

**Enforcement of the Ratified and Un-ratified Core Conventions in China in 2012
For the ILO Annual Survey of 2013**
Prepared by IHLO, 28 July 2013

Summary

China has ratified four of the eight ILO core labour conventions only, namely C138 and C182 on child labour; as well as C100 and C111 on discrimination. China has yet to ratify C87 and C98 on Freedom of Association and Collective Bargaining; and C29 and C105 on Freedom from Forced Labour. Despite the rising number of wild cat strikes in recent years, the Chinese government has not indicated a plan to protect workers' fundamental right to organise and bargain collectively that would eventually comply with the international core labour standard. Workers' petitions, industrial actions and spontaneous negotiation with the employers are handled unevenly and arbitrarily by the local government and the public security, varying from government-led negotiation, administrative detention and criminalization. Although the central leaders announced the suspension of the notorious re-education through labour (RTL) system in January this year, the government has not indicated a commitment to completely abolish the RTL despite rising levels of domestic outcry against the civil rights violations and forced labour practices associated with the system.

I. Implementation of C100 Equal Remuneration Convention in China

The employment rights of women are legally protected by the Law on the Protection of Rights and Interests of Women (1992), the Labour Law (1995), the Amendment to the Law on the Protection of Rights and Interests of Women (2005) and the Employment Promotion Law (2008). This legal package guarantees a wide range of equal rights and protection to women workers in China. The Amendment in 2005 goes further to forbid discriminatory clauses related to marital status and child-bearing in job recruitment and employment contracts. It also spells out that sexual harassment is prohibited, finally opening the door for women workers to lodge complaints¹. The above mentioned laws, however, fail to protect the women from employment discrimination as intended. Official national surveys show that women are disadvantaged in recruitment, promotion and income.

Gender Income Gap and Gender-Blind Income Statistics

According to the national surveys and the All China Federation of Women (ACFW), the gender income gap between men and women keeps widening. Urban women were earning 78% of the male's income in 1990. It was dropped to 67% in 2010² and 66% in 2012³. The female-to-male ratio of wage equality was even wider at 0.20:1 amongst the "legislators, senior officials and managers"⁴.

The lack of gendered statistics on remuneration makes public participation and monitoring in the wage and gender policies of the government difficult. Although the National Bureau of Statistics compile

¹ Article 23 states that the labor contract or service agreement shall not contain restrictions on her matrimony and child-bearing. Article 40 states that "Sexual harassment against women is banned. The victims shall be entitled to complain to the entity or the relevant organs". (Source: <http://www.lawinfochina.com/display.aspx?lib=law&id=4492&CGid=>, accessed 2013-7-11)

² Gender income gap continues to widen, *China Daily*, May 16, 2013, http://www.chinadaily.com.cn/china/2012-11/28/content_15964718.htm

³ Ricardo Hausmann, Laura D Tyson and Saadia Zahidi, 'The Global Gender Gap Report 2012' (Report, World Economic Forum, 2012) 146.

⁴ Ibid.

data regarding the household income and mean wage levels, and the Ministry of Human Resources and Social Security (MoHRSS) publishes annual release on the median wage levels and social security coverage rate, these data do not have gender segregation.

Equal Remuneration in the Determination of Wages

The statutory minimum wage levels in China are calculated by the proportion method and/or the Engel Coefficient method subject to the decision of the local labour administration (Appendix of the *Provisions on Minimum Wage* (2004)). Both methods use the poorest 5% of the population as reference and the household as a unit. The minimum wage levels are fixed by using the per capita living expenditures or the minimum food and household expenditures of the family, to be multiplied by the number of dependents. Living wage and gender are not factors of consideration in the wage policies. Moreover, the lack of data access and transparency in the local authority's minimum wage calculation makes it difficult to tell if the gender differences are counted, or whether the household expenditure data collected are based on the suppressed expenditures and needs of the female members.

Job Segregation by Sex

Job segregation along gender line, a discriminatory practice in itself, is a key factor contributing to the widening income gap. The report released by the ACFW in 2011 finds that up to 91.9% of the surveyed female university graduates felt discriminated at the workplace, and more than half of them felt inequality in job opportunities⁵. Their experiences agree with the findings of another academic research which finds that nearly 70% of the firms across China have stated explicitly that they only require male candidates for certain posts⁶.

Men-only recruitment is widespread in both the public and private sector. A civil complaint was lodged against the MoHRSS by a non-government organisation in mid-2012 revealing that civil servant recruitment in Fujian Province favours men by a ratio of 1:0.7, and women have less chance to apply at all⁷. In the private sector, companies openly put up online job postings with men-only requirement. Moreover, fewer women are able to climb to the executive positions. Their percentage amongst the company board of directors had dropped to 32% in 2011, a decline of 11% compared with 2005⁸.

Uneven Enforcement

Judicial remedies are timely, expensive and therefore exclusive of the participation of the woman workers in the low-end jobs. Civil litigation cases on gender discrimination are seldom taken up by the courts. Even if it ever goes to the court, the success rate is low. And if the case is won, the penalty is too low as a deterrent⁹. The first civil litigation on job discrimination by sex, the CAO Ju vs Giant

⁵ *Survey on the Female University Graduates in Setting up their Business and Employment*, ACFW, 2011.

⁶ Research data on gender discrimination released in 2010 by Liu Xiaonan, associate professor at China University of Political Science and Law, reported in *Women of China*, 2013-7-11, <http://www.womenofchina.com.cn/html/report/4752-1.htm>, accessed 2013-7-6)

⁷ Guo Bin of Shenzhen Hengping Institute lodged complaints with the Fujian Provincial Bureau of Labour and Social Security about the men-only requirement for some of the Xiamen City civil service posts. (Source: China Legal Daily Online, http://www.legaldaily.com.cn/index_article/content/2012-08/28/content_3800565.htm?node=5955, accessed 2013-7-7)

⁸ *China Daily*, 2013-5-16, http://www.chinadaily.com.cn/china/2013-05/16/content_16502360.htm, accessed 2013-7-6.

⁹ Observation of rights promotion lawyers and NGOs reported in both official news and their own reports. See the comment on the limitation of legal and administrative redress mechanism on Xinhua News, http://news.xinhuanet.com/fortune/2013-01/31/c_114562087_2.htm, accessed 2013-7-7. Shenzhen Hengping Institute makes similar comment in their report.

Education case raised by a fresh college graduate in Beijing in July 2012 is still on the shelf. CAO Ju, the plaintiff, complained to the district, the municipal intermediary court and the procuratorate in September 2012 demanding a redress. By now, she has not received any reply for either her complaint or the lawsuit¹⁰.

The *Law on the Rights and the Interests of Women* (revised 2005) spells out the remedies for gender discrimination cases by labour arbitration or civil litigation (Article 52), and the responsible authorities would receive administrative penalties if failure of duties or retaliation is found. Yet, the litigation channel is blocked by a lack of standards, procedure, precedent and even capacity training within the judicial system to establish tort claims in sexual discrimination cases. In June 2012, the municipal ACFW and the high court in Beijing jointly ventured the two-step mediation and litigation mechanism to resolve women and children's rights cases¹¹. However the mechanism covers marital, family and tort claims disputes only and does not include job discrimination by sex¹².

With the judicial channel blocked, the administrative remedy by the MoHRSS becomes the only option for the discriminated women. A group of female university graduates from eight cities took action to complain the discriminatory recruitment of 267 companies posted on Zhaopin.com, a recruitment agent, with the respective labour authorities in December 2012¹³. Yet the responses of the MoHRSS and the rectification they took are discrepant based on unclear and un-even standards when deciding to file or reject the case¹⁴. Disappointingly, only 30% of the authorities responded to the women graduates' complaints. Only one company was fined RMB10,000. The rest of the complaints could have fallen on deaf ears.

The local labour authorities are referring to the *Provisions on the Administration of Talents Markets*, passed by SAIC, State Administration of Industry and Commerce, in 2005 to cap the fine to RMB10,000 if the case of employment discrimination is established¹⁵. The low administrative penalty

¹⁰ "The Precedent Case on Gender Discrimination is Yet to be Filed in Court after One Year", Chinanews.com, 2013-07-10, <http://www.chinanews.com/fz/2013/07-10/5027337.shtml>

¹¹ The People's High Court and the ACFW of Beijing signed the *Opinions on Establishing the Mechanism for the Protection of the Rights of Woman in the Municipal Courts* in June 2013 《关于在全市法院建立妇女维权工作机制的意见》.

¹² To support Cao Ju's case, seven women lawyers from Beijing, Henan, Shandong and Hainan province sent a joint letter to the high court and the ACFW in Haidian district and Beijing municipality in July 2013. They pressed the ACFW and the court to widen the two-step protection mechanism to include job discrimination by sex and proceed with the Cao Ju's case as soon as possible.

¹³ The action was initiated by Zheng Churan, a fresh graduate of Zhongshan University in Guangzhou. She also launched an online campaign to send letters to National People's Congress delegates, appealing to protect women's right to equal employment. (Source: *Xinhua News*, http://news.xinhuanet.com/fortune/2013-01/26/c_114510501.htm?prolongation=1, accessed 2013-7-6; *Radio Free Asia*, <http://www.rfa.org/mandarin/yataibaodao/renquanfazhi/lp-03142013160049.html>, accessed 2013-7-6)

¹⁴ It takes the district MoHRSS of Guangzhou city 71 days to establish the job discrimination case raised by a woman fresh graduate Wen Yuxuan against Fortune Industrial Supplies (Guangzhou) Company in Guangzhou city between October 2012 and January 2013. The company was made to post an open letter of apology to Wen in its web page, reimburse RMB600 to Wen for her transportation and compensate RMB1 for her psychological damage. The results of the complaint against the 267 companies in December 2012 were less satisfactory. The discriminatory recruitment ads were removed from the website of the agent and only 30% of the companies replied the complainants. Disappointingly, the local authorities have not given an answer to the complainants. Some even rejected or did not process the cases.

¹⁵ This is a general observation of rights promotion lawyers and NGOs reported in both official news and their own reports.

makes the labour authorities' reliance on mediation with the employers even more ineffective.

II. Implementation of C111 on Discrimination in Employment and Occupation

Following the ratification of the convention in 2006, China has promulgated several legal instruments to address employment discrimination in general. The *Employment Promotion Law* (2008) refers discrimination to rather narrow grounds on ethnicity, race, gender and religious beliefs (Article 3), focusing on direct discrimination and job discrimination based on one's gender, physical ability, carrier of infectious disease, ethnicity and rural/urban background (Article 26 to 31). It also makes provision for the workers to take legal action if they face discrimination.

A civil survey found that the five major types of job discrimination are health, gender, age, place of origin and physical appearance in 2010¹⁶. It is even more common to find workers indirectly discriminated at the workplace when they are casualised.

Indirect Discrimination of the "Temporary" and Agency Workers

The law does not exempt the irregular and agency workers from equal treatment or protection from job discrimination. Yet actual discriminations at work are rampant when workers are casualised. The only official All China Federation of Trade Unions (ACFTU) once estimated the size of the agency workers to stand at 60 million across the country in 2010 and the state-owned and public sector is the largest employer of the agency workers in China. Known previously as "temporary workers", these are the irregular workers who had not been given a regular contract for tens of years and many of them were turned into agency workers later for the purpose of depriving them of the same right as the regular workers to sign non-fixed term employment contracts and receiving the same remuneration¹⁷.

It is written in the employment contract of the "temporary workers" in the state-owned Agricultural Development Bank that they are not entitled to the welfare, medical and work injury benefits, or social securities the regular workers enjoy. The employer can dismiss them without prior notice or justification. Many "temporary workers" were recruited since the Agricultural Bank was re-structured in 1994 to replace the laid-off regular workers and they have remained so by now. They receive the statutory minimum wage without increase or overtime compensation. Compared to the agency workers recruited later, they do not have promotion opportunities¹⁸.

Please see the comment on the limitation of legal and administrative redress mechanism on Xinhua News, http://news.xinhuanet.com/fortune/2013-01/31/c_114562087_2.htm, accessed 2013-7-7; and Shenzhen Hengping Institute makes similar comment in their report.

¹⁶ The survey conducted by Shenzhen Hengping Institute, a rights promotion NGO, in 2010 finds that over 60% of the 1560 companies interviewed put up discriminatory recruitment requirement. See, *A Survey Report on the Situation of Employment Discrimination in Shenzhen*, Shenzhen Hengping Institute, May 2010.

¹⁷ Many agency workers in the non-private sectors were employed as "temporary workers", some for more than twenty years, without a regular contract and equal remuneration. They were dismissed and re-hired by the employing units through the labour agencies after the Labour Contract Law (2007) became effective in 2008 to avoid signing non-fixed term contract with them. Re-hired to work in the same posts, these agency workers continue to receive lower salary, none of the benefits and lower levels of social security protection compared to the regular workers. They are also not entitled to the same right to join the trade union of the user company.

¹⁸ "Agricultural Development Bank Reported RMB38 Billion Profit, Temporary Workers Received RMB1000 in Salary", China Business News, 2012-8-3, <http://ln.sina.com.cn/news/finance/2012-08-03/10376474.html>

The agency workers are easily victimized and dismissed in enterprise re-trenchment, and in the recent clean-up campaign of the MoHRSS against illegal agency work before the revised LCL came into effect on 1 July 2013. On 15 April 2013, the state-owned Citic Heavy Industries Co. Ltd in Luoyang city of Henan province announced the dismissal of 1789 agency workers. The agency workers complained that they had been hired for three years as apprentice and another three years as agency workers in Citic without a regular contract. Their salary is half of that of the regular workers doing the same work and they suffer from less chance of promotion.

Agency workers are either not unionized, or they are unionized but not effectively represented in the user company to bargain their working conditions. Although they are equal in law to exercise their trade union rights, the ACFTU in the directive issued in 2009 on unionizing agency workers instructs its affiliates to unionise agency workers under the agency company rather than including them as members for equal protection at the user company¹⁹. Only partial remedy is provided if the union of the user company and the labour agency get into a bilateral agreement to extend services to the non-members, rather than effectively representing them in collective bargaining with the user company²⁰. All these indirect discriminations have pushed the agency workers to use wild cat strikes to defend their interests²¹.

Due to the opposition from the state-owned and public sector, the drafting of the *Wage Regulation* which was proposed by the MoHRSS to give enforcement specifically to the determination of wages by collective bargaining and equal remuneration since 2009 is still suspended. Instead of passing the *Wage Regulation*, the *Labour Contract Law* (LCL) was revised in December 2012 to put a halt to the unregulated growth of agency workers by narrowing the definition of agency work which was loosely limited and allowed in “temporary”, “auxiliary” and “substitutive” posts. Equal remuneration for the agency workers is now written into the revised LCL. Another specific regulation on agency work is also in the pipeline to tighten restrictions which might include putting a cap on the number of agency workers at 10% of the total workforce of the user company.

Nevertheless, the revised LCL and the regulation on agency work under draft are weak in regard to the promotion opportunities and regularization of the agency and irregular workers. The penalty for violation is low and there are very few remedial measures for the irregular and the agency workers to redress the inequality and discrimination in employment. Given that class action lawsuit is uncommon in China, it becomes very difficult for individual workers to use the revised law to remedy their cases.

Discrimination Against the HbsAg Carriers Continues

About 10% of the Chinese population is HBV carriers²². The problem is grave if such a huge

¹⁹ *Provisions of the ACFTU on Unionising Dispatch Workers to Join the Trade Union*, issued by ACFTU in 2009 《中华全国总工会关于组织劳务派遣工加入工会的规定》.

²⁰ To push the backbone state-owned enterprises where large number of agency workers has been employed to set an example, Shanghai SASAC asks the trade union of the Central Enterprises to allow agency workers to attend the workers' assembly as observers with no voting rights.

²¹ For example 400 agency workers in Delphi Wanyuan factory in Beijing went on strike on 13 February 2013 to demand equal remuneration and a regular employment contract which the management has persistently refused to provide for them. About 95% of the workers are agency workers. They are not entitled to the same wages, insurance coverage, benefits and annual leave compared to the regular workers.

²² Updated statistics on the number of HBV carriers is missing. It ranges from the official figure of 94 million to other

community is denied of the right to seek employment because of a long-standing misconception. The Chinese government was prompted to issue a series of regulations to forbid discrimination against the HBV carriers since the two victims, Zhou Yichao and Zhang Xianzhu took high profile protest in 2003²³. Including the Employment Promotion Law (2008), these regulations seek to prohibit employers from rejecting the job application of the HBV carriers (See Appendix 1 for the list of laws and regulations). Neither can they screen the candidates for HBV in the recruitment process. The medical institutions have to protect the applicant's privacy without revealing the HBV test results to the recruitment or remploying unit without the applicant's consent.

The strong legal and administrative framework, however, still fails to guard the HBV carriers against employment discrimination. According to a survey released in 2011 by the Beijing-based Yirenping Center, 35% of 180 major state-owned enterprises said they would not employ HBV carriers. And some 61% of them said they required their employees to be screened for HBV²⁴. Discriminatory practices in violation of the law are found regardless of the size of the enterprises and the type of industry²⁵. It is written in the employment contract of China National Offshore Oil Corporation (Shenzhen) that the recruited employee would be suspended from employment if the screen test shows the employee is a HBV carrier. In July 2012, eight graduate students were turned down by AVIC Chengdu Engine (Group) Co. Ltd after a health check revealed that they were HBV carriers.

The first ever litigation case against HBV discrimination won in 2009 has not led to a surge in similar legal actions²⁶. More subtle practices are used by the employers by collaborating with the medical institutions to do the screen tests without the knowledge of the job seekers. Despite the laws, the judicial remedy is still not accessible since the burden of proof lies with the plaintiff; whereas administrative rectification is unevenly enforced. The AVIC case in the above was not taken up by the local labour authority to order rectification and the court did not file the case for arbitration or litigation²⁷. Moreover, the light penalty (of only RMB1000 or nearly USD160) provided in the *Employment Promotion Law* (2008) to fine the employing units for doing illegal HBV screening makes the enforcement ineffective.

estimates of 130 million. Out of a total population of 1354million as of 2012, a rough estimate of 10% is taken. (Sources: *China's Total Population and Structural Changes in 2011*, National Bureau of Statistics, http://www.stats.gov.cn/english/pressrelease/t20120120_402787463.htm; *Press Release on the National Prevention and Treatment Plan of Hep B, 2006-2010*, Ministry of Health, www.moh.gov.cn/zhuzhan/zcjd/201304/72ea886b4f6c416fae8bdb38634b0620.shtml; *Plague of HBV Discrimination*, <http://www.china.org.cn/english/China/79979.htm>; *Hepatitis B Virus Biology*, American Society for Microbiology, <http://mmbr.asm.org/content/64/1/51.long>, all accessed on 2013-7-12)

²³ In 2003, Zhou Yichao killed a local government official in Zhejiang Province after he was disqualified from his civil service examination when he was tested HBV positive. Another HBV carrier, Zhang Xianzhu in Anhui Province, brought the 'First Court Case of HB Discrimination in China' after he was denied the chance to apply to the civil service.

²⁴ *Chinese Hepatitis B Carriers Call for Equal Rights*, Xinhua News, http://news.xinhuanet.com/english/china/2012-07/28/c_131744922.htm, accessed 2013-7-6)

²⁵ The watchdog organisation, Yirenping Center and the robust online community of HBV carriers, *Gan Dan Xiang Zhao* host updated information of HBV-related discrimination and their own legal cases. Please see <http://www.yirenping.org/> and <http://www.hbvhbv.info/forum/forum-forumdisplay-fid-1004-page-1.html>)

²⁶ Back in 2009, a job seeker in Hangzhou, a HBV carrier, won the first ever privacy violation case related to medical examination in China. The medical institution concerned was fined RMB5000 (USD814) on the ground of infringing upon his privacy for releasing the HBV test result to the employing unit. Please see, <http://www.yirenping.org/article.asp?id=337>, accessed 2013-7-7

²⁷ *Xinhua News*, 2012-7-29, http://news.xinhuanet.com/fortune/2012-07/29/c_123487358.htm, accessed 2013-7-7

Indirect Discrimination Against Workers of Rural Origin

Discrimination based on one's household registration occurs when the job seekers from a certain province/ place of origin are barred from certain jobs or the job is open only to candidates from certain province/place of origin. The *Employment Promotion Law* (2007) protects the equal right to employment of the employees of rural origin (Article 31), but discrimination based on household registration is largely ignored by the labour officers. Although the sub-regulations regarding the recruitment of civil servants and in the public service units (PSUs) prohibit job discrimination²⁸, the PSUs is known as the most discriminatory employer. More than 99% of the recruitment ads of the PSUs in the major cities requires the candidates to be local residents²⁹. Similarly, more than 1500 recruitment ads of the civil servants in 2012 are either open to local residents only or they contain unequal provisions for non-local applicants³⁰.

Although some government bodies quickly straighten their recruitment policies in reaction³¹, the uneven legal enforcement of the labour authorities keeps the door open to violations. The labour officers seldom regard unequal treatment based on the place of origin a legal violation and order rectification and very few victims can afford to proceed for administrative litigation against its inaction.

Equality of Opportunity and Treatment of Ethnic Minorities

Articles 9 and 22 of the *Regional Ethnic Autonomy Law*, Articles 12 and 14 of the *Labour Law* and Articles 3 and 28 of the *Employment Promotion Law* all clearly state that ethnic minorities should receive equal opportunity in the job market.

In Xinjiang Uyghur Autonomous Region, the 2010 Census reports that Han Chinese takes up 40.1% of the population and Uyghur takes up about 45%. In the capital city of Urumqi, the proportion of Uyghur drops to 13% as against 76% of Han Chinese. Unemployment and poverty of the Uyghur, as a consequence of the official policy of promoting the migration of Han Chinese to Xinjiang, remain as one of the root causes of the aggravated racial conflicts and discrimination³². Youth unemployment remains acute as revealed by the official statistics showing 80% of the 60,000 jobless college graduates in 2011 are from the ethnic groups.

Yet, the official statistics on unemployment in China does not have gender and ethnic segregation. The

²⁸ The recruitment regulation of the civil servants and the PSUs prohibits discrimination based on gender, race and religion.

²⁹ The survey was done by Yirenping (Zengzhou), covering more than a hundred PSUs in Beijing, Shanghai, Hanzhou, Xian and Zengzhou etc. Please see, "Grave Discrimination in the Ads of the PSUs", 2013-5-29, <http://news.sina.com.cn/c/2013-05-29/065927252958.shtml>

³⁰ The research of the China University of Political Science and Law in 2011 on job discrimination in the civil service sector (《2011 年国家公务员招考中的就业歧视调查报告》) confirms serious job discrimination by household registration. Up to 85% of the job discrimination cases are related to household registration and 955 civil servants posts are open to the local residents only.

³¹ In reaction to the negative publicity, the State Assets Administration and Supervision Commission (SASAC) issued the notice Number 37 to straighten the recruitment practices of the state-owned enterprises in 2013. The notice prohibits discriminations of all forms including those based on gender, household registration and the institute where the candidate graduates.

³² The Beijing-based Uyghur economist Illam Tohti noted that joblessness of the Uyghur is the single biggest problem in Xinjiang. Tohti's research back in 1990s estimated that 1.5 million Uyghur workers were unemployed. Source: An interview with the RFA in March 2009. <http://www.rfa.org/english/news/uyghur/tohti-03062009130647.html>, accessed 2013-7-7

wage statistics also fail to inform much about the income equality along the ethnic and gender line. Independent statistics on employment in the ethnic and autonomous regions almost do not exist.

Job segregation by race in Xinjiang region is serious. The region's civil servant recruitment in 2013 shows a staggering exclusion of the Uyghur. Out of 7757 posts put up for the year 2013, 917 of them are open to Uyghur only, as compared to 2507 open exclusively to Han Chinese. In total, Han Chinese can apply the job in 70% of the posts³³. Ethnic candidates are virtually barred from decision making or strategic positions in the government and the party organs³⁴. They are over-represented in the agricultural and low-paid sectors, reinforcing the social status and the income gap³⁵.

The 5-year 'leapfrog development' plan approved for Xinjiang in 2010 calls for urbanisation and modernisation of industries and husbandry. The rapid development in the mining, energy and manufacturing recently brought by the leading state-owned and private companies has not necessarily narrowed the employment and income gap. China National Petroleum Corporation (CNPC), the major state-owned oil investor in the region was complained for discrimination in recruitment and treatment against the Uyghurs in the company's branches in Karamay. Seven Uyghur and Kazakhstan mothers from the oil city took their grievance to the MoHRSS, SASAC and SEAC (State Ethnic Affairs Commission) in Beijing in May. The 5000 ethnic youths are under-recruited despite the company's stated policy of proportional employment by race. One of them stated that her son was rejected because the company could not offer Halal food, a common excuse used in the region³⁶. The ethnic employees in CNPC in Karamay are suffering from unequal remuneration and the irregular employees are deprived of promotion opportunities.

The problem of unemployment among Uyghur is compounded by counter-productive labour policies. The new employment promotion policy drawn up in Karamay in 2011, adopted also in other Northern cities in Xinjiang, requires the local employing units to recruit by a certain proportion, the unemployed ethnic people locally originated (and not including the migrant ethnics)³⁷. The policy is however offset by the inflated migration of the Han Chinese resulting in the downsizing and lower rate of recruitment of the local ethnics. The free migration of the Uyghur and other ethnicities is also discouraged under this employment promotion policy³⁸.

³³ Another 2771 posts are open to all ethnicity. Given their cultural and language advantage, it is likely that most of the 2771 posts will be filled by Han Chinese. Consolidated information from government recruitment postings, see: <http://www.uighurbiz.net/archives/13713>, accessed, 2013-7-7).

³⁴ Out of the 20 recruitment posts in the party organs and mass organizations open for recruitment in 2012, only one post is open to Uyghur applicant and another open to all ethnicities. The other 18 posts are restricted to Han Chinese only. Similarly, out of the 110 posts in the fire service open for recruitment, only 5 of them are open to non-Han Chinese candidates.

³⁵ A research on the income gap between young Han Chinese and Uyghur in the capital city of Urumqi in 2005 indicates that Han Chinese earn RMB411 (USD67) more than the Uyghur counterparts. See Zang Xiaowei, *Age and Cost of Being Uyghurs in Urumchi*, China Quarterly Volume 210, June 2012, excerpted in CNPolitics, <http://cnpolitics.org/2012/10/ethnic-inequalities/>, accessed 2013-7-7

³⁶ Multiple reports on Uyghur Online, <http://www.uighurbiz.net/archives/14977>, <http://www.uighurbiz.net/archives/14627>, <http://www.uighurbiz.net/archives/14299>, accessed 2013-7-7

³⁷ The subsidy policy for employment promotion adopted in Karamay in January 2011 is criticized as a misleading one running contrary to its stated intention. It is based on the ratio of the ethnic population by birth in the region excluding the other non-Han Chinese ethnic migrants. Given a demographic drop in the ethnic minorities in the region vis-à-vis the Han-Chinese, the employers are actually allowed to recruit fewer ethnic people.

³⁸ The rapid increase in the Han Chinese in the population of Karamay is reflected in the data of the sixth national census of 2010. Of a size of 391,000 permanent residents (residing for six months and above) in the region, only 18.35% of

Cases of racial discrimination are rarely filed and heard in the court. There is also no official statistics to indicate the number, the dispute issues and the resolution of the racial discrimination cases in the annual releases of the Judiciary, the Procuratorate and the MoHRSS.

III. Implementation of C 138 Minimum Age for Admission to Employment and Work Convention, and C182 Worst Form of Child Labour Convention in China

China ratified C138, the Minimum Age for Admission to Employment and Work Convention in 1999 and C182, the Worst Form of Child Labour Convention in 2002. While ambiguities are found in some legislations, China has a strong set of legal framework protecting the children from falling into child labour. The Constitution provides for universal, compulsory and free education. The *Labour Law* prohibits the employment of people below the age of 16. The *Compulsory Education Law* (1986) guarantees school-age children the right to receive education. In 2002, the State Council issued Order 364 prohibiting the use of child labour, and the employers will be fined RMB5000 per child used for work. Later in the same year, the fourth amendment to the *Criminal Law* was promulgated, making it a crime for those employing children below 16 overwork and work in dangerous environment. Penalty is fixed at a prison term of 3-7 years³⁹.

Official statistics on child labour are lacking and abuse cases are revealed when they have made a scandal and by the media. In May 2013, a fourteen-year-old boy, LIU Fuzhong, was found dead in the dormitory of an electronics factory in Dongguan city of Guangdong province. Thirteen under-aged workers of less than sixteen years old were killed in the fire accident of an informal garment factory in Shantou city of Guangdong province last December. The scale of child labour is usually inferred from the drop-out rate in schools which is increasing from 4.58% to 8.89% between 2001 and 2011⁴⁰. The increase was said to coincide with the shut down of the village schools which increases the schooling expenses of the rural parents⁴¹.

More worrying is the surge in under-aged labour sent by the vocational schools or agencies as student interns or summer interns to relieve the youth unemployment in the less developed regions and the labour shortages in the coastal areas. In July 2012, a plastic factory in Dongguan city of Guangdong province was found to be using a batch of 180 vocational school students for summer work through an un-registered labour agency and 20 of them were under sixteen years old⁴². Eleven Apple's suppliers

them, ie. 71743 persons, are ethnic minorities; compared to 319,265 Han Chinese residing in the region. The size of the Han Chinese is said to have increased by 51.32% in a decade. See Uyghur Online:,
<http://www.uighurbiz.net/archives/14299>, 2013-5-27.

³⁹ Qiu Yang has a detailed list of the laws and regulations in his article “*ILO Fundamental Conventions and Chinese Labour Laws: A Comparative Perspective*” published in *East Asia Law Review*, Volume 2, Issue 1, 2006-7. In the article, he also discusses the ambiguities in some of the legislations. Download link:
http://www.pennelr.com/archive/issues/vol2/CLPR_v2i1ps10pe35.pdf

⁴⁰ The number of drop-outs was said to have increased from 620,000 to 883,000 from 2001 to 2011. Some schools hit a drop-out rate of 40% in 2004. Consolidated information from *High Dropout Rates in Rural Schools*, 2004 (<http://china.org.cn/english/2004/Jun/99362.htm>) and *China's Rural Education at Risk*, 2013 (http://www.china.org.cn/china/2013-01/08/content_27618239.htm), both accessed 2013-7-13

⁴¹ Village schools were shut down under the reform of the rural elementary and middle schools due to the declining rural student population, pushing the parents to send their children to township and county schools at higher expenses. A U-turn policy was introduced in September 2012 by re-opening the closed village schools.

⁴² “Labour Service Company Operates without a License”, <http://gzdaily.dayoo.com/html/2012->

including Foxconn in Shandong and Guangdong province were revealed to have used 106 children under age sixteen in 2012⁴³. A number of vocational tertiary schools in Jiangsu, Shandong and Hubei provinces were found to be forcing their students in hundreds and thousands to work as “voluntary” summer or winter interns between one-three months in the Foxconn factories. In the case of Samsung’s supplier, HEG Electronics(HuiZhou) Co. Ltd where under-aged student workers were found in August 2012, the internship agreement was signed between the vocational school and the factory without verifying the ID and the age of the students. The latter were placed to work on the production line as the other workers and received their salary at the end of the 3-month internship.

By 2011, there were 30 million students studying in vocational middle and high schools in China, graduating by 6.6 million in number every year. There is however no national legislation that protects the labour rights of the student workers. There is no standard rectification and penalty over the employers, the vocational schools and the labour agencies when under-aged students are found and repatriated.

IV. Un-Ratified Conventions

1. Forced Labour in China – in relation to C29 Forced Labour Convention and C105 Abolition of Forced Labour Convention

China has not ratified C29 (Forced Labour) nor C105 (Abolition of Forced Labour). The *Criminal Law* prohibits forced labour and the punishment for violation has increased ranging from three to seven years (Article 244, Criminal Law, amended 2011).

The use of forced labour in the private sector, including the use of child labour, is revealed only when it becomes a scandal in the media. Following the Shanxi brickyard slave labour scandal in May 2007, another 167 child workers were rescued from factories in the city of Dongguan in Guangdong province in April 2008, and a group of disabled persons were rescued from a brick kiln in Henan Province just south of Shanxi in September 2011. The mentally disabled, the handicapped and children are easy victims to forced labour for economic profits in the private sector⁴⁴.

Forced labour used for “correctional” purposes, known notoriously as the re-education through labour (RTL) system, is used in China as a compulsory administrative punishment to non-criminals, increasingly so for maintaining social stability nowadays. Not a system ruled by law, the RTL is increasingly used by the local government and the public security to punish the petitioners victimized by land evictions, judicial injustices, as well as workers for having taken part in strikes and petitions. LI

[08/07/content_1817883.htm](http://www.guardian.co.uk/technology/2013/jan/25/apple-child-labour-supply)

⁴³ “Child Labour Uncovered in Apple’s Supply Chain”, *Guardian*, 2013-1-25, <http://www.guardian.co.uk/technology/2013/jan/25/apple-child-labour-supply>, accessed 2013-7-14; “Foxconn Admits Child Labour”, 2013-10-17, http://www.cb.com.cn/deep/2012_1017/419905.html 2012-10-17

⁴⁴ See China Labour Bulletin, *From Shanxi to Dongguan, slave labour still in business* (<http://www.clb.org.hk/en/content/shanxi-dongguan-slave-labour-still-business-0>), *Xinjiang slave labour factory owner sentenced to four years imprisonment*, (<http://www.clb.org.hk/en/content/xinjiang-slave-labour-factory-owner-sentenced-four-years-imprisonment>) and *Time: Another Slavery Scandal Uncovered in Central China* (<http://www.clb.org.hk/en/content/time-another-slavery-scandal-uncovered-central-china>), all accessed 2013-7-14. These reports draw reference to Chinese official media.

Benyu and WANG Wenming, previously employed in the state-owned Chongqing Grain Group and were sent for 3-month RTL in April 2012, are just two examples. Li and Wang were amongst the laid-off workers in thousands who had been petitioning the government since 2008 to protest the restructuring of the company and the bribery practices of the management leading to their dismissals and illegal severance compensations.

The exercise of the RTL is also associated with gross human rights violations, physical and mental tortures, as well as forced labour that generates economic profits for the administrative authorities. In February 2013, the diaries and appeals of the prisoners of Masanjia Women's Labour Camp in Liaoning province were smuggled and exposed by a released female prisoner. Their words were followed by a number of news interviews and public debates that renewed the call for a thorough end to the inhuman RTL system. According to the testimonies of the prisoners in Masanjia camp, they were made to work 7 days a week, 10-12 hours a day (more during the peak season) to make garment outsourced by factories all over the country⁴⁵. The toilets are opened only three times a day. They are subject to verbal abuses and all kinds of physical penalties and tortures if they could not finish the target orders or refuse to work. The prisoners do not receive salary nor do they have any safety and health protection. In theory, the labour camps are now funded by the government and the fees charged to the prisoners (for their food, medical and other expenses), prison labour is still maintained to generate profits. The Masanjia camp was keeping as many as 5000 prisoners and their free labour is estimated to have made a profit in tens of million yuan for the camp every year.

There are more than 300 RTL camps in China and 160,000 people are estimated to be under detention for up to four years without trial by the end of 2013⁴⁶. The extra-judicial punishment system was not established by law but a number of statutory documents approved by the government since 1957⁴⁷. RTL was managed by the local government through the RTL Committee, and the public security came in to take full charge of the admission, administration and review of the RTL under the RTL Review and Approval Committee it established in 2002 without any supervision⁴⁸.

The constitutionality of the administrative directives that established the RTL has been challenged by academics and civil rights advocates in China for a long time. The RTL is also in blunt contradiction with the stated objective of C105, the Abolition of Forced Labour Convention which strictly forbids any form of forced labour for political coercion, education, labour discipline and punishment against workers for their participation in strikes. The absence of a regulatory framework to restrict the administrative authorities in depriving the freedom and the constitutional rights of the person is also in

⁴⁵ The article "Escaping from Masanjia" was based on the diaries of the prisoners smuggled out and the interviews with other released RTL prisoners over a period of five years. The article was originally published by the Lens magazine on 7 April 2013. The online post was immediately blocked by the government and Lens magazine was ordered to suspend the publication of its next issue. See "Escaping from Masanjia", Lens Magazine, 2013-4-7, originally posted at http://blog.sina.com.cn/s/blog_4859f68a0101isept.html; retrieved from HRIC, <http://www.hrichina.org/hk/content/6630>

⁴⁶ The figure was estimated by Human Rights Watch, see Human rights group: China may not be ready for labor camp reforms, Maya Wang, Special for CNN, January 16, 2013, <http://edition.cnn.com/2013/01/15/opinion/china-labor-camps-human-rights-watch>

⁴⁷ The State Council released *The Decision on Issues Concerning Education through Labor* in 1957 to establish the RTL.

⁴⁸ In 2002 the Ministry of Public Security introduced *Regulations on the Handling of RTL Cases by Public Security Organs*, allowing it to set up RTL review and approval committees to be in full charge of the admission and administration of the RTL, replacing the original mechanism which was supposed to be jointly managed by the civil affairs, public security, and labour bureaus.

clear violation of the ICCPR which China signed in 1998 without ratification, with regard to namely Article 9 on freedom from custody without due procedure, Article 14 on the right to fair and open trial, and Article 8 on freedom from forced labour.

In January 2013, the new government leadership indicated a commitment to suspend and eventually reform the RTL system by making relevant legislative changes within this year⁴⁹. Suspicion about the commitment of the government is casted given the serious lack of information and transparency about the RTL reform process. The direction of the RTL reform is also questioned when evaluating the pilot scheme which took place in four cities in November 2011⁵⁰. Rather than complete abolition, the pilot scheme is searching for a regulatory framework to make the RTL less dependent under the public security, either by putting the RTL under the judiciary or a committee of the participation of multiple government bodies⁵¹. There are also worries that the suspension of the RTL will simply sweep the illegal detention and tortures underground in the even more notorious “black jails” given the rising number of public protests, petitions and labour strikes in China.

The suspension of the RTL should be a transitional step towards its complete abolition under a time frame acceptable to the public opinions. At the same time, the Chinese government should indicate a commitment and the plan for the ratification of Convention 105 and the ICCPR to ensure that the revision of the administrative and legal tools related to RTL is consistent with the international standards that it has an obligation to abide to. The reform of the RTL is also in relation to the protection of the labour rights to associate, strike and bargaining under ILO Convention 87 and 98 without which workers will be subject to other forms of administrative punishments.

2. Freedom of Association and Collective Bargaining in Relation to Convention 87 and 98

China has not ratified C87 Freedom of Association Convention and C98 on organizing and collective bargaining. Although there is no national legislation to protect workers’ right to take industrial actions in China, labour strikes and work stoppages are not legally banned. In 2012, ITUC noticed that industrial actions and strikes, staged spontaneously by workers, are handled with un-even standards, local regulations and mechanisms led by the local governments and the public security (see ITUC submission for the UPR on China, 2013). The wild cat strikes were tolerated and ended in government-led mediation in some cases, but cracked down by the public security in the others. The government, the public security and the employers were free to detain, criminalise and retaliate the workers participating in strikes and the worker leaders, in contradiction with the international labour standards

⁴⁹ On 7 January 2013, the Central Political and Law Commission of the China Communist Party announced the suspension of the RTL. The government of Guangdong and Yunnan province followed the suspension and the Ministry of Public Security of Hunan province claimed to have renounced its authority to approve the RTL prisoners.

⁵⁰ In November 2011, the Supreme People’s Court and nine other ministry-level bodies jointly issued a Pilot Scheme for Committees of Education and Correction for Illegal Acts. Four cities, ie Lanzhou (Gansu province), Qingdao (Shandong province), Nanjing (Jiangsu province) and Zhengzhou (Henan province) were chosen to pilot the RTL reform. See RTL: ‘Reporters Shed Some Light on Reform Projects’, Posted by Dui Hua Foundation, 2012-12-11, <http://www.duihuahrjournal.org/2012/12/rtl-reporters-shed-some-light-on-reform.html>

⁵¹ The multi-party management approach piloted involves individuals from the courts, procuratorates, public security, government legislative affairs offices, education bureaus, civil affairs bureaus, and justice bureaus in forming the RTL administrative committee. The independence of such a committee is questioned as the offices of the committees are set up within the public security bureaus. See Legal Reform “Being Studied,” Pilot Details Still Not Released, Zhou Xifeng, *Xiaoxiang Morning News*, November 22, 2012, retrieved from Dui Hua Foundation, posted on 11 December 2012, <http://www.duihuahrjournal.org/2012/12/rtl-reporters-shed-some-light-on-reform.html>

rather than seeking a convergence with them.

Strikes and industrial actions are not distinguished from “emergency situations” when justification for using extra-judicial authority is needed, and excessive police force is used to intimidate and disperse the striking workers. Strikes are viewed as disruption of social stability by the government in general. It is the attitude taken by the local government and the official trade union to restore social order and economic production as soon as possible when a stoppage of work or a strike breaks out.

Use of excessive forces to intimidate the strikers

When workers are exercising the right to take industrial actions, it is commonplace for the government to send a large number of police and anti-riot squads to disperse the strikers from proceeding to petitioning the government, or to station at the workplace for intimidation purposes.

In the strike by more than a thousand workers in New Ocean Precision Components (Jiangxi) Co. Ltd, a supplier of Foxconn in Fengcheng city of Jiangxi province (2013.1.11), water cannon and pepper spray were used by the anti-riot police to disperse the strikers who attempted to block the road in the second day protest⁵². Similarly, more than a hundred anti-riot police were sent in the midnight on the ninth day of the strike staged by 3000 workers in the electric goods factory, Sonco Products Co. Ltd in Shenzhen (2 January 2013). They were pressured to return to work the next day. Physical clashes between the police and the strikers are sometimes severe. Five strikers were hospitalized and ten were detained when more than 200 police dispelled the sit-in strikers forcing them to go back to work in the strike in Tokai Rubber Industries (Guangzhou) (2013.1.28)⁵³.

Administrative detention

The police and the public security are free to put the striking workers under administrative detention for up to 15 days without a legal procedure. This is commonly used by the government to intimidate the workers, enabling the employers to use both threats and reward to further disperse the strike. Workers were taken away by the police and put under administrative detention of un-even length for blocking the factory entrance or persuading their colleagues to join the strike⁵⁴. The administrative detention of the striking workers involved about 200 workers in the case of the Taiwan-owned Diweixin Furniture in Shenzhen (2013.5.7). Business was closed down without notice and the employer had run away. Workers took over the factory complex for more than a month while petitioning to the local government for a settlement over their back wages and compensations. About 200 of them were arrested by the anti-riot police when they were marching to the district government office on 23 May. They were disconnected from communication for a day during the detention. A hundred of them were released after midnight, followed by another 59 of them ten days later, while three worker representatives were still kept and disconnected from the outside. By the end of July, one worker

⁵² <http://stock.sohu.com/20130113/n363292542.shtml>

⁵³ <http://tieba.baidu.com/p/2128804502>

⁵⁴ For example, the anti-riot police arrested the striking workers who were videotaping the strike and detained five others for five hours in the strike in Qianda Metal Co. Ltd in Dongguan city (2013.2.27). The workers were protesting the employer for relocating production and pressuring the senior workers to resign rather than giving them severance compensation recently (Source: “Police Clash with Workers in a Japanese Factory in Dongguan”, 2013.3.3, Oriental Daily News, http://orientaldaily.on.cc/cnt/china_world/20130303/00178_007.html). Similarly, seven workers were detained by the police when they were asking their fellow workers to join the strike on 5 April 2013 in the strike in Molten auto-parts factory in Jiaying, Zhejiang province.

representative was still under detention, exceeding the 37-day legal maximum for administrative detention. He was deprived of free contact and access to his family and lawyer. His bail-out request was rejected without given a reason. Without a legal process or authorization, the detention is clearly illegal in violation of the administrative detention and the criminal procedure⁵⁵.

Although local legislations on collective bargaining have been passed by more and more government at the municipal and autonomous region level, few of them contain protection of workers when exercising their rights to take industrial actions for collective bargaining purposes. This is further embarrassed by the fact that almost all the strikes in China are wild cat strikes not led by the official trade union. It is the government which steps in to mediate or request the official trade union to negotiate with the employers on behalf of the strikers. Their administrative-led mediation goes hand in hand with the use of force and intimidation to break up their strike and pressure the workers to return to work. This often results in undermining or capping the demands of the strikers, based on other factors such as maintaining social stability or preventing a rippling effect amongst other workers. In the strike cases relating to enterprise retrenchment, re-structuring and relocation which rise in number rapidly, the protesting or striking workers are given only the legal minimum in severance and compensations as a result of the mediation by the government and the official trade union.

Unfair labour practices

ITUC notices that the employers are making use of the double absence of the protection of workers' right to strike and protection against unfair labour practices to penalize the strikers with dismissals or other retaliatory measures (see ITUC submission for the UPR on China, 2013). The Labour Law, allowing termination of employment contract for breaking the company rules, disrupting production and absenteeism, is used by the employers to punish the strikers and the worker leaders. For instance, the Italian-owned Ferroli's branch facility in Heshan city of Guangdong province dismissed the worker leader BU Guolong on 25 February 2013, within less than three hours after he took more than a hundred workers to file a labour arbitration over the outstanding overtime compensations. The workers had staged a strike forcing the management to agree to raise their wages and give them the same bonus just one day before⁵⁶.

This was followed by Walmart which dismissed six workers in its distribution centre in Shenzhen in July 2012 who were taking the lead to collect workers' demands on wages, overtime compensation and the appraisal system. The worker leaders had warned the management and the enterprise trade union of a possible strike if the management refused to negotiate with them. Instead of a strike, a protest at the workplace was organised on 5 July. The six leaders were dismissed by the management between 6 July and 10 July for violation of the company rules. Rather than taking it as a case of retaliation, the labour arbitration committee of Pingshan district in Shenzhen ruled in August 2012 to support Walmart's dismissal⁵⁷.

⁵⁵ The Diweixin case coincided with the protest of the workers from the Taiwan-owned furniture factory, Jinshuntai Art Products (Shenzhen) which was closed down all of a sudden (2013.5.6). The 300 hundred workers were marching to the government for a settlement of their back pay and compensations worth more than RMB4 million in total. Similarly, nearly two hundred of them were put under administrative detention outside the government office.

⁵⁶ "A striking worker dismissed by Ferroli in Heshan", 2013.3.8, Southern Metropolitan Daily

⁵⁷ "Representatives of workers found to have violated company rules", 2013.2.18, Nanfang Daily, <http://www.nfgb.com.cn/NewsContent.aspx?id=38764>

Protection against the unfair labour practices of the employers, even as a concept, has not been established in the labour relation and the judicial system in China. The labour bureaus, the judiciary, and even the official trade union have limited awareness or ground to step in to defend workers and their leaders when the employers are taking revenge, or not bargaining in good faith.

In a similar action against the vocal worker leaders, Walmart Shenzhen went further to dismiss WANG Shishu on 24 July 2012. Wang started to gather the opinions of his colleagues in Shenzhen Xiangmihu store. He went to the street federation of trade unions for support when the workers in the distribution centre were requesting a negotiation with the management in early July⁵⁸. The consolidated demands of the workers with the signatures of 85 workers Wang collected were sent to the Xiangmihu street federation of trade unions which then shared it with the management⁵⁹. Wang was fired later for violating the company rules and damaging the image of the company. The case is still under arbitration and the street federation seemed to be short of means in offering protection to its members except providing legal support to Wang.

There are also limited options in terms of judicial remedies. In a number of cases brought to the labour arbitration committee and the civil court, the judicial rulings are unfavourable to workers since they are not based on unfair dismissal as a punishment to workers for their participation in the labour strikes. The absence of this major principle closes off appropriate remedial and redress measures such as reinstatement of workers. The objective effect it serves is enhanced intimidation and discouragement amongst workers in exercising their right to take industrial actions. On 21 February 2013, five workers from the US-owned International Paper (Panyu) in Guangzhou city were fired by the management, using the excuse that they were not observing the factory rules in revenge for the leading role they played in the two-day strike on 19 and 20th February. The workers were protesting against the unequal remuneration and annual bonus. The fired workers took the case to labour arbitration. Although the arbitration committee ruled in July that their dismissal was related to the strike and it was illegal, the demand of the workers for an apology from the management and reinstatement was rejected. At the moment, there is no legal basis to mandate the reinstatement of workers and worker representatives when they are penalized by the employers for taking industrial actions in China. Nevertheless, the case of the US-owned International Paper (Panyu) in Guangzhou city could be a point to start.

⁵⁸ Wang was said to have been elected by workers into the branch trade union committee of the store he was working in 2006. It was not approved by the management and he stayed as a worker representative.

⁵⁹ It is not sure whether the materials were shared by the street federation with the Walmart management during an official collective negotiation or not (Source: "Investigation on the collective actions taken by workers in Shenzhen Walmart", written by HE Yuanchen, LIU Jiang, 2013.6.21, China Workers, http://zgldgxxxy.oinside.cn/_d276102331.htm).