

# **Non-discrimination and the Reform of the Chinese Hukou System in a Human Rights Perspective**

A case study of farmer workers



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# 1 Introduction

## 1.1 Background

Since the establishment of the People's Republic of China in 1950s, the Chinese hukou system<sup>1</sup> has categorized citizens, normally dependent on people's birth place and family association, as either "agricultural" or "non-agricultural" residents. "Local authorities issue citizens hukou identification through a registration system".<sup>2</sup> Every Chinese household is issued one hukou booklet containing the names of every family member, and each individual can have only permanent hukou, at only one hukou zone.

The main of purpose of hukou system is resource distribution and migration control. "The Chinese government provided agricultural hukou holders with food rations and grain subsidies, and granted non-agricultural and urban residents greater employment opportunities, subsidized housing, free education, medical care, and old-age insurance."<sup>3</sup> The traditional hukou system has been described as "affixing people's social career, role, personal identity, production and living space; restricting the free migration of people and labor; maintaining and strengthening the dual economic and social structure between the urban and rural areas."<sup>4</sup>

The economic development increased the labor demand in urban areas and lots of rural people emigrate to cities to seek for more opportunities. These migrants and their family members are faced with severe limits on their ability to public services on equal basis with urban residents. Thus, since the early 2000s the Chinese State Council and some local

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<sup>1</sup> It is also called "household registration system".

<sup>2</sup> Yu Zhu, (2004), p. 207.

<sup>3</sup> Congressional-executive Commission on China (2005).

<sup>4</sup> Peng Yiyong (1994), p.39

governments respond to the situation by making some sporadic reforms; however, the outcome is not so good as they thought, accompanied with a lot of criticism.

The main focus is on the issues of inequality and discrimination. “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”<sup>5</sup> From the Universal Declaration of Human Rights (UDHR)<sup>6</sup> to the later following international human right instruments such as International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and regional human right conventions such as European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),<sup>7</sup> equality and non-discrimination have been widely recognized. “Societies should not be ordered in hierarchical form, with entitlements and duties determined by birth or social status rather than by virtue of an individual’s inherent worth as a human being”.<sup>8</sup> Despite the widespread belief of equality and non-discrimination, we still live in a world which is deeply surrounded by inequalities, such as through the population mechanism of hukou system in China.

Thus, this paper will address by taking farmer workers as the target group and by referring to the right to freedom of movement, right to employment and right to education under hukou system, how, and to what extent Chinese governments can effectively implement its obligation, in the social transition to respect and protect citizens’ human rights without discrimination. The sub-questions will be: 1) under household registration system, how are farmer workers differently treated? 2) Are these different treatments direct or indirect discrimination against farmer workers? 3) What measures should the government adopt in

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<sup>5</sup> ICCPR, General Comment No.18. Para. 1.

<sup>6</sup> Article 7 has already articulated, “All are equal before law and are entitled without any discrimination to equal protection of law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

<sup>7</sup> The recognition of equality and non-discrimination in ICCPR, ICESCR, ECHR will be described in detail in the following chapters.

<sup>8</sup> Sandra Fredman (2002). p.4.

hukou reforms for addressing the problems now exist that contribute to the discrimination and violation of human rights?

## 1.2 The terminology of the hukou system

Before start the paper and study the relevant human right issues in the hukou system, a few special terms and phrases related to this system cannot be avoided translating and need to be explained:

***Non-agricultural residents & Agricultural residents:*** This system, categorizes Chinese as “non-agricultural resident” and “agricultural resident”.

Urbanites, urban residents, urban population, city dwellers---“non-agricultural” hukou holders or legally registered permanent residents of the cities. They may temporarily working or traveling in the rural areas.

Ruralites, rural residents, farmers, rural population, villagers --- “agricultural” hukou holders or legally registered permanent residents outside the urban areas. May be temporarily working and living in the cities.<sup>9</sup>

To migrate under the hukou system, an individual could not simply and freely change his/her place of residence to a different one and dwell there over a given period; instead, he/she normally need to apply for an official change of permanent residence, which is difficult to obtain.

***Farmer workers:*** There is no specific or uniform legal definition of this group of people. Normally it is an old and traditional calling for the farmers who emigrant to cities and have jobs there. “Farmer” identifies that the person is an agricultural resident. The word “worker” reflects the farmer has a job in cities, different from cultivating vegetables or fruits on the farm.

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<sup>9</sup> Fei-Ling Wang (2005). p.29

*Wai Di Lao Dong Li* or *Wailai Wugong Renyuan*: migrants who is moving and looking for a job, or already working temporarily outside of where his permanent hukou is located. The legal way is to register in the new residence and acquire a *Zanzhuzheng* (temporary residence permit) after three months. A migrant may live and work in one place for many years but still is considered a temporary hukou holding resident if he or she cannot get a permanent local hukou through hukou relocation. “The issuance of *Zanzhuzheng* and forced repatriation are the main tools to control this type of internal migration.”<sup>10</sup>

“*Wailai Wugong Renyuan*” and “*Wai Di Lao Dong Li*” are, to great extent, “farmer workers”, and in this paper they are the same group of people. “They are the new names for farmer workers with more courtesy in Chinese”.<sup>11</sup>

### 1.3 Motivation

#### 1.3.1 The words of nationwide reform and previous studies

The hukou system is currently a heatedly debated topic in Chinese society. Especially the academic circle is engaged in debates on the negative consequences of the hukou system, the necessities and urgencies of its reform. Concerns about its reform are being expressed in many areas. However, most of the scholars conducted research in the perspective of demography, sociology, economics or exclusively Chinese domestic law.<sup>12</sup> Economic issues seem to be at the heart of the words of reform. One author wrote on the website hosted by Renmin Ribao (People’s Daily), in 2001: “The nature of the hukou system is closely linked to the planned-economy system [...]. While restricting population mobility, the hukou system also restricts China’s economic development and further intensified the urban-rural gap. It is extremely incompatible with the current economic development in China.”<sup>13</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> “Calling *Wailai Wugong Renyuan* instead of *Nongmin Gong*”, Xin Hua News, <http://finance.sina.com.cn/chanjing/b/20060106/09262254038.shtml>, Jan. 6<sup>th</sup> 2006

<sup>12</sup> For example, Liu Fei (2007); Yin Zhijing and Yu Qihong (1996); Liu Guangren (1992); Guo Shutian and Liu Chunbin, (1990); Cai Fang (1990); Yu Depeng (2000); and etc.

<sup>13</sup> He Jun (2001)



The sporadic reforms since the beginning of 2000s are not effective as planned and with a lot of criticism. With the determination to promote equality and make the society democratic, now the Chinese government is preparing to make a Hukou Law. Thus, in this paper, the overall research objective is, by reference to international human right standards, to explore the Chinese regulatory framework governing farmer workers' human rights to determine its consistency with non-discrimination, and then make suggestion on how to incorporate those international human right standards into the domestic system at the national level in the hukou reforms.

### 1.3.2 Clarification

Undoubtedly, reform of hukou system is surging forward irresistibly. Its ultimate purpose is certainly about China's development and then common good for Chinese. However, can a nation make progress by reform only in the economic perspective? Purely pursue the increase of GDP cannot necessarily bring people happiness without considering what constitute people's happiness and how it can come true.

As human beings, the most basic happiness come from the respect for human dignity and protection of human rights, shaping their own lives in accordance with liberty, equality, and social justice, especially without discrimination. Thus, development should not only confine to the growth of gross national product, or social modernization. During the process of development, human rights should be concerned a lot, such as the non-discrimination of social and economic arrangements. To great extent, human rights are central to the process of development.

Hence, human rights affected by the hukou system should not be neglected if China is really determined to make a successful and effective reform, on the contrary, much attention ought to be paid, particularly in the context of China's "transition from a planned economy to market socialism and from a totalitarian state to a democratizing authoritarian

state”<sup>14</sup> and the tendency of transition from “rule by law” to “rule of law”. In 2004, the Amendment of the Constitutional Law of the People’s Republic of China was adopted with the articulation of “Chinese citizens enjoy equality before law” and “The state respect and protect human rights”<sup>15</sup>. Chinese government has been faced with a severe problem: How can traditional hukou system be adjusted to be compatible with the international human rights standards? This is why to address the discrimination issues in this paper caused by the attendant functions of hukou system in the perspective of international human rights is important.

#### 1.4 Methodology

This paper, in the perspective of international human rights, will adopt the legal approach to touch different levels of the hukou system. It will start from the international human right instruments to the Chinese Constitutional Law, other national legislation and, then the relevant local regulations and policies. And in particular see if the national and local regulations meet up to international human right standards. During this process, some cases tried in international treaty bodies such as Human Rights Committee and the regional human right courts such as European Court of Human Rights and the Chinese domestic cases as well, will also be considered. I will look at the government’s obligations imposed by ICCPR and ICESCR, and General Comments of Committees concerned, and then to evaluate whether and to what extent the State Council and local government violate the principle of non-discrimination and farmer workers’ specific human rights.

#### 1.5 The content and structure of this paper

I will not deny this paper is not the first one to discuss the differential treatment towards different citizens. Some scholars have already touched the topic of the creation and maintenance of inequality and discrimination among people. However, most of them just write articles with general description.<sup>16</sup> But China is a big country with the increasing gap of economic development from west to east, thus, research at the local level about specific

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<sup>14</sup> Ling Li, (2001), p. 149.

<sup>15</sup> Article 33, The Constitutional Law of The People’s Republic of China (Amendment 2004).

<sup>16</sup> For example, Liu kaiming(2006); Sean Cooney (2007).

region to discuss detail issues is necessary. Hence, what is new and challenging in this paper is to take farmer workers as a target group and take Shanghai City and some cities in Guangdong Province<sup>17</sup> as a case study at the local level.

Meaningful research and useful findings should not be divorced from reality. This paper intends to describe its attendant and discriminatory function of hukou system for different Chinese citizens, and then taking advantage of the principle of non-discrimination on the ground of “social origin” and equality as a thread or clue, analyze what specific human rights are violated when related to ICCPR and ICESCR, make comment on how government shows up negative or even hostile attitude towards rural-to-urban work migrants.

Chapter 2: right to freedom of movement without discrimination. Chapter 2 will first introduce non-discrimination under international human right instruments, and analyze that the freedom of internal movement in China under hukou system is limited, and then evaluate whether the Chinese hukou system is compatible with Article 12, ICCPR by taking North Korea’s case study into consideration.

Chapter 3: direct discrimination against farmer workers in employment under the hukou system. Farmers migrate to cities normally on the purpose of seeking for jobs and earning more money. This part will discuss that farmer workers’ right to employment is limited on the basis of social origin because the government want to control their de facto movement from rural to urban areas. According to the criteria of the definition of direct discrimination, this part will evaluate one by one criterion whether the different treatment in employment towards farmer workers compared with urban workers constitute a direct discrimination or not, by referring to ICCPR, ICESCR, and relevant general comments. Attention will be paid to whether the farmer workers and urban workers have comparable situations, whether the differential treatments are linked to any prohibited ground, and whether there is any reasonable or objective justification for the distinction.

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<sup>17</sup> The cities in Guangdong Province, such as Guangzhou, Zhongshan, Shenzhen, Dongguan, Shantou and etc.

Chapter 4: reforms at the local level and the new discrimination. This chapter will give some examples of the sporadic reforms in local places, discuss and analyze whether the reforms cause new and indirect discrimination against farmer workers. The attention will not be paid to the purpose of, but to the effect of the new policies in the reforms by addressing the issue that whether the facially neutral treatment has essentially discriminatory effect on farmer workers. To avoid the discussion in a limited way and to consider this issue comprehensively, this chapter will not only focus on farmer workers themselves, but also on the children of farmer workers and the children's right to education.

The final part is conclusion and suggestion. In this part I will give a summary of the whole thesis. With the conclusion that there is no excuse of unavailable resources to impose differential treatment on non-agricultural residents, and non-agricultural residents have less chance to meet the requirements of the facially neutral treatment, and thus China failed to meet its minimum core obligation to ensure the minimum essential levels of relevant human rights without discrimination, Chapter 5 of this paper would like to finally make some recommendations for Chinese government to adopt some measures for addressing the problems now exist that contribute to the discrimination.

## **2 Non-discrimination and the right to freedom of movement**

### **2.1 Point of departure: non-discrimination in international instruments**

Non-discrimination and equality are the two sides of one coin. They are without doubt among the central principles of human rights law and have been reaffirmed time and again in several UN core human rights treaties in particular. Non-discrimination and equality are claimed to be the most important principles imbuing and inspiring the concept of human rights, one of most frequently declared norms of international human rights laws, and one of the major themes of most UN core human rights treaties.

ICCPR doesn't offer any definition of "discrimination", however, the Human Rights Committee (here after referred as HRC) pointed put in its General Comment NO.18 as following:

“While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as [...] social origin [...] and which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>18</sup>

ICCPR contains the most comprehensive non-discrimination and equality guarantee, including both dependent and freestanding non-discrimination clauses. Article 2, para.1 ICCPR prohibits discrimination in the exercise of the Covenant's rights on a number of grounds. It reads:

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<sup>18</sup> Ibid 4, para.7.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, [...] national or social origin, property, birth or other status.

But article 2 limits the scope of the rights to be protected against discrimination to those set forth in the ICCPR. They have therefore been said to be of “a parasitic or accessory character: a violation of these provisions can be found only in conjunction with the concrete exercise (but not necessarily violation) of one of the substantive rights ensured by the Covenant.”<sup>19</sup>

By contrast, article 26 of ICCPR holds an independent or freestanding prohibition of discrimination. It triply guarantees equality before law and equal protection of the law and it impose the duty to protect from discrimination. It reads as:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, [...] social origin, property, birth or other status.

Article 26 has been interpreted as requiring equality in any area of law, not just in those within the ambit of ICCPR rights. It is not limited to rights which are provided for in the Covenant, but is truly an autonomous right. It is a freestanding guarantee of non-discrimination in relation to all rights, whether or not independent guaranteed in the ICCPR. Thus, it is not only a duplication of the guarantee in article 2, but also goes clearly beyond it. Here, we need to go a little bit deeper into the two different aspects: equality of law and equal protection of the law.

“The claim of equality before the law requires equality in the application and enforcement of the law”<sup>20</sup>: “legal administrators - judges, administrative officials - are not to apply

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<sup>19</sup> Wouter Vandenhoele (2005), p. 13.

<sup>20</sup> Lord Lester of Herne QC, Sarah Joseph (1995), p. 566.

legislation in a discriminatory manner”.<sup>21</sup> While “the requirement of equal protection of the law is directed at the national legislator, who is to grant legal rights and duties to all without discrimination, and who should not adopt or maintain discriminatory legislative standards.”<sup>22</sup> This equality in law is “qualified as substantive equality”.<sup>23</sup>

As regards ICESCR, it doesn't include any provision with the definition of discrimination either. The Committee on Economic, Social and Cultural Rights (hereafter referred as ICESCR Committee) subscribes to the definition contained in International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In its 1994 General Comment on the rights of the disabled, it defined disability-based discrimination as “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.”<sup>24</sup>

Similarity, in the reporting guidelines for states on article 6, discrimination is defined by ICESCR Committee as

Any distinction, exclusion, restriction or preference, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, [...] social origin, which have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity or treatment in employment or occupation.<sup>25</sup>

## 2.2 The right to freedom of movement

As it is described in the exposition above, non-discrimination can be claimed either freestanding from any other rights or dependent on other rights in international human right

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<sup>21</sup> Manfred Nowak (1993), p.466-467.

<sup>22</sup> Lord Lester of Herne QC, Sarah Joseph (1995), p.566.

<sup>23</sup> Wouter Vandenhole (2005), p. 18.

<sup>24</sup> ICESCR, General Comment No.5, Persons with Disabilities, para.15.

<sup>25</sup> Revised General Guidelines Regarding the Form and Content of Reports to Be Submitted by State Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (1991), article 6, para.3 (a).

instruments. Among the most important “other rights” when addressing China’s hukou system, one is the right to freedom of movement.

The right to freedom of movement is one of the most important, basic human rights widely and deeply protected by international human right instruments. The right to freedom of movement include the right to leave and return one’s own country, to emigrate and immigrate freely on one hand, and the right to move and reside inside one’s own country on the other hand. In this paper, the attention will be firstly paid to the right to the freedom of internal movement and residence, which means “in a specific State, a person with its nationality can freely move about and reside with its territory, subject to the restrictions provided for by the law concerned.”<sup>26</sup> The freedom of internal movement and residence “constitute [...] one which was an essential part of the right to personal liberty”<sup>27</sup>, and thus, in a sense, such rights are the hallmark of a democratic society.

### 2.2.1 International standards for the right to freedom of movement

In the contemporary international society, it sure constitutes a most important civil right, firstly enshrined in the article 13 of the UDHR. Para 1, “Everyone has the right to freedom of movement and residence within the border of each State”. Afterwards, the following international human rights treaties provide more legal basis for this right with binding force on states. ICCPR is the major standard-setting treaty to analyze the right to freedom of movement and residence within a State. Article 12 (1) says, “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”. Further, the HRC in its twenty-seventh General Comment 27, made more detail explanation as to the substantial content:

The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12(1), persons are entitled to move from one place to another and to establish themselves in a place of their choice.

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<sup>26</sup> Zhu Lijiang (2003)

<sup>27</sup> Bossuyt (1987), p.253.



The enjoyment of this right must not be made independent on any particular purpose or reason for the person wanting to move or to stay in a place.<sup>28</sup>

Apart from the international instruments, some regional human right treaties also provide protection for this right to freedom of movement and residence:

Protocol No.4 to ECHR, article 2 (1) says “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” The saying here is totally the same with the regulation in ICCPR. And there are similar regulation in article 22 (1) of American Convention on Human Rights and article 12 (1) of the African Charter on Human and People’s Rights.

However, this nearly universal acceptance of the right to freedom of movement has not necessarily meant true freedom in practice in China, as the strict limitation by hukou system and lots of auxiliary regulations and policies rob people especially rural ones of opportunities to travel, emigrate to find jobs, or even to get family unification. The *Household Registration Regulations* (1958) declared that:

Article 6: “Citizens should register as permanent residents in the place they regularly reside. One citizen can only have permanent resident registration in one location.”

Article 10 says: “Before a citizen moves out of his registration’s jurisdiction, he or the head of the household will file registration for moving out of the jurisdiction at the institution responsible for household registration, obtain a certificate for moving, and nullify his household registration [...]”

Article 16: “A citizen leaving his place of permanent residence for personal reasons must apply for a time extension or go through migration procedures at the institutions responsible for household registration if the time for temporary residency exceeds three months; if the individual has neither reason for a time extension nor meets the conditions for migration, he must return to the place of his permanent residence.”

Hence, article 6 of the regulation legally compels every individual to become a part of the hukou system. “In cases of temporary location changes, even from vacation to attending

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<sup>28</sup> ICCPR, General Comment 27, November 2, 1999. Para. 5.

family affairs, individuals had to register their movement with government authorities.”<sup>29</sup> Article 10, superficially a delineation of the hukou transfer process, in practice prohibited nearly all such movements. Governments that allocate free compulsory education, urban employment, public housing, free medical services, and retirement benefits to holders of urban hukou registration broadened the system’s urban/rural divide, because those carrying agricultural registration received none of these benefits.

### 2.2.2 A brief case study on the Democratic People’s Republic of Korea

In the contemporary international society, it is not only China that operates the hukou system. A political similarity as being communist countries may be found in Cambodia, China, Laos, Mongolia, the Democratic People’s Republic of Korea (hereinafter referred to as “North Korea”), and Vietnam. Although Mongolia, North Korea, and Vietnam are parties to the ICCPR, North Korea “has been called the most restrictive country in the world in terms of travel and emigration, despite its contrary assurance to the Human Rights Committee”<sup>30</sup> and thus is a very good example for the case study. Therefore, we can have a look at the response of the HRC towards it and then think about China’s hukou system by studying the State report of North Korea and the relevant Concluding Observations. In its second periodic report to HRC, North Korea stated that,

All the DPRK citizens and foreigners have the freedom of travel and residence. Article 75 of the Constitution provides: ‘Citizens have freedom of residence and travel.’[...] By article 6 of the Regulation (of Travel) the citizens who want to travel are issued with travellers’ certificate. The certificate is issued by people’s committees of all levels and there is no restriction. [...] The DPRK citizens and foreigners are free to choose their residence and to move it. They need to go through due legal procedures when they want to move residence. By articles 14 and 15 of the Law on Registration of Citizens, a citizen who wants to move his residence to another place has his or her removal registered. For this he or she should present the application for removal registration to the public security organ of the residing district. The citizen who has had his or her removal registered moves to the new residence place and registers his or her residence.<sup>31</sup>

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<sup>29</sup> Hayden Windrow, Anik Guha (2005)

<sup>30</sup> Hurst Hannum (2004), p.76.

<sup>31</sup> The second periodic report of the Democratic People’s Republic of Korea on its implementation of the International Covenant on Civil and Political Rights, Para.75-80.

And then the HRC made a list of issues, and among the issues the Committee asked in Para. 13 (1) “Is an administrative permit still required for travel by citizens of the Democratic People's Republic of Korea within the country (Para. 76 of the report)? How is this practice considered compatible with article 12 of the Covenant?” Finally, the Committee in its Concluding Observations<sup>32</sup> noted:

19. [...] the State party's justification of the "traveller's certificate" which citizens of the Democratic People's Republic of Korea are required to obtain for travel within the country, but considers that such restrictions on domestic travel raise serious questions about their compatibility with article 12, paragraph 1, of the Covenant.

The State party should consider the elimination of the requirement of travellers' certificates.

Thus, in the point of view of HRC, application by citizens for administrative permit to move or reside within his or her own country is not compatible with the relevant international human right standard in ICCPR. Furthermore, the HRC criticized the unreasonable requirements in its General Comment 27:

5. [...] the enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.

17. [...] regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, [...].

Now let's draw inference from North Korea instance to consider China's hukou system. The North Korea case shows that the practice that people shall apply for approval and obtain the registration and papers concerned before moving to another place and residence within States is inconsistent with ICCPR. Hence, there is no doubt China's hukou system

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<sup>32</sup> Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea. (2001)

which requires the citizens to go through similar administrative procedures and apply for permits, is not compatible with Article 12, ICCPR either.

### 2.2.3 Lawful limitation without discrimination

The right to freedom of movement and residence is a very basic and important civil right; however, it is not an absolute one without any limitation. Both article 12 (3) of ICCPR and Article 2(3) of the fourth protocol of the ECHR lay down similar restrictions upon the right to freedom of movement and residence: “shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the right and freedom of others, and are consistent with the other rights recognized in the present Covenant”.

A key point for the discretion of States in applying restriction on the freedom of internal movement and residence is the principle of non-discrimination. HRC holds the view in its General Comment:

18. The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, [...] national or social origin, property, birth or other status.<sup>33</sup>

“In most part of the world, had individual free choice and pragmatism prevailed, city-ward migration would be the natural choice outcome”,<sup>34</sup> however, it is not this case in China. There are four overall principles governing hukou system and internal migration in PRC<sup>35</sup>:

1. To strictly control any migration that changes agricultural or rural hukou to non-agricultural or urban hukou, town hukou to city hukou, or city hukou to metropolitan hukou.
2. To control migration appropriately from the countryside to suburban areas,

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<sup>33</sup> ICCPR, General Comment 27, Para.18.

<sup>34</sup> Linda Wong, Huen Wai-Po (1998), p. 975

<sup>35</sup> Yu Jing (1991), p.55.

- from suburban areas to cities, or from small cities to large cities.
3. To allow parallel migration between or exchanges of hukou zones in similar villages, comparable towns, or similarly ranked cities.
  4. To encourage dispersal from cities to towns, from large cities to small cities, and from urban areas to the countryside.

“There is no denying that China’s development trajectory has an urban bias. It favours industry and urbanites over agriculture and agricultural producers.”<sup>36</sup> From the principles described above, we can see that the non-metropolitan hukou holders are controlled when they want to emigrate to metropolitan cities and that the rural society and rural citizens are most strictly prejudiced.

Responding to the four overall principles, the *Household Registration Regulations* provide more in detail:

Article 10: “[...] a citizen moving from a village to the city must hold proof from the city’s Labor Department, proof of a school’s acceptance, or proof of an immigration permit from the institution responsible for registering his permanent residency and apply to go through emigration procedures...”

Article 15: “When a citizen temporarily resides outside of the place of his permanent residence for over three days, he or a household head of the place of temporary residence will register for temporary residence at the institution responsible for registering household registration within three days, and before leaving he will have it nullified. An individual temporarily residing at a hotel will simultaneously register through the hotel for a traveller-registration registry.

A citizen who permanently resides in the city and temporarily resides within that county or temporarily resides in a village outside his place of permanent residence does not need to register for temporary residency except, when temporarily residing at a hotel, for registering through a hotel for a traveller-registration registry.”

We should note that the application of immigration permits and the limitation for internal movement is only set up for citizens holding agricultural hukou (rural citizens), while on the contrary, the urban citizens do not need to go through any procedures to apply for

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<sup>36</sup> Linda Wong, Huen Wai-Po(1998), p.975

administrative permits. Based on people's birth place and hukou type, limitations imposed on agricultural hukou holders constitute a violation of their rights to freedom of movement and right to non-discrimination as well when compared with urban residents.

The differential treatment upon farmer workers will be further addressed in detail in Chapter 3 and Chapter 4 by referring to the one of the requirements for limitation upon freedom of movement - the consistency with other rights. Consistency with the other rights recognized in international human rights treaties is a condition for the lawful limitation. "The restriction placed upon a person's right to move about and reside in a State ought not to negate his or her ability to enjoy other rights contained in the Covenant because of the interplay between those rights and the freedom of movement."<sup>37</sup> However, the restriction imposed by hukou system in China on freedom of internal movement and residence is not consistent with the enjoyment of non-discrimination, right to work and etc.

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<sup>37</sup> Zhu Lijiang (2003).

### **3 Direct discrimination against farmer workers in employment under the hukou system**

It is mentioned in Chapter 2 that the limitation on the right to freedom of movement should be consistent with other rights and with the fundamental principles of equality and non-discrimination in international human right treaties. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12 ICCPR were restricted by making distinction of any kind such as social origin and inconsistent with other rights.

As a matter of fact, Chinese citizens are not entitled to a Constitution-based freedom of movement as there is a lack of legal protection with any relevant provision in the Chinese Constitutional Law<sup>38</sup>. What's more, governments make use of hukou system to ensure against the occurrence of free movement. However, it seems that the direct control of movement by hukou is not as effective as planned, and the fact cannot be denied that people are rapidly and frequently moving and migrating due to the economic development.<sup>39</sup> Thus, the national and local governments find a way to control the de facto movement by restricting people's right to work, which is a disguised limitation of freedom of movement. This chapter will take the examples of farmer workers' non-access to urban employment to further evaluate the means of restricting migration to cities and address the direct discrimination issue in employment under the hukou system.

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<sup>38</sup> The 1982 Chinese Constitutional Law (2004 amendment).

<sup>39</sup> "Since the Chinese economic reform which was launched in the late 1970s to stimulate Chinese market economy and development of industrialization, nearly 40 percent to 47 percent rural laborers have become spare ones, and then this bulk of spare labors from rural areas moved into cities. After 1990s, the number of emigrating-to-work farmer averagely goes up by 5 million for each year. From 1997 to 2000, the number of rural emigrating laborers all over China went up from 83.15 million to 113.4 million by accumulating 10 million for each year." See. Science Academic Institute, Ministry of Labor and Social Security (2003), P.189.

Obviously, the right to work includes the right of a person to seek for a job anywhere because a person has the right to “free choice of employment”<sup>40</sup> and “the opportunities to gain his living by work which he freely chooses or accepts”<sup>41</sup>. International Labor Organization Convention No. 122 concerning Employment Policy (1964) also speaks of “full, productive and freely chosen employment”, thus, the right holders in search of jobs can sojourn in the places where they were born, or go to other places, or even cross the national frontiers. One of the essential features of the right to work is “*accessibility*”, which “includes the right to seek [...] on the means of gaining access to employment [...] at the local, regional, national and international levels”<sup>42</sup> and the first component accessibility is non-discrimination.<sup>43</sup> Hence, it is worth discussing the discrimination issue of the hukou system.

When judging a typical direct discrimination case, three aspects should be taken into consideration<sup>44</sup>:

- (1) Whether the complainant has been treated less favourably than others who are in comparable circumstances or analogous situations?
- (2) Whether there is a connection between the less favourable treatment and the prohibited grounds for differential treatment such as social origin?
- (3) Whether there is an exception or justification which permits the less favourable treatment?

### 3.1 Differential treatment in comparable circumstances

It is not difficult to find out farmer workers with non-local agricultural hukou and local urban workers who are non-agricultural hukou holders have the analogous situation when seeking for jobs. Both of them are nationals of People’s Republic of China and enjoy the

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<sup>40</sup> Article 23 Para. 1, UDHR, “everyone has the right to work, to free choice of employment, [...] to protection against unemployment. [...]”.

<sup>41</sup> Article 5 Para. 1, ICESCR, “States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunities to gain his living by work which he freely chooses or accepts, [...]”.

<sup>42</sup> ICESCR General Comment 18, Para.12.

<sup>43</sup> Ibid, Para. 12 (b) (i).

<sup>44</sup> Ronald Craig, (2006) p.33.



constitutional basic right to work<sup>45</sup>. Thus, when seeking for jobs in the labor market, farmer workers are in the comparable circumstances compared with local workers.

The prohibition against direct discrimination means “like cases should be treated alike”. Hence, farmer workers should be ensured as far as possible they are treated no less favourably than the non-agricultural workers who are local residents of receiving cities in all aspects of employment. As regards the differential treatment, it will be described and discussed between these two groups of people.

### 3.1.1 Granting employment priority to local non-agricultural residents

In Shanghai, “*The Implementation Guideline for Local Enterprises to Employ Local Civilians before Hiring Wailai Wugong Renyuan*<sup>46</sup>”, which was carried out by Shanghai Employment Promotion Center in March 19<sup>th</sup> 2001, set up a general principle --- “give priority to non-agricultural residents rather than agricultural residents; give priority to local civilians rather than those from other places”. And it has further specific regulation: “The employers should, if necessary to employ *Wai Lai Lao Dong Li*<sup>47</sup> on a basis of the need of manufacture and business, at first take local laborers [...] the employers should take at least 15-30 percents of the local applicants [...]”.

The Guangzhou government also adopted the similar policy. In “*the Regulation of Controlling and Managing the Temporary Residents*” (1990), article 11 is read as: “If the enterprises or individual business units need to recruit temporary employees, they must follow the principle that ‘non-agricultural hukou residents prior to agricultural hukou residents, local residents prior to non-local residents, residents from within Guangdong Province prior to those from outside of Guangdong.’”

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<sup>45</sup> Article 42, para.1, the Constitutional Law of the People’s Republic of China (1978), “Citizens have the right as well as the duty to work”.

<sup>46</sup> Refer to Chapter 1, 1. 2 “The terminology of hukou system”.

<sup>47</sup> Ibid.

We can also find similar regulations in some other cities; however, we cannot exemplify all of them. Since the local workers are given the prior and privileged status of access to work, it is hard to say that farmer workers have equal access to work compared with local workers.

### 3.1.2 Limitation on specific positions in different areas for farmer workers

The Authority of Labor and Social Security of Shanghai Municipal Government adopted “*The classified management method for Shanghai enterprisers to use and recruit Wai Di Lao Dong Li (1995)*”, which classify the positions with limitations on *Wai Di Lao Dong Li* into three categories: “A. the positions for which the *Wai Di Lao Dong Li* can be employed; B. [...] for which the *Wai Di Lao Dong Li* can be partly employed according to redistribution; C. [...]for which the *Wai Di Lao Dong Li* are forbidden to be hired.” Afterwards, a further regulation “*Opinion on further strengthening the control and management of the Wailai Wugong Renyuan (2001, NO.11)*” set up the prohibition on *Wai Di Lao Dong Li* to have five types of specific jobs. They cannot be recruited to be: “sellers in stores or shops; cleaners in airports, bus or train stations, and docks; servers for property management; workers for public sanitation, security, and maintenance; logistic-service personnel in administrative authorities or party institutions, enterprises and social organizations.”

Meanwhile, some other cities set different limitations on the employment rate for specific positions. Generally speaking, the more attractive the positions are for local civilians, the stricter the limitation is for farmer workers to obtain the employment. The more proportion or quota is given to local laborers, the less opportunities farmer workers can have.

In Zhuhai, “*The classified management method for recruiting Wai Di Lao Dong Li (2000, No.107)*”, Article 3 read as:

“The method to control the positions for *Wai Di Lao Dong Li* is: [...] II. For the below positions, the rate of taking *Wai Di Lao Dong Li* cannot be more than 20 percent [...], they are: secretaries, car drivers, postmen, bus conductors or train attendants, cleaners,

storekeeper in parking places. III. For the below positions, [...] cannot be more than 40 percent [...], they are: security personnel, tourism guide, purchasing agent, any positions in hotels and restaurants.”

In Shenzhen, “*The temporary regulation for civilians to proportionally obtain employment*”(1997) , also adopted the similar policy to exclude the *Wai Di Lao Dong Li* by classifying positions into three categories with different prior employment proportions for local civilians. The employment ratios for local laborers are respectively: 80 percent, 60 percent, and 40 percent.<sup>48</sup>

Although farmer workers’ right to work “should not be understood as an absolute and unconditional right to obtain employment”<sup>49</sup>, it includes the substance that they have equal access to work and full freedom to choose employment. Urban and local workers are entitled to more proportion or quota of employment, which means that farmer workers have already lost some opportunities to choose specific employment before equal competition with urban workers in the labor market.

### 3.1.3 Setting up strict examination and approval procedures before recruiting farmer workers

The employers are not free to recruit the employees when farmer workers apply the positions. They are required to strictly control the work positions to farmer workers and not authorized to recruit them depending on their own decisions. The employers need to report to local authorities of employment and get their approvals before recruiting farmer workers,

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<sup>48</sup> “*The temporary regulation for civilians to proportionally obtain employment*”(1997), *Appendix*, “I. For the following positions, the rate of taking local laborers cannot be less than 80 percent, including: accountants, cashiers, secretaries, typists, statisticians, car driver, secret-profiled document postman, sellers in post office, property management personnel, sellers for finance and insurance business. II. .... cannot be less than 60 percent, including: store sellers, store cashiers, storehouse keepers, commodity purchasers, tourism guide, dispatcher or controller in bus and train stations, ticket-sellers in train stations, train attendants, economic policeman or security personnel or cleaner in finance and insurance business. III. ....cannot be less than 40 percent, including: housekeepers, cleaners, public bus drivers, car maintenance workers, security personnel in parking places, receivers for international letters, property maintenance worker. .... IV. After implementing the quota employment regulation, the following industrials should take local laborers as employees with no less than following proportions: wholesale trade 78%, tourism, hotel and restaurant service 50%, transportation service 60%, postal and telecommunication service 80%, finance and insurance industry 87%, logistics management service 66%, storehouse service 76%.” This regulation was abolished in 2002 and taken place by new implementation regulation.

<sup>49</sup> ICESCR General Comment 18, para.6.

and authorities will examine the number of farmer candidates and what the vacant positions are. The essential aim of this procedure is to guarantee the local workers' priority of employment and their occupation of specific positions. We can find the example in *<Shenzhen Special Economic Region's Regulation of Wai Di Lao Dong Li>* (1993). "The employers should apply to the Authority of Labor and Employment for the examination and approval before recruiting Wai Lai Lao Dong Li by reporting details such as recruitment reasons, the number of candidates and working places [...]".

This kind of differential treatment doesn't directly point at farmer workers themselves, but through increasing employers' burdens if recruiting farmer workers. In contrast, when taking local laborers, employers are exempted from the same burdens or responsibilities. It is a disguised differential treatment upon farmer workers.

#### 3.1.4 "Three documents" before employment of farmer workers

In order to limit non-local labors' entering into local labor market, administrative mechanisms are set up to require farmer workers to provide three documents, including temporary residence permit, birth control certificate and work permit. Here only taking temporary residence permit and birth control certificate as examples to discuss.

The Ministry of Public Security adopted in 1995 *<The regulation for application of Temporary Residence Permit>*. Art.10, "[...] the employers cannot recruit the temporary residents who don't have temporary residence permit." In Shanghai, having *ZanZhu Zheng* (temporary residence permit) is the requisite for farmer workers to apply for *JiuYe Zheng* (work permit).<sup>50</sup>

As regards the birth control certificate, it has the first source directly from *<The Regulation of Birth Control Management of 'Liudong Renkou'>*<sup>51</sup> adopted by the State Council in

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<sup>50</sup> *<Shanghai Regulation for controlling LiuDong RenKou>*(1996), Article 21, "alien labors must apply and get *<Shanghai employment permit for alien labors>* according to the following regulations if they want to work here: [...] They are forbidden to work in Shanghai without *<Shanghai employment permit for non-local labors>*".

<sup>51</sup> *Liudong Renkou*, means floating population. in the Chinese terminology, Liudong Renkou targets at agricultural hukou

1991. Article 10 says, “Liudong Renkou should submit their birth control documents to local administrative departments of family planning [...] the authorities should issue certificates with stamps. Those who don’t have or only have incomplete birth control certificates are required to register again and apply for re-issuing.” And art.11 further says, “When relevant departments approve work permit, they should check the verified documents [...] not authorized to approve work permits if the applicants cannot submit birth control certificate.” however, we cannot find any regulation which requires local hukou holders to apply for or even show their birth control certificate in search of jobs.

In addition, it is not easy for farmer worker to successfully get these documents. Application for these documents cost farmer workers much money and time while local workers don’t need to provide the same certificates because they have local hukou registration. Each document costs more than dozens of CNY, and then each farmer worker need to pay at least 500 CNY (about 80 USD) or sometimes more than thousands of CNY if the guarantee fee is included and used for farmer workers to promise and guarantee themselves to comply with the rules where they will work. Money is not the only cost price of employment. For applying those permits, farmer workers need to go to different authorities which are located at different places or even far away from each other, and what’s worse, they normally need to go there round-way for several times because of the strict requirements.

In a word, we can find examples in the Chinese regulations that local workers have priority and privilege of employment while farmer workers stay in the inferior status with more difficulties to get access to work. Even if this chapter cannot cover all the differential treatments towards farmer workers, it is not hard to see that they are indeed less favourably treated in analogous situations with urban workers when seeking for jobs. They are deprived of some opportunities to employment before they enter into the labor market due to their agricultural hukou.

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holders when they emigrate to other places rather than their hometown. In cases of searching for jobs, Liudong Renkou means the group of farmer workers.

## 3.2 Prohibited ground of discrimination: “social origin”

### 3.2.1 “Social origin”

In the relevant provisions concerned with non-discrimination in several international conventions, there are several grounds for the prohibition of discrimination and social origin is one of them. Considering article 1 in both CERD and CEDAW, discrimination can be defined as any distinction, exclusion or preference on prohibited grounds, with the purpose or effect of impairing the equal enjoyment of rights. Then, we may conclude that the concept of discrimination on ground of social origin contains the elements as: stipulate a difference in treatment; has a certain unfavourable purpose or effect; and is based on the prohibited ground as social origin. Then we need to ask, what is social origin?

Social origin is different from social status, which is the honour or prestige attached to one’s position (social position) and can be achieved or changed through education, occupation, property and etc. People dependent on their social status live in the intersection of the social worlds. If social status can be described to divide and exclude people based on what they have regarding their skills and ownership of resources or property, or what they have done or what they do or their individual work and behaviour, on the contrary, “social origin” is used to divide or exclude people because of who they are in terms of where they are in regard to their family associations and their physical location or birthplace.

### 3.2.2 Link to the prohibited ground: “social origin”

The types of hukou under China’s hukou system are not dependent on those inherent or inherited characteristics such as ethnics, race, and etc; in contrast, the determination of categories of agricultural and non-agricultural hukou holders is based on the differences of location and association, family residence and registration. Thus, the hukou system becomes a mechanism on ground of “social origin” when registered people are limited in their migration between regions, and when they are treated differently according to their different registration categories.

We can see from the section 3.1 all the differential treatment suffered by the group of farmer workers are closely and exclusively link or connected to the ground of their “rural origin”, which is definitely “social origin” and then a statutorily-prohibited characteristic in international human right treaties. No matter granting employment priority to local non-agricultural hukou residents, or setting up less quota on specific positions for farmer workers, or even requiring documents and certificates if farmer workers want to get employed, all the practices of differential treatment affect farmer workers by reason of their being members of the agricultural hukou holding group. Hukou type is the sole cause or at least the main cause of the less favourable treatment towards farmer workers.

### 3.3 Justification defenses and exceptions

“The definition of discrimination has been used by the European Court of Human Rights since its earliest case-law on equality and non-discrimination, which is differential treatment in comparable situations without an objective and reasonable justification.”<sup>52</sup> Thus, the third criterion of discrimination definition is “without objective and reasonable justifications”, which is also confirmed in ICCPR General Comment No.18 and the working definition of the HRC in its jurisprudence:

Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

The ICESCR Committee also sent out an explicit message about the definition in its 2001 concluding observations on Japanese second periodic report. It expressed concern that the state should interpret “the principle of non-discrimination as being subject to [...] ‘reasonable’ or ‘rationally justifiable’ exceptions.”<sup>53</sup>

Hence, when we judge whether a treatment is discriminatory or unfair, it is necessary for us to seriously consider the jurisprudence that differentiation based on reasonable and

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<sup>52</sup> Wouter Vandenhoele (2005). p83.

<sup>53</sup> Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Japan (2001)

objective criteria does not amount to prohibited discrimination<sup>54</sup>, or put differently, that distinctions must be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant.<sup>55</sup>

The main purpose the hukou system traditionally served is resource distribution and migration control. The aim of differential treatment in employment comes down in one continuous line with hukou system: migration control due to the resource limitation<sup>56</sup>. The first key issue is, can resource limitation justify the differential treatment?

Although the ICESCR provides for progressive realization of rights<sup>57</sup>, and acknowledges that developing countries face resource constraints, some obligations are of immediate effect. First, each State party must implement the rights under the Covenant without discrimination of any kind, which includes non-discrimination based on “national or social origin”, which would encompass migrant populations including farmer workers. Second, there is a positive obligation to “take steps” which should be “deliberate, concrete and targeted towards realizing the rights recognized in the Covenant”.<sup>58</sup> Further, States are required to “ensure the satisfaction of, at the very least, minimum essential level of each of the rights.”<sup>59</sup>

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<sup>54</sup> *Hoofdman v. The Netherlands* (1994) para.11.4; *Schmitz-de-Jong v. The Netherlands* (1999), para. 7.2: differences in treatment based on objective and reasonable criteria, do not take the form of discrimination.

<sup>55</sup> *Lindgren v. Sweden* (1988), para.10.4: reasonable and objective criteria and made for a purpose that is legitimate under the Covenant.

<sup>56</sup> After 1990s, the number of emigrating-to-work farmer goes up by 5 million for each year. Due to the extreme pressure of accommodation by local infrastructure facilities and resources, governmental officials have responded to the influx of migrants with a proliferation of new regulations to restrict or prevent migrants from entering cities. See. Science Academic Institute, Ministry of Labor and Social Security (2003), p.189

<sup>57</sup> Article 2 of ICESCR:

“1. Each State party to the present Covenant undertakes to take step, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The State Parties to the present Covenant undertakes to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to [...] social origin, property, birth or other status. [...]

<sup>58</sup> ICESCR General Comment 3, Para.2.

<sup>59</sup> *Ibid*, para. 10.



Poverty and resources limitation can only be justifiable and reasonable consideration when taking steps towards the full realization of the rights; it cannot be taken as excuses to make the discriminatory and unfair treatment. The non-discrimination standard should be applicable to cover every individual within the State Party's territory and subject to its jurisdiction. Non-nationals may be excluded from the protection in developing countries<sup>60</sup> with due regard to human rights and their national economy; however, nationals cannot be excluded from the protection. Farmer workers, even if they are agricultural residents, are definitely citizens with Chinese nationality. We cannot help asking why they are treated differently when the non-agricultural residents and agricultural residents are both Chinese nationals.

According to Art.4 of CESCR, “[...] the state may subject such rights only to such limitations as are [...] solely for the purpose of promoting the general welfare in a democratic society”, “promoting general welfare” is a key point for the limitation. “General welfare” may, in my opinion, have two aspects of meaning. According to the *Noah Webster's American Dictionary of the English Language*, the word “welfare” means:

1. Exemption from misfortune, sickness, calamity or evil; the enjoyment of health and common blessings of life; prosperity and happiness; *applied to persons.*
2. Exemption from any unusual evil and calamity; the enjoyment of peace and prosperity, or the ordinary blessings of society and civil government; *applied to states.*

Thus, a clear distinction is made with respect to welfare as applied to persons and states. The ICESCR doesn't make clear the general welfare should be defined in the context of states or persons; however, no matter what the context is, limitation with discrimination cannot be justified for the so-called purpose as general welfare.

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<sup>60</sup> Article 2, para. 3 ICESCR, “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”

If it points at general welfare of individuals or persons, then the State Party is under the obligation to promote the common well-being of citizens governed thereunder. “The right to work is an individual right that belongs to each person” and “contributes at the same time to the survival of the individual and to that of his /her family, [...] to his/her development and recognition within the community,”<sup>61</sup> thus, States Parties should undertake the obligations to respect, protect and fulfill all nationals’ right to work. Since both of farmer workers and urban workers are Chinese citizens within China’s territory and subject to its jurisdiction, Chinese government has the obligation to guarantee that this right will be exercised without discrimination. Hence, the explanation that China doesn’t have enough available recourse cannot be reasonable justification for favoring urban residents and city development by sacrificing farmer workers’ rights and interests.

If it points at the general welfare of the whole state, it is difficult to think of it not congruous with farmer workers’ interests. Since the 1980s, China has been moving constructively forward with growing rural to urban migration, farmer workers have provided essential labor in developing China’s urban centres and industrial areas. Indeed, they “not only speed up the development of their hometown, but also help build skyscrapers in cities.”<sup>62</sup> Thus, depriving farmer workers’ full enjoyment of right to work is not compatible with “the importance of work for personal development as well as for social and economic inclusion,”<sup>63</sup> nor can definitely make contribution to the general welfare; in consequence, the economic, social and cultural right will lose their sense to “promote social progress and better standards of life.”<sup>64</sup> Furthermore, the agricultural hukou residents make up nearly 70 percent of the whole Chinese population; we cannot deny that their welfare is closely link to the national interest in an industrial society. Therefore, the welfare of farmer worker is definitely a big part of the general welfare of China. Without good welfare of farmer workers, the general welfare of China is far away from full realization.

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<sup>61</sup> ICESCR General Comment 18, Para. 1 and Para.6.

<sup>62</sup> Ibid.

<sup>63</sup> ICESCR General Comment 18, para.4.

<sup>64</sup> UDHR, Preamble, para.5.

In a word, “unavailable recourses” or resource limitation cannot be used to justify the discriminatory, unfair treatment towards farmer workers. Following the “Open and Reform” movement since 1978, the Chinese government made choices focusing on economic growth in urban areas that contributed to inequalities between urban workers and farmer workers. These resulted inequalities have undermined the China’s obligations under the Covenant, and suggest that there have not been proportional deliberate, concrete and targeted steps taken towards meeting its obligations. Specifically the legislative violation of non-discrimination suggests that “the Chinese government’s policies have not led to an enjoyment of economic growth by all equally.”<sup>65</sup>

The second issue, is whether the less favourable treatment towards farmer workers reasonable and objective?

As the ICESCR Committee said, “Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his /her family”<sup>66</sup>. Farmer workers are spare labors at hometowns<sup>67</sup> without land or jobs and more worse, are deprived sufficient opportunities to employment in cities, how can they survive and support their families? It is not only a matter of choice to employment, but also an issue that they need to survive. Since the government cannot properly regulate domestic and agricultural work, farmer workers’ right to work should be more protected, at least grant them the same legal status with the legal protection as granted for other workers.

The full freedom to choose and accept work without discrimination should be a basic guarantee for their and their family’s survival. It doesn’t necessarily mean that the right to work should be understood as “an absolute and unconditional right to obtain employment”; however, it includes:

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<sup>65</sup> *Implementation of the international covenant on economic, social and cultural rights in the People’s republic of China*, a parallel NGO report by Human Rights in China, April 14, 2005

<sup>66</sup> ICESCR General Comment 18, Para.1.

<sup>67</sup> Nearly 40 to 47 percent rural laborers have become spare ones because the progress of the agricultural technology make agriculture need few farmers and the rapid modernization make the governments take over rural land for commercial use.

The right of every human being to decide freely to accept or choose work. This implies not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment. It also implies the right not to be unfairly deprived of employment.<sup>68</sup>

And additionally, the “accessibility”-The labor market must be open to everyone under the jurisdiction of States parties, include the dimension:

under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of [...] social origin, [...] which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.<sup>69</sup>

If farmer workers are inferior and not entitled to equal access to employment compared with urban workers on the ground of where they were born, Chinese government makes its nationals into two categories with urban residents as “the first-class citizens” and rural residents as “the second-class citizens”. This hypothesis will also make China violate the universal recognition of inherent dignity and art.1 of UDHR “all human beings are born free and equal in dignity and rights [...]” and, art.33 of its own Constitutional Law “all citizens of People’s Republic of China are equal before the law” as well. In addition, states are required to pay particular attention to “any worse-off regions or areas” and “any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged.”<sup>70</sup> Compared with farmer workers, urban workers are not disadvantage group which need to be cared for to realize the substantial equality, because it is exactly on the contrary that farmer workers are not entitled to receive the same social advantage such as old-age pensions and subsidized housing which are applied to urban workers. It is the farmer workers who are disadvantage ones and need more opportunities.

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<sup>68</sup> ICESCR General Comment 18, Para.6.

<sup>69</sup> ICESCR General Comment 18, Para.12.

<sup>70</sup> ICESCR General Comment 1,Para. 3.

## **4 Reforms and the follow-up indirect discrimination against farmer workers**

Recent reforms to China's hukou system have begun to redress the historical bifurcation of Chinese society into urban and rural classes since 2000. However, hukou reforms are not systemic from national to local levels, but sporadic and different from locality to locality. The reforms seem feasible in resolving the direct discrimination against farmer workers based on their agricultural hukou in appearance; as a matter of fact, recent reforms reduce a hidden unfair effect on farmer workers. As the ICESCR Committee says “indirect discrimination occurs when a law, policy or program does not appear to be discriminatory on its face, but has a discriminatory effect when implemented”<sup>71</sup>, thus, this chapter will describe some reforms and discuss whether the new policies with the resulted effect constitute a new indirect discrimination.

### **4.1 Recent reforms at the local level**

Take Shanghai as the first example. The reform provides preferential treatment towards educated professionals in name of importing talented people. As described in Chapter 3, farmer workers need to apply for temporary residence permit and work permit if working in Shanghai. In contrast, the article 2 of <Shanghai regulation for non-local talents' residence permit> is read as “Chinese or foreign talented people who have bachelor degree education backgrounds or above, or have specific skills, can apply for and get residence permit of Shanghai without changing their permanent hukou registration or nationalities”. And in addition, “the non-local talents don't need to apply for the work permit”<sup>72</sup> while application for the work permits is a requisite for farmer worker to get employment.

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<sup>71</sup> ICESCR, General Comment No.16, para.13.

<sup>72</sup> <Shanghai Regulation of Non-local Talents' Work Permit> (Shanghai, 2000, No.33)

In Guangdong, it has reportedly eliminated the urban-rural distinction altogether and no longer stamps hukou as "urban" and "rural", or "non-agricultural" and "agricultural", while issuing all the Guangdong people the same "Guangdong resident hukou". Nevertheless, farmer workers migrating to Guangdong from other provinces still try to have local hukou to access the city's social services. The further local reform in reality favours educated professionals. The government of Guangdong Province made the policy that "if professionals with doctor, master or bachelor degrees and technological talents with high-class certificates come to work in Guangdong, they and their family can register as local residents."<sup>73</sup>

Normally, talents in Chinese terminology are thought to be the group of people who are engaging in the high technological, scientific, cultural and educational work, commercial trade, economical management and etc. Of course, rural people can possibly become from farmer workers to members of the so-called group of talented people if they have high education background or excellent work experience in those high-level working areas. It seems that the reforms no longer give differential treatment on ground of different hukou types or social origin, while only providing favourable treatment towards educated professionals due to the need of importing talented people. Therefore, it sounds as if rural people had chance to become talents and thus they were also entitled to the preferential treatment in Shanghai or could register as Guangdong residents. Since everyone has the same chance to become talented people as long as they study hard, this kind of policy in reforms is facially neutral without intentionally distinguishing agricultural hukou holders from non-agricultural hukou holders on the prohibited ground of social origin.

#### 4.2 Discriminatory effect

Local governments grant favourable treatment towards talents people without a discriminatory intent to bring unfairness to farmer workers. However, "discriminatory

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<sup>73</sup> <The Opinion about How to Make Further Reform of Hukou System in Guangdong Province> (2001, No.106), [http://www.szlawyers.cn/Article\\_Show.asp?ArticleID=1724](http://www.szlawyers.cn/Article_Show.asp?ArticleID=1724)

intent is not an essential element in the concept of discrimination”<sup>74</sup>, because discrimination is any distinction with the purpose “or” effect of impairing the equal enjoyment of rights but not with the purpose “and” effect. Thus, the treatment constitute indirect discrimination if it has discriminatory effect by resulting in unjustifiable, disadvantageous and differential consequences for farmer workers linked to prohibited grounds. As the HRC said in 2001 about the indirect discrimination:

A violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds of enumerated in article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, [...] national or social origin, or other status.<sup>75</sup>

As a matter of fact, “in the case of indirect discrimination, treating unequals equally leads to unequal results which can have the effect of fostering inequality. Indirect discrimination deals with institutional and structural biases.”<sup>76</sup> The new policy in local reforms seems fair because everyone has chance to become talented persons and then it applies to everyone, but when applied, it acts as a barrier to persons of the particular group - farmer workers.

If farmer workers want to work in cities and enjoy those sound treatment in the reforms, first they have to have high education background or high-class certificates. There is no showing of a social origin purpose or an invidious intent behind these requirements. However, farmer workers have less chance than urban people to have high-education diplomas or high-class certificates. There are three reasons we need to take into consideration why farmer workers have less chance. First, farmers have common pressure of poverty, and thus are involved in cultivation activities or emigrate to work at a very young age. Normally, farmers survive dependent on the cultivation products and the little

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<sup>74</sup> Ronald Craig (2006). P.77.

<sup>75</sup> *Althammer et al. v.Austria* (2001),Para.10.2. It didn't find a violation, for the measure was found to be based on objective and reasonable grounds.

<sup>76</sup> *Analytical study of the High Commissioner for Human Rights on the Fundamental Principle of Non-discrimination in the Context of Globalization* (2004), Para.12.

income of selling spare crop or fruit products.<sup>77</sup> This little income is, however, used to pay daily expense, the farm manure and seeds, and the tuition fee for the children's education as well. What are worse, farmers are faced with great economic difficulties when they become old or get sick as they don't have the public medical or old-age insurance. Hence, most of them have to stop their study after the junior or senior high school and begin to earn money for supporting their families. And there are examples that some rural students who get the admission letters from universities have to quit the chance because their family cannot afford them the tuition fee for high education.<sup>78</sup> Second, there is a big gap of education quality between urban and rural areas, which is a fact admitted by the Ministry of Education.<sup>79</sup> Students in rural area are not well provided with adequate study equipments and the teachers there receive low salaries. Since China is a State party of ICESCR, it has the obligation to fulfil the right to education and its feature: "availability" - "functioning educational institutions and programmes have to be available in sufficient quantity with the jurisdiction of the State party. [...] for example, [...] trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as library, computer facilities and information technology."<sup>80</sup> Recent years, Chinese government has organized a lot of volunteers to go to western rural areas to be teachers; however, most volunteers are not professional trained teachers but just non-pedagogical graduates from universities. Rural students receiving the education taught by volunteering graduates are not competitive in the national examination for attending universities or colleges compared with urban students taught by professional teachers with rich teaching experience. Thus, Chinese government cannot be thought to effectively fulfil its obligation "to ensure that the standards of education are equivalent in all public educational institutions of the same level"<sup>81</sup>. Third, the children of farmer workers cannot enjoy the same treatment as urban children if they join their parents to go to cities. As regards the third reason, this paper will discuss it further in section 4.3. Although this paper

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<sup>77</sup> For agricultural hukou holders, foods were mainly self-produced and food consumption was depended on productivity. The income is paid by the rhythm of the agricultural cycle and income level is depended on productivity and state purchasing prices.

<sup>78</sup> Zuichu de Zuichu (2007).

<sup>79</sup> People's Daily (2006)

<sup>80</sup> ICESCR, General Comment No.13, para.6 (a).

<sup>81</sup> UNESCO, Convention against Discrimination in Education, Article 4 (b).



takes farmer workers as the target group, we can't consider their rights in a very limited way and it is worth discussing their children's right to education, as this right also significantly affects the evaluation of indirect discrimination and full realization of farmer workers' human rights in employment. In addition, children are a very important part of farmer workers' family lives and they are right holders themselves.

### 4.3 Right to education without discrimination

There is no doubt that the close connection between parents and children is of great significance for children's survival and development. Children need special safeguards and care before and after birth, which is claimed in UDHR and reaffirmed by CRC<sup>82</sup>. Therefore, article 18 para.1 of CRC further confirms the parents' responsibility by saying that "parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern". Then, we take it for granted that the farmer workers take their children to join them when emigrating to work and thus the parents can perform their responsibilities. Conversely, farmer workers are faced with a dilemma when sending their children to local schools when emigrating to cities.

ICESCR recognizes the right of everyone to education in article 13. China implements this international standard by making national education policy as "the children and adolescents of right ages [...], based on their hukou registration, attend schools near their homes."<sup>83</sup> We can see that the realization of children's right to education is closely linked with and subject to the place of their permanent hukou registration. Obviously, farmer workers' children with the characteristic of separating themselves from their registered hukou villages have to face disadvantages when they join their parents in the cities.

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<sup>82</sup> Article 25, para.1, UDHR: "[...] childhood is entitled to special care and assistance". Preamble, para. 9, CRC: "the child, by the reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".

<sup>83</sup> Compulsory Education Law of the People's Republic of China, article 12 para.1.

For example, since the middle of 1990s in Dongguan City, the non-local hukou holding children have attended public schools in name of “*Jie Du*” (Borrow education) on a temporary basis. The local government categorized all the non-local students as “*Jie Du Sheng*” (Education Borrowing Students). This group of children might go to public schools if their parents can pay a high price for “borrowing education”; otherwise have to attend private schools. In concrete terms, a high extra fee besides regular tuition fee, in name of “*Zan Zhu Fei*” (Donation for school development) need to be paid to the school which the children want to attend. Generally, the parents pay this donation not on a voluntary basis while they have to do so if they don’t hope their children will be rejected by public schools. “This donation cost at least 6,000 CNY”<sup>84</sup>, which means a lot for farmer workers. In contrast, the parents of the children with local hukou registration don’t need to pay the same extra fee for attending schools. Thus, the “*Zan Zhu Fei*” is a typical example of differential treatment towards not only farmer workers’ children but also farmer workers themselves based on the different types of hukou registration.

As regards the essential feature of the right to education, two of the three dimensions of “accessibility” are non-discrimination and economic accessibility.<sup>85</sup> “Education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any prohibited grounds”<sup>86</sup> The ICESCR Committee confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party; and article 2, para.1 of CRC also says “State Parties shall *respect and ensure* the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s [...] ethnic or social origin [...]”. Hence, it is obvious that the rejection by public schools towards non-local children based on their hukou violates children’s right to education. The collection of “*Zan Zhu Fei*” is incompatible with the substance of the right such as economic accessibility, especially incompatible with the standard that “primary

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<sup>84</sup> Nanchong Daily Newspaper (2007).

<sup>85</sup> ICESCR, General Comment No.13, para.6 (b) and 34.

<sup>86</sup> Ibid, para.6 (b).

education should be compulsory and available free to all”<sup>87</sup>. Therefore, compared with the local children, non-local children are definitely unfairly treated by public schools on the ground of their social origin.

In addition, article 26 of ICCPR guarantees a general and non-accessory, right to equality before the law, equal protection of the law, prohibition of discrimination and protection against discrimination. Consequently, any distinction based on social origin relating to the practice of education such as access to education, tuition and fees, constitute a violation of article 26 of ICCPR, as “in the well-known Dutch social security cases the HRC established its constant jurisprudence that article 26 of the ICCPR also protects against discrimination in the field of economic, social and cultural rights.”<sup>88</sup>

Since China ratified ICCPR, ICESCR and CRC, it as a State Party does not only has negative obligation to respect child’s right to education and non-discrimination, but also should take positive obligation to ensure these rights. China integrated this international standards into domestic law as the <Compulsory Education Law> with Article 4 read as “all the Chinese children and adolescents of right ages, has the right and liability to accept compulsory education without discrimination on ground of sex, minority, ethnic, religion, and other status”. Hence, a practical issue of how to effectively implement the law exists after a statutorily legal protection has been made. “States parties must closely monitor education – including all relevant policies, institutions, programmes, spending patterns and other practices – so as to identify and take measures to redress any de facto discrimination.”<sup>89</sup> Nevertheless, the Chinese government fails to fulfil its obligation by neither changing the practice of “*Zan Zhu Fei*” in public schools, nor stopping to make local discriminatory regulations which are not complying with “equal protection of law”.

The children of farmer workers are not only unfavourably treated compared with urban children as regards the right to education in practice, but also discriminated against in law

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<sup>87</sup> ICSECR, Article 13 (2) (a).

<sup>88</sup> Manfred Nowak (2001), p. 258.

<sup>89</sup> ICESCR, General Comment No.13, para.37.

when compared with the children from rich families and the children of high-class professionals. In Dongguan, according to the regulations made by the Education Department of local government,

The non-local children who come from the family with ‘Guangdong Residence Permit’<sup>90</sup> or any member of his/her family has ‘Special Recruitment Certificate’ can attend public primary and secondary schools and enjoy the same treatment as that towards the local children. They pay for the books, accommodation and other sundry charges at the same price as the local students pay. Other children in this group of “Jie Du Sheng” should pay the price according to the specific standard for non-local students.<sup>91</sup>

What’s worse, only the local students and the non-local children from the families with ‘Guangdong Residence Permit’ or ‘Special Recruitment Certificate’ can register in the examination for attending public senior high schools; while other “*Jie Du Sheng*” in private schools cannot do so when their farmer worker parents don’t pay “*Zan Zhu Fei*” or don’t have those permits or certificates.

The discrimination in education was defined as

any distinction, exclusion, limitation or preference which, being based on [...] national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: (a) Of depriving any person or group of persons of access to education of any type or at any level; [...].<sup>92</sup>

Each child within the jurisdiction of China should have the basic right of access to education on the basis of equality of treatment among each other. Thus, unequal access to education is definitely a violation of non-discrimination in education. The distinction in the regulation that “*Jie Du Sheng*” in private schools cannot register in the examination for

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<sup>90</sup> Buying local commercial mansion apartments or making investment is a requisite for residence permits. According to <The opinion about how to make further reform of hukou system in Guangdong Province> (2001, No.106), “citizens from other provinces buy commercial mansion apartments, make investment or establish enterprises [...] in Guangdong, they and their directly-related family members (parent, spouse and children) are allowed to register as local residents (with Guangdong residence permit).”

<sup>91</sup> Ge Xinbin, Hu Jingsong, p. 96-97.

<sup>92</sup> UNESCO, Convention against Discrimination in Education, Article 1.

attending public senior high schools based on the children's social origin (hukou) or their family's social status ('Guangdong Residence Permit' or 'Special Recruitment Certificate'), is not compatible with the substance of non-discrimination - "education must be accessible to all".<sup>93</sup> We can't help asking, since the children don't have equal access to education, how can they have equal chance to get high-education diplomas before they seek for jobs? And how can they have the same chance to become the so-called talented people to enjoy the preferential treatment after they grow up?

Hence, we can conclude that discriminatory and unfair treatments exist between the children of local residents and farmer workers, even between the children of the family with 'Guangdong Residence Permit' or 'Special Recruitment Certificate' and other non-local children.

#### 4.4 Indirect discrimination against farmer workers

Through the exposition above, we can understand farmer workers' dilemma, on one hand they cannot accompany their children and care them when emigrating to work; on the other hand, they cannot afford the extra fee for their children to attend local public schools if their children join them to emigrate. Thus, rural children left behind by their parents working in China's urban areas attend substandard schools in the rural areas and endure lives without seeing their parents for months or years at a time. Children who are able to accompany their parents in the urban areas, however, have to, due to the hukou system, trade away their opportunity to have an education for family unity.

The amended Chinese Compulsory Education Law says in article 12 para.2, "Local governments should provide conditions for the children to have equal opportunities of receiving compulsory education, if the children or adolescents of right ages need to attend local schools when their parents or other legal guardians work out of their hukou registration places [...]". In addition, the State Council issued "Decision about the

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<sup>93</sup> ICESCR, General Comment No.13, Para.6 (b) (i).

reformation and development of basic education” in May 2001 and explicitly put forward that the governments in receiving cities should take the main responsibility and the children can enter local public primary and secondary schools. However, local governments are still not willing to follow this provision and decision, for the reason that the evaluation of governments’ achievement is mostly connected with the welfare of its own people with local hukou registration. A positive assessment of governments’ performance depends on, to great extent, the interests of local hukou holding residents. Thus, the amendment of the Chinese Compulsory Education Law is far from enough, because the unwillingness of the government is essentially influenced by the hukou system. The hukou system also means that the local government has obligation to provide any service, including education, to individuals registered in this locality. Thus, governments of labor-importing cities hold the opinion that to protect and promote the non-local workers’ welfare as well as their family members’ interests is the responsibility of governments of labor-exporting cities. Therefore, they don’t want to undertake the responsibility to “waste” money and resources to develop the interests of non-local people which is not directly link with local economic indicators.

Thus, Migrant children fall within this unregistered category. One reason why farmer workers emigrate to work, earn money and pay for children’s education is that they place great hopes on their children to get rid of poverty through education. “Education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”<sup>94</sup> The essential effect of Chinese hukou system and education policy for the children of farmer workers is to make most of the children unwillingly obliged to discontinue their studies, and then to become farmer workers for low-level jobs again like their parents. The education policy based on the hukou system encourages a vicious circle: poverty is not only the difficulty for one specific generation, but also generation after generation, institutionally self-reproduces. Therefore, the new policy in reforms seems equal to everyone, but when applied, it has discriminatory effect on farmer workers and

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<sup>94</sup> Ibid, para.1.

essentially link to the ground of social origin. It still essentially favours urban people over rural people because rural people have less chance to meet those requirements. Hence, we can make a conclusion that, farmer workers are not only directly and unfairly treated through the limitation to their freedom of movement, violation of right to work, but also are indirectly and differently treated by the violation of their children's equal right to education with discriminatory effect on farmer workers themselves. Sometimes differential treatment is necessary in order to attain equality in fact; unfortunately, the differential treatment under the hukou system doesn't have this effect, but in fact strengthens the inequalities.

## **5 Conclusion and Suggestion**

### **5.1 Conclusion**

#### **5.1.1 Overview**

It is clear that from Chapter 2 to Chapter 5 the current position of farmer workers in China and even that of their family members, due to the hukou system and their agricultural hukou registration, cannot be considered satisfactory. Despite the tangible guarantees in international standards and the lip-service promised by governments through signification and ratification of relevant conventions, farmer workers are still remaining clustered at the bottom of society hierarchy, and as a result they constitute a disadvantage group and are discriminated against.

There is no denying with the substantial progress of economy in China, which has been accompanied by great changes in people's lives; many people now enjoy a happier and higher quality of life than they ever knew in the past. Especially in some developed regions, the lifestyles and consumption patterns have reached the international standard. However, the group of farmer workers with agricultural hukou registration is lack of opportunities to enjoy the benefit brought by the dramatic economic developments the same as urban residents with non-agricultural hukou registration. In order to assure the economic livelihood of urban industrial workers and due to the so-called resource limitation, Chinese government through the hukou system provides and grants non-agricultural and urban residents greater employment opportunities, subsidized housing, free education, medical care and old-age pensions, while making regulations prevent rural residents from moving to cities and obtaining many public services their urban counterparties received.



In Chapter 2, we have discussed that the freedom of internal movement is a basic human right. It is no longer a domestic matter. The international community has made several human right treaties and established a set of international standards to deal with it. It is, however, not an unfettered right without any limitation. ICCPR grants the State parties some discretion to set up restrictions upon the freedom of movement in some situations; during this process, consideration should be taken to the key point that the relationship between the right and the limitation cannot be reserved and used to essentially corrode the substantial part of the freedom of movement. The restriction upon the freedom should meet the basic principle of non-discrimination and be consistent with the enjoyment of other human rights stipulated in the relevant conventions.

If the citizens are required to register to move from one place to another, they should not be deprived of the essence part to enjoy the freedom of movement. As the HRC suggested in its General Comment and Concluding Observation in North Korea case, some registrations and requirements are so severe that they are incompatible with article 12, ICCPR. When drawing reference about China's hukou system from North Korea instance, we can find that the China's hukou system is a comprehensive social system setting up the barriers between rural areas and urban areas for citizens. This system requires the farmers living in the urban areas with agricultural hukou registration to obtain permission in order to move into cities, while urban residents don't have much limitation in the comparable situations.

### 5.1.2 Discrimination

Government enforcement of the hukou system, traditionally one of the most potent tools to control population mobility in the face of the massive number of rural migrants in China towns and cities, has failed due to the rapid economic development. Thus, the national and local governments restrict farmer workers' right to work and their children' right to education to control the de facto movement, which means a covert and disguised limitation of freedom of movement.

In Chapter 3, this paper have discussed the differential treatment upon farmer workers in employment, such as granting employment priority to local non-agricultural residents, setting up limitation on specific positions for farmer workers, setting up strict examination and approval procedures upon employers before recruiting farmer workers, and even requiring farmer workers to well prepare some certificates and documents which are not relevant to the jobs and positions. As a matter of fact, farmer workers and urban workers are placed in the comparable situations when seeking for jobs. Both of them are nationals of the People's Republic of China and enjoy the constitutional basic right to work. The non-discrimination standard is applicable to cover every individual within the State Party's territory and subject to its jurisdiction. However, all the differential treatment suffered by the group of farmer workers are closely and exclusively link or connected to the ground of hukou registration types. The hukou types and auxiliary economical and social treatments are derived from rural residents' birth places and family associations. Farmer workers' rural origin makes them a different and disadvantaged group compared with urban workers. Thus, the hukou system can be taken as a mechanism on ground of "social origin", which is a statutorily-prohibited characteristic in international human right treaties.

Both of HRC and ICESCR Committee, when determining a direct discrimination case, hold the opinion that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. Taking into consideration of the hukou system's purpose to control migration and ultimately limit resource, it is difficult to find any reasonable defence and exception. First, the ICESCR provides for progressive realization of rights and acknowledges that developing countries face resource constraints, however, State's obligations to implement the rights under the Covenant without discrimination are of immediate effect, and to ensure the satisfaction of, at the very least, minimum essential level of each of the rights. Poverty and resources limitation can only be justifiable and reasonable consideration when taking steps towards the full realization of the rights; but it cannot be taken as excuses to make discriminatory and unfair treatment, particularly for the individuals. Second, considering the limitation allowed by ICESCR on

rights due to the pursuit and promotion of general welfare, agricultural hukou residents occupy most part of Chinese population and then their interests are definitely linked to China society's general welfare and national interests. Thus, farmer workers' right to work is essentially important for their personal and the whole nation's development; otherwise the economic, social and cultural right will lose their sense to promote social progress and better standards of life. According to the enumeration in CESCR General Comment, farmer workers should have the right to be able to work and equal access to work, allowing him/her to live in dignity. Favourable treatment towards urban workers is not reasonable or objective and then resource limitation isn't a justified defence. Hence, hukou system makes up a direct discrimination in employment against farmer workers and China failed to fulfil its obligation under ICESCR.

Then, some local governments initiated some sporadic reforms to the hukou system and how non-local people can migrate to work. The local governments grant favourable treatment towards talents people without a discriminatory intent to bring unfairness to farmer worker and, the new policies seem fair because everyone has chance to become talented persons and then it applies to everyone without showing of a social origin purpose. Chapter 4 discussed that the reform acts as a barrier to farmer workers when applied, and analyzed that farmer workers have less chance than urban people to have high-education diplomas or have professional skills. First, farmers have common pressure of poverty, and thus are involved in cultivation activities or emigrate to work at a very young age. Second, there is a big gap of education quality between urban and rural areas. Third, the children of farmer workers cannot enjoy the same treatment as urban children if they join their parents to cities. As regards their children's right to education, accessibility is a fundamental feature. According to right to non-discrimination confirmed by ICCPR article 26 and the right to education without discrimination affirmed by ICESCR and CRC, rural children should have equal access to school compared with urban children without discrimination on any prohibited ground. However, based on their hukou registration, rural children shall attend schools near their home, and they will be rejected by public schools in cities if their parents cannot pay the extra fees besides tuition fees. The rejection and the collection of

extra fees for attending schools constitute a violation of right to education and the Chinese government as a State party failed to fulfil its treaty obligation.

Farmer workers have less chance to become high-educated professional persons, and their children have less chance to receive the same quality education as urban students but with more possibilities to become new farmer workers of next generation in the future. Thus, the local reforms have discriminatory effect on farmer workers and essentially link to the ground of social origin because most people of this particular group cannot meet the requirements, thus it constitutes an indirect discrimination against farmer workers. Hence, farmer workers are not only directly discriminated against but also indirectly discriminated against link to their social origin under the hukou system.

### 5.1.3 Ineffective anti-discrimination legal remedies

Unlike European and other western countries, China doesn't have any specific provisions or acts dealing with freedom of movement without discrimination or concerned with hukou, however the general principle against discrimination and specific provisions about anti-employment-discrimination can be found in a series of laws. Unfortunately, the only few provisions can afford neither enough nor effective remedies.

Article 33 of the Constitution of the People's Republic of China (2004) established that "[...] All citizens of People's Republic of China are equal before the law. The state respect and protect human rights. Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and the law." "Since many employment discrimination victims cannot find direct legal support in statutory law, they have to base their cause of action solely on a right enumerated in the Constitution, namely the Constitution's 'equal rights' provisions". However, "the outcomes of these cases suggest that the equal rights provisions in the Constitution provide weak support to their case and in effect, the Constitution is not directly actionable."<sup>95</sup> The courts do not have the power to base decision on the constitutional provisions, and constitutional rights are not protected

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<sup>95</sup> Xun Zeng (2007). P7

except by statute. So far, farmer workers haven't brought any case of discrimination on ground of hukou against the governments and local authorities. What's more, the courts are really reluctant to "interpret the Constitution to find a particular law or government enactment in violation of the Constitution. The rejection of interpretation of the constitutional law by Chinese courts results in a highly restricted reading of these rights, and in effect, it causes the constitutional rights to be inactionable"<sup>96</sup>, which can be found in the two high-profiled cases: Mr. Jiang Tao's height-employment-discrimination case<sup>97</sup> and Mr. Zhang Xianzhu's HBV-positive health status employment discrimination<sup>98</sup>.

The article 3 of the Labor Law of the People's Republic of China (1994) provides "Laborers shall have equal right to employment and choice of occupation, [...] to social insurance and welfare, to submission of labor disputes for settlement and other rights relating to labor stipulated by law." And it further stipulates in article 12 that "laborers, regardless of their ethnic groups, race, sex or religious belief, shall not be discriminated against in employment." In addition, the principle of "equal pay for equal work" is enunciated in article 46. It should be noted that the labor law provided a very limited legal support for victims in employment discrimination cases. The grounds of discrimination prohibited in article 12 are only ethnics, race, sex and religious belief. Any other employment discrimination based on other grounds is thus implicitly allowed. Hence, the discrimination based on social origin such as "hukou" cannot be prohibited in the narrow scope of the discrimination ground in the Labor Law. What's more, article 3 is included in Chapter 1 "Principles", which means the equality is more treated as a principle here but not a specific and independent right. As such in practice, "the Labor Law in China is not operative as a general anti-employment-discrimination mechanism. Furthermore, the law fails to provide legal criteria, burden of proof, and legal remedies."<sup>99</sup>

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<sup>96</sup> Ibid, P8

<sup>97</sup> MICHAEL C. DORF (2004)

<sup>98</sup> *Zhang Xianzhu v. Wuhu Authority of Human Recourses*

<sup>99</sup> Xun Zeng (2007). p 9

Recent progress is a little bit more focus on the discrimination based on hukou, which to some degree was caused by the “Sun Zhigang Event”<sup>100</sup>. Under the social pressure, in 2003 China issued an executive directive containing the content of prohibiting discrimination against rural migrants, called “State Council Office Notice: Regarding Improving the Performance of Providing Employment Service and Managing Migrants in Urban Areas”<sup>101</sup>. It is good that this directive give more comprehensive protection for farmer workers and their children. However, it is called “State Council Office Notice” as an executive document in China’s legislation system without any legal binding effect, while only giving a guideline for local authorities to follow and behave. Farmer workers are not likely to depend on it as a powerful legal resource of effective remedies.

## 5.2 Suggestion

In drawing together with the conclusion of this paper, this section recommends the means by which the Chinese framework governing farmer workers’ rights might be improved.

### 5.2.1 Granting people the freedom of internal movement and residence

Most academic agrees that the Chinese government has no intention of abolishing the hukou system in the near future, and in 2002, the Security Minister said that the hukou system could not be eliminated immediately because it was an important component of China’s administrative system. Hence, we need to find out a way to make this system compatible with international standards without abolishing the hukou system- eliminate the restrictions upon free movement that contravene international laws and grant people freedom of internal movement.

The restrictions imposed on the freedom of movement by hukou regulations and laws conflict with ICCPR and the relevant General Comment. Since China has signed the

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<sup>100</sup> In this case, Sun was detained because he didn’t have a temporary residence permit and then was mistaken as one of the floating population without local hukou or even a temporary residence permit, and three days later he was beaten to death at a clinic for holding vagrants and beggars. This case is an extremely abnormal result of discrimination on ground of social origin. Sun Zhigang’s death paid the price for the attention from authorities on this kind of discrimination. See. China.org.cn, (2003)

<sup>101</sup> <http://www.chinacfa.cn/1/z/2006-06-17/e1792eef6f61c476bd44a0222462dcec.html>

ICCPR, the Chinese government should clear away the limitations under hukou system from national laws to local regulations. According to article 18 of Vienna Convention, “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty, or [...]”, thus, China’s international treaty commitment should be complied and then those state obligations are to be fulfilled.

As a matter of fact, the freedom of movement and residence was written in the 1954 Constitution. However, in order to support the economic growth of China’s urban areas by slowing the influx of migrant labors into cities, in 1975 the National People’s Congress (NPC) removed the explicit guarantees of freedom of movement. After the 1978 “Reform and Open” movement, the economy took the pattern of market economy and then the existing 1958 Household Registration Regulation reflects an outdated economic model dependent on central planning. Hence, the Chinese government should conform to the economic and social trend, and take measures to amend the current Constitution by inserting the right to freedom of movement and residence into it and make a new law of hukou.

#### 5.2.2 Peeling off all the extra unfair and discriminatory functions attached to the hukou system

Each member of the society should equally enjoy the justice. Tolerance and solicitude are the basic rule for a society to harmoniously exist and develop. The inequality brought by discrimination will damage social balance and even cause different groups to conflict with each other. Then the stable order will be disturbed and each member of the society cannot evade from being badly effected.

As Chinese public security officials themselves have stated that “the focal point in reform is to peel away the auxiliary functions that have become attached to hukou registration.”<sup>102</sup> There isn’t anything wrong with the system itself for civil registration and information collection, however, taking the different hukou types as a ground to set up limitation and differential treatment towards different groups of people, cannot avoid criticism. The societal disruption brought about by economic transition, causing discrimination must be managed by government’s guiding hand allowing all citizens to fully and more equally participate in the economic benefits brought on by the transition. This requires more than policy pronouncements. Hence, steadily eliminating the hukou barriers linked to social benefit and public services for agricultural hukou holders is of extreme and first importance. For example, it is imperative to abolish the limitations on the specific positions for farmer workers, and the unreasonable requirements for farmer worker to access to employment and etc. The educational barriers relevant to hukou types for attending public schools should be eliminated. The State has the obligation to make the family unification possible in places where farmer workers work, among it let children’s right get rid of the connection with their parents’ hukou types.

Now China is preparing a totally new hukou law. In the process of making the new law, the government should have in mind that the reform of the hukou system should not lead to new inequalities. Several reforms or reform plans of local governments provide that the rural residents who are entitled to have urban hukou or urban hukou and relevant benefit shall have a sound economic background. These kinds of reforms are criticized as creating new discrimination on ground of property and urban hukou is favourable to wealthy people but closed to all others.

### 5.2.3 Increasing consciousness of non-discrimination through education

It is clear that effective laws and their meaningful enforcement cannot always bring a complete end to illegal discrimination in all aspects. The complex problem should be dealt

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<sup>102</sup> Wang Zhengzhong and Zhou Limin (2003)



with at different levels of the society. Actually, there is a real need to educate the society especially the group of farmer workers about non-discrimination.

One of the main challenges facing China is the long-term education of the population regarding the fallacies of discrimination, and its dangers to the society. Farmer workers should be provided for opportunities to know what rights they have and how to resort to remedies when their rights are violated, and the employers should be educated by making them pay for their violations.

Reform may meet resistance from an increasing vocal urban middle class because it has grown accustomed to these favourable treatment and benefit, and fears their interests being shared with rural migrants. Hence, not only farmer workers should be educated about how to protect themselves, but also the urban people need knowledge from schools, and even NGOs. Chinese government should also engage in more international exchanges and human right dialogues regarding hukou system, and propagandize information to the society.

#### 5.2.4 Endowment farmer workers full political right in elections and hear their voices

Granting farmer workers the chance to express themselves and hearing their voices are one of the essential steps to eliminate discrimination and respect and protect farmer workers' human rights. The direct way to solve this issue is electing them as part of the representatives in the People's Congress at both national and local levels. Equally enjoying political rights is a good precondition and meanwhile a strong guarantee for equal enjoyment of economic, social and cultural rights.

However, the political elections in China have clearly favoured the urban population. For the elections of people's representatives to national and local People's Congress, the Election Law insured that the majority of Chinese population, rural people, was only fractionally represented. According to law, each rural representative to the People's Congress represents more voters than one urban representative (eight times as many in

1953-1995 and four times as many after 1995). Since National People's Congress is the highest level organ of political power in China and constitutionally designated lawmaking institution, the hukou based election system institutionally segments people into privileged and excluded while allowing the urban minority to solidly control the rural majority and politically maintain their institutional exclusion, without giving rural people enough seats in the elections to express their need and request their benefit.

There is a good trend from October 2007. The Chinese Communist Party made an advice at its 17<sup>th</sup> National Conference for the reform in election to gradually implementing new mechanism that both the urban and rural deputies will represent the same number of voters. However, this suggestion hasn't been changed into normative standards; thus a pressing matter of this moment is to modify the Election Law and make this statutorily-protected election mechanism become true.

Farmer workers still face an obstacle even if the guideline becomes normative provision in law because people cannot participate in election and voting out of their hukou registration regions, neither can they participate in these activities in the temporary working and resident places. The Chinese existing election system didn't adjust the election techniques and arrangement of representative quota with taking the migration population into consideration; and thus farmer workers cannot really and fully enjoy their right to elect and right to vote. Hence, farmer workers are not likely to realize their rights in hukou registration regions due to the high expense for round way of going back to hometown, nor in the working places due to the original hukou registration, which makes them a group of institutionally marginal people.

Lack of farmer workers' political participation, the democracy and social justice cannot be truly realized, neither is the aim of harmonious society. Hence, it is imperative to involve them into the political life and social management by institutionally guaranteeing farmer workers full political right in election. Therefore, as regards those emigrating to work outside hukou registration regions for a long time, the authorities at farmer workers' hukou

registration places should issue them certificates as voters and allow them to participate the election in working places. It is really necessary to make farmer workers have their own representatives to articulate their voices, pour out their grievance and protect their interests.

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