), 1999, available at: http://www.adb.org/Documents/Policies/Poverty_Reduction/Poverty_Policy.pdf p. 5.

⁵ ADB, Technical Assistance Compilation Report, RETA 5856: Legal Literacy for Supporting Governance. The term “legal literacy” was used to describe the capacity building programmes carried out by the ADB prior to the introduction of “legal empowerment”. Golub compared the two terms and explained why he preferred legal empowerment in his article mentioned in note 7.

⁶ Further information on Stephen J Golub, please see: <http://online.ceu.hu/legal/pdf%20documents/Stephen%20Golub%20CV,%20June%202009.pdf>.

1.2 Conception

Legal empowerment, as Golub describes, is “the use of law to increase the disadvantaged population’s control over their lives.”⁷ To stress the difference between legal empowerment and law reform, Golub renewed the conception in his working paper on Democracy and Rule of Law Project by the Carnegie Endowment for International Peace: “Legal empowerment is the use of legal services and related development activities to increase disadvantaged populations’ control over their lives”.⁸ It includes education aiming at capacity building. Therefore, legal empowerment is a process, through which the disadvantaged become capable of using legal tools, and a goal referring to the actual achievement made by them for themselves.⁹ The dual feature makes legal empowerment a hybrid of theory and action in the sense that the theory comes from practical work and can then guide further efforts.

Legal empowerment process emphasizes the role of the disadvantaged and the civil society in identifying their real legal needs, pays attention to informal justice and administrative agencies and does not blindly rely on foreign (especially Western) experience. Accordingly, legal empowerment activities are mainly in the form of the provision of legal services such as litigation, non-judicial representation, education of communities and paralegals and related activities, for example, community organizing and the use of media.¹⁰ The general objective of legal empowerment is poverty alleviation and then in a broader sense to achieve omni-perspective development addressing problems like gender, race and other human rights issues.

⁷ Stephen Golub, Legal Empowerment: Advancing Good Governance and Poverty Reduction, in Law and Policy Reform at the Asian Development Bank, 2001 Edition, Office of the General Counsel (Manila: Asian Development Bank). Available at http://www.adb.org/Documents/Others/Law_ADB/lpr_2001.pdf, p. 25.

⁸ Stephen Golub, Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative, working paper for the Democracy and Rule of Law Project by the Carnegie Endowment for International Peace, 2003, p. 25.

⁹ See 7, p.26.

¹⁰ See 8, p. 26.

After the declaration of Millennium Development Goals (MDGs), there has been a worldwide commitment to poverty alleviation and the increased attention has been drawn on the disadvantaged as the subject of this process, thus more and more scholars and organizations devote to the research. The most significant one is the United Nations Development Programme (UNDP) which launched a Commission on Legal Empowerment of the Poor (CLEP) in 2005 to conduct comprehensive research on legal empowerment in developing countries. The Commission consisted of policymakers and human rights/legal practitioners from all around the world, both developing and developed countries. It completed its work in 2008 and produced reports.¹¹

As stated in the Commission's final report:

*“Legal empowerment is the process through which the poor become protected and are enabled to use the law to advance their rights and their interests...It involves the poor realising their full rights... through public support and their own efforts as well as the efforts of their supporters and wider networks. Legal empowerment is a country and context-based approach that takes place at both the national and local levels.”*¹²

The Report provides plentiful statistics and analysis on the serious exclusion of the poor from formal legal system and how the neglect of informal justice system and administrative agencies exacerbates the problem. Accordingly, the report suggests a detailed agenda for legal empowerment process through four pillars: access to justice, property rights, labour rights and business rights.

Similarly, in a publication by the USAID, it is suggested that the definition of legal empowerment should be revised as follows based on the comparison and analysis of the previous articulators:

“Legal empowerment of the poor occurs when the poor, their supporters, or governments—employing legal and other means—create rights, capacities, and/or

¹¹ Further information please see: http://www.undp.org/legalempowerment/clep_archive/index.html.

¹² The Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone (Volume I), 2008, p. 26.

*opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization.”*¹³

Lorenzo Cotula, a senior researcher in the International Institute for Environment and Development (IIED), also conducted study for a legal empowerment project funded by the UK Department for International Development (DFID). Agreeing Golub's definition on legal empowerment, Cotula distinguishes two kinds of empowerment tools: legal tools referring to institutional arrangements and para-legal tools referring to measures to help vulnerable parties use legal tools more effectively.¹⁴ He also notes that the root of exclusion is power asymmetries between powerful parties and vulnerable parties. In decision-making process, the extent of participation of vulnerable groups and to what extent their opinion matter (namely negotiation power) determine how much certain policy can reflect the interest of the weak side.¹⁵

Other approaches to legal empowerment have been in place at a later stage, though described with different terms. An “economic” approach called “micro-justice” suggests a need-demand model providing more economical legal services at the same time of which the services suppliers are also attracted by the market. The government here plays as a supervisor and provides incentives for the delivery of such affordable legal services.¹⁶ Benjamin Van Rooij, in one of his working papers makes a distinction between access to justice and legal empowerment, terming both and the micro-justice as “bottom-up” approaches.¹⁷

¹³ USAID, LEGAL EMPOWERMENT OF THE POOR: FROM CONCEPTS TO ASSESSMENT, 2007, <http://usaidlandtenure.net/library/global-reports/legal-empowerment-of-the-poor-from-concepts-to-assessment.pdf/view> p. 29.

¹⁴ Lorenzo Cotula, Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects in Africa, 2007, p.10.

¹⁵ See 14, pp. 20-23.

¹⁶ Maurits Barendrecht and Patricia van Nispen, Microjustice, 2007, available at: <http://ssrn.com/abstract=1022936>.

¹⁷ Benjamin Van Rooij, Bringing Justice to the Poor, Bottom-up Legal Development Cooperation, 2009, <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/VanRooijBringingJusticetothePoor.pdf>.

1.3 A New Paradigm for Integrating Rule of Law and Legal Empowerment?

Many have expressed their views on legal empowerment, though not all are listed here. The most remarkable difference between the notion of legal empowerment and the law and development theory is the paradigm shift from “rule of law orthodoxy” to capacity building at the basic level. Critics of the earlier law and development movement and advocates of legal empowerment have provided comprehensive reasoning as to the underlying rationale of this shift.

David M. Trubek and Marc Galanter, two “insiders” during the law and development movement, criticize that the attempt to transplant the American legal system which is based on “liberal legalism” (the rule of law orthodoxy/paradigm) into the Third World countries is “ethnocentric and naive”. Liberal legalism assumes that individuals consent to the state to regulate human interaction through law that formalized by the individuals in the society; law is equally applied to all citizens while the court is central in the rule application process. Thus, the reform of law and strengthened education of legal professionals can effectively achieve social development. However, it overlooks the reality in some developing countries, where authoritarianism still widely exists, the state is not the only locus of control but also local communities, law only represents small segment of the society and informal justice system normally plays a greater role in dispute resolution.¹⁸ In addition, Elliot M. Burg states in his article on the literature of law and development that the elitist view on legal profession could possibly render the law even harmful to development, because “the formal neutrality of the

¹⁸ David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062 1974.

legal system is not incompatible with the use of law as a tool to further dominant elite groups”.¹⁹

Golub similarly holds a strong critical view towards the rule of law orthodoxy based on its contextlessness and institutionalization (here the institution does not refer to “the rules of the game in a society” but only organizations such as the judiciary²⁰) orientation. He further argues that there is paucity of evidence that legal and institutional reform has any actual impact on development and in contrast, multi-country documentation has proven the positive impact of legal empowerment activities.²¹ Examples are given like increased awareness of rights, knowledge and practical skills on legal issues, improved access to legal system and participation in public decision-making process and as consequences improvements in material circumstances.²²

The CLEP seems to adopt a more moderate position on this question. It gives enough attention to the existing contexts in development countries and stresses the significance of bottom-up approach. In the meantime, it admits the usefulness of law reform and includes it as one of their legal empowerment agendas. As it defines legal empowerment, “public support” is counted in. It is not surprising that CLEP adopts such a position. Since UNDP is a UN organization, it cannot avoid political gaming between states. The commission basically equals legal empowerment to a process of multi-level participatory law/institution reform:

*“Legal empowerment is not about aid, but about helping poor people lift themselves out of poverty by working for **policy and institutional reforms** that expand their legal opportunities and protections.”*²³

¹⁹ Elliot M. Burg, Law and Development: A Review of the Literature & a Critique of “Scholars in Self-Estrangement”, 25 Am. J. Comp. L. 492 1977, p. 23.

²⁰ See 8, p.14.

²¹ See 8.

²² See 7.

²³ See 12, p.16.

Many compliments have been there for legal empowerment. However, some voices the doubts. Benjamin Van Rooij, based on his comprehensive appraisal of all the “bottom-up” approaches as he terms, argues that they should not work as substitute for but complement of rule of law paradigm. Firstly, he writes, legal empowerment is not a brand new innovation since many organizations have been engaging in activities including legal clinics, legal aid and so on at very early stage. Secondly, rule of law/law reform is indispensable in development process because normative framework cannot be achieved only by bottom-up method. What’s more, the two paradigms suffer from common challenges methodologically such as lack of knowledge base and over-ambitiousness.²⁴

Different opinions posed. If examining every opinion carefully, it is not hard to find that all the opinions are not inherently contrasting; rather, they share the same rationale to some extent. The key point is how they define rule of law, legal empowerment and the relationship between them.

At the first place, clarification should be made between rule of law and rule of law orthodoxy. Rule of law is the guiding principle of the legal framework of one society while rule of law orthodoxy is considered as a paradigm under which state-centred legal and institutional reform (especially the judiciary, resulting from the court centrality belief) is the only focus. Basically most of the above researchers agree that rule of law enhances development, what they really oppose to is the rule of law orthodoxy that overlooks the context in developing countries and the potential of the disadvantaged.

Golub seems to hold the view that even rule of law itself cannot be proved helpful for development. He argues that there is lack of evidence that rule of law necessarily results in poverty alleviation by saying that “*several nations that have achieved significant economic*

²⁴ See 17.

growth and attendant poverty alleviation in recent decades have done so in the absence of Western-style rule of law. China is a leading example".²⁵ Though the main goal of development is poverty reduction and one of the most important indicators is economic growth, poverty reduction is not equal to economic growth and development is not limited to improvement of material living standards but also the recognition of human dignity and enhancement of human rights. It is true that China has achieved great economic growth in recent years, but it is not tantamount to say that poverty has been remarkably reduced and individuals get developed in a full sense. Nevertheless, Golub admits that rule of law orthodoxy and legal empowerment are not mutually exclusive.²⁶ Actually, what he wants to convey here seems not his disappointment towards rule of law, but the potential political significance of legal empowerment, compared with technical legal reform. Legal empowerment tries to address power imbalance fundamentally and is sustainable in a substantial sense.

Rule of law is not only about law, but about justice through law. It's a goal to be achieved with intrinsic value, and also a legal way to promote development. How to achieve rule of law and development is thus the central question for the law and development scholars. Consequently, different opinions have arisen and it seems like the debate is essentially on the relationship between law reform (including institutional reform) and the so-called "legal empowerment". Van Rooij and the CLEP take different position on this question. Van Rooij excludes law reform from legal empowerment while the CLEP holds that law reform should be one of the legal empowerment agenda.

As commonly agreed, the purpose of legal empowerment is to strengthen the poor's control over their lives through improved capacity of participating in the decision-making

²⁵ See 8, p.10.

²⁶ See 8, p. 4.

process. Several scholars have stressed that the key words here are “empowerment” and “capacity of participating” thus a “bottom-up” approach should apply here. It is absolutely true. However, the cooperation from the “top” is necessary. Laws dealing with substantive and procedural rights need to be reformed as recognition of basic human rights; institutions in relation to the implementation of laws should be improved to make sure human rights are actually realized. Even when it comes to the capacity building area, we need specific law and institution to facilitate relevant activities. For example, passage or amendment of law recognizing the role of NGOs could be extremely useful for capacity building of the community. On the other hand, law reform should never be processed solely by the state. The state has the power and duty to reform law and corresponding institutions, but it should accord to the real legal needs addressing all citizens’ rights rather than capturing only elites. Therefore, civil society should be fully involved.

Nevertheless, the motive behind the notion of legal empowerment should not be neglected. It could be inferred from the scholars that their real purpose is to draw people’s attention to the possibility of the poor to help themselves out of disadvantaged situation. Therefore, I suggest re-defining legal empowerment in two folds. Broadly, legal empowerment should be regarded as a process aiming at providing better protection for the disadvantaged through comprehensive law-related activities by both “top” and “bottom” actors; narrowly, it specifically refers to those “bottom-up” activities such as community legal education, legal services and paralegal work where civil society plays the central role and the state serves as a facilitator.

1.4 Legal Empowerment and Human Rights

It seems like that human rights are explicitly mentioned in none of the definitions of legal empowerment. However, it’s not difficult to identify the link between these two notions.

Empowerment, as mentioned above, though initially as a development conception, indicates not only a technical but also political process to change the way of living of the disadvantaged: they are not only passive receivers of “rights”, rather, they are rights-holders with the power to assert their owned rights actively. Among all the rights, human rights are of most significance. Therefore, legal empowerment is a very important strategy for the realization of human rights since the essence of legal empowerment is rights-based rather than charity-based. Legal empowerment and human rights are inherently coherent.

Human rights-based approach (HRBA) is a different concept with decided framework. As Urban Jonsson summarizes it, HRBA requires the incorporation of human rights standards and principles into programming. Concretely, in legal empowerment projects, a project should analyze the human rights gaps and decide the way to tackle them. During and after the whole project, human rights should be used as guidelines, which contains three aspects: 1) the whole project is based on the notion that how to realize the human rights of rights-holders by the fulfilment of obligations by the duty-bearers; 2) all activities should be comply with human rights principles such as equality, non-discrimination, indivisibility and rule of law; 3) the central benchmark for monitoring and evaluating of activities is to check whether certain level of human rights enjoyment has been achieved and gets closer to international human rights standards.²⁷

Legal empowerment is usually used in terms of “legal empowerment of the poor” since the initial purpose of this idea is to achieve poverty alleviation. However, as Golub himself suggested, this process was trying to fundamentally change the disadvantaged

²⁷ Urban Jonsson, Legal Empowerment of the Poor and Human Rights: Is there Conflict or a Synergy?, paper presented at the conference Legal Empowerment of the Poor: Exploring the Legal Dimension, University of Lund, Sweden, 3-4 March 2010, www.lucsus.lu.se/.../LUND_UJ_-_Legal_Empowerment_of_the_Poor_and_Human_Rights_DRAFT_2_.pdf, accessed on November 16th 2010.

situation of the poor.²⁸ Poverty results from combined social factors. The poor are disadvantaged and becoming more disadvantaged because of poverty. Legal empowerment is actually a tool to help the poor out of disadvantaged situation at the first stage and then get rid of poverty. Here we find an even closer link between legal empowerment and human rights since human rights is born to stand for the disadvantaged.

1.5 Legal Empowerment of Labour

Towards the goal of poverty reduction, the CLEP divides legal empowerment into four pillars, access to justice, as the basis for the other three pillars: property rights, labour rights and business rights. This paper mainly deals with labour rights in terms of how the most disadvantaged workers, here particularly referring to migrant workers²⁹, can get their entitled human rights through enjoy equal access to justice in the context of China. Nowadays in China migrant workers is a disadvantaged group with huge population. These people go to cities and earn their living by hard work. They usually work longer than the others in bad conditions while obtaining much less income. The reasons involve lack of rights awareness and imperfection of relevant systems, behind which are discrimination and disrespect for human rights towards the disadvantaged people. The agenda set out by the CLEP includes strengthening dialogue, enhancing quality of regulation and enforcement and supporting a “minimum package of labour rights” for the workers in informal economy such as health and safety at work, hours of work, and minimum income.³⁰ However, when it comes to the concrete implementation, the CLEP focuses mostly on substantial law reform, where the

²⁸ Professor Stephen Golub, class lecture, Strengthening Legal Reform and Legal Empowerment, Central European University, Budapest, Hungary, June 11st 2009.

²⁹ Migrant workers here refer to domestic migrant workers. They are those who work in counties or urban areas, while maintaining rural households. They are also called “peasant-workers.”

³⁰ See 12, pp. 31-38, 59-70.

bottom aspect has rarely been taken into consideration.³¹ Thus, to explore a more inclusive empowerment approach is necessary.

Access to justice, as the foundation of the other 3 pillar provided by CLEP, is a vital channel for the disadvantaged to protect their own rights. As the CLEP suggests in its publication, in many occasions people are not able to access justice because they are excluded from the formal legal system and therefore law and relevant mechanisms should be reformed to include them.³² The fact of exclusion is undeniable. However, as to the solution, other paths could be taken into consideration. Though access to justice might be impeded by legal exclusion, at the same time access to justice could be improved through testing the borderline and trying to cross the border. The writer of the paper has seen cases where people broke the limits and expanded the scope of legal protection little by little. The process might be slow and difficult, but it will be more effective and sustainable than the almsgiving from the top. Another important consideration is that the possibility of informal justice system. Informal justice is especially valuable in China because there is a huge population while the formal justice resources are relatively scarce. What is more, the local complications might be solved in a way that is more tailored to the clients' needs and more peaceful by facilitators or clients' themselves within the informal justice framework that they are more familiar with.

The next chapter will first portrait a picture of the general situation in respect to migrant workers in China in light of international standards and identifies the problems therein; then possible resolution will be given in perspective of legal empowerment and experiences from other jurisdictions.

³¹ The Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (Volume II), 2008, pp. 170-175.

³² See 12, p. 19.

Chapter 2 International Human Rights Standards

and Domestic Situation

2.1 Fundamental Human Rights

The transition from planned economy to market economy in China has led to rapid economic development while migrant workers are not benefiting from this process. Along with the social transition are increasing income inequality between rural and urban areas and accelerating industrialization, urbanization which provides more and more non-rural employment opportunities. All these have contributed a lot to domestic migration. Rural people go to cities to with hopeful visions of prosperous life, only to find that they are not better off at all while encountering with hardships from all sides such as higher living expenses, discrimination in employment, no guarantee of wages and social security, long working hours and harmful working conditions.³³ According to the *Survey Report on Migrant Workers* from the National Bureau of Statistics of China (NBSC), in 2009 there are 229.78 million migrant workers in China³⁴, 145.33 million of which are working in cities and increased by 1.9% compared to last year. Among those who work in cities, women account for 34.9%. They are either young girls going to cities seeking better employment opportunities or women moving with their husbands. In 2009, the average income of migrant workers (those working in local counties excluded) is 1, 417 CNY (approximately 208 USD) per month. In the section of situation of rights protection, it has mentioned several problems:

³³ Cai Fang, *Weishenme Laodongli Liudong Meiyou Suoxiao Chengxiang Chaju* [Why cannot the Labour Mobility Narrow the Urban-Rural Gaps?], *Jingji Qianyan* [Forward Position in Economics], Vol.6 2006, p. 9.

³⁴ This data refers to those engaging in non-rural occupations in cities or local counties more than 6 months. Therefore, the data would be bigger if migrant workers who have worked less than 6 months are counted.

1) wage arrears still occur in some industries such as construction and manufacturing; 2) the working hours of migrant workers working in most industries are averagely 14.4 hours longer than statutory provisions; 3) nearly 60% of migrant workers do not have labour contract with the employer; 4) the insured proportion for migrant workers is very low.³⁵ The root cause of the worrying situation is the long-existing discrimination against migrant workers based on the historically dualistic social stratification which categorizes people into rural and urban households. The household registration (*Hukou*) system in China does not only divide people into different occupations as farmers and workers; but more importantly, it has created two types of identities, according to which various social resources are distributed.³⁶ This system actually constitutes discrimination based on birth status which is incompatible with international human rights standards.

China has ratified a good number of international human rights instruments, among which there are many human rights principles and human rights that are of special significance to migrant workers, such as the International Covenant on Civil and Political Rights (ICCPR), signed but not ratified in by China yet³⁷, and the International Covenant on Social, Economical and Cultural Rights (ICESCR). The International Labour Organization (ILO) has a list of conventions covering extensive labour rights standards more detailed. China has ratified 25 ILO conventions (4 of which are core conventions), including equal remuneration, minimum wage, safe and healthy working conditions, tripartite consultation, employment

³⁵ 2009 *Nongmingong Jiance Diaocha Baogao* [2009 Survey Report on Migrant Workers], *Zhonghuarenmingongheguo Guojia Shuju Tongjiju* [National Bureau of Statistics of P.R.C], March 19th 2010, http://www.stats.gov.cn/tjfx/fxbg/t20100319_402628281.htm. Accessed on November 22th 2010.

³⁶ Lu Yilong, *Hukou Haiqi Zuoyong ma—Huji Zhidu yu Shehui Fenceng he Liudong* [Is Household Registration still working? — The Household Registration System and Social Stratification and Mobility], *Zhongguo Shehui Kexue* [China Social Science], Vol.1 2008, pp. 149-150.

³⁷ It is expressed in China's first National Human Rights Action Plan (2009-2010) that China will actively engage in legal reform in preparation for the ratification of ICCPR. National Human Rights Action Plan of China (2009-2010), Information Office of the State Council of the People's Republic of China, April 13th 2009, http://www.china.org.cn/archive/2009-04/13/content_17595407.htm. Accessed on November 22nd 2010.

discrimination and so on.³⁸ In ICCPR and ICESCR it is explicitly stipulated that the member states should ensure equal enjoyment of human rights provided in the conventions “**without distinction of any kind**”, including birth status.³⁹ In reality, migrant workers in China are facing various kinds of discrimination which impede their equal enjoyments of human rights.

2.1.1 ICCPR

Article 12

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

Article 26

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law...*⁴⁰

In 1958, China enacted the Ordinance on Household Registration.⁴¹ The household registration system was initially for the purpose of basic population management without imposing limitation on people’s freedom of movement and residence. Later, because China under planning economy chose to prioritize the capital-intensive heavy industries and had to control the urban population. Then the household registration system began to be used to limit the free urban-rural movement and to manage resource distribution. The system has created

³⁸ <http://www.ilo.org/ilolex/english/newratframeE.htm>. Accessed on November 22nd 2010.

³⁹ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, <http://www2.ohchr.org/english/law/ccpr.htm>, Article 2. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, <http://www2.ohchr.org/english/law/cescr.htm>, Article 2. Accessed on November 22nd 2010.

⁴⁰ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, <http://www2.ohchr.org/english/law/ccpr.htm>, Article 2, 26.

⁴¹ *Zhonghuanrenmingonghezuo Hukou Dengji Tiaoli* [Ordinance on Household Registration], adopted on 91th conference of the Standing Committee of the National People’s Congress, January 9th 1958, http://www.law-lib.com/law/law_view.asp?id=1338. Accessed on November 23rd 2010.

and deepened the awareness of the division between urban and rural people and household (*Hukou*) has become an identity and the hierarchy behind it has been widely accepted.⁴²

The system occasionally resulted in some untoward incidents. For example, the Custody and Repatriation (C&R) system was used to impose control over migrant workers. The Sun Zhigang case in 2003 is a very influential one. The C&R Centres were established with unchecked power to detain and repatriate beggars and vagrants. Sun who came from rural areas, was working in the city and then was arrested and detained by the police for the reason that he was suspected to be an illegal migrant. Later, a hospital informed Sun's family that he died of heart attack, while it turned out that he died of injuries. The case was soon reported and drew great attention from the public.⁴³ Three legal scholars in China jointly submitted a petition to the Standing Committee of the National People's Congress (NPCSC) asking for constitutional review in regard to the *Custody and Repatriation Measures*. The NPCSC accepted the petition. Finally, the State Council abolished the regulation but without formally written reply to the petitioners.⁴⁴

The household registration system is incompatible with the international human rights principles of equality and non-discrimination. The preferential policies to the cities render the rural people unable to enjoy equal rights and opportunities. Urban citizens have advantages in every aspect of life including employment, education and social security. In the long run, the household identity becomes descendent and very difficult to change. Since late 1970s, China has been taking reform measures by allowing qualified rural people go to cities and introducing systems such as identification card or residence card to ensure them equal

⁴² Yao Xiulan, *Lun Huji Zhidu de Yanbian yu Gaige* [On the Evolvement and Reform of Household Registration System], *Faxue* [Legal Science], Vol.5 2004, pp. 45-47.

⁴³ Keith J. Hand, Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China, 45 *Columbia Journal of Transnational Law* 114 (2006), pp. 119-127.

⁴⁴ Wang Zhengjun, *Lun Woguo Gongming Weixianshencha Jianyiquan de Yiyi yiji Wanshan* [The Analysis on the Significance and Improvement of the Citizen's Right to request for Constitutional Review], *Hebei Faxue* [Hebei Law Science], Vol. 27, No. 11, November 2009, p. 107.

treatment as urban people. However, there are some challenges which limit the effect of the reform. Though rural people are allowed to move to cities, relatively high thresholds are imposed such as high education level and financial capacity. And the lag of relevant mechanisms regarding social security, employment and education actually impedes the realization of equal enjoyment of freedom of movement and other rights.⁴⁵ As to the migrant workers, the situation is even tougher. As mentioned above, the high barriers of admission has rendered it almost impossible for the low-educated and poor migrant workers to obtain urban household. They are a marginalized group between farmers and citizens with a huge number. Because the right to vote is connected with households, migrant workers with rural households are not able to participate in democratic management. And local administrators are only responsible for the local residents, thus rarely take into consideration migrant workers' interests.

2.1.2ICESCR

The ICESCR provides a relatively complete framework of human rights in respect to work besides stressing the non-discrimination principle:

Article 6

*1. The States Parties to the present Covenant recognize the right to work...*⁴⁶

People with different household identities enjoy different treatment. As mentioned above, city governments are preferential to their local citizens in allocating social resources. Though employment policies have been adjusted to a considerable extent, some practices which violate migrant workers are maintained in order to protect local labours: 1) high threshold of

⁴⁵ Yao Xiulan, *Huji, Shenfen yu Shehui Bianqian—Zhongguo Huji Falvshi Yanjiu* [Household, Identity and Social Change—Research on Legal History of Household Registration in China], published by Law Press China, 2004, pp. 232-234.

⁴⁶ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, <http://www2.ohchr.org/english/law/cescr.htm>, Article 6. Accessed on November 22nd 2010.

admission. Take Shanghai for example, Shanghai has been actively taking measures of household registration system reform. In 2009, Shanghai began to carry out a new policy, to the effect that migrant labours that satisfy the qualifications of “talented person” will be able to obtain Shanghai household.⁴⁷ However, the new policy is mainly for the purpose of attracting talents and does not really open the gate for those migrant workers who are with lower educational level; 2) limitations on types of work for migrant workers. Positions like governmental staff are not open to migrant workers; 3) exclusion of migrant workers from governmental public services in respect to employment. To provide the labours with job information, relevant policies and vocational training is one of the functions of governmental institutions. However, the public services as such are rarely provided to migrant workers, which reduces their employment opportunities considerably.⁴⁸

China enacted the Employment Promotion Law in 2007, which confirmed equal right to work of rural and urban residents for the first time.⁴⁹ Despite this, there are some discriminative provisions in regard to migrant workers’ rights. For example, article 12 enumerates the prohibited grounds of unequal treatment such as ethnicity, race, gender, religious belief etc Though this is an open-ended enumeration, the omission of birth status to some extent shows that the attitude of the legislator is obscure.⁵⁰ Another example is in regard to employment support policies. Article 49 stipulates that local governments should provide vocational training to the unemployed persons with governmental training subsidies, while

⁴⁷ *Shanghai Fabu Huji Xinzheng* [Shanghai Enacted New Policy on Household Registration], Caijingwang [Finance and Economics net], February 23rd 2009, <http://www.caijing.com.cn/2009-02-23/110072654.html>. Accessed on November 23rd 2010.

⁴⁸ Zhou Haiwang, Gao Hui, *Zhongguo Chengshi Wailai Laodongli Jiuye Qishi Xianzhuang yu Duice* [Situation and Solutions on Employment Discrimination towards Migrant Labours in China], in *Employment Discrimination: International Standards and National Practice*, published by Law Press China, Edited by Li Weiwei, Lisa Stearns, 2006, pp. 535-538.

⁴⁹ Employment Promotion Law of the People's Republic of China, adopted by Standing Committee of the National People's Congress, August 30th 2007, Article 20, http://www.baliprocess.net/files/China/China_employment%20promotion%20law_2008-eng.pdf. Accessed on November 23rd 2010.

⁵⁰ Ding Daqing, *Nongmin Pingdeng Jiuyequan zai Jiuyecujinfa zhong de Quexian yu Wanshan* [On Defects and Perfection of Equal Employment of Migrant Workers in the Employment Promotion Law of PRC], *Beifang Faxue* [Northern Legal Science], Vol.3 2010, pp. 85-86.

article 50 does not mention subsidies when talking about vocational training provided to migrant workers.⁵¹

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with...

*(i) Fair wages and equal remuneration for work of equal value without distinction of any kind;*⁵²

Due to the pre-employment discrimination such as lack of education and vocational training resources, and the long-existing powerlessness, migrant workers are mainly employed in industries like construction, manufacturing and services where the wage is low. China has introduced the Minimum Wage system since 1994 for the purpose of ensuring the minimum standard of monthly income and hourly income of workers in enterprises.⁵³ Due to the vagueness of the law text and the ineffectiveness of supervision, enterprises may use some tricks to evade their obligations. Some employers usually count in certain additional remuneration like overtime wage or night work allowance as base salary; some will pay in full first and then deduct certain amount in the name of accommodation or meal subsidies.⁵⁴ Since 2003, there occurred large-scale “shortage of migrant workers” in areas where the processing and manufacturing industry are booming. This is on one hand because migrant workers feel that their rights are not properly protected; on the other hand, their wage is too low. Many enterprises choose to strategically pay the exact same amount as the local minimum wage standard, but in many occasions this amount can hardly reflect the actual

⁵¹ See 49, Article 49, 50.

⁵² See 46, Article 7(a).

⁵³ Labour Law of People's Republic of China, adopted at the 8th Meeting of the Standing Committee of the 8th National People's Congress on July 5, 1994, promulgated by Order No.28 of the President of the People's Republic of China on July 5, 1994, and effective as of January 1, 1995, <http://www.usmra.com/china/Labour%20Law.htm>, Article 48. Accessed on November 24th 2010.

⁵⁴ Zhong Lihua, Zhigong Zuidi Gongzi Biaozhun Zhixingnan de Yuanyin ji Duice Tanxi [Analysis on the Cause and Solution of Poor Implementation of the Minimum Wage Standard], *Zhongguo Laodongguanxi Xueyun Xuebao* [Journal of China Institute of Industrial Relations], Vol.22 No.2 2008, pp. 103-104.

labour value due to the industry upgrade which needs more skilled workers and the increasing living expenses.⁵⁵

Not only this, there was a time when wage arrears happened a lot nationwide. Thanks to the government's attention and positive action, the problem got mitigated to some extent though still occurs from time to time. One important problem is in the newly enacted ***Labour Contract Law***, the remedy provided for infringements of the wage payment obligations is not that effective. Basically, only the labour administration department can order the employers to pay within given time and make compensation to the employees in cases of defaulting wages and overtime pay, but the employees themselves are not explicitly granted the right to action.⁵⁶ Therefore many scholars suggest that the conduct of defaulting wages should be included into the criminal legislation as a crime.⁵⁷

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(b) Safe and healthy working conditions...

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for...

*(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases...*⁵⁸

In China, migrant workers are facing great challenges in rights assertion in respect of occupational health. According to Chen Gang, director of Industrial Injury Insurance

⁵⁵ Mei Zhequn, Miao Qing, Jiedu Mingonghuang [Interpretation of the Labour Shortage], Renli Ziyuan [Human Resources], Vol.7 2008, pp. 24-26.

⁵⁶ Xie Zengyi, *Dui Laodonghetongfa Ruogan Buzu de Fansi* [Rethinking the Labour Contract Law], *Faxue Zazhi* [Law Journal], Vol.6 2007, p. 63.

⁵⁷ *Lun Woguo Xingfa ying Zengshe Tuogian Gongzi Zui* [On the Inclusion of Wage Arrears into the Criminal Law of China], *Fazhi yu Shehui* [Legal System and Society], Vol.10 2009, p. 45.

⁵⁸ See 46, Article 7(b), 12.

Department under the Human Resource and Social Security Ministry, in 2007 there were approximately 1 million industrial injuries, while 80% of the victims are migrant workers.⁵⁹ Regarding occupational diseases, on November 9th this year, the Ministry of Health announced that there are approximately 20 million workers have suffered from occupational diseases. By the end of 2009, there have been 720 thousand reported occupational diseases, 650 million of which are pneumoconiosis that happened most in migrant-workers-intensive industries such as mining and manufacturing.⁶⁰

Migrant workers are especially vulnerable to industrial injury for several reasons: firstly, the employers are reluctant to conclude labour contract with migrant workers since they want to avoid legal obligations of buying them industrial injury insurance; migrant workers, on the other hand, either because of lack of rights awareness or fear of losing their jobs, usually compromise and work without labour contracts. Therefore, when injuries occurred, migrant workers have no basis for rights assertion. Even there are labour contracts between the two parties, it's extremely difficult for them to obtain compensation since the procedures are so complicated and money-consuming.⁶¹

When it comes to occupational diseases, the situation is similar. According to the *Law of the People's Republic of China on Prevention and Control of Occupational Diseases*, the employers have the obligation to provide relevant proving documents and only the diagnosis by authorized institutions is effective.⁶² The appropriateness of the two provisions is worth

⁵⁹ *Woguo Shoubu Gongshang Kangfu Biaozhun jiang Chutai* [The First Standards on Industrial Injury Rehabilitation is Forthcoming], *Shuimu* net, October 22nd 2007, http://www.shm.com.cn/economy/2007-10/22/content_2176038.htm. Accessed on November 24th 2010.

⁶⁰ *Zhongguo you Liangyi Laodongzhe Zaoshou Zhiyebing Weihai* [There Are 20 Million People Suffered From Occupational Diseases in China], *Huanqiu* net, November 9th 2010, <http://china.huanqiu.com/roll/2010-11/1240201.html>. Accessed on November 24th 2010.

⁶¹ *Cui Xiaoxi, Qianxi Nongmingong Gongshang Weiquan de Xianzhuang ji Cunzai Wenti* [Situation and Problems of Migrant Workers' Rights Assertion in Regard to Industrial Injuries], *Xueshu Luntan* [Academic Forum], Vol.8 2009, p. 268.

⁶² *Law of the People's Republic of China on Prevention and Control of Occupational Diseases*, Adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on October 27, 2001 and

considering because it will be difficult to request the employers to provide evidence to prove them guilty and the power granted to the authorized diagnosing institutions without oversight might be abused.⁶³

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice...

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society...⁶⁴

The right to form and join trade unions is stipulated in our Constitution and the 1992 **Trade Union Law**. The **Trade Union Law** confirms that trade unions are representing labour rights and help the employees effectively participate in democratic management and collective negotiation.⁶⁵ The establishment of inferior trade union at lower level shall be approved by the superior one and the inferior is led by the superior.⁶⁶ The powers of the trade union include making suggestions to enterprises, ordering them to correct their wrongfulness, applying for arbitration, instituting lawsuits and helping the employees with arbitration and litigation.⁶⁷

It's not hard to find out that some provisions might infringe the effective function of the trade union. Firstly, the organizational principle of "democratic centralism", where the All China Federation of Trade Unions (ACFTU) is the supreme leading organization⁶⁸, might have some impact on the trade unions' independence. The approval requirement make the

promulgated by Order No. 60 of the President of the People's Republic of China on October 27, 2001, <http://www.china.org.cn/english/government/207413.htm>, Article 39, 48.

⁶³ *Nongmingong Quanli Baozhang de Queshi he Jiuji—yi Zhiye Jiankangquan wei Li* [Deficiency and Relief of Guaranteeing Migrant Workers' Rights—Occupational Health as an Example], *Hunan Gong'an Gaodeng Zhuangke Xuexiao Xuebao* [Journal of Hunan Public Security College], Vol.22 No.4 2010, pp. 12-13.

⁶⁴ See 46, Article 8.

⁶⁵ Trade Union Law of People's Republic of China, adopted on April 3, 1992 at the 5th Session of the 7th National People's Congress. Amended according to the Decision on Amending the Trade Union Law of the People's Republic of China at the 24th Session of the Standing Committee of the 9th National People's Congress on October 27, 2001, http://en.china.cn/content/d50052_b8d27c_1427_4023.html, Article 6.

⁶⁶ See 65, Article 9, 11.

⁶⁷ See 65, Article 19, 20, 21, 22.

⁶⁸ See 65, Article 9, 10.

interior trade unions are not able to form freely, which is not in compliance with international standard. Secondly, enterprises usually take some measures to weaken the trade unions' power. For instance, to cope with the external oversight and to mitigate the resistance against trade unions from the employers, in some enterprises, leaders of trade unions are not elected as the law stipulates, rather, s/he is appointed by the enterprise, sometimes via consultation with the superior trade union. In result, the appointed leaders of the trade unions are usually administrators, vice presidents and factory directors, who are unlikely to stand beside the workers in collective bargaining or litigation. Thirdly, unlike ordinary trade unions, the migrant workers' trade union are functioning largely depends on specific appropriation from its superior union due to the high mobility of migrant workers, while the superior union is not abundant in fund itself.⁶⁹

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

In China, the social security system is established on basis of household registration. Initially, only urban residents can enjoy various social insurance through the employers. Though have experienced the institutional reform, due to their rural households, migrant workers are still disadvantaged.⁷⁰ As mentioned above, the insured proportion of migrant workers is very low. In 2009, the average percentage of endowment insurance, industrial injury insurance, medical insurance, unemployment insurance and maternity insurance that the employers buy for migrant workers are respectively 7.6%、21.8%、12.2%、3.9% and 2.3%.⁷¹ Another problem

⁶⁹ Liang Yongbei, *Jiaqiang Nongmingong Gonghui Jianshe de Sikao* [Some Reflections on Enhancing the Migrant Workers' Union Construction, *Anhui Nongxue Tongxun* [Anhui Agricultural Science Bulletin], Vol. 14 No.13 2008, pp. 11-12.

⁷⁰ Jiang Lihua etc, *Zhongguo Nongmingong Quanli Baozhang Yanjiu* [Research on Rights Protection of Migrant Workers in China], published by China Social Science Press, 2008, p. 37.

⁷¹ See 35.

is that the social security relation is not transferable. The high mobility of migrant workers determines that they are unlikely to benefit from long-term insurance.⁷²

2.2 Access to Justice

One famous legal proverb says that “*ubi jus ibi remedium*”. The ICCPR also confirms that member states shall ensure “*any person whose rights or freedoms...are violated shall have an effective remedy*”.⁷³ With no doubt this should be equally applied to migrant workers in China, like other disadvantaged groups. These years, the government and the society have shown much concern on migrant workers issue and actions of all kinds have been taken to improve the situation and help migrant workers get the violations of their rights remedied. However, there are some obstacles for migrant workers to access effective legal remedies.

Notably, government policies and media coverage have made very positive contribution on the issue. Regarding the household registration system, it has been mentioned that China has been conducting reforms in pilot areas to allow migrant workers to obtain urban household on conditions these years though all matters cannot be settled at one go. In 2006, China issued *Some Opinions on Resolving the Problem of Migrant Workers* highlighted some points including wage payment, rise of salary through implementing minimum wage system and collective bargaining system, conclusion of labour contracts, occupational health, social security and further reform in respect of household registration system.⁷⁴

⁷² Li Dongwei, *Nongmingong Shehui Baozhang Wenti Tanta* [Discussion on Social Security for Migrant Workers], *Xibu Caikuai* [Western Finance and Accounting], Vol.9 2010, p. 60.

⁷³ See 40, Article 3(a).

⁷⁴ *Guowuyuan Guanyu Jiejue Nongmingong Wenti de Ruogan Yijian* [Some Opinions on Resolving the Problem in Respect of Migrant Workers], issued by State Council of China, March 27th 2006, http://www.gov.cn/jrzq/2006-03/27/content_237644.htm. Accessed on November 25th 2010.

Media is fairly helpful too. The Sun Zhigang case mentioned above could be an excellent example of how media contributes in informing the public and pushing the change. What is more important in the Sun case and many other similar cases that got to be known by the public is that “legal experts” (here the writer refers to organizations and individuals involving in the events from legal perspective) are actively participating in this process. Media itself is neutral but influential power. By effectively making use of it, the powerless’ voice got louder and expected social value would spread. If the media report involves legal reflection, it could possibly help to bring about change in the legal system. However, it has been noted that in many occasions the intervention of policies and media can only lead to very reactive changes, which is not based on procedural justice and is not expected to be observed persistently. For instance, the Sun case again, the relevant law was abolished (probably because of social pressure), but citizens’ petition for judicial review was never replied. In this situation, it cannot be guaranteed that similar thing will not happen again.

Migrant workers are facing obstacles in obtaining judicial remedies since the cost of litigation is too high for them. Procedures in respect to labour disputes are very complicated. In China, arbitration by the Labour Arbitration Committee⁷⁵ serves as the preposed procedure before the employees are able to institute a lawsuit. If the decision made by the Committee is not accepted, the employees can then proceed to the courts, where the courts need to go through all the judicial procedures, which might take years. When it comes to industrial injury and occupational diseases, the situation is ever worse. Therefore, the time cost is far too high for migrant workers. And migrant workers lack financial resources to sue. During litigation,

⁷⁵ The Committee consists of representative from labour administration departments, trade union at the same administrative level and the enterprises.

migrant workers have to bear various expenses such as counsel fee and investigation fee, which might be much higher than the involved amount of the case itself.⁷⁶

Legal aid seems a possible path under the circumstances. It is stipulated in the Constitution of China that “*all citizens of the People's Republic of China are equal before the law*”⁷⁷. After years of piloting, the legal aid system was established officially in 2003 marked by the adoption of the **Legal Aid Ordinance**, which confirms the government as the subject of obligation in providing legal aid.⁷⁸ Regarding the scope of aid, the Ordinance provides that citizens with financial difficulties can apply for legal aid in cases concerning state compensation, social security, wage payment and so on⁷⁹, which are in favor of migrant workers. In addition, there are some relevant documents paying special attention on migrant workers. Many migrant workers are making use of this system to protect their rights. Problems are that cases keep increasing while the appropriation and personnel for legal aid are not enough.⁸⁰ In addition, according to the writer’s working experiences, the quality of legal aid might not be guaranteed since many legal aid workers at basic level are not qualified lawyers.

2.3 Chapter Summary

Migrant workers issue has drawn much attention these years and it should be admitted that the government has done a lot to improve the situation to provide migrant workers with

⁷⁶ *Lun Woguo Nongmingong Quanyi Sifajiuji Jizhi de Buzu yu Wanshan* [Defects and Perfection of Judicial Remedies for Migrant Workers’ Rights in China], *Huazhong Nongye Daxue Xuebao* [Journal of Huazhong Agricultural University], No. 74 2008, p. 44.

⁷⁷ Constitution of the People’s Republic of China, adopted on December 4, 1982, <http://english.peopledaily.com.cn/constitution/constitution.html>, Article 33. Accessed on November 25th 2010.

⁷⁸ *Falv Yuanzhu Tiaoli* [Legal Aid Ordinance of People’s Republic of China], adopted on July 16th 2003, http://news.xinhuanet.com/zhengfu/2003-07/31/content_1002993.htm, article 3. Accessed on November 25th 2010.

⁷⁹ See 78, article 10.

⁸⁰ Wang Yingming, *Nongmingong Quanyi Baohu Falvyuanzhu Zhidu Yanjiu* [Research on Legal Aid Mechanism for Migrant Workers Protection], *Shaoyang Xueyuan Xuebao* [Journal of Shaoyang University], Vol.8 2009, p. 39.

more adequate protection. However, problems still exist and needs timely solution. From the above discussion it could be seen that though defects of legislation and legal mechanisms need to be addressed, it is also, even more important for migrant workers to make use of these legal tools. The imperfection of legislation and mechanisms exists in most jurisdictions, but so long as people are able to use them, they will have greater chance to get their rights protection and realized. What is more, to make use of the legal tools are itself an effective way to improve them. The idea of legal reform does not emerge by itself in the legislator's brain, while the change is caused by influential cases, events, public opinions and so on. Not only law would be improved through the process, the more significant is that the disadvantaged get more powerful by voicing their claims through legal channel. The empowering process is more sustainable and fundamental for changing the lives of the disadvantaged.

In next chapter, experiences will be drawn from other jurisdictions. They might not particularly about labour, but have inspirations in regard to empowerment of labour.

Chapter 3 Foreign Experiences

3.1 The United States

3.1.1 Public Interest Litigation⁸¹

Public interest litigation, emerged firstly in the U.S., has been used to help with the realization of social justice all around the world. The value of this kind of litigation lies in its pursuit of common shared individual rights and interests in the society. For the writer of this paper, this is significant because of its human rights implications. Public interest is different from national interest; rather, it's based on individual interests that are shared among the people in a certain community or society.⁸² Since the interests are common to a large extent, the assembly of shared individual interests might usually lead to notably qualitative change so that the interests dispersedly vested in individuals could be considered as an interest in the whole. What is most important is that this term is originated and mostly used historically by lawyers to protect the disadvantaged, in contrast to representing the powerful as "corporate adjuncts".⁸³ As to public interest litigation, due to the character that the interests could be assembled as one, this kind of interest is able to be represented and claimed collectively, therefore issues concerning a large group of individuals could be addressed at one go. Though some criticism is correct in alleging that even successful public interest litigation might not

⁸¹ As commonly understood, "public interest litigation" usually refer to cases with public interest content, and, maybe more important, a strategy with explicit purpose to achieve certain social impact. In this paper, the writer would like to use the term in a more general manner, referring to all cases that have certain social implications, no matter whether they are considered as typical public interest litigations that have been used intentionally as a strategy to achieve systemic change. Cases discussed below belong to the general definition.

⁸² Actually, this is not an easily defined term. Many literatures have posed opinions on it. The description above is the writer's attempted summary based on the accumulation of these years' study. However, for the sake of a well-referenced paper, the writer here take the definition from the Black's dictionary (9th ed. 2009) as an example: "public interest. (16c) 1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation."

⁸³ Edwin Rekosh, Who Defines Public Interest? Public Interest Law Strategies in Central and Eastern Europe, SUR - International Journal on Human Rights, Year 2 • Number 2 • 2005, pp. 168-169.

achieve systemic change since it is court-centred and ignores other strategies⁸⁴, it could be cost-effective in many occasions and can achieve what might not be achievable by other means because

*“A concrete case could provide a way of highlighting the importance of a legal principle in the context of a real set of facts and actual people affected by the outcome. A case could serve to rally press and public attention to the legal principle at stake”.*⁸⁵

Good examples are numerous. It is really exciting and encouraging to see how the “substantive due process” theory enables people to get protected of rights that seem not explicit in the U.S. Constitution. In *Griswold* case, the Court reasoned in such an artistic manner that within the Constitution’s penumbra, there is an unwritten right to marital privacy without which the enumerated rights cannot be enjoyed properly.⁸⁶ Later, in *Lawrence* case, the Court again bravely challenged its previous judgment and confirmed that consensual sexual conduct between two same sex adults belonged to the “liberty” protected by the Due Process Clause.⁸⁷ It’s also inspiring to see how civil rights organizations in the U.S. strategically struggled for group rights through well-planned litigation. In *Brown* case, it has been seen that how the National Association for the Advancement of Colored People (NAACP) successfully challenged the segregation practice in school through its effort.⁸⁸

These experiences are worth careful consideration. They are perfect proof of what Bundy, the head of Ford Foundation, said: “law must be an active, not a passive force”.⁸⁹ Law is in place does not necessarily mean that it’s well implemented. It is needed people who are under the law’s regulation and protection to make use of it by saying that “I have this right

⁸⁴ Scott L. Cummings & Deborah L. Rhode, Public Interest Litigation: Insights from Theory and Practice, *FORDHAM URB. L.J.* Vol. XXXVI, p. 606.

⁸⁵ Hellen Hershkoff & David Hollander, Rights into Action :Public Interest Litigation in the United States, in *Many Roads to Justice: the law-related work of Ford Foundation grantees around the world*, Edited by Stephen Golub and Mary McClymont, published by The Ford Foundation, 2002, p. 96.

⁸⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁷ *Lawrence v Texas*, 539 U.S. 558 (2003).

⁸⁸ *Brown v. Board of Education (I)*, 347 U.S. 483 (1954).

⁸⁹ Heather Mac Donald, This Is the Legal Mainstream?, *City Journal*, http://www.city-journal.org/html/16_1_law_schools.html. Accessed on November 27th 2010.

and not it's violated". More importantly, it has been indicated in the above cases that in some occasions, people might even go before the court and say "I should have this right, though it's not clear in the current law, and thus the law should be amended or interpreted in this manner". In this way, the law could become more and more inclusive and protective than it seems initially, even though the text does not change.

Another lesson learned from the examples is the importance of well organizing. The power of single disadvantaged people is almost nothing, but when they are gathering and with the help of those who devote themselves to the career of social justice and human rights. And this might be how public interest law, as a broader notion than public interest litigation, partly refers to. Public interest law, while is not a particular field of law rather as a way of working with law, including public interest litigation, community legal education, legal advocacy and so on.⁹⁰ In the U.S. context, approaches have also been explored regarding how to first make the disadvantaged to realize that they have the right to litigate and how to proceed. For example, the California Rural Legal Assistance Foundation helped with organizing the neighbourhood in the Central Valley in California to make use of the legal system to tackle the local environmental problems.⁹¹

Nevertheless, what the writer of the paper considers important is the role played by the external help of the so-called "experts" or "elites". It should be admitted that the help of these organizations are vital, but their role are mainly to facilitate and empower, not substitution. It's been discussed in the first chapter that how "legal elitism" may fail to find out the real legal needs of the disadvantaged. Therefore, it is basically for the organizations to act as resource centre, rather than "saviours".

⁹⁰ As public interest, to define public interest law is hard and there are many literatures. Here the writer simply uses the definition provides by the Irish national NGO, the Free Legal Advice Centre, where the writer took a 3-month internship in 2010 and worked with the public interest law alliance project, <http://www.flac.ie/whatwedo/>.

⁹¹ See 85, pp. 110-111.

3.1.2 Legal Aid Clinics

The legal aid clinics are not there from the very beginning in the U.S., rather, it has taken a long time for this creative pedagogy to be well established. What is interesting to have a look is that how social justice as a value has been injected into the legal professional education, which gradually made the clinical education not only a teaching method but a way of making access more accessible and promoting human rights. Actually China's experience is similar to this and would probably get some more ideas from the development process. Some scholars divide the evolvement of legal clinical education in the U.S. into three phases⁹² which the writer of the paper would like to summarize and describe as exploration, expansion and incorporation.

The first phase is in the early 20th century where the casebook method which focused on court judgments began to be doubted by some and legal education method which could provide law students with practical experiences were raised and experimented in small-scale.⁹³ However, it was not spreading fast for several reasons: 1) law schools generally characterized themselves mainly as academic institutions which were different from talents trained under the proposed clinical education; 2) there was lack of manpower since the clinical education needed a large number of supervisors; 3) the value of clinical education had not been widely noticed and agreed.⁹⁴ By the 1950s, more proponents of clinical education came out to express their appreciation of this teaching method on the ground that it was helpful for the law students to have chances to encounter with real legal problems and on the

⁹² Margaret Martin Barry, Jon C. Dubin and Peter A. Joy, *Clinical Education for this Millennium: the Third Wave*, 7 CLINICAL L. REV. 1 (2000).

⁹³ See 92, pp. 6-7.

⁹⁴ See 92, pp. 8.

other hand it was a path of approaching social justice since people in disadvantaged situation could get chances to be aided.⁹⁵

The second phase lasted from 1960s to 1990s, during which the legal clinical education method was gradually systematized and expanded to a wider context, and what was most important, the social justice dimension began to be injected into the legal education as an internal value and incentive.⁹⁶ For example, Charles E. Ares, a law professor in the New York University, expressed his concern that law students were profit-oriented in pursuing their careers. But according to him, this was partly because of the curriculum setting in law schools, where students had rare chances to be exposed to the situation of the poor. He then developed a program in which students had to tackle criminal issues in regard to the poor.⁹⁷ It is also comforting that though during that time the Critical Legal Studies were trying to tell students that law was partly the reflection of realistic power, the clinical education did not give up with making use of law and perfecting law to realize social justice.⁹⁸

Finally, it comes to the third phase which we are experiencing. At this stage, it is expected that the clinical education would be strengthened by giving students more chances to get in touch with real issues and further the value established in clinical education would finally be incorporated into every class, which ensures students' great commitment to work for the poor's access to justice.⁹⁹

⁹⁵ Robert G. Storey, Law School Legal Aid Clinics: Foreword, 3 J. Legal Educ. 533 (1951), pp. 533-534.

⁹⁶ See 92, pp. 12.

⁹⁷ Charles E. Ares, Legal Education and the Problem of the Poor, 17 J. Legal Educ. 307 (1965), pp. 307-309.

⁹⁸ See 92, pp. 13.

⁹⁹ See 92, pp. 15-16.

3.1.3 Street Law Model

The Street law model is particularly useful for community legal education, in the mean time an effective way of involving law students before they actually enter the realistic world with various legal problems.

The street law program was initiated as part of the clinical courses at Georgetown University in 1972, which organized the law students to teach practical law in local high schools and correctional institutions.¹⁰⁰ The launch of this program was considered from both perspectives of law students and the younger non-law students. According to some reports, the in the U.S. more than 30 million Americans were incompetent in handling their legal rights and in high schools that were surveyed, law was among the courses that students desired most; regarding the law students, it was thought that “one of the best ways to learn law is to teach it”.¹⁰¹ The law students that firstly took the clinical program gave the name Street Law to this kind of course because the legal knowledge conveyed in this course are closely connected to people’s daily lives—just what they might be come across on the street. It was also selected because it was believed that it would attract high school students.¹⁰² The program involved diverse teaching methods, such as role play, mock trial, court visits with participation of lawyers, local judges and police officers; and there developed a textbook on practical law containing charts, pictures and legal texts.¹⁰³

The street law model has been widely spreading during the years, both nationally and internationally.¹⁰⁴ This model has significant impact on communities, both the ordinary communities and the legal communities. It involves multipronged legal resources and

¹⁰⁰ Edward L. O’Brien and Lee P. Arbetman, A New Clinical Curriculum: Teaching Practical Law to High School Students and Inmates, 29 J. Legal Educ. 568 (1977-1978), pp. 568-569.

¹⁰¹ A New Clinical Curriculum, 29 J. Legal Educ. 568 (1977-1978), pp.569.

¹⁰² How did Street Law get its name? FAQs on the Street Law.com, <http://www.streetlaw.com/>. Accessed on November 28th 2010.

¹⁰³ See 101, pp.569-570.

¹⁰⁴ Kamina A. Pinder, Street Law: 25 Years and Counting, 27 J.L. & Educ. 211 (1998), p. 212.

establishes positive relationships among lawyers, judges, law students and communities, which greatly expand the possibilities of pro bono.¹⁰⁵

3.2 The Philippines—Participatory Justice

Both as developing countries, the Philippines and China might have more in common in respect to human rights situation and the possible solution therein. Due to historical situation, a large portion of the people in both countries could be described as powerless in addressing their rights legally. This has resulted from many factors, such as economical underdevelopment, institutional deficiency and inadequate education. When it comes to the question that how the people of one country can effectively participate in realizing their rights as well as contributing to the whole nation's development, the Philippines could be a good example where China can draw lessons from.

Unlike the U.S., the Philippines seems to have adopted a quite integral approach of promoting social justice and human rights which has been working pretty well, though it should not be denied that many constituent strategies were inspired by the U.S.. The writer of the paper considers it very pragmatic to examine the situation of the Philippines because it seems like the Philippine experience is highly localized thus can probably provide China with more insights.

3.2.1 The Alternative Law Groups (ALGs)

The ALGs in the Philippines emerged in the post-Marco era when the revived democracy still seemed not accessible by civil society. There, patronage and power was permeating and the disadvantaged who lack legal knowledge, financial resources and were not influential enough did not have access to justice since the legal system was mainly based on

¹⁰⁵ See 104, p. 231-232.

personal relations.¹⁰⁶ The ALGs were consequently working to make the legal system under the democracy more accountable and participatory and empower the disadvantaged to have an equal voice in the country's decision-making process and to help realize their civil, social and economical rights.¹⁰⁷

By addressing themselves as “alternative” law groups, they differ themselves from ordinary legal practice. They are working with the notion of “developmental legal aid”, first articulated by the late Philippine Senator and human rights activist lawyer Jose W. Diokno and the Free Legal Assistance Group in the Philippines later changed the word “aid” to “advocacy”.¹⁰⁸ Lawyers working with this strategy are called people's lawyers and carrying out public interest law practice which are different from traditional legal aid: they work in response to the legal needs of the poor while bearing in mind that poverty is caused by social inequalities and violations of human rights, therefore they are making efforts in addressing the social causes when handling the legal cases and they are aiming to promote social organizing and awareness.¹⁰⁹ The clients and issues that they are working with as parnters including peasants' land rights, migrant workers' equal rights overseas, workers' right to obtain fair wages, to enjoy working conditions and to form trade unions, etc.¹¹⁰

The way they are working is pretty collaborative; they are actively interacting with governments, communities, law schools/students, NGOs and other self-help organizations (which is referred to as People's organizations—POs).¹¹¹ For example, the organization BALAOD-Mindanao (Balay Alternative Legal Advocates for Development in Mindanao,

¹⁰⁶ Stephen Golub, Participatory Justice in the Philippines, in *Many Roads to Justice: the law-related work of Ford Foundation grantees around the world*, Edited by Stephen Golub and Mary McClymont, published by The Ford Foundation, 2002, pp. 197, 200-201.

¹⁰⁷ See 106, pp. 199, 202.

¹⁰⁸ Jefferson R. Plantilla, *Lawyering for Human Rights*, HuRights OSAKA-FOCUS Asia-Pacific News, Vol.38, 2004, http://www.hurights.or.jp/asia-pacific/no_38/focus38.pdf, p. 10. Accessed on November 28th 2010.

¹⁰⁹ Romeo T. Capulong, *Alternative Lawyering and the Filipino Peoples' Struggle for Justice and Genuine Freedom*, www.arkibongbayan.org/2010/2010-09Sept25-rtc/romycapulong.ppt. Accessed on November 28th 2010.

¹¹⁰ See 109.

¹¹¹ See 106, pp. 199-200.

Inc.), has assisted the Sumilao farmers in obtaining their lands. They negotiated with the high-priced lawyers from the other side for a long time and successfully took back the farmers' lands, with little or no pay for their work.¹¹² Also, KAKAMMPI is a community-based organization of migrant workers and their families, which was formed to protect the rights of overseas Filipinos. It is working in an integral manner which includes "organizing, advocacy, case documentation and institutional networking" and empowering.¹¹³

3.2.2 Paralegal Development

In the Philippines, the implementation of law is equally, maybe more important, than the adoption of law *per se*, which is exactly the same situation in China, where the unsatisfactory enjoyment of rights usually results from poor implementation of law while law with beautiful content is in place. The ALG lawyers address the problem from two perspectives: to educate the communities in regard to their rights on one hand and to push the governmental officials to fulfil their legal obligations on the other hand.¹¹⁴ They achieve this by focusing on paralegal development, combining training sessions and long-term contact for assistance.¹¹⁵ Examples of success are sufficient. In one case, 500 trained paralegals were able to apply for land reform to the Department of Agrarian Reform, during which the paralegals collected proving documents and represented the farmers before non-judicial proceedings; ALGs only provided representation in courts when needed.¹¹⁶ The other case has shown how 5 trained paralegals successfully handled about 200 cases concerning violence against women for years through requesting the police to fulfil their functions.¹¹⁷

¹¹² Mahar Mangahas, Alternative law groups, <http://opinion.inquirer.net/inquireropinion/columns/view/20080405-128496/Alternative-law-groups>. Accessed on November 28th 2010.

¹¹³ <http://kakammmpi.tripod.com>.

¹¹⁴ See 106, pp. 212.

¹¹⁵ See 106, pp. 213.

¹¹⁶ See 106, pp. 213.

¹¹⁷ See 106, pp. 213-214.

It is worth noting from the Philippines in respect of paralegals it that the training of paralegals mainly focus on domestic law and mechanisms rather than international law. It's not to say that the international law is not useful, but due to the limitation of resources, it would be more cost-effective to prioritize legislation and mechanisms which are most connected to ordinary people.¹¹⁸ This localization is valuable for China because we have the same situation that people do not even know much about the domestic legal system and have no idea of what to do when they encounter violations of legal rights. However, the writer of the paper considers that it would be still necessary to rely on international law when conducting rights awareness since fundamental human rights principles engraved in international conventions are important. In addition, the two examples provided above also indicate that a well-trained and organized community could be very powerful and could contribute a lot to positive change.

3.2.3 A Multi-faceted Framework

The success of ALGs also lies in that they integrate all kinds of social resources in an effective manner. They do not resist working with the government; their rationale seems that talking with the government in a friendly manner (in opposition to advocate in a big way) itself is not compromise; what is in the central place is what you are talking with the government and how to make them buy in your idea. ALGs' merits is that it's exactly community-based/linked, so they know what is needed most at the bottom level of the society and they know that it would be far better for the government to be cooperative rather than hostile. Apart from paralegals, the ALGs also involve other strategies such as litigation,

¹¹⁸ See 106, pp. 214.

community-organizing, media and so on. Experiences have proven that an integral approach is necessary and effective.¹¹⁹ An excellent quotation seems perfect for the ALGs' position:

*"Some of the ALG lawyers were top graduates of the nation's leading law schools. They persuasively articulated both their goals and their willingness to experiment with new strategies. The fact that many hailed from elite institutions did not necessarily make them elitist. Many had cut their professional teeth on fieldwork with disadvantaged populations, and their community orientation suggested that they would remain rooted in grassroots realities."*¹²⁰

¹¹⁹ See 106, pp. 215-221.

¹²⁰ See 106, pp. 205.

Chapter4 Legal Empowerment of

Labour—Possibilities in China Context

4.1 Legal Aid System in China

Currently in China, the legal aid providers come from diverse sources and work in flexible forms which were able to mobilize the limited resources in order to provide legal aid to as many people as possible. However, different legal aid providers are working relatively independently without no communication or cooperation.

4.1.1 Governmental Legal Aid

On November 9th 1995, Guangzhou Legal Aid Centre was established as the first state-owned legal aid centre in China.¹²¹ It was a milestone symbolizing that China's legal aid has moved from spontaneous and non-governmental charity to standardized governmental behaviour, which is a big step forward in complying with international standards. During years, the governmental legal aid agencies have drawn more and more attention from the public and are playing a crucial role in propelling the protection for the disadvantaged.

The advantages of governmental legal aid agencies are obvious: 1) the broad coverage. Now China has established a 4-level legal aid system in accordance with China's administrative division, therefore legal aid institutions are almost in place in every township

¹²¹ *Falvyuanzhuchu Jianjie* [Introduction to the Legal Aid Centre], *Guangzhou Sifawang* [Justice of Guangzhou net], <http://www.gzsfj.gov.cn/zwgk/flyz/index.htm>. Accessed on November 29th 2010.

and the cross-regional cooperation is guaranteed to some extent;¹²² 2) the low cost. Since it's appropriated from governmental finance, the legal aid centres are likely to deal with more cases with little or no charge in comparison to other legal aid providers;¹²³ 3) comprehensive aid approaches. Currently, the government coffer legal aid in forms of consultation hotlines, departmental coordination and so on;¹²⁴ 4) positive connection between the legal aid providers and the clients. Legal aid workers at the basic level are usually working in his/her hometown, so they might provide extra emotional care to the clients.¹²⁵

One of the landmark cases was 500 migrant workers from Ma'an Shan city got back their unpaid wages from a Beijing construction company for about 5,000,000 Yuan with the assistance of governmental legal aid. This was the first case where legal aid was used in arrears of wages in construction industry. However, it was reported by newspaper that there was no immediate payment of wages following the judgment. This drew the Mayor's attention and he declared on a meeting that asking the court to enforce the judgment. Finally, the 500 migrant workers successfully went back to their hometown for the spring festival with their earnings.¹²⁶ Though the result of the case is encouraging, we still can see there is problem of enforcing the judgment and the fact that sometimes administrative orders are more enforceable than judiciary decision.

Besides the limitation of the fund in legal aid, the governmental legal aid is still confronted with some problems: 1) the embarrassing position in handling administrative

¹²² Liu Genju, *Falvyuanzhu Zhidu de Jige Wenti* [On the Legal Aid System], *Zhengfaluntan* [Tribune of Political Science and Law], Vol.1 2001, p. 13.

¹²³ See 122.

¹²⁴ The legal aid hotline '12348' has been put into use nationwide where citizens can turn for help. And recently the legal aid centre is divided into 'legal aid centre' mainly dealing with cases and 'legal aid division' in charge of legal aid administration.

¹²⁵ This is from personal observation during the writer's participation in a NGO project called Promoting Access to Justice in Rural China, carried out by Wuhan University Public Interest and Development Law Institute from 2006-2009.

¹²⁶ *Beijing: 500 Mingong Nahui Quanbu Qianxin* [Beijing: 500 migrant workers got back all their unpaid wages], *Zhongguo Fayuanwang* [China Court Net] September 7th 2004, <http://www.chinacourt.org/public/detail.php?id=130537>. Accessed on October 4th, 2010.

lawsuits. Though the legal aid workers are authorized to deal with administrative lawsuits,¹²⁷ it does not seem to make sense for the legal aid workers to stand against governmental departments while the basic-level legal aid organization is the branch of local government and receive appropriation from the government; 2) there is a sizable gap of income and credibility between legal aid lawyers and social lawyers. Legal aid lawyers do not put less effort than social lawyers in handling cases, but the governmental subsidy per case given to them is far less than the amount of case handling fee that the social lawyers can legally charge;¹²⁸ in addition, basic-level legal aid workers are tired out from a multitude of duties such as popularization of law and mediation. Therefore the incentive mechanism for them is still relatively insufficient; 3) Basic-level legal aid workers are in need of experience sharing and capability enhancement. The basic-level justice system in China, which was established to tackle the lack of lawyer resource, allows quailed legal workers (but non-lawyers) to provide legal services such as consultation, mediation and non-judicial representation to rural people.¹²⁹ They are at the very front of the justice system in China and working closely with rural people who are vulnerable to violations of their rights. And because they are very familiar with the local situation, they are supposed to provide tailored assistance to the people. However, since they are not qualified lawyers and mostly do not obtain higher education, the quality of service might be affected. They might not be very authoritative when mediating among parties and might not be seen as very credible in the eyes of rural people.¹³⁰ Nevertheless, the paralegals are very important resource for helping the disadvantaged, and the more effective involvement of this group of people will be discussed in the following section.

¹²⁷ See 79, Article 3 of the Legal Aid Ordinance, which allows legal aid workers to represent state compensation case.

¹²⁸ Peng Lihong, *Falv Yuanzhu Banan Butie Ruogan Shijian Wenti Qianyi* [On Some Practical Problems of Subsidies for Legal Aid Case Handling], Legal Aid of Guangong, <http://www.gdfv.gov.cn/main/contextBody.jsp>. Accessed on November 29th 2010.

¹²⁹ Songfa Xiaxiang; *Zhongguo Jiceng Sifa Zhidu Yanjiu* [Sending Law to Countryside: Research on Basic-Level Justice System in China], China University of Political Science and Law Press, 2000, pp. 328-329.

¹³⁰ See 129, pp. 306-308.

4.1.2 Trade Unions

Trade unions have been clearly recognized as qualified juridical associations and can institute civil lawsuits and criminal proceedings and bear civil liabilities in China.¹³¹ Therefore, trade unions, different from governmental departments and other civil society organizations, can be one of the important sources to provide assistance for migrant workers by means of legal consulting, mediation, arbitration and litigation. To comprehensively implement the legal aid for migrant workers, ACFTU has launched pilot projects of public attorneys and cooperated with the Ministry of Justice in selection and awarding of “National Outstanding Attorneys in Safeguarding the Legitimate rights and Interests of Staff and Workers” and took various stimulus measures to guide attorneys to provide legal aid for migrant workers.¹³² Since the issue of *Rules of Trade Union on Legal Aid*, legal aid service organizations have been developing further. By the end of 2008, trade unions around China have set up 5,779 service institutions with 15,565 staff, among which 1,818 are qualified lawyers, amounting to 11.7% of the whole, and they have 17,081 trade union legal aid volunteers.¹³³ The in-system trade unions now rely mainly on their systematic advantages and political resources to mediate between enterprises and governmental departments, and are more inclined to settle labour disputes by means of consultation and mediation, which sometimes have achieved satisfactory effects.

¹³¹ See 65, article 14.

¹³² ACFTU, 2006 *Nian Zhongguo Gonghui Weihu Zhigong Hefa Quanyi Lanpishu(Zhaiyao)* [Blue Paper on Safeguarding the Legal Rights and Interests of Staff and Workers by Chinese Trade Unions 2006 (Excerpt)], September 27th 2007, http://www.humanrights.cn/cn/zt/qita/rqzz/2007/04/t20070927_292720.htm. Accessed on November 29th 2010.

¹³³ Data from ACFTU's website, <http://acftu.worker.cn/contentfile/2009/08/10/142403118692127.html>, accessed 23 March 2010.

4.1.3 University-based Legal Aid Organizations

University-based legal aid aiming to help those litigants who are in poor economic conditions was originated in 1992. In May 1992, Wuhan University established the Centre for Protection of Rights of Disadvantaged Citizens (CPRDC), which is the first university-based legal aid institution in China. In recent years, more and more universities have set up legal department and have introduced legal clinic courses in a bid to offer legal aid to society.

On one hand, university-based legal aid organizations could mobilize their intelligence and knowledge and their relatively independent status to provide legal aid to litigants, in forms of legal consultation, drafting legal documents, representation before courts and tribunals. In addition, student volunteers could have the chance to comprehend the reality and cultivate their spirit of pursuing public interest.

However, the university legal aid organizations are confronted with following limitations: 1) the number of the cases handled is limited. The university legal aid organizations usually concurrently undertake mandates such as legal education and internship, so only a part of students can participate in legal aid and it's almost impossible for them to devote their full energy in providing legal aid. Since the student volunteers are not full-time legal aid workers, they can merely handle limited cases in several months based on the semester-unit; 2) legal services provided by student volunteers are not professional enough and the clinical professors' supervision is lacking; 3) the legal position of university-based legal aid organizations is unclear. In the Legal Aid Ordinance it is stipulated that the government encourages and supports social organizations to provide legal aid¹³⁴, their role is not clarified in justice practice. Unlike the CPRDC, which registered as an independent

¹³⁴ See 78, Article 8.

organization, most university-based legal aid organizations do not enjoy the status of juridical person, so they might facing many blind points in practice. 135

4.1.4 Grassroots NGOs and Self-help Organizations

In recent years, grassroots NGOs and self-help organizations are springing up like bamboo shoots. Surprising increase has shown up not only in the number of the organizations and the coverage of areas, but also the capacity of offering services and delivering assistances. These organizations usually set up and develop based on the common interests of certain group of people such as the group of the water pollution victims (Huai River Water Liuing Circumstance Scientific Researching Centre) and The Beijing Cultural Development Centre for Rural Women. They work effectively since their goals and activities are well-defined. The advantages of these organizations lie in that the participants are with vital interests in the activities and understand all what they have gone through, thus heading on persistently. Sympathizing with each other, they are endowed with natural and sufficient motivation to help their countrymen or “brothers and sisters”. Besides, the organizations are usually small-sized and flexible in action. They are closely linked with community members and are familiar with the local situation, so they know what is most in need thus can address the underlying problems and provide more sustainable assistance. If many university-based NGOs are advocating-type, these grassroots organizations are more like “acting-type”. However, the limitations on providing legal assistance by grassroots NGOs are: 1) there is lack of professional assistance. Due to the limitations of economic resource and social status, grassroots organizations can hardly obtain guidance and help from full-time lawyers; 2) the function of NGOs are restricted by certain organizational regulations in terms of legal status

¹³⁵ Tang Ming and Wang Qing, *Woguo Minjian Falv Yuanzhu Zuzhi de Xingqi yu Biange* [The Rise and Reform of Civil Society Legal Aid Organizations in China], *Shehui Zhuyi Yanjiu* [Socialism Studies], Vol. 5 2008, p. 49.

and funding, etc¹³⁶, causing these organizations less powerful than they are supposed to be; 3) the capacity building is inadequate. These organizations which take legal aid as their missions can hardly develop their own leaderships through citizen action and project management. Internally, they are weak in research; externally, they lack capacity to advocate.

4.1.5 Pro Bono Lawyers and Law Firms

Those attorneys who commit themselves to legal aid and protecting vulnerable groups in society are also called pro bono lawyers. According to current legislation in China, legal aid is the legal duty of social lawyers.¹³⁷ In the mean time, they have their own reasons to do pro bono work: reputation, potential punishment, pursuing realization of the value as a lawyer and the creation of a “genuinely independent legal profession”.¹³⁸ Typical examples among them are Guo Jianmei, known for safeguarding women’s rights, Zhou Litai, the spokesman of migrant workers’ rights and Ton Lihua, well-known for protecting rights of juveniles, etc. These attorneys and their law firms vary in ways of providing legal aid, including ordinary legal service and more strategic ones like public interest litigation. The legal aid they provide might be totally free or charged in a low rate on condition of contingency. However, the market transition and commercialization seems to have slightly changed the atmosphere and the pure pursuit of monetary interest might impair the impact of public interest action.

The poor, as used here, is not tantamount to the impoverished rich. As discussed in the first and second chapter, their poverty results from structural discrimination and disrespect for human rights. To tackle these problems, pure top-down approach seems not omnipotent; rather, bottom-up strategies are proven very promising but needs further capacity injection. Without denying the top-down legal reform in its entirety, the writer considers that a mixed

¹³⁶ See 135, p. 50.

¹³⁷ See 78, Article 6.

¹³⁸ Francis Regan, Legal Aid in China: An Analysis of the Development of Policy, Civil Justice Quarterly, Vol.23 2004, p183.

mode of legal aid with developmental perspective would be extremely helpful in wiping out discrimination and realizing social justice and human rights. Legal empowerment is not just happening for its own sake. Actually, when we making efforts on legal empowerment to make people more powerful, we are at the same time addressing the problems of formal legal system.

4.2 Paralegals Involvement

In current China, paralegals appear in two forms. One is what has been mentioned above as basic-level legal aid workers. They are actually providing legal services on a full time basis but they are not qualified practicing lawyers. This is similar to what Golub describes as “professional paralegals” that are employed by certain organizations and receive special training regarding pertinent legal problems and mechanisms and then provide legal services for the community.¹³⁹ In China context it is a little bit different because these professional paralegals are employed by the government rather than civil organizations. In response to the concern that the use of paralegals might unwittingly put the poor into a lower level which can only enjoy “second-class” legal services, Golub says that the difference is not really between first-class or second-class, but whether there is legal service at all. ¹⁴⁰ The writer of the paper would like to add that actually in many occasions, the paralegals could achieve more satisfactory solutions since they are more familiar with the local context. The other form is volunteer paralegals, as Golub categorizes. ¹⁴¹ These people gather by themselves, out of common interest, which the writer guesses that more commitment would be made to this kind of organization.

¹³⁹ Stephen Golub, Nonlawyers as Legal Resources for Their Communities, in *Many Roads to Justice: the law-related work of Ford Foundation grantees around the world*, Edited by Stephen Golub and Mary McClymont, published by The Ford Foundation, 2002, p. 301.

¹⁴⁰ See 139, p. 303.

¹⁴¹ See 139.

In China, we call these people “barefoot lawyers”¹⁴², who are not qualified practicing lawyers but with legal knowledge to a certain degree thus help people with legal issues. Besides the lack of lawyer resource and the high cost, the formal justice system seems not in harmony with the Chinese tradition of “rule by emotion”, where human interaction is regulated by emotional connection rather than rigorous legal texts. ¹⁴³ Barefoot lawyers, most of whom born in rural China, usually act with more emotional care when serving the rural communities.¹⁴⁴ In 2008, there established a law popularization team consisting of migrant workers themselves. They got legal training from a pro bono law firm and work for the rights protection of their fellow workers. ¹⁴⁵

4.3 Legal Clinical Education

Legal clinical education, as mentioned above, are a good way of adjust law students into the real world and on the other hand a resource for the disadvantaged to turn to when needing legal assistance. Since more and more law schools and legal clinics have been set up in China, the law students have gradually become an assignable power for rights protection of the disadvantaged.

One important thing for legal clinics is that it can integrally work with other legal aid providers. Firstly, as future lawyers, legal aid workers or human rights activists, clinical students add to the human resources of NGOs and pro bono law firms thus a sustainable chain forms. Secondly, clinical students normally have a lot of chances to be exposed to the practical legal problems. Therefore, when they grow as a social lawyer, they are likely to

¹⁴² This is an analogical use of the term “barefoot doctors” in Mao’s era, referring to people providing free medical services though without qualification.

¹⁴³ Ying Xing, *Dui Zhongguo Xiangcun Chijiaolvshi de Ge’an Yanjiu* [Case Study on Barefoot Lawyers in Rural China], *Zhengfa Luntan* [Tribune of Political Science and Law], Vol. 25 2007, p. 86.

¹⁴⁴ See 143, p. 86.

¹⁴⁵ *20 ming Nongmingong Chijiaolvshi jiang wei Gongyou Weiquan* [20 Migrant Worker-Barefoot Lawyers are Going to Protect Their Fellow Workers’ Rights], December 3rd 2008, <http://beijing.qianlong.com/3825/2008/12/03/2902@4772167.htm>. Accessed on November 29th 2010.

embrace a spirit of pursuing public interest. Finally, legal clinics are independent at the same time could work well with the government. What the Wuhan University Public Interest and Development Law Institute (PIDLI), in which the writer is working with, has done could be a good example. PIDLI has been cooperating with local judicial governments to provide the clinical students with more chances to get to know how legal aid workers at basic-level are working. The cooperative relationship between legal clinics and local judicial departments could expand the access justice via different types of legal aid services.

4.4 Public Interest Litigation

Though the court system is deficient in China, we still have witnessed many occasions where the court stands firmly for human rights and justice and where after successful challenges the system is progressing. Public interest litigation has contributed a lot in this process.

Zhou Litai, for example, has helped migrant workers realize their rights in many cases through public interest litigation. He does not only focus on the current case, but also how it can affect a wider group. One of the cases was that he represented 83 migrant workers to sue the trade union for failing to carry out its legal duties. The story was that the 83 migrant workers could not afford the expensive arbitration fees and asked the trade union to prove that their economic situation was “difficult” thus the arbitration fees should be reduced according to relevant law. However, the trade union refused to do so on the ground that the plaintiffs should provide proving materials by themselves according to a notification made by the trade union itself concerning how to define the “difficult” economic situation. In addition, the proving material it requires was actually a certification of enjoying the minimum subsistence allowance which was only granted to urban workers. This regulation de facto rendered it impossible for migrant workers to satisfy the financial requirement set up by the trade union.

During the deliberation on whether to admit the case, some governmental department intervened and the case was ended by reducing the arbitration fees without any judgment. 146

¹⁴⁶ *Chongqing 83 Ming Gongren Zhuanggao Shi Zonggonghui* [Chongting: 83 workers sued the Municipal Federation of trade unions], January 7th 2005, <http://news.sohu.com/20050107/n223824113.shtml>. Accessed on October 4th, 2010.

Conclusion

Labour in China, especially migrant workers, are those who make considerable contribution to the society's development. However, they are suffering various human rights violations on a daily basis with numerous difficulties in seeking remedies. This is caused by structural discrimination and it seems that though laws are in place, they are either not inclusive enough or not implemented well.

Charity from the top will never be enough to solve the problem. The workers need to be empowered to claim their rights. After all the discussion here, it seems that an effective way would be to take multi-faceted measures to help the migrant workers to build their capacity, by which they can be politically more powerful and have a say in the decision-making process.

Solutions are presented here. However, more social resources should be mobilized to support. NGOs, both advocating-type and acting-type need to develop to make their voice heard. We need more powerful and more competent civil society to guide the legal empowerment effort.

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