

**UNIVERSITY OF CAPE TOWN
SCHOOL FOR ADVANCED LEGAL
STUDIES**

**'TOWARDS THE IMPROVEMENT OF
CHINESE LABOUR LAW**

*-----A Comparative Analysis of Chinese and
South African Collective Labour Law'*

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws of the University of Cape Town in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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INDICATION

Some of reference of this dissertation were directly translated from Chinese into English. I also offered the original Chinese reference in the bibliography if you are interested in viewing of the Chinese copies.

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ABSTRACT

With the expansion of the open market system and globalization, employees increasingly need more protection from the law. So how to properly and efficiently develop a labour law system is becoming an important question for many countries. China is one country facing this issue. Therefore, the purpose of this dissertation is to explore this question. It will examine the weaknesses existing in current Chinese labour law system through a comparative analysis with South Africa's labour law system, establishing the main influences which impact on the Chinese labour law system. Finally, it will demonstrate that the use of legal transplantation would help the Chinese labour law system.

1 Introduction

1.1 Background

People's Republic of China (PRC) is a developing country which is receiving more and more attention from other countries around the world. This is because the Chinese economy has developed at an inconceivably high rate in the past decade. According to government reports, the Chinese Gross National Product (GDP) growth rate has been around 10 per cent per year.¹ However, this was not at all surprising. Since the 'open door' policy² was put forward, the Chinese government has made considerable effort, whether it be in policy, economy, law or culture. Foreign investment has been hugely attractive, and great numbers of factories have been established. So, now, China is called 'a world factory' by other countries, because one can buy products which were made in China almost anywhere in the world. However, during this period of long concentration on the development of the economy, China may have neglected the development of other areas of governance, for example, the area of labour law. In fact, the development of Chinese Labour Law and its relevant regulations is relatively slow, comparing them with the development of interrelated economic law. For example, the Labour Law which was enacted in 1994 has not been amended for ten years. Accordingly, the labour law field is very worthy of consideration, especially in the current context of globalization. This is because, in a country with such a huge population, cheap labour is attractive to the foreign investors, as it can provide a competition. Furthermore, it is true that workers are always in a weak position and employers are naturally powerful over powerless

¹ http://www.gov.cn/jrzq/2006-01/09/content_152082.htm accessed on 09/01/2006. Chinese government reported that, from 1993 to 2005, Chinese GDP growth rates were as follows: 14.0%, 13.1%, 10.9%, 10.0%, 9.3%, 7.8%, 7.6%, 8.4%, 8.3%, 9.1%, 10.0%, 10.1%, and 9.8%.

² An economy reforms policy put forward by Deng Xiaoping who was a former chairman of the PRC.

workers, These conflicts between employers and employees have existed for a long time in industrial countries. Therefore, how to protect workers more suitably and how to balance the power between employers and employees should be considered by governments. However, it is not enough to balance the power only by way of individual labour law which is usually primarily regarded as individual contractual relationship. In this regard, the collective labour law which primarily concerns with workers legitimate collective rights, such as the right to participate in trade unions, the right to collective bargaining, and the right to strike action, plays a rather significant role. International organisations, such as International Labour Organisation (ILO) and United Nations, also recognized this. Many conventions were made to support the workers' legitimate collective rights. Other countries, like South Africa, have also made great efforts in this regard by way of legislation. As a developing country as well, South African labour legislation, which is mainly based on the Conventions of the ILO³, could be a good example for China to follow.

This paper attempts to explore how to improve Chinese collective labour law by comparing it with South African collective labour legislation. It is going to firstly introduce collective labour law theory, international conventions and the Chinese labour legal context. Then, it will introduce Chinese and South African collective labour legislations respectively. After that, a comparison which involves trade unions, collective bargaining, collective agreements, dispute resolution process and strikes in these two countries will be made. Furthermore, this paper will examine some reasons which influence the current Chinese labour law system. More than that, it will discuss whether China can use a way of legal transplanted to help the development of the Chinese labour legal system.

³ D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch *Labour Relations Law a Comprehensive Guide* 4ed P61. The author indicates that 'in terms of South African law an international convention does not become part of municipal law merely upon ratification. Some act of legislative transformation is required. The LRA was enacted "to give effect to the public international law obligations of the Republic relating to labour relations"; the BCEA was enacted "to give effect to the right to fair labour practices referred to in section 23 (1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the ILO"; while the EEA was enacted to "give effect to the obligations of the Republic as a member of the ILO.'

1.2 Collective Labour Law and International Conventions

1.2.1 Collective labour law

Traditionally, the individual employment relationship is the primary concern of labour law. However, with the development of industrialized societies, collective labour law, as a part of the labour law, gradually plays a more significant role. This was because employees realized that if they could stand together and act as a group in their relations with their employer, their position would often be significantly stronger.⁴ This led to the formation of trade unions and collective bargaining. Trade unions as the representative of the employees, draws collective agreements with the employers by means of collective bargaining. If the employer refused to bargain with a trade union, or if their demands for improved terms and conditions of employment were not met, they could use their collective strength – strike – to enforce their demand.⁵ If the employer breached the collective agreement, employees could appeal through the process of dispute resolution. What is mentioned above comprise five important aspects of collective labour law, namely trade union, collective bargaining process, collective agreement, dispute resolution process and strike. At the same time, the provisions of collective agreements also affect the individual labour relationship between employer and employee. Those collectively-agreed terms can also be part of the individual employment relationship.⁶ Thereby, trade union, collective bargaining, and even strikes and other forms of industrial action, came to be accepted as important elements of a society. Collective bargaining came to be seen as a valuable method of setting conditions of employment for employees, and of resolving disputes that arise in the employment sphere.⁷ However, the balance of power between employers and employees in the process of collective bargaining is not easily achieved. This is because the employers are naturally

⁴ Basson Christianson, Garbers Le Roux, and Michke Strydom *Essential Labour Law Volume 2: Collective Labour Law* P2.

⁵ Ibid P2.

⁶ Ibid P5.

⁷ Ibid P4.

powerful. Consequently, for ensuring the interest of employees, international organisations, such as ILO and United Nations, play a very positive role in this area. Conventions of ILO and the *International Covenant on Economic, Social and Cultural Rights of United Nations* (ICESCR) served as significant guidelines for states. Both South Africa and China are member states of ILO and have signed the ICESCR, and South African labour legislation has mainly come from the ILO conventions.

1.2.2 International Labour Organisation Conventions

The ILO, which was founded under the Treaty of Versailles in 1919, is the United Nations specialized agency which seeks the promotion of social justice and internationally recognized human and labour right.⁸ The ILO formulates international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights,⁹ such as freedom of association, the right to organize, collective bargaining and so on. The relevant conventions on collective labour law are those: *No.C87 Freedom of Association and Protection of the Right to Organise, 1948*; *No.C98 Right to Organize and Collective Bargaining Convention, 1949*; *No.C154 Promotion of Collective Bargaining Convention, 1981*. These conventions protect the right of employees and employers to form and join trade unions and employers' organisations, and the right of trade unions and employers' organisations to be active without undue restriction.¹⁰ They have also been interpreted as protecting the right of employees to embark on strike action.¹¹

The ILO convention No.87 stipulates that workers and employers, without distinction, shall have the right to establish and join organisations of their own

⁸ R.Blainpain and M.Colucci *The Globalization of Labour Standards – The Soft Law Track* P10.

⁹ *Ibid.*

¹⁰ Basson Christianson, Garbers Le Roux, and Michke Strydom *Essential Labour Law Volume 2: Collective Labour Law* P20.

¹¹ *Ibid.*

choosing without previous authorisation.¹² Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.¹³ The ILO convention No. 98 provides that workers are to enjoy adequate protection against anti-union discrimination in respect of their employment,¹⁴ and that measures are to be taken to encourage and promote voluntary negotiations between employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.¹⁵ Convention No.C154 of ILO prescribes that 'the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations on the one hand, and one or more workers' organisations on the other, for instance:

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.'

1.2.3 International Covenant on Economic, Social and Cultural Rights

The ICESCR of United Nations, as the most important document on human rights, came into effect on 3 January 1976. The Covenant protects inherent dignity of the human person and declares that everyone has the right to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned. The Covenant also claims that everyone has the right to strike which is exercised in conformity with the laws of the particular country.¹⁶

¹² Article 2 of the No.C87 Freedom of Association and Protection of the Right to Organise, 1948.

¹³ Ibid Article 3.

¹⁴ Article 1 of the No.C98 Right to Organise and Collective Bargaining Convention, 1949.

¹⁵ Ibid Article 4.

¹⁶ Article 8 of the International Covenant on Economic, Social and Cultural Rights.

1.3 Briefly Introducing Labour Law Development in PRC Context

To easily understand this paper, I would like to briefly describe PRC's labour law development, because China as a socialistic country, unlike other countries, has a unique development history.

PRC was set up in 1949. Since then, Chinese labour law system has been formed. The development of China's labour legislation can be divided into three periods. The period from 1949 to 1956 was described as the establishment and formation period of Chinese labour legislation.¹⁷ At that time, the current government just formed, PRC as a socialist country decided to learn from the Soviet Union. Thereby, only two formats of enterprises were considered, namely State-owned and collectively-owned enterprises, which were actually both controlled by state. All previous private ownership enterprises were transformed into State or collective ownership. The majority of the labour legislation was therefore focused on State-owned and collectively-owned enterprises. The second period was from 1956 to 1976. During this period, the 'Cultural Revolution'¹⁸ was experienced, a so-called disaster suffered by China, so few regulations were promulgated. The third period is from 1976 until now. China entered into a new stage of development. The year 1978 was regarded as a turning-point in China's modern development, because economic reforms, which were pushed by the open door policy, were started at that year. This period has been claimed as the recovery and development period of China's labour legislation.¹⁹ The state government has enacted many labour legislations, including laws and regulations on labour system, wages, labour protection, social insurance, vocational training of workers, democratic management of enterprise workers, labour discipline, labour dispute resolution and so on.²⁰ In addition, from 1979, China started to introduce foreign investment to assist the development of its economy.²¹

¹⁷ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P458.

¹⁸ A political movement (1966-1976).

¹⁹ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P458.

²⁰ *Ibid* P458-459.

²¹ *Ibid*.

With the progress of economic reforms and opening-up of China to foreign investors, various kinds of enterprises with different combinations of ownership have co-existed,²² namely state-owned, collectively-owned, privately-owned, and foreign investment enterprises. A contract employment system has been introduced to those enterprises since 1983. The current *Labour Law*, as a national legislation, was enacted in 1994. However, the Law only lays down the framework and main principles, so its implementation relies on more detailed subsidiary legislation²³ which promulgated shortly after the enactment of the *Labour Law of 1994*.

²² Ibid.

²³ Ibid P460.

2 Provisions on Chinese Collective Labour Law

In China, current collective labour legislation mainly involves the *Labour Law of 1994*, the *Trade Union Law of 1992*, the *Regulations Governing Collective Labour Agreement of 2004*²⁴ and the *Regulations on Dispute Resolution in Enterprises of 1993*. Above all, the Constitutional law as the supreme law grants considerable status to workers as a leading class. Trade unions therefore have quite a stable base to support workers' rights in the collective bargaining process, in making collective agreements, and in the dispute resolution process. However, with regard to the right to strike, it is currently not allowed in China.

2.1 Trade Unions

2.1.1 Legal Status of Trade Unions

Under both the *Constitutional Law of People's Republic of China* and the *Trade Union Law of 1992*, China is a socialistic state led by the working class²⁵ and trade unions are the mass organisations of the voluntary unity of the working class.²⁶ This is clear that trade unions are granted a higher legal status in China than those in most other countries. According to the Trade Union Law, the All-China Federation of Trade Unions and its trade union organisations as the representatives of the workers and staff members in China safeguard the legitimate rights and interests of employees.²⁷

²⁴ The Regulations was issued by the Ministry of Labour and Social security.

²⁵ The Constitutional Law, Art.1.

²⁶ Trade Union Law of 1992, Art.2.

²⁷ Ibid.

2.1.2 Role of Trade Unions

According to the *Trade Union law of 1992*, trade unions play an active role in China. **Firstly**, trade unions organize and conduct education among workers and staff members in accordance with the provisions of the *Constitution* and other laws. Trade unions participate in the administration of State affairs, management of economic and cultural undertakings and handling of social affairs.²⁸ **Secondly**, trade unions assist the government in their work and safeguard the socialist state power under the people's democratic dictatorship.²⁹ **Thirdly**, trade unions safeguard the legitimate rights and interests of workers and staff members.³⁰ **Fourthly**, trade unions co-ordinate labour relations and safeguard the rights and interests of the workers and staff members of enterprises through consultation on an equal footing and the collective contract system.³¹ **Fifthly**, trade unions organize the workers and staff members to participate in democratic decision-making and management of and democratic supervision over their own work units.³² **Finally**, trade unions maintain close ties with workers and staff members, solicit and voice their opinions and demands, show concern for their everyday life, help them solve their difficulties³³ and where possible address all their needs.

2.1.3 The Organisational Structure of Trade Unions

Under the *Trade Union law of 1992*, trade union's organisation system is similar to that of the state. The system of trade union organisations is composed of the national level trade unions, the trade union federations at sectoral and regional-level, and the basic-level trade unions. The All-China Federation of Trade Unions as the unified national organisation is established at national level.³⁴ The principle of 'democratic centralism' is the fundamental principle of trade union organisation in China, that is,

²⁸ Ibid, Art.5.

²⁹ Ibid.

³⁰ Ibid, Art.6.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid, Art.10.

the higher trade union organisations exercise their leadership over the trade union organisations at lower levels.³⁵ The establishment of basic-level trade union organisations, local trade union federations, and national or local industrial trade union organisations will be submitted to the trade union organisation at the next higher level for approval.³⁶ Trade union committees at various levels will be democratically elected at members' assemblies or members' congresses.³⁷ In China, the All-China Federation of Trade Unions and the trade union federations at sectoral and regional level are entitled legal persons of social organisations.³⁸ The basic-level trade unions may be granted the status of legal persons according to the provisions of the general principles of the Civil Law.³⁹

2.1.4 Duties and Functions of Trade Unions

The Trade Union Law provides several functions for Chinese trade unions. Among them, the most basic duties and functions of trade unions are to safeguard the legitimate rights and interests of workers and staff members. Other duties and functions include: that trade unions have the power to submit opinions on protection of the exercise of the democratic management authority of employees.⁴⁰ Trade unions assist and guide workers in signing labour contracts with enterprises or institutions managed as enterprises, and, on behalf of the workers, make equal consultations and sign collective contracts with enterprises or institutions under enterprise-style management.⁴¹ Trade unions should be informed of the reasons for dismissal or disciplinary actions against any employees.⁴² Trade unions have authority to submit their opinions on labour condition, safety, hygiene, potential danger and occupational detriment within the existing enterprises.⁴³ Trade unions

³⁵ Wang Guiguo and John Mo *Chinese law* P463.

³⁶ Trade Union Law of 1992, Art. 11.

³⁷ *Ibid*, Art. 9.

³⁸ *Ibid*, Art. 14.

³⁹ *Ibid*.

⁴⁰ *Ibid*, Art. 19.

⁴¹ *Ibid*, Art. 20.

⁴² *Ibid*, Art. 21.

⁴³ Wang Guiguo and John Mo *Chinese law* P464.

have the right to investigate infringements upon the legitimate rights and interests of the workers and staff members by enterprises or institutions.⁴⁴ Trade unions provide legal consultation services to the unions' members and are involved in the mediation of labour disputes.⁴⁵ Trade unions provide support to the employees when they bring legal action to the people's court.⁴⁶ In the case of a work-stoppage or slow-down strike in an enterprise or institution, the trade union will, on behalf of the workers and staff members, hold consultation with the enterprise or institution.⁴⁷ They will present the opinions and demands of the workers and staff members, and put forth proposals for solutions.⁴⁸ Trade unions should assist enterprises, institutions and government departments in providing adequate collective welfare services to the workers and staff members and in properly dealing with matters concerning wages, occupational safety and health as well as social insurance.⁴⁹

2.2 Collective Bargaining

2.2.1 Parties and Principles of Collective Bargaining

Chinese law promotes a completely voluntary collective bargaining system, which has led to the collective bargaining in Chinese law looking much more like 'negotiation' than 'bargaining'. Under the *Labour Law of 1994* and the *Regulations Governing Collective Labour Agreement of 2004*, the right to collective bargaining is usually between trade unions and enterprises. Trade unions represent the employees in negotiation and signing of a collective labour agreement. If no trade union exists in an employing unit, the representatives of workers, who with the support of more than half of the workers, can attain this right by law. The collective negotiations are held according to three principles under the Labour Law. First, it must comply with laws and regulations. Second, it must be equal, that is, the number of representatives

⁴⁴ Trade Union Law of 1992, Art.25.

⁴⁵ Ibid, Art.28.

⁴⁶ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P482.

⁴⁷ Trade Union Law of 1992, Art.27.

⁴⁸ Ibid.

⁴⁹ Ibid, Art.30.

from each side shall be equal, ranging between three and ten persons.⁵⁰ Third, it must be founded on the voluntary willingness and there is no duty to bargain between the parties.

2.2.2 Content and Process of Collective Bargaining

The *Regulations Governing Collective Labour Agreement of 2004* provides the detailed procedure of the collective bargaining. The employees or employers may propose, in writing, to open collective negotiations for the purpose of concluding an agreement.⁵¹ Once a party has proposed negotiations, the other party must issue a written response within 20 days.⁵² A proposal to initiate negotiations cannot be rejected without justification.⁵³ The content of collective negotiations must cover one or more of the following issues: wages; hours of work; rest time and holidays; labour safety and health; supplementary insurance and welfare; special protection for women and under-age employees; vocational skill training; supervision of labour contracts; rewards and punishments; termination of employment; duration of the collective contract; procedures for modifying and cancelling the contract; dispute resolution procedures; liabilities for the violation of contract terms; and any other issues on which the two sides agree to negotiate.⁵⁴

In the process of collective bargaining, employers and employees must have the same number of delegates⁵⁵ participating in the negotiations.⁵⁶ The enterprise trade union is entitled to select the negotiating delegates for employees.⁵⁷ If there are no trade unions, the delegates will be nominated by employees and must be elected by at least one half of the employees.⁵⁸ If the negotiations fail, the meeting can be

⁵⁰ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation? P18.*

⁵¹ Article 32 of Regulations Governing Collective Labour Agreement of 2004.

⁵² Ibid.

⁵³ Trade Unions in the Private Sector (China), November, 2004.

⁵⁴ Article 8 of Regulations Governing Collective Labour Agreement of 2004.

⁵⁵ According to the Regulations Governing Collective Labour Agreement of 2004, there are three to ten representatives from each party.

⁵⁶ Article 19 of Regulations Governing Collective Labour Agreement of 2004.

⁵⁷ Ibid Article 20.

⁵⁸ Ibid.

suspended for more than 60 days. Upon negotiation, the agreed draft shall be presented to the assembly of workers and the staff or all employees for review and adoption.⁵⁹ The trade union representative is obliged to report to the employees about the contents and the reasoning for the stipulations in the contract.

2.2.3 Levels of Collective Bargaining

With regard to the bargaining level, Article 35 of the Labour Law provides that 'the collective agreement signed according to the law is legally binding on both the enterprise and the workers of enterprise....' Consequently, in China, the level of the collective agreement, which was usually concluded at enterprise level, is low.⁶⁰ Collective agreements at the industrial and national level are still not regulated explicitly in law and practice.⁶¹ It is estimated that, by the end of 2004, 1.2 million businesses will have signed 673,000 collective contracts covering more than 103 million employees.⁶² Approximately, one-third of covered employees are under regional collective contracts, and the remaining two-thirds are under enterprise contracts.⁶³

2.3 Collective Agreements

The collective agreement system was introduced in the mid-1990s in China. The collective agreement mechanism in China is thus embedded in the legal environment, in which contractual protection of collective rights of employees in an enterprise is safeguarded.⁶⁴ A collective agreement is defined by the *Regulations Governing*

⁵⁹ Ke Chen 'Role of the Trade Union in Negotiation on Collective Labour Contracts, China' in Roger Blanpain (ed.) 'Collective Bargaining, Discrimination, Social Security and European Integration' P235.

⁶⁰ Shi Meixia 'The People's Republic of China' in R. Blanpain (ed.) et al. 'The Process of Industrialization and the Role of Labour Law in Asian Countries' P40.

⁶¹ Ke Chen 'Role of the Trade Union in Negotiation on Collective Labour Contracts, China' in Roger Blanpain (ed.) 'Collective Bargaining, Discrimination, Social Security and European Integration' P236.

⁶² *Trade Unions in the Private Sector (China), November, 2004.*

⁶³ Ibid.

⁶⁴ Ke Chen 'Role of the Trade Union in Negotiation on Collective Labour Contracts, China' in Roger Blanpain (ed.) 'Collective Bargaining, Discrimination, Social Security and European Integration' P234.

Collective Labour Agreement of 2004 as a written agreement to collective consultations.⁶⁵ The collective agreement in China only specifies minimum standards.⁶⁶ The content of collective agreement, which is similar to the content of collective bargaining, includes labour remuneration, working hours, rest and leave, labour health and safety, insurance, welfare and other matters in accordance with the law and regulations. The duration of collective contracts is between one and three years.⁶⁷ The term of contract shall extend if agreed by both sides and approved by the relevant labour department. The collective agreement can only be terminated if both sides agree or if the term of contract officially ends.⁶⁸

Once the collective agreement is approved by the employees, the agreement is signed by the legal representative of the enterprise and the chairman of the trade union on behalf of the employees in the enterprise.⁶⁹ The signed contract is in practice submitted to the trade union organisation at a higher level for its notice and supervision.⁷⁰ The effectiveness of the collective agreement is subject to administrative review by the labour administrative departments which are the government organs in charge of labour administration and supervision and handling of various disputes arising out of employment relationships.⁷¹ The labour administrative department will examine the qualification of the two parties, in detail, for example looking at the legality or illegality of the procedure and contents. If the authority does not raise any objection to the collective agreement within 15 days of receipt of the copy, the collective agreement will take effect.⁷² Such a collective contract is binding on both the enterprise and all its employees.⁷³

⁶⁵ Ibid.

⁶⁶ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P16.

⁶⁷ Article 38 of Regulations Governing Collective Labour Agreement of 2004.

⁶⁸ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P18.

⁶⁹ Ke Chen 'Role of the Trade Union in Negotiation on Collective Labour Contracts, China' in Roger Blanpain (ed.) *Collective Bargaining, Discrimination, Social Security and European Integration* P235.

⁷⁰ Ibid.

⁷¹ Wang Guiguo and John Mo *Chinese law* P473.

⁷² Article 34 of the Labour Law.

⁷³ Wang Guiguo and John Mo *Chinese law* P468.

2.4 Dispute Resolution

Dispute resolution is regulated by the *Labour Law* of 1994 which provides the general principles and the *Regulations on the Resolution of Labour Disputes of Enterprises* which provides the detailed provisions concerning the labour dispute resolution. According to the *Regulations*⁷⁴, the scope of labour dispute resolution is as follows. Disputes arise from the discharge, expulsion or dismissal of staff by enterprises, and the resignation of or voluntary leaving of office by staff and workers.⁷⁵ Disputes arise from the implementation of state regulations concerning wages, insurance, welfare, training and labour protection.⁷⁶ Disputes also arise from the performance of employment contracts.⁷⁷ Other employment disputes that laws and regulations require to be handled in accordance with these Regulations.⁷⁸

Any employment disputes may be resolved through one of the measures which are consultation, mediation, arbitration and litigation.⁷⁹ Chinese government encourages both parties in a dispute to solve their problems through negotiation and consultation. Under the Regulation,⁸⁰ whenever a labour dispute arises between a worker and an enterprise, either party may apply to the labour dispute mediation committee at the enterprise for mediation.⁸¹ If the mediation fails or if neither party wants mediation, then they may apply to the local labour dispute arbitration committee for arbitration.⁸² If either party is not satisfied with the decision of the arbitration committee, he or she may file a lawsuit with a people's court.⁸³ While the first step of solving a labour dispute, the mediation, can be skipped, the labour dispute

⁷⁴ Article 2 of the *Regulations on the Resolution of Labour Disputes of Enterprises of 1993*.

⁷⁵ Wang Guiguo and John Mo *Chinese law* P469.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Article 77 of the *Labour Law*.

⁸⁰ *Regulations on the Resolution of Labour Disputes of Enterprises*.

⁸¹ *Labour and Social Security in China* Information Office of the State Council of the People's Republic of China, April 2002, Beijing.

⁸² Ibid.

⁸³ Ibid.

arbitration body must be called in order to receive the right to file the case in court.⁸⁴

2.4.1 Consultation

Consultation is the method through which the parties to a dispute deal with each other directly either in oral or written form, without any formality and procedural requirements.⁸⁵ The premise of consultation is mutual willingness of parties. Once without this premise, the consultation will not apply. Recently, according to the *Amendment Trade Union Law of 2001*, there is a new regulation, that is, in the case of labour disputes or work stoppage, the trade union is entitled to hold consultations with the enterprise to find a solution.⁸⁶ This article signifies a large step towards a consultative system.⁸⁷

2.4.2 Mediation

According to the *Regulations on the Resolution of Labour Disputes of Enterprises*, an enterprise may set up a labour dispute mediation committee which is responsible for the mediation of labour disputes arising within the enterprise.⁸⁸ The labour Dispute Mediation Committee shall be composed of representatives of the employer as well as of the employees and trade union officials. The chairmanship shall be held by one of the representatives of the employees.⁸⁹ Mediation must be completed within 30 days after its submission, otherwise, the mediation will be deemed unsuccessful.⁹⁰ Mediation can also be conducted in the process of arbitration and litigation by arbitrators and judges respectively.⁹¹

2.4.3 Arbitration

Arbitration is the most important process for employment dispute resolution so far.

⁸⁴ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P16.

⁸⁵ Wang Guiguo and John Mo *Chinese law* P469.

⁸⁶ Article 7 of the Trade Union Law of 1992.

⁸⁷ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P16.

⁸⁸ Wang Guiguo and John Mo *Chinese law* P470.

⁸⁹ Article 80 of the Labour Law.

⁹⁰ Wang Guiguo and John Mo *Chinese law* P470.

⁹¹ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P484.

This is because arbitration is the pre-condition of the litigation, that is to say, any labour dispute cannot, over this process, directly access the court. The labour arbitration committee plays an important role in the resolution of labour disputes. A great number of labour disputes are actually resolved by the committees at various levels.⁹² A few of labour disputes progress to the people's courts. Counties, cities and districts administered by the cities are required to set up labour arbitration committees.⁹³ The Labour Dispute Arbitration Committee shall be composed on equal terms from the official labour bureau, the trade union at the corresponding level and the employer.⁹⁴ The labour bureau shall hold the chairmanship.⁹⁵ The party concerned shall file the application to a labour dispute arbitration committee within 60 days after the first occurrence of the dispute.⁹⁶ The arbitration committee should mediate first. A voluntary agreement between parties should be concluded. If an agreement has not been reached, the parties have 15 days after the decision of the arbitration committee to take the file to court.⁹⁷ If the agreement is reached and no action is brought to the people's court to challenge the arbitral award within 15 days, the award becomes legally binding upon the parties and can be enforced.⁹⁸

2.4.4 Litigation

Litigation is the final method to resolve the employment dispute. Either party to an employment dispute may bring an action to court if it is not satisfied with the arbitral award.⁹⁹

2.4.5 Dispute Resolution on Collective Agreement

In terms of the *Trade Union Law of 1992*,¹⁰⁰ if an enterprise infringes upon labour

⁹² Wang Guiguo and John Mo *Chinese law* P471.

⁹³ Ibid P470.

⁹⁴ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P16.

⁹⁵ Article 81 of the Labour Law.

⁹⁶ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P19.

⁹⁷ Article 83 of the Labour Law.

⁹⁸ Wang Guiguo and John Mo *Chinese law* P471.

⁹⁹ Ibid P472.

¹⁰⁰ Article 20 of the Trade Union Law.

rights and interests of the workers and staff members in violation of the collective contract, the trade union may demand the enterprise to assume the responsibilities for its acts.¹⁰¹ If the disputes arising from the performance of the collective contract and cannot be settled between the trade union and the enterprise through consultation, the trade union may submit them to the labour dispute arbitration committees for arbitration.¹⁰² The handling of such a dispute shall be completed within 30 days.¹⁰³ If the arbitration committees refuse to pass judgment on the case or the trade union is not satisfied with the arbitral ruling, the trade union may bring the case to court.¹⁰⁴

2.5 Strikes

2.5.1 Background

In China, unlike other countries, the right to strike to balance the power between employees and enterprises has not been established. Despite the ratification of the *International Covenant on Economic, Social and Cultural Rights*, China has still not passed any legislation guaranteeing the right to strike.¹⁰⁵ In 1982, the right to strike was removed from the constitution. It was argued that there was no need for it as the enterprises belonged to the people.¹⁰⁶ As a result, the concept of strike has neither appeared nor been defined in any national legislation in China.¹⁰⁷ However, with developing the socialist market economy, numbers of foreign investment companies and private companies have been set up in China. The ownership of enterprises and labour relations have changed greatly. The conflicts between enterprises and workers can not be avoided in practice. As the right to strike is illegal in China, before, workers usually tried other forms of expressing their concerns, such as the petitioning framework.¹⁰⁸ However, these kinds of forms fail to protect the interests

¹⁰¹ Ibid.

¹⁰² Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P19.

¹⁰³ Article 35 of the *Regulations on the Resolution of Labour Disputes of Enterprises*.

¹⁰⁴ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P19.

¹⁰⁵ Ibid P20.

¹⁰⁶ At that time, all enterprises were controlled by the state, which were state-owned enterprises and collective-owned enterprises.

¹⁰⁷ Wang Guiguo and John Mo *Chinese law* P472.

¹⁰⁸ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P20.

of workers, especially in foreign investment companies and private companies. Consequently, the protection of workers' rights, like other industry countries, naturally touches the issue of the right to strike. According to related literature, the 'strike' does take place in China.¹⁰⁹ Most strikes have occurred in foreign investment enterprises. The biggest one involved about 700 people in Shandong province which lasted three days.¹¹⁰ Thus, the Chinese government has had to face the reality of the strikes. However, the word 'strike' is avoided by the Chinese government documentation and law. The Chinese government usually uses the term 'accidental events' replacing the term 'strike'.

2.5.2 Handling of 'Strike'

The labour administration departments are the government organs in charge of labour administration and supervision and the handling of various disputes arising out of employment relationships.¹¹¹ The only available document is the *Notice on the Handling of Accidental Events* (Notice) issued by the Ministry of Labour and Social Security (MLSS). According to the Notice, if the accidental event involves more than 100 people and lasts for more than one day, the local labour administration department should report the case to the MLSS.¹¹² The officials sent by the MLSS, together with officials from other relevant departments, constitute a joint investigation team.¹¹³ The labour administration department or the joint investigation team assumes the role of mediator. Usually the labour administration department, employees' representatives, trade unions and the employer negotiate the conditions and time for the resumption of work.¹¹⁴ These accidental events are usually resolved within a week through reaching an agreement between the employees and employer.¹¹⁵

¹⁰⁹ Wang Guiguo and John Mo *Chinese law* P472.

¹¹⁰ Ibid.

¹¹¹ Ibid P473.

¹¹² Ibid P472.

¹¹³ Ibid.

¹¹⁴ Ibid P473.

¹¹⁵ Ibid.

Recently, new words for 'strike' appeared in Chinese legislation, namely 'work-stoppage' and 'slow-down strike', according to the *Amendment Trade Union Law of 2004*. Meanwhile, this Amendment grants trade unions a balanced role between workers and employers. In case of work-stoppage or slow-down strike in an enterprise or institution, the trade union shall, on behalf of the workers and staff members, hold consultation with the enterprise or institution or the parties concerned.¹¹⁶ Trade unions shall present the opinions and demands of the workers and staff members, and put forth proposals for solutions.¹¹⁷ With respect to the reasonable demands made by the workers and staff members, the enterprise or institution shall try to satisfy them.¹¹⁸ The trade union shall assist the enterprise or institution in properly dealing with the matter so as to help restore the normal order of production and other work as soon as possible.¹¹⁹

¹¹⁶ Article 27 of Trade Union Law of 1992.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P19.

3 Provisions on South African Collective Labour Law

In South Africa, the *Constitution Act 108 of 1996* and the *Labour Relations Act of 1995* (LRA) are the main source of collective labour law. The Constitution Act as the supreme law in the state provides that every worker has the right to form and join a trade union and to participate in its activities and programmes.¹²⁰ Trade unions have the right to determine its own administration, programmes and activities, to form and join a federation, and to engage in collective bargaining.¹²¹ The LRA set up the Labour Court and Labour Appeal Court especially for solving labour dispute. Moreover, the right to strike as a basic right is granted to every worker by law.

3.1 Trade Unions

According to the LRA, a 'trade union' means an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations.¹²² The LRA confers various rights and freedoms on trade unions. These include organisational rights, the right to freedom of association, the right to conclude collective agreements, the right to join bargaining councils or statutory councils, the right to engage in strike action and many others.¹²³

3.1.1 Freedom of association

In a very important sense, the right to freedom of association should be seen as the foundation of the collective labour law. The right to freedom of association also is

¹²⁰ Article 23 of the Constitution Act 108 OF 1996.

¹²¹ D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch *Labour Relations Law a Comprehensive Guide* Fourth Edition P169.

¹²² Article 213 of the LRA.

¹²³ D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch *Labour Relations Law a Comprehensive Guide* Fourth Edition P174.

the pre-condition of the independence of the trade unions. This is because this right protects against both state interference and anti-union discrimination.¹²⁴ The right to freedom of association as a basic labour right is protected by the Constitution of South Africa primarily. Chapter II of the LRA provides further details and ensures this right which is that employees have the right to join and participate in the lawful activities of trade unions.¹²⁵ These activities include the election as office-bearers, officials or union representatives and so on.¹²⁶

3.1.2 Rights of Trade Unions

The LRA protects the autonomy of trade unions. A trade union is independent and has a distinctive name. Trade unions may draw up their own constitutions and rules which meet the law's requirements. Trade unions may hold elections for officer-bearers, officials and representatives.¹²⁷ Trade unions also have the right to plan and organize their own administration and lawful activities. A trade union may participate in forming federations or may join federations of trade unions.¹²⁸ Trade unions may affiliate with, and participate in, the affairs of international workers' organisations, as well as participate in the activities of the ILO.¹²⁹ Trade Unions may also contribute to or receive financial assistance from these international organisations.¹³⁰

3.1.3 The Organisational Rights

Under the LRA, trade unions can exist without their registration, which means unions are not obliged to register. However, organisational rights are only acquired by registered trade unions. In terms of the LRA, only the registered trade unions are

¹²⁴ Clive Thompson and Paul Benjamin 'Labour Relations Act 66 of 1995 AA1 to 16, South African Labour Law' P AA1-5.

¹²⁵ Ibid.

¹²⁶ D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch *Labour Relations Law a Comprehensive Guide* Fourth Edition P169.

¹²⁷ Article 8 (a) of the LRA.

¹²⁸ Article 8 (b) (c) (d) of the LRA.

¹²⁹ Article 8 (e) of the LRA.

¹³⁰ Article 8 (e) of the LRA.

eligible for membership of bargaining councils and statutory councils and they may enter into statutorily collective agreements, including agency and closed-shop arrangements.¹³¹ The LRA provides that a registered trade union is sufficiently representative of employees at workplaces.¹³² The organisational rights of the trade union may include the following. Above all, trade unions have the right to access the workplace.¹³³ They may hold meetings on the premises outside of working time,¹³⁴ and hold ballots on the employer's premises.¹³⁵ Trade unions also have the right to administer stop-orders for membership fees, and the trade union office-bearers have the right to reasonable time off for the purpose of performing functions related to their office.¹³⁶ Moreover, a trade union representative has the right to assist and represent the employees in grievance and disciplinary proceedings. They have the right to monitor the employer's compliance with the law's requirements and any collective agreement which is binding on the employer. The trade union representatives also have the right to report any alleged contravention and to perform any other function agreed to between the representative trade union and the employer.¹³⁷ Furthermore, a registered trade union is a legal persona that is independent, not under the control or influence of any employer or employers' organisation.¹³⁸ The unions may represent its members in legal proceedings in both the civil and labour courts, and its officials are entitled to represent their members in arbitration proceedings.¹³⁹ Meanwhile, the implementation of the organisational rights of trade unions are supported by the LRA from the employer side as well, that is to say, there is an obligation for the employer to disclose all relevant information when an employer is consulting or bargaining with a registered trade union.¹⁴⁰

¹³¹ D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch *Labour Relations Law a Comprehensive Guide* Fourth Edition P167.

¹³² Sonia Bendix *The Basics of Labour Relations* P107.

¹³³ Article 12 of the LRA.

¹³⁴ Article 12 (2) of the LRA.

¹³⁵ Sonia Bendix *The Basics of Labour Relations* P107.

¹³⁶ Ibid.

¹³⁷ Article 14 (4) of the LRA.

¹³⁸ John Grogan *Workplace Law* P322.

¹³⁹ Ibid P327.

¹⁴⁰ Article 16 of the LRA.

3.2 Collective Bargaining

The primary objective of the LRA is to promote collective bargaining as a means of preventing and resolving disputes between employers and workers. Its aim is to avoid industrial strife and to maintain peace.¹⁴¹ Its purpose is securing labour peace, social justice, economic development and employment equity.¹⁴² In general, the LRA favours voluntary collective bargaining. It provides for the establishment of bargaining councils and statutory councils in industries or sectors.¹⁴³ All collective agreements whether negotiated at plant-level or in bargaining councils are enforceable in terms of the LRA.¹⁴⁴

3.2.1 Parties of Collective Bargaining

The LRA provides three agents in the collective bargaining: trade unions, employers' organisations and workplace forums. Trade unions and workplace forums which include non-members of trade unions both represent the employees. Moreover, trade unions represent the majority of employees in the bargaining. The primary role of trade unions is to engage in collective bargaining with their members' employers. The employers' organisations mean any number of employers associated together for the purpose of regulating relations between employers and employees or trade unions,¹⁴⁵ in terms of the LRA.

3.2.2 Contents and Forums

The purpose of collective bargaining is to determine wages, terms and conditions of employment and other matters of mutual interest between employees and their

¹⁴¹ John Grogan *Collective Labour Law* P24.

¹⁴² D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch *Labour Relations Law a Comprehensive Guide* Fourth Edition P227.

¹⁴³ Sonia Bendix *The Basics of Labour Relations* P142.

¹⁴⁴ Ibid.

¹⁴⁵ Article 213 of the LRA.

employers as well as effective the resolution of disputes.¹⁴⁶ Under the LRA, collective bargaining occurs at plant level or industry level, depending on the decision of parties involved. At the same time, as a whole, the LRA enjoys promoting collective bargaining at sector level and encouraging bargaining at this level. The two forums of collective bargaining where parties cannot be compelled are bargaining councils and statutory councils.¹⁴⁷

3.2.2.1 Bargaining Councils

The key bargaining institution is the bargaining council in terms of the LRA.¹⁴⁸ Article 27 of the LRA provides that one or more registered trade union and one or more registered employers' organisation may establish a bargaining council and they may negotiate the terms of the constitution of that council. There is no provision made for employers to be parties to councils directly. The registration of a bargaining council is considered by the National Economic Development and Labour Council. After a bargaining council is registered, it will attain legal personality. The council may own property, enter into contracts in its own right and sue and be sued in its own name.¹⁴⁹ The jurisdiction of a bargaining council is determined by reference to the sector and the area stated in the registration certificate.¹⁵⁰ The primary function of a bargaining council is the negotiation of collective agreements.¹⁵¹ Bargaining council agreements are enforced through the private arbitration process,¹⁵² they may figure as a form of minimum wage regulation, and they may be extended to non-parties within a council's registered scope.¹⁵³

¹⁴⁶ See article 213 of the LRA.

¹⁴⁷ John Grogan *Workplace Law* P365.

¹⁴⁸ Clive Thompson and Paul Benjamin 'Labour Relations Act 66 of 1995 AA1 to 16, South African Labour Law' P AA1-9.

¹⁴⁹ Basson, Christianson, Garbers, Le Roux, Michke, and Strydom '*Essential Labour Law Volume 2: Collective Labour Law*' P77.

¹⁵⁰ *Ibid* P78.

¹⁵¹ *Ibid* P80.

¹⁵² Clive Thompson and Paul Benjamin '*Labour Relations Act 66 of 1995 AA1 to 16, South African Labour Law*' P AA1-12.

¹⁵³ *Ibid* P AA1-9.

3.2.2.2 Statutory Councils

Article 39 of the LRA provides that registered trade unions or employers' organisations may apply for the registration of a statutory council if there is no registered bargaining council for that sector and area. A union with thirty per cent support within a sector can trigger the process for the establishment of a statutory council.¹⁵⁴ If employers decline to participate, the Minister of Labour may appoint representatives on their behalf.¹⁵⁵ Collective Agreement arrived at by statutory councils may be extended to non-parties as well.¹⁵⁶

3.2.3 Duty to Bargain and the Public Sector

The LRA does not distinctly stipulate a duty to bargain. But, if the issue in dispute concerns a refusal to bargain, an advisory award may have been made¹⁵⁷ in this context. The advisory awards are a necessary precursor to industrial action¹⁵⁸ (See 3.5.3 Strikes in Response to a Refusal to Bargain this section).

The LRA also considers that employees in the public sector need to be protected. So the Act provides a bargaining council especially for the public service as a whole, namely, the Public Service Co-ordinating Bargaining Council.¹⁵⁹ Special provision is made for a dispute resolution committee which must resolve any jurisdictional disputes between the Public Service Co-ordinating Bargaining Council and any other bargaining council in the public service.¹⁶⁰

¹⁵⁴ Clive Thompson and Paul Benjamin 'Labour Relations Act 66 of 1995 AA1 to 16, South African Labour Law' P AA1-11.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Article 64 of the LRA.

¹⁵⁸ Carol Rudd and Brian Van Zyl *Guide to the 1995 Labour Relations Act* P357. In this book, the authors assume that the arbitrator had advised the employer to recognize the union, but the employer refused to take this advice. The only way that such union could then attempt to compel recognition would be through industrial action.

¹⁵⁹ Article 36 of the LRA.

¹⁶⁰ Basson, Christianson, Garbers, Le Roux, Michke, and Strydom 'Essential Labour Law Volume 2: Collective Labour Law' P88.

3.2.4 Practice

In practice, the efficiency of protection of workers in South Africa can be seen from the research of ILO whose statistics reveal the benefits of collective bargaining. This is evident in the excerpt below.

ILO Research Project on the Contribution of Collective Bargaining to Employment Protection or Creation and to Competitiveness: The Case of South Africa:

[a]t the end of October 1998, there was a total of 76 bargaining councils. At the end of 1998, 51 agreements had been published in terms of the new LRA and 13 amendments to agreements were made. 632 992 workers' wages and working conditions were regulated by such agreements. In addition, approximately 510 440 workers belonged to pension and provident funds provided for in bargaining council agreements and approximately 376 470 were members of funds providing medical benefits. In 5494 instances, exemptions were granted to employers from the provisions of bargaining council agreements, compared with 1575 during 1997.

3.3 Collective Agreement

In South Africa, collective agreement as the product of the collective bargaining is regulated by the LRA. Only registered trade unions and employers or employers' organisations may conclude collective agreements and they may deal with 'any matter of mutual interest' between the parties.¹⁶¹ A collective agreement is defined in the LRA as 'a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between one or more registered trade unions, on the one hand, and on the other hand, one or more employers, registered employers' organisations, or a combination of employers and employers' organisations'.¹⁶² According to the LRA, the collective agreements bind not only the

¹⁶¹ Clive Thompson and Paul Benjamin 'Labour Relations Act 66 of 1995 AA1 to 16, South African Labour Law' P AA1-12.

¹⁶² Article 213 of the LRA.

parties of the collective agreement, but also create obligations between each party, the members of every other party, the members of registered unions and registered employers' organisations, and non-union employees.¹⁶³ Collective agreements concluded at bargaining councils do not bind all council parties, but only those who actually enter into the agreements.¹⁶⁴

3.4 Dispute Resolution

Dispute resolution in South Africa is governed under the LRA. The Act sets up mechanisms which settle disputes through conciliation, arbitration and adjudication. There are four institutions established to deal with dispute resolutions, namely, the Commission for Conciliation, Mediation and Arbitration (CCMA), accredited councils and private agencies, the Labour Court and the Labour Appeal Court.

3.4.1 CCMA

CCMA plays a central role in the process of dispute resolution. The CCMA, which is established under the LRA as a juristic person,¹⁶⁵ is a state-funded but independent body with jurisdiction throughout all the provinces of the Republic of South Africa.¹⁶⁶ The CCMA is a tripartite body which consists of government, organized labour, and organized business.¹⁶⁷ The main function of the CCMA is to attempt to resolve any dispute by way of conciliation and if the dispute remains unresolved to try other methods in terms of the LRA.¹⁶⁸

3.4.1.1 Conciliation

Conciliation is a compulsory step in the processing of a dispute under the LRA. When a dispute is referred to the CCMA, the Commissioner is appointed to attempt

¹⁶³ Article 23 of the LRA.

¹⁶⁴ Clive Thompson and Paul Benjamin *'Labour Relations Act 66 of 1995 AA1 to 16, South African Labour Law'* P AA1-10.

¹⁶⁵ Article 112 of the LRA.

¹⁶⁶ Article 113 and 114 of the LRA.

¹⁶⁷ Article 116 of the LRA.

¹⁶⁸ Article 115 of the LRA.

to resolve the disputes by way of conciliation.¹⁶⁹ The appointed commissioner must attempt to resolve the dispute within 30 days of the date the CCMA received the referral unless the parties agree to extend the 30 days period.¹⁷⁰ If conciliation fails within the 30-day period or any further period agreed between the parties, the commissioner must issue a certificate stating whether or not the dispute has been resolved.¹⁷¹ The Commissioner must file original certificate with the CCMA and the CCMA must serve a copy of the certificate on all parties.¹⁷²

3.4.1.2 Arbitration

If the dispute remains unsolved after conciliation, the CCMA may resolve the dispute by way of arbitration. Application for arbitration must be within 90 days of the date on which the certificate was issued.¹⁷³ Legal practitioner may represent the parties in arbitration. The arbitrator must issue an arbitration award within 14 days of the conclusion of the arbitration proceedings and must serve the copies to all parties.¹⁷⁴ The CCMA must file the original award with the registrar of the Labour Court.¹⁷⁵ The arbitration award is final and binding and it may be enforced, as it was an order of the Labour Court, unless it was an advisory arbitration award.¹⁷⁶

3.4.2 Accredited Councils and Private Agencies

Article 127 of the LRA provides that any council or private agency may apply to the CCMA for accreditation to resolve certain disputes. The aim of the LRA is to relieve some burden of the CCMA. In the context of the bargaining council and statutory council, it is important to note that the dispute resolution function of a bargaining council extends to all employers and employees falling within the jurisdiction of the council, irrespective of whether they are members of the trade unions and employers'

¹⁶⁹ Article 135 of the LRA.

¹⁷⁰ Article 135 (2) of the LRA.

¹⁷¹ Article 135 (5) of the LRA.

¹⁷² Article 135 (5) of the LRA.

¹⁷³ Article 136 (1) (b) of the LRA.

¹⁷⁴ Article 138 (7) of the LRA.

¹⁷⁵ Ibid.

¹⁷⁶ Article 143 (1) of the LRA.

organisations which are parties to the council.¹⁷⁷

3.4.3 The Labour Court

The Labour Court as a court of *law and equity* is established under the LRA.¹⁷⁸ The Labour Court is a superior court¹⁷⁹ and has exclusive jurisdiction, which is provided under the LRA, in all the provinces of the Republic of South Africa.¹⁸⁰ It also has concurrent jurisdiction with the High Court in respect of any alleged violation of any fundamental right under the *Constitution of the Republic of South Africa, 1996*. The most important powers of the Labour Court are to grant urgent interim relief, to grant interdicts, to make order for specific performance, to make declaratory orders, to award compensation and to make orders for costs.¹⁸¹ It may also make any arbitration award or any settlement agreement an order of Court and review arbitral awards.

3.4.4 The Labour Appeal Court

The labour Appeal Court as a *court of law and equity* is established under the LRA and is the final court in relation to the labour matters.¹⁸² The Labour Appeal Court consists of the Judge President of the Labour Court, the Deputy Judge President of the Labour Court and other judges of the High Court.¹⁸³ The position of the Labour Appeal Court is equal to the Supreme Court of Appeal. The Labour Appeal Court has the exclusive jurisdiction to hear and determine appeals against any final judgments and orders of the Labour Court.¹⁸⁴

¹⁷⁷ Basson, Christianson, Garbers, Le Roux, Michke, and Strydom *Essential Labour Law Volume 2: Collective Labour Law* P79.

¹⁷⁸ Article 151 (1) of the LRA.

¹⁷⁹ Article 151 of the LRA.

¹⁸⁰ Article 156 (1) of the LRA.

¹⁸¹ Article 158 (1) (a) of the LRA.

¹⁸² Article 167 of the LRA.

¹⁸³ Article 168 (1) of the LRA.

¹⁸⁴ D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch *Labour Relations Law a Comprehensive Guide* 4ed P161.

3.4.5 Dispute Resolution on Collective Agreement

The LRA provides that every collective agreement (excluding an agency-shop agreement or a closed-shop agreement) must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement.¹⁸⁵ The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.¹⁸⁶

If the collective agreement does not provide for a procedure, or the procedure provided for in the collective agreement is not operative, or any party to the collective agreement has frustrated the resolution of the dispute, any party may refer the dispute in writing to the CCMA.¹⁸⁷ The CCMA must attempt to resolve the dispute through conciliation.¹⁸⁸ If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.¹⁸⁹ Any person bound by an arbitration award may appeal against that award to the Labour Court.¹⁹⁰

3.5 Strikes

Under the Labour Relations Act 1995, “strike” means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory.¹⁹¹ In collective bargaining, as a trade off, the LRA not only points out that, ‘every

¹⁸⁵ Article 24 (1) of the LRA .

¹⁸⁶ Ibid .

¹⁸⁷ Article 24 (2) of the LRA .

¹⁸⁸ Article 24 (4) of the LRA .

¹⁸⁹ Article 24 (5) of the LRA .

¹⁹⁰ Article 24 (7) of the LRA .

¹⁹¹ Article 213 of the LRA.

employee has the right to strike'¹⁹², but also protects the right to strike which is thought of as an integral weapon to collective bargaining. At the same time, the right to strike is a fundamental right protected by the *Constitution of 1996*.¹⁹³ The right to strike is not only a threat for employers, but also balances power between employers and workers. Under the Labour Relations Act, strikes are distinguished protected strikes and unprotected strikes. The LRA expressly protects the rights of employees who are involved in a protected strike. In this context, the employers cannot claim damages from the employees or the trade union for losses as a result of the strike.¹⁹⁴ The employers also cannot obtain an interdict to prevent the strike and cannot dismiss employees on the grounds that the strike is a breach of contract or that the strike action by the employees itself constitutes misconduct (refusal to work).¹⁹⁵ Meanwhile, the LRA also limits the right to strike. This is because the strike can cripple a sector, even a state, and this right cannot be unlimited.

3.5.1 Prohibitions against Strikes

Article 65 of the LRA prohibits strikes under the following circumstances. Firstly, a person is bound by a collective agreement that prohibits a strike in respect of the issue in dispute.¹⁹⁶ Secondly, a person is bound by an agreement that requires the issue in dispute to be referred to arbitration.¹⁹⁷ Thirdly, if a party has a right to refer a dispute to arbitration or to the Labour Court in terms of the LRA, that party cannot resort to a strike.¹⁹⁸ These could be disputes regarding alleged unfair dismissals of employees,¹⁹⁹ unfair discrimination,²⁰⁰ unfair conduct²⁰¹ and freedom of association.²⁰² Fourthly, employees who are engaged in essential or maintenance

¹⁹² Article 64 of the LRA.

¹⁹³ Constitution of The Republic of South Africa, Act 108 of 1996. Art.23.

¹⁹⁴ Basson, Christianson, Garbers, Le Roux, Michke, and Strydom '*Essential Labour Law Volume 2: Collective Labour Law*' P99.

¹⁹⁵ Ibid.

¹⁹⁶ Article 65 (1) (a) of the LRA.

¹⁹⁷ Article 65 (1) (b) of the LRA.

¹⁹⁸ Article 65 (1) (c) of the LRA.

¹⁹⁹ See article 191 of the LRA.

²⁰⁰ See article 10 of the Employment Equity Act, 1998.

²⁰¹ See Schedule 7 of the LRA.

²⁰² See article 9 (4) of the LRA.

services are prohibited from striking.²⁰³ Fifthly, no one may embark on a strike if the party is bound by an arbitration award or a collective agreement which regulates the issue in dispute.²⁰⁴ Finally, a person may not resort to a strike if that person is bound by a determination made in terms of section 44 of the LRA by the Minister that regulates the issue in dispute.²⁰⁵

3.5.2 Procedures

Before resorting to a strike, there are two procedures that need to be met according to the LRA. The first step is to obtain protected status for a strike, that is, the issue in dispute must be referred to a bargaining or statutory council or the CCMA for conciliation.²⁰⁶ The second step is that once conciliation has failed or the periods of 30 days have lapsed since receipt of the referral, at least 48 hours' written notice of the commencement of the strike must be given.²⁰⁷ Where the State is the employer, at least seven days' notice of the commencement of the strike must be given.²⁰⁸ Meanwhile, the holding of a ballot is not a precondition for a protected strike according to the LRA.

3.5.3 Strikes in Response to a Refusal to Bargain

As we mentioned above, in collective bargaining, once there is a refusal to bargain and parties fail to conciliate, an advisory award must be made. According to the LRA, a refusal to bargain includes the following contents: a refusal to recognise a trade union as a collective bargaining agent or to agree to establish a bargaining council, a withdrawal of recognition of a collective bargaining agent, a resignation of a party from a bargaining council, and a dispute about appropriate bargaining units, appropriate bargaining levels or bargaining subjects.²⁰⁹ Further, an advisory award in

²⁰³ Article 65 (1) (d) of the LRA. Also see article 213 of the LRA about the definition of the 'essential service' and article 75 (1) of the LRA regarding the definition of the 'maintenance service'.

²⁰⁴ Article 65 (3) (a) (i) of the LRA.

²⁰⁵ Article 65 (3) (a) (ii) of the LRA.

²⁰⁶ Article 65 (1) of the LRA.

²⁰⁷ Article 65 (1) (b) of the LRA.

²⁰⁸ Article 65 (1) (d) of the LRA.

²⁰⁹ Article 64 (2) of the LRA.

nature does not bind parties. However, in this context, it is a necessary precondition to the industrial action. If the advisory award goes against the trade union, or if the employer decides to ignore an advisory in favour of the union, the union may give notice of the commencement of the strike in terms of the LRA.²¹⁰

²¹⁰ Basson, Christianson, Garbers, Le Roux, Michke, and Strydom 'Essential Labour Law Volume 2: Collective Labour Law' P129.

4 Comparative Analysis of Collective Labour Law between China and South Africa

In the previous two sections, the collective labour legislation in China and in South Africa were respectively introduced. This section will make a comparative analysis between these two countries. It will examine some similarities and differences between the two legal systems, and then establish the weakness of Chinese collective labour law. The discussion will involve four aspects, namely trade unions, collective bargaining process and collective agreements, dispute resolution and strike action.

4.1 Trade Unions

It is well known that trade unions as representatives of workers play a significant role in protecting workers' rights. Both South Africa and China guarantee trade unions' position through their legislation. The South Africa's Constitution and the LRA grants trade unions comprehensive rights, such as the organisational rights, the right to freedom of association, the right to conclude collective agreements, the right to join bargaining councils or statutory councils, the right to engage in strike action and so on. China, like South Africa, is also concerned with trade unions' basic rights through the Chinese constitution and the trade union law. However, the independent nature of trade unions, which is the primary factor of concern for trade union organisations, and which decides the role of trade unions on the aspect of protection of employees' interests, is rather different in practice in these two countries. The difference arises from the various structures of trade union organisations in South Africa and in China. In China, there is a single, government-authorized trade

union.²¹¹ The All-China Federation of Trade Unions is actually a union confederation whose members consist of provincial, autonomous community, municipality and industry federations; these union federations are comprised of enterprise unions.²¹² This structure of trade unions' organisation is in fact similar to that of the state, which indicates that trade unions are in practice gradually losing their independence. The reason is that, before, under a planned economy system, there were merely two models of enterprises in China, which were state-owned and collectively-owned enterprises. Under that centralized system, the officials of state-owned and collectively-owned enterprises were also the officials of the state, even the officials of trade unions were also officials of state.²¹³ This structure resulted in trade unions losing their ability to protect workers. Recently, one case *Yang shue v North-west airway's engine Ltd*,²¹⁴ proved that trade unions are on the side of the enterprise in the court rather than on the workers' side when conflicts occur between enterprise and workers.²¹⁵ Moreover, the scope of activities of trade unions is decreasing as well. Trade unions now mostly engage in organizing unemployment assistance (training entities), to the establishment of legal advisory offices,²¹⁶ and attending to the welfare of workers.

In contrary to China, in South Africa, there are very many trade unions in different sectors. According to the 2001-2002 South Africa Yearbook, there were about 17 trade union federations at the end of 2000.²¹⁷ There are three prominent trade union federations with affiliates operating in the different sectors of the economy.²¹⁸ In addition, these trade unions are independent: they are not under the control or

²¹¹ Trade Unions in the Private Sector (China), November, 2004.

²¹² Ibid.

²¹³ Li jinzhu and Zheng tukang *The Anatomy and Revelation of the System of Collective Bargaining from Occident*.

²¹⁴ *Government Body and Legal System* (2003) vol.6. P15.

²¹⁵ Ibid. In this case, the president of trade union was a deputy of enterprise in the court.

²¹⁶ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation? P3*.

²¹⁷ Trade unions in South Africa.

²¹⁸ Ibid. These are the Congress of South African Trade Unions (Cosatu), the Federation of Unions of South Africa (Fedusa), and the National Council of Trade Unions (Nactu).

influence of any employer or employers' organisation,²¹⁹ they may even represent their members in legal proceedings in both the civil and labour courts, and their officials are entitled to represent their members in arbitration proceedings.²²⁰

From the above comparison between South Africa and China, it is evident that increasing the power and enhancing the independence of trade unions is a matter of urgency for China today. Like South Africa, more independence is given to trade unions so that they can get equal position to employers and establish social dialogue with them, which is a balance of power between employers and trade unions. Trade unions of China should represent and safeguard the legitimate rights and interests of workers, and independently conduct their activities in accordance with the law.²²¹ It is hoped that more independence will be returned to trade unions, and as the economic reforms enhance the autonomy of state-owned enterprises and the authority of enterprise managers, the unions will likely enjoy more independence from the government.²²²

4.2 Collective Bargaining and Collective Agreements

With regard to collective bargaining and collective agreements, China has not yet ratified the ILO Convention 98 – *Right to Organize and Collective Bargaining Convention, 1949*, but China's laws give details on how the process of collective bargaining shall be organized.²²³ According to legislation, three differences exist in the collective bargaining process and its outcome of collective agreements between South Africa and China.

First of all, the levels of collective bargaining are varied between these two countries.

²¹⁹ John Grogan *Workplace Law* P322.

²²⁰ Ibid P327.

²²¹ Shi Meixia 'The People's Republic of China' in R.Blainpain (ed.) et al. 'The Process of Industrialization and the Role of Labour Law in Asian Countries' P37.

²²² Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P481.

²²³ Caroline Heuer *China's Labour Law: An Effective Instrument of Workers' Representation?* P18.

In South Africa, the LRA stipulates that collective bargaining takes place not only at plant level but also at sector level, and the LRA enjoys promoting collective bargaining at sector level and encouraging bargaining at this level. This is because, at sector level, collective bargaining can set sectorial minimum standards that are legally binding so that the collective agreement can play a role similar to legislation.²²⁴ A collective agreement which bargains at sector level, on the one hand, builds a standardization of the sectoral workers' interests, and benefits more workers in the same sector, on the other hand, decreases the quantity of labour disputes and harmonizes the labour relation.

In China, collective bargaining is still restricted to enterprise level. Of course, at this level, it has its own advantages, such as being more flexible than upper level, it allows for the co-determination of working conditions, participation in the decision-making process, mutual education and training process of economy, business and working life. But it is a fact that the collective bargaining at upper level can cover and protect more workers, which is difficult to achieve for the lowest level. At present, in the drafting work of the Collective Agreement Law, some experts are discussing the feasibility of establishing collective bargaining at upper level in China.

The duty to bargain is also various in these two countries. In South Africa, bargaining can not be compelled by law as a whole, at the same time, in limited circumstances, a duty to bargain is also absolutely necessary. That is to say, the collective bargaining is a hybrid of voluntarism and compulsion.²²⁵ The advantage is obvious that this ensures employers involvement in bargaining.

²²⁴ Yasuo Suwa 'The Actors of Collective Bargaining: Is the System really Sustainable in the Future?' in Roger Blanpain (ed.) *The Actors of Collective Bargaining* P29.

²²⁵ D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, with C Bosch *Labour Relations Law a Comprehensive Guide* Fourth Edition P227.

In China, Chinese law promotes completely voluntary bargaining between parties, so that the collective bargaining looks much more like negotiation than bargaining. Once one party does not want to bargain, then there will be no bargain. Especially on the workers' side, as they are in the weaker position, so how to protect their rights is an issue which arises from this kind of voluntary bargaining.

In addition, South African collective bargaining concerns the public sector while Chinese labour law applies to all employing units in the same way whether in the private or the public sector.²²⁶ In South Africa, collective bargaining in the public sector is with certain restrictions, although the government acknowledges that the employees in the public sector also need social dialogue, which is the same as most countries in the world. These kinds of limits are due to the characteristic of the public sector which lacks the market mechanisms *per se*. The government is still reluctant to allow collective bargaining and want to keep the legal regulations on administrative staff as before.²²⁷ However, there are still some certain regulations that are beneficial to the public sector.

In China, the Labour Law applies to all employing units regardless of whether they are enterprises in the private sector or in the public sector.²²⁸ It may be due to the relationship with the past planned economy system with only two models of enterprises state-owned and collectively-owned enterprises. But now, the new socialist market economy is growing gradually. As mentioned before, the new scope of enterprises in China includes state-owned, collectively-owned, privately-owned, individual economic organisations and foreign investment enterprises. The concurrence of multi-forms of enterprises must bring strong pressure to the Labour

²²⁶ Shi Meixia 'The People's Republic of China' in R.Blainpain (ed.) et al. 'The Process of Industrialization and the Role of Labour Law in Asian Countries P33. 'In China, labour law applies to all employing units regardless of whether they are enterprises in the private sector or in the public sector.'

²²⁷ Yasuo Suwa 'The Actors of Collective Bargaining: Is the System really Sustainable in the Future?' in Roger Blainpain (ed.) 'The Actors of Collective Bargaining' P27.

²²⁸ Shi Meixia 'The People's Republic of China' in R.Blainpain (ed.) et al. 'The Process of Industrialization and the Role of Labour Law in Asian Countries P33.

Law. Division of public sector and private sector in collective bargaining is imperative under this situation.

4.3 Dispute Resolution

The dispute resolution process is an important part of collective labour law. South African law provides the CCMA, the Labour Court and the Labour Appeal Court to ensure the implementation of dispute resolution justly. The two levels Labour Courts have exclusive jurisdiction and are granted very high position for dealing with labour disputes. The Labour Court is the superior court and the Labour Appeal Court is equal to the Supreme Court of Appeal, which guarantee the justice and equity of the litigation of dispute resolution. China also attempts to promote a justice dispute resolution process. Chinese law prescribes consultation, mediation, arbitration and litigation as the four-step approach to go through the process. However, the litigation in China perhaps could not play a powerful role because of the levels of the courts. In China, under the *Organic Law of the People's Court*, the judicial power is exercised by the courts at four levels (See Chart 1): the basic people's courts, intermediate people's courts, higher people's courts, and the Supreme People's Court and special courts.²²⁹ Among them, the basic people's courts, intermediate people's courts and higher people's courts are generally referred as 'local people's courts'.²³⁰ China follows the principle of two instances of trials for final adjudication: one is first instance, and the other on appeal.²³¹ The basic people's courts are established at the county and district level²³² and serve as the courts of first instance. The intermediate people's courts which were established in capitals or prefectures in a province level, and higher people's courts which are courts of provinces, autonomous regions and municipalities directly under the Central Government,²³³ whilst servicing as courts

²²⁹ Wang Guiguo and John Mo *Chinese law* P15. The special courts include military courts, railway courts and maritime courts.

²³⁰ *Ibid.*

²³¹ *Ibid* P16.

²³² *Ibid* P15.

²³³ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P61.

of second instance (appeal), may also serve as courts of first instance in accordance with the law.²³⁴ The labour dispute in China is usually deemed as small lawsuit because it involves a little sum of money. The disputes are usually handled by the basic people's courts for first instance and the second instance is handled by the intermediate people's courts. Accordingly, the labour disputes generally only involve the two lowest levels of the local courts, and the disputes are seldom reach the higher level courts. This might be not enough to protect the workers because dispute resolutions at the lower level are probably belittled and delayed, and other higher level courts may intervene or give direction to the lower one, which interferes with the independence of hearing the case by the courts. Like South Africa, establishing special labour courts with exclusive jurisdiction are quite necessary for guaranteeing the workers' legitimate rights in China. If doing so, workers would hire greater confidence and would enjoy more protection under the law.

4.4 Strikes

A strike can be called a threatening weapon to employers in industrial countries. In South Africa, both the Constitution and the LRA ensure that everyone has the right to strike, which guarantees the interests of employees. The LRA further clearly defined the strike and divided strike into two parts, one is lawful, and the other is unlawful. The LRA only accepts the lawful strike. In the lawful context, there is a two-step procedure to guide the parties who engage in the strike, on the one hand; on the other hand, the LRA also prohibits strike under certain circumstances. Consequently, we can see that appropriate legislation is a correct way of regulating strike. In South Africa, the right to strike not only gives workers' confidence but also ensures the balance of power in the collective bargaining process between employers and workers. In China, the right to strike still does not exist in the current Constitution.²³⁵ However, conflicts between employers and workers cannot be avoided. Workers in

²³⁴ Wang Guiguo and John Mo *Chinese law* P16.

²³⁵ *Ibid* P472.

China need to have this right and need greater protection from the legislation in this regard. Accordingly, lawful strike should be supported by Chinese legislation. In this regard, China may learn from South African experience, that is to say, they may also make regulations in detail on the process of strikes, prescribe the lawful behavior as well as prohibit unlawful action. These must benefit the workers and protect their basic rights. It cannot be neglected that China has made gradual efforts on laws relating to strike in recent years. As a member of United Nations, China signed the *International Covenant on Economic Social and Cultural Rights* which took effect in July 2001. This gives more confidence to the Chinese workers, although China has not passed any legislation about this right. It is hoped that Chinese workers will be granted this right as soon as possible, so their rights can be protected by themselves.

4.5 Conclusions

Through the comparison between South Africa and China, we see some similarities and differences between these two countries and the comparison exposes some weaknesses in the Chinese collective labour system. These weaknesses mainly appear in four aspects. In the first place, Chinese trade unions are not as independent as South African trade unions, because they have a particular organisation structure which is similar to that of the state. In the second instance, the collective bargaining in China is completely voluntary and promoted by the government at the lowest level, the enterprises level, and no regulations apply to public sector. The collective agreements thereby cannot benefit more workers. Further, the labour disputes are solved in the basic or intermediate people's courts not in the special labour court. Lastly, strike as a threatening weapon to employers is still not supported by law in China. These weaknesses erode the current collective labour law and workers have thereby lost rights to a certain extent. But what causes these pitfalls? The next section will explore some of the influences which impact on the current Chinese labour law system.

5 Impact on Current Chinese Collective Labour Law

5.1 Introduction

In the previous section, we saw the differences and shortcomings which exist in the current Chinese collective labour law system. What elements led to these results? From my point of view, probably these are mainly influenced by four aspects. The first is the traditional Chinese legal culture, the second is the transition from Chinese planned-economy to socialist market economy, the third is deficiency of the current labour legislation *per se*, and the fourth is the impact of globalization. The purpose of this section is to examine these influences.

Before discussing these influences, we need to know the general frameworks of the development of the whole Chinese legal history. The development of Chinese legal history may be roughly divided into four stages. The first stage is the traditional legal system which was strongly influenced by Confucianism and which lasted approximately two thousand years in China until the earlier part of the last century. The second stage is from 1904 to 1949.²³⁶ During this stage, China attempted to introduce the western legal models. The attempt was short-lived and it failed. The third stage was from 1949 to 1978. In this stage, the current Chinese government was formed. The socialist legal model was established by the government, and then, China suffered the 'Culture Revolution' which led to the stagnation of the development of the Chinese legal system. The fourth stage is the current legal reform stage which began in the 1980s and persists to date. During this stage, the Chinese legal system has incorporated a mass of western laws and it has been quickly developed, especially in the field of economic law.

²³⁶ Albert HY Chen *An Introduction to the Legal System of the People's Republic of China* P21.

5.2 Influences of Traditional Chinese Legal Culture

The traditional Chinese legal system, lasting from the 21st century B.C. to the earlier part of the 20th century, continued from one dynasty to another for several thousand years.²³⁷ The earliest published law in the Chinese legal history was the *Book of Punishment* which was promulgated in 536 B.C.²³⁸ Traditional Chinese conceptions of law have been largely influenced by writings of traditional schools of philosophy.²³⁹ Confucianism²⁴⁰ which was one of the well-known philosophies, strongly influenced the Chinese traditional legal system for more than two thousand years since it was a dominant force in the Han dynasty (206 B.C.-220 A.D.) The political significance of Confucianism lies in its integrated vision of the family and the state, and of morality and politics.²⁴¹ The central Confucian norms relate to the relationships between members of the family, particularly between father and son, brother and brother, and husband and wife.²⁴² Within the family the cardinal virtue was filial piety. The state or nation as a whole was conceived of as an extended family, and the importance of filial piety in the family corresponded to the emphasis on the duty of absolute loyalty and obedience on the part of subjects to their ruler.²⁴³

Under the influence of Confucianism, the role of law was considered secondary and supplementary to morality.²⁴⁴ Thus, law in China was first and foremost a political tool, operating in a vertical direction with its primary concern for state interests, rather than on a horizontal plane between individuals.²⁴⁵ It led to the whole legal system leaning towards enacting penal law and overlooking others. This attitude

²³⁷ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P6.

²³⁸ Albert HY Chen *An Introduction to the Legal System of the People's Republic of China* P8.

²³⁹ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P7.

²⁴⁰ For an introduction to Confucius' thought, see Dawson, R (1981) *Confucius* (Oxford: Oxford University Press).

²⁴¹ Albert HY Chen *An Introduction to the Legal System of the People's Republic of China* P10.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid P13.

²⁴⁵ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P15.

explains to some extent the relatively slow development of the legal system and legal thought in traditional China.²⁴⁶

Contemporary Chinese law has few links with the traditional legal heritage.²⁴⁷

Modern concepts of the jurisprudence, such as legal rights, the rule of law, equality under the law, constitutionalism, democracy and majority rule, elections, judicial independence, procedural fairness and due process, and defence lawyers,²⁴⁸

developed in the West were not reflected in the traditional Chinese legal system. The existing Chinese legal system is a nascent system emerging from the decline of long-sustained Chinese traditional law.²⁴⁹ Institutionally and ideologically, there are

no direct links between traditional law and contemporary law in China.²⁵⁰

Accordingly, traditional legal cultures cannot explain the arrangement or provisions of contemporary Chinese law involved in the legislation.²⁵¹ Nevertheless, the impact

and influence of traditional law, especially the traditional legal culture, on contemporary law cannot be disregarded or underestimated.²⁵² The values and

techniques of traditional Chinese law still continue to influence the contemporary legal system. These influences can be founded on the management of the labour

law system. As a result of history, the management of labour law in China is more special than that in other countries. The labour law, in fact, is operated by state in a

vertical direction rather than on a horizontal plane between enterprises and employees. This operation system means that the management of the labour law is

similar to the administration of the state, which is the result of the past social economic structure. As mentioned above, in the past, under the planned-economy, the

Chinese economy system was purely state-owned, which led to the pyramidal administration system in the labour management from top-down. Thereby the

²⁴⁶ Albert HY Chen *An Introduction to the Legal System of the People's Republic of China* P13.

²⁴⁷ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P15.

²⁴⁸ Albert HY Chen *An Introduction to the Legal System of the People's Republic of China* P16..

²⁴⁹ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P1.

²⁵⁰ Ibid.

²⁵¹ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P15.

²⁵² Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P1.

function of labour law primarily is to protect the interests of the state through administration orders passed by the state. However, with the development of the social economy, this system appears to have many limitations and is out of date. According to the demands of the current economic system, the state should adopt laws to prevent government officials from unnecessary intervention in the management of enterprises and to guarantee the rights of autonomy to the latter.²⁵³

5.3 Influences of the Transition from the Planned-economy to the Socialist Market Economy

When the PRC was established in 1949, the government wholly abandoned the traditional Chinese legal system and absorbed the model of Soviet law and its jurisprudence. This socialist legal system was based on socialist public ownership and a planned-economy system. During that period, one of the features of this planned-economy system was that the political administration in China was more important than law, which was similar to that of the traditional Chinese legal system. Accordingly, this characteristic ultimately led to the 'Cultural Revolution'. The stage of the 'Cultural Revolution' is considered as a period of disaster in the PRC's history.²⁵⁴ The whole country was in complete chaos and social development was suspended during the ten years of the 'Cultural Revolution'.²⁵⁵ The laws which had been enacted in that period were wholly negated by the scholars.

After the 'Cultural Revolution', the Chinese government acknowledged the importance of the law. This was summarized by Deng Xiaoping as a 'Two Hands' policy: on the one hand, the economy must be developed; and on the other hand, the legal system must be strengthened.²⁵⁶ Thereby, the 'open-door' economic policy was put forward after 1978. The rigid planned economy was abandoned and replaced by a

²⁵³ Wang Guiguo and John Mo *Chinese law* P4.

²⁵⁴ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P11.

²⁵⁵ *Ibid* P12.

²⁵⁶ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P40.

socialist market economy.²⁵⁷ Corresponding to this social transition, the legal system was redesigned for the purpose of implementing, institutionalizing and strengthening the reform enterprise.²⁵⁸ Current Chinese legal developments are moving away from the domination of Soviet law and jurisprudence.²⁵⁹ Law-makers in China are looking for experience and models in western countries.²⁶⁰ Law was regarded as the most efficient and institutionalized means to safeguard people's democracy and to maintain the sustained economic development of the country.²⁶¹ Accordingly, plenty of western laws have been introduced into the current Chinese legal system. These are mainly reflected in the area of economic law, for instance, the enactment of the *Maritime Code* and the *Law of Contracts*. However, the labour law system did not receive attention from the government to the same extent as the economic law system. So, the labour legal system is slowly developed comparing it with the development of other areas of law. This can be founded in the *Labour Law of 1994* which is the core and has the highest legal force in current labour legislation. The *Labour Law* was enacted in 1994 at the beginning of the transition from the Planned Economy to the Socialist Market Economy. The *Labour Law of 1994* only cursorily regulates the main frameworks of the labour law system and principles. Now, ten years later, the *Labour Law* has never been amended. However, the development of the Socialist Market Economy has been rapid. Due to the 'open-door' policy, plenty of foreign investment has come into China, leading to the change of the labour relations from wholly state-owned to a co-existence of foreign, private, collective and state ownership.²⁶² Current legal reform focuses primarily on the area of economic law and neglects the labour legislation. An increased focus on economic law reveals the lack of the development of the labour law system and of the protection of the interests and rights of the employees. Furthermore, due to the open market policy, increasing numbers of foreign enterprises have come into China.

²⁵⁷ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P12.

²⁵⁸ Ibid.

²⁵⁹ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P55.

²⁶⁰ Ibid.

²⁶¹ Wang Chengguang and Zhang Xianchu *Introduction to Chinese law* P12.

²⁶² Wang Guiguo and John Mo *Chinese law* P4.

Therefore the open market policy also requires the bridging between Chinese labour law and western law with specific reference to the ILO conventions.

5.4 Deficiency of Labour Legislation

The deficiency of labour legislation is largely due to inadequacies within the labour legislation framework, resulting in reduction in the legal effects of labour law. In China, the employment law has five levels (See Charter 2). The first level is national legislation enacted by the National People's Congress and its Standing Committee.²⁶³ The most relevant legislations are the *Labour Law of 1994* and the *Trade Union law of 1992*. The second level is administrative regulations issued by the State Council which is the centre government of the PRC, such as the *1993 Regulations on Dispute Resolution in Enterprises in the PRC* and the *State Council Regulations on the Working Hours of Employees of 1995*. The third level is the regulations issued by the MLSS and other relevant ministries.²⁶⁴ A major part of Chinese employment law is in this category.²⁶⁵ The fourth level of employment law in China is local legislation enacted by local people's congresses.²⁶⁶ The fifth level is local regulations and departmental rules issued respectively by local people's governments and their working departments (the local labour bureaux.)²⁶⁷ This structure shows that, in the labour legislation area, the majority of regulations and rules were made between the third level and the fifth level. However, regulations and rules made at these levels do not have powerful legal effect. In practice, once the regulations and rules are not in accordance with other laws, they would lose their strength. Thus the low level of legal effect of the labour legislation cannot protect the interests of employees.

²⁶³ Ibid P448.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid P449.

5.5 Impact of Globalization

The last influence is the impact of globalization which is rather an important phenomenon not only for the global economy and labour market, but also for the legal system in a state. I will firstly present the phenomenon of globalization and then discuss what its impact in China is.

Globalization is a very broad concept. According to Harry Arthur, globalization can be defined as:

[g]lobalization is an integrated system of business arrangements that seeks to move large volumes of goods, services, information and capital across international borders with low friction and high velocity. But it is much more. Globalization is a technological system that uses transportation and communication and manufacturing techniques to make such movements possible. Moreover, globalization... is a political system sometimes known as neo-liberalism... Neo-liberals... believe that market forces are superior to all other forms of social ordering, such as state intervention and community co-operation... Globalization is a legal system. It depends upon the willingness of states to repeal old laws that constrain trade, to bring existing laws into alignment with the regulatory and proprietary regimes of international trading partners, to abstain from passing new laws that discriminate against foreign firms or discourage foreign investors, and to accommodate the complex body of contractual and customary legal arrangements that have grown up to facilitate global business transactions.²⁶⁸

From the definition, it is evident that globalization is an integration of the global economy and its influences on each aspect of community. These influences are both positive and negative. No country can ignore both the negative impact of globalization and its potential to promote economic growth. Therefore, under the context of globalization, there are more pressures on the labour market than ever, which impacts on the changes of three parties, namely employers, governments and employees. Firstly, for employers, now they have the choice to produce goods in

²⁶⁸ Harry Arthurs, 'Reinventing Labour Law for the Global Economy: (2001) The Benjamin Aaron Lecture' *Berkeley Journal of Employment and Labour Law* P273-274.

foreign countries where labour is cheaper and the policy and law are business friendly. Secondly, governments believe that in the world-wide competition for jobs, investment and prosperity, rewards will flow to countries whose labour policies can be described as 'business friendly'.²⁶⁹ Thirdly, for employees, they are not only to be more productive, but to work harder and more cheaply, and to be less assertive about their rights.²⁷⁰ These changes resulted in government passive failure to renovate labour law which means that there may be a disregard for human and trade union rights²⁷¹ in certain cases. These phenomenons are world wide.

In China, the All-China Federation of Trade Unions published a report in 2004 entitled 'An Investigation into the Operation of Trade Union Law in China'. The report found that 'a number of multinationals in China ignore that law and resist the establishment of trade unions. Famous multinationals such as Wal-Mart, Kodak, Dell, 8 branch companies of Samsung, Delta, Seagate Technology International, KFC, and McDonald's in many cities have not established trade unions despite investing in the country for many years'.²⁷² The report revealed that China's labour law is facing the tremendous impact of globalization as well, and the government has overlooked workers' interests to a certain extent in favour of being seen as a business friendly country, in keeping with other countries. Nowadays, in the context of globalization workers need the law to provide even more protection. Multinationals and free flows of the capital weaken the position of employees who have to be cheaper and work harder than ever simply to keep a job opportunity. Therefore, making legislation and keeping it working properly so as to benefit more labourers.

This section, clearly shows the main influences, mentioned above, which impact on the current labour law system, these being, the influences of the traditional Chinese

²⁶⁹ Ibid P281.

²⁷⁰ Ibid P282.

²⁷¹ World Bank *Doing Business in 2005: Removing obstacles to growth* (2005).

²⁷² 'Multinationals are seriously violating Trade Union Law', [China Daily], 25 October 2004.

legal culture, the transition from Chinese planned-economy to socialist market economy, the deficiency of the current labour legislation *per se*, and the impact of globalization. Closer examination has demonstrated how these impact on the current labour law system highlighting some of the weaknesses. Consequently, current labour legislation should be improved as soon as possible. Maybe, the establishment of an effective market economy in China demands a revolution in legal theory and legal thought.²⁷³ In the next section, whether using a way of borrowing and bending to improve Chinese labour law or not will be discussed.

²⁷³ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P45.

6 The Use of Legal Transplantation

Seeing that differences and shortcomings from the comparison of collective labour law between South Africa and China and those influences of the Chinese legal culture, social transition period, legislation and globalization, this section will discuss whether using the way of legal transplantation to help the Chinese labour law system is feasible. It will first introduce the theory of legal transplantation, and will then look at Chinese legal transplantation practice in history, that will prove the potential of currently using the way of borrowing and bending in China.

6.1 Legal Transplantation

Legal transplantation means that the legal ideas, institutions, and procedures developed in one country are adopted by another. In this area, there are three main theories, one by Montesquieu, one by Khan-Freund, and another by Watson.

In Montesquieu's opinion, many factors react in the context of legal transplantations, such as climate, the political, social and economic factors, density of the population, environmental factors, geographical factors and so on, especially if the law was very closely linked with its environment.²⁷⁴ He hence thought that legal transplantation only happens in the most exceptional cases where the institutions of one country could serve those of another at all.²⁷⁵

Khan-Freund accepts Montesquieu's contestation for his own time, because, in his opinion, industrialization, urbanization, and the development of communications

²⁷⁴ Watson, A 'Legal Transplants and Law Reform' (1976) 92 *law Quarterly Review* 79.

²⁷⁵ Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1. Vol. 37.

have greatly reduced the environmental obstacles to legal transplantation.²⁷⁶ At the same time, he emphasizes the element of political differentiation is the most important aspect in the legal transplantation at present. He said that '...its use [legal transplantation] requires a knowledge not only of the foreign law but also of its social, and above all its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context.'²⁷⁷

In contrast to Khan-Freund, Watson asserts that it is possible to borrow successfully from a very different legal system, even from one at a more advanced level of development and of a different political complexion.²⁷⁸ From his point of view, the law reformer should be looking at foreign systems to get ideas which could be transformed into part of the law of his country.²⁷⁹

I agree with those theories of both Khan-Freund and Watson, because legal transplantation is not simply copying of rules from other countries. When the receptor wants to transplant law from the donor, they need to look at some involved factors, such as social, political economical factors and so on and combine with their own status, and then make a decision, which is in keeping with what Khan-Freund said. Usually, the receptor will modify some ideas, for instance, South African labour law has absorbed / borrowed ideas from those legal systems of Australia, Canada, and Germany and subsequently modified some ideas to suit its own legal system.²⁸⁰ This is because the legal transplantation *per se* makes the rules of the receptor progress. The receptor does not simply copy the rules from other countries, but rather reforms take place through the reception of a legal system which get rid of some bad or inappropriate rules and chooses some suitable rules to replace them.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Watson, A 'Legal Transplants and Law Reform' (1976) 92 *law Quarterly Review* 79.

²⁷⁹ Ibid.

²⁸⁰ Thompson, C 'Borrowing and Bending: The Development of South Africa's Unfair labour Practice Jurisprudence' (1993) 6, 3 *International Journal of Comparative Law and Industrial Relations*.

But, in some circumstance, factors, such as social, political economical factors, are not always as important, like those which Watson suggests. In this regard, China is a good example which will be examined in the next section.

6.2 Legal Transplantation in China

Looking back at the path of China's legal reforms of the last 20 years, China has demonstrated its willingness to learn from the experience of the developed economies in establishing a suitable legal system for strengthening the socialist market economy.²⁸¹ Although, the distance between different legal traditions may not be as fixed, rigid or unbridgeable as it initially appears to be,²⁸² transplants of legal principles and institutions from one legal tradition or system to another are possible and have indeed occurred not infrequently in Chinese legal history, providing stimulus for the legal system's growth and development.²⁸³ This can be found in the following legal areas: the tax system, which was heavily influenced by the United States of America's tax system; the industrial property laws that patents, designs and trademarks which is essentially a copy of the German system; and civil law which is heavily influenced by German law and also affected by Swiss, Japanese, Taiwanese and the Soviet Unions' civil codes.

In addition, legal transplantation has happened in China not only from other countries but also from conventions of international organisations. This is due to the impact of globalization and the features of a modern market economy which include internationalization and openness, and which require the Chinese economy be a part of and competing in the internationalized market.²⁸⁴ All economic activities, domestic or international, must be regulated in accordance with internationally accepted norms, customs, practices and rules.²⁸⁵ Accordingly, internationalizing

²⁸¹ Wang Guiguo and John Mo *Chinese law* P3.

²⁸² Albert HY Chen *An Introduction to the Legal System of the People's Republic of China* P19.

²⁸³ *Ibid.*

²⁸⁴ J. Chen *Chinese Law – Towards an Understanding of Chinese Law, Its Nature and Development* P53.

²⁸⁵ *Ibid.*

Chinese law and the emphasis with regard to legal transplant or assimilation has been an important task for China. In this regard, a good example is the *Maritime Code* which has been in the making for over ten years and is primarily composed of borrowings from international conventions and practice, and its adoption has been heralded as an excellent example of assimilating Chinese law with international practice.²⁸⁶

In fact, as the impact of globalization deepens, the law is increasingly moving towards that tendency which is the amalgamation of the law of the world. We can see not only China and South Africa but also other countries are all borrowing and bending laws from others. In considering China's labour law system, evidently, from the above discussion, the question, which is whether or not the legal transplantation of labour law can take place in China, can now be solved. The answer is fairly clear that we can effectively use this approach of borrowing the rules from other legal systems. Definitely, before the legal transplantation occurs, due consideration must be given as we cannot blindly copy the black letters of law. Furthermore, the international conventions in labour law, such as the conventions of ILO and the ICESCR, should be mainly considered by the Chinese government in the current globalization context. To do so Chinese labour legal system will gain strength and will cover and benefit more employees.

²⁸⁶ Ibid P54.

7 Conclusions

Through this comparison, we saw that there are similarities and differences between the Chinese and South African collective labour law systems, and this exploration exposed the weakness existing in the current Chinese labour law system. The weaknesses include: the trade unions' lack of independence, the lack of collective bargaining and making collective agreements at higher level, and the lack of special courts for labour disputes and the right to strike. For protecting the legitimate rights and interests of workers, China must remove these pitfalls and shortcomings.

Moreover, it should be noted that in recent years Chinese government has gradually recognized the lack of development in the area of labour law. The government has made certain efforts for improving the labour law system. For example, the *Trade Union Law of 1992* was amended in 2004 and Chinese scholars are drafting the Collective Agreement Law. However, making law is a slow and meticulous work, which is not rapid enough to receive the challenge of the globalization. Therefore, using the way of legal transplantation for resolving those problems is very necessary and urgent in China.

Furthermore, with regard to international conventions, China has ratified the International Covenant of Economic, Social and Cultural Rights in 2001 and has still not ratified the ILO Convention 87 and 98.²⁸⁷ This looks like an obstacle to the reference from the ILO conventions. However, as a member state of ILO, China has the obligation to ratify the ILO conventions, which should be the same as what South

²⁸⁷ See ILO 2004.

Africa has done as a fellow member. China will need to ratify those conventions in the near future to develop its labour law system, bringing it in line with the international community.

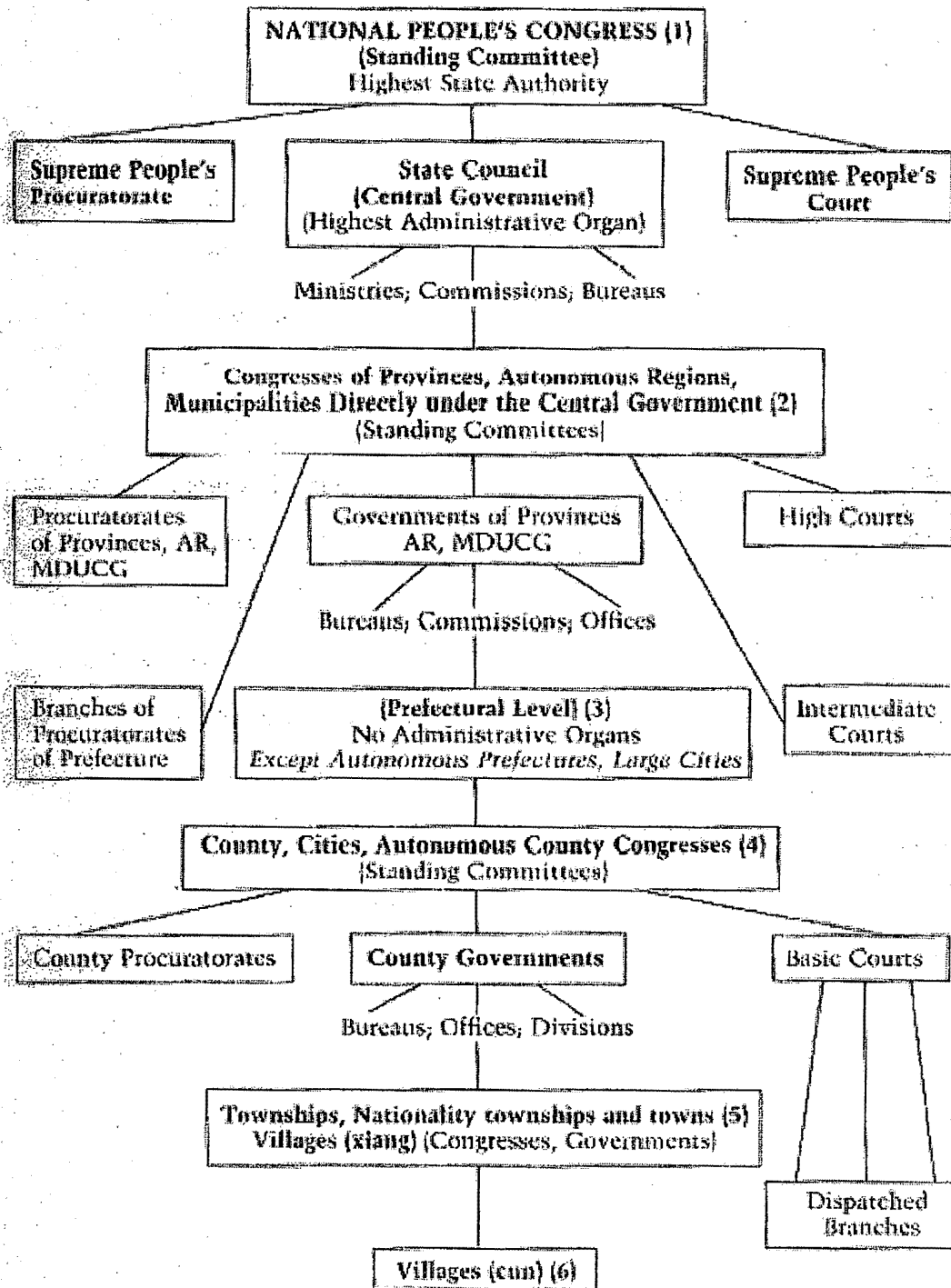
All in all, restructuring and reforming the system of collective labour law in China is necessary in the context of globalization. We hope that China will give more protection to workers, developing its system of collective labour law thereby strengthen its position for its future in the global free market.

Charter 1*

**LEGAL SYSTEM OF THE PRC
GOVERNMENTAL STRUCTURE OF THE PRC**

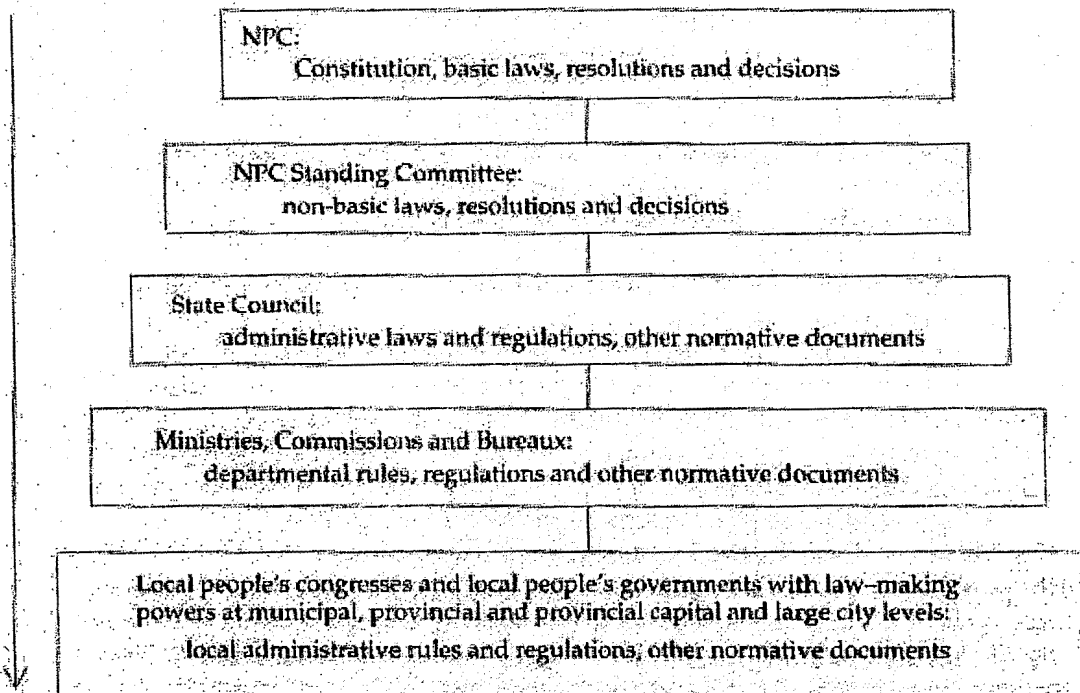
- (1) - Central Level; (2) Provincial Level;
(3) Prefectural Level (not existing); (4) County Level; (5) Township

(Procuratorial Branch) Higher level directs the work of the lower levels (Congress and Administrative Branch) (Judicial Branch) Higher level supervises the work of the lower



Charter 2*

Hierarchy of laws and the law-making system



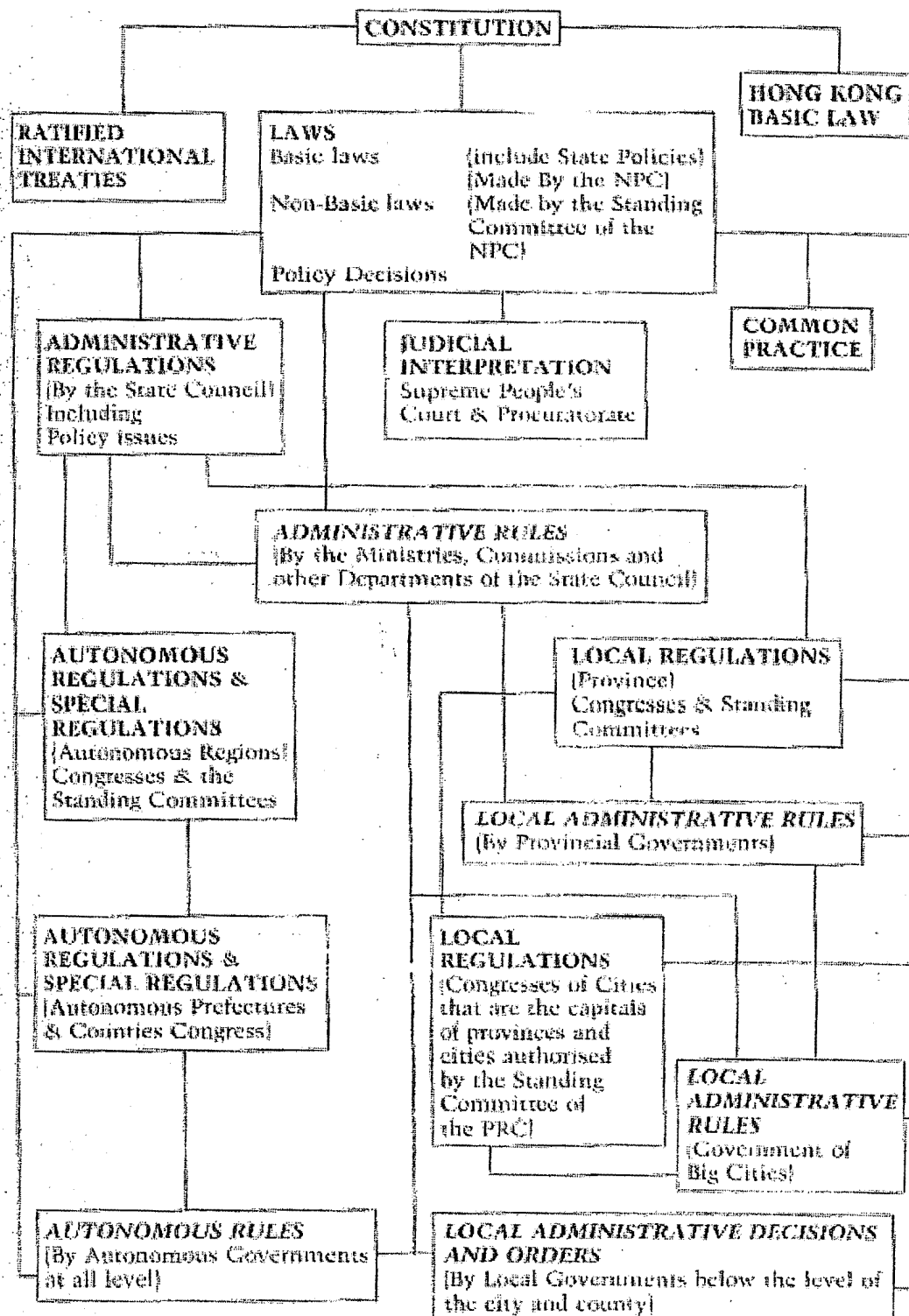
Legend:

—> Binding force.

Charter 3*

STRUCTURE OF THE CHINESE LAW

PARTY POLICY



- * Chart 1 from Wang Chengguang and Zhang Xianchu (eds.)
'Introduction to Chinese law', Sweet&Maxwell Asia, 1997 P17.
- * Chart 2 from Wang Guiguo and John Mo (eds.) *'Chinese law'*
Kluwer Law International, 1999 P42.
- * Chart 3 from Wang Chengguang and Zhang Xianchu (eds.)
'Introduction to Chinese law', Sweet&Maxwell Asia, 1997 P19.

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2 Trade Union law of 1992

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4 Constitutional Law of People's Republic of China

5 Amendment Trade Union Law of 2001

6 Notice on the Handling of Accidental Events

7 Organic Law of the People's Court

8 1993 Regulations on Dispute Resolution in Enterprises in the PRC

9 State Council Regulations on the Working Hours of Employees of 1995

10 Maritime Code of People's Republic of China

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1 The International Covenant on Economic, Social and Cultural Rights of United Nations

2 No.C87 Freedom of Association and Protection of the Right to Organise, 1948

3 No.C98 Right to Organize and Collective Bargaining Convention, 1949

4 No.C154 Promotion of Collective Bargaining Convention, 1981

WEBSITE

http://www.gov.cn/jrzg/2006-01/09/content_152082.htm

ABBREVIATIONS

LRA Labour Relations Act

BCEA Basic Conditions of Employment Act

EEA Employment Equity Act

PRC People's Republic of China

MLSS Ministry of Labour and Social Security

ILO International Labour Organisation

ICESCR International Covenant on Economic, Social and Cultural Rights of
United Nations

CCMA Commission for Conciliation, Mediation and Arbitration

GDP Chinese Gross National Product