ARTICLE

THE RIGHT TO EMPLOYMENT SECURITY IN CHINESE LABOR LAW: LATEST DEVELOPMENTS IN LIGHT OF INTERNATIONAL LAW

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Employment security is very often examined from a labor law rather than a human rights perspective. This article looks at the employment security in Chinese labor law from a human rights perspective. The right to employment security includes both negative and positive aspects: a negative right to protection against unfair dismissal, including dismissal for cause and economic redundancy, and a positive right to employment stability. Comparing Chinese labor law with international standards, this article focuses on analyzing important changes in the legislative developments in China in the past years, such as severance pay, labor contract with indefinite duration, and labor dispatching. This article also points out the main deficiencies, such as dismissal on the ground of criminal liabilities, weakness of trade unions and law enforcement, and no exemption of small employers. The article concludes with observing a tendency of Chinese law getting closer to international standards and pointing out the approach China should follow: to enhance employability through vocational training and providing better social security when strengthening the legislative protection of employment security.

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INTRODUCTION

Employment security is not only a labor issue, but also a human rights issue. The right to employment security is an essential aspect of the right to work, which is provided by most international and regional human rights institutions.1 Moreover, the right to employment security is related to the enjoyment of other human rights, such as freedom of expression, trade unions rights, right to adequate standards of living, right to health, and right to social security.

As a United Nations and International Labor Organization (ILO) member country, China has ratified most of major international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, and 22 ILO conventions. It is therefore an international obligation for China to protect the right to employment security and to follow related international standards.

Although employment security is rarely a research subject in human rights literature, it is not questioned as a human right, being part of the right to work. It is, however, not so obvious in the realm of labor law whether workers should enjoy a right to employment security or what kind of job security workers should have. In the U.S., the prevailing rule is “employment at will.” A common practice is that employees can be dismissed without any reason or prior notice. In many European countries, the rule of dismissal for just cause is “constantly under attack.”2 In the context of a globalized economy, one can see a worldwide tendency of labor de-regularization and a so-called “race to the bottom” phenomenon in terms of national labor standards, including reduced thresholds for dismissals. Nowadays, even the ILO encourages a “flexicurity” approach, which aims at striking a balance between the economic reality and the employment security.3

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1 See ILO, Protection against Unfair Dismissals, General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1995, para.4.
In contrast, China has been promulgating new labor rules one after another in the past years, which intend to strengthen the protection of employment security by measures such as more severe sanctions against unlawful dismissal, higher economic compensation for dismissed workers, and stricter control over labor dispatching practices. The 2007 Labor Contract Law and its Implementing Rules, Interpretation IV of the Supreme People’s Court (SPC), the 2013 Amendment to the Labor Contract Law and its follow-up rules appear to adopt an opposite approach than the world trend or the “Western” trend.

What is the current status of the Chinese labor law on employment security? Is it meeting the international standards on the right to employment security? Does it mean that the Chinese labor law is becoming more socialist? What are the contributing factors behind the phenomenon? From a human rights perspective, is China doing the right thing and doing it in a right way? What does China still need to do?

This article tries to answer the questions above. More specifically, it intends, first, to clarify international standards on the right to employment security; second, to examine the Chinese labor law rules on employment security in comparison with international standards from three main perspectives: protection against arbitrary dismissal, economic redundancy, and the reduction of short-term and informal employment. In the meantime, this article analyzes the reasons behind adopted rules and the effectiveness of their enforcement. Due to the lack of access to the entire data of Chinese case law, it is not possible for this paper to conduct a systematic analysis of cases, but this paper focuses on legislation and a rather qualitative analysis on representative cases based on available resources.\(^4\)

I. WHAT DOES INTERNATIONAL LAW SAY ABOUT THE RIGHT TO EMPLOYMENT SECURITY?

Losing a job, especially when it is for an unfair reason, can be among the hardest hits a human being may suffer in life. Losing income and being forced to change the life-style is one thing; the sense of humiliation, self-doubt, and other negative psychological effects may be more unbearable. It is thus against human dignity to loose a job without

\(^4\) Since 2000, the SPC of China and some local courts have started to selectively publish their judicial documents online. Until Jan. 2014, most of provinces have established their own website for publishing judicial documents. On Jan. 1, 2014, the SPC established the website “Judicial Opinions of China” (www.court.gov.cn), integrating all types of judicial documents around China. Nevertheless, according to some recent research, this website is still selective on published cases and not fully integrated. For example, the author searched cases on dismissal, there are only case documents in 2013 and 2014. For a critical study on the publication of judicial documents, see HE Jie, ZHANG Fang & HUANG Bohao, 裁判文书网络公布平台需要改进 (The Platform for Publishing Judicial Documents Need to Be Improved), available at http://opinion.caixin.com/2014-06-30/100697536.html (last visited Jul. 28, 2014).
The right to employment security contains more than a negative right not to be dismissed unfairly but also a positive right to employment stability.

The right to employment security is contained in a numerous international human rights instruments: ILO Convention NO. 158, several other ILO conventions, International Covenant on Economic, Social and Cultural Rights (hereafter CESCR), European Social Charter (hereafter ESC), the Protocol of San Salvador to the American Convention on Human Rights, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and Convention on Migrant Workers.

The ILO Convention NO. 158 of 1982 and Article 24 of the ESC similarly provides that workers shall not be dismissed without valid reasons connected with their capacity or conduct, or based on the operational requirements of the employer. Both instruments also provide workers with a right to appeal and adequate compensation or other relief.

The Protocol of San Salvador goes further to provide not only the negative freedom from unfair dismissal, but also an active right to employment stability. Article 7d requires the State to guarantee “stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislations.”

Each international legal instrument mentioned above addresses some aspects of the right to employment security. Combining all relevant legal sources, the right to employment security contains at least two aspects: (1) freedom from arbitrary dismissal; and (2) right to employment stability. The first aspect suggests that national law should protect workers from unjustified dismissal, which includes unnecessary redundancies. The second aspect requires the State to take measures actively to reduce unstable employment such as short-term and informal employment. As elaborated later, it also requires the State to enhance the employability of workers through measures such as providing public employment services or vocational training.

A. Freedom from Arbitrary Dismissal

International law provides protection against arbitrary dismissal mainly in three aspects: justification for dismissal, procedural guarantees, and income protection.

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5 Up until May 30, 2014, China has not ratified ILO Convention NO. 158.

6 In addition to ILO Convention NO. 158, several ILO instruments provide protection in the area of employment security, such as those in relation to protection against acts of anti-union discrimination (ILO Conventions Nos. 98, 135, 141); or against discrimination in employment or occupation (ILO Conventions NO. 111 and 156); maternity protection (ILO Conventions NO. 3 and 103); the protection of workers’ claims in the event of the insolvency of their employer (ILO Conventions NO. 173); or part-time work (ILO Conventions NO. 175).
Normative developments in this field have been advanced in many national legal systems. International regulations are rather complementary and provide minimum standards and supervision for their implementation.

1. Justification for Dismissal. — International rules against arbitrary dismissal emphasizes that there should be “valid reasons connected with the capacity or conduct of the worker or based upon the operational requirements of the undertaking concerned.” As such, the lawful termination of employment should be either a dismissal for cause (serious misconduct, or incompetence for the job) or a so-called economic redundancy. Nevertheless, what constitutes misconduct or unsatisfactory performance often causes disputes in national practices.

**Dismissal for Cause**

ILO requires that misconduct of the worker leading to the dismissal must be “sufficiently serious,” which can be constituted either by professional misconduct or improper behavior. “Professional misconduct” includes: “neglect of duty, violation of work rules, disobedience of legitimate orders and absence or lateness without good cause.” “Improper behavior” includes: “disorderly conduct, violence, assault, using insulting language, disrupting the peace and order of the workplace, work in a state of intoxication or under the influence of narcotic drugs...or causing material damage to the property of the undertaking.” From the illustrative examples given by the ILO Committee of Experts, one can conclude that the misconduct cause for dismissal must be employment related and what the worker has done should affect the employer to a serious degree. Lack of capacity is distinct from misconduct. In the case of misconduct, it is necessary to demonstrate a certain degree of “guilt” of the worker concerned. Lack of the capacity may take the form of poor work performance not caused by intentional misconduct, or various degrees of incapacity to perform work as a result of illness or injury. As the ILO Committee of Experts indicates, the worker can be offered some safeguards such as careful assessment of his work, warning him about the possible consequences if the quality of his work does not improve, and allowing him to demonstrate his skills and to improve his work performance.

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8 Id. at 182–183.
9 See Art. 4 of ILO Convention NO. 158 and Art. 24a of the ESC.
10 See Art. 4 of ILO Convention NO. 158.
12 Id. para. 90.
13 Id.
14 Id. para.94.
15 Id. para.95.
Economic Redundancy

International law does not define the concept of the “operational requirements” of the undertaking. The ILO Committee of Experts have interpreted it as “reasons relating to the operational requirements of the undertaking were generally defined by reference to redundancy or reduction of the number of posts for economic or technical reasons, or due to force majeure or accident.”16 Regarding a more specific definition of the term, it is left to the discretion of the State. In fact, whether a redundancy is indeed caused by economic reasons in general needs to be determined case by case. As Article 9(3) of ILO Convention NO.158 provides, “the national appellate bodies shall be empowered to determine “whether the termination was indeed for these reasons,” but “the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination” shall be determined by the methods indicated in Article 1 of the Convention. Nevertheless, a general principle is that redundancy based on operational requirements must be justified. In the jurisprudence of the ESC, it is not specified “whether economic reasons within the meaning of Article 24 must be limited to situations where firms are in difficulty or whether they can include other business strategies.”17 With regard to the question to what extent economic reasons can be considered as valid reasons justifying dismissal, the Committee examines the national court’s interpretation of the law and their decisions and judgments.18

Invalid Reasons for Dismissal

ILO Convention NO. 158 provides an illustrative list of what shall not constitute valid reasons, such as union membership or activities, the filing of a complaint against the employer, maternity leave, temporary absence due to illness or injury, and discriminatory grounds such as race, color, sex, marital status, family responsibilities, religion, or political opinions (Articles 5 and 6). ILO Recommendation NO. 166 sets forth two more grounds: age and absence from work due to compulsory military service or other civil obligations (Article 5). The Appendix of the European Social Charter (Revised) provides an almost identical list of non-valid reasons except it adds “parental leave” to the list. As the above list of “invalid reasons” illustrates, an arbitrary dismissal is often caused by discrimination on various grounds, which should be non-exhaustive and can include other grounds such as moral or political qualities,19 or nationality.20

2. Procedural Protection against Arbitrary Dismissal. — Compared to the very

16 Id. para.96.
17 See the ECSR, Conclusions 2003, France, 191.
18 See the ECSR, Conclusions 2005, Norway, 572–575.
general substantive requirements in dismissal and the wide discretion left to national authorities in this respect, international standards are more restrictive with procedural safeguards.

**Procedural Protection on Dismissal for Cause**

In case of dismissal for cause, there are following procedural requirements: (1) A worker shall have an opportunity to defend himself against the allegations before the employer;\(^{21}\) (2) a right to appeal against dismissal, within a reasonable time, to an impartial body, such as a court, labor tribunal, arbitration committee or arbitrator;\(^{22}\) and (3) a worker shall be entitled to a reasonable period of notice prior to the termination of his employment, unless he is guilty of serious misconduct.\(^{23}\)

**Procedural Protection in Case of Economic Redundancy**

In case of economic redundancy or collective dismissal, ILO and ESC jurisprudence provide for similar procedural protection, which includes (1) providing relevant information to workers’ representatives “in good time,”\(^{24}\) such as the reasons for the redundancies, planned social measures, the criteria for selection and the order of the redundancies;\(^{25}\) (2) consultation with workers’ representatives “as early as possible,” on measures to mitigate the adverse effects such as finding alternative employment for the worker concerned;\(^{26}\) or “a redundancy package”;\(^{27}\) and (3) and notification to competent authorities with relevant information as that provided to workers’ representatives.\(^{28}\)

3. Compensation and Relief.

**Remedies for Unfair Dismissal: Reinstatement or Financial Compensation**

The right to adequate compensation or appropriate relief in case of unfair dismissal is expressly protected by Article 24b of the ESC, Article 7d of the Protocol of San Salvador, and Article 10 of ILO Convention NO.158. According to the jurisprudence of the ESC and ILO Committee of Experts, compensation can be considered “appropriate” when following conditions are met: (1) Either reinstatement or financial compensation should be available for the worker concerned; (2) compensation includes reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body or of the actual reinstatement;\(^{29}\) and (3) the level of compensation should be

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\(^{21}\) See Art. 7 of the ILO Convention NO.158.

\(^{22}\) See Art. 8 of the ILO Convention NO.158.

\(^{23}\) See Art. 11 of the ILO Convention NO.158.

\(^{24}\) See Art. 13(1a) of the ILO Convention NO.158.

\(^{25}\) See the ECSR, Conclusions 2005, Lithuania, 404 and Conclusions 2003, Romania, 429.

\(^{26}\) See Art. 13(1b) of the ILO Convention NO.158.

\(^{27}\) See the ECSR, Digest of the Case Law, 157.

\(^{28}\) See Art. 14 of the ILO Convention NO.158 and Art. 29 of the Revised ESC.

\(^{29}\) See the ECSR, Conclusions 2003, Bulgaria, 78.
sufficient both to deter the employer and proportionate to the damage suffered by the victim, especially when the dismissal impairs a basic human right. As such, there should not be any pre-set limits to the level of compensation.\footnote{For example, the Committee considers that the maximum compensation equivalent to six-month salary in Bulgaria is not adequate. See the ECSR, Conclusions 2003, Bulgaria, 67. See also the ECSR, Conclusions 2005, Norway, 572–575; Estonia, 217.}

Compensation in Lieu of Notice

Compensation in lieu of notice should correspond to the remuneration the worker would have received during the period of notice if it had been observed.\footnote{Id. para. 247.} Although the failure to fulfill the obligation of notice can be considered as a breach of contract and an unlawful dismissal, the standard for calculating the compensation should be different and less severe than that for unfair dismissal.

Compensation for Lawful Dismissal

Article 12 of the ILO Convention NO.158 provides that, unless guilty of serious misconduct, a worker whose employment has been lawfully terminated shall be entitled to a severance allowance or other separation benefits, the amount of which shall be based \textit{inter alia} on the length of service and the level of wages, and paid directly by the employer or by a fund constituted by the employer’s contributions. The worker may also receive benefits from unemployment insurance and/or other forms of social security, such as old-age or invalidity benefits.

B. Right to Employment Stability

The right to employment security has an active aspect that requires employment stability. Whereas regular full-time employment has a relatively high job security, unconventional forms of employment and jobs in informal economy, including part-time, fixed-term employment, and self-employment are inevitably less stable.\footnote{See Craven, fn. 19 at 223.} As such, a more realistic solution is to reduce the number of informal employment. It is also an approach required or encouraged by international law. Article 3(2) of ILO Convention NO. 158 requires that “adequate safeguards” should be provided against utilization of short-term employment contracts, which often aim at avoiding protection accorded to contracts of indefinite duration. Article 3 of the ILO Recommendation NO.166 proposes some specific measures: (a) limiting recourse to contract with fixed term only when it is necessary due to the nature of the work or to the interests of the worker; (b) deeming contracts with fixed-term, unless necessary, to be permanent contracts; and (c) deeming contracts with fixed-term, when renewed on one or more occasions, unless necessary, to be permanent contract. For instance, the ILO Committee supported the government policy...
of Finland, which allows long-term unemployed workers to be hired on fixed-term employment contracts of at least six months’ duration without any work-related grounds, for purpose of reducing long-term unemployment. The CESCR Committee has also asked States to pay particular attention to persons working in economies with lower job security and States to “take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy.” This point is also reflected in the jurisprudence of the Committee. For instance, the Committee has expressed its concerns about the involuntary part-time employment in France, fixed-term contract or casual workers in Australia and large proportion of workers on temporary contracts in Spain, and wide extent of temporary contracts and subcontracting in Ecuador. As the ILO indicates as early as 1995, there may be some updates on the concept of employment security, which means security of being employed rather than being employed for a particular job, as the modernization of the employment forms and space of job changes have been common today, it would be unrealistic to expect one to stay in one job for a lifetime like it used to be. Therefore, it is important to enhance the employability of workers through public measures such as providing public employment services or vocational training.

II. PROTECTION AGAINST ARBITRARY DISMISSAL IN CHINA

China’s labor law provides both substantive and procedural protection against arbitrary dismissal. Main regulations in this respect can be found in the 1994 Labor Law and the 2007 Labor Contract Law, while more detailed guidance is scattered in numerous administrative regulations. Examining the legislative development in the past two decades, one can conclude that Chinese labor law is moving toward a more protective approach against arbitrary dismissal. Given the very limited space, this article focuses on analyzing major changes in the developments of the Chinese law, in particular, its deficiencies from a human rights perspective.

A. Dismissal for Cause: Relevant Issues with Substantive, Procedural Protection and Remedies

In general, Chinese labor law allows employers to dismiss workers when workers have serious misconducts or have no capacity to perform the work.

34 See CESCR Committee, General Comment NO.18, para.10.
35 See CESCR Committee, Concluding Observations France, E/C.12/1/Add.72 paras.17 and 28; Concluding Observations Australia, E/C.12/1/Add.50 paras.26; Concluding Observations; Spain E/C.12/1/Add.99 paras.13, 14 and 30; Concluding Observations Ecuador E/C.12/1/Add.100 para.19.
1. Misconducts of the Worker. — Article 25 of the 1994 Labor Law and Article 39 of the 2007 Labor Contract Law list several circumstances where employers are legally permitted to dismiss workers without an obligation to give a prior notice: serious violation of regulations of the employer; derelictions; criminal liabilities; second labor relationship affecting the performance; annulment of the labor contract as a consequence of fraud. Among the above causes for dismissal, “criminal liabilities” need further examination. Both Labor Law and Labor Contract Law allow dismissal without notice when a worker is “held for criminal liabilities in accordance with the law,” which refers to the following circumstances: (1) when a person is sentenced by a court [main penalty: surveillance (guanzhì), criminal detention (juyì), imprisonment with term, lifetime imprisonment, death penalty; accessory penalty: fine, deprivation of political rights, confiscation of property]; and (2) when a person is convicted but exempted from a penalty by a court.\(^\text{37}\) For workers who are not convicted, the Chinese law provides certain employment security to those under the pre-trial detention,\(^\text{38}\) workers released on bail pending trial,\(^\text{39}\) and workers acquitted of a crime.\(^\text{40}\) In these instances, the employer is only allowed to suspend the worker concerned and is required to reinstate him/her if proved innocent. This rule is in conformity with the ILO recommendation. In both the ILO and ESC jurisprudence, the position on this point is consistent: A prison sentence can become a valid reason for dismissal only in two circumstances — the offense is employment-related; or the length of the sentence prevents the person from performing his job.\(^\text{41}\) The idea is to help the person to “return to normal life after his sentence is served.”\(^\text{42}\) The European Court of Human Rights shares the view of ILO and ESC on this point. In the case Dickson vs UK, the Grand Chamber of the Court confirmed that “persons continued to enjoy all Convention rights following conviction except the right to liberty.” It pointed out that any prison sentence has “inevitably entailed limitations and controls” on the exercise of rights, and such control is in principle compatible with the Convention but the key issue was “whether the nature and extent of that control was compatible.”\(^\text{43}\) The Court also held that “only the right to liberty was automatically

\(^{37}\) See Art. 25 of the 1994 Explanation by Ministry of Labor on Certain Articles in Labor Law.

\(^{38}\) Id. para.28.


\(^{40}\) See 劳动部办公厅关于企业职工被错判宣告无罪释放后，是否应恢复与企业的劳动关系等有关问题的复函 (The Answering Letter of the Secretariat of the Ministry of Labor to Questions Regarding Whether Enterprise Staff Released as Innocent after Wrongful Sentence should Recover the Labor Relationship with the Enterprise ), issued on Apr. 29, 1997.

\(^{41}\) See the ECSR, Conclusions 2005, Estonia, 205–210.

\(^{42}\) See ILO, General Survey on protection against unjustified dismissal, 1995, para.92

\(^{43}\) See the ECtHR, Dickson vs UK, application NO. 44362/04, judgment of Dec. 4, 2007, para.39.
removed by a sentence of imprisonment” and a State “had to justify the limitation of any other rights” with “compelling reasons.” 44 In this vein, prisoners or persons subject to criminal sanction should enjoy a right to work unless justified. Regarding employment security, “compelling reasons” that may justify the removal of the right to work are when imprisonment is related to employment or the length of detention prevents the person concerned from returning to the job in a reasonable time. In contrast, the Chinese law does not consider the nature of the crime, whether it is related to the job or entails any imprisonment. Among the above-mentioned penalties in the Chinese law, situation (2) and an accessory penalty do not involve any restriction of physical freedom. Criminal detention involves detention from one to six months. “Surveillance” restricts personal liberty to a limited extent only. In addition, Article 39(2) of the Criminal Law provides that persons under surveillance should enjoy equal pay for equal work. This can be interpreted as those persons under surveillance should enjoy the equal right to work as other workers. Although international jurisprudence does not clarify the exact length of the imprisonment that can justify the dismissal, the above situations in the Chinese law should not fall into the justified categories because such absence (up to six months) from the job, if the offence is not related to the employment, can technically be equivalent to temporary absence from illness or injury and may not necessarily cause serious business loss of the employer. Judicial practice in China also appears to follow this rather simplified approach: Judges do not examine whether the crime is employment-related or whether there is imprisonment affecting performance of the job. 45 Any criminal liability justifies dismissal. The Chinese approach is not compatible with international law and is also contradictory to China’s jurisprudence on criminal sanctions that favor the rehabilitation purposes of penalty.

2. Incapacity of the Worker. — The Chinese law also allows employers to dismiss a worker for being incompetent to perform his job, with an obligation to give a prior notice. The rules appear to comply with international law. With regard to workers who are unable to perform the work due to illness or injury unrelated to work, the Chinese law provides a reasonable set of “medical treatment periods” (yiliaoqi), which varies from 3 to 24 months based on the length of service of the worker concerned. 46 It provides additional protection by requiring the employer to provide alternative employment if the worker

44 Id. para.49.
45 For instance, in the case HAN Gangqiang vs Hebei Province Metal Ltd. Company Tangshan Branch, the worker was convicted for bribery but exempted from any penalty, judges at the first instance and appeal held that dismissal is lawful because of his criminal liability. See first trial judgement, (2013) Beimin Chuzi NO. 1625, and appeal judgement, (2013) Tangmin Yizhongzi NO. 622.
46 See Art. 3 of 企业职工患病或非因工负伤医疗期规定 (The Regulations on Medical Treatment Period of Workers with Non-Work-Related Illness or Injuries), issued by the Ministry of Labor, effective on Jan. 1, 1995. With regard to certain illnesses such as cancer or mental illness, the “medical treatment period” can be extended over 24 months upon the approval of the labor administration.
cannot perform the original work upon his return.47 Regarding the workers who are unqualified for their jobs, Chinese law provides additional opportunity of training or alternative employment before the termination of employment.48 It is also important to note that the 2007 Labor Contract Law provides better protection against dismissal during probation by requiring just cause and three-day notice while the previous labor law requires no justification or notice in advance.49

3. Procedural Protection. — In conformity with international standards, the Chinese labor law provides that employers should give a 30-day period of notice or compensation in lieu of notice (one month salary) for dismissal unless the worker is guilty of misconduct.50 The law also provides a procedure of notification to or consultation with the trade union before dismissal, and a right to appeal through the labor dispute resolution system. The conformity of the latter two procedures with international law deserves a further look.

Notification to or Consultation with the Trade Union

The Chinese legislation does not offer workers the right to defend themselves prior to the dismissal, while the ILO Convention NO.158 requires that a worker shall have an opportunity to defend himself against the allegations before the employer, which is considered by the ILO Committee of Experts as “a basic principle.”51 Nevertheless, this deficiency may be somewhat compensated by the employer’s obligation to notify and consult the trade union under the Chinese law, which in theory should allow the worker to have an opportunity to defend himself before the employer if the trade union does intervene.52 Moreover, according to Article 12 of the 2013 Interpretation IV of the SPC, employer’s failure to comply with procedural requirements is considered to constitute an unlawful dismissal. Consequently, the dismissal will be annulled or the worker concerned will be entitled to double compensation. Nevertheless, the Interpretation IV also allows employers to correct the procedure before the litigation. In other words, if the employer informs the trade union before the lawsuit is filed, this procedural requirement will be considered as satisfied by the court. In practice, as arbitration is a mandatory pre-step for labor disputes, employers would have enough time to notify or consult the trade union after the dismissal and before litigation starts. The question is: What is the point to notify or consult trade unions after the dismissal already takes place?

47 See Art. 26(1) of the Labor Law and Art. 40(1) of the Labor Contract Law.
48 See Art. 26(2) of the Labor Law and Art. 40(2) of the Labor Contract Law.
49 See Art. 21 of the Labor Contract Law.
50 See Art. 26 of the Labor Law and Art. 40 of the Labor Contract Law.
52 See Art. 30 of 1994 Labor Law and Art. 43 of 2007 Labor Contract Law, which requires the employer to notify the trade union about the reason for dismissal and should study trade union’s opinions and provide written notice of the result to the trade union.
This rather odd rule reveals that the SPC considers employer’s failure to notify and consult trade union as a minor procedural defect, like a failure to notify the worker 30 days in advance.\textsuperscript{53} But theoretically speaking, failure to notify trade unions is not a minor procedural flaw and it is in nature different from failure to notify the worker. If we look at the purpose of this procedure, which is to give the worker an opportunity to challenge the dismissal substantively through the help of trade union so the dispute may be solved before the dismissal actually takes place.\textsuperscript{54} The result of this procedure may have an important impact on the right to work. In contrast, 30 days notice to the worker does not affect the result of termination and the purpose of the rule is to provide the worker with some time and financial support to find a new job. So this explanation cannot justify the SPC interpretation.

The above analysis is, however, merely theoretical. The interpretation may simply imply that SPC believes that this procedure is not so important after all, which is in conformity with the reality: Trade unions have a marginalized role in protecting workers’ rights in China.

Examining the legislative development on this matter, from Article 30 of the 1994 Labor Law, to the Revised 2001 Trade Union Law, and Article 43 of the 2007 Labor Contract Law, we observe a tendency that trade unions are given a more and more important role in dealing with termination of employment.\textsuperscript{55} This reveals legislators’ intention to provide workers with better protection against dismissal through strengthening the role of the trade union.

However, no matter how labor law and trade union law change the technical details in order to promote trade unions, the lack of freedom to organize and an independent status have determined that trade unions in China are not able to defend workers’ rights as their counterparts in many other countries.\textsuperscript{56} Available case law reveals that in many lawsuits, the notification and consultation procedure is either not respected by the employer or is only about acquiring a written paper from the trade union concerned with no impact on the result of dismissal.\textsuperscript{57} Moreover, the Interpretation IV makes this requirement even

\textsuperscript{53} ZHANG Yongjian, HAN Yanbin & WANG Linqing, \textit{《关于审理劳动争议案件适用法律若干问题的解释 (四)》的理解与适用 (Understanding and Applying the SPC Interpretation IV on Labor Disputes)}, 5 \textit{人民司法} (People’s Justice) 18–20, (2013). Authors are all judges of the SPC.


\textsuperscript{57} See, for example, DONG Xiangyou vs Changzhou Public Security System Engineering Company, (2014) Changmin Zhongzi NO. 367.
more pointless by allowing employers to inform trade unions before litigation.

**A Right to Appeal**

Chinese labor law has a unique labor-dispute resolution system (hereafter LDR system), which is composed of three steps: mediation, arbitration, and litigation. While mediation can be opted out by the parties in dispute, arbitration is a mandatory procedure to be exhausted before the parties can bring the dispute to a civil court. Similar to what ILO suggests, in China’s labor arbitration and litigation process, sitting arbitrators or judges must conduct mediation before deciding on the case. It is fair to say that the 2007 Law on the Mediation and Arbitration of Labor Disputes has made quite progress in many aspects: For example, rules regarding the time limit for filing a claim are more reasonable; rules on the burden of proof become more favorable for workers; arbitration becomes free and more efficient; arbitration awards now can become final for certain claims. Nevertheless, in comparison with international standards, China’s LDR system still has deficiencies in the following aspects, which affect the effectiveness of the right of workers to appeal against dismissal. First, the impartiality of the labor arbitration commission is highly questionable because it is subordinated to the local labor administration, although the same doubt can be placed on China’s judicial system in general. Second, China’s LDR system is heavily criticized by its lengthy procedure despite the fact that its designers intended to make it quick and cheap as it should be. With arbitration being mandatory before litigation and the arbitration awards not final, a labor dispute can last two or three years or even longer. As mentioned above, Article 47 of the 2007 Law on the Mediation and Arbitration of Labor Disputes has made arbitration final for certain types of cases, which include claims for severance pay and compensation for unfair dismissal provided the amount of which does not exceed 12-month minimum wage by local standards. Nevertheless, this type of cases only count for a small percentage of cases concerning termination of employment because disputes over the lawfulness of the dismissal are not among the cases for which arbitration can be final.

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61 For these cases, workers still have a right to appeal before a court while employers do not have this right unless there is evidence of irregularities of the arbitration process such as corruption of arbitrators. See Arts. 48 and 49 of the 2007 Law on the Mediation and Arbitration of Labor Disputes.
Moreover, the 12-month minimum wage is a small amount, which for example is RMB16,800 (around $2,700) in Beijing local standards in 2013. With average monthly salary being RMB5,793 in Beijing in 2013, it means many workers with higher wages and longer length of service likely claim more than this amount and thus be subject to both arbitration and litigation. Available statistics shows that in 2009, only 13.9% labor disputes fall into this category. For majority of cases concerning termination of employment, it is very likely that workers still need to go through arbitration first and litigation afterwards, thus this remains a lengthy process.

Such lengthy proceedings for labor disputes can affect the workers’ right to a fair trial. It is clearly established in the jurisprudence of the HRC and the ECtHR that a dispute regarding termination of employment falls within the meaning of “a suit at law” in Article 14 of the CCPR and “civil rights and obligations” in Article 6 of the ECHR. The length of proceedings is implicit in the “fairness” requirement. The ECtHR held in several cases that excessively lengthy proceeding of litigations on dismissals has amounted to a violation of the right to a fair trial. As the ECtHR pointed out, “an employee who considers that he had been wrongfully suspended or dismissed by his employer has an important personal interest in securing a judicial decision on the lawfulness of that measure promptly, since employment disputes by their nature call for expeditious decision, in view of what was at stake for the person concerned, who through dismissal loses his means of subsistence.” The HRC also found a violation of the right in the case Muñoz Hermoza vs Peru and considered that the seven-year long administrative proceedings in a dismissal case constituted “unreasonable delay.” Although a Chinese labor dispute probably will not go this far, the lengthy process does affect workers’ right to seek effective remedies in case of unfair dismissal and thus can amount to a violation

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65 See, for example, HRC, Y. L. vs Canada, application NO. 112/1981, para. 9.2; see also ECtHR, Thlimmenos, judgment of 6 April 2000, para.58; see also Werner, judgment of 15 Nov. 2001, para.32.

66 See ECtHR, Frydlender vs France, NO.30979/96, judgment of Jun. 27, 2000, the proceedings lasted nine years and eight months; and Launikari vs Finland, NO. 34120/96, judgment of Oct. 5, 2000, proceeding lasted nearly four years and eight months; Toth vs Hungary, NO.60297/00, judgement of Mar. 30, 2004, two proceedings lasted respectively more than nine years and eight months, and six years and four months.

67 See HRC, Muñoz Hermoza vs Peru, application NO. 203/1986, paras. 11.3 and 12.
of the right to a fair trial.

4. Remedies and Compensation.

Reinstatement

While the 1995 Labor Law does not mention the possibility of reinstatement as a form of remedy, Article 48 of the 2007 Labor Contract Law has made progress by providing that workers have the choice between reinstatement and financial compensation in case of unlawful dismissal. It also gives certain flexibility to the employer: if the situation does not allow a reinstatement, the employer should pay a financial compensation. This approach appears to generally satisfy what international law requires, which demands adequate compensation or other appropriate relief in case of unfair dismissal, including the possibility of reinstatement.

Nevertheless, unlike what the ILO jurisprudence recommends, the Chinese law and practice does not establish concrete criteria for the arbiter or judge to decide whether to order reinstatement or financial compensation, such as the size of the undertaking and the length of proceedings. The only two express criteria for choice are the worker’s wish and the practical possibility of reinstatement. The latter criterion leaves quite discretion to the appellate body to take into account the particular circumstances of each case. Given the dynamic nature of the employment relationship, this discretion probably is necessary, not denying that the suggested ILO criteria can also be useful guidance for Chinese arbitrators and judges.

Severance Allowance

In case of a lawful termination, Chinese law requires the employer to pay a severance benefit to the dismissed worker unless he is guilty of serious misconduct. The amount of the compensation is based on the length of service and the wage level of the worker concerned. Each year of service entitles the worker one-month salary as compensation.

The 2007 Labor Contract Law has made some important changes that provide dismissed workers better severance pay. First, the law eliminates the upper limit (12 months’ salary) for the severance allowance under the old law for certain types of dismissals.68 Second, workers on a fix-term labor contract can receive severance allowance upon the expiration of the contract.69 The 2008 Implementation Rules of the Labor Contract Law adds that workers on a labor contract for the completion of certain tasks can also obtain severance pay at the end of the contract.70 These new rules not only provide better income protection for workers, but also aim at deterring the extensive use of short-term labor contracts in China.

68 See Arts. 24 and 26(2) of the 1994 Labor Law.
69 See Art. 46(5) of the 2007 Labor Contract Law.
70 See Art. 22 of the Implementation Rules of the Labor Contract Law, promulgated by the State Council (NO. 535), effective on Sep. 18, 2008.
It is also worth noting that Article 47 of the 2007 Labor Contract Law adds an upper limit of severance pay for workers with a high salary. If their monthly salary is three times higher than the average monthly salary of workers at the municipality level last year, the highly-paid workers will receive a severance allowance up to 12 months of three times of the average monthly salary. This rule may be justified in the case of a lawful dismissal, which seems to have a legitimate aim of balancing between the interests of workers and a dynamic economy.

**Financial Compensation for Unlawful Dismissal**

In case of unlawful dismissals, Article 48 of the 2007 Labor Contract law requires the employer to pay the worker concerned financial compensation of a punitive nature: an amount equivalent to double severance allowances that the worker would receive in case of a lawful dismissal.

This simplified new rule replaced the complicated and often confusing methods of calculating compensation for unlawful dismissals before the 2007 Labor Contract Law.\(^{71}\) Moreover, the new rule somewhat compensates the emotional distress that workers have suffered from unfair dismissal.

Nevertheless, the deficiency of the new method is the lacking of flexibility, which does not consider the situations of workers and employers at an individual level. Both the jurisprudence of ILO and ESC requires that the compensation for unfair dismissal should be “sufficient” to both “fully compensate the victim” and sufficiently deter employers. ILO additionally recommends that an unlawful dismissal impairing a basic human right should entail compensation higher than do other kinds of termination.\(^{72}\) Workers with dependents may find compensation provided by the Chinese law inadequate, in contrast to workers without families. This is also true for workers who are subject to discrimination on various grounds, such as sex, age, and disability. They may emotionally suffer more than other workers if they are dismissed for a discriminatory reason and have more difficulties to find new employment if reinstatement is not practical.

Moreover, the Chinese rule does not take into account the financial ability of the employer concerned. As such, it may not be “deterrent” enough to large-scale or wealthy employers. It is to be noted that the upper limit of severance pay for workers with a high salary, as mentioned above, also applies to compensation for unfair dismissal because it is the double amount of the severance pay. Unlike the situation of lawful dismissal, this upper limit may diminish the punitive nature of the compensation for unlawful dismissal, especially when the dismissal violates human rights, such as discrimination. In the jurisprudence of ESC, limits to levels of compensation for unfair dismissal are not

\(^{71}\) For a detailed explanation on compensation for unfair dismissal, see LIN Jia, 劳动法和社会保障法 (Labor Law and Social Security Law), Remin University of China Press (Beijing), at 153–155 (2011).

\(^{72}\) See ILO, General Survey on protection against unjustified dismissal, 1995, para. 232.
considered as compliant with the Charter. For example, the European Committee of Social Rights held that the maximum compensation equivalent to six-month salary in Bulgaria and Estonia is not adequate. Along the same line of reasoning, the upper limit set by the Chinese law, which may be around RMB410,000 (around $67,000) in Beijing according to the local standards in 2014. It may look considerable for many workers and employers, it may not insufficient to compensate the victims with a high salary who have served the employer for many years. Also, this amount may not be deterrent enough for powerful employers such as those among the “Fortune 500.”

B. Economic Redundancy

The 1994 Labor Law demonstrates the fear of economic redundancy. Article 27 sets a high threshold: Only those enterprises “at the edge of bankruptcy” or in “serious” economic situation are allowed to lay off its workforce. It is not surprising as law-makers in early 1990s still have a strong mentality of planned economy. In practice, massive redundancies that do not qualify for Article 27 still take place one after another, without going through all the procedures as required for economic redundancy.

The 2007 Labor Contract Law embraces the idea of collective redundancy, which provides more reasonable restrictions on economic redundancy and better procedural protection for workers. Special procedures apply to an economic redundancy that involves more than 20 workers or more than 10% of the entire workforce.

1. Substantive Protection. — Article 41 of the 2007 Labor Contract Law allows economic redundancy in broad circumstances, which includes technological innovation or business strategy change.

Lowered threshold for redundancy is compensated by the cumulative requirements of “necessity” and the number of affected workers. The 2007 Labor Law uses the word “need,” which should be interpreted as that redundancy must be necessary and proportionate. The minimum number of 20 workers or 10% of the workforce is also an important criterion because it not only provides a clear and objective method for applying procedures in collective redundancy, but also exempts small-scale redundancy from burdensome procedures and thus provides flexibility to the business. Such an exemption is compatible with Article 13(2) of ILO Convention NO.158 that allows the application of the Convention to be limited “to cases in which the number of workers whose termination of employment is contemplated as at least a specified number or percentage of the workforce.”

Nevertheless, there is no time limit on the redundancy. It is thus possible for the

73 See the ECSR, Conclusions 2005, Estonia, 29.
74 See the ECSR, Conclusions 2003, Bulgaria, 67.
employer to avoid the procedural requirement by, for example, laying off less than 20 employees each time but do so for several times over a period of time.

In practice, from available cases, it seems quite difficult for workers to challenge whether the employer indeed “needs” to lay off its workforce. The disputes often focus on procedures and compensation package.

2. Procedural Protection. — Similar to what international standards require with regard to economic redundancy, Article 41 of the 2007 Labor Contract Law and Article 27 of the 1994 Labor Law both provide the following procedures: information to the trade union or the workforce; consultation with trade union or workforce; and notification to the labor administration. Article 41 of the Labor Contract Law provides more developed criteria for the selection of workers subject to redundancy, which is based on the length of service and family circumstances. Moreover, the most vulnerable groups, such as pregnant workers, enjoy protection against redundancy.

As explained earlier in cases of procedural protection against dismissal for cause, the information and consultation process in redundancy can largely be compromised by the weak nature of trade unions in China. The possible effective protection may come from the last procedure: notification to the competent authorities. Chinese law imposes on the employer an obligation to report to the local labor administration about the layoff plan and opinions of trade union or the whole workforce, and to seek the opinions of the labor authorities before conducting a redundancy. It does not require the layoff plan to be approved by the labor authorities. The main purpose of this reporting requirement is to give the labor authorities an opportunity to examine the legitimacy of the layoff. If the authorities consider that the employer is not qualified for economic layoff or that there are any procedural deficiencies, the authorities can order the employer to discontinue layoff or even impose a sanction. In practice, the attitude of local authorities towards redundancy can directly affect the result of redundancy and different regions have different requirements in practical details.

While ILO Convention NO. 158 requires the employer to notify the competent authority “as early as possible,” the Chinese law does not specify the time when the notification should be made. From the order of the procedural requirements, this step should be taken after the consultation. In practice, out of the concern for social stability, local authorities often intervene in massive layoffs and assist the parties in seeking solutions, although they do not have a legal obligation to do so. This notification

75 See Art. 4(4) of the 1994 Regulations on Economic Dismissals in Enterprises.
76 See Art. 27 of the 1994 Explanation by Ministry of Labor on Certain Articles in Labor Law.
77 See Art. 8 of the 1994 Regulations on Economic Dismissals in Enterprises.
procedure gives authorities an opportunity to react at the early stage of redundancy.

C. Principle of Equality and Groups under Special Protection

International law provides an illustrative list of invalid reasons for dismissal, many of which are related to grounds for discrimination. In comparison, the Chinese law contains prohibition against discrimination on the grounds of ethnicity, race, sex, or religious belief and provides certain workers under special protection against dismissal or redundancy except when they are guilty of serious misconducts: (1) workers who have lost total or partial work ability due to occupational diseases or work-related injuries; (2) workers who have been receiving medical treatment for diseases or injuries within the prescribed period; (3) female workers during pregnancy, maternity leave, or breast-feeding period; and (4) workers with long-term service (who have worked continuously for the same employer for more than 15 years and will reach the retirement age within 5 years).

For the above four categories of workers, the Chinese legal protection appears adequate. In the case of workers suffering from occupational diseases and injuries, the Chinese law provides even more favorable protection than do international standards. Nevertheless, outside these specified categories, seeking remedies on employment discrimination is very difficult. Unlike some scholars optimistically predicted after the 2007 Employment Promotion Law was promulgated, which for the first time provides workers with a right to sue employers for discrimination, the Chinese court does not seem to apply the new provision to tackle employment discrimination so willingly. After the Employment Promotion Law entered into force in 2008, dozens of discrimination claims have been brought by the victims who are HBV positive but are dismissed by the courts for various reasons. For example, in the recent case CAO Ju vs Juren School on gender discrimination in employment, it took the applicant about one and a half years to have the lawsuit filed to the court in the end of 2013. The humble success is attributed to several factors, including NGO’s campaign and media coverage. It does not mean that from

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79 See Arts. 3 and 29 of the 1994 Labor Law; Art. 44 of the 2007 Labor Contract Law.
80 For more detail, see Regulations on Work Injury Insurance, promulgated by the State Council (Guowuyuan Lin NO. 375), effective on Jan. 1, 2004.
82 For example, Pagnattaro in her article, painted a quite promising picture of the anti-discrimination provision contained in the Employment Promotion Law, see M. A. Pagnattaro, Is Labor Really “Cheap” in China? Compliance with Labor and Employment Law, 10 San Diego International Law Journal, 357–379 (2009).
84 Id.
then on, the Chinese courts will have no problem accepting discrimination lawsuits. As such, it is probably appropriate to conclude that the Chinese law still cannot provide effective protection against dismissal for discriminatory reasons such as sex, age, victimization as international law requires.

III. ENHANCING EMPLOYMENT STABILITY IN CHINA

As discussed earlier, positive aspects of the right to employment security require the State to actively reduce short-term and informal employment. States should provide “adequate safeguards” against short-term contracts and to allow them only when it is necessary due to the nature of the work or other circumstances. Without such justification, the ILO suggests the States to deem fixed-term contracts to be contracts of indefinite duration. If fixed-term contracts have been renewed on one or more occasions, the ILO suggests that the employee should be considered under a contract of indefinite duration.

In contrast, the 2007 Labor Contract Law has made efforts to discourage the use of short-term labor contracts in several ways. First, as mentioned earlier, severance pay is imposed on the termination of fixed-term contracts. Second, workers under the following situation are entitled to a labor contract of indefinite duration: (1) when they have continuously worked for over ten years for the same employer; (2) when the fixed-term contracts have been renewed once; and (3) when there is no written contract after one year of employment.85

These efforts have partially met the ILO requirements. Nevertheless, the Chinese labor law does not require any justification on the use of fixed-term contracts by the employer. This explains why short-term contracts, ranging from one to three years, are still widely used in private sectors in China, and this is unlikely to change in the near future. Certainly the poor enforcement of labor law in China also contributes to this fact, which is a complex issue in and of itself.86 In fact, many causes for non-compliance listed by scholars, such as Cooney in 2007 and others in early years, include economic incentives for non-compliance, local protectionism, inadequacy of labor inspectors, shortcomings in labor dispute resolution system, and trade union system, remain pertinent today.87 Regarding conditions for workers to request a contract of indefinite duration, judicial interpretation and practice also varies in different provinces.88 For example,

85 See Art. 14 of the 2007 Labor Contract Law.
According to the interpretation of the High Court of Shanghai Municipality, only when an employer agrees to renew the third contract, a worker can obtain a contract with indefinite duration after his contract has been renewed once. This interpretation literally turns futile Article 14(2) C of the Labor Contract Law and denies the worker a right to a permanent contract. Another endeavor that Chinese law-makers have been making is to control the abusive practice of the so-called “labor dispatching” (laowu paiqian) in China. In the ILO jurisprudence, particular concern on the extensive use of fixed-term contracts and practice similar to “labor dispatching” has been expressed on several occasions.

For example, the Committee noticed that in Finland, there was a high rate of evasion of the laws protecting job security in hotel and restaurant industries due to contracting out of labor and the use of fixed-term contracts, and a substantial number of workers are pressured into becoming self-employed as a means of evading the protection against unjustified dismissal.

In China, labor dispatching is widely used to avoid not only protection against unfair dismissal but also other rights of workers such as equal pay for work of equal value. The 2007 Labor Contract Law, for the first time, tries to regularize labor dispatching and to clarify the rights and obligations of the workers, dispatching entities, and actual employers. Nevertheless, partly because the 2007 Labor Contract Law has enhanced the costs for employing conventional labor, the use of labor dispatching has been increasing dramatically in 2008 and following years. According to the statistics of the All China Federation of the Trade Unions (ACFTU), in 2011, there were around 37 million dispatched workers nationwide, counting for 13.1% of the total workforce. Surveys conducted in Shanghai and Jiangsu Province show that dispatched workers respectively occupy 25% and 32% of the total workforce in 2011, increased respectively 36.1% and 47.1% compared to 2008. Moreover, partly due to the vagueness of the law, the practice remains chaotic, if not worse. Consequently, disputes concerning labor dispatching also

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90 See ILO CEACR: Individual Observation concerning Convention NO. 158, Termination of Employment, Portugal, 2000; Spain, 1990, para.2; Finland, 2000, para.3.
91 See, for example, ZHOU Baomei & WANG Zhishuang,劳务派遣制度“规避性”之解析——兼论我国劳务派遣制度之完善 (Examining the “Flexibility” of the Labor Dispatching System), in Beijing Labor Law and Social Security Law Association eds. 劳动关系和劳动争议现状和展望 (Current Situation and the Future of Labor Relations and Labor Disputes), China Legal Publishing House (Beijing), at 93–102 (2013).
94 Id.
has been increasing enormously.\textsuperscript{96}

The situation was so serious that the NPC decided to revise the 2007 Labor Contract Law, specifically tackling the issue of labor dispatching. In the end of 2012, the Amendment was adopted by the NPC and entered into force on the July 1, 2013. In January 2014, the Ministry of Human Resources and Social Security issued the Temporary Rules on Labor Dispatching, with a view to providing more detailed guidance. The following rules are the key points of China’s new attempts to regulate the labor dispatching practice: First, the labor dispatching company must apply for a license from the labor administration; second, the minimum registration capital of the dispatching company is raised to RMB2 million (RMB0.5 billion in the 2007 Law); third, dispatching companies must sign a labor contract of more than two years with dispatched workers; forth, disguised forms of labor dispatching, such as outsourcing or sub-contracting, are treated as dispatching; last, more restrictions are imposed on positions that can use dispatched workers. Accordingly, labor dispatching can be used only on “temporary, subsidiary, or substitute” positions. “Temporary” refers to positions lasting less than 6 months; “subsidiary” refers to positions that provide service to the main business of the employer; and “substitute” means those positions temporarily available because of maternity leave and other take-offs of full-time employees.\textsuperscript{97} Nevertheless, this rule is criticized by scholars and practitioners as unclear, unnecessary, or useless.\textsuperscript{98} Since “subsidiary” positions are rather difficult to define, additional procedural requirement is imposed on the employer, who must consult workers or trade unions and publish the subsidiary position at the workplace.\textsuperscript{99} The new rules also requires employers to strictly control the proportion of dispatched workers and make it less than 10% of the entire workforce.\textsuperscript{100}

While some of the new rules do provide clearer constrains on the use of dispatched labor, some still doubt their efficiency or even the motive behind it.

First, administrative licensing cannot prevent dispatching companies from non-compliance of law and is more likely to strengthen the power of authorities and create new room for corruption. When examining the license application, the labor administration looks only at the formal conditions of labor dispatching companies, such


\textsuperscript{97} See Art. 3 of \textit{劳务派遣暂行规定} (The 2014 Temporary Rules on Labor Dispatching), effective on Mar. 1, 2014.


\textsuperscript{99} Id.

\textsuperscript{100} Id.
as work premise and equipment and annual reports. It is unlikely that the administration has resources or willingness to verify the real situation. It would be more effective to control the irregularities of labor dispatching if the administration sends out more labor inspectors to enforce the existing rules instead of creating a new licensing rule.

Second, raising the registration capital means to squeeze out small dispatching companies that are assumed to be more “irregular.” Nevertheless, there is no evidence that larger companies respect the law better than smaller ones. In fact, many state-owned enterprises (SOEs) or public entities widely use dispatched workers disproportionately and do not respect their basic labor rights.101 It may also result in the monopoly and leaves workers with little choice. After all, problems with labor dispatching do not lie in dispatching companies alone, but also in employers using dispatched workers. A large proportion of the employers using dispatched labor are SOEs whose various institutional problems have contributed to the phenomenon.102

Third, given the weak status of workers and trade unions, it is doubtful whether the procedural requirement to consult workers or trade unions will actually have any impact on employers’ decision on what positions are “subsidiary” and thus can use dispatched labor.

CONCLUSION

After a close examination of the developments of the Chinese labor law in the past years, especially after the adoption of the Labor Contract Law in 2006, one can observe a legislative tendency of strengthening the protection of employment security. This is partly to address the pervasive unlawful dismissals and extensive use of short-term labor contracts. Another important intention of law-makers is to upgrade China’s economic structure.

No matter what has motivated the change, at least from the legislative perspective, Chinese approach appears to have becomecloser to international standards on employment security.

While the general picture may look rosy, the effectiveness of the legislative protection of employment security can be compromised extensively by the weakness of trade unions, poor enforcement of law, and the deficiencies associated with the labor-dispute resolution system.

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101 There is wide reporting on how SOEs and public entities abuse labor dispatching as a way to reduce labor costs. See, for example, SHI Fumao, 被派遣劳动者权利保护研究 (Protecting Rights of Dispatched Labourers), 4 Labor & Social Security, 53–60 (2013).

While the legislation may look more “socialist,” the capital is not. More protective legislation reveals the intention of law-makers rather than the reality of the labor market. In labor practice, due to the relatively low cost of law-breaking and the lack of efficient involvement of trade unions, employers tend to ignore the procedural requirement of the law.

Moreover, many of these rules, such as severance pay on the expiry of a fixed-term contract, are too burdensome for small employers. It is desirable for the Chinese law to exempt small employers, such as those having less than 10 employees, to be free from such rules.

It is also important to point out that strong labor protection, such as a labor contract with indefinite duration, does not really guarantee life-time employment. The ILO’s advocating “flexicurity,” despite how pragmatic or even desperate it sounds, does have merits by calling for improving employability through vocational education and training. The latter also looks like a right approach for China. More protective legislation may contribute to upgrading the Chinese economy, but the social costs are high, which are assumed by both employers and workers in “sunset” industries. The upgraded legislation should be accompanied by supporting policies and measures, including social security measures and free vocational training for unemployed workers. Such policies and measures can also help to secure the right to employment security.