THE CRITERIA FOR EMPLOYMENT RELATIONSHIP IN CHINA

Hu Dawu

Associate professor, Southwest University of Political Science and Law

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Abstract: The issue of how to identify employment relationships in a particular case has puzzled scholars and judges for ages. In China, the problem is rooted in two critical respects, namely (i) that natural persons are not deemed employers according to the Labor Law; (ii)the negligence of requirements of dual labor markets and the trends of the human resources models. For the former reason, the court has to take a "form over substance" logic basis in hearing labor disputes cases, which is totally putting the cart before the horse. For the latter reason, there often exist conflict decisions made by judges and arbitrators in face of similar cases or even certain special cases. Nevertheless, the past three years has witnessed the promulgation of the Tort Liability Law of the People's Republic of China which has added to the confusion. Article 35 of it has made a withdrawal risk to workers who have been protected by the recent labor law back to the realm of traditional civil law. According to the existing theories, 'subordination' or 'control', as key indicators of vulnerability, are two basic characteristics of the employment relationship. Both the two elements reflect the objective relationship between the employer and employee. Not only using these fundamental characteristics to define employment relations is meaningful in the perspective of worldview, it also has been improving our understanding of the relations itself. In the process of judging whether the relation between two entities is employment relation or not, we should use subordination or control as key indicators. Meanwhile, we should find the starting point of labor protection policies from both the subjective and objective dimensions, using the methodology of critical thinking. To conclude, the labor law should expand the range of employee to natural persons in response to the judicial reality in China so that the laws with regard to workers fit the requirements of dual labor markets .

I Introduction

The debates on whether there exist the labor relationships between employers and employees or not mark that the labor relationship is one concept whose time has come and gone and now has come again. Its connotations defined by the shaping of a country's social structure, economic system and people's philosophy, show a very distinctive color of changing times and strong path dependence. Only from specific social background of the term, combined with the objective facts of cases, it could be made the correct understanding and proper interpretation. The historical dimension and practical features of the evolution of the labor relationship make its connotations ancient and eternal so that the criteria for labor relationships at all levels in academe, legislation and policy is the important theory which is directly related to the value judgment that are deeply rooted in the complicated systems In some sense, we are currently confronted with the

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In this paper,the terms of labor relationship, work unit are mainly uesed in Chinese legal context .In a broard sense,the author uses the terms of employment relationship,employee or employer..

many self-evident challenges and issues. When the academics and practitioners ,who are good at identifying who is protective workers in labor law according to classical criteria for labor relationships, are faced with many atypical employments which are often given the label of non-labor relations, the inability to identify employees in atypical relationships shows the classical criteria for labor relationships should be revised.1

Liu ZhongFan is a Chinese off-farm worker who has worked with clients of YinZhongYin Decoration Design Co., Ltd. on housing decoration projects. He was engaged as a tiler from March 2011 to September 2011.They didn't create a binding contract. In practice, as soon as the firm signed a housing interior decoration agreement with the clients, the firm would call Liu zhongfan to tile the kitchen, bathroom and balcony with wall brick, floor tile. Liu zhongfan got paid only when he has done his work and his payment depended on dimensions he tiled. He has no other working unit (employer).Up to Dec 2011, the firm owed him 13057RMB, Liu zhongfan continuously duned the firm for his payment. On the contrary, the boss of the firm gave him a severe beating .So Liu zhongfan wrote a poem entitled Dun for Wages Chilly in microblogging, thus he was named the first Chinese person who duns for wages via microblogging. In December, 2012, Liu zhongfan applied to the Labor Dispute Arbitration Board of Jiangbei District of Chongqing, arguing that he was in fact a protective worker of the firm and asking for a written statement of the particulars of his employment. He was successful at the Labor Dispute Arbitration Board, which made an arbitral adjudication stating that there existed labor relationship between Liu zhongfan and YinZhongYin Decoration Design Co., Ltd. However, the firm persistently argued that Liu zhongfan was an independent contractor and appealed to court. The court, putting its emphasis on the freedom as set by the firm, reversed the judgment.

The case of Liu ZhongFan marks the new challenge of criteria for labor relationship which has long been recognized by Chinese judge .Moreover the legal cornerstone of labor and employment law which Chinese court faced in the case just is that the problem, which has been perplexing courts, scholars, work units, and workers all over the world2, has been localized in China.

II the Criteria for Labor Relationships in China

A The Worker Concept in Statutory Rules of China

Chinese labor and employment law is the outcome of economic and political reform, which has been influencing by the economic globalization. The 21st Century has seen that China is also facing the same worker protection challenges which results from dramatic shift in strategic management of human resources as other developed countries. In some degree, the law related to labor protection in China does reflect the conflicts of globalization of economy and law. Though the concept of work unit (employer) has share the uniform and coherent notions in labor law, tort law, social security law and tax law, different notions of worker have been developed in the above laws. It's a great need of an increased coordination among labor law, social security law and tax law regarding the notion of worker. Today it seems that the legislator wouldn't intend to make the concept of worker be generally acknowledged. Thus the legal status of Liuzhongfan could be explicitly defined on the basis of reasoned distinction of worker between labor law and other laws.

1. workers in labor law and social security. A work unit or danwei3 is the name given to a

1 Guy Davidov,The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection,University of Toronto Law Journal Fall, 2002,p10.
2.Ibid,358.
3 Prior to Deng Xiaoping's economic reforms ,a work unit acted as the first step of a multi-tiered hierarchy linking

place of employment in P.R. China. While the term danwei remains in use today, it is more properly used to refer to a place of employment in the context of labor law and social security, i.e. the terms of work unit and worker are used in 1994 Labor Law of the People's Republic of China (hereinafter Labor Law),2007 Labor Contract Law of the People's Republic of China(hereinafter Labor Contract Law) ,Employment Promotion Law of the People's Republic of China（hereinafter Employment Promotion Law ）and 2010 Social Insurance Law of the People's Republic of China(hereinafter Social Insurance Law).The term of worker has the same meaning as employee in common law and the expression of work unit as employer in the Labor Law, the Social Insurance Law and Labor Contract Law. But the term of worker 4related to the social rights of Chinese citizen in social security law is relatively the sub-concepts of citizen5.In addition to workers who perform work entirely in the interest of work unit, individual industrial and commercial households without employees, part-time employees and other persons in flexible employment may enjoy social insurance benefits. 6 Obviously Social Security Law collaborates with labor law, and contract law to provide protection for workers. There is no doubt that Labor Contract Law is conducive to degrading the conflict on rights and obligations when Labor Contract Law are more concentrated on the respond to the change of dramatic shift in strategic management of human resources by balancing the need of protecting labor rights with increased flexibility in the labor market.

a. Part-time work. In Labor Contract Law, just because part-time workers are subject to still less control by work unit over performing their work than full-time workers ,the legislator makes a distinction between full-time employment and part-time employment in a few respects. On the one hand, it seems that the part-time worker has more freedom in labor relations. First of all, less working time. One worker performs the task less than four hours per day for one work unit 7.Secondly, availability in a choice of oral or written contract. Under Labor Contract Law, the parties may sign an oral or written contract and establish non full-time labor relationship. Thirdly, the double labor relationships are available at the same time.8 Fourthly, free dismissal, i.e. any party enjoys the right to terminate the contract without any reasons at any time.9On the other hand, the work unit entails still less obligations. Firstly, no severance pay shall be paid by the Employer

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each individual with the central Communist Party infrastructure. Work units were the principal method of implementing party policy. Also workers were bound to their work unit for life. Each danwei created their own housing, child care, schools, clinics, shops, services, post offices, etc.

4 The term of worker is related to the regulations of the pension, work injury, medical care, unemployment, maternity according to Social Security Law.

5 Article 1 This Law is formulated in accordance with the Constitution for purposes of regulating social insurance relations, protecting the legitimate rights and interests of citizens participating in social insurance and enjoying social insurance benefits, enabling citizens to share the achievements of development and promoting social harmony and stability.

6 Art 10::Individual industrial and commercial households without employees, part-time employees not participating in the basic endowment insurance through their employers and other persons in flexible employment may participate in the basic endowment insurance, but shall pay the basic endowment insurance premiums themselves.

7 See article 68 :The term “part-time labor” means a form of labor for which the compensation is chiefly calculated by the hour and where the Employee generally averages not more than 4 hours of work per day and not more than an aggregate 24 hours of work per week for the same Employer.

8 See Article 69:The two parties to part-time labor may conclude an oral agreement.

A Employee who engages in part-time labor may conclude an employment contract with one or more Employers, but a subsequently concluded employment contract may not prejudice the performance of a previously concluded employment contract.

9 Article 71:Either of the two parties to part-time labor may terminate the use of the labor by notice to the other party at any time. No severance pay shall be payable by the Employer to the Employee upon termination of the use of the labor.

to the Employee upon termination of the use of the labor. Secondly, in accordance with the existing policy, the employer of work unit shouldn't pay for insurance premium except for work-related injury

b. Dispatch Labor System. The dispatch of workers is, in theory, strictly controlled by the Chinese government. Only those companies or dispatch agencies which have received approval from the Chinese Ministry of Labor are legally allowed to dispatch workers as part of regular business operations. Increasing concerns have been raised over the increasing numbers of companies which violate dispatch labor rules. It forces the government to strictly regulate the conditions of Worker Dispatch. In 2012, Labor Contract Law was revised .Some articles related to labor dispatch have been seen as cracking down on companies because the dispatch work is limited to be used in the jobs which are less than six months, alternative and subservient according to the Amendment of Labor Contract Law.

c. Workers directly hired by subcontractor10. Workers directly hired by work unit which has no capacity as a subject of labor law. By comparison with the 1994 Labor Law of the People's Republic of China (hereinafter Labor Law), 2007 Labor Contract Law greatly fits in with the needs of the flexible employment.

2. Workers in tort law. There are two categories of workers in The Tort Law of the People's Republic of China (hereinafter Tort Law).(a) client（individual service acceptor） v. individual service provider. Domestic decoration workers and domestic workers are treated as individual service providers in China. If a individual service provider is subjected to work-related injury, Liabilities for damages caused by accident are allocated between parties in accordance with the principle of fault liability11.The rules has been fiercely criticized in academic circles of labor law so that some scholar argue that it's a big mistake. 12(b) Work unit v. worker. According to 34 of Tort Law13, if the worker causes the damages to the third party's interests, the employer should be liable for damages committed by the worker who performs his work.

3. Workers in interpretation of the Supreme People's Court. In 2003, the terms of Employer/ employee were used firstly by of the Supreme People's Court in Interpretation of the Supreme People's Court of Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury(hereinafter Interpretation of the Supreme People's Court).

Under Interpretation of the Supreme People's Court, the employer means natural person and work unit who are not qualified for the article 2 of Labor Contract Law. There exists the employment relationship between employers and subordinate workers hired by them. The person hired by natural employer can not be perceived as the worker covered by labor law in spite of severe subordination to his employer under Chinese labor law .But he is an employee under Interpretation of the Supreme People's Court. The employer is liable for work-related damages committed by the employee acting in a course of performance.

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10 See article 94: If an individual that contracts for the operation of a business hires Employees in violation of this Law and a Employee suffers harm as a result thereof, the organization that employed such contractor shall be jointly and severally liable with the contractor for damages.

11 See Article 35 of Tort Law: Where, in a labor relationship formed between individuals, the party providing labor services causes any harm to another person as the result of the labor services, the party receiving labor services shall assume the tort liability. If the party providing labor services causes any harm to himself as the result of the labor services, both parties shall assume corresponding liabilities according to their respective faults.

12The paragraph 2 of article 35 of Tort Law has degraded the paragraph 11 of Iterpretation of the Supreme People's Court. Just because of the rules, judges have to distinguish employment relationships from individual service relationships if they don't stop applying of the latter.

13 See Article 34 of Tort Law :Where an employee of an employer which is an entity causes any harm to another person in the execution of his work duty, the employer shall assume the tort liability.

The workers within the sphere of the Interpretation of the Supreme People's Court consist of two categories: (i) the workers who are in the scope of Labor Contract Law; (ii) the persons hired subordinately by natural employer.

4. Workers in contract law. In contract law, the concept of worker, namely contractor, is the antithesis of customer under the Contract Law of the People's Republic of China (hereinafter Contract Law). 14

The rules concerning contract for work under Contract Law imply that contractor is subordinate to customer in some extent.15According to article 260 of Contract Law, the contractor shall accept necessary supervision and inspection at work from the ordering party. Under the Interpretation of the Supreme People's Court, the ordering party should be liable for damages resulted from his negligence on his order, instruction or selection 16.Obviously, the nature and extent of ordering party's negligence compensation involves faults liabilities under Contract Law. All in all, the contractor related to service is mainly natural person. Sometimes because the ordering party implies the control over contractor in performing work, it seems that the former should be employer defined by labor law. In practice, if the customer is qualified for work unit under Labor Contract Law, it would be available to be perceived as the work unit (employer). Maybe it is the reason that Liu Zhongfan was treated as a worker within the scope of Labor Law by the Labor Dispute Arbitration Board of Jiangbei District of Chongqing.

Though Chinese legislations related to worker are configured actively to respond to the challenges of human resources management in the process of globalization and make reasonable adjustments to remove barriers for an efficient labor market, the fact that the inaction in identifying the workers who should be protected by labor law from independent workers indicates that the legislator and the Chinese Supreme Court do their best to avoid making a definition who is the worker in labor law. In practice, the Chinese Supreme Court clearly excludes some special people from the scope of labor law, such as domestic workers. Personally, there are no traditional methods of legislation in China, as many western countries are like to define some terms first in labor law17

The connotations of special terms in labor law are explained often by scholars and judges in China. It may be useful to avoid two drawbacks (i) circle logic18;and（ii）the definition always lagging behind the reality of labor market. However, in China, the lack of definition of worker in labor law has caused the outstanding difference in the process of the implementation of labor law when courts have to make a decision that whether or not one person is a worker in labor law. By comparison with some statutes in UK ＆ U.S.A, in which the definition of employer or employee

14 The customern(ording part) in the Contract Law of the People's Republic of China(hereinafter Contract Law), has the same meanings as it's in German Civil Code and Dutch Civil Code. The contractor means the business contractor or commercial contractor.In a degree, it includes the independent contractors.

15 Article 251 of Contract Law: A contract for work is a contract whereby the contractor shall, in light of the requirements of the ordering party, complete certain work and deliver the results therefrom, and the ordering party pays the remuneration therefor.

Article 260 of Contract Law: In the period of working, the contractor shall accept the necessary supervision over and inspection of the work by the ordering party. The ordering party may not obstruct the normal work of the contractor with the supervision and inspection.

16 Article 10 of Contract Law. Where an undertaker causes an injury to a third person or to himself when completing certain work, the hirer shall bear no compensation liability. However, if the hirer has any negligence on his order, instruction or selection, he shall bear corresponding compensation liabilities.

17 Langille, Brian A. and Davidov, Guy, Beyond Employees and Independent Contractors: A View from Canada (1999). Comparative Labor Law & Policy Journal, Vol. 21, No. 1, p. 17, 1999

18 More criticism was directed against at the definition of "employee"and "employer",see Langille, Brian A. and Davidov, Guy, above 17. p16.

is explicitly stipulated in labor law. Whether judges or arbitrators are in great need of definition direction because statutory definitions of "unit worker" and "worker" would be perfect to direct them to think over what judgments are in conformity with the goals of labor protection properly .The scope of worker in labor law is indirectly implied by the categories of work units, which are listed in articles of the 1994 Labor Law and the 2008 Labor Contract Law. The work unit in Labor Contract Law is divided into two separate categories according to whether they are in business or not: (i) enterprises, individual economic organizations and private non-enterprise units；（ii）state authorities, institutions or social organizations. Under 2008 Labor Contract Law, a natural person can't be work unit in labor law.

Article 2 of Labor Contract Law has caused negative effects, i.e. first of all, whether the hirer has the qualifications to employ a worker in labor law or not is the first level factor to make a decision concerning the legal status of the worker. Even if there exists obvious and severe subordination or control between a natural person and a worker, there is no labor relationship between them in China. The natural person has no responsibilities for the worker, such as social insurance premiums, overtime fee, severance pay. Secondly, the courts at all levels in China have to announce interpretation concerning the criteria for a worker covered by labor law for their trial of cases .Therefore, different courts have different criteria for a worker's employment status. Thirdly, the lack of rules concerning definition or scope has been perplexing courts, scholars, work unit and workers in China. For example, there doesn't exist the same list of work units in the Employment Promotion Law as in the Labor Contract Law. In a board sense, the state government should be covered by the law. When the authorities employ civil servants, they should obey the law.

Though it's often difficult to determine the line between an worker covered by labor law and an worker in civil law.Chinese experience reveals that the statutory definition of worker in labor law has direction functions for courts, scholars, work units, and workers. Thus, on the one hand, Chinese legislation should adopt a western-style code in the labor law, which stipulates the statutory definition of the worker. On the other hand, judges and arbitrators who hold different doctrinal opinions should intentionally insert content into these concepts in case and, in effect, determining the boundaries of each regulation's scope of application in the context of different laws related to worker protection.

B. The Criteria for Workers in the Scope of Labor Law 19

The levels of worker protection in China in deed are divided into four ranks:(a)senior rank workers within the labor law and social law, employment promotion law;(b)high rank worker within interpretation of the Supreme People's Court;(c)junior rank—service provider in tort law;(d) low rank contractor in Contract Law.

The opposite opinions on the legal status of Liu ZhongFan between Jiangbei District Court and Arbitrator Board illustrate that it's great hard to be distinguish the worker covered by labor law from independent contractor. The legislators and courts have faced great challenges. Thus on

19 Under Labor Contract Law of 2007 and Labor Law of 1994, the work unit must sign an writen contract,But in fact,the factual labor relations go with the labor relations for a long time. In order to encourage contracts parties,especially a work unit to sign labour contracts with a worker in written form, 2007 and Labor Law of 1994 stipulates punitive rules.

Article 82:If a work unit signs a written employment contract with a work more than one month but less than one year after the date on which it started using him, it shall pay the worker twice wage per month.

In fact,Critea for Worker Within the Scope of Labour Law focuses on the factual labor relation.i.e. how to make a decision whether one worker is an employee within the scope of labour law when the parties don't sign an labor contract.

the one hand , as the interpreter of the purpose of the laws, many provincial high courts enact some interpretations or applicable opinions concerning how to judge whether some one is a worker in labor law or not. On the other hand, the Ministry of Human Resources and Social Security of P. R. China (hereinafter MHRSS) has taken it upon himself to give a whole new meaning to the workers in Labor Law.

1. MHRSS' Criteria

Although the degree and extent of worker's protection results from the performance by businesses, courts and the administration of governments at all levels in China. MHRSS plays an important role in protecting workers' rights and interests from infringement.

a. Some provincial MHRSS' Criteria before 2005.In 2001, Chongqing Human Resources and Social Security Bureau (hereinafter CQHRSS) enacted the Notice of Certain Issues Concerning the System of Labor Contract (hereinafter CQN).The document puts emphasis on the conditions of the "legal qualifications of work unit and worker". Under the CQN, besides the legal qualification of parties, the criteria focus on overhauling the fact of cases:(i)A work unit provides a worker with production material, working conditions, object of labor;(ii)a worker performance is under the supervision of work unit.;(iii) There exists an agreement that a worker unit pays for a worker in currency. In CQHRSS' view, if there exists above four indicia, the worker would be the scope within the Labor Law.

Four factors reveal that the keys to labor relationship are three points, namely(i)the cooperation between labor forces and production materials;(ii)the control by work units over workers;(iii)the styles of payment with respect to reward of labour.The above three points show that CQHRSS describe the characteristics of a traditional industrial workers in factory. Non-industrial workers such as dispatch workers, home-workers aren't perceived as the worker who should be protected under CQN. Therefore, Liu zhongfan wouldn't be treated as the worker who qualifies for the protection of labor law under CQN.

b. MHRSS' Criteria

Judges will use certain criteria as a tool for gathering information on the relationship between the payer and the worker. The MHRSS' criteria is to deal with the deficiency of labor law. In 2005, the regulation of the Notice of Criteria for Labor Relationship (hereinafter NCLR) was enacted by MHRSS as a reaction to the question how to make a decision on whether one worker should be protected under labor law or not. Since then, NCLR is the most important and dominant regulation for Chinese courts ，scholars, workers, work units, which is most frequently cited for a discussion of whether there exists labor relationship between parties or not. MHRSS' Criteria include two parts, namely (i) substantial standard; (ii) formal rule.

Substantial criteria .Under NCLR, the labor relationship between parties should simultaneously have three factors below: (i) Legal qualifications of work unit and worker under Labor Law.20(ii) The labor rules and regulations made by work unit are applicable to the workers engaged in the paid labor 21and the workers are subjected to the management of the work units,

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20 on the one hand, the work unit must have the qualification for employing worker,as listed in paragraph 1 and 2 of Article 2 of Labor Law . on the other hand,the woker shoud be at least sixteen years old.

21The style of payment is variable in fact. In the casr of Liu Youguo v. Heng Tong Hotel Taxi Service Co. of Chongqing Line Haul Co,Ltd.(2011),though the taxi driver got the payment from the clients who take the taxe, the court and employment tribual arbitrator made the judgement that Liu youguo is the worker (employee) of Heng Tong Hotel Taxi Service Co. of Chongqing Line Haul Co,Ltd.

As opposed to Liu Youguo v. Heng Tong Hotel Taxi Service Co. of Chongqing Line Haul Co,Ltd.(2011), the Canadian case of Yellow Cab Ltd. v. Board of Industrial Relations et al([1980] 2 S.C.R. 761), the judge of Court of

(iii) the service provided by workers is an integral part of the business of work unit. These indicia, in fact, boil down to one question ,i.e.whether the worker is subordinate to the work unit in the respect of personality, economy and organization.

Form indicia. Under NCLR, when there were no written contracts between parties, labor relationship may be indicated by facts as follows: (a) the wage records, or the worker list for wages, or the social security records;(b) some certificates such as work card or service card granted by work unit ,which can demonstrate the identity of the worker; (c) the recruitment records such as registration form or application form filled by workers;(d) the attendance records；(e) the eyewitness testimony of other workers.

NCLR is different from CQN in three critical points. First of all, the former puts emphasis on the consideration of labor offer rather payment style in currency; Secondly, the factor that the service provided by workers is a part of the business of work unit is a crucial point ,which is very useful for courts to make a judgment whether one person is a worker within the scope of labor law by piercing the independent contractor's veil. When an work unit contract out its business to the natural person in order to avoid the liabilities stipulated in labor law, the courts may ask the work unit to perform liabilities for the vulnerable worker according to the doctrine.The facts in the case of Liu ZhongFan v.YinZhongYin Decoration Design Co., Ltd obviously illustrated that the service provided by Liu Zhongfan was the vital business parts of YinZhongYin Decoration Design Co., Ltd, whose benefit directly comes from the service labor.

However, both CQN and NCLR haven't mirrored the legal profile of peripheral workers such as Liuzhongfan. All in all, Courts and employment tribunals couldn't make a decision on whether Liuzhongfan is a worker within the sphere of labor law or not .In reality, many work units contract out their entire service with natural persons in order to escape the liabilities of protecting workers, but they in fact have control over those natural persons. Those contractors perform the same work as a worker directed by the work unit in practice. 22 Therefore, in light of the two documents above, it's hard for courts to find sufficient reasons to classify insurance marketing personnel, postal agency staff, forest caretaker and domestic worker as workers within the scope of labor law. Also, it's a hard question whether those people, who don't need the workplace or work condition provided by work unit and who are not available to rules on work ,rest system, holiday system , are independent contractors or not. 23

b. Courts' Criteria

It's a vital step for courts to decide whether a contract of employment exists or not. Chinese Courts have been grappling with the question of "who is a worker within the scope of the labor law" for four decades in order to prevent, or at least minimize the widespread avoidance of responsibilities by work units.24 It seems that The supreme Court of China would never face with a claimant who wishes to be classified as a independent contractor for tax purposes because it has no chance to make one decision concerning particular labor disputes under the Chinese judicial system. Courts' criteria are exclusively interpreted by the provincial courts or middle courts.

Appeal for Alberta took the view as follows: no wages flow from the employer-owner to the lessee driver, he cannot find that the relationship of employer and employee existed here within the meaning of the statute.

22 The Administrative Law Chamber of Standing Committee of the National People's Congress ： Labor Contract Law (Draft) Reference，China's democracy and legal system Press，2006,p42.

23The Administrative Law Chamber of Standing Committee of the National People's Congress ： Labor Contract Law (Draft) Reference，China's democracy and legal system Press，2006,p84.

24 Davidov, Guy, Who is a Worker?. Industrial Law Journal, Vol. 34, p69, 2005. Available at SSRN: http://ssrn.com/abstract=783465=2013/4/2。

The earliest judicial interpretation on control test for labor relationship, namely Discussion Minutes of Some Perplexing Issues concerning labor disputes (hereinafter MZHC), is put up by Zhejiang higher courts in 2001. MZHC states as follows：

Labor relationship25 means that the rights and liabilities relations exist between workers and work units for the purpose of labor offer. Service relationship refers to the legal relationship regulated by the rules that the worker as a service provider provides particular services for service recipient, as a result, the latter pays for the former under the agreement.26The differences between them exist in three respects: (i) in addition of elements of a debt between parties, labor relationship involves in some identity and social factors. As opposed to labor relationship, service relationship is concerned with elements of a debt only. (ii) Labor relationships between the parties are generally more stable, but service relationships between the parties tend to be temporary, short-term or one-time; (iii) Labor relationships between the parties tend to be the social relationship of management, domination. On the contrary, service relationship between the parties is the contractual relationship equally

Under MZHC, the factual labor relationship refers that the parties do not sign an labor contract, but the parties have enjoyed the rights and performed liabilities in fact .The characteristics of factual labor relationship have been stipulated as follow:(a)The worker worked for the work unit;(b)the former obeyed the rules and regulations of the latter;(c) the former was subjected to the management of the latter;(d)the latter paid the former remuneration;(e)the former got protection from the latter. However, the MZHC concering the difference between labor relationship and service relationship only reveals the theoretical hypothesis, which puts its emphasis on the substantial control. We couldn't make a decision on whether Liuzhongfan is a worker within the scope of labor law in light of five factors.

The control test states that if a person is a worker to be protected, then the work unit has the right to state not only what needs to be done, but also how it should be done. This does not mean that what happens when a person who hires a mechanic to fix their car would not be considered as a protected worker using the control test as the person could only specify what needs doing but not how the job should be done as they lack technical knowledge. Therefore there exists the problem with the control test that there are many work units who lack technical knowledge to tell their workers what to do. Hence Shanghai higher Court in China enacted the Answer to the Questions Concerning Labor Disputes in 2002(hereinafter AQLD).

The paragraph 8 of AQLD states that though there is no written labor contract, the nature of relationship between two parties could be treated as labor relationship, if there exists simultaneously factors as follows:

(i)the work unit paid the work remuneration；(ii) the worker performing the services is an integral part of the work unit or the former in fact is subordinate to the supervision and control by the latter over not only what needs to be done, but also how it should be done;(ii)the latter granted the work card or service card ,which can demonstrate the identity of the former, or the former filled in registration form and application form, or the latter permitted the former to perform in the name of the latter explicitly. or impliedly .Conversely, the worker shouldn't be perceived as the protected worker in labor law if he isn't subjected to the management , disciplines, control by

25 In China ,the term of Labor relationship is equal to employment relationship In academia, labor relationship is not the same frequently a subarea within industrial relationship as in U.S.A and UK.

26 The distinction between Labor relations and service relations is just the same as diference between service of contract and service for contract.

work unit ,or he is almost not directed by employer, or he is not subordinate to the wok unit , whereas he takes the business risk on the basis of own skills, facilities, knowledge.27

The fist factor of AQLD above shows that labor relationships are characterized by economic subordination; the second factor focuses on the nature of the organization subordination. The third factor lists the exterior appearance indicia. It's no doubt that there exist the labor relationships if the relationships between parties are in conformity with control test or organization test. Personally, the AQLD criteria for relationships still has its problems.

In sum, it's no doubt that there is no labor relationships in reality without the nature of subordination or control, but it doesn't mean that relationships between work unit and the worker must be perceived as labor relationship when one person is subordinate to a work unit because the main problems are what weighting does the court apply to each criterion and to what percentage will rule a person as being either an employee or a contractor.28Furthermore, one worker agrees to be subordinate to the work unit just for the purpose of remuneration. On the other hand, one work unit is always pleased to pay for worker wages just because they could got much more benefits from the productive activities of workers. Thus it's a vital task for legislator and courts to think over how to balance the interest conflicts between parties. Their ideas of the relationships between parties would lead to the different protective level of workers in the society.

C. Chinese Experience: Judicial Logic to Identify Protective Workers

Worker's protection in China has been dedicated to increasing labor disputes since 1994. It's often said that China's courts across the nation are battling to address a growing number of cases involving labor disputes. According to official statistics of 31 provinces (autonomous regions and municipalities) and Xinjiang Production and Construction Corps, in 2012, the Chinese mediation-arbitration institutions handled labor disputes 1,512,000 with an increase of 6.4%, involving 195.9 million workers with an annual growth of 7.9%29.

In practice, Chinese courts generally follow three steps to make a decision on whether one person is in need of protection or not. First of all, review of eligibility for labor relationships. Under the Labor Contract Law, a worker should be eligible to employ a worker. At the same time, the worker must be within the scope of labor rules and regulations, which has been stipulated in judicial notices or interpretations. Secondly, review of exterior appearance. In order to make a right decision on whether one person is a protective worker or not , detailed information on how the relationship between the parties is structured must be gathered and assessed. Records of wages and worker cards are the most important exterior information. Finally, review of control. Even though the control test is not an exclusively efficient tool for courts to make a decision on a person's legal status, it is still the leading tool for courts. The above steps mean that Chinese courts follow the logic from exterior appearance review to substantial review

1. The emphasis on the review of eligibility for labor relationships. The emphasis is primarily on the eligibility for labor relationships in case of labor disputes. In effect, the judicial path is due to the compulsory by the article 2 of Labor Contract Law, which forces the courts to distinguish labor relationships form employment relationships30 so that courts must review the

27 Beijing higher court and Arbitrition Commitee (2009) share the interpretions,see the paragraph 13 of Minutes of Application of Labr law Related to Labor Disputes enacted by Beijing higher court and Arbitrition Commitee.
28http://wiki.answers.com/Q/What_are_the_deficiencies_of_the_control_test_the_multiple_test_and_the_integration_test=2013-05-05.
29 http://www.labournet.com.cn/ldzy/ckzl/t24.htm=2013-4-11
30 In China,employment relations is different from labor relaion . Both labor relations and employment relations show that one person is subordinate to a work unit.The labor relations excluded from labor law is called

eligibility of a worker and work unit firstly rather the substantial factors focusing on subordination or control.

Interpretation Ⅱ of the Supreme People's Court of 2006 clearly excludes some people from labor law. The paragraph 7 stipulates that the disputes below aren't labor disputes:(i)the disputes between family(an individual) and a domestic worker;(ii) the dispute between an individual craftsman and a helper or an apprentice;(iii) the dispute between individual farm households and the hired. In addition, Chongqing Higher Court in 2004 stipulated that there didn't exist labor relationship between a work unit and a worker if the work unit isn't eligible for employing a worker. Even if there is a work fact and both parties have actually fulfilled their rights and obligations, the worker couldn't be classified into the worker within the scope of labor law.31

Article 2 of Labor Contract Law concerning the eligibility of parties has put Chinese courts in a quandary. As a result, some vulnerable persons have been desperate. Hence in order to protect those workers excluded by labor law, who are vulnerable to exploitation and abuse, Chinese courts have to make an alternate decision according to paragraph 11 of Interpretation of the Supreme People's Court .Namely, though they are excluded by labor law, courts would still treat them as protected worker when they are the victims of a workplace injury and they often get the same compensation as a worker within the scope of labor law.

The logic of review of eligibility forces Chinese courts to be in conformity with the principle of form over substance in case of those work units aren't eligible for employing a worker. On the other hand, when courts face the life reality of injured workers, they will try their best to find convincing reasons why the victims can get enough indemnification.

2. Principle of Piercing the Contractor's Veil. In practice, more and more work units prefer to contract out their entire or part of business for the purpose of evasion of responsibilities by calling their workers business contractors. The business contractors are, in fact, a bridge of work units to achieve his aims. Thus the courts should review whether the purpose of the business contractor between the work unit and the worker is reasonable or not.

Article 94 of Labor Contract Law doesn't stipulate that courts should apply the principle of piercing the contractor's veil when a work unit intends to evade his responsibilities for his workers by the contract, in which his workers aren't protected workers. But it stipulates the rule of joint and several liabilities. There is no doubt that the rule is a rational choice to protect those workers who are employed by business contractors.

CQHRSS has clearly stipulated the doctrine in CQN in 2001. It has put up a valuable rules concerning the contractor, namely(i)when a work unit contracts with its department or personnel by internal economic accounting, there exists labor relationship between the work unit and the worker, employed by personnel of the department or staff ;（ii）if a work unit contracts with another work unit within the scope of Labor Law, who have recognized qualifications for employing a worker, there exists labor relationship between the latter and the worker employed by him；(iii) if the latter, especially as a natural person, doesn't qualify for employing a worker, there exists labor relationship between the former and the worker employed by latter. It's no doubt that the rules above have shed light on the doctrine of the piercing the contractor's veil so that more workers could be covered by Labor Law. Up to now, CQHRSS' views of the piercing the

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employment relations.

31 Guangzhou Middle Court shares the same poits.

contractor's veil32 has an important influence on courts broadly in Chongqing so that some courts apply the doctrine to make a decision on whether there is a labor dispute as defined under the Labor Contract Law and on whether the worker is under the definition offered in the Labor Contract Law or not. It's obvious that CQHRSS have created a new rule beyond the Labor Contract Law. When applying the doctrine, courts shouldn't put their emphasis on the terms of engagement as set by work unit.

3. The Criteria Choice of Courts in China. Though many textbooks focus on subordination test, it seems that courts prefer control test rather than subordination test in practice. In my view, the reason is that it's easy for judges to find convincing evidence of how the work unit has exercised the right to control over a worker. When a work unit has the right to state not only what needs to be done, but also how it should be done, the control over workers by work units has the same meaning of direction, management, requirement. It's no doubt that a work unit's active direction decides when his worker perform his liabilities, where to do it, how to do it, what to do and with who to do it. In a degree, a worker's performance is just a reaction to the work unit's will. Thus the factors of control test could be found directly, but the factors of subordination test must be analogized indirectly.

D. Coordination of Protection for Chinese Workers

In various degrees, the lack of coordination between courts and arbitration institutions exists universally in most countries when they have to make a decision concerning labor disputes. The fact that the worker rather than work units is in need of protection is related to the background rules of law. As mentioned above, the legal rules with regard to workers is stipulated by usually such as labor law, property law, contract law and tort law, it obviously implies that it's necessary for courts to closely co-operate with arbitration institutions for the purpose of protection for workers.

1. at the legislative level: coordination between Labor law and civil law. Generally speaking, Labor laws being independent law has got comprehensive recognition for its own philosophy. In fact, it has resulted from breaking the barriers set by traditional civil laws. On the one hand, to some extent, it has pierced so closed systems of the traditional civil law that labor law itself has also became a rational product of the traditional civil law theory by newly re-selection, collocation and design for social public relationship, which has involved with traditional civil law for many centuries. On the other hand, although the normative system of labor law is based on a set of the guiding ideologies and values of ethics independently, the traditional spirit and philosophy of the Civil Law still have a profound influence on its fundamentals. Thus labor relationships have been developing as the result of this change. Therefore, it means that it's inevitable logic for labor law to make coordination with traditional civil law, such as contract law and tort law.

In China, the defects of coordination between labor law and civil law are embodied in two respects, namely, Contract Law of 2003 hasn't stipulated employment contract, and the article 35 of Tort law of 2007 isn't in conformity with the principle of social vulnerable groups. In fact, before Contract Law was enacted in 1997, some scholars had strongly proposed a motion that it was necessary to govern employment contracts in Contract Law. However, just due to ideological reasons, legislators didn't follow the suggestions. Hence, before 2003, the private employment relationships were in lack of substantive direction so that there were no relief channels for the

32see in Liu Youguo v. Heng Tong Hotel Taxi Service Co. of Chongqing Line Haul Co,Ltd.(2011) ,namely the Civil Judgment (2011)Yu Gao Fa Min Ti Zi NO.382 of the Higher People's Courts of Chongqing Municipality.

parties of the employment relationship and the courts were actually faced with the vacuum of rules when there were disputes on employment relationships concerning private security guards, private lawyers, private chauffeurs33.

However, the defects had been already recognized by the Supreme People's Court. In 2003, the court issued the Interpretation of the Supreme People's Court, in which the terms of employee and employer were firstly used explicitly34. Article 9 of the Interpretation of the Supreme People's Court states that employer entails joint and several liability for employee' actual harm and risk exposure. Namely the employer who does not cause the injury directly should be liable for an injury to the third party committed by an employee's acting within the general scope of her or his employment. But if the employee causes the injury due to his intent or major negligence, he shall bear joint compensation liabilities along with the employer. The employer may, after bearing the joint compensation liabilities, claim compensation from the employee. Article 11 of the Interpretation of the Supreme People's Court provides that employers must be held liable for injury or disease to their employees arising out of the general course of employment. i.e. employer's liability. In addition, if one employer whose business is within the sphere of construction breaks the China's Construction Law , illegally contracts out a project to the contractor or subcontract who has no corresponding qualifications to employ a worker or safety production conditions, the former, the contractor and the subcontractor should be charged with joint compensation liabilities for injury or disease to their employees arising out of the general course of employment. The notable breakthrough of the judicial interpretation is reflected in two aspects. One is that at the judicial level the terms of employer and employee are used firstly; the other is to fill the gaps so that those workers who are excluded from the protection of labor relationship in the labor law could be named as employment relationships and protected by using the judicial interpretation.

However, defects of the explanation are quite obvious. It limits the contents of dispute resolution concerning the employment relationships .i.e. employee injury compensation. In effect, the Interpretation of the Supreme People's Court filters the disputes between employees and employers with regard to the labor rights .e.g. the right of labor remuneration, the right to have a rest. Thereby the employees are just treated as independent workers without the right of labor remuneration, the right to have a rest as apposed to the workers within the scope of labor law. The principles of contract law are applicable to the disputes on labor remuneration between employees and employers. Furthermore, this indicates that Supreme People's Court has not crossed the boundaries of the existing provisions of the labor legislation. If an employer is the work unit under Labor Contract Law, the violation of the rights of the employee, such as wages, the right to rest and leisure, will still be protected according to the relevant provisions of the act. It seems that the workers involved in the employer/employee relationships haven't the right to rest. It's so clear that the Supreme People's court has designed the rules of protection for employees, which are in conformity to the existing legal provisions. Its internal logic remains that only workers within the scope of labor law are entitled to ask for social insurance, wages, dismissal protection and so on while the rights of employees under civil law should not be perceived as objects related to labor law. The efforts of Supreme People's Court at employment relationships were eliminated by provisions of Article 35 of Tort Liability Act, which has brought an end to employment

33 Zheng Shangyuan,the legal boundaries to adjust the employment relationship-the system and concept to adjust the employment contract relations of civil law and labor law, upload China Legal Science,2005,3.

34 To this day, the terms of employee and employer hasn't be used in law enacted by China's Nation Congress.

relationship. Article 35 of Tort Liability Act provides that, as for labor relationships between individuals, the party accepting services will be subject to tort liability for, if the party providing services causes damages to others. And both parties shall assume corresponding liabilities with respect to the delinquency respectively, if the loss or injury is commited by the party providing services itself.

The inner meaning of the service provider stated in Article 35 of Tort Law is still worth discussing. If the parties sign a contract of hired work, the client focuses on the ultimately specific fruits of labor. On the one hand, it is often understood that the service provider is an independent contractor rather than employee of the client. The client will not provide fringe benefits, including health insurance benefits, paid vacation, or any other employee benefit. On the other hand, the work product .e. g. any copyrightable works, ideas, discoveries, inventions, patents, products, or other information developed in whole or in part by service provider in connection with the services shall be exclusive property of service provided.

As in the contract of carriage, the contract of custody, the damages which the service provider suffered should be set forth according to the principle of fault responsibilities under the Tort Law. For example, if the owner of the goods has not previously told the risk of goods itself, such as highly toxic, inflammables, the client shall entail the responsibilities. The relationship above differs from those among the purely natural persons. In my view, the paragraph 2 of article 35 of Tort Law is only applicable to the cases in which one individual person doesn't provide any helps such as tools, materials.

In theory, the relationship between Labor Contract Law and Tort Law is mutual in China, which the former regulates the labor contract liabilities, while the latter does tort liabilities. However, as for the force levels of different laws, 2010 Tort Law has greatly weaken the functions of judicial interpretation.35 In a sense, it's no doubt that article 35 of tort law has factually eliminated employment relationship. At the same time, it also deals with damages suffered by the party providing services under the principle of liability for fault. As a result, the idea stickled by Contract Law of 1997 that civil law has nothing to do with employment relationships, is aroused again .Hence tort law, contract law and labor law don't govern the employment relationship under contemporary legal system of China.

2. at the judicial level, the coordination between courts and arbitration institutions. The decision on whether one person is the worker within the scope of the labor law or not should not be based on judges or arbitrators' subjective fondness, but on its objective factors. The coordination defects of China's judicial and arbitral institutions are mainly reflected in two aspects: (i) courts to arbitration institutions: try harder on some rules. On the one hand, the Supreme Court of China has made it clear that the rules and regulations issued by labor and social security administration departments at all levels are for reference only for courts. While the policies and regulations issued by upper labor and social security administration departments must be obeyed by lower labor and social security administration departments, which have the force of legislation. On the other hand, documents relating to labor protection, which are issued by courts at all levels, have the force of legislation for courts rather for arbitration institutions. Therefore, by China's administrative inertia, it's not surprised that, in the same cases, a judge often disagrees with a arbitrator on some key points. (ii) The difference of the notions on labor law between courts and

35 But In the case of an individual labour/employment dispute,many courts still make a judgement under Iterpretation of the Supreme People's Court.

arbitration institutions. In China, many cases have stated that arbitration institutions pay more attention to the protected workers, while the courts are more inclined to the autonomy of parties in labor relations36.

In China's case of Hengtong Cab Ltd. v. Liuyouguo, Peng jingyi as a cab owner, attached his car to Hengtong Ltd., running taxi business. On November 19th, 2008, Liu youguo was injured in a robbery at work. After that, the board of arbitration ruled that the factual employment relationship existed between Liu youguo and Hengtong. Hengtong brought a lawsuit to court of first instance, which then maintained the referee. Hengtong then appealed to the court of second instance, which supported Hengtong's declaration. As for this, Liu youguo appealed to Chongqing Higher People's Procuratorate to present a protest. In December 2011 Chongqing Higher People's Court ruled that there existed labor relationship between Liu youguo and Hengtong . The court affirmed the following facts: Firstly, Hengtong handled passenger supervising card of public transportation service for Liu youguo in Yongchuan district and the company name on the card was Hengtong. Secondly, the study certificate of public transportation employee held by Liu youguo also suggested that the company was Hengtong. Thirdly the evidence suggested that Liu youguo followed all regulation rules of the company and participated all employee' training. Fourthly, the evidence suggested that Liu youguo paid for Hengtong security money of safety and high quality service. Based on all those facts, the court held that the relationship between Liu youguo and Hengtong was in line with qualifications of NCLR i.e. (i)legal employment qualification; (ii)all Hentong's regulations and rules were applied to Liu youguo and Liu youguo accepted all labor administration of Hengtong and running paid work which Hengtong arranged .(iii)The service provided by Liu youguo was part of Hengtong's business. Therefore, Liu youguo had established an actual labor relationship with Hengtong. At the same time, the court pointed out that the Implementation Opinions on Further Cleanup of Regulation Issues of Taxi Industry released by General Office of the State Council has clearly stipulated that the taxi company should sign labor contract with taxi drivers. The real purpose of Hengtong's using the form of lease contract was to evade mandatory rules that the taxi company should sign labor contract with the driver.

In fact, there have also existed disputes on worker's legal status in UK. Mr. Fowler Kent in England worked as a dock operative for Stevendoring & Haulage Services Ltd. He was employed from 1989 to the end of 1995. After that Mr. Fuller was fired, but it was immediately that he was offered work on a casual basis. According to the contract signed by them, Mr. Fuller would not be considered as an employee. In fact, Mr. Fuller continued to do the same job just as he was fired before. But only because he was not considered to be an employee, he couldn't be entitled to sick leave, holidays, pensions or other fringe benefits. Three years later, Mr. Fuller applied to an Employment Tribunal, claiming that he actually was an employee of the firm His request was supported by the Employment Tribunal and the Employment Appeal Tribunal. But the Court of Appeal, putting the focus of the case on the terms of contract, reversed the Employment Tribunal's decision37.In this case, Judge Tuckey thought that the court actually treated the written contract between parties as criteria for employment relationships according to the principle of the form

36.In China, some people even insist that in some cases, the employer has become the de facto weak rather employee. Their opinions actually reflects the diferent oriented-values as for how to balance the intractable conflicts on benefits between the protection of workers and the enterprise to survive.

37.Haulage Services Ltd v. Fuller & Ors [2000] EAT 493_99_1602 (16 February 2000). also see，Guy Davidov, above n 1.

over substance; while the Employment Tribunal adopted a substantive standard of employment relationships and made a decision that Fuller was an employee under the British Labor Law.

In this case, mutual obligations are the key points of the employment relationship. The basic requirements of employment contract are that the employers provide work for employees, whereas employees must complete it. The main points of Tuckey in the case was stated as follow: Firstly, it can not make inferences inconsistent with the express terms of the contract. In this case, there are no words to justify the existence of employment contract. Secondly, the minimum obligations can be excluded by parties with the clear terms of the contract. The contract stipulated that the firm provided for the workers with causal work .Moreover, the former wouldn't not entail any obligations to offer work for the workers, while the workers had the right to not receive any arrangements. The contents illustrated that there didn't at least exist employment contract. Therefore, Mr. Fuller was not an employee of the firm and he should not be entitled to claim benefits stated in the Employment Rights Act 199638.

Ⅲ The Challenges of Employ Model

It's hard to determinate the legal status of people like Liu Zhongfan according to the existing logic of legal judgment. The perplexity in cases similar to Liu Zhongfan was originated from many aspects. First, the progression of modern technology made the transformation of traditional industrial organization possible. Workplaces are getting more and more diverse. Adapting to this trend, Atkinson proposed that "flexible firm model" had became a crucial strategy in the human resource management of a company, which not only intensified the hierarchization of employees hired by one employer, also contributed to the loose relationships between employers and employees. These effects would further affect the allocation of employee's rights and obligations profoundly

A. The Main Content of the "Flexible Firm Model"

The concept of the "flexible firm model" was first put forward by Atkinson in 1984，who argued that existing hierarchic structure should be broken so that the company could take distinguished employment policy to different group of employees. According to Atkinson, the reason for the emerging of this model was that companies bear great burden on seeking for more flexible means for employing. They would value a group of labor force which could cope with un-seeable changes in the future. This labor force should be able to change its scale according to the demand for the working time and work content.Furthermore it should keep the cost of labor force at a relatively low level39. According to Atkinson's model, there are three types of human resource flexibility in a company. The first one is called numerical flexibility, it means when the market condition or the production need changes, a company should change the amount and types of employees in conformity with business operation so that it can adjust to the conditions and keep a proper scale of human resource pools. The second one is functional flexibility, it suggests that an enterprise should develop employees' working skill so that they can adapt to different work content and respond to the change of the market conditions. The third kind is called financial flexibility, which refers to a salary payment system established on the basis of personal performance combined with profit-sharing plan. The financial flexibility is supportive to

38.Stevedoring and Haulage Services Ltd. v. Fuller, [2001] E.W.C.A. Civ. 651 (C.A.). also see，Guy Davidov, above n 1.

39.David Goss, Principles of human resource management, Routledge, New York,1994,p31.

numerical flexibility and functional flexibility.40 On the basis of this classification, Atkinson divided the whole stuff group into three different categories, which are core workers, peripheral workers I and peripheral II. Core workers constitute the primary labor market and they are well educated, holding knowledge about core techniques and they earn a lot. These employees are in charge of crucial issues of the company, who are mostly full-employed, holding long-term contract, and are guaranteed in salaries. This kind of employees is the basis of functional flexibility peripheral II refers to workers who are inferior to the core workers, whose skill levels are lower and their jobs are less secured. They assist core workers to finish tasks, and in most cases they are seasonal casuals or part-time workers. They are the basis of the numerical flexibility, who gain low wages, enjoy low level of job security, even have no decision-making power41. For example, recruiting independent contractors has three benefits to a company. Firstly it enables the enterprise to respond to the changes of the need for human resources, and makes financial expenditure easier and under control. The second benefit is to make the expansion or cut down of the scale more easily. It also averts the difficulty for cutting down the stuff after expansion of recruiting common employees. In the end, it is a good way to avoid the payment of salary tax, compensation for industrial injury, overtime and other stuff expenses. Besides these, this method can also be used to avoid certain provisions of the law.42In fact, as many other countries, more and more companies in China choose to outsource their business, which has turned the employees into pro forma independent contractor for avoiding their obligations stipulated by labor law. It's commonly said that the construction business is typical in China. There is no construction company willing to employ long-term workers, while they usually contract out the project dividedly and sign a few contracts with at least two subcontractors (in most cases the subcontractors are illegal work units).Then the subcontractor would recruit off-farm workers, who sometimes have no idea of who is their employer.

1. from visible control to invisible control. The following reasons contributed to this change：First of all, the reinforcement of human rights protection and the implications of related to legislations. Because the legislations for employee protection have been strengthened, especially related to forced labor, working time and labor supervision, the labor relationship has been evolving tension to harmony with increasing conflicts. Furthermore, the avoidance of labor law was also an important factor. In principle, the fact that one is doing part-time jobs, working as a casual or a domestic worker would not impact his or her status as an employee. Nevertheless, employers always use the loopholes of the law to avoid their obligations. They even tried to exclude all these workers from the employment scheme. Actually, it is the most frequently used way to avoid legal obligations by signing a civil contract. Under this circumstance, workers are pro forma independent contractors, while employers succeed in avoiding their legal obligations as well as controlling the labor relationship invisibly. There is no doubt that if the aim of labor law is to protect workers on the opposite side of employers, then the form which had already changed could be ignored. This consideration had been put to a primary place in many cases judged by labor tribunals.43 The third one is that the lack of job opportunities compels workers to

40 Suzette Dyer，Flexibility Models: A Critical Analysis,International Journal of Manpower - INT J Manpower, vol. 19, no. 4 ，P107，1998.

41 see Mia Rönnmar,the Personal Scope of Labour Law and the Notion of Employee in Sweden ,in Roger Blanpain, Takashi Araki, Shin'ya Ōuchi, Labour Law In Motion: Diversification Of The Labour Force & Terms And Conditions of Employment，Kluwer Law International,2005，P47.

42 http://www.chinesetoday.com/zh/article/60406=2013/4/8

43 Langille, Brian A. and Davidov, Guy, above 17. p15.

compromise on the arrangement of employees. Employer's control over the employment relationship is no longer a mere fact, whereas it has been a possible right of control over employees. In S. G. Borello & Sons, Inc. v Dept. of Industrial Relations in 1989, the Superior Court of California stated that the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work to be done and the manner and means by which it is performed44

To distinguish invisible control from those visible ones, the adjustment of criteria for employees is necessary. In Canada, the measurement used for identifying control is still drawing people's attention, whereas the application of the standard has undergone dramatic changes. Now, courts in Canada are not satisfied with the mere investigation on the direct control over workers. It is widely acknowledged that employment relationships do not exist under employer's order. The task itself demands ability to work independently and employees are highly professional workers. The task can be finished beyond the working space of the employer. Unlike direct control, courts have shifted their emphasis to the so called "bureaucratic control" or "administrative control"45.

2. From identity control to economic control .Associating with the development of the society, the hierarchical structure of workers is transforming from the traditional fixed model to the modern flexible model, from the "attribute mode" to the "performance mode". It means that the traditional industrial employment relationship which focused on identity control is switching to the modern flexible mode which centers on economy control. The dependency of employees is stemmed from the transfer of their identities to the employer in a degree. And this transfer may attribute to two corollaries. The first one is the restraints on the expression of employees' will. Once one's identity as an employee is set, he will resemble his employer during performing his duties. When an employee establishes external legal relationship with a third party in his employee's interest, he needs to get the employer's warrant first. Then his activities will be deemed as the expression of his employer's will, and all his activities represent the employer's will. Hereby, the legal relationship established between an employee and a third person in good faith would be deemed as the relationship established directly between the third party and the employer. And the employer should bear all the legal consequence of that activity. The second kind is physical restraints. To ensure that employee's conduct would correctly reflect the will of the employer, it is necessary to set some physical restraints. These restraints are reflected in two aspects: time and space. In terms of the restraints of space, employees are supposed to work in particular working places. While in terms of the restraint on time, if an employee spends most of his time on work, it means he transfers a part of his own time to employer, i.e., working time.

If the traditional employment relationship is featured by the employee's dependency on employers in the aspects of both identity and economy, then in this new era, the number of workers who are economically dependent is increasing. Usually, these workers have no contract with their employers. However they do depend on those employers economically. In the case of Liu zhongfan, the company as a work unit was the source of his income, or most of his incomes were from one work unit. In addition, Liu zhongfan had the same work content with recent stuff and he just did what other employees used to do. For this reason, when judging whether one person is a worker covered by labor law or not, the Department of Labor and the Social Security Administration usually make their judgments according to the principle of "economic reality".

44 S. G. Borello & Sons, Inc. v Dept. of Industrial Relations44 (1989) 48 Cal.3d 341
45 Langille, Brian A. and Davidov, Guy, above n 17,p19.

This principle requires courts or arbitrators to identify the legal status of workers in conformity with the standard used by those two organizations. It indicates that economic realities are in fact of decisive importance on the determination of legal status of one worker.

Economic dependency is apparently the most distinctive factor for distinguishing employees from other workers. It can be seen in the provisions about independent contractors in the Alaska's Employment Security Act. According to the Act, the definition for independent contractor should be workers who are not completely economically dependent on their employers and have the freedom to decide their working schedule and the party who they work for. It is evident that the Act defines an independent contractor basing on the premise of the extent of freedom which is enjoyed by workers. In general, a free worker is just like a free man, who could do things at anytime, anywhere with anybody in any way he likes. Of course, a worker should be economically independent to get that level of freedom, which could not be realized without the independency. From this perspective we can see that the essential difference between an independent contractor and an employee is the extent of freedom they enjoy. And the extent of freedom can be determined through material supply right, objects being served and other economic factors. In fact, material supply rights reflect the integration of capital and labor force, which is the essence of the structure of industrial organizations under which workers are deemed as employers according to labor law. The reason we analyze from the perspective of rights other than the actuality is that rights can be given up. When one person serves for a individual customer or get materials from an individual customer, it does not necessarily mean that the worker is an employee. When there is a contract which states clearly that the worker enjoys the right, then no matter whether he gives up the right or not, he should not be deemed as an employee.

3. From relatively intensive control to relatively weak control. The society itself is developing through balancing distribution of benefits between advantaged groups and disadvantaged groups. Thus the existing social relationships also change relatively. The variation of employment relationship reflects this pattern. Dated back to the year 1880 in the Victorian era, the employment relationship was defined in the case Yewens v. NoaKes as the relationships between masters and servants in which the servant must perform his duty according to his master’s requirements.46 However, the evolution from the master-servant relationship to the employment relationship not only shows the nature of constantly literary change, but also reflects. Professor S. Deakin once pointed out that the 19th century master-servant had been replaced by the modern employment contract in 20th century for the developments in legislation and collective negotiation. 47 Employment contract is a composite shaped by new legislations in the area of worker’s compensation and state insurance. 48 The master-slave relationship demonstrates that dependency embodies employer’s instruction control over employees on their work contents year after year. Intensive control represents the intensive relationships between workers and the capital. When the employee is a skilled worker, e.g., journalist, doctors, college teachers, it is possible that the employer would not directly control over his work day after day, but the relationship between them is still employment relationship. On the recent labor market, the

46 Alison Bone and Marnah Suff, Essential Employment Law (2nd,ed,), Cavendish Publishing,1999 London,p17.
47 Simon Deakin，the Contract of Employment:a Study in Legal Evolution, Working Paper No. 203，ESRC Centre for Business Research, University of Cambridge， p.1.
48 Ibid,p.7.Two typical case illustrates the statement (See Simmons v. Heath Laundry [1910] 1 KB 543 and Scottish Insurance Commissioners v. Edinburgh Royal Infirmary 1913 SC).

restrict check and tight scrutinization concluded in the control mode is outdated to some extent49. Now the traditional employment relation is still developing and there is a trend that the control over employees is weakening. With the help of modern technology, the relatively loose control is becoming the main stream. The Changes in the balance of power between workers and employers have contributed to the changes in the standard used to identify employment relationships and the changes in labor law protection policies.

B. The Hierarchization of Workers

Provisions of laws in China have indicated that there is a trend of hierarchization between employees. However, labor law has not solved the dilemma of determining whether workers like Liu Zhongfan are employees or not. In fact, the term "independent contractor" has not appeared in any law in China (nor does the word 'self employed' or any other word alike). If you are not an employee, then what you are ,it is not important at all. Independent contractor is a term which can cover those who have not been deemed as employees within the scope of labor law. Owing to the dichotomy used by the legislators, distinguishing employees from other workers is hard work for judges.50 Thus the dilemma in Liu's case is a new problem caused by the changes in employment relationship associating with the development of the strategy of modern human resources management today. The recognition to the hierarchization of employees is the key for solving the problem.

1. Categorization of the Stratification of Workers

The flexible firm model divides workers into different layers, which manifests the difference of workers' identity in the labor market. The absolute dichotomy between employers and independent contractors cannot effectively protect those people who should be protected. Under this background, some famous scholars focusing on labor law try to classify the workers in the broad sense so as to clarify the categorization policy of protecting workers specified in the labor law. Among these classification methods, the influential ones include:

a. The quartering method of Professor Guy Davidov .In order to solve the long-standing problem that workers in the grey zone only become the victims of the unreasonable system of distinguishing independent contractors from employees51，Professor Davidov classifies workers into employees, dependent contractors, independent employees, and independent contractors from organizational, social/spiritual, and economic perspectives, namely the democratic deficits structure, workers' dependency on employers for completing social and spiritual targets, and their inability to spread risk. He proposes to use this quartering method to detail the scope of protective rules according to the specific injury-prone characteristics of different workers at the legislative layer. At the interpretation level, he maintains that the above-mentioned tri-axial theory is an important test which needs to be adjusted in line with the backgrounds and specific purposes of specific rules.52

In the quartering method, Guy specifically designs the intermediary "dependent contractors" and "independent employees" between employees and independent contractors.53"Among them, dependent contractors are economically independent but obliged to complete work for employers/customers. Compared with independent contractors, dependent contractors and

49.Brenda Daly, Principles of Irish Employment Law, Clarus Press，2010,p44.
50.See Guy Davidov,Freelancers: An Intermediate Group in Labour Law,in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) ,Challenging the Legal Boundaries of Work Regulation(Hart Publishing ,2012),p185.
51 Davidov, G, above n 1,p16.
52 Davidov, G, above n 1,p1.
53 Davidov, G, above n 1,p9.

employers/customers are in a relationship more similar to the employee-employer relationship. These workers generally enjoy the right of collective bargaining in some special fields and other rights specified in labor standards.54 They have their own business and can make decisions freely but they are dependent on one or two customers.55Some self-employed truck drivers are the workers of this type. Independent employees refer to the workers who depend on no one else but are still subjected to some limitations (such as democratic deficit) of the employment relationship, e.g., senior technical staff and football stars. This type of workers can reduce and even eliminate their dependence on employers by changing their jobs.56

The quartering method of Professor Guy has striking valules on providing protection for specific types of employees.Furthermore it reveals the relationships between workers of different types and their employers to some extent. However,it cannot explain the degree of vulnerability to injuries of these four types of employees. For example, independent employees have become dependent on their employers to a great degree. Obviously, the protective capability of this type of workers is the weakest. Dependent contractors actually should be in the traditional employment relationship, which is largely the result of employers avoiding labor law. Compared with the classification of workers made by Atkinson, there is no axis throughout the classification logic of Professor Guy. For example, from the perspective of economic dependence, the degree of such dependence cannot be distinguished. In the aspect of democratic deficit, the declining logic of the deficit cannot be told. Besides, the demand for employers cannot reflect its degree as well.

b. The Quartering Method of Davies and Feedland. Professors Davies and Feedland classify workers into four types in accordance with the degree to which workers' behaviors are correlated to labor law and business law. The first type is employees, namely the subordinated workers in the traditional sense. The second type is employee-like workers who are not legally subordinated but economically subordinated. Their work is temporary and they often complete work personally. Economically, they are highly dependent on a certain employer or several employers. Freelance workers fall into this type. The third type is personal service workers who provide personal service through their identifiable business. They have no regular customers and are not highly economically dependent on any customer. They are self-employed workers, such as the artists engaged by parents to paint on the wall of their children's room. The fourth type is the workers who don't perform their work personally but by signing contracts. Their products could be the result of their own labor, and could be the result of the labor of the people who they employ or subcontractors or even their joint labor.57 According to the quartering method of Davies and Feedland, the subordinated employees are the most closely related to the labor law and the most distant from the business law. Workers who don't perform their work personally are the most closely related to business law ,but the most distant from labor law. Employee-like workers are closely related to both labor law and business law, and personal service workers are more related to the business law and labor law than those who don't perform their work personally, but in a way different from how employee-like workers are related to the two laws.

The quartering method of Davies and Feedland investigates the legal status of different workers from the perspective of their relationships with labor law and business law, and partly

54 Davidov, G, above n 1 ,p20.
55 Davidov, G, above n 1 ,p54.
56 Davidov, G, above n 1,pp54-55.
57.See Davies, Paul L. and Freedland, Mark R., Employees,Workers,and the Autonomy of Labour Law(December 1999),p7-9. Available at SSRN: http://ssrn.com/abstract=204348 or http://dx.doi.org/10.2139/ssrn.204348.

reveals the correlation between different workers and the above laws. However, it deserves discussion about what kind of logic should be adopted to reflect such correlation.

c. The Quartering Method of Professor Dong Baohua. In the course of discussing China's Labor Contract Bill, the discussion on the stratification of Chinese workers is also an important aspect. Chinese scholar Dong Baohua maintains that workers are in a pyramid structure, with professional managers, professionals, industrial workers, and non-standard personnel from top to bottom. Relevant rules should follow the strategy of "restraining the powerful and helping the weak". As professional managers have strong bargaining power, they should not be incorporated under the protection of labor law**.** Senior technical personnel enjoy the right of "voting with feet" and should be protected by private law, and emphasis should be laid on agreement. Normal industrial workers should be protected by public law. It is especially essential to regulate the minimum basic wages and the maximum working hours；For non-standard personnel, the stress should be laid on promoting the employment.58

Professor Dong borrows the social stratification theory and proceeds from the perspective of the bargaining power between workers and employers to put forward the theory of restraining the powerful and helping the weak. However, he fails to respond to the requirement for coordination among laws.

Speaking of the degree of the protection of workers, different scholars follow opposite ways of thinking. Professor Dong proposes to take the path of restraining the powerful and helping the weak, while Guy, Davies and Freedland follow the declining logic of labor law's scope of protection .Nonetheless, the core of problems lies in to what extent workers belong to the organization and are subjected to managerial control.59 Therefore, the theories of Guy, Davies and Freedland only reveal the necessity of protection of workers to some extent. The establishment of the intermediary group of workers still cannot thoroughly deal with the complicated changes in real life. So the distinction between workers and independent contractors still needs to be drawn in a traditional way.

The class, stratum, and level division among individual members of the human society may be the guarantee for social order and value. The stratification theories concerning workers actually reflect the degree to which workers are correlated to their enterprises, workers' status and bargaining power. At the same time, stratification also means disparate treatment and the difference in the degree of the vulnerability, so laws need to adopt differentiated regulatory strategies.

C. Basic Logic of the Stratification of Workers: Degree of Freedom in Economic Activities

Labor freedom is an important aspect of economic freedom. Workers have different degrees of freedom from other parties concerned in economic activities because of different scenes. Workers' economic activities have two kinds of objects, i.e. business in the organizational form and individuals like workers. When one person has economic communication with these two kinds of objects, he has different degrees of freedom. The degree of freedom which workers obtain when dealing with institutions or individual engaged in business activities is lower than that they obtain when conducting separate and livelihood-based individual activities.

58 Dong Baohua,Thoughts on Labor Contract Law，Shanghaipeople's Press,2011,p43.
59 Davidov, G, above n 1 ,p14.

Speaking from the perspective of the development of human history, control over workers in nature is the manifestation of their degree of freedom in social relationship. At the economic level, from non-free self-employed manual workshop in the times of small commodity economy to universal non-free labor-using for machine production by employment contract at specific times, and then the divorce from the control of underlying machine along with scientific and technological progress, workers obtain more freedom than before. Because of the change caused by scientific and technological progress, the legal status of labor providers changes accordingly, namely from apprentices to employees and then to independent contractors. Nonetheless, in the course of such change, capital has less physical control but more economic control over people. This economic control means new relationship between human capital and production capital under new background.

In the aspect of evolution of labor law, the protection of workers evolving from civil law to labor law diachronically reflects some changes in legal rules concerning protection of workers. The track, which is from hirer indicating faults' system in civil law and highly dangerous responsibilities in tort law, to employer liability in labor law actually, indicates different requirements for the legal guarantee for workers due to changing forms of social and economic organizations. The evolution of law is nothing but response to "who should be protected", further the mission of protecting the weak undergoes a long process from contract law to tort law and then labor law. In the traditional civil and commercial individual activities, workers are assumed to be beyond their existence insurance for self economic development. On the contrary, under the scope of labor law, workers pursue the existing insurance required by making a living. The setting of this target determines the difference in status recognition of workers in economic activities. As people are all equal according to civil law, the exchange of products including labor service all follows the principle of freedom. In civil activities, the ultimate purpose of labor providers is to provide qualified products for the opposite party and to take it as the only standard. However, employers specified in labor law often control the labor process of workers in order to achieve their purposes they expect. The intervention in such process realizes the control over the personality factors of workers, costing workers' paradise of freedom where they are all born equal according to civil law. Specifically speaking, the investigation into the freedom of economic activities can be divided as follows. (a) The freedom of time arrangement in the work process. (b) The freedom of deciding to complete task personally or by employing workers. The core of the concept of employment contract is to require employees to complete work in person. The boundary of labor law should be determined by investigating how the work is done, in person or by allowing or expecting contractors to use agents or employ others.60(c) The freedom of adopting the kind of tool. (d) The freedom of deciding where to complete the work in the work process.

Workers in different laws are assumed to have different degrees of freedom. By virtue of powerful position, employers often take advantage of written contracts to obtain the freedom inconsistent with objective circumstances. For example, relevant contracts may grant employees freedom of providing alternative work. However, this is nearly an impossible freedom. Because of limited abilities, employees cannot make full use of this freedom. In order to avoid this kind of manipulation, the obligation to provide individual service should adopt the way of functional test

60 Brenda Daly, Principles of Irish Employment Law, Clarus Press，2010,p49.

rather than be confined to the level specified in contract terms.61Therefore, for those so-called contracts of hired work but actually of employment, the court should figure out how much control power employers have on how the task should be completed and duly pierce the veil of service contract. The ruling of this type of cases is actually on the basis of the degree of economic freedom.

The degree of freedom provides reference for the legal remedy for workers in different department laws. The subordination of some workers means that they cannot freely and fully pursue their targets and cannot make (or at least participate in) decisions that directly influence their life.62 It is an intrinsic logic of fairness in human society that what is lost in life is remedied in law. The freedom of economic activities is inversely proportional to the protection of rights and interests. With lower degree of freedom, the law will save larger share for workers while they create still less wealth . On the contrary, when the freedom which a person has enables him to obtain more from social activities, the law will impose more burdens on him. Even for the workers incorporated under the protection of labor law, the rights and interests determined by their degrees of freedom still should be treated differently. Therefore, the different levels of freedom directly lead to different contents and degrees of workers who enjoy freedom at different levels with the different ways of legal protection.

Ⅳ. Notions of Worker Identification

Changes of human resources management models in enterprises bring new requirements for industrial relations system. The traditional industrial relations system, based on the thought of full-time workers in enterprises, can not satisfy varied types of working paradigms besides workshop. The scholars who held the thoughts of traditional industrial relations views labor problems as: employers wish to use resources for production and gain profits; while employees wish to gain maximum rewards; governments have reasons to regulate. However, modern industrial relations system based on international politics, economics, society and law, is facing challenges such as emphasis of flexibility(contracts type, work time, payment etc)and production efficiency. Deregulation and flexibility in labor market result conflicts between efficiency and equality. Therefore, industrial relation system has to make a balance between efficiency and equality, a pair of concepts with opposite meaning. Facing up with this challenge, the way took by relative laws to response to it would directly determine the value orientation of the country's legislation and the degree of efforts put into employee protection. 63

A. Basic Principles of worker identification

1.Principles to be followed in identification. The construction of different industrial relation systems is the result of combined effects of worker class and employer group. On one hand, there is a tendency that workers are detaching from their employers, which is a rational and optimal choice based on status change of human being in accordance with environment. In this case, the relationship between worker and employer is a rational element of market economy. Legislators and courts should respect the existence. On the other hand, those people who control positions, who have supreme power, and who can manipulate communication

61 Paul Davies and Mark Freedland, "Employees, Workers, and the Autonomy of Labour Law" in Hugh Collins et al. (eds.), Legal Regulation of the Employment Relation (London: Kluwer, 2000), p20.

62 Langille, Brian A. and Davidov, Guy, above n 17. p. 20

63.Sriyan de Silva,The Changing Focus of Industrial Relations and Human Resource Management，International Labour Office Geneva April,1997，p40,42.
http://www.ilo.org/public/english/dialogue/actemp/downloads/publications/srsirhrm.pdf=2013/4/6

channels and information flow, can make different turns for those persons who have nothing in the form of inequality reproduction" 64. Obviously, this imbalance is against the requirements of justice that our law is pursuing. The relationship based on injustice should be corrected by law.

a. The principle of differentiation. On the one hand, as different workers may have different injury possibilities and varied individual demands, thus it is an inevitable choice to provide different protection for different worker groups. The consensus of relationships between workers and employers can be divided into three sorts: employer-sponsored, worker-sponsored, and sponsored by both parties. That is, the will of employers and workers may be overlapped, conflict or reflect true interests of both parties sometimes65. As for labor law, which has inclination, it is unnecessary to pay special attention to the employer-sponsored model. Instead, it should pay more attention to worker-sponsored model and the model sponsored by both parties from the perspective of employers' obligation. On the other hand, the principle of differentiation is the necessary consequence of human resources strategy response by enterprises. As for the change of human resources strategy, legislators should take into account the standpoint of enterprises and provide available room for it. As far as the logics of Atkinson model in human resources management, the protection for core workers is complete, the protection for marginal workers is less, and the protection for peripheral workers is the least. To some extent, it has direct correlation with the relationships between enterprises and workers. Therefore, under this model marginal workers and peripheral workers should be main focus of law.

However, that is just an assumption in theory. While core workers may not lose their job for reasons of techniques, they still can be victims of enterprises infraction. The peripheral workers who have loose relationships with enterprises can resolve their disadvantaged risk by being contractor or constructing more labor relationships. As a result, for non-core workers, labor law should focus on cooperation between labor law and other rules ,and establish worker protection mechanism which can coordinate with worker protection mechanism stipulated by other rules.

b. The principle of law coordination. It is self-evident that labor law was born out of civil law. If we expend the scope of individual in labor law to commercial relationships, then labor law theories will have to be mixed up with civil and commercial law theories66. Obviously, it is not good for the formation of logic system in labor law. Although labor law is the law to regulate workers' world, there is no government that brings all relationships aimed at finishing work and gaining rewards into labor law67. The reasons for that include varied vulnerability among workers and difference in extent and content of legal protection. Based on this thought, once workers are brought into certain law, different legal ideas and legal assumptions concerning workers will be assured. Workers brought into certain legal department will enjoy their rights and assume their obligations. For example, those self-employed workers and independent contractors may need still less protection against unemployment, illness and oldness. 68

Although there are differences among legal departments, workers still have some common

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64.Jonathan H. Turner ，the structure of sociological theory（6ed），Belmont,CA:Thomson/Wadsworth Publishing Co.2003 p147.

65.Peter A. Reilly, Flexibility at work: balancing the interests of employer and employee, Gower Publishing, Ltd,2001,P72.

66 See Davies, Paul L. and Freedland, Mark R., Employees, Workers and the Autonomy of Labour Law(December 1999),p25. Available at SSRN: http://ssrn.com/abstract=204348 or http://dx.doi.org/10.2139/ssrn.204348.

67 See Paul Davies and Mark Freedland, "Employees, Workers, and the Autonomy of Labour Law," in Hugh Collins et al. (eds.), Legal Regulation of the Employment Relation (London: Kluwer, 2000), p2-3。

68.Brenda Daly, Principles of Irish Employment Law, Clarus Press，2010,p40.

characteristics, thus the allocation of different legal departments presents similarity. The similarity includes: Firstly, in reality, compared with the counter party, workers are more prone to injury. Secondly, in the sense of law theory, human rights and decent work have been acknowlededed as common views widely. Under this theory, some rules and regulations have escaped the boundary of employee protection and extended to regular health care, social insurance and occupational health and safety. Because of this, although the distinction between employee and independent contractor may exist in tort law and tax law as well as some other fields, they imply different purposes. However, many labor and employment laws seem to have a common idea suggesting that they are protecting workers69 and there is an assumption that an employer can and should bear responsibility for these workers 70.Thirdly, when it comes to possibility, there is an existence of corresponding employer who can or should bear responsibilities in some aspects71.

It is of significant importance for worker protection to coordinate among labor law , civil law and social security law. It can not only clarify the boundary clearly but also exert functions of different legal department relatively, thus providing more relief channels for those who lose some deserved benefits in real life. For example, in Sweden, judge may apply distinct employee ideas in separate fields of civil law and social law traditionally. The extension of the concept “employee” is quite narrow in civil law, which is based on contracts. While in social law, the extension of this concept is wider, and it contains some social factors. In the year of 1949, a judgment, which is a milestone, remolded the idea of employee and emphasized much on economic and social reality. 72

c. The principle of restraining the powerful and helping the weak. It’s commomly said that all workers should be protected because they are the source of social development and wealth accumulation. The idea was well implied in the fifth charter of Italia Civil Code. The legislation should choose a different path to protect different types of workers. However, that may result paradox in protection. On one hand, those who are most invulnerable have loose relationships with enterprises and have higher degree of freedom and less legal responsibilities compared to enterprises implementing flexible strategy; on the other hand, those who are already core workers have been valued and they have legal basis to get protection stipulated by labor law while not easily incur disputes. From the angle of labor law which traditionally focused on employment relation, this may contribute not only protection from enterprises but also protection from related national labor law which is mainly aimed at protecting rights of those workers. Consequently, those who are not typical workers in traditional employment relationships suffer from alternative risk from labor market and they are neglected by labor law due to lack of characteristics of typical workers. Thus, the existing labor law should fulfill the transformation from traditional to modern and practice the principle of restraining the powerful and helping the weak in order to give more protection to those vulnerable groups creatively.

d. The Principle of wide coverage. The scope of any particular labor law must be related to substantive contents. A broad scope may suggest a relatively simple regulatory structure while a more focused scope may require tougher regulationships.73 Precise judgments on which group of

69. Langille, Brian A. and Davidov, Guy, above n 17, p19.
70. Langille, Brian A. and Davidov, Guy, above n 17, p19.
71The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection, P25.
72.Mia Rönnmar , The Personal Scope of Labour Law and the Notion of Employee in Sweden ,P161= http://www.jil.go.jp/english/reports/documents/jilpt-reports/no1.pdf=2013/4/1
73 See Davies, Paul L. and Freedland, Mark R., Employees, Workers and the Autonomy of Labour Law(December 1999),p24. Available at SSRN: http://ssrn.com/abstract=204348 or

workers should be covered by labor law are almost impossible. Whereas decent work has been accepted as an appeal of social values, labor law can protect more untypical workers under the principle of wide coverage. Under the background of new human resources strategy, most invulnerable workers belong to various worker types and have low degree of organization. Compared to traditional and stable labor law concept and mechanism, it is necessary to lower the threshold in definition of workers and cover those disadvantaged workers to ensure that they are protected in certain areas. Assuming that the protection strength under typical industrial employment relationship is 100 scores and setting the corresponding numerator according to the perspectives of special protection in labor basic law, then as a reference, those persons coinciding with the numerator should be protected accordingly. As the regulations of basic labor law are relatively concrete, the protection degree can be determined by subordination and controllability between workers and employers.

As many self-employed workers are more like employees rather than employers, they rely on sale of labor and suffer from deprivation provisions and limits of work condition. 74 In fact, the wide coverage tendency has already been reflected in many countries' legislations. Britain's employment law uses a more extensive concept of worker as basis for protective legislation. This would have great influence on workers including certain individuals who do not have employment contract but promise to supply their personal services to certain employers and those people who are economically dependent on the employer's business to some degree, that is to say, they derive a high proportion of their incomes from this particular employment.75This wider definition of dependent labor is used for the purposes of legislations concerning equal treatment. The term of worker has been used in National Minimum Wage Act 1998 and the Working Time Directive. With regard to this legislative phenomenon, some scholars pointed out that this clearly suggested the importance to widen the scope of protective employment rules and those people, who are excluded by the narrow and formalist interpretation given by courts, are taken into the protection scope of employment rules. 76

B. The Identification of Legislative Purpose

In every country, the ample labor laws contain many tasks with purposes. Those purposes can be abstracted as fair distribution, worker autonomy protection，workplace equality or realization of more detailed desires such as on-time payment or no extension on work hours77. For example, Russia's Labor Code has definitely held the view that labor law legislations should aim at guaranteeing citizen's labor rights and freedom. 78 Because of that, legal hermeneutics argue that the meaning of a word should be determined by its background and purpose. Likewise the definition of workers to be protected by labor law should be made on the base of the particular background and purpose79. On the one hand, as legislative backgrounds of many laws related to workers differ from each other, there are differences among the definitions of worker. On the other

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http://dx.doi.org/10.2139/ssrn.204348.

74 Tucker, Eric, Fudge, Judy and Vosko, Leah, Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada (July 22, 2011). Canadian Labour and Employment Law Journal, Vol. 10, No. 2, pp. 193, 2003. Available at SSRN: http://ssrn.com/abstract=1888625

75 See B. Burchell, S. Deakin and S. Honey, The Employment Status of Individuals in Non-Standard Employment (March 1999),p1. http://www.dti.gov.uk/files/file11628.pdf=2013/4/2.

76 Davidov, Guy,above n 24, p. 57.

77 Davidov, G, 'Re-Matching Labour Law with Their Purpose' in G Davidov and B Langille (eds), The Idea of Labour Law (Oxford, OUP, 2011)179.

78 Jiang Luyu(translator),Code of Russian Labor Law,Beijing University Press,2009,p2.

79 Langille, Brian A. and Davidov, Guy, above n 17, p. 17-18.

hand, even in the same law, worker status may be different because of varied legislative purposes in different clauses, thus resulting difference in identification. For example, according to Chinese Labor Contract Law, in a case of kitchen contractor agreement, a chef may be a worker based on the purpose of labor standards. However, once court ruled that the chef should bear joint liability according to article 94 of Chinese Labor Contract Law, the chef would be an independent contractor.

According to legal logic, the basic purpose to discriminate between employee and independent contractor is to distinguish those who need special protection (there is a definite employer) from those who can protect themselves80. However, the reality is that if we see independent contractor as the landmark of groups to be protected by labor law, then it means that it is inside and outside of labor law. As a landmark, an independent contractor has characteristics of employee on one hand and characteristics of employer on the other hand. The activities and related information reveal characteristics of independent contractor or employee at the same time. Under this situation, whether one personn is more like independent contractor or employee; and among all characteristics which one can decide his/her legal status? So how to manipulate the coordination among different rules will be an important requirement for judges. When other laws could not provide protection for independent contractors, it would be necessary to make them get protection of labor law. However, when other laws could provide effective protection on human dignity, then courts shouldn't ruled disputes concerning independent contractors under labor law. Therefore, logically speaking, we can build a connection between case facts and legal provisions only by analyzing workers in statutory law. For this reason, judges need to find the most relative statutory law with the help of demurrer between two parties.

Generally speaking, if statutory law or relative policy clearly states some purposes previously, they should be **reflected in judgment. However, when statutory laws or policies do not involve such guidelines or common sense ,** legislative or political purposes will be unfathomable. In the case of Yellow Cab Ltd. v. Board of Industrial Relations et al81, Yellow Cab opposed the referee made by Board of Industrial Relations, which held that the employment relationship between Yellow Cab and drivers existed. While appellate court held that the employee should be the party who got wage. The existence of employment relationship depends on whether employee get wage and whether employer pay for that. As drivers rented cars from company and paid rents, there weren't payment issues between the company and drivers. As a result, since the business entrepreneur did not pay drivers, so the appellate court ruled that there was no employment relationship between company and drivers. But Professor Langille Brian thought that the court totally neglected the legislative purpose of labor law and this case was regarded as an obvious failure82.

In this case, Canadian Supreme Court excluded cab drivers from employees, just because they get paid from customers instead of employers. 83Conversely, Liu youguo was treated as an worker covered by labor law. Hence it was not only because of the existence of regulation relationship between taxi company and drivers but also because of relevant policies of state council on taxi industry that made China judges hold that Liu yoiuguo is an worker within the scope of labor law in China. The public policies have clearly forbidden any business model using

80 Langille, Brian A. and Davidov, Guy, above n 17, p19.
81See Yellow Cab Ltd. v. Board of Industrial Relations et al., [1980] 2 S.C.R. 761.
82 See Brian Langille, Developments in Labour Law: The 1980-81 Term, 5 SUP. CT. L. REV. 225 (1983).
83 Langille, Brian A. and Davidov, Guy, above n 17, FN29.

the form of lease contract. Without such obliged policy, China court may reach the same judgment as Canada court had done. As the taxi company did not pay drivers any wage, especially when the contract clearly stipulates that the relationship between two parties belongs to contract relationship, according to logic of judges in the case of Haulage Services Ltd v. Fuller & Ors84, taxi drivers would probably not be viewed as workers protected by labor law.

Obviously, we can know from the two cases that purpose method is limited, even when statute law stipulates the legislative purpose clearly. In fact, facts and backgrounds of a case may be prior to the pursuit of purpose. It can be attributed to two reasons: Firstly, legislative purpose is based on presumption, which presumes that someone is subjects of labor law protection. As for public policy based on particular purpose, a worker should be viewed as employee sometimes85. So in the case of Liuyouguo, the judge held that according to state policies, Liuyouguo was an worker covered by labor law. Secondly, in specific case, the role of an arbitrator or a judge is a unity of contradiction. On the one hand, they may be put themselves in the position of the parties involved in the case. The court may assume that if he were Liu youguo, how to make a decision is rational .So when the court were an employer, he should consider long-time convention in taxi industry. The convention maybe justice or unjust, based on judgment whether employer would suffer from his decision or even go bankrupt. When the court were an employee, he should think over the existing living condition of his family without protection of labor law, especially when employees had suffered from injury against low-level social security. When the court were an independent contractor ,he should make a decision whether he as a contractor had got multiple payment compared to an average worker and as a common employee ,whether he had got more payment than employee in specific case.

The court shifts his role just for the purpose of finding relatively balance way. Firstly ,not only were he a spokesman of statutory law because he should analyze that whether the purpose of statutory law should be realized in specific case or not ,but also an reviewer of convention because he must think over some questions .e, g ., whether specific convention is reasonable, why common practice has been accepted by workers for a long time, specially why some workers would rather to be an independent contractor in order to get more payment and freedom when the contract signed by the two parties has clearly stipulated the legal status of independent contractor. Secondly, the judge were not only a judge because he wish that the case decided by himself would not be appealed to superior court or the appeal would be overruled ,but also to be a judged how he would think when he imagined himself as a worker. Thirdly, the judge were not only legislator because if he had participated in legislation ,he should know his own standpoint, but also as a executor because he should have a right attitude in order to understand legal spirit correctly and protect workers who are in truly need of labor law protection.

However, with regard to what spectrum should be viewed as limits of workers, service provider or contractor would necessarily be relevant to case situation and purpose of legislation. The reason that board of arbitration and courts have different idea about legal status of certain workers has close relation with situation observation, legislative purpose and independent judgment. Even though labor law is rational assumption, it is motional for judges when comes to objective situation. In fact, in recognition of labor relationship, purpose is far more important than index. When confronted with cases, judge's ration is the way to guide the recognition of related

84 Haulage Services Ltd v. Fuller & Ors [2000] EAT 493_99_1602 (16 February 2000).
85 Langille, Brian A. and Davidov, Guy, above n 17, pp. 12-13, 1999.

parties. However, logically speaking, only when judges think a worker is an employee, legislative purpose can be combined with specific cases. That is to say, when a worker has been viewed as the party linked with civil law, a judge may have a good reason to treat her/him as independent contractor; when a worker is put into vision of labor law, then a arbitrator may have a good reason fixed in labor law .Psychological realism concerning labor law clearly supports the idea, which holds that psychology is more important factor than ration and morality in judgment and claims that judicial cognition of facts reflects previous value and assumption instead of recorded evidence86. However, those scholars as an advocate of psychological realism haven't yet made it clear about mechanism of judge's value on re-shaping the reality of labor law. Psychological realism insists that usually judges are not partial unconsciously but arbiter, which means that at most of the time, a judge pursues correct application of law rather than practice any previous legal or political opinions consciously. The notion of values is certainly important because that a judge is also common people and he has to consider some law reality and make a decision based on facts that are important in cultural cognition. Like the common people, psychological forces make them think about facts in certain ways. 87

There are no judging methods that are simple and once for all. In all cases, there is no gold division line or necessary conditions or index series. There are no special factors that would necessarily reach the conclusion that a given judgment of employee is true.88 However, in order to step out of multi- paradox roles, judges need to clarify all roles and choose relatively rational role on the background of cases. Therefore, judges must search for rationales of social justice far from emotion and conscience. The empirical method in judging will have decisive influences on realization of the rationales.

C. Methodology of Employee Identification

The above-mentioned development of labor relationship has directly affected judges' thinking logic in judicial decision. Although courts still use control test and view them as important characteristics of employment relationship instead of commercial relationship, it is no longer a single characteristic and more complicated tests have been raised. It is not blind obedience but emphasizing on purposes of concept and connotation of employee89.Therefore, subordination or control is world outlook and methodology of judging labor relationship rather than judging criteria.

1. Facts and Appearance

Recognition of labor relationship takes subordination and control as cause and takes real scene as effect. As for causes, economic subordination is a determining factor, which determines subordinate level, even non-existence of organization and personality. Personality subordination can be divided into physical subordination and psychological subordination.

Under the typical pattern, the industrial workers' physical subordination and psychological subordination are an integral whole. However, as for employment models, especially with changes of working places, psychological subordination has been an important consideration factor. As for

86 Psychological realism claims, similar to its close-cousin cultural cognition theory, that values act as a subconscious influence on decisionmaker cognition. See Dan M. Kahan, David A. Hoffman & Donald Braman, Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 891 (2009);.

87 See Paul m. Secunda，Psychological Realism in Labor and Employment Law, Marquette University Law School Legal Studies Research,paper series, research paper no. 11-03 ,2011.

88 Langille, Brian A. and Davidov, Guy, above n 17, pp. 12-13.

89 Langille, Brian A. and Davidov, Guy, above n 17, p16.

effect, the injury ranks of workers in reality may determine whether a worker should be protected by labor law. For example, if workers are prone to injury or they had got injured, judges usually decide that labor relationships are valid. Otherwise, labor relationships were denied. The cause-effect logic suggests that recognition of labor relationship depends on not only theoretical or legislative index review but also real injury that workers may suffer.

Qualified normal logical inference and rigorous deduction can not replace the evidence effect of facts. Confirmation of labor relationship should be on basis of facts, which, that is to say, have been accepted by all parties in fact and have been realized in work, rather than under the guide of contract name. When carrying out the principle of facts first, Japan court takes the following method: as for reality, working environment results that when the reality turns out to be employment relationship, judges will decide that the relationship is valid without considering contract provisions. That is to say, when an effective control is added to work and payment, a court will rule that employment relationship exists. 90In U.S.A, economic reality was taken as an important factor in identifying employment relationship, which is nothing but emphasis on facts of cases in nature. In the case of NLRB v. Hearst Publications Inc.(U. S.1994), United States Supreme Court pointed out that broad language in labor law makes people have no doubt that its applicability should be defined extensively under uncertain condition, it should be based on economic reality rather than technical classification of laws. 91 In South Africa, juridical practice also emphasizes on the reality of labor relationship. In the case of Denel (Pty) Ltd. v. Gerber 2005, labor appeal court held that whether one person was an employee of another ,one should be judged by objective facts-----based on essence of facts rather than forms or labels----at least not just forms or labels. 92 In the case of Wiebe Door Services Ltd. V. Canada (Minister of National Revenue) , in judging whether a company should bear taxes, industrial injury insurance, unemployment insurance and Canada pension plan responsibilities, federal appeal court mainly reviewed worker's factual situation. At the same time, the court also noticed that the company had agreement with labor provider that the latter runs business as independent operator and bears taxes or other payment dependently. However, the court held that the agreement alone was not decisive evidence to decide whether employment relationship was valid.93 In this case, the reality itself became base to pierce veil of independent contractor. And the court needs correct world outlook as guideline.

Appearance is external reflection of reality and the label takes original existence of objects as premise. In the case of Massey v. Crown Life Insurance Co. Ltd., British Appellate Court pointed out that when the nature of relationship is inexplicit or doubtful, labels ironed on relevant parties may solve this problem94. In the case of Yong and Woods v. West 1980, thin metal plate workers chose to be self-employers. However, the court held that labels chose by a party were just one relevant factor, and it was valid only when other factors could not reach different conclusion. 95 Obviously, labels alleged by British scholars are nothing but appearance reflection of concerned

90. SAGA TV Case: Fukuoka High Court Judgment 7 July 1983, Hanrei Jiho No.1084, p.126; SEN-EI Case: Saga District Court Takeo Branch Judgment 28 March 1997, Rodo Hanrei No.719, p.38

91.Robert A. Gorman,Basic Text on Labor Law: Unionization and Collective Bargaining, China University of Political Science and Law Press,2003,p27.

92 Denel (Pty) Ltd v. Gerber (2005) 9 BLLR 849.

93 SAGA TV Case: Fukuoka High Court Judgment 7 July 1983, Hanrei Jiho No.1084, p.126; SEN-EI Case: Saga District Court Takeo Branch Judgment 28 March 1997, Rodo Hanrei No.719, p.38

94 Massey v. Crown Life Insurance Co. of Canada [1978] I.R.L.R. 31

95.Alison Bone and Marnah Suff, Essential Employment Law (2nd ed), Cavendish Publishing,1999 London,pp.18-19.

parties' rights and obligations. The appearance can be indicator on whether concerned parties have subordination and controllability relationship. In some American cases, although employers do not have real control but only appearance of control, employers are required to bear responsibilities. In the case of Parker v. Domino's Pizza, Inc., judges held that intensive examination, agreement and relationship between licensor and licensee suggested that there existed control relationship between two subjects, although it was energetically denied in franchise agreement. 96 Franchise provisions are usually thought enough to mark the establishment of control and basis of vicarious liability for licencer as employer97. In New Jersey, the fourth article of Construction Industry Independent Contractor Act stipulates that individuals would be independent contractors only when they are out the control and guide of the service type according to the contract of service in fact, from past to present and even future98.

Appearance does not always reflect facts. Therefore, the decision on labor relationship may need to pierce the appearance of independent contractor in order to identify employees who are disguised as independent contractor. Certainly, in all judicial systems, judges usually have to make a decision on the basis of facts, no matter how relevant parties explain or describe a certain contract relationship. 99 No matter whether the labor relationship exists or not, it mainly depends on satisfaction of objective condition, including the forms taken by workers or employers to set their rights and obligations with actual service. Therefore, in order to avoid evasion of labor law and deprivation of labor rights, a court should not be affected by previous oral or written definition on description of relationship and character offered by two parties. Instead, the court should make an independent decision on nature of law based on given actual situation100. Once there is substantial subordination between parties, then all workers should be viewed as employee according to labor basic law regardless of names of contracts, which may be worker v. client contract or appointment contract101.

As for employees who are transformed to independent contractor by employers involuntarily, they are usually in the same condition as before. Generally speaking, under this situation, the relationship between worker and employer usually has legitimate appearance. In the case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance102, according to the contact, Mr. Latimer was an independent contractor and worked for Ready Mixed Concrete Ltd as a truck owner. The Social insurance bureau thought Mr. Latimer was an employee while Judge MacKenna held that Mr. Latimer was small business man rather than an independent contractor103 .In this case, reliance of Mr. Latimer on Ready Mixed Concrete Ltd is obvious. His ability to disperse risks was weak and he had an employer for long time. He also could not use his truck for other purpose. He did not sign contract with varied customers that could give him more freedom. His ability to find gas station and repair truck could hardly change his reliance on Ready Mixed104. It is clear that this case was a typical form by which employer escaped from legal

96 629 So. 2d 1026 (Fla. Dist. Ct. App. 1993.

97.John Dwight Ingram，Vicarious Liability of the Employer of an Apparent Servant，Tort & Insurance Law Journal，Fall, 2005，p.41.

98.http://lwd.dol.state.nj.us/labor/wagehour/lawregs/indep_contractor_act.html#1.7=2013/2/19

99.ILO,The scope of the employment relationship, Report V,p24,Fifth item on the agenda, 91st Session, Geneva.

100 Mia Rönnmar , The Personal Scope of Labour Law and the Notion of Employee in Sweden ,P159= http://www.jil.go.jp/english/reports/documents/jilpt-reports/no1.pdf=2013/4/1

101 See Lin zhenxian,on the Amendment of Labor Basic Law, Taiwan Jietai Press,2000,p85.

102 Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497.

103 http://en.wikipedia.org/wiki/Employment_Rights_Act_1996=2013/4/3。

104 Davidov, Guy, above n 24, p72.

rights and obligations. It suggests that when labor provider is in vulnerable environment, the court will make a decision on the basis of protection for labor provider. Thus veil of independent contractor will be pierced in order to realize the purpose of protection for labor provider.

2. Assumption and Deduction

As for criteria of labor relationships, a fundamental characteristic is assuming that relevant law exists in many countries. 105 British appellate court needed to ask questions such as who did what to whom, how did it, use what tools to do it, when did it and who gave the direction in defining whether someone is employee or independent contractor. 106 In other words, if someone is perceived as an independent contractor, then logically he is not in subordinate position. The relationships between them should be service for contract. Since the revised Social Security Code came into force in 1999, Germany has developed a legal definition of employee, which is aimed at social security. That is to say, in legal perspective he will be viewed as an employee if someone satisfies at least two of the following factors, i.e. usually he only works for just one contractor; he is engaged in the same work as regular employee; he shares the same work content with a regular employee; he has no sign of participating in management activities of enterprises107. In South Africa, Basic Conditions of Employment Amendment Act of 2000 and Labor-capital Relation Amendment Act of 2002 stipulate that if someone satisfies one or more conditions of seven basic conditions stipulated in the act, then he will be viewed as an employee 108. Reviewing grammatical rules of assumptions on employee qualifications in Germany and South Africa, there are many practical expressions under presumed forms which results objective differences between Germany and South Africa because of different conditions on employee qualification. This not only annotates original pursuit derived from assumption method in judicial practice but also corroborates that life of justice lies in the facts with regard to particular cases, but law science' life lies in the logic of assumption and deduction .

As for labor relationship standards, either in civil law or common law, the recognition of relevant facts is nothing but interpretation and demonstration concerning abstract control and subordination in specific case. It is a process of assumption to deduction. Both assumption and deduction are used as judgment methodology on whether labor relationships exist or not. When one judge rules the validity of labor relationships, it neither requires existence of all characteristics nor satisfaction of all relevant characteristics without any limits .Whereas inner contacts and fitness between facts and assumptions with the help of judging methods ,could finally integrated into an associated system .i.e., facts--assumption--characteristics.

3. Absoluteness and Relativity

The degree of subordination determines not only the specific allocation pattern related to rights and obligations, also specific operation model and relief mechanism between workers and employers. The question what is the definition of subordination can be interpreted as the degree of subordination. In terms of the history of labor transaction, from slave v. master to landlord v. serf, then capitalist v. worker, the changing progress of human society suggests that in the evolution of interpersonal relationships there is a tendency that the control degree of subordination develops

105 Harare, Zimbabwe,Sub-Regional Workshop on Labour Law Reform: New Forms of the Employment Relationship,28 and 29 August, 2007,pp.15-16，see http://www.ilo.org/public/english/dialogue/ifpdial/downloads/harare_report.pdf=2010-2-19.

106 Alison Bone and Marnah Suff, Essential Employment Law (2nd,ed,), Cavendish Publishing,1999 London, p.17.

107.ILO ,above n 100.

108. ILO ,above n 100.

from absoluteness to relativity. While in modern welfare state marked by social security system, subordination between workers and employers is increasingly weakening .Thus we can see that if we use the standard of absoluteness blindly in deciding whether labor relationships exist or not, then there will no control or subordination within the scope of law. Otherwise, if we use the relativity standard, then any labor supply behavior will represent existence of control and subordination in some degree.

At what level of control or subordination which a workers is suffered, the law should provide corresponding remedy; in what dimension of the worker is vulnerable, the law should allocate rights and obligations accordingly. In China, because the relationship of non-full-time employment between workers and employers is loose and less dependent, the degree of subordination is weak. Thereby the legal rules of non-full-time employment are different from the full-time employment in rights and obligations.

In Japan, the court holds that labor law attempts to amend civil law in order to provide substantial protection for provider of subordinate labor. With characteristic of subordinated labor, although it was clarified into contracts, the subordinate aspects should be protected by labor law .But the subordination is weak compared to employment, accordingly the protection degree will decrease. In addition,if the contract between two parties has mixed qualities of contracts and employment (quality of subordination) ,then in the scope of employment it should be protected by labor law. 109

4. Quantitative analysis and qualitative review

As for disputes of IRS in American, there are 20 factors to be considered in determining whether a man is an independent contractor or not110. it's commonly said that judges use a simple ABC test traditionally. Among all states, almost two thirds of them use ABC test. Among all these states, moreover many states require all of the three factors if one person were an employee, while some states only require any two of three indicators111. It suggests that different states have different ideas toward criteria for employee. Obviously, the states requiring three factors have higher standard than those states requiring only two. For example, in the case of Robert t. Darden v. Nationwide Mutual Insurance Company, Judge Terrence W. Boyle held that ABC test is out of date. While in the case of Darden v. Nationwide Mutual Ins. Co. ruled by U.S. Supreme court in 1992, the court pointed out that 12 independent factors should be considered in identifying employee112. Therefore, in many cases, an independent fact is not enough for deciding whether one person fits within the scope of labor law or not113. There are no answers for the questions

109 See Tian Silu Jia xiufen,on the Contract Work（Japan's Theory ＆Practice），Law Press,2007,p82.

110 http://labor.vermont.gov/?tabid=453=2013-4-11。

111 http://www.wisegeek.com/what-is-an-abc-test.htm=2013/2/19。

112 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 321 (1992). The case has striking effects on Amercian courts(see Alan Hyde , Classification of U.S. Working People and Its Impact on Workers' Protection , a report submitted to the International Labour Office ,January 6, 2000 ,p.74）.However,M. Linder criticized that the root problem with U.S. labor law defining covered employees is the purported denial of socioeconomic purpose. In its most recent decision on this question, the U.S. Supreme Court unanimously enshrined such purposelessness as principle（See M. Linder, 'Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness' (1999) 21 Comp.Lab.L.& Policy J. 187）。Langille, Brian A. and Davidov, Guy stated that but it is no longer the single characteristic; a more sophisticated approach has been developed. Nor is it always followed blindly without attention to the purpose for which the concept of "employee" is invoked.（Langille, Brian A. and Davidov, Guy, Beyond Employees and Independent Contractors: A View from Canada (1999). Comparative Labor Law & Policy Journal, Vol. 21, No. 1, FN19, 1999）。

113 ALI HAJI，Petitioner Employee v. the Industrial Commission of Arizona No. 1 CA-IC 07-0026

before all factors of all parties have been checked114. The logic, i.e. all factors should be considered while none of factors have a decisive effect by itself ,can not solve the problem of the identification of employee. In complicated cases, there are not only factors supporting workers, but also factors supporting employers. However, among different factors, some factors have dominative characters, which have decisive effect on recognition of worker's status. Thereby several important factors will lead judges to make a right judgment. For example, if one person works in employer's workplace according to employer's direction, and the relationship between them stands long, the worker could be perceived as an employee.

However, in some cases of weak subordination, it is not enough to make a judgment just by searching for quantity of factors. After all, the external examination of factors for an employee's identification is just a quantitative analysis method and the amount of factors just suggests what workers' status ought to be, which has no decisive effects. Hence the court can not make a convincing judgment according to the principle that one person who has 4 favored factors is an employee, while the other party who has only one favored factors is an independent contractor. Therefore, it is necessary to break the number restriction of factors and use qualitative method.
Qualitative method depends on legislative purpose or even valid policy made by government and other executive branch, which suggest value orientation and social pursuit in economic activity. Thereby even there is only one factor supporting Liu youguo's subordinated status, then it is enough to illustrate that Liu youguo is a worker within the scope of labor law under the guide of legislative purpose in China.

Specifically, Qualitative method falls into two circumstances:（a）stipulated clearly by law or policy. In the case of Liu youguo, the striking reason that Liu youguo was recognized as a worker covered by labor law was that current policy in China had required that all of taxi companies must sign labor contract with drivers. While most of taxi companies broke this mandatory rules by taking the operation form of lease which was against the current legislative purpose obviously. Thus, Chongqing Higher People's Court finally decided that there existed labor relationship between the driver and the taxi company. In U.S.A,the method of policy purpose was used by Federal Supreme Court in the case of Nationwide Mutual Ins. v. Darden in 1992115. This case involved definition of employee in the Employee Retirement Income Security Act of 1974. Although appellate court held that Darden was not an employee according to ERIS. Whereas the court still mentioned Congress's declaration, which states that the employee benefit plans had become an important factor affecting the stability of employment and the successful development of industrial relations,but many workers employed for years are losing their expected retirement benefits . Finally the court ruled that Darden did not meet political and legislative purposes alleged in ERISA. 116 Hence legislative policy is an important factor in American cases.（b）when there are no direction of legislative or political mandatory rules, one worker's legal status should be judged by the following factors: Firstly, legislative purpose. In China, legislative purpose is usually formulated in the first article of particular law. For example, the first article of Chinese Labor Contract Law clearly stipulates that to protect worker's legal rights is mainly legislative purpose. Therefore, we should be under this legislative purpose to understand all other provisions of Chinese Labor Contract Law. Secondly, worker's economic reality. In judicial decision, qualitative analysis should focus on economic reality. In labor arbitrator's view in China, as for

114 Langille, Brian A. and Davidov, Guy, above n 17, p. 19.
115 Nationwide Mutual Ins. v. Darden (90-1802), 503 U.S. 318 (1992).
116 http://www.law.cornell.edu/supct/html/90-1802.ZO.html=2013-4-11.

whether certain case is the nature of labor dispute or not, arbitrator is prone to follow the logic. i.e., if the accident happened to one worker ,then the worker is usually recognized in great need of protection of labor law and the worker would enjoy industrial injury insurance treatment, while employers are required to perform relevant obligations; when there is no accident injury, the worker is not necessarily recognized as an worker with the scope of the labor law117.obviously, if the court clearly considers one person's economic and social reality, then his or her dependent and unsafe status will help them gain employee status118. This may explain the reason that although Department of Labor and the Social Security Administration use five-point checklist, they are more prone to the primary principle of economic reality.

When there is a gray area where it's hard to distinguish employee from independent contractor, the question ,whether someone should be protected by labor law or not, closely links to the background of particular case and legal purpose to be pursued by judges This is a reflect of judge's active function. Courts, labor tribunals and other adjudicators not only appeal to clear legal definition but also draw help from reality, which means they always use the definition of employee for particular purpose119. No matter what signs or factors (or element series) are used, we are trying to identify basic characteristics of an employee. Both judeges and arbitrators wish that the characteristics should exist objectively as they determinate the recognition of employment relationship. While when parties sign contracts in the name of independent contractors, then all those characteristics would disappear. Although the above efforts are deemed to be failed, we should still try our best to imagine case or background that someone is(should be) an employee regardless of control, ownership of tools, duration of contracts, ability of subcontract and chance to gain benefits or risks of loss, even those certain elements may be rare,. 120

Ⅴ. The Criteria Concerning Public Policy

The "subordination" or "control" themselves is a concept of uncertainty. The judgment concerning one worker's legal status within the sphere of labor law is an integrated decision on basis of the factors in the specific social context. The answer for the way and extent of control or subordination varies in different countries. From public policy perspective on labor protection, the main tasks of policy makers are to understand the nature of vulnerabilities of workers and explore the context of public policy concerning labor protection. Once in order to expand the scope of labor law due to the requirements of particular public policies, the minimal subordination may be perceived as a criterion for labor relationship. e.g., Costa Rica or Panama121; Furthermore, the court also states that there exists the employment relationship e.g., Lane v. Shire Roofing Co. Ltd when the case involved in case of safety at work, in which the judge of the Court of Appeal advocated genuine public interest 122.

A judge's task is to find the labels of "subordination" or "control" on a specific case. However, public policies are still an important factor, which usually can be manifested through "Judge Activism" in China. It's no doubt that whether a worker should be identified as the protector of

117 When I communicted with some arbitrators,they told me that they often use the method to determinate one worker's status.But they couldn't explain the reasons.
118 See Mia Rönnmar , The Personal Scope of Labour Law and the Notion of Employee in Sweden ,p160= http://www.jil.go.jp/english/reports/documents/jilpt-reports/no1.pdf=2013/4/1.
119 Langille, Brian A. and Davidov, Guy, above n 17, p. 14.
120 Langille, Brian A. and Davidov, Guy, above n 17, pp. 12-13.
121.ILO,above n 100,p 23 Note 8.
122Alison Bone and Marnah Suff, Essential Employment Law (2nd,), Cavendish Publishing,1999 London,pp17-18.

labor law does not lie in theoretical logic, but the judge should achieve the goal of protecting the rights and interests of workers under the guidance of eloquent facts. In addition, surely no matter how the society develops, as long as we acknowledge the public policy nature of labor relations, the subordination or control would still be their leading and core criteria for judges .The ground of appeal to deal with cases is just the reason that judges logically should choose a best solution to the dispute when they are faced with the grounds of appeal to the court.