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China Labour Bulletin, Hong Kong

Contact:

Robin Munro

Email: rmunro@clb.org.hk

Tel: +852 2780 2187

CHINA: Economic and Social Rights¹

Introduction

1. In the late 1990s and early 2000s, China carried out a wholesale restructuring and privatization of its State-Owned Enterprises (SOEs), which had previously been at the core of the socialist planned economy. The so-called enterprise restructuring (*qiye gaizhi*) program was designed to weed out inefficient enterprises by either closing them down or, through a range of new ownership mechanisms, merging them with more productive units. It was hoped that the whole process would be completed in a few years and that everyone, including the workers, would benefit from enhanced efficiency, economic growth and new job and business opportunities. Instead, severe negative consequences for the millions of workers involved continue to this day.

2. The government's failure to implement clear policy guidelines for the process, combined with a lack of transparency, flawed auditing of company assets and widespread official corruption, has left millions of workers out in the cold, with no job and barely enough income to support their families.

Impact on Human Rights

3. On the ground research and legal analysis of the SOE restructuring process shows that, despite China's staggering economic development that has helped lift millions out of poverty, the SOE restructuring process has been a barrier for Chinese citizens seeking to achieve their human rights to social security and to an adequate standard of living. Furthermore, the authorities' infringement of the right to freedom of association has prevented workers from carrying out their legitimate activities in defense of human rights. Arbitrary detention, the ineffectiveness of the official Complaints and Petitions (*xin-fang*) system, and a systematic politicization of SOE labour-related cases are all issues that have prevented Chinese workers from effectively seeking redress for violations of their lawful rights. The process has also been detrimental to the realization of the government's own

¹ Information for this submission was compiled from on-the-ground interviews with workers and lawyers in mainland China. A complete report of the research initiative will be available in a forthcoming publication, *No Way Out: Worker Activism in China's State-Owned Enterprise Reforms*, China Labour Bulletin with Rights & Democracy, October 2008.

priority objective of enhancing the right to development. The Chinese government views the right to subsistence and development as the paramount human rights objective.²

Background

4. In the 1990's and early 2000's, China underwent a process of massive privatization of its SOEs, with the total number of such enterprises falling from 64,737 in 1998 to just 27,477 in 2005. No fewer than 30 million SOE employees were laid-off (*xia gang*) during the privatization process from 1998 to 2004, and the number rose further thereafter.³ In March 2007, the vice-chairman of the All China Federation of Trade Unions (ACFTU), Xu Deming, stated that, as of June 2006, a total of 2.05 billion yuan was owed in unpaid wages by SOEs undergoing restructuring, closure or bankruptcy proceedings in 11 different provinces and cities across China, together with a total of 700 million yuan in unpaid worker compensation. He further noted that in enterprises that had already completed such proceedings, 25 percent of the laid-off workers were still not receiving any form of social security benefits.⁴

5. When bankruptcy proceedings were required, for example in the case of chronically underperforming SOEs, those with longstanding and excessive debts, or companies unable to attract a buyer, local governments – instead of adhering to the stipulations of the Enterprise Bankruptcy Law (Trial Version) – followed a practice known as “policy-determined closure” (*zhengcexing guanbi*). This was an administrative measure, triggered by government directive, but “implemented” through court procedure.⁵ By law, bankruptcy liquidator teams should have consisted of senior enterprise executives, financial experts and other officials and specialists designated by the courts.⁶ Under the “policy-determined closure” approach, however, they were composed mainly of government functionaries, and so bankruptcy proceedings that were ostensibly independent and impartial were in practice government-directed. Court officials complained that during liquidation hearings, the “bankruptcy leadership teams” simply dictated to the courts how to handle specific cases.

² “Building of Political Democracy in China” Information Office of the State Council of the People's Republic of China, White Paper, October 2005.

http://www.chinahumanrights.org/Whitepapers/Whitepapers/t20070620_256346.htm

³ Liu Yingli (March 2005). “*Jinnian gaobie xiagang zhi Gong*” (Bidding farewell to this year's laid off workers), China News Weekly, vol. 220; cited in CLB Report, *Speaking Out: The Workers' Movement in China, 2005-2006*. The category “*xia gang*,” applied to most of the workers who lost their jobs during SOE restructuring, meant that they technically remained on the company payroll for the following three years and received a monthly living subsidy from the company.

⁴ Liu Sheng, “*Gonghui jiebie weiyuan pilu 11 shengshi tuoqian guoqi zhi Gong gongzi 20 duo yi*” (Delegates from trade union circles reveal that over 2 billion yuan in unpaid wages are owed by state-owned companies of 11 provinces and cities), *Zhongguo Qingnian Bao* (China Youth Daily), 13 March 2007, from [www.people.com.cn <http://politics.people.com.cn/GB/1026/5464228.html>](http://politics.people.com.cn/GB/1026/5464228.html).

⁵ See Article 37 of *Enterprise Bankruptcy Law of the People's Republic of China (Trial Implementation)* (*Zhonghua renmin gongheguo qiye pochangfa [shixing]*), approved 2 December, 1986 by Standing Committee of the National People's Congress.

⁶ *Ibid*, Article 24.

6. According to the official news agency, *Xinhua*, in general, the SOE restructuring process resulted in two main problem areas: firstly, a lack of applicable regulations, insufficient transparency in the process, behind-the-scenes manipulation of events, and failure to give workers congresses advance notice of restructuring or bankruptcy plans; and secondly, widespread non-payment of laid-off workers' wages, pensions and social security benefits, often as a result of difficulties or irregularities in the calculation and realization of enterprise assets.⁷

No Legal Recourse

7. Despite these deficiencies in the SOE restructuring process and the resultant widespread violations of workers' rights, the authorities took steps that specifically blocked workers' access to appropriate legal remedies. On 26 March 2003, Huang Songyou, a deputy chief justice of the Supreme People's Court, stated at a session of the All-China Civil Law Working Conference:

No collective disputes triggered by wage arrears at SOEs due to state industrial policy or corporate restructuring can be accepted [by the courts] for the present....⁸

This and other similar policy rulings meant, in effect, that tens of millions of laid-off workers were arbitrarily stripped of their constitutional right to seek legal redress through the courts, as laid down in Articles 33 and 41 of the PRC Constitution.⁹

8. Also, the legal profession itself, at the government's behest, took steps to block potential litigants' access to legal representation in SOE-related collective labour dispute cases. The *Guiding Opinion of the All-China Lawyers Association [ACLA] on the Handling of Collective Incidents*, issued on 20 March 2006,¹⁰ forced lawyers involved in collective case to give case details to, and actively assist, judicial authorities and relevant government organizations. In other words, plaintiffs' lawyers are now obliged to report to and, in essence, collaborate with the accused party in the case. The ACLA directive thus severely limited the rights of Chinese workers to secure independent legal counsel in SOE

⁷ Ren Xiang., "Wu da yuanyin dao zhi guoqi gaigezhong zhigong quanyi shousun" (Five major reasons why the rights and interests of workers at SOEs have been damaged by restructuring), *xinhuanet.com*, 15 Nov. 2006; http://news.xinhuanet.com/politics/2006-11/15/content_5334163.htm.

⁸ Supreme People's Court deputy chief justice Huang Songyou, "Fengfu he wanshan xiandai minshi shenpan zhidu wei quanmian jianshe xiaokang shehui tigong sifa baozhang—jiu quanguo minshi shenli gongzuo fang zuigao renmin fayuan fuyuanzhang Huang Songyou" (A fully equipped and comprehensive modern civil judicial system provides the judicial safeguards for establishment of a basically affluent society), Supreme People's Court deputy chief justice Huang Songyou, *ChinaCourt.org*, 3 April 2003, from Xuzhou City government website www.xz.gov.cn.

⁹ Article 41 states, *inter alia*: "In case of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them. Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law." And according to Article 33, "All citizens of the People's Republic of China are equal before the law."

¹⁰ See ACLA website: <http://www.chineselawyer.com.cn/pages/index.html>.

privatization dispute cases and obtain a fair and impartial hearing of their grievances. In addition, it violates the basic legal principle of lawyer-client confidentiality.¹¹

Criminalizing Worker Protests

9. Some worker protests concerning the restructuring of SOEs have led to worker activists being arrested and sentenced on charges of “subversion of state power”. More frequent is the state’s false attribution of common criminal charges – in particular, “assembling a crowd to disturb social order” – against workers who stand up for their rights.¹²

10. The criminalization of the labour movement is further enhanced by two other factors: the Communist Party’s “politics and law committees” (*zheng-fa weiyuanhui*) and the court systems’ “adjudication committees” (*shenpan weiyuanhui*).¹³ In practice, courts accept the PRC Constitution-mandated “unified leadership of the Party” through the “politics and law committees” (*zheng-fa weiyuanhui*) – political bodies whose function is to supervise and direct the work of the police, procuracy and courts at all levels. Moreover, the politics and law committees are usually chaired by the local police chief, thus vividly illustrating the subservient position of the prosecution and judicial authorities within the legal system as a whole. These committees can interfere at will in the areas of law enforcement, court procedure and individual case adjudication.

11. The “adjudication committee” is the ultimate decision-making body within the court system, and these committees have the final say in all judgments concerning “difficult or thorny cases” (*yi-nan anjian*.) Whenever a case is so categorized, the adjudication committee meets in advance of the trial to decide on the verdict, and the hearing then becomes a formality.

12. The authorities also punish labour activists through the extra-judicial measure of Re-education through Labour (RTL), under which those seen as troublemakers can be detained and “re-educated,” solely on police authority, for up to three years without trial.¹⁴ By failing to provide for any form of trial or access to legal counsel, RTL violates article 9 of the International Covenant on Civil and Political Rights (ICCPR).¹⁵

¹¹ See: *A Great Danger for Lawyers: New Regulatory Curbs on Lawyers Representing Protesters*, Human Rights Watch, December 2006; available at <<http://hrw.org/reports/2006/china1206>>.

¹² For examples, please see the case accounts of Yao Fuxin, Xiao Yunliang, Zhu Guo, Luo Mingzhong, Zhan Xianfu, Luo Huiquan, and Zhou Shaofen in the attached report *No Way Out*, by China Labour Bulletin with Rights & Democracy, forthcoming.

¹³ According to Article 11 of the Organic Law of the Courts of the People’s Republic of China, (approved on 1 July 1979 by the second session of the 5th National People’s Congress), “People’s Courts at all levels must establish adjudication committees and implement democratic centralism.” The adjudication committees are responsible for summarizing court proceedings, deliberating upon “thorny” or “difficult” cases and dealing with other key issues arising in judicial work.

¹⁴ For examples, please see the case accounts of Wang Hanwu and Wang Guilian in the attached report *No Way Out*, China Labour Bulletin with Rights & Democracy, forthcoming.

¹⁵ First, the only remedy available to those sentenced to RTL detention is to bring an administrative lawsuit against the police chief who issued the sentence. But since this can only be done after the RTL sentence takes effect, it is at best a post hoc remedy – and one, moreover, that must be pursued from the highly disadvantageous position of a police detention cell. In practice, such legal challenges against RTL very rarely

Conclusion

13. In labour disputes that involve private enterprises, the Chinese legal system increasingly functions relatively well. More than 50 percent of workers win their cases nowadays, in both arbitration hearings and court cases against employers. In addition, China's Labour Dispute Mediation and Arbitration Law, introduced in May 2008, has improved the effectiveness of the non-litigious labour dispute resolution approach by granting labour arbitration bodies the authority to make financial compensation awards that are binding on employers in a wide range of cases.¹⁶ Another welcome initiative has been the recent establishment of a Department of Migrant Workers' Affairs.

14. However, as detailed above, many millions of former SOE workers in China have been left out in the cold and still await justice. For the government's declared policy goal of constructing the Harmonious Society to become a reality, this longstanding malaise at the heart of urban life and the Chinese economic miracle must be squarely addressed and a fundamental and durable solution devised.

Recommendations

15. We urge the Chinese government to continue in the spirit of recent positive initiatives in the labour rights area, first, by rescinding its current reservation to Article 8, 1. (a) of the International Covenant on Economic, Social and Cultural Rights, which limited workers' freedom of choice concerning trade union membership; and, secondly, by promptly ratifying the International Covenant on Civil and Political Rights, in order to better enable workers to protect their rights and economic security.

16. The government, at both central and local level, should repay its debt to the millions of workers who were victim to the SOE restructuring process. This means, above all, providing fair and adequate compensation for the loss of their jobs, together with the restitution of full pension and medical insurance benefits that unlawfully evaporated in the course of SOE reform and restructuring.

17. The government should take immediate steps to remove all arbitrary barriers and obstacles to former SOE workers who wish to avail themselves of the existing legal channels of redress. Rule of law requires not just formal equality of all before the law, but also equality of access to legal channels of redress.

18. Those currently detained solely on account of peaceful labour rights activities should be unconditionally released.

succeed. And second, although the revised PRC Criminal Procedure Law of 1996 gave criminal detainees somewhat increased rights of access to legal counsel, those held in RTL detention facilities continue to have no legally stipulated right to meet with a lawyer at any time – including for assistance in preparing an administrative lawsuit to challenge the lawfulness of their detention.

¹⁶ For more information, see CLB report: *Help or Hindrance to Workers: China's Institutions of Public Redress* at www.labour-china.org.hk